

Social Dialogue, Information and Consultation

9.1 SOCIAL DIALOGUE

9.1.1 General Remarks/Related Provisions

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Social dialogue is a broad concept that is used in the EU context to refer to different procedures, both formal and informal, which have in common the involvement of EU-level and/or national social partners. Even if there are no minimum standards on social dialogue or collective bargaining in EU law, there are references to social dialogue in several provisions of EU primary and secondary law, as well as in the CFREU (*see* 3.3). Moreover, the EU supports different fora and procedures of social dialogue with variable levels of formalisation. Nonetheless, the EU recognises the role of the social dialogue and is committed to its promotion and development, as established in Art. 152 TFEU (*see* 3.2).

The most obvious expression of social dialogue in the EU legal order is the system of consultation and social dialogue established in Arts 154 and 155 TFEU, which guarantees the involvement of EU social partners when the Commission seeks to legislate in matters of social policy, at cross-industry or sectoral level, but also opens the door to independent regulations with origins in the bilateral agreements of the social partners.

But social dialogue refers to many other instances of social partners' participation in governance in the EU. First, social dialogue takes place in a number of committees and other structures. At cross-industry level, we can find the Tripartite Social Summit (quoted in Art. 152 TFEU), the Macroeconomic Dialogue, the Employment Committee, the Social Protection Committee and the Social Dialogue Committee. Besides, social

dialogue also takes place at sector level, where there is a total of 43 Sectoral Social Dialogue Committees in different sectors, covering most of the European workforce.

Second, social dialogue is also present, more or less directly, in several Directives, either in the form of provisions establishing procedures for social partners' involvement or calling for the reinforcement of social dialogue, also at national level. This is the case of Directive 2022/2041 on adequate minimum wages (8.2.2), where there are provisions obliging MSs to develop structures for the participation of social partners (Art. 4(1)) and contributing to reinforce the social dialogue (at least the setting and updating of the minimum wages – *see* Arts 1(1), 4(2), 7, 8, 15, 17(3)) at national level. In this sense are also relevant the provisions on information and consultation of the social partners that can be found scattered across several Directives, such as Directive 98/59/EC on collective redundancies (7.1.2), Directive 2001/23/EC on transfer of undertakings (7.2.2), Directive 2002/14/EC on information and consultation of employees (9.2.2), Directive 2009/38/EC on European Works Councils (9.2.3), and the SE Directive 2001/86/EC (9.2.4). References to collective bargaining and freedom of association are also found in the public procurement Directives, such as Directive 2014/24/EU on public procurement.

Third, social dialogue has been strengthened via the European Semester, in the form of country-specific recommendations on the participation of national social partners in policy-making. Last but not least, references to the freedom of association, collective bargaining and the right to strike are found in the CFREU (3.3), in Arts 12 and 28.

9.1.2 Guidelines on Collective Agreements for Solo Self-Employed

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Guidelines on collective agreements for solo self-employed

Communication from the Commission. Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02)

Full text

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022XC0930%2802%29>

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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;
 - (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.
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 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.
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.

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

- 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.**

Related Case Law

C-66/85 (*Lawrie Blum*); C-67/96 (*Albany*); C-413/13 (*FNV Kunsten*)

Commentary

The Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (hereinafter just the ‘Guidelines’) have been issued by the European Commission in the form of a Communication on 30 September 2022. In June 2020, the Commission undertook the initiative that eventually led to the adoption of the Guidelines, with the intent to guarantee that EU competition regulations would not hinder collective agreements designed to enhance the working conditions of solo self-employed individuals. In January 2021, the Commission initiated an initial impact assessment, through a public consultation and external research. In December 2021, the Commission released a public consultation seeking input from stakeholders over the draft Guidelines. Eventually, the Guidelines were adopted in September 2022.

They provide indications for the ascertainment of the compliance with Art. 101 TFEU (*see* 3.2) of agreements between undertakings, the decisions made by associations of undertakings, and concerted practices as a result of collective negotiations between solo self-employed individuals and one or more undertakings, regarding the working conditions of the solo self-employed individuals themselves. In the following, we will provide a comment on the Guidelines under the framework of the existing EU legislative norms in light of the case law by which the CJEU has provided for an interpretation of such norms.

The overall commentary follows the structure of the Guidelines, and is therefore articulated under four main sections.

