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COMMUNICATION FROM THE COMMISSION

Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons

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1. INTRODUCTION

(1) These Guidelines set out the principles for assessing under Article 101 of the Treaty on the Functioning of the European Union ('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 and one or several undertakings ('the counterparty/-ies'), concerning the working conditions of solo self-employed persons.

(2) For the purposes of these Guidelines, the following definitions apply:

(a) 'solo self-employed person' means a person who does not have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned;

(b) 'counterparty' means an undertaking to which solo self-employed persons provide their services, namely their professional customer, including associations of such undertakings;

(c) 'collective agreement' means an agreement that is negotiated and concluded between solo self-employed persons or their representatives and their counterparty/-ies to the extent that it, by its nature and purpose, concerns the working conditions of such solo self-employed persons[1];

(d) '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[2].

(3) Article 101 TFEU prohibits agreements between undertakings that restrict competition within the internal market, notably where they directly or indirectly fix purchase or selling prices or any other trading conditions. Union competition rules are based on

[1] This definition is without prejudice to the definition of 'collective agreement' used in Member States in the context of social dialogue.

[2] The term 'digital labour platform' is defined in accordance with the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final (Proposal for a Platform Work Directive). The Commission will consider the need to update the definition in these Guidelines, if the definition of the same term in the adopted version of Platform Work Directive differs materially from it.

Article 3(3) of the Treaty on European Union ('TEU'), which provides that the Union is to establish an internal market, including a system ensuring that competition is not distorted[3].

(4) Article 3(3) TEU also provides that the Union shall promote 'a highly competitive social market economy, aiming at full employment and social progress'. Likewise, Article 9 TFEU provides that '[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'. To that end, the Union recognises the important role of social dialogue and collective bargaining and commits itself, 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 recognises the right of collective bargaining and action[4].

(5) The Court of Justice of the European Union (the 'Court') took the social policy objectives of the Union into account when it ruled in *Albany*, in the context of collective bargaining between management and labour, that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers and necessary for the improvement of working conditions[5]. Therefore, agreements entered into in the framework of collective bargaining between employers and workers and intended, by their nature and purpose, to improve working conditions

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

4 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'. See 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.

5 Judgment of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraph 59. See also 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 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.

(including pay), fall outside the scope of Article 101 TFEU and therefore do not infringe Union competition law ('the *Albany* exception')[6].

(6) The situation for self-employed persons is different. 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[7]. Therefore, 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[8].

(7) The Court has clarified in that regard that the *Albany* exception also covers 'false self-employed persons', as they are considered to be in a situation comparable to that of workers[9]. In that context, the Court has considered an individual to be a false self-employed person if that person: (a) acts under the direction of his or her employer as regards, in particular, the freedom to choose the time, place and content of work; (b) does not share the employer's commercial risks, and (c) for the duration of the relationship, forms an integral part of the employer's undertaking and thus, an economic unit with that undertaking. Those criteria apply for the purpose of applying Union competition law, irrespective of whether that person is classified as self-employed under national law for tax, administrative or organisational purposes, and require a case-by-case assessment in light of the facts of the individual case[10]. Nevertheless, until a false self-employed person has been found by a court or by an administrative authority to be a worker, that person does not have the legal certainty that the *Albany* exception will

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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 Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, 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*, C-244/94, EU:C:1995:392, paragraph 14; judgment of 11 December 1997, *Job Centre coop. arl.*, C-55/96, EU:C:1997:603, paragraph 21.

8 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 and 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.

9 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411, paragraphs 30, 31 and 42.

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

apply. Where a person has been found to be a worker, there is no risk that that person will infringe Article 101 TFEU by entering into collective negotiations and agreements intended to improve working conditions.

(8) At the same time, some self-employed persons face difficulties in influencing their working conditions. This is particularly the case for solo self-employed persons, who work on their own and primarily rely on their own personal labour to make a living. Even if they are not fully integrated into the business of their principal in the same way as workers, certain solo self-employed persons may not be entirely independent of their principal or they may lack sufficient bargaining power. Recent labour market developments have contributed to this situation, notably, the trend towards subcontracting and outsourcing business and personal services, as well as the digitalisation of production processes and the rise of the online platform economy[11]. Collective negotiations may provide an important means to improve the working conditions of these solo self-employed persons.

(9) Against this background, these Guidelines clarify: (a) that collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Article 101 TFEU; and (b) that the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/-ies.

