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COMMUNICATION FROM THE COMMISSION

Approval of the content of a draft for a

COMMUNICATION FROM THE COMMISSION
Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons

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ANNEX

COMMUNICATION FROM THE COMMISSION
Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons

DRAFT

1. INTRODUCTION

(1) These Guidelines set out the principles for assessing under Article 101 of the Treaty on the Functioning of the European Union ("Article 101 TFEU") agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively referred to as "agreements") concluded as a result of collective negotiations between solo self-employed persons[1] and other undertaking(s) ("the counterparty/-ies"[2]), concerning the working conditions of the solo self-employed persons.

(2) Article 101 TFEU prohibits agreements between undertakings that restrict competition within the internal market, notably if they directly or indirectly fix purchase or selling prices or any other trading conditions. The EU competition rules are based on Article 3(3) of the Treaty on European Union ("TEU"), which provides that the Union shall establish an internal market, including a system ensuring that competition is not distorted.[3]

(3) Article 3(3) TEU also provides that the Union shall promote "a highly competitive social market economy, aiming at full employment and social progress". To that end, the Union recognizes the important role of social dialogue and collective bargaining and commits, under Article 152 TFEU, to "facilitate dialogue between the social partners, respecting their autonomy". Article 28 of the Charter of Fundamental Rights of the European Union further recognizes the right of collective bargaining and action. Improved working conditions and proper social protection also constitute core principles of the European Pillar of Social Rights, under which "social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices" and "shall be encouraged to negotiate and conclude collective agreements in matters relevant to them".[4]

(4) The Court of Justice of the European Union (the "Court") took the EU's social policy objectives into account when it ruled, in the context of collective bargaining between management and labour, that certain restrictions of competition are inherent in

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1 For the purposes of these Guidelines, the term "solo self-employed persons" refers to persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned.

2 For the purpose of these Guidelines, the term "counterparties" refers to undertakings with which the solo self-employed persons contract (i.e. their professional customers), including associations of such undertakings.

3 Title VII, Chapter 1, Section 1 of the TFEU and Protocol No 27 of the TEU and TFEU.

4 European Pillar of Social Rights, point 8; https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en .

collective agreements between organisations representing employers and workers and necessary for the improvement of working conditions.[5] Hence, agreements entered into within the framework of collective bargaining between employers and workers and intended, by their nature and purpose, to improve working conditions (including pay), fall outside the scope of Article 101 TFEU and therefore do not infringe EU competition law.[6]

(5) The Court has further clarified that this exclusion from the scope of Article 101 TFEU also covers collective agreements concluded between employers and workers' organisations negotiating in the name, and on behalf of their false self-employed[7] members, namely service providers in a situation comparable to that of workers.[8] In this context the Court has considered an individual to be a false self-employed person if: (i) he/she acts under the direction of his/her employer as regards, in particular, his/her freedom to choose the time, place and content of his/her work; (ii) does not share the employer's commercial risks and (iii) for the duration of the relationship, forms an integral part of the employer's undertaking. Such criteria apply irrespective of whether that person is labelled as self-employed under national law for tax, administrative or organisational reasons and require a case by case assessment in light of the facts of the individual case.[9]

(6) In recent years, the labour market has undergone fundamental changes, influenced by the trend towards subcontracting and outsourcing business and personal service activities as well as by the digitalisation of production processes and the rise of the online platform economy. Self-employment in the EU is relatively high and has grown substantially in recent years, mainly in the online platform economy.

(7) While these developments have increased the flexibility and accessibility of the labour market, in some cases they have also led to difficult working conditions in the online platform economy and beyond. Even if they are not fully integrated into the business of their principal in the same way as workers, certain self-employed persons may still not be entirely independent of their principal or they may lack sufficient

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5 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 22; Judgment of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie,* C-67/96, EU:C:1999:430, paragraph 59; Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti,* C-438/05, EU:C:2007:772, paragraph 49; Judgment of 9 July 2009, *3F v Commission of the European Communities*, C-319/07, EU:C:2009:435, paragraph 50.