Legal nature

In order to better understand the scope and objectives of the Guidelines, it is important to briefly analyse the legal nature of the instrument adopted by the Commission and its juridical effects. The Guidelines have been issued by the Commission in the form of a Communication, which is a non-binding act that may be employed for a variety of purposes. Communications might be acts that define a framework for future initiatives in a policy area or that present the position of the Commission on a certain matter or

area. Numerous communications are released by the Commission for the purpose of policy assessment, analysis, and the justification of action plans, as well as being succinct summaries of upcoming policies and arrangements pertaining to the specifics of existing policies.

In the case at hand, the Guidelines pursue a double objective: on the one hand, to clarify the position of the Commission regarding the interpretation of the scope of Art. 101 TFEU in order to clarify *ex ante* the application of Art. 101 TFEU adopted by the Commission in its role as the highest competition authority within the EU. Among its competences, the Commission has the task of defining the EU's competition policy, examining incidents of suspected anticompetitive activity, and making decisions to maintain or restore competition in the Single Market. The Commission possesses extensive investigative authority, including the capacity to conduct surprise inspections at corporate facilities and to compel corporations to furnish pertinent material for its enquiries. On the other, the Guidelines aim to guide the national competition authorities in their own antitrust activities in order to guarantee the homogeneous application of EU law in the field of competition.

In this sense, the Guidelines outline the Commission's enforcement of EU competition legislation, while ensuring that other rules and principles of EU law may still apply. Given their non-binding nature, they do not establish social rights or responsibilities, nor do they impact the Member States' authority or competences in social policy or the autonomy of social partners. They do not affect the ability of MSs and their social partners to organise collective bargaining within national legislation. The Guidelines also clarify that they do not affect future interpretations of Art. 101 TFEU by the CJEU, particularly regarding agreements made through collective bargaining.

Structure

The Guidelines are composed of four main sections. The first one provides for an introduction on the scope and goals of the Guidelines; it is of particular interest as it situates the Guidelines in the framework of the existing interpretation of Art. 101 TFEU (*see* 3.2) by the case law of the CJEU and establishes a dialogue with such case law, as will be better clarified below. The second section specifies the scope of application of the Guidelines and, in particular, both the types of agreements (objective scope of application) and the persons (subjective scope of application) covered by them, while providing for some examples. The third section establishes and clarifies the extent to which collective bargaining agreements signed by or on behalf of solo self-employed persons comparable to subordinate workers shall be deemed to fall outside the scope of application of Art. 101 TFEU. Finally, section 4 lists a number of cases where the Commission will not intervene against collective bargaining agreements signed by or on behalf of solo self-employed persons who are not comparable to workers, and which would therefore fall under the scope of application of Art. 101 TFEU, due to the specific circumstances clarified under section 4 itself.

Objectives and taxonomy

The first section of the Guidelines might be subdivided into the three subsections for descriptive purposes that might better guide the reader in the understanding of this complex document.

First, the document opens with a clear statement of the main goal of the Guidelines to establish the principles and lines of interpretation that shall guide the ascertainment of the compliance of collective bargaining agreements signed by or on behalf of solo self-employed persons with Art. 101 TFEU. Such a goal is framed in light of the interpretation of the scope of application of Art. 101 TFEU, and in particular, the notion of ‘undertaking’ contained thereof, provided by the CJEU (*see below*).

In its second subsection, the introduction contains the definition of a number of terms employed in the Guidelines in order to provide clarification of the meaning of these terms, to be considered throughout the reading of the whole document. Self-evidently, such definitions concur with the setting of the Guidelines’ scope of application as well, which is then further specified under sections 2 and 3.

For now, it is sufficient to recall and briefly clarify the meaning of the first three terms, which are essential for the purpose of application of the Guidelines.

The notion of ‘*solo self-employed person*’ is identified under paragraph 2(a) of the Guidelines as ‘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’. The clause contains an *a contrario* definition of the notion of ‘solo self-employed person’ as a person who is *not* classified as a subordinate worker but who provides a service on a given market *primarily* by means of his or her personal labour.

Two observations might be made about this definition. First, the Guidelines avoid any indication of the notion of subordinate workers, which is indeed essential to identify who is not a worker, and therefore who is indeed a solo self-employed person. Second, although the guidelines basically give the impression of merely concretising the CJEU’s case law, this definition seems considerably broader than the CJEU’s approach in *FNV Kunsten* of exempting only ‘false self-employed’ from competition law. All in all, the theme is complex and broad. For further details on the notion of worker under EU law, *see* section 2.1.2 and the commentary on Art. 101 TFEU, last paragraph.