(10) These Guidelines explain how the Commission will apply Union competition law, without prejudice to the application of other rules or principles of Union law. These Guidelines do not create any social rights or obligations and they do not affect the prerogatives of Member States in social policy or the autonomy of the social partners. In particular, they do not affect the competences of Member States and/or social partners as regards the organisation of collective bargaining in the framework of national law and/or the practices of Member States. They are also without prejudice to the definitions of the terms 'worker' or 'self-employed person' under national law[12] or the possibility for solo self-employed persons to seek re-classification of their employment status (or the national authorities/courts to assess such cases) under Union or national law. These Guidelines merely clarify the conditions under which certain solo self-employed

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11 Moreover, the COVID-19 crisis has made many solo 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. See 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.

12 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. See 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; judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian Magistrates)*, C-658/18, EU:C:2020:572.

persons and their counterparty/-ies can enter into collective negotiations and agreements without running the risk of infringing Article 101 TFEU.

(11) These Guidelines are also without prejudice to any subsequent interpretation of Article 101 TFEU by the Court, in relation to agreements entered into within the framework of collective bargaining. They do not affect the application of Union competition law as set out in Article 42 TFEU and the relevant Union legislation in relation to the agricultural and fisheries sectors[13]. Furthermore, these Guidelines apply without prejudice to the application of Article 101(3) TFEU, which exempts from Article 101(1) TFEU agreements that: (a) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (b) pass on a fair share of their benefits to consumers; (c) contain only indispensable restrictions of competition, and (d) do not afford the parties the possibility of eliminating competition in respect of a substantial part of the products or services in question[14].

(12) For the avoidance of doubt, collective agreements negotiated and concluded by self-employed persons that do not fall within the scope of these Guidelines do not necessarily infringe Article 101 TFEU, but require a case-by-case assessment, as with any other type of agreement between undertakings.

2. GENERAL SCOPE OF APPLICATION

2.1. Types of agreements covered by these Guidelines

(13) These Guidelines apply to 'collective agreements' as defined in point (2)(c).

(14) Without prejudice to Member States' discretion in determining the channels for the collective representation of self-employed persons, these Guidelines apply to all forms of collective negotiations conducted in accordance with national law and practice, ranging from bargaining through social partners or other associations to direct negotiations by a group of solo self-employed persons or their representatives with their counterparty/-ies or associations of those counterparties. They also cover cases where solo self-employed persons, either individually or as a group, wish to be covered by an existing collective agreement ('opt-in') concluded between their counterparty and a group of workers/solo self-employed persons.

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13 Articles 206 to 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); 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).

14 Point (34) of the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

(15) The working conditions of solo self-employed persons include matters such as remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services.

(16) The negotiation and conclusion of collective agreements pre-supposes a certain degree of coordination between the multiple parties on each negotiating side prior to the negotiation and conclusion of the collective agreement. Such coordination may take the form of an agreement, or information exchange, between the parties on each negotiating side in order to decide on a common approach to the subject matter (working conditions) and/or the form of the negotiation (e.g. multilateral or through the appointment of representatives). 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 (or would have been linked in the case of unsuccessful negotiations)[15].

(17) These Guidelines do not cover decisions by associations or agreements or concerted practices between undertakings outside the context of negotiations (or preparations for negotiations) between solo self-employed persons and their counterparty/-ies to improve solo self-employed persons' working conditions. In particular, they do not cover agreements which go beyond the regulation of working conditions or determine the conditions (in particular, the prices) under which services are offered by solo self-employed persons or the counterparty/-ies to consumers[16], or which limit the freedom of undertakings 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 their services, as well as the minimum health and safety obligations of the platforms

15 For example, the Guidelines cover coordination between the counterparties to decide on a remuneration range that they can discuss with solo self-employed persons in their collective negotiations. Such coordination is covered by the Guidelines, to the extent that it is necessary and proportionate for the negotiation or conclusion of a collective agreement (point (16)) and does not amount to an anticompetitive agreement (point (17)). An anticompetitive agreement may arise, for example, where the counterparties use the information exchanged through such coordination as a focal point in order to unilaterally set the same remuneration for their respective solo self-employed persons. That practice is not covered by these Guidelines, as it goes beyond what is necessary and proportionate to engage in collective negotiations with solo self-employed persons.

16 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).

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 into 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 refers to two agreements between undertakings within the meaning of Article 101 TFEU: (a) the collective agreement between the platforms and the solo self-employed riders; and (b) the 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 working conditions but constitutes a market-sharing agreement, which as such is likely to infringe Article 101 TFEU by object[17].

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 assessed separately.