6 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 23; Judgment of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie,* C-67/96, EU:C:1999:430, paragraph 60; Judgment of 21 September 1999, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, C-115/97, EU:C:1999:434, paragraph 57; Judgment of 21 September 1999, *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, C-219/97, EU:C:1999:437, paragraph 47; Judgment of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, C-180/98, EU:C:2000:428, paragraph 67; Judgment of 21 September 2000, *Hendrik van der Woude v Stichting Beatrixoord*, C-222/98, EU:C:2000:475, paragraph 22; Judgment of 3 March 2011, *AG2R Prévoyance v Beaudout Père et Fils SARL*, C-437/09, EU:C:2011:112, paragraph 29.

7 As opposed to genuine self-employed persons, who can choose their activity, place, time and manner of work freely and carry it out at their own risk.

8 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraphs 30-31.

9 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraphs 36-37.

bargaining power to influence their working conditions. Moreover, the COVID-19 crisis has made many self-employed persons even more vulnerable as their loss of earnings has been exacerbated by weak or non-existent national social security schemes and dedicated support measures.[10]

(8) When self-employed persons are overall in a situation comparable to that of workers, they may, in individual cases, be considered as false self-employed persons and be reclassified as workers by national authorities/courts. Certain groups may also be considered as workers by virtue of a legal presumption. However, in cases where they have not been reclassified as workers, access to collective bargaining may still allow them to improve their working conditions.

(9) The prohibition of Article 101 TFEU applies to "undertakings", which is a wide concept that covers any entity engaged in an economic activity, regardless of its legal status, and the way in which it is financed.[11] Hence, genuine self-employed persons, even if they are individuals working on their own, are, in principle, undertakings within the meaning of Article 101 TFEU, since they offer their services for remuneration on a given market and perform their activities as independent economic operators.[12] A service provider can lose the status of undertaking not only when, in practice, he/she is in a situation of subordination, but also in cases of economic dependence, based on an assessment of the facts of a specific case.[13] Current labour market developments, and in particular the emergence of the online platform economy, reinforce the uncertainty as regards the circumstances under which collective agreements concluded by or on behalf of self-employed persons can be deemed to fall outside the scope of Article 101 TFEU.

(10) Against this background, these Guidelines clarify i) that certain categories of collective agreements fall outside the scope of Article 101 TFEU; and ii) that the Commission will not intervene against certain other categories of collective agreements.

(11) These Guidelines explain how the Commission will apply EU competition law, without prejudice to the application of other rules or principles of EU law. These Guidelines do not affect the prerogatives of the Member States in social policy or the autonomy of the social partners. They are also without prejudice to the definitions of

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10 European Parliament, Report of 13 October 2021 on the situation of artists and the cultural recovery in the EU (2020/2261(INI)), Committee on Culture and Education, https://www.europarl.europa.eu/doceo/document/A-9-2021-0283_EN.html#title1.

11 Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, EU:C:1991:161, paragraph 21; Judgment of 16 November 1995, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*, Case C-244/94, EU:C:1995:392, paragraph 14; Judgment of 11 December 1997, *Job Centre coop. arl.*, Case C-55/96, EU:C:1997:603, paragraph 21.

12 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 27; Judgment of 28 February 2013*, Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, C-1/12, EU:C:2013:127, paragraphs 36-37; Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, paragraph 45.

13 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 33; Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, paragraphs 43-44.

the terms "worker" or "self-employed person" under national law.[14] They do not affect the competences of the Member States or social partners as regards the organisation of collective negotiations in the framework of labour law, or the possibility of the contracting parties to seek re-classification of their employment status (or the competent authorities/courts to assess such cases) under EU or national law.

(12) These Guidelines are also without prejudice to the Court's further interpretation of Article 101 TFEU in relation to collective bargaining agreements. They do not affect the application of EU competition law, as prescribed by Article 42 TFEU and the relevant EU legislation[15] in relation to the agricultural and fisheries sectors. Furthermore, they apply without prejudice to the application of Article 101(3) TFEU, which exempts from Article 101(1) TFEU agreements that (i) contribute to improving the production/distribution of goods or to promoting technical or economic progress; (ii) pass on a fair share of their benefits to consumers (iii) contain only indispensable restrictions of competition and (iv) do not afford the parties the possibility to eliminate competition in respect of a substantial part of the products or services in question.[16]

(13) For the avoidance of doubt, collective agreements concluded by self-employed persons that are not covered by these Guidelines do not automatically infringe Article 101 TFEU, but require an individual assessment.

