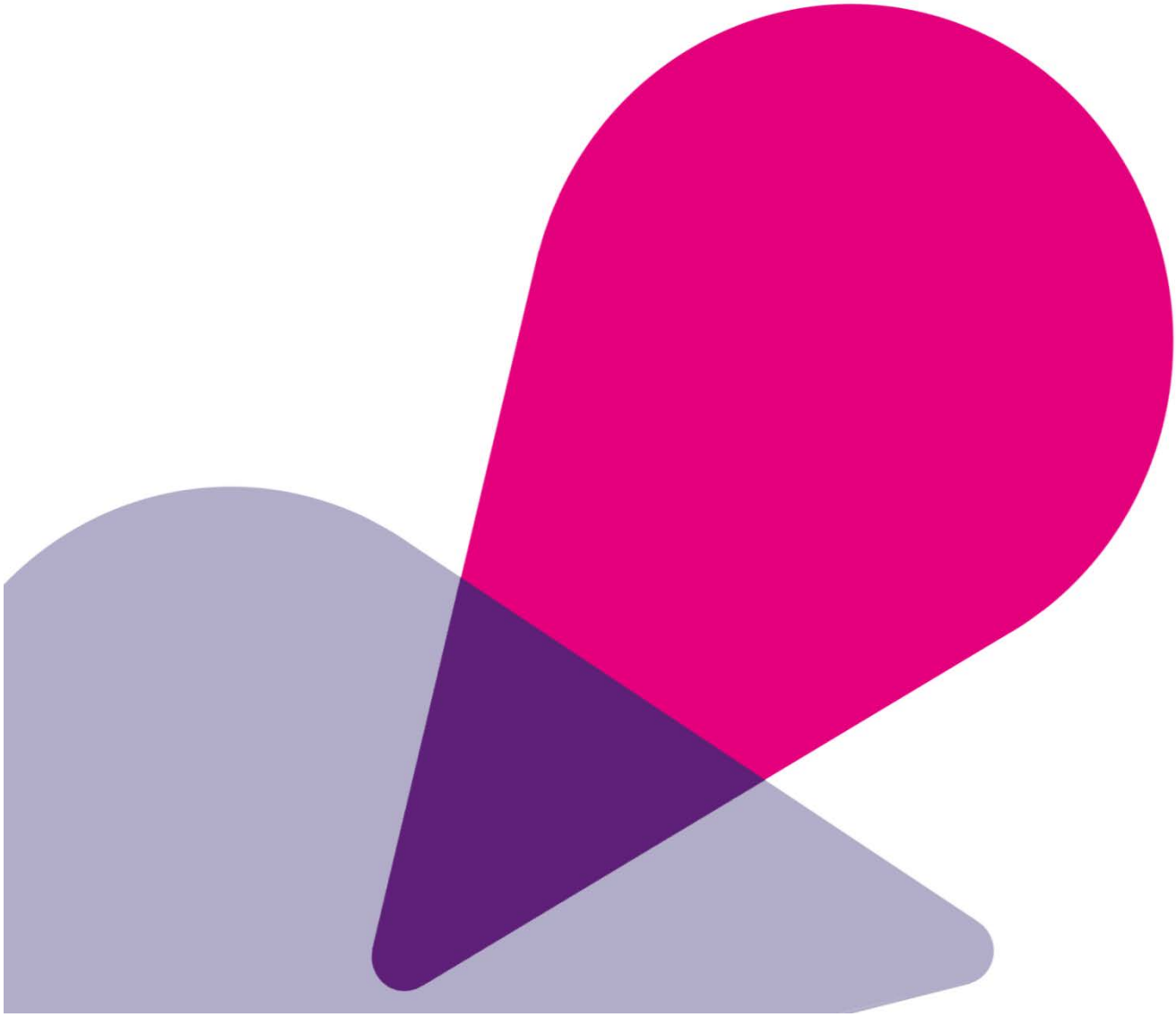
Authority for Consumers & Markets

Guidelines

Price arrangements between self-employed workers



Markets that work well for people and businesses

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Summary of the Guidelines regarding price arrangements between self-employed workers

These Guidelines target self-employed workers whose only commercial activity is the provision of services or create works through their own labor. These Guidelines show what opportunities the Dutch Competition Act (In Dutch: Mededingingswet) offers to this group of self-employed workers in terms of collective negotiations and arrangements with clients about rates and other conditions. In essence, these Guidelines identify three opportunities.