Example 2

Situation: The professional sports clubs in Member State X agree among themselves not to hire athletes from each other's club for the duration of the athletes' contracts with one of the sports clubs. 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. The arrangements are not covered by these Guidelines, as they are not negotiated between solo self-employed persons and their counterparty/-ies and are therefore not collective agreements. The first 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 market. 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 align their input costs.

[17] A restriction of competition might also be found if the collective agreement regulated other matters going beyond working conditions, such as the business hours during which the three platforms would provide their services.

Overall, this example illustrates practices of undertakings in the labour market which fall outside the scope of these Guidelines and are likely to infringe Article 101 TFEU.

2.2. The persons covered by these Guidelines

(18) These Guidelines cover collective agreements relating to the working conditions of 'solo self-employed persons' as defined in point (2)(a). 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 solo self-employed persons would thus 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.

(19) Section 3 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 4 of these Guidelines sets out the categories of collective agreements with regard to which the Commission will not intervene. Notwithstanding the fact that a solo self-employed person, or a collective agreement, falls within the categories identified in Section 3 or 4 of these Guidelines, the general principles defining the scope of these Guidelines, as set out in this Section, remain applicable. The criteria set out in Sections 3 and 4 must be fulfilled at the time when solo self-employed persons collectively negotiate and conclude an agreement with their counterparty/-ies.

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

(20) In instances where solo self-employed persons are in a situation comparable to that of workers, their collective agreements will be considered to fall outside the scope of Article 101 TFEU, regardless of whether the persons would also fulfil the criteria for being false self-employed persons (see point (7) of these Guidelines)[18].

(21) 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

[18] 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.

the service providers are in a situation comparable to that of workers[19]. It has confirmed that 'in today's economy it is not always easy to establish the status of some self-employed contractors as undertakings'[20]. The Court has also ruled that a service provider can lose the status of an independent trader, and hence of an undertaking, if the service provider does not determine independently his or her own conduct on the market, but is entirely dependent on the principal, because the service provider does not bear any of the financial or commercial risks arising out of the principal's activity and operates as an auxiliary organ within the principal's undertaking[21].

(22) On the basis of these criteria, and taking into account developments in Union labour markets and in national labour markets (in terms of legislation and case-law), for the purposes of these Guidelines, the Commission considers that the categories of solo self-employed persons referred to in Sections 3.1, 3.2 and 3.3 of these Guidelines are in a situation comparable to that of workers and that collective agreements negotiated and concluded by them therefore fall outside the scope of Article 101 TFEU[22]:

3.1. Economically dependent solo self-employed persons

(23) 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 and thus an economic unit with that counterparty. In addition, such solo self-employed persons are more likely to receive instructions on how their work should be carried out. The issue of economically dependent solo 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[23].

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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, paragraphs 31 and 42.

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

21 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 and 44.

22 The categories of solo self-employed persons referred to in Sections 3 and 4 may overlap. Some solo self-employed persons may therefore fall within more than one of those categories.

23 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 2007, 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.

(24) The Commission considers that a solo self-employed person is in a situation of economic dependence where that person earns, on average, at least 50 % of total work-related income from a single counterparty, over a period of either one or two years[24].

(25) Therefore, collective agreements relating to working conditions concluded between solo self-employed persons who are in a situation of economic dependence and their counterparty on which they are economically dependent fall outside the scope of Article 101 TFEU.

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, as proved by their tax declarations. The architects 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 each architect's level of experience.

Analysis: Solo 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 solo 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.

3.2. 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. These solo self-employed persons provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy sufficient 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, solo self-employed persons should still be able to enter into collective agreements for the purpose of improving their working conditions in cases where they have not been reclassified as

[24] This also applies where the solo self-employed person provides services to a counterparty for less than a year.

workers. This has been recognised by the practice in several Member States where collective agreements (or certain provisions of such agreements) cover workers and self-employed persons active in the same sector[25].

(27) Therefore, 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. The same applies to collective agreements which, in accordance with national law and/or practices of Member States, cover both workers and solo self-employed persons.

Example 4

Situation: Company X organises orchestra concerts and other classical music events. Many 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 is a member of the Association of Music-Event Organizers, and (workers and self-employed) musicians working for Company X are members of the Musicians' Association. A collective agreement has been concluded between the two organisations, representing the interests of their respective members. The collective agreement establishes a maximum of 45 working hours per week for all the musicians and grants them a special leave of 1 day after the performance of 3 concerts within the same week.

Analysis: Solo self-employed musicians, 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 solo self-employed musicians mentioned in this example 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 from Company X regarding the content, place and timing of the performances, and they are engaged for a similar duration as the employed musicians. Therefore, the collective agreement regulating the working conditions of these self-employed musicians working "side-by-side" with the employed ones falls outside the scope of Article 101 TFEU.

