HUNGARIAN LABOUR LAW
E - J O U R N A L

Adequate Remuneration for the Self-Employed

Legal framework in Germany

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Abstract

In addition to traditional employees protected by labour law, there is a significant number of so-called solo self-employed persons, i.e. self-employed service providers without employees of their own. In their relationships with their clients, however, there can nonetheless be significant dependencies that give rise to an individual need for protection. Accordingly, international law standards, particularly those of the ESC, provide for obligations regarding the achievement of adequate remuneration that also cover solo self-employed persons in need of protection. As part of the DFG-funded research project "The right to adequate remuneration for solo-entrepreneurs", this article will examine the extent to which the legal situation in Germany meets these requirements with regard to individual and collective remuneration protection mechanisms.

Keywords: Self-employment, remuneration, minimum wage, collective bargaining, collective agreements, Germany, country report, international law requirements

1. Introduction

1.1. Problem definition

Not least due to the EU's Minimum Wage Directive, there is a current discussion about fair and appropriate remuneration for employees, but so far mainly in labour law. In Germany, whether a

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legal relationship constitutes an employment relationship is determined by whether the statutory requirements of Section 611a (1) of the German Civil Code (hereinafter: BGB) are met in the performance of the contract. In order for this to be the case, one party to the contract must perform work in the service of the other, bound by instructions and under the control of others, in a state of personal dependence. If these requirements are met, the other party acquires a claim to payment of the agreed remuneration in accordance with Section 611a (2) BGB. Whether the remuneration is appropriate or fair in relation to the work performed therefore depends on the balance of power between the negotiating parties. However, for employees, who are typically the weaker party to the employment contract, the German Minimum Wage Act sets a de facto lower limit.

However, the agreed remuneration can be unreasonably low not only in employment relationships. Self-employed persons can also have systematic difficulties in contract negotiations to enforce appropriate remuneration for their services. This is often the case for solo self-employed persons who do not have any employees and accordingly can only offer their services to a limited extent. In many cases, they are so economically dependent on the continuation of a contractual relationship with their clients that their negotiating position is also impaired as a result. Therefore in this context, the question of remuneration protection under German law also arises.

1.2. Solo self-employment in Germany

It should be noted in advance that the number of people potentially affected in Germany is not small. In 2022, the number of self-employed people in Germany was around 3.6 million[1] (8-9% of the labour force), including around 1.8 million solo self-employed people without own employees.[2] Among the self-employed in Germany, the solo self-employed are therefore the largest subgroup.[3] As people get older, the proportion of self-employed people also increases, not least beyond the age of 65.[4] The level of income from self-employment varied greatly, but was significantly lower for solo self-employed persons than for self-employed persons with employees and – in three out of five quintiles – lower than for dependent employees.[5] The earnings of solo self-employed persons were often so low that the household income was essentially generated by other household members.[6] Protection of earnings may therefore be necessary for solo self-employed persons in particular, although not for everyone. Those

1 Annabelle Krause-Pilatus – Ulf Rinne: Selbstständige Erwerbstätigkeit in Deutschland (Aktualisierung 2024). no. 6435. 2024. 18.

2 Ibid.

3 Katharina Uffmann: Aktuelle Fragen der Solo-Selbständigkeit. *Recht der Arbeit,* 6/2019. 360–361.

4 Krause-Pilatus–Rinne op. cit. 23.

5 Krause-Pilatus–Rinne op. cit. 51.; for earlier years see Karl Brenke – Martin Beznoska: Solo-Selbständige in Deutschland. *BMAS research report,* No. 465, 2016. 38.; Uffmann op. cit. 360–361.

6 Krause-Pilatus–Rinne op. cit. 52, 53.

self-employed persons who achieve an educational qualification at the highest qualification level also achieve high incomes in some cases, especially in the so-called "liberal professions" (such as doctors, lawyers, notaries, architects).[7] The situation is often different in artistic or social professions, in which self-employment is relatively common[8], for example in teaching at extracurricular educational institutions, journalism, arts and crafts and visual arts and journalism.[9]

Even this brief overview shows that the group of self-employed persons, like the subgroup of solo self-employed persons, is extremely heterogeneous. People with high qualifications and a good income stand in contrast to people with precarious incomes[10], whose numbers are likely to grow as a result of the internet economy. If working people are unable to cover their living expenses with their income, they are entitled to social support from the state, which has to use taxpayers' money to compensate for inadequate remuneration and the associated inadequate pension provision.[11] Establishing instruments to ensure adequate remuneration for the solo self-employed is therefore also in the public interest.[12]

1.3. Human rights standards

Furthermore, national law is not completely free to guarantee or waive pay protection for vulnerable solo self-employed workers. Germany has ratified Art. 4 of the European Social Charter (hereinafter: ESC) and thereby committed itself to observing the international standards of fair pay. According to the interpretation of the competent European Committee of Social Rights (ECSR), the personal scope of the standard for adequate remuneration extends to atypical employees, including gig workers and platform workers[13], which should also cover people who would be categorised as solo self-employed under German law. Objectively, the guarantee of a minimum wage of 60% of the national net average income is a prerequisite.[14]

This article will show whether and to what extent self-employed persons who are actually in need of protection for an appropriate remuneration receive this protection under German law.

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7 Brenke–Beznoska op. cit. 44–45.

8 Daniel Ulber: *Gutachten zu möglichen Ansätzen einer Absicherung von Lücken in der Erwerbsbiographie von selbständigen Künstlerinnen und Künstlern*. Düsseldorf, 2022. 6.

9 Krause-Pilatus–Rinne op. cit. 18.

10 Daniel Hlava et al: #Zukunftsozialeseuropa. *WSI Report,* No. 67, 2021. 16.

11 Brenke–Beznoska op. cit. 53–57.; Ulber op. cit. 21.

12 Federal Constitutional Court (BVerfG). 1 BvR 2204/00 no. 6.

13 European Committee of Social Rights. Conclusions XXII-3 (2022) Germany, on art. 4 § 1. 13.

14 European Committee of Social Rights. Conclusions XIV-2 (1998), Statement of Interpretation on Art. 4 § 1 ESC.

2. Applicability of labour law in the event of a mere misdeclaration as a solo self-employed person

The "genuine" solo self-employed persons who is to be considered here must be distinguished from those service providers who are described as self-employed in their contract, but whose service relationships actually fulfil the requirements of an employment relationship. Under German law, these persons are not self-employed persons, but employees. According to Section 611a (1) sentence 5 BGB, the existence of an employment relationship does not depend on the designation in the contract, but on its actual implementation. As in other legal systems[15], contractual relationships falsely declared as self-employment can also be classified as an employment relationship by the courts under German law.[16] Reclassification is accompanied by the employee-related minimum wage protection and the possibility of concluding collective agreements in accordance with the Collective Agreement Act (hereinafter: TVG).

In this respect, the affirmation of the employee status of a crowdworker by the Federal Labour Court (hereinafter: BAG)[17] caused a stir in German legal doctrine. This decision was based on the fact that the plaintiff was continuously providing services to a company in accordance with the company's digitally organised specifications. Despite the fundamental importance of this decision, not all solo self-employed workers can derive protection claims from it. In many cases, the constitutive features of an employment relationship, i.e. the obligation to follow instructions and personal dependence, will either not be present[18], or will at least not be sufficiently demonstrable, so that the principles of the decision remain inapplicable. In these cases, even the possibility of reclassifying contractual relationships, which generally exists, does not help.[19] Whether remuneration protection is also guaranteed in favour of "genuine" solo self-employed persons will first be considered below on the basis of existing protective provisions under individual labour law (see 3.), before collective remuneration agreements are examined (see 4.).