2. GENERAL SCOPE OF APPLICATION OF THESE GUIDELINES

(a) Types of agreements covered by these Guidelines

(14) These Guidelines apply to all agreements negotiated and/or concluded collectively between certain categories of solo self-employed persons on the one hand and their counterparty/-ies on the other hand (referred to here as "collective agreements"), to the extent that by their nature and purpose they concern the working conditions of such solo self-employed persons.

(15) Without prejudice to Member States' discretion as regards the scope and form of collective representation channels for self-employed persons, these Guidelines apply to all forms of collective negotiations, ranging from negotiations through social

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[14] According to the settled case law of the Court, the essential feature of the employment relationship is that "for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration". It should be noted that the classification of a person as a "worker" or as "self-employed" is to be determined primarily on a case by case basis under national law, taking into consideration the case law of the Court. Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 34; Judgment of 21 February 2013, *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, C-46/12, EU:C:2013:97, paragraph 40; Judgment of 10 September 2014, *Iraklis Haralambidis v Calogero Casilli*, C-270/13, EU:C:2014:2185, paragraph 28.

[15] Articles 206-210 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671-854. Articles 40 and 41 of Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, OJ L 354, 28.12.2013, p. 1-21.

[16] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty OJ C 101, 27.4.2004, p. 97–118, paragraph 34.

partners or other associations to direct bargaining by a group of solo self-employed persons with their counterparties or associations of those counterparties. They also cover cases where solo self-employed persons wish to be covered by an existing collective agreement concluded between the counterparty they work for and a group of workers/solo self-employed persons.

(16) The working conditions of solo self-employed persons include matters such as remuneration, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which the solo self-employed person is entitled to cease providing his/her services, for example, in response to breaches of the agreement relating to working conditions. However, agreements under which solo self-employed persons collectively decide not to provide services to particular counterparties, for example because the counterparty is not willing to enter into an agreement on working conditions require an individual assessment. Such agreements restrict the supply of labour and may therefore raise competition concerns. To the extent that it can be shown that such a coordinated refusal to supply labour is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked (or would have been linked in the case of unsuccessful negotiations).

(17) The conclusion of collective agreements presupposes a certain degree of coordination between the multiple parties on each negotiating side prior to the conclusion of the collective agreement. Such coordination may take the form of an agreement or information exchange or communication between the parties on each negotiating side in order to decide a common approach to the subject matter and the form of negotiation (e.g. multilateral or through the appointment of representatives). Again, to the extent that such coordination is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked.

(18) These Guidelines do not cover decisions by associations or agreements between solo self-employed persons outside the context of negotiations (or preparations for negotiations) with a counterparty to improve the self-employed persons' working conditions. In particular, they do not cover agreements which go beyond the regulation of working conditions by determining the conditions (in particular, the prices) under which services are offered by the solo self-employed persons or by the counterparty to consumers[17], or which limit the freedom of employers to hire the labour providers that they need.

Example 1

Situation: Solo self-employed riders provide their services to the three delivery platforms active in city B. A collective agreement is in place between the delivery platforms and the riders, laying down the fees that the platforms must pay to riders for

[17] Article 2(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

their services, as well as the minimum health and safety obligations of the platforms towards the riders. The collective agreement provides for the riders to limit their services to a specific area of the city. For that purpose, the agreement divides the city in three separate areas, one for the riders of each platform. Separately, the solo self-employed riders in city B agree among themselves not to perform more than twenty deliveries per four hours within a working day.