[25] See for example Article 14 of the Collective Labour Agreement for Drama and Dance in the Netherlands concluded between the Kunstenbond (Artists Union) and the Nederlandse Associatie voor Podiumkunsten (Dutch Association for Podium Arts) for the period 1 January 2022 – 31 December 2023, available at https://napk.nl/wp-content/uploads/2022/03/Cao-TD-2022-2023-V1_ENG_v.2.pdf and see 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.

3.3. 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 the digital labour platforms through or to which they provide their labour. Solo self-employed persons may be dependent on digital platforms, especially for the purpose of reaching customers, 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 the relationship, without previously informing or consulting solo self-employed persons.

(29) Recent case-law and legislative developments at national level provide further indications of the comparability of such self-employed persons with workers. In the context of cases concerning the classification of employment status, national authorities/courts are increasingly recognising 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 an employment relationship, or the right to collective bargaining, for service providers to or through digital platforms.

(30) The term 'digital labour platform' is defined in point (2)(d). Digital labour platforms differ from other online platforms in that they organise work performed by individuals at the request, one-off or repeated, of the recipient of a service provided by the platform. Organising work performed by individuals should imply, at a minimum, a significant role in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task, and can include other activities such as processing payments. Online platforms which do not organise the work of individuals but merely provide the means by which service providers can reach the end-user, for instance by advertising offers or requests for services or aggregating and displaying available service providers in a specific area, without any further involvement, should not be considered a digital

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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*, 2.5.2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603.

27 See for instance Spain: Royal Decree-Law 9/2021, of 11 May 2021, amending the recast text of the Workers' Statute, approved by Royal Legislative Decree 2/2015, of 23 October 2015, 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: 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' 101/19-6-2021.

labour platform. For example, a platform that merely aggregates and displays the details of plumbers available in a specific area, thereby allowing customers to contact the plumbers in order to use their services on demand, is not considered a digital labour platform, as it does not organise the work of the plumbers. The definition of digital labour platforms should be limited to providers of a service for which the organisation of work performed by the individual, such as transport of persons or goods or cleaning, constitutes a necessary and essential, and not merely a minor and purely ancillary, component.

(31) In light of these considerations, collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU.

Example 5

Situation: A group of drivers working for ride-hailing platforms enters into negotiations with the regional association of ride-hailing platforms with the aim of concluding 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. While discussing their strategy for negotiating with the drivers, the ride-hailing platforms also discuss the possibility of agreeing on a minimum price per ride. Ultimately, the negotiations between the platforms' association and the drivers fail and no collective agreement is concluded. Subsequently, the association of ride-hailing platforms adopts a decision which sets a minimum price of EUR 10 per ride for consumers.

Analysis: Through their association, the ride-hailing platforms attempt to negotiate a collective agreement with the drivers, aimed at improving the drivers' working conditions. The negotiations between the solo self-employed drivers and the platforms' association would fall outside the scope of Article 101 TFEU, irrespective of whether an agreement is concluded or not. 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. Since the ride-hailing platforms compete with each other, 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 setting a minimum price per ride would fall outside the scope of these Guidelines because it is not the result of collective negotiations between solo self-employed persons and their counterparty/-ies. It is instead the result of an agreement between the members of the association, i.e. the platforms (which are the counterparties).

Conversely, if the solo self-employed drivers and the platforms' association had collectively agreed on a minimum or fixed fee (remuneration) of EUR 10 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 have difficulties in influencing their working conditions because they are in a weak negotiating position vis-à-vis their counterparty/-ies. 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 difficulties that are similar to those faced by solo self-employed persons in the categories referred to in Sections 3.1, 3.2 and 3.3 of these Guidelines. For this reason, the Commission will not intervene against the following categories of collective agreements:

4.1. Collective agreements concluded by solo self-employed persons with counterparty/-ies that have a certain level of economic strength

(33) Solo self-employed persons who deal with counterparty/-ies 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.

(34) Accordingly, the Commission will not intervene against collective agreements relating to working conditions between solo self-employed persons and their counterparty/-ies in cases where there is such an imbalance in bargaining power[28]. Such imbalance is to be presumed in either of the following cases:

(a) where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties which represent the whole of a sector or industry;

(b) where solo self-employed persons negotiate or conclude collective agreements with a counterparty whose aggregate annual turnover and/or annual balance sheet total exceeds EUR 2 million or whose staff headcount is equal to or more than 10 persons, or with several counterparties which jointly exceed one of those 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 their counterparty/-ies in cases where such an imbalance in bargaining power does not exist.