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15 Christina Hiessl: Multiparty work relationships in Europe. *European Labour Law Journal,* Vol. 13, No. 4 (2022) 471.

16 Federal Labour Court (BAG). 9 AZR 102/20.

17 Ibid.

18 Frank Bayreuther: Arbeitnehmereigenschaft und die Leistung fremdbestimmter Arbeit am Beispiel des Crowdworkers. *Recht der Arbeit,* No. 4/2020. 241.; Claudia Schubert: Crowdworker – Arbeitnehmer, arbeitnehmerähnliche Person oder Selbständiger. *Recht der Arbeit,* No. 4/2020. 248.; Wolfgang Däubler: Crowdworker als Arbeitnehmer? *Vierteljahresschrift für Sozial- und Arbeitsrecht,* 2022. 325.

19 Andreja Schneider-Dörr: *Crowdwork und Plattformökonomie*. Baden-Baden, 2021.

3. Remuneration protection under individual law for solo self-employed persons

3.1. Legal standards for securing remuneration

3.1.1. Statutory minimum wage

Germany has had a general statutory minimum wage since 2015 (Statute on Minimum Wages, hereinafter: MiLoG), which has risen to €13,90 per hour since January 2026. Given the inflation in recent years, this level of pay falls below the standard of 60% of the national average wage, which is a prerequisite for fair pay in accordance with Article 4 of the ESC. In some sectors, such as construction, building cleaning or care professions, a special sector-specific minimum wage applies. This guarantees a higher level of pay because it is negotiated by the collective bargaining parties responsible for the sector and declared generally binding by the state.

However, applying Section 1 (1) MiLoG, only employees are entitled to a statutory minimum wage.[20] The implementation of the EU Minimum Wage Directive[21], the completeness of which is disputed, will not remove this restriction either, as the personal scope of this directive is limited to "workers in the Union", Art. 2 of the directive. The case law of the European Court of Justice (hereinafter: CJEU)[22] must be taken into account in order to concretise the definition of employee in the Directive. In the future, this will include those formally self-employed persons who, like employees, are subject to the instructions of their contractual partner and are therefore equally in need of protection. However, this also only protects those who are subject to the instructions and control of the client when carrying out their task. However, the majority of solo self-employed workers will not be subject to instructions when carrying out their assignments. In this case, minimum wage law does not offer them any protection for remuneration.

3.1.2. State regulations concerning remuneration

In addition, there are even state remuneration regulations explicitly for the self-employed in certain sectors of the economy, in particular for liberal professions such as architects (until the end of 2020), notaries, tax consultants, lawyers and doctors. However, the purpose of such regulations is not to protect freelance contractors, but rather the general public: prescribed minimum fees are intended

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20 Minimum Wage Act of 1 August 2014, Federal Law Gazette 2014 – I. 1348; Federal Labour Court (BAG), 18.11.2020, 5 AZR 103/20, no. 16.

21 Directive 2022/2041/EU on adequate minimum wages in the European Union. OJ EU L 275/33.

22 C-216/15. Ruhrlandklinik [ECLI:EU:C:2016:883] 36. point; C-229/14. Balkaya [ECLI:EU:C:2015:455] 47. pont; C-177/10. Santana [ECLI:EU:C:2011:557] 44. pont; C-19/23. Denmark v Parliament and Council [ECLI:EU:C:2025:865].

to prevent price competition among the self-employed and thus ensure the quality of their services.[23] However, the CJEU has already declared the binding remuneration provisions for architects to be contrary to EU law due to a breach of Art. 15 (2) and (3) of the Services Directive 2006/123/EC[24]; the admissibility of such remuneration regulations has thus become questionable overall. Even if this decision is not transferable to other minimum wage regulations[25], they will not protect most solo self-employed workers. The freelancers covered by the remuneration regulations do not usually work on a solo self-employed basis, but employ staff; moreover, these remuneration regulations only affect members of professional groups in the highest qualification range who already receive remuneration that is significantly higher than the minimum wage for employees. These remuneration regulations are therefore meaningless for ensuring an appropriate minimum wage. However, various regulatory proposals use them as points of reference, for example for the introduction of minimum wages for all solo self-employed workers[26], but their compatibility with EU law is just as unclear as their practical or political enforceability.[27]

3.1.3. National implementation of the maternity protection and equal treatment directives

Some EU labour law directives base their personal scope of application on the case law of the CJEU on the concept of employee in Art 45 Treaty on the functioning of the EU (hereinafter: TFEU), which includes self-employed persons insofar as they perform their work under the instructions of the contractual partner, for example the Maternity Protection Directive 92/85/EEC[28] and the Equal Treatment Directive 2006/54/EC[29]. Both directives also regulate aspects of remuneration that must be implemented in national law. In Germany, Section 1 Para. 2 No. 7 of the Law on Maternity Protection (hereinafter: MuSchG) stipulates that economically dependent employee-like persons enjoy maternity protection, although this expressly does not apply to remuneration for maternity leave. Solo self-employed persons are therefore entitled to maternity leave in cases where they are employee-like persons, but this group also receives no remuneration during the leave. If they had this entitlement,

23 Federal Court of Justice (BGH). VII ZR 174/19.

24 C-377/17. COM ./. D [ECLI:EU:C:2019:562] 92. point: fundamentally already C-94/04. Cipolla [ECLI:EU:C:2006:758] (for lawyers' fees).

25 Matthias Kottmann: Unionsrechtskonformität von Honorarordnungen der freien Berufe. *Neue Juristische Wochenschrift,* No. 42/2019. 3028.

26 Johannes Heuschmid – Daniel Hlava: Entwurf eines Gesetzes über Mindestentgeltbedingungen für Selbstständige ohne Arbeitnehmer. *HSI Working Paper,* No. 12., 2018.

27 Research Service of the German Bundestag, Constitutional framework for industry-specific minimum fees (2016), WD-3-3000-218/16. 1221–1222.

28 In the version of Directive 2014/27/EU amending Council Directives 92/58/EEC, 92/85/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures. OJ L 2014/65.

29 In the version of Directive 2006/54/EG on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 2006/204.

they would have to continue to receive their previous remuneration during the maternity protection period. However, this does not guarantee that this remuneration is appropriate concerning material terms. This could indeed constitute discrimination. However, those affected will hardly be able to defend themselves against this in practice, as Art. 8 of Directive 2010/41 EU on the protection of self-employed persons against discrimination has not yet been implemented in Germany.

Germany has implemented the other EU equal treatment directives with the General Equal Treatment Act (hereinafter: AGG), which is also applicable to employee-like persons in accordance with Section 6 para. 1 no. 3.[30] The law prohibits discrimination in terms of pay, among other things (Section 2 (1) No. 3 AGG[31]) and would therefore protect self-employed persons similar to employees from receiving too low a salary due to discrimination. This is restricted by the Pay Transparency Act, Section 5 para. 2 no. 6 which only provides pay protection for the special group of people working from home, but not for all employee-like persons. In future, the CJEU's broad definition of employee must be used here to implement Art. 2 para. 2 of Directive 2023/970 EU[32], but even this does not cover all solo self-employed workers.[33] While the CJEU recently emphasised that the prohibition of discrimination under EU law protects all self-employed persons from discrimination in terms of employment and working conditions[34], this does not provide effective pay protection for solo self-employed workers. A ban on discrimination only protects against discrimination on certain grounds and does not guarantee a minimum rate of pay at a certain level. Those affected have the right not to be paid less than a comparable person doing the same or equivalent work because of a protected characteristic. If everyone is paid equally (unreasonably) low wages, the prohibition of discrimination is not violated and does not give rise to a claim for higher pay.