First opportunity: the Dutch Competition Act does not apply to arrangements with or between self-employed workers who are not undertakings

Self-employed workers who *de facto* **work side-by-side with employees** are **not considered to be undertakings** within the meaning of the Dutch Competition Act for those activities. Therefore, the cartel prohibition does not apply to them. For activities where self-employed workers work 'side-by-side' with employees, self-employed workers are allowed to make arrangements with each other about rates and other conditions. They are also allowed to negotiate collectively and make arrangements with clients about such aspects, whether or not in the context of collective-bargaining agreements.

The cartel prohibition *does* apply to the situation where self-employed workers *are* undertakings. For those self-employed workers, arrangements (with each other and collectively with employers) about rates and other conditions are illegal because they restrict competition, **unless** one of the two **exceptions** described below applies.

Second opportunity: the bagatelle exception

The cartel prohibition does not apply to arrangements of little significance, the so-called **bagatelle exception**. This exception applies to two situations: for (i) arrangements within groups consisting of a maximum of 8 self-employed workers with a collective turnover from services of no more than 1.1 million euros and for (ii) arrangements between self-employed workers with a collective market share of no more than 10 percent.

Third opportunity: the exception for efficiency improvements

There is an exception to the cartel prohibition for arrangements that, even though they do restrict competition, on balance contribute to consumer welfare. In order to qualify for this exception, several conditions must be met. The arrangement must improve **the social protection** of self-employed workers and cannot go beyond what is necessary for that purpose. Furthermore, buyers of services provided by self-employed workers should also benefit from the arrangement, for example because it safeguards the continuity or the quality of the services in question, or because the buyers consider the improvement of the social protection of self-employed workers as such to be a quality improvement, and are willing to pay the

expected price increase.

ACM's oversight

Finally, with these Guidelines, ACM explains in what ways it oversees arrangements between self-employed workers (and collective arrangements with clients).

ACM will not impose any fines on arrangements between and with self-employed workers that aim to guarantee the **subsistence level for those self-employed workers.** The agreed upon minimum rates cannot be higher, and their scope cannot be larger than necessary for being able to support oneself.

ACM expects that all arrangements that self-employed workers make within the context of these Guidelines have been made in good faith, correctly, and sincerely. If it turns out however that, in spite of the above, they do not comply (in full or partially) with the Dutch Competition Act, yet the participants are willing to adjust their arrangements quickly in order to bring them in line with the law, ACM will not see any reason to take action and impose a fine.

Attention!
ACM wishes to emphasize that, in these Guidelines, it only provides information about the application of the Dutch Competition Act and about ACM's oversight on collective price arrangements between and with self-employed workers. This means that the Guidelines expressly do not concern the legal status of self-employed workers in other areas, such as labor law or tax law.

1. Introduction

1. The Netherlands Authority for Consumers and Markets (ACM) is an independent regulator. ACM's mission is to ensure markets work well for people and undertakings. ACM enforces compliance with the Dutch Competition Act (in Dutch: Mededingingswet) and other laws.

2. The Dutch Competition Act safeguards effective and fair competition. For effective and fair competition, it is necessary that undertakings do not coordinate their market conduct. The absence of coordination ensures that undertakings compete with each other for the favor of consumers. This stimulates undertakings to manufacture products or offer services of higher quality, at lower costs, and more innovatively. This will benefit society as a whole.