Analysis: The example contains two agreements between undertakings within the meaning of Article 101 TFEU: (i) the collective agreement between the platforms and the solo self-employed riders; (ii) the separate agreement between the solo self-employed riders on the maximum number of deliveries. The collective agreement is covered by these Guidelines, as it is the result of collective negotiations and regulates the working conditions (fees, health and safety conditions) under which the solo self-employed riders provide their services to the platforms. However, the part of the collective agreement which divides the territory of the city between the three platforms does not relate to their working conditions but constitutes a market-sharing agreement, which as such is likely to restrict competition by object under Article 101 TFEU.[18]

By contrast, the separate agreement between the solo self-employed riders on the number of deliveries per working day is not the result of collective negotiations between the solo self-employed persons and their counterparty/-ies and is therefore not covered by these Guidelines but should be analysed separately.

Example 2

Situation: The sports clubs in Member State X agree among themselves not to hire athletes from each other, for the duration of their contracts with the respective sports club. The clubs also coordinate on the remuneration levels of the athletes over 35 years old.

Analysis: The arrangements between the sports clubs constitute agreements between undertakings within the meaning of Article 101 TFEU. These arrangements are not covered by these Guidelines, as they are not negotiated between solo self-employed persons and their counterparties and are therefore not collective agreements. The first

[18] The same conclusion would apply if the collective agreement included a clause regulating other matters going beyond working conditions, such as the business hours during which the three platforms would provide their services.

arrangement is likely to infringe Article 101 TFEU by object, as it restricts competition between the sports clubs to hire the best athletes in the marketplace. The second (wage-fixing) arrangement, is also likely to infringe Article 101 TFEU by object, since it is in essence an agreement between competitors (the clubs) to reduce their input costs.

Overall, the present example illustrates practices of undertakings in the labour markets which clearly fall outside the scope of these Guidelines and are likely to infringe Article 101 TFEU. In particular, the agreements of the example between sport clubs are likely to infringe Article 101 TFEU irrespectively of whether they are related to self-employed persons or workers.

(b) The persons covered by these Guidelines

(19) These Guidelines cover collective agreements relating to the working conditions of solo self-employed persons (see Sections III and IV of these Guidelines). For the purposes of these Guidelines, the term "solo self-employed persons" refers to persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned. Solo self-employed persons may use certain goods or assets in order to provide their services. For example, a cleaner uses cleaning accessories and a musician plays a musical instrument. In these instances, the goods are used as an ancillary means to provide the final service, and the solo self-employed persons would hence be considered to rely on their personal labour. By contrast, these Guidelines do not apply to situations, where the economic activity of the solo self-employed person consists merely in the sharing or exploitation of goods or assets, or the resale of goods/services. For example, where a solo self-employed person rents out accommodation or resells automotive parts, these activities relate to asset exploitation and the resale of goods, rather than the provision of personal labour.

(20) Section III of these Guidelines sets out the categories of collective agreements involving solo self-employed persons which the Commission considers to fall outside the scope of Article 101 TFEU and Section IV sets out the categories of collective agreements against which the Commission will not intervene. The categories of solo self-employed persons and/or collective agreements identified in Section III and IV of these Guidelines should respect and fully comply with the general principles defining the scope of these Guidelines set out in this Section II.

3. COLLECTIVE AGREEMENTS BY SOLO SELF-EMPLOYED PERSONS COMPARABLE TO WORKERS FALLING OUTSIDE ARTICLE 101 TFEU

(21) In instances where solo self-employed persons are considered to be in a situation comparable to that of workers, their collective agreements should be considered to fall outside the scope of Article 101 TFEU regardless of whether they would fulfil

the criteria for being false self-employed persons (see paragraph (5) of these Guidelines).[19]

(22) The Court has ruled that a collective agreement which covers self-employed service providers can be regarded as the result of dialogue between management and labour if the service providers are in a situation comparable to that of workers[20] and has confirmed that "in today's economy it is not always easy to establish the status of some self-employed contractors as "undertakings".[21] The Court has also ruled that "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary organ within the principal's undertaking".[22]

(23) On the basis of these criteria and taking into account developments in the EU labour market and at national level (in terms of legislation and jurisprudence), for the purposes of these Guidelines, the Commission considers that the following categories of solo self-employed persons are in a situation comparable to that of workers and that collective agreements concluded by them therefore fall outside the scope of Article 101 TFEU:[23]

(a) Economically dependent solo self-employed persons

(24) Solo self-employed persons who provide their services exclusively or predominantly to one counterparty are likely to be in a situation of economic dependence vis-à-vis that counterparty. In general such solo self-employed persons do not determine their conduct independently on the market and are largely dependent on their counterparty, forming an integral part of its business. In addition, they are more likely to receive directions on how their work should be carried out. The issue of economically dependent self-employed persons has been recognised by a number of national laws that grant such solo self-employed persons the right to bargain collectively, provided they fulfil the criteria set out by the respective national measures.[24]

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19 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411; Judgment of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430.