3.2. Remuneration protection for the "employee-like person"?

As the German legal system recognises the category of "employee-like persons" in addition to employees and self-employed persons[35], it would be conceivable to include solo self-employed persons in need of protection in this third category.

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30 Michael Horcher in: *Beck'scher Online-Kommentar BGB.* 76th ed., Munich, 2025. § 6 AGG no. 13.; Hans-Jürgen Rupp in: Henssler–Willemsen–Kalb (Ed.)*, Arbeitsrecht, Kommentar.* 11th ed., Cologne, 2024. § 6 AGG no. 5, 7.; Gregor Thüsing in: *Münchener Kommentar zum BGB.* 10th ed., Munich, 2025. § 6 AGG no. 8–9.

31 Horcher op. cit. § 2 AGG no. 12–15.; Rupp op. cit. § 2 AGG no. 4, 6.

32 Directive 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance). OJ L132/21.

33 Expanding already: Federal Labour Court (BAG). 8 AZR 145/19; Michael Fuhlrott – Cara Hinrichsen: Arbeitnehmerbegriff nach dem Entgelttransparenzgesetz. *Neue Juristische Wochenschrift,* No. 8/2021. 513.

34 C-154/21. Österreichische Post [ECLI:EU:C:2023:3].

35 Günther Spinner in: *Münchener Kommentar zum BGB.* 9th ed., Munich, 2023. § 611a BGB no. 130.

In practice, however, this poses considerable difficulties as a general concept of an employee-like person is not defined. Some individual labour statues explicitly stipulate that they also apply to persons who "are to be regarded as employee-like due to economic dependence", for example in Section 2 sentence 2 of the Paid Leave Act (hereinafter: BUrlG), in § 5 para. 1 ArbGG (Act on Labour Court Proceedings), or in the maternity protection (§ 1 para. 2 no. 7 MuSchG).

The term is only defined in the act on collective bargaining (Section 12a TVG), according to which employee-like persons are self-employed but economically dependent and in need of social protection comparable to an employee. The prerequisite for this need for protection is their work for someone else, performing the work personally and essentially without their own employees, and working predominantly for the same client. Although the provision only specifies the conditions under which collective agreements may be concluded for these persons (see 4. 2. c. below), it is used as a general definition of the term.[36] This unnecessarily limits the third category, as a person is only recognised as being similar to an employee if their entire economic existence depends on the orders of a specific (or a maximum of 2-3) contractual partner[37], which is particularly detrimental to service providers in the platform economy.

However, the decisive factor for pay protection is that even recognition as an employee-like person does not provide legal protection against unreasonably low pay. Employees can receive this protection through collective labour agreements which will be dealt with below. Statutory entitlements under review in this section primarily flow from the Minimum Wage Act. However, as this law does not apply to employee-like persons, solo self-employed persons are not statutorily entitled to a minimum wage even if they are employee-like.

3.3. Remuneration protection via the category of "home-based work"?

Alternatively, remuneration protection under the Home-Based Work Act (hereinafter: HAG) could be considered.[38] Home based workers who work from home or at a place of work of their own choosing are also formally self-employed because they are not subject to any instructions when performing work and determine the duration and location of their working hours and the organisation of their work themselves.[39] Although they do not enter into an employment relationship with the recipients of

[36] Federal Labour Court (BAG). 5 AZB 52/06; 10 AZB 14/10; Rolf Wank: *Arbeitnehmer und Selbstständige*. Munich, 1988. 9.

[37] Spinner op. cit. § 611a BGB no. 132.

[38] Rüdiger Krause: *Digitalisierung der Arbeitswelt*. Gutachten B 105, 2016.; Eva Kocher – Isabell Hensel: Herausforderungen des Arbeitsrechts durch digitale Plattformen. *Neue Zeitschrift für Arbeitsrecht,* No. 16/2016. 989.; Ulrich Preis: Heimarbeit, Home-Office, Global-Office. *Soziales Recht,* No. 5/2017., 175.

[39] Olaf Deinert: Die heutige Bedeutung des Heimarbeitsgesetzes. *Recht der Arbeit,* No. 6/2018. 361–363.; August Otten: Heimarbeit – ein Dauerrechtsverhältnis eigener Art. *Neue Zeitschrift für Arbeitsrecht,* No. 7/1995. 289–290.

their services, while regularly concluding freelance service or work contracts[40], the law has recognised them as worthy of social protection and also stipulated a certain level of wage protection.[41] Originally, home-based work was predominantly simple, such as low-skilled activities e.g. the processing and packaging of goods. Yet the law does not formulate any such restriction. For this reason, case law has also subjected a "qualified software developer" to the HAG.[42] The term "home-based work" is also understood broadly under international law, Art. 1 lit. a para. 3, 2nd alt. of ILO Convention 177 on home-based work, which also speaks in favour of a correspondingly broad personal scope of application of rules for the protection of home-based work under national law.

However, as in the case of employee-like persons, case law requires economic dependence on the client as a central prerequisite.[43] This requirement is justified by the fact that home workers are only particularly in need of protection because they are economically dependent on a specific client and their legal freedom of organisation is therefore only formal.[44] In view of the absence of such a requirement in the law, however, this restriction is not convincing.[45] However, even if this economic dependency on a single client is waived as a prerequisite, the workers must have established a relationship with their client that is regular and stable enough to constitute a permanent exchange relationship.[46] If this is not the case, protective obligations such as the granting of holidays, continued payment of wages in the event of illness or social security obligations cannot arise.[47] Some solo self-employed persons can therefore be covered by the protection of the HAG if interpreted broadly. On the contrary, all those who only work rarely and irregularly for a specific client, but receive orders from many different clients, are excluded.

Even if the HAG is applicable, however, it is only suitable for securing remuneration to a limited extent. The fact that collective agreements may be concluded for home workers in accordance with Section 17 HAG, which can ensure fair pay, has a positive effect (see 4. 2. d. below). However, if there is a lack of trade unions or employers' associations for a particular sector that could enforce collective agreements, the legal admissibility of collective agreements does not help. Section 19 HAG recognises this problem and instead allows the remuneration of homeworkers to be determined with binding effect by "homework committees". Such committees are to be formed for each sector of the economy. This places practical limits on the application of the law to solo self-employed workers, as it is not possible to define an economic sector as "self-employment" or "digital work" due to the

40 Federal Labour Court (BAG). 4 AZR 273/62.

41 Deinert op. cit. 360.; Preis op. cit. 177.

42 Federal Labour Court (BAG). 9 AZR 315/15.

43 Federal Labour Court (BAG). 3 AZR 258/88.

44 Federal Labour Court (BAG). 9 AZR 41/19 no. 44.

45 Dietmar Martina: Heimarbeit und ihre Voraussetzungen. *Neue Zeitschrift für Arbeitsrecht,* No. 15/2020. 988–989.

46 Federal Labour Court (BAG). 9 AZR 305/15 no. 48.

47 Frank Bayreuther: Sicherung der Leistungsbedingungen von (Solo-)Selbständigen, Crowdworkern und anderen Plattformbeschäftigten. *HSI Working Paper,* No. 26, 2018. 15.

differences in the content of the services offered by self-employed workers. Obviously, the structures of the HAG reflect the economic framework conditions at the time it was created[48], which are not suitable for many solo self-employed workers who are currently in particular need of protection.[49]

3.4. Interim Result

An overall view shows that although solo self-employed persons in Germany sometimes earn particularly low wages, they are hardly protected by statutory law. Labour law as an employee protection law is at best applicable to employee-like self-employed persons, and even then only in limited marginal areas; remuneration protection is generally not part of this. State regulations in favour of special professions usually do not cover those solo self-employed who are specifically in need of protection. Although pay falls within the material scope of prohibitions on discrimination, these only ensure equal treatment with a comparable person, but not the appropriateness of the pay remunerated.