3. Undertakings or associations of undertakings that wish to know in what way they are allowed to work together with competitors can use the Guidelines regarding collaborations between competitors[1] to see for themselves what arrangements between competitors are allowed and which are not. These Guidelines build on this general information, and offers specific information about collective arrangements between and with self-employed workers whose only commercial activity is the provision of services through their own labor. In the rest of this document, we will refer to them as self-employed workers.

4. The number of self-employed workers in the Netherlands has soared over the past few years, and continues to rise in part because of the emergence of digital platforms. The flexibilization of the labor market, of which said growth is a manifestation, has positive effects on the economy and society. It boosts entrepreneurship, and it creates new forms of services. That benefits the economy as a whole, and, in many cases, self-employed workers can capitalize on the benefits of entrepreneurship to realize a respectable financial position. However, there are also concerns.

5. First of all, there are concerns about the vulnerable position of certain groups of self-employed workers at the lower end of the labor market, where the bargaining power of individual self-employed workers is more limited than it is at the top end. Certain groups of self-employed workers experience uncertainty about income, legal position, and rights, and they bear the consequences of risky work themselves. There are self-employed workers who have to work more than 40 hours a week in order to earn a minimum income. A large group of self-employed workers have household incomes that are below the low-income threshold[2], the number of self-employed workers living in poverty has grown since 2017, and, of all employed people, self-employed workers run the most risk of living in poverty.[3]

6. Furthermore, these self-employed workers are not the only ones that are vulnerable. The growth of this group of self-employed workers can also undermine existing social achievements of employees such as those reflected in the statutory minimum wage and in collective-bargaining

[1] https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten (in Dutch).
[2] Statistics Netherlands (CBS) – Publication Poverty and social exclusion 2018. When a household has an income below the low-income threshold, then CBS considers this a low-income household or a household with a chance of poverty. The Ministry of Social Affairs and Employment estimates that approximately 17% of self-employed workers charges a rate that, even with a forty-hour working week, leaves them below the social minimum.
[3] CBS, Statistical Trends – Risk of poverty increased, March 2019.

agreements. If employers are tempted to replace, to a considerable extent, people in employment with 'cheaper' self-employed workers, it might erode the function of the statutory minimum wage and the bargaining position of employees and trade unions in collective-bargaining negotiations.

7. In its letter to the Dutch House of Representatives of June 15, 2020, titled in Dutch '*Voortgang uitwerking maatregelen 'werken als zelfstandige"* (which roughly translates to 'Progress of fleshing out measures regarding 'working as a self-employed worker''), the Dutch cabinet cancelled its previous plans that it would introduce a statutory minimum rate for self-employed workers. However, the cabinet still wishes to protect self-employed workers against poverty, and to prevent them from being hired at too low a rate, and to prevent clients at the lower end of the labor market from choosing to work with self-employed workers solely because of the lower costs[4].

8. As a result thereof, there will be a continued need for information about the opportunities that the Dutch Competition Act offers for arrangements that may help prevent or further reduce the identified social problems.[5] That is why, with these Guidelines, ACM shows what options are available to self-employed workers to organize themselves, and to make arrangements collectively about rates and other conditions under which they offer their services.

9. These Guidelines only concern *self-employed workers whose only commercial activity is the provision of services or creating works through their own labor*. This includes self-employed workers who use their own equipment such as tools, laptops, camera or means of transportation in order to be able to offer their services. These Guidelines are not meant for self-employed workers that offer goods or mediate in offering goods or services from third parties.

10. These Guidelines are also meant for clients who hire self-employed workers, for employers' and employees' organizations (trade unions), for associations of undertakings that promote their interests, and for advisors.

11. ACM does not grant exemptions from the cartel prohibition. This means that undertakings that wish to work together, and, by extension, also self-employed workers who wish to make agreements collectively, are, first and foremost, responsible themselves for compliance with the competition rules, and for answering the question whether an exception to the cartel prohibition applies to their situations. These guidelines can help find those answers. These Guidelines replace the Guidelines on rate agreements in collective-bargaining agreements 2017.[6]

[4] See Dutch House of Representatives, parliamentary year 2019 - 2020, 31311, '*Voortgangsbrief ' Werken als Zelfstandige*', 15 June 2020, available at https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/15/voortgangsbrief-werken-als-zelfstandige (in Dutch).