20 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 31.

21 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 32.

22 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraph 33; Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, paragraphs 43-44.

23 Some solo self-employed persons might fall under several of the categories in these Guidelines.

24 For instance, Germany under Section 12a of the Collective Agreements Act in the version published on 25 August 1969 (Federal Law Gazette I, p. 1323), last amended by Article 8 of the Act of 20 May 2020 (Federal Law Gazette I, p. 1055); or Spain under Article 11 of Law 20/2007, of 11 July, on the status of self-employed work, Official State Gazette No 166 of 12 July 2007, pages 29964 to 29978 have both relied on a criterion of economic dependence. Some solo self-employed persons might fall under several of the categories in these Guidelines.

(25) The Commission considers that a solo self-employed person is in a situation of economic dependence where he/she earns at least 50 % of his/her total annual work-related income from a single counterparty. Hence, collective agreements relating to the improvement of working conditions concluded between solo self-employed persons that are in a situation of economic dependence and their counterparty on which they are economically dependent fall outside Article 101 TFEU, even if the self-employed persons in question have not been reclassified as workers by national authorities/courts.

Example 3

Situation: Company X is a firm of architects which contracts a large number of (self-employed) architects for the completion of its projects. The architects earn 90% of their income from Company X. They collectively negotiate and conclude an agreement with Company X which provides for a maximum of 45 hours working time per week, annual leave of 26 calendar days and specified remuneration rates based on the architect's level of experience.

Analysis: Self-employed architects, like other independent contractors, are generally considered as undertakings for the purposes of Article 101 TFEU and that provision therefore applies to agreements between them. However, the agreement concluded between the self-employed architects and Company X would fall outside the scope of Article 101 TFEU, as it is a collective agreement relating to working conditions between Company X and individuals who can be considered to be in a situation comparable to that of workers (in terms of their economic dependence). In this example, the architects are economically dependent on their counterparty (Company X), since they earn 90% of their income from that company. They can therefore be regarded as forming an integral part of Company X.

(b) Solo self-employed persons working "side-by-side" with workers

(26) Solo self-employed persons who perform the same or similar tasks "side-by-side" with workers for the same counterparty, are in a situation comparable to that of workers, as they provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy any independence as regards the performance of the economic activity concerned. It is for the competent national authorities/courts, to decide whether the contractual relationship of self-employed persons who work side-by-side with workers should be reclassified as an employment relationship. However, in cases where the solo self-employed persons have not been reclassified as workers, they may still benefit from collective bargaining. This reality has been recognised by the practice in several

Member States where collective agreements cover workers and self-employed persons active in the same sectors.[25]

(27) Hence, collective agreements relating to working conditions between a counterparty and solo self-employed persons who perform the same or similar tasks "side-by-side" with workers for the same counterparty fall outside the scope of Article 101 TFEU, even if the self-employed persons in question have not been reclassified as workers by national authorities/courts. The same applies to collective agreements which in accordance with social dialogue systems cover both workers and solo self-employed persons.

Example 4

Situation: Company X organises orchestra concerts and other classical music events. Multiple musicians work for Company X either as workers or as self-employed persons, on the basis of annual contracts. These musicians, independently of their status, are instructed by the cultural director of Company X as to the works they must perform, the timing and place of rehearsals and the events in which they must participate. Company X has concluded a collective agreement with all the musicians. This establishes a maximum cap of 45 working hours per week and grants the musicians a special leave of 1 day after the performance of 3 concerts within the same week.