However, in view of existing obligations under international labour law, in particular under Art. 4 ESC, Germany would also be obliged to grant protection of remuneration to solo self-employed workers in need of social protection. However, this does not necessarily have to be in the form of a statutory provision. The following section will show the extent to which appropriate protection can be guaranteed by collective agreements.

4. Collective pay protection for solo self-employed persons

4.1. Basic requirements for a legal framework to achieve appropriate pay protection through collective agreements

In contrast to statutory minimum wages, collective agreements cannot be used to directly impose wage floors. Collective agreements require a legal framework that allows the collective representatives to freely negotiate appropriate remuneration for solo self-employed workers. Because the right to collective bargaining is guaranteed both in the constitution and in international law, the legal framework must fulfil certain basic requirements in order to comply with its provisions.

48 Home-Based Work Act of 14 March 1951, Federal Law Gazette 1951-I. 191.; Preis op. cit. 174–175.

49 Bayreuther op. cit. 23–24.

4.1.1. Necessity of the cartel exemption

The first basic prerequisite for appropriate pay protection through collective agreements is that the negotiation results achieved are not themselves subject to state prohibitions. This is particularly important for collective pay agreements. Although it is generally recognised that regulations on pay levels can be freely agreed in collective agreements, German law could (also) restrict this principle to protect free competition through cartel prohibitions. This is done at national law level (in particular) by Section 1 Competition Act (hereinafter: GWB), to which the prohibition under Art. 101 TFEU is added in matters relating to EU law.

Since both antitrust prohibitions could also cover collective price agreements in favour of solo self-employed persons in need of protection, effective protection of remuneration via collective agreements can only succeed if the collective agreements are not subject to antitrust prohibitions in this respect. This is in line with the case law of the ECSR, which has found that national antitrust prohibitions can constitute a violation[50] of the rights under Art. 6 (2) ESC – which also cover solo self-employed[51] workers with weak bargaining power. Obligations of the Member States under EU law may not override their obligations under international law either.[52]

4.1.2. Need for a legal framework to promote the effectiveness of collective agreements

However, the mere absence of prohibitions alone does not lead to realistic protection through collective agreements. In any case, an additional prerequisite for this is the possibility of making the collectively achieved negotiation results effective for the beneficiaries. Under international law, this is achieved by formulating a positive obligation for the ratifying states to act. According to the ECSR, the obligation under Art. 6 (2) ESC includes taking positive measures, where necessary and appropriate, to facilitate and promote the conclusion of collective agreements.[53] The EU Minimum Wage Directive also stipulates that all member states that do not already have at least 80% collective bargaining coverage are obliged to promote this.

50 ECSR. Decision on the Merits, Complaint No. 123/2016 no. 96 et seq.

51 ECSR. Decision on the Merits, Complaint No. 123/2016 no. 35 et seq.

52 ECSR. Decision on the Merits, Complaint No. 123/2016 no 113–114.

53 ECSR. Digest of the case law of the European Committee of Social Rights, 2022. 87.

4.1.3 Conclusions and course of the presentation

In the following, we will examine the extent to which German law provides a corresponding framework for solo self-employed workers. To this end, the German Collective Labour Agreement Act (4.2 – 4.6.) followed by specific regulatory options under copyright law (4.7.) will be examined. Finally, the framework conditions for solo self-employed persons who do not fall under any of the previously analysed regulations will be examined (4.8.) before an overall assessment can be made (4.9.)

4.2. Collective agreements for solo self-employed persons in direct application of the Collective Labour Agreement Act (TVG)?

4.2.1. The Collective Labour Agreement Act as a solution

The initial logical point of reference is the German Collective Labour Agreement Act (TVG), as this expressly addresses the problems just identified, at least for employees. Collective agreements concluded under the TVG are indisputably exempt from the national[54] ban on cartels because the TVG is in any case[55] a lex specialis compared to the ban on cartels under Section 1 GWB.[56] In addition, the TVG also solves the problem of the effect of negotiated results on labour relations: Pursuant to Section 4 (1) sentence 1 TVG, legal provisions of the collective agreement that regulate the content of employment relationships apply directly and mandatorily between the parties bound by the collective agreement that fall under the scope of the collective agreement. Remuneration provisions in collective agreements therefore have normative – i.e. quasi-statutory – effect. Deviations are only possible within narrow limits (Section 4 (3), (4) TVG) and in principle only in favour of the employee. In addition, collective agreements can be enforced through industrial action, i.e. they are also enforceable against non-cooperating employers, provided the trade union is sufficiently assertive.

4.2.2. Restriction of the subject matter to employment relationships

However, these possibilities do not generally apply in favour of solo self-employed workers, as Section 1 TVG only mentions "employment relationships" as the potential subject matter of the intended

54 The relationship to the prohibition of cartels under EU law in Art. 101 TFEU, which has also been clarified by the "Albany" case law of the CJEU, will be the subject of a separate article and will not be discussed in detail here.

55 In some cases, the result is also based on an interpretation of the prohibition of cartels itself or the primacy of the constitutionally protected freedom of association. Cf. in more detail Achim Seifert: Kollektivverträge für wirtschaftlich abhängige Selbständige und unionsrechtliches Kartellverbot. *HSI Working Paper,* No. 42, Frankfurt am Main, 2022. 11 with further references.

56 Seifert op. cit. 11.

collective agreements.[57] According to the prevailing opinion[58], this term is not specific to the TVG; otherwise, it potentially might allow a broad, teleological interpretation. Instead, the norm is understood as following the general concept of employee from Sec. 611a BGB. According to the crowdworker decision of the Federal Labour Court[59] described above, Sec. 611 a BGB may well cover some service providers whose classification as employees has been disputed to date. In principle, however, the TVG does not provide for the regulation of service relationships of genuine solo self-employed persons via collective agreements. This is justified in particular by the systematic connection to the expressly provided exceptions (see c. and d. below).

In its recent case law, the Federal Labour Court has also emphasised that solo self-employed persons are "neither employers nor employees" within the meaning of the German Collective Labour Agreement Act and that collective bargaining parties are therefore – apart from the standardised exceptions – "neither responsible for collective bargaining nor authorised to set standards" for them.[60] Caution is required when drawing conclusions from this decision, as it did not concern a case in which solo self-employed persons had a position closer to that of employees, as would be the case with a remuneration regulation in their favour. Rather, it concerned the opposite constellation, in which solo self-employed persons were obliged by collective agreement to pay contributions to an organisation to offset training costs, i.e. they were in a position similar to that of employers. Despite this difference, however, it can be assumed that the scope of regulation opened up by the TVG is generally limited to employment relationships, even according to the current view of the BAG.