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

(35) An imbalance in bargaining power can also exist in other cases, depending on the individual underlying circumstances.

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 in bargaining power would not apply if Company X, Y or Z were to negotiate independently, as none of them meets the EUR 2 million turnover threshold specified in point (34) of these Guidelines. However, the presumption does apply if the three companies negotiate collectively, since the aggregate turnover of the three companies exceeds the EUR 2 million turnover threshold. In that case, the Commission will not intervene against collective negotiations and agreements relating to working conditions between the solo self-employed technicians and the three automotive services companies.

4.2. Collective agreements concluded by self-employed persons pursuant to national or Union legislation

(36) In some instances, the national legislator, in pursuit of social objectives, has acted to address an imbalance in bargaining power faced by certain categories of solo self-employed persons, either (a) by granting such persons the right to collective bargaining or (b) by excluding from the scope of national competition law collective agreements concluded by self-employed persons in certain professions. Where such national legislation pursues social objectives, the Commission will not intervene against collective agreements relating to working conditions that involve categories of solo self-employed persons to which the national legislation applies.

Example 7

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

Analysis: Member State A has established a sectoral exemption from national competition law pursuant to social objectives. This means that collective agreements concluded between the individuals covered by the exemption and the undertakings to

which they provide their services are not considered to be anticompetitive under national competition law. Therefore, the Commission will not intervene against collective agreements entered into by solo self-employed persons that are covered by the national measure.

Example 8

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

Analysis: The national legislator of Member State B has specifically granted the right of collective bargaining to certain self-employed persons, namely self-employed audiovisual translators. This national legislation, which pursues a social objective, aims to correct the imbalance in bargaining power between these self-employed persons and the companies to which they provide their services. Therefore, the Commission will not intervene against collective agreements entered into by solo self-employed audiovisual translators that are covered by the national legislation.

(37) In the same vein, Union legislation may recognise the right of certain solo self-employed to rely on collective agreements in order to correct an imbalance in bargaining power with their counterparty/-ies.

(38) This is the case of Directive (EU) 2019/790 of the European Parliament and of the Council[30] (known as the 'Copyright Directive'), which has set out the principle that authors and performers[31] are to 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 performers tend to be in a weaker contractual position than their counterparty/-ies[33], and Directive (EU) 2019/790 provides for the possibility to strengthen their contractual position in order to ensure fair remuneration in contracts for

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 (OJ L 130, 17.5.2019, p. 92).

31 All authors and performers are covered by Article 18 of Directive (EU) 2019/790, with the exception of authors of computer programmes 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 programmes (OJ L 111, 5.5.2009, p. 16). Article 23(2) of Directive (EU) 2019/790.

32 Recital (72) and Article 18(1) of Directive (EU) 2019/790. See also recital (73) of that 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 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) of Directive (EU) 2019/790.

the exploitation of their work[34]. Directive (EU) 2019/790 grants flexibility to Member States to implement this principle using different mechanisms (including collective bargaining), as long as they comply with Union law[35].

(39) In line with the provisions of Directive (EU) 2019/790 that are referred to under point (38) of these Guidelines, and without prejudice to the other provisions of that Directive, the Commission will not intervene against collective agreements entered into by solo self-employed authors or performers with their counterparty/-ies pursuant to national measures that have been adopted pursuant to that Directive.

(40) Point (39) of these Guidelines does not apply to collective negotiations concluded in the context of the activities of collective management organisations or independent management entities[36], since these activities remain subject to Directive 2014/26/EU of the European Parliament and of the Council[37], which applies without prejudice to the application of Union competition rules[38].

Example 9

Situation: Company Y is a publisher of newspapers and magazines. Several journalists who work as freelancers contribute articles to the company's publications. The company 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, so they negotiate and agree collectively with it a 20% increase in the royalties (remuneration) to be paid by it.

34 Collective bargaining may also be used in the instances set out in Articles 19(5), 20(1) and 22(5) of Directive (EU) 2019/790.

35 Recital (73) and Article 18(2) of Directive (EU) 2019/790. In particular, recital (73) provides that 'Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law'.

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: (a) it is owned or controlled by its members; (b) 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: (a) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (b) organised on a for-profit basis; Article 3, points (a) and (b), of Directive 2014/26/EU (see infra footnote (37)).

37 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).

38 Recital (56) of Directive 2014/26/EU.

Analysis: In accordance with these Guidelines, the Commission will not intervene against the collective agreement concluded by the solo self-employed (freelance) journalists and Company Y, as the agreement is concluded pursuant to Directive (EU) 2019/790.