Analysis: The solo self-employed musicians are in a situation comparable to that of Company X's workers in terms of subordination and similarity of tasks. They perform the same tasks as the employed musicians (i.e. performing music for events), they are subject to the same instructions of Company X regarding the content, place and timing of the performances and they are engaged for a similar duration as the employed musicians. Under these circumstances, the collective agreement regulating the musicians' working conditions falls outside the scope of Article 101 TFEU.

(c) Solo self-employed persons working through digital labour platforms

(28) The emergence of the online platform economy and the provision of labour through digital labour platforms has created a new reality for certain solo self-employed persons, who find themselves in a situation comparable to that of workers vis-à-vis

[25] See for example Article 14 of the Collective Agreement in the Theatre and Dance sector in the Netherlands concluded between the Kunstenbond (Artist Union) and the Nederlandse Associatie voor Podiumkunsten (Dutch Association for Podium Arts) for the period 1 Jaunary 2020 – 31 December 2021, available at https://www.napk.nl/wp-content/uploads/2019/12/Cao-TD-2020-2021.pdf; or Article 2 of the Collective Agreement for professional journalists, concluded by the Gospodarska zbornica Slovenije (Chamber of Commerce and Industry of Slovenia), the Svet RTV Slovenija (Council of RTV Slovenia) and the Združenje radijskih postaj Slovenije ter (Slovenian Radio Station Association) and the Sindikat novinarjev Slovenije (the Trade Union of Slovenian Journalists), available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=KOLP49.

the digital labour platforms through or to which they provide their labour. Solo self-employed persons may be dependent on digital platforms, especially in terms of their customer outreach, and may often face “take it or leave it” work offers, with little or no scope to negotiate their working conditions, including their remuneration. Digital labour platforms are usually able to unilaterally impose the terms and conditions of their relationship, without prior information or consultation of the solo self-employed persons.

(29) Recent jurisprudence and legislative developments at national level provide further indications of the comparability of such self-employed persons with workers. In the context of reclassification cases, national courts are increasingly recognizing the dependence of service providers on certain types of platforms, or even the existence of an employment relationship.[26] In the same vein, some Member States have adopted legislation[27] establishing a presumption of employment relationship or the right to collective bargaining for service providers to or through digital platforms.

(30) For the purposes of these Guidelines, the term digital labour platform means any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location. Platforms which do not organise the work of individuals but simply provide a means through which the solo self-employed persons can reach end-users do not constitute digital labour platforms. For example, a platform that merely aggregates and displays the available service providers (e.g. plumbers) in a specific area, thereby allowing customers to use their services on demand is not considered a digital labour platform, as it does not organise the work of the service providers.

(31) In light of these considerations, collective agreements between solo self-employed persons and digital labour platforms that by their nature and purpose aim at improving working conditions fall outside the scope of Article 101 TFEU, even if the self-employed persons in question have not been reclassified as workers by national authorities/courts.

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[26] For a detailed overview of the case law in nine EU Member States, Switzerland and the United Kingdom see Hießl, C., ‘Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions’, *Comparative Labour Law & Policy Journal*, 02.05.2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603.

[27] See for instance Spain, with the Royal Decree-Law 9/2021, of 11 May, amending the recast text of the Workers’ Statute, approved by Royal Legislative Decree 2/2015, of 23 October, to guarantee the labour rights of persons engaged in distribution in the field of digital platforms, Official State Gazette No 113 of 12 May 2021, pages 56733 to 56738; or Greece with the Hellenic Republic, Law 4808/2021 for the Protection of Labour – Establishment of an Independent Authority "Labour Inspection" – Ratification of Convention no 190 of the International Labour Organization to eliminate violence and harassment in the world of work – Ratification of Convention no 187 of the International Labour Organization for the Promotional Framework for Occupational Safety and Health at Work – Implementation of the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance, and other provisions of the Ministry of Labour and Social Affairs and other urgent arrangements, Official Gazette A' 101/19-06-2021.