However, things could be different if the parties to the collective agreement were authorised to define the term "employment relationship" within the meaning of Section 1 TVG in a broader sense by a mutual agreement.[61] In practice, an interest in this seems quite conceivable, at least on the trade union side, as IG Metall[62] and ver.di, the two largest German trade unions, have already enabled self-employed workers to join.[63] Legally, however, the prevailing opinion to date rejects such authorisation.[64]

It therefore remains the case that the regulatory power granted by the TVG only covers employment relationships. The only exceptions to this are the expressly regulated provisions in Section 12a TVG (4.3.) and Section 17 HAG (4.4.), the scope of which is discussed below.

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57 Bayreuther op. cit. 70.

58 Martin Franzen in*: Erfurter Kommentar zum Arbeitsrecht*. 25th ed., Munich, 2025. § 1 TVG marginal no. 38 with further references.

59 Federal Labour Court (BAG). 9 AZR 102/20.

60 Federal Labour Court (BAG). 10 AZR 279/16 no. 22.

61 In detail Katja Nebe in: Däubler (Ed.): *Tarifvertragsgesetz mit Arbeitnehmer-Entsendegesetz*. 5th ed., Baden-Baden, Nomos, 2022. § 1 TVG no. 239.

62 IG Metall, press release dated 22 October 2015, available at: https://www.igmetall.de/ueber-uns/ig-metall-oeffnet-sich-fuer-solo-selbststaendige

63 See the information page "Self-employed in ver.di", available online at: https://selbststaendige.verdi.de/

64 Monika Schlachter in: *Gedächtnisschrift Zachert*. Baden-Baden, 2010. 634, 636, 643.; Gregor Thüsing in: Wiedemann (Ed.)*: Tarifvertragsgesetz*. 9th ed., Munich, 2023. § 1 no. 368.; Jürgen Treber in: Schaub et al. (ed.): *Arbeitsrechts-Handbuch*. 20th ed. 2023. § 200 no. 3.; in favour, however, with reference to the need for protection resulting from the structural changes in forms of employment, Nebe op. cit. no. 23. with further references.

4.3. Corresponding applicability of the Collective Labour Agreement Act (TVG) in accordance with Section 12a

The first – and most important – exception is Section 12a TVG, according to which the provisions of the Collective Labour Agreement Act apply accordingly to employee-like persons.

4.3.1. Scope of the "corresponding" applicability of the TVG

The order that the TVG only applies "accordingly" does not serve to restrict the quasi-statutory regulatory effect of collective agreements.[65] The wording is merely intended to allow the collective bargaining parties a certain amount of leeway in the application of provisions that are not tailored to the service relationships of employee-like persons. This means that professional associations of employee-like persons can be understood as parties to collective agreements in accordance with Section 2 TVG, as can individual clients and their associations on the other side.[66]

Collective agreements pursuant to Section 12a (1) TVG can indisputably also regulate content standards – in particular the remuneration of the persons covered.[67] Section 12a TVG also privileges the collective agreements concluded hereunder as lex specialis in any case[68] over the national ban on cartels.[69] In addition, the rules agreed also apply directly and mandatorily in the service relationships covered. As a result, the persons covered by Section 12a TVG are guaranteed sufficient protection in the collective organisation of remuneration.

4.3.2. Prerequisites

In order to be considered an employee-like person, solo self-employed persons must in principle be economically dependent and in need of social protection comparable to an employee. These requirements are then further specified by additional conditions.

On the one hand, this concretisation is performance-related. Section 12a TVG only covers those persons who work "on the basis of service or work contracts for other persons". However, this

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65 Stephanie Rachor in: Däubler (Ed.): *Tarifvertragsgesetz mit Arbeitnehmerentsendegesetz*. 5th ed., Baden-Baden, 2022. § 12a TVG marginal no. 57.

66 Hartmut Oetker in: Wiedemann (Ed.): *Tarifvertragsgesetz*. 9th ed., Munich, 2023. § 12a marginal no. 118; Rachor op. cit. § 12a TVG marginal no. 57.

67 Franzen op. cit. § 12a TVG no. 11.; Oetker op. cit. § 12a no. 120.

68 In relation to Art. 101 TFEU, employee-like persons within the meaning of § 12a TVG are likely to fall under the "FNV Kunsten" exception of the CJEU, which will be discussed in more detail in a separate article.

69 Seifert op. cit. 31.

requirement is not strictly understood, meaning that any contracts that correspond to the basic type of these contracts are included.[70] This also encompasses mixed-type contracts such as franchise or subcontractor agreements. Therefore no major restrictions arise from this characteristic. The same applies to the further requirement that the persons covered by Section 12a TVG must "provide the services owed personally and essentially without the co-operation of employees". This already applies to solo self-employed persons by definition. Only commercial agents are generally excluded in accordance with Section 12a (4) TVG.[71]

In contrast, the scope of application is severely limited by the contractual partner-related requirements, which define economic dependency within the meaning of Section 12a TVG para. 1 no. 1 in more detail[72]. Section 12a para. 1 TVG only applies to self-employed persons who either work predominantly for one person (no. 1 lit. a)) or receive more than half of their earnings from one person on average (no. 1 lit. b)). It is obvious that neither of these applies to many solo self-employed persons, especially those working in the platform economy.

In this respect, the law only provides relief for self-employed persons who offer artistic, literary or journalistic services, where it is sufficient that at least one third of the total remuneration is generated by one contractual partner on average. In addition, pursuant to Section 12a (2) TVG, several contractual partners are combined into a single client if they belong to the same group or the same organisational or working group. This ensures a certain degree of protection against circumvention.[73]

Cumulatively[74] to economic dependency, Section 12a (1) TVG requires the characteristic of a need for social protection comparable to that of an employee, although this is not specified further in the text of the norm. According to case law, this need for social protection exists "if the degree of dependency reaches a level that generally only occurs in an employment relationship and the services rendered are comparable to those of an employee in terms of their sociological typology"[75].

To determine the scope of application of collective agreements for employee-like persons, the Federal Labour Court now considers the parties to the collective agreement to be authorised[76] to further specify its reach themselves.[77] Therefore, the "need for social protection" can be specified in the collective agreement. As a prerequisite, the BAG formulates that the parties to the collective agreement only have to "orientate themselves according to the model of Section 12a TVG"[78].

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70 Franzen op. cit. § 12a TVG marginal no. 6.; Richard Giesen in: *Beck'scher Online-Kommentar ArbR*. 78th ed., Munich, 2025. § 12a TVG marginal no. 2.

71 Critical of this is Seifert op. cit. 32.

72 Franzen op. cit. § 12a TVG marginal no. 4.

73 Giesen op. cit. § 12a TVG marginal no. 4.

74 Franzen op. cit. § 12a TVG marginal no. 4.

75 Federal Labour Court (BAG). 4 AZR 106/90.

76 With a different basic understanding of the norm, Federal Labour Court (BAG). 4 AZR 106/90.

77 Federal Labour Court (BAG). 9 AZR 51/04; confirmed in Federal Labour Court (BAG). 9 AZR 820/09; critical: Manfred Löwisch – Volker Rieble: *Löwisch/Rieble, Tarifvertragsgesetz*. 4th ed., Munich, 2017. § 12a TVG no. 40.

78 Federal Labour Court (BAG). 9 AZR 51/04.

4.3.3. Practical significance

Section 12a TVG has only gained practical significance in the media sector[79], where collective bargaining agreements have been common practice for a long time, particularly in favour of so-called "permanent freelance" journalists, and are currently still being concluded. Because there are often established service relationships in these professional groups, such as "regular authors" employed on a fee basis, they are relatively easy to reach for attempts at union organisation. Moreover, this is precisely one of the areas for which the reduced requirements for economic dependency pursuant to Section 12a (3) TVG apply.