The two other relevant notions are the one of ‘*counterparty*’, defined as ‘an undertaking to which solo self-employed persons provide their services, namely their professional customer, including associations of such undertakings’ and the one of ‘*collective agreement*’, defined as ‘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’. In defining collective agreements, the Guidelines employs almost *verbatim* the definition employed by the CJEU in the *Albany* decision.

The Guidelines specify that the definition of collective agreement shall be intended without any prejudice to the definition of the same notion adopted at the national level by MSs in the context of social dialogue.

Legal context

Third, a comprehensive description of the existing legal framework and case law within which the Guidelines shall be situated is provided. Such illustration is of particular interest as the Commission establishes a dialogue with the existing and highly debated case law of the CJEU on Art. 101 TFEU (3.2; *see* the commentary on that article for a detailed analysis of Art. 101 TFEU and the relevant case law of the CJEU).

For the purpose of the following paragraphs, it suffices to recall that agreements that limit competition within the internal market are forbidden by Art. 101 TFEU, especially when they directly or indirectly set buying or selling prices and any other trading conditions. Art. 3(3) TEU (3.1), which states that the EU must create an internal market and implement measures to prevent competition distortion, serves as the foundation for EU competition laws. In addition, under Art. 3(3) TEU and Art. 9 TFEU, the EU pursues and supports a highly competitive social market economy that strives for both social advancement and full employment. In this context, the EU acknowledges the significance of social dialogue and collective bargaining and pledges, in accordance with Art. 152 TFEU, to ‘promote communication between the social partners while respecting their independence’. Art. 28 of the Charter of Fundamental Rights of the EU (3.3) completes the essential normative framework by acknowledging and affirming the freedom to engage in collective bargaining and take collective action.

When the CJEU held in *Albany* that certain competition restrictions are inherent in the collective agreements between organisations representing employers and workers and are necessary for the improvement of working conditions (*see* commentary on Art. 101 TFEU, section ‘Competition law and labour law’), it was ruling in the context of collective bargaining between labour and management, taking into account the EU’s abovementioned social policy objectives. Consequently, agreements between employers and employees within the framework of collective bargaining that are designed to enhance working conditions do not fall under the purview of Art. 101 TFEU and do not violate EU competition law.

However, in accordance with the case law of the CJEU, and in particular the *FNV Kunsten* decision, the same reasoning cannot be extended *mutatis mutandis* to collective agreements signed by or on behalf of self-employed workers. The CJEU provided for an extensive interpretation of the notion of ‘undertaking’ for the purpose of the application of Art. 101 TFEU, by including any organisation involved in economic activity, irrespective of its legal structure and funding source. Consequently, the CJEU classified genuine self-employed workers as undertakings under Art. 101 TFEU since they engage in their business as autonomous economic operators and offer their services against compensation on a particular market.

In light of such a normative framework, read in conjunction with the established interpretation of the CJEU, the Commission certainly seems to go beyond the rigid interpretation of the CJEU and acknowledges that some self-employed workers struggle to determine, or at least co-determine, by means of negotiation with their counterparty, fair and acceptable working and economic conditions. This is especially true for *solo* contractors who operate alone, who depend mostly on their own personal labour to

support themselves, and who therefore are in a situation not dissimilar to the one experienced by a subordinate worker.

For these reasons, by means of the Guidelines under observation, the Commission considers collective agreements of solo self-employed workers 'who are in a situation comparable to that of workers' as not subject to the prohibition of Art. 101(1) TFEU (section 3) and made it clear that the Commission will not intervene against collective agreements signed by or on behalf of self-employed workers who 'experience an imbalance in bargaining power vis-à-vis their counterparty/ies' (section 4).

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.**
- 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).**

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 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 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.

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.

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.

Related Case Law

C-413/13 (*FNV Kunsten*)

Commentary

In their second main section, the Guidelines set their scope of application by defining the type of agreements covered (objective scope of application) as well as the persons

covered by the Guidelines (subjective scope of application). These shall be read in conjunction with the definitions provided under the first section and with the expanded illustration under Section 3 of the collective agreements by solo self-employed workers considered to be ‘comparable to workers’.

Given the notion of ‘collective agreements’ set out in the first section, under paragraph (2)(c), the Guidelines establish their objective scope of application by defining: (1) the type of negotiations; (2) the objects of the negotiations (i.e., the working conditions) that might be covered; and (3) the forms of the negotiations, relevant for the purpose of application of the Guidelines.