Example 5

Situation: A group of drivers working for ride-hailing platforms enters into negotiations with the regional association bringing together as members the ride-hailing platforms in order to conclude a collective agreement to improve the drivers' working conditions. Before entering into negotiations with the drivers, the ride-hailing platforms (members of the association) coordinate their negotiating strategy. Ultimately, the negotiations fail and no collective agreement is concluded. Subsequently, the association of ride-hailing platforms adopts a decision which sets a minimum price of EUR 5 per ride for consumers. The platforms also discussed the possibility of fixing a minimum price per ride as part of their coordination before entering into the negotiations with the drivers.

Analysis: Through their association, the ride-hailing platforms attempt to negotiate a collective agreement with the drivers, aimed at improving the drivers' working conditions. Despite the fact that ultimately no agreement is concluded, the negotiations between the solo self-employed drivers and the platforms' association would fall outside the scope of Article 101 TFEU. The same applies to the coordination between the platforms preceding the negotiations with the drivers, provided such coordination is necessary and proportionate for the negotiation of a collective agreement covered by these Guidelines.

However, the discussions between the platforms relating to the minimum price per ride to be charged to consumers do not relate to working conditions. Such coordination on pricing between competitors is likely to infringe Article 101 TFEU by object. In any case, the decision adopted by the association of ride-hailing platforms would fall outside the scope of these Guidelines because it is not the result of collective negotiations between solo self-employed persons and their counterparties. It is the result of an agreement between the members of the association, i.e. the platforms (counterparties).

Conversely, if the solo self-employed drivers and the platforms' association had collectively agreed on a minimum fee of EUR 5 per ride for the drivers (irrespective of how that cost is passed on to consumers), such agreement would have been considered as relating to working conditions and thus falling outside the scope of Article 101 TFEU.

4. ENFORCEMENT PRIORITIES OF THE COMMISSION

(32) In some cases, solo self-employed persons who are not in a situation comparable to that of workers may nevertheless be in a weak bargaining position vis-à-vis their counterparties and therefore may be unable to significantly influence their working conditions. Therefore, even if it cannot be assumed that their collective agreements fall outside the scope of Article 101 TFEU, these solo self-employed persons may in fact face issues that are similar to those faced by solo self-employed persons in the categories described above. For this reason, to the extent that collective agreements aim to correct a clear imbalance in the bargaining power of solo self-employed persons relative to their counterparties and are intended, by their nature and purpose, to improve working conditions, the Commission will not intervene against them.

(33) The following categories of collective agreements will be considered to fulfil the above criteria:

(a) Collective agreements concluded by solo self-employed persons with counterparties of a certain economic strength

(34) Solo self-employed persons who deal with counterparties that have a certain level of economic strength, and hence buyer power, may have insufficient bargaining power to influence their working conditions. In that case, collective agreements can be a legitimate means to correct the imbalance in bargaining power between the two sides.

(35) Accordingly, the Commission will not intervene against collective agreements between solo self-employed persons and their counterparties in cases where there is a clear imbalance in bargaining power.[28] Such an imbalance in bargaining power will be considered to exist at least:

- where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties which represent the whole sector or industry ; and
- where solo self-employed persons negotiate or conclude collective agreements with a counterparty whose annual aggregate turnover exceeds EUR 2 million or whose staff headcount is equal or more than 10 persons or with several counterparties which jointly exceed one of these thresholds.[29]

[28] These Guidelines should not be interpreted as establishing a (positive) enforcement priority of the Commission as regards collective negotiations and agreements between solo self-employed persons and undertakings below these thresholds.

[29] Calculated in accordance with Title 1 of the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422), OJ L 124, 20.5.2003, p. 36–41.

Example 6

Situation: Companies X, Y and Z provide automotive maintenance and repair services. The total turnover of Company X is EUR 700,000, that of Company Y is EUR 1 million and that of Company Z is EUR 500,000. Solo self-employed technicians working for these companies as independent service providers are dissatisfied with their low remuneration and poor safety conditions, and decide to negotiate jointly with Companies X, Y and Z in order to improve their working conditions. The three companies refuse to negotiate, claiming that any collective agreement with the solo self-employed technicians would infringe Article 101 TFEU.