4.3.4. Valuation

Overall, it can therefore be concluded that Section 12a TVG provides an effective framework for the collective regulation of working conditions, including pay. At the same time, only a fraction of those solo self-employed workers who are actually in need of protection are likely to be covered by this provision.

This can be explained by the more restrictive basic approach of Section 12a TVG compared to the provisions of international law. While the personal scope of Art. 6 (2) ESC in the interpretation of the ECSR is based directly on the regulatory purpose of the right to collective bargaining, i.e. an individual bargaining weakness requiring compensation, Section 12a TVG takes a "diversion" via economic dependency with regard to its personal scope of application. This approach also covers some cases of individual bargaining weakness requiring compensation through collective means, but by no means all of them.

This finding is reinforced by the fact that the concept of economic dependency is defined restrictively in Section 12a (1) no. 1 a) and b) TVG. Apart from the privileged areas, this means that solo self-employed persons who only have three regular clients, two of which are of approximately equal economic importance, fall outside the scope of the standard. However, this alone is unlikely to rule out a negotiating weakness requiring compensation. Due to these strict requirements, Section 12a TVG is likely to be largely ineffective, especially in the growing area of the digital world of work, where the fiction of contracting authority in Section 12 para. 2 TVG can also be easily circumvented.[80]

Section 12a TVG in its current version can therefore only be regarded as one of several components for granting appropriate pay protection for solo self-employed persons through collective agreements, but by no means as sufficient regulation.

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79 Seifert op. cit. 32.; Rachor op. cit. § 12a TVG marginal no. 9.

80 More optimistic Seifert op. cit. 32.

4.4. Collective agreements for home workers pursuant to § 17 HAG

A second possibility for reaching collective agreements outside of the employment relationship is provided for by German law in Section 17 HAG for homeworkers. Specifically, the norm stipulates that written agreements between trade unions on the one hand and clients or their associations on the other hand regarding the content, conclusion or termination of home employment relationships are also deemed to be collective agreements.

4.4.1. Fictitious effect of § 17 HAG

The legal relationships of homeworkers, who are not employees under German law, as already explained, but rather dependent self-employed persons, could not be regulated by collective agreements in accordance with the principle of Section 1 TVG.[81] Similarly, the clients of homeworkers would not be considered employers and their associations would therefore not be considered employers' associations within the meaning of Section 2 TVG. Section 17 HAG avoids this problem by the fact that the written agreements concluded by these parties on the content, conclusion or termination of contractual relationships of homeworkers are to be regarded as collective agreements by virtue of fiction.[82] In particular, this also triggers the normative effect of the agreements provided for in Section 4 TVG, so that Section 17 HAG also enables directly and bindingly effective remuneration regulations that are not subject to the national ban on cartels in Section 1 GWB.[83]

4.4.2. Prerequisites

The applicability of the provision hinges on the concept of "home-based work" pursuant to Section 2 HAG (as described above in the individual law section of the article).

If this term were limited to the conditions expressly provided for in Section 2 HAG, Section 17 HAG could serve as an effective instrument for collective wage protection for solo self-employed workers, particularly in the digital economy. This assessment has become even more important since the Federal Labour Court clarified that qualified activities can also fall under the concept of working from home because it is not limited to the production of goods.[84] Self-employed programming, image

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81 Michael Horcher in: *Nomos Kommentar Gesamtes Arbeitsrecht*. 2nd ed., Baden-Baden, 2023. § 17 HAG no. 2 with further references.

82 Horcher op. cit. § 17 HAG no. 2.

83 Bayreuther op. cit. 22.

84 Federal Labour Court (BAG). 9 AZR 305/15; Bayreuther op. cit. 22.

processing or design tasks in particular are likely to often fulfil the activity in a self-chosen workplace, as well as engaging in remunerative activities on behalf of tradespeople who retain the rights to the work's outcome.

However, as *Bayreuther*[85] has already explained, case law[86] has assumed for decades that the unwritten prerequisite for working from home is the economic dependence of the home worker on their employer. Based on this, a scope of application of Section 17 HAG that goes beyond the scope of Section 12a TVG would only arise if the economic dependency required for the assumption of a home-based work relationship were defined less restrictively than that in Section 12a para. 1 no. 1 lit. a), lit b) TVG.[87]

However, in a decision conserning home-based work issued in 2016, the BAG[88] expressly rejected the requirement of a "special need for protection" for the assumption of a home-based work relationship. On the one hand, this could merely refer to the distinction between higher and lower-skilled activities, but on the other hand it could also refer to the previous requirement of economic dependence. In the literature, the decision was therefore partly seen as a questioning of the previous case law.[89] This interpretation is also supported by the fact that the BAG formulated in a follow-up decision issued in 2019 that home workers are "usually"[90] economically dependent on the client's orders. Since none of the decisions specifically concerned Section 17 HAG, it cannot be concluded from them with certainty that the BAG would also waive the requirement of economic dependence with regard to the fictitious effect of the collective agreement. However, this is suggested by the fact that the BAG emphasises that "the legislator has expressly codified the examination of a special need for protection a statutory requirement where it has deemed it necessary"[91]; this is because the text of Section 17 HAG does not make its effects dependent on a special need for protection.

4.4.3. Valuation

Section 17 HAG also ensures that German law guarantees the necessary basic conditions for securing remuneration through collective agreements in favour of the group of people covered by the provision. In contrast to Section 12a TVG, however, there are currently some uncertainties regarding the personal scope of Section 17 HAG. Based on the previous homeworker case law of the BAG[92], the norm would

85 Bayreuther op. cit. 20.

86 Cf. Federal Labour Court (BAG), 3 AZR 258/88.

87 However, Horcher continues to oppose a wider scope of application than that of op. cit. § 17 HAG no. 2.

88 Federal Labour Court (BAG). 9 AZR 305/15.

89 Bayreuther op. cit. 20; also based on the requirement Preis op. cit. 178.

90 Federal Labour Court (BAG). 9 AZR 41/19.

91 Federal Labour Court (BAG). 9 AZR 305/15.

92 Federal Labour Court (BAG). 3 AZR 258/88.

at best only have a minor significance beyond that of Section 12a TVG if – which is not certain – economic dependency were to be defined more generously within the framework of Section 17 HAG. However, it seems conceivable that the requirement of economic dependence of the beneficiaries for Section 17 HAG could be waved or at least defined more generously in the future. The standard could then open up a very relevant protection option, particularly in the area of digital solo self-employment, which would go well beyond its current scope of application.

Even in this case, however, it should be noted that Section 17 HAG does not determine its scope of application based on the necessity of collective bargaining to compensate for individual contractual weaknesses, as is the case under international law. Even if the new case law of the BAG gives rise to the hope that Section 17 HAG could enable further solo self-employed workers who are worthy of protection to conclude collective agreements on remuneration, the personal scope of this provision therefore inevitably falls short of that of Art. 6 (2) ESC.

4.5. Indirect protection of solo self-employed persons through collective agreements concluded in favour of employees?

It is also possible for collective agreements for employees to include provisions that provide a certain degree of protection for solo self-employed contractors in the same company.