For the first aspect, the Guidelines are applicable to all types of collective negotiations conducted in accordance with national law and practice, including bargaining through social partners or other associations as well as direct negotiations by a group of self-employed individuals or their representatives with their counterparts or associations representing those counterparts. The form of collective representation of the solo self-employed workers is irrelevant and might be conducted by means of institutionalised or ‘traditional’ collective representatives, as well as by autonomous groups. Furthermore, the Guidelines address situations in which individual or groups of self-employed workers wish to be included in an existing collective agreement that has been negotiated between their principal and a group of self-employed workers and also applies to subordinate workers.

Such a reference to the possibility of considering the extension of existing collective bargaining agreements signed on behalf of subordinate workers to solo self-employed ones is a clear manifestation of the intention of the Commission to include under the Guidelines cases such as that at issue in the *FNV Kunsten* decision of the CJEU. There, the collective bargaining agreement under scrutiny of the Dutch competition authority, and eventually of the Dutch national courts and the CJEU, covered equally workers (in the case, musicians who were part of orchestras) who were classified as subordinate employees and those classified as self-employed workers.

The Guidelines specify the objects of the collective negotiations that might be included in a collective bargaining agreement for them to be considered as agreements that, by their nature and purpose, concern the working conditions of solo self-employed workers. A number of economic and working conditions might be included, such as compensation, incentives, working hours and schedules, vacation and leave, physical workspaces, health and safety, insurance and social security, as well as the conditions for terminating the services or for the counterparty to stop utilising the services, i.e., the conditions based upon which to unilaterally terminate the contract.

On the opposite side of things, decisions made by associations or agreements or concerted practices between undertakings that are not related to negotiations with the aim of enhancing the working conditions of solo self-employed individuals are excluded by the scope of the Guidelines. Specifically, they do not include arrangements that extend beyond the regulation of working conditions or establish the terms at which services are provided by solo self-employed to consumers, or that restrict the freedom of businesses to hire the necessary labour providers.

As for the forms of negotiation of such working conditions, the Guidelines clarify that the process of negotiating and finalising collective agreements does not require a specific form but a certain level of coordination among the many parties involved on each side of the discussion before reaching an agreement. In other words, the negotiations shall have a *collective* dimension.

Regarding the subjective scope of application, the Guidelines pertain to the collective agreements affecting the working conditions of workers classified as ‘solo self-employed persons’. These individuals rely ‘primarily’ on their personal labour for the provision of a service to the counterparty. The use of the adverb ‘primarily’, as opposed to ‘exclusively’, bears a specific meaning. The Guidelines apply to *solo* self-employed workers, intended as workers who do not rely on a complex organisation of people and assets to provide a service. The service is personally provided by the self-employed person, by means of their human labour. However, the solo self-employed person can use certain items or assets to deliver their services and might according to the wording even be allowed to use assistants without falling outside the scope.

The Guidelines do not apply to cases where the individual’s economic activity is limited to sharing or exploiting goods or assets, or reselling goods/services. In these cases, the activity lacks the essential contribution of the human activity and therefore cannot be classified as a service provided by a self-employed person.

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).**
- 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 the service providers are in a situation comparable to that of workers. It has confirmed that ‘in today’s economy it is not always easy to establish the status of some self-employed contractors as undertakings’. 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.**
- 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.

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.**
- 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.**
- 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 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.
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.

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. In the same vein, some Member States have adopted legislation 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 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.

Related Case Law

C-413/13 (*FNV Kunsten*)

Commentary

Section 3 outlines the types of collective agreements that involve solo self-employed individuals that, in accordance with the position of the Commission expressed in the Guidelines, are deemed not to be subject to Art. 101 TFEU (3.2). The line of interpretation on the scope of application of Art. 101 TFEU regarding the collective bargaining agreements of self-employed workers is of particular interest and might produce a relevant effect in relation to expanding the space for collective negotiations for self-employed workers.

On the one hand, the Commission deviates from the position expressed by the CJEU in accordance with which genuine self-employed workers shall indistinctly be classified as undertakings for the purpose of Art. 101 TFEU. On the other, the Commission does not include all solo self-employed workers but instead identifies the specific categories of self-employed workers whose collective bargaining agreements, according to its interpretation, do not violate the prohibition under Art. 101(1) TFEU.