Analysis: Both the solo self-employed technicians and the three automotive services companies are undertakings for the purposes of Article 101 TFEU. The presumption of an imbalance of bargaining power would not apply if Companies X, Y or Z were to negotiate independently, as none of them meets the EUR 2 million turnover threshold specified in paragraph (35) of these Guidelines. However, in this case the presumption does apply, because the three companies negotiate collectively and it is therefore their aggregate turnover that is taken into account. The Commission would therefore not intervene against collective agreements relating to working conditions of the solo self-employed persons in this case.

(b) Collective agreements concluded by self-employed persons pursuant to national or EU legislation

(36) In some instances, the national legislator, in pursuit of social objectives, has acted to address the imbalance in bargaining power of certain categories of solo self-employed persons, either (i) by explicitly granting such persons the right to collective bargaining or (ii) by excluding from the scope of national competition law collective agreements concluded by self-employed persons in certain professions. Thus, when such national measures are adopted in consideration of social objectives, the Commission will not intervene against collective agreements involving categories of solo self-employed persons to which such national legislation applies.

Example 7

Situation: The national law of Member State A excludes from the scope of national competition law agreements concluded by certain self-employed persons in the cultural sector.

Analysis: Member State A has established a sectoral exemption from national competition law in consideration of social objectives. Even if the scope of the measure may go beyond the situation of solo self-employed persons as addressed in Section III of these Guidelines, the Commission will not intervene against collective agreements entered into by solo self-employed persons pursuant to the national measure.

Example 8

Situation: The labour law of Member State B establishes a right for solo self-employed journalists to bargain collectively with the companies to which they provide their services.

Analysis: Member State B has specifically granted the right of collective bargaining to a particular category of self-employed persons, namely the journalists. This means that collective agreements concluded between journalists and the companies to which they provide their services are not considered to be anticompetitive under the national competition law. Hence, in this instance the Commission would not intervene against collective agreements concluded by solo self-employed journalists.

(37) In the same vein, the Copyright Directive[30] has set the principle that authors and performers[31] shall be entitled to receive appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works and any other subject matter protected by copyright and related rights.[32] Authors and

[30] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

[31] All authors and performers are covered by Article 18 of the Copyright Directive with the exception of authors of a computer programme within the meaning of Article 2 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16–22. Article 23(2), Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

[32] Article 18(1) and Recital 72, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125. See also Recital 73 of the same Directive, according to which the remuneration of authors and performers should be "appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking

performers tend to be in a weaker contractual position than their counterparties[33] and the Directive foresees the possibility to strengthen their contractual position in order to ensure fair remuneration in their exploitation contracts.[34] The Copyright Directive grants flexibility to Member States for implementing this principle using different mechanisms (including collective bargaining), as long as they are in compliance with EU law.[35]

(38) In line with these provisions and without prejudice to any other provisions of the Copyright Directive, the Commission will not intervene against collective agreements concluded by solo self-employed authors or performers with their counterparties in pursuance to this Directive.

(39) Paragraph (38) of these Guidelines does not apply to collective negotiations concluded in the context of collective management organizations or independent management entities.[36] These Guidelines should not be interpreted as excluding from the application of the EU competition law the practices of these organizations or entities.[37]

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into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work".

33 Recital 72, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

34 Collective bargaining may also be used in the instances provided under Articles 19(5), 20(1) and 22(5) of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

35 Article 18(2) and recital 73, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

36 'Collective management organisation' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right-holder, for the collective benefit of those right-holders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis. 'Independent management entity' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis; Article 3(a) and (b), Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market OJ L 84, 20.3.2014, p. 72–98.

37 Recital 56, Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market OJ L 84, 20.3.2014, p. 72–98.

Example 9

Situation: Company Y is a publisher of newspapers and magazines. Several journalists who work as freelancers, contribute with articles to Company Y's publications. Company Y remunerates the journalists, based on the articles published in each newspaper or magazine. The journalists are not satisfied with the level of remuneration they receive from Company Y and they negotiate and agree collectively with Company Y an increase of the royalties (remuneration) paid by Company Y by 20%.

Analysis: In accordance with these Guidelines, the Commission will not intervene against the collective agreement concluded by the solo self-employed (freelancer) journalists and Company Y as the agreement is concluded pursuant to the Copyright Directive.