In the past, German collective bargaining practice has already occasionally included regulations on the outsourcing of activities previously carried out in the company, which provided indirect protection for contractors, for example through regulations on their appropriate remuneration or equal pay requirements.[93] It therefore seems conceivable that this could also result in a certain indirect protection of remuneration in favour of solo self-employed contractors. Regardless of the (controversial) legal admissibility of such regulations[94], practical protection for solo self-employed contractors will only materialize to the extent that the interests of these contractors coincide with those of the employees in whose favour the collective agreement is negotiated.

Such overlaps appear to be realistic in some cases of outsourcing of activities previously performed in-house. However, as soon as the distribution of limited resources is indirectly affected, the interests of the core workforce could compete with those of third-party contractors. Although the regulatory mechanism can therefore in fact contribute to an improvement in the performance conditions of solo self-employed contractors in some constellations, it is not a fundamentally effective instrument for their protection.

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93 Cf. the description in Wolfang Däubler: Tarifverträge zur Unternehmenspolitik? *HSI Schriftenreihe,* No. 16, 2016. 20–21.

94 See in detail ibid. 27, 62.

4.6. Result on protection under the Collective Labour Agreement Act

Overall, trought the exceptional extension of the Collective Agreements act's applicability via Section 12a TVG and Section 17 HAG, German law privides an effective framework for wage protection in favour of solo self-employed workers through collective agreements that meets the requirements of international law approaches to the delimitation of the protected persons compared to. However, due to the different delimitation of the areas of application under international law, this protection only covers segments of the solo self-employed workers in need of protection.

4.7. Partial protection through joint remuneration guidelines pursuant to Section 36 of the Intellectual Property Act (UrhG)

In addition to the TVG, German law provides for its own type of collective agreements regulating remuneration in favour of intellectual copyright holders.[95] These "Joint Remuneration Guidelines" can be drawn up by representative associations of copyright holders with representative associations of work users or individual work users (Section 36 (1), (2) UrhG).

4.7.1. Legal construction

Unlike collective agreements, the joint remuneration guidelines do not have a direct and binding effect on the legal relationships between copyright holders and users of works. Instead, the guidelines are incorporated into the legal relationships via the "diversions" of Section 32 UrhG. This standard serves to protect appropriate remuneration for the granting of rights of use and the authorisation to use the work. It stipulates that, in the absence of a remuneration agreement, an appropriate remuneration is deemed to have been agreed and that a corresponding contractual adjustment can be demanded in the event of an existing but inappropriate remuneration agreement. The common remuneration rules established in accordance with Section 36 UrhG then serve as (irrefutable) concretisation of the respective "appropriate remuneration" (Section 32 (2) sentence 1 UrhG).

The regulations are secured by injunctive relief from the associations involved. These exist against users of works who deviate from the provisions of the remuneration guidelines co-designed by the associations (Section 36b UrhG), as well as corresponding claims by affected copyright holders for

[95] For more details, see Martin Soppe: Das Urhebervertragsrecht und seine Bedeutung für die Vertragsgestaltung. *Neue Juristische Wochenschrift,* No. 11/2018. 729.

contract adjustment (Section 36c UrhG).[96] As a result of the interplay of these rights, the remuneration guidelines have an effect almost comparable to collective bargaining standards[97]. As the rights also exist in favour of copyright holders who were not involved in the establishment of the remuneration guidelines themselves, the effect is even partly similar to a collective agreement that has been declared generally binding.[98]

4.7.2. Protected group of persons and practical significance

The construction to include negotiated results in the performance relationships proves to be innovative, but can only address the need for protection examined here to a very limited extent, as Sections 32 and 36 UrhG only concern remuneration for the granting of rights of use and the authorisation to use works. By definition, the regulations therefore have a relatively narrow scope of application that is limited to copyright-relevant industries.

In addition, this scope of application clearly overlaps with that of Section 12a TVG, in the context of which privileged requirements apply to self-employed artists, writers and journalists in particular. In the relationship between the two regulations, German law also provides for the collective agreement to take precedence: If the contractual relationship to be regulated is already covered by a collective agreement, a remuneration regulation in joint remuneration guidelines pursuant to Section 32 (4) UrhG is out of the question. The actual significance of the construction has therefore remained relatively low to date[99], probably also due to actual enforcement problems.[100] According to *Seifert,* there were only 15 cases of joint remuneration regulations in 2019, in particular for journalists, translators, directors, actors and cameramen.[101]

4.7.3. Valuation

The possibility opened up by Sections 32 and 36 UrhG for the collective establishment of remuneration guidelines fulfils the obligations under international law to promote the inclusion of collective negotiation results in the service relationships. In addition, Sections 36 and 32 UrhG should also be seen as a more specific regulation in relation to the national ban on cartels under Section 1 GWB,

96 Gisela Hütter: Möglichkeiten und Grenzen kollektivautonomer Regelungen der Lohn- und Arbeitsbedingungen Selbstständiger. *Zeitschrift für Arbeitsrecht*, No. 4/2018. 564.

97 See also Bayreuther op. cit. 40.

98 For comparison, see also Soppe op. cit. 729, 732.

99 Soppe op. cit. 732.; Seifert op. cit. 34.

100 See also Bayreuther op. cit. 40.

101 Seifert op. cit. 34 with further references.

which exempts the remuneration guidelines from the national ban on cartels. Until now, compatibility with the European ban on cartels under Art. 101 TFEU has been seen as more problematic[102]. However, the *European Commission's* new *guidelines on the application of EU competition law to collective agreements on the working conditions of solo self-employed workers*[103] could have a positive impact on the assessment here.[104]

At the same time, however, the scope of application of the remuneration guidelines is strictly limited and also clearly overlaps with that of Section 12a TVG. De lege lata, Sections 32 and 36 UrhG only provide genuine additional protection for the very specific group of copyright holders who are not already covered by Section 12a TVG due to a lack of sufficient economic dependency. De lege ferenda, however, the regulatory approach could - as the proposal by *Bayreuther*[105] shows - also be utilised for other groups of solo self-employed persons in need of protection.[106] The fact that the definition of "reasonable remuneration" is likely to be more complicated in other sectors[107] does not necessarily preclude this.

4.8. The remaining option of coalition agreements under the law of obligations

As shown above, the special statutory provisions so far do not offer all solo self-employed workers in need of protection sufficient opportunities to collectively negotiate appropriate remuneration. It therefore remains to be clarified whether and if so what possibilities exist for those solo self-employed workers who do not fall under any of the special statutory provisions mentioned so far. A certain degree of protection for this group could result from the fundamental right of freedom of association provided for in Art. 9 para. 3 of the German Constitution.

4.8.1. Solo self-employed persons as bearers of freedom of association

Although the right to form associations for the protection and promotion of working and economic conditions is "guaranteed for everyone and for all professions" by Article 9 (3) of the Basic Law (GG),

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102 On the discussion, Bundestag Research Service. PE 6 – 3000 – 121/16; Jan Tolkmitt: Gemeinsame Vergütungsregeln. *Gewerblicher Rechtsschutz und Urheberrecht,* No. 6/2016. 564.

103 Jochen Mohr – Paul Mey: Kollektivverträge über die Tätigkeitsbedingungen von Solo-Selbständigen nach den neuen Leitlinien der Kommission. *Neue Zeitschrift für Kartellrecht,* 2022. 655.

104 This antitrust implications can only be touched upon here; for a in-depht analysis, see Dominik Leist: Ensuring adequate remuneration for vulnerable solo self-employed through collective bargaining – EU antitrust prohibition as a limit? *Italian Labour Law E-Journal,* Vol. 18, No. 2 (2025) 159–188.