The Guidelines identify a general category of solo self-employed workers who are ‘comparable to workers’. We have already outlined the meaning of the expression ‘solo’ self-employed, intending to indicate self-employed workers who provide their services by relying primarily on their personal labour (*see* comments under sections 1 and 2 above). Furthermore, for exclusion from the scope of Art. 101 TFEU, the solo self-employed workers shall bear a contractual position that is comparable to one of subordinate workers. More specifically, the Commission takes into consideration the arguments employed by the CJEU in the *FNV Kunsten* decision in order to identify the three specific groups of solo self-employed workers who are in a situation comparable to that of subordinate workers: (1) economically dependent solo self-employed persons; (2) solo self-employed persons working ‘side by side’ with subordinate workers; and (3) solo self-employed persons working through digital labour platforms.

Economically dependent solo self-employed persons

The notion of economically dependent workers has been employed under the legislation of some MSs to identify specific categories of workers; it has also been considered by legal scholars, and often by case law, as a parameter to detect a subordinate employment relationship in cases of litigation on the legal nature of a working relationship. Generally speaking, without going into too much detail on what has represented a wide theme of debates in labour law for decades, in a great many European jurisdictions, the distinction between the notions of employee and self-employed worker remains essential for the purpose of identifying those who enjoy the protections provided by labour law.

In some MSs, including, for example, Italy, Austria, Germany and Spain, the legislature has introduced categories of workers who do not fall within the definition of an employee. They have become covered by certain forms of protection in order to address their specific need for social protection. Albeit with different regulatory techniques, some national legislatures have modulated or extended protections beyond the boundaries of subordination, responding to specific needs and attempting to bridge, at least in part, the gap that otherwise separates the self-employed from the employed. Some jurisdictions – such as Spain or Germany – have seen fit to use, as a criterion for recognising these ‘third categories,’ parameters related to a worker’s economic dependence on their principal. Others, including the Italian system, have traditionally valued parameters exclusively linked to the functional connection between work performance and the principal’s organisation.

The Guidelines choose to employ the category of solo self-employed workers who are economically dependent on their principal as one of the three hypotheses in which solo self-employed individuals are considered to be in a situation comparable to that of employees, at least for the purpose of the application of competition law. More specifically, the Guidelines acknowledge that self-employed individuals who primarily or solely provide services to a single client are economically dependent on that client, often lacking control of their working conditions and relying heavily on their business partners. These independent contractors are closely connected to their counterparty and are more likely to receive explicit directives on the execution of their services.

In light of these observations, the Commission defines a solo self-employed individual as economically dependent if they receive at least 50% of their work-related income from a single counterparty consistently over one or two years.

Solo self-employed persons working ‘side by side’ with subordinate workers

The Guidelines include under the umbrella of solo self-employed workers comparable to employees also those solo self-employed who work side by side with subordinate ones. The reference is to a functional and organisational parameter to be ascertained with regard to the performance of the work activities for the client: independent contractors that work alongside employees for the same employer/principal, performing identical or similar tasks, are in a situation that can be equated to that of employees. These independent contractors offer their services under the guidance of their client and do not assume the financial risks associated with the client’s business or have enough autonomy in carrying out the specific economic activity.

The Guidelines clarify that the determination of whether the contractual position of self-employed individuals who operate alongside employees should be classified as an employment relationship rests with the competent national authorities and courts. Nevertheless, individuals who are self-employed should still have the ability to participate in collective bargaining with the aim of enhancing their working conditions, even if they have not been reclassified as employees.

Hence, any agreements made between a party and self-employed individuals who perform similar jobs alongside employees for the same party, including working

conditions, as well as collective agreements which encompass both employees and independent contractors, as dictated by the laws and practices of each MS, are not covered by Art. 101 TFEU (3.2).

Solo self-employed persons working through digital labour platforms

While the Guidelines extend beyond solo self-employed individuals who work only through digital labour platforms and also encompass cases where self-employed individuals are engaged in the offline sector, they constitute an essential component of the efforts to effectively address the working conditions of platform workers, which have been on the European agenda for some time (*see* 6.4.1).

Indeed, new ways of organising work and offering services on the market through digital platforms have challenged the traditional legal canons of classifying working relationships. Faced with work performance and business structures with characteristics that do not seem to fit into any of the models codified or elaborated by traditional case law, legal scholarship and jurisprudence have long addressed the classification issue of the relationships characterised by the (apparent) voluntariness of individual performance, the extreme fragmentation of productive activities and the (again, apparent) absence of organisation that is typical of platform work.

The rich doctrinal debate as well as the intense activity of courts under different jurisdictions have pushed the EU to undertake specific initiatives in order to recognise the proper legal nature of platform work and to provide adequate protection for platform workers. These initiatives include the Platform Work Directive (*see* 6.4.2), the Transparent and Predictable Working Conditions Directive (*see* 8.1.2), and the Guidelines themselves. The Guidelines confirm that independent contractors often rely heavily on platforms to connect with clients and consumers, often encountering non-negotiable job offers and limited or no ability to discuss their working conditions, including pay. Digital labour platforms often impose terms and conditions without prior negotiation, nor notification or consultation.

In light of this assessment, the Guidelines exclude from the scope of application of Art. 101 TFEU (3.2) the collective bargaining agreements signed between solo self-employed workers and digital labour platforms, defined as ‘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’. The notion of digital labour platforms is restricted to entities that offer services where the organisation of work carried out by individuals is a crucial and indispensable component, rather than a minor and entirely supplementary one.

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. 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.

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 (known as the ‘Copyright Directive’), which has set out the principle that authors and performers 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. Authors and performers tend to be in a weaker contractual position than their counterparty/-ies, and Directive (EU) 2019/790 provides for the possibility to strengthen their contractual position in order to ensure fair remuneration in contracts for the exploitation of their work. 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.
39. In line with the provisions of Directive (EU) 2019/790 that are referred to under point 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, since these activities remain subject to Directive 2014/26/EU of the European Parliament and of the Council which applies without prejudice to the application of Union competition rules.

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.

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.

Commentary

Eventually, section 4 completes and complements the provisions under section 3 by outlining the enforcement priorities of the Commission, meant as the types of collective agreements against which the Commission will refrain from intervening in its role as the antitrust authority in the EU.

It is important to note that the normative technique adopted by the Commission in the definition of the collective bargaining agreements that do not fall within the scope of application of Art. 101 TFEU (3.2), at the recurrence of the subjective and objective conditions set forth by the Guidelines, is not reiterated for the collective agreements described under section 4. Instead, the Commission acknowledges that solo self-employed workers who are not in a situation comparable to that of subordinate workers, and who therefore do not fall within the exclusions from Art. 101 TFEU in accordance with the Guidelines, might still face challenges in exerting control over their working conditions due to their disadvantaged bargaining position. Consequently, even if the collective bargaining agreements signed by them or on their behalf are not per se excluded from the scope of Art. 101 TFEU, the Commission would refrain from intervening against the two main categories of collective bargaining agreements.

The first is constituted by collective agreements entered into by solo self-employed workers whose counterparties hold a certain degree of economic power such as to create imbalance in the bargaining power exercised during the negotiation of the working conditions. The classification of a collective agreement under this category requires a case-by-case assessment in light of the concrete bargaining positions of the parties. However, the Commission specifies two conditions that lead to the presumption of an imbalance in bargaining power: the situation in which the counterparty or the counterparties represent the whole of a sector of industry and the situation in which the counterparty or the counterparties' aggregate annual turnover and/or annual balance sheet exceeds the amount of 2 million of euros, or in which the counterparty or counterparties' number of employees is equal to or exceed the number of ten. In any case, the Guidelines specify that an imbalance in bargaining power can be detected and taken into consideration upon an individual assessment of the situation, in consideration of the specific circumstances of the case.

Such dispositions are of particular interest. Self-evidently, the assessment of the concrete bargaining power of the parties requires a case-by-case evaluation. However, the two described criteria reverse the presumption of the existence of an imbalance in the power between the negotiating parties. The first criterium is a qualitative one, as it occurs if the counterparty (or counterparties) represents the entirety of a sector of industry. The second criterium is a quantitative one, set in accordance with two precise thresholds, regarding respectively the annual turnover and the number of employees of the counterparty (or counterparties).

The second category is constituted by the collective agreements entered into by self-employed individuals in accordance with national or EU laws. Such exclusion is essential in the overall effect produced by the Guidelines. The scholarship has underlined that in many national legal systems, the right of collective rights is recognised equally for workers and self-employed workers. The clause that excludes

these agreements from an intervention of the Commission might serve as a non-regression clause, as it clearly establishes that the interpretation of the scope of Art. 101 TFEU acknowledged by the Commission in relation to collective agreements shall not limit the exercise of collective rights recognised by national or EU law.