105 Bayreuther op. cit. 42.

106 Hütter op. cit. 555.

107 Bayreuther op. cit. 41–42.

the Federal Constitutional Court (BVerfG) initially[108] only mentioned the parties to the employment contract and their associations as holders of freedom of association, before it then included home workers[109] in the scope of protection in 1973. The Federal Labour Court assumes that all employee-like persons within the meaning of Section 12a TVG[110] also fall within the scope of protection of freedom of association.

On one hand, in constitutional law literature, the majority of voices have so far only extended the freedom of association to groups already recognised by case law.[111] In labour law literature, on the other hand, a more open view[112] now seems to be gaining acceptance (with differentiations in detail), according to which solo self-employed persons are also subject to the freedom of association insofar as they are in a weak individual negotiating position with regard to their conditions of service that requires compensation. This approach is convincing in view of the purpose and the open wording of Art. 9 (3) GG and also largely corresponds to the understanding on which Art. 6 (2) ESC is based. However, it remains to be seen whether case law will also converge towards this view.

4.8.2. The "problem" of freedom from opponents

In this context, the literature discusses whether the inclusion of self-employed workers in a trade union jeopardises its constitutive characteristic of "freedom from opponents"[113]. This characteristic is intended to protect the functioning of collective bargaining autonomy by ensuring its independence from the social opponent as a prerequisite for the concept of a trade union. While this would undoubtedly pose a problem for self-employed workers with their own employees, the solo self-employed workers of interest here do not, by definition, have their own employees. Moreover, in a collective organisation to improve their working conditions, they will typically embrace a position that is so close to that of an employee that conflicts with employee interests are not to be feared.[114]

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108 For example Federal Constitutional Court (BVerfG). 1 BvR 629/52.

109 Federal Constitutional Court (BVerfG). 2 BvL 27/69.

110 Federal Labour Court (BAG). 9 AZR 51/04.

111 Cf. the description by Bayreuther op. cit. 68 with further references.

112 In this sense, Franzen op. cit. § 12a TVG no. 2.; Jan Gärtner: *Koalitionsfreiheit und Crowdwork*. Berlin, 2020. 173.; Robert Kretzschmar: *Die Rolle der Koalitionsfreiheit für Beschäftigungsverhältnisse jenseits des Arbeitnehmerbegriffs*. Lausanne, 2003. 162–163.; Wolfgang Linsenmaier in: *Erfurter Kommentar zum Arbeitsrecht*. 24th ed., Munich, 2024. Art. 9 GG no. 28.; Schlachter op. cit. 634.; further evidence can be found in the detailed presentation by Hütter op. cit. 559.; also openly Bayreuther op. cit. 67–68.; more narrowly: Löwisch–Rieble op. cit. § 12a TVG no. 4.; in favour of a limitation to employees was Manfred Lieb: Die Schutzbedürftigkeit arbeitnehmerähnlicher Personen. *Recht der Arbeit,* 1974. 267.

113 For more details, see Hütter op. cit. 561–562.

114 In conclusion, similar to Bayreuter op. cit. 70.; Hütter op. cit. 562.

4.8.3. Consequences for the relationship with antitrust law

Compared to the national ban on cartels, collective negotiation results in favour of individually weakly negotiating solo self-employed persons would take precedence either as lex specialis or in any case as higher-ranking law if the agreements represent the results of their exercise of fundamental rights. Compared to the prohibition of cartels under EU law, this could result in indirect protection via Art. 28 CFREU[115]. If this is not the case, the congruence of the group with the "FNV-Kunsten"[116] exemption would have to be examined and the position of the CJEUJ on the new Commission guidelines would have to be awaited.[117]

4.8.4. Consequences for the inclusion of realised results in the performance relationships

Even if solo self-employed persons were able to negotiate their remuneration collectively in the exercise of their freedom of association without colliding with the national ban on cartels, the question would still remain as to how the agreements are incorporated into the service relationships. German law only expressly provides for a normative effect within the scope of application of the TVG. In any case, an authority to set standards is not likely to arise directly from Art. 9 Para. 3 GG itself.[118] However, international law does not necessarily presuppose such an effect. Under German law, it would remain possible for contractor associations to conclude contracts in favour of third parties with the client in accordance with Section 328 BGB.[119] However, the goal that such contracts also directly obligate the members of the negotiating client associations can probably only be realised through representation.[120] This means that individual solo self-employed persons could receive direct claims for fulfilment of the agreed conditions[121], but the construction does not create mandatory law. The claims are therefore likely to be excluded again in the individual contract.[122] The protective effect of the civil law construction therefore falls well short of the normative effect of collective agreements or the solution in Sections 32 and 36 UrhG. In addition, there is a lack of enforcement options if the client's side does not cooperate.[123]

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115 Dominik Leist in: Hiessl (Ed): *EU Labour Law – A Commentary.* The Netherlands, 2025. Art. 28 CFREU, 138, 140.

116 C-413/13. FNV Kunsten [ECLI:EU:C:2014:2411], 42. pont.

117 See Leist (2025a) op. cit. (Footnote 104), 159–186.

118 So already Schlachter op. cit. 634, 642.; Gärtner op. cit. 245–246.

119 Bayreuther op. cit. 75.

120 Ibid.

121 Gärtner op. cit. 239–240, 244.

122 Ibid. 244.

123 Schlachter op. cit. 634.

4.8.5. Interim result

Overall, although it seems both conceivable and desirable to include additional solo self-employed persons who are individually weak in negotiations in the scope of protection of the freedom of association, this understanding has as of now not been recognised by case law. If such interpretation was acknowledged, the collective agreements concluded would automatically be exempt from the national ban on cartels, but the entitlements negotiated could not be included in the individual service relationships with legal certainty; the legal constructions enabling this, as described above, have not been tested in practice. De lege lata, it would be virtually impossible to prevent worsening deviations in individual contracts that would contradict the regulatory purpose. The framework conditions for collective bargaining for solo self-employed persons not already covered by Section 12a TVG, Section 17 HAG or Sections 32, 36 UrhG remain unclear overall and are therefore unlikely to fulfil the promotion obligations under international law with regard to effective collective bargaining options.

5. Overall view

Overall, the German legal situation appears to be a "patchwork quilt" with regard to the collective negotiation of adequate remuneration for solo self-employed persons. The Collective Labour Agreement Act would offer effective protection, but is only applicable to the self-employed in exceptional cases. On the one hand, this concerns the group of employee-like persons via Section 12a TVG, and on the other hand the group of homeworkers via Section 17 HAG. Both standards only cover a fraction of the solo self-employed persons in need of protection. In addition, there is the innovative approach of the joint remuneration guidelines pursuant to Sections 32 and 36 UrhG. However, this also has a narrow scope of application due to its industry-specific focus on copyright holders, and also overlaps strongly in its practical scope of application with the group already protected under Section 12a TVG. For the numerous solo self-employed workers who are not covered by any of these special regulations, the only remaining recourse is the freedom of association under Art. 9 para. 3 GG. However, wheter they are entitled to this right at all, has not been recognised by the highest level courts yet. Moreover, it essentially only achieves an exemption of negotiation results from the national ban on cartels. It can therefore be concluded that German law provides a relatively small group of solo self-employed workers with an effective framework for collectively agreeing their terms and conditions of employment. In addition to these, there are nonetheless other solo self-employed workers for whom it is legally unclear whether they are protected at all and how effective the potentially permissible protection can be.