[5] In addition, self-employed workers are able to benefit from other parts of the Dutch Competition Act (for example, the prohibition on abuse of a dominant position) and other laws that ACM enforces, for example, consumer protection laws sometimes also protect self-employed workers who work from their private homes, see: https://www.acm.nl/en/publications/acm-changes-consumer-law-should-protect-people-better and https://www.acm.nl/en/publications/small-businesses-working-private-homes-should-have-consumer-energy-contracts.

[6] https://www.acm.nl/nl/publicaties/publicatie/16978/Leidraad-tariefafspraken-voor-zzpers-in-caos (in Dutch).

2. What does the cartel prohibition mean?

12. Section 6, paragraph 1 of the Dutch Competition Act prohibits '*agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof*.'

13. The main rule is that the cartel prohibition prohibits competitors from making price-fixing agreements, sharing customers or catchment areas, jointly limiting sales or production capacity, or holding preliminary discussions when submitting bids in tender processes. The Guidelines regarding Collaborations between competitors [7] provide more information about those forms of distortion of competition as well as about other forms of cooperation between undertakings that compete with each other.

14. The concept of 'price-fixing agreements' should be interpreted broadly: 'directly or indirectly fix[ing] purchasing or selling prices'[8] can refer to fixed prices or minimum prices, but, according to case law, also to price components and surcharges, to restrictions for granting discounts, and to arrangements about mandatory inclusion of costs in the prices. Arrangements about rates (minimum rates or otherwise) between self-employed workers may fall under the cartel prohibition as a 'price-fixing agreement'.

15 Recommendations by trade organizations about the prices that their members should charge, also fall under the scope of the cartel prohibition. However, trade organizations do have opportunities, within the boundaries of the Dutch Competition Act, to help their members maintain a healthy business operation by drawing up calculation methods, calculation examples, cost projections and comparative models for them. Section 3.2 of the Guidelines regarding collaborations between competitors describes how they can do so without violating the Dutch Competition Act.

16 The cartel prohibition does not only *limit* self-employed workers in their options of making collective price-fixing agreements, it also *protects* them against distortion of competition by other undertakings. After all, the suppliers from which self-employed workers buy products or the clients to whom they provide their services have to comply with the Dutch Competition Act, too. In the Guidelines regarding Collaborations between competitors, section 3.8 specifically concerns arrangements between undertakings about hiring labor and services from self-employed workers.

In what situations does the cartel prohibition not apply?

17. The application of the cartel prohibition has been restricted in several ways. Arrangements, even price-fixing agreements, may be allowed in exceptional circumstances, despite their anticompetitive nature.

18. First, the cartel prohibition only applies to *undertakings* (and associations of undertakings). In

[7] https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten (in Dutch).
[8] Taken from the text of the European cartel prohibition, which contains examples of illegal practices.

chapter 3 of these Guidelines, ACM explains in what situations self-employed workers can and cannot be considered undertakings within the meaning of the Dutch Competition Act. Since the Dutch Competition Act contains a specific exception for collective-bargaining agreements, **chapter 4** contains a more detailed explanation about what options such an agreement can offer self-employed workers who are not undertakings.

19. Second, the Dutch Competition Act contains an exception to the cartel prohibition for small-scale arrangements that can have little influence on competition. These will be discussed in **chapter 5** of the Guidelines.

20. Third, the Dutch Competition Act contains a general exception to the cartel prohibition for arrangements that lead to efficiency improvements and that are, on balance, more economical for direct and indirect buyers. This is the subject of **chapter 6** of the Guidelines.

21. Finally, **chapter 7** of these Guidelines provides information about how ACM deals with arrangements between and with self-employed workers in its enforcement practice. ACM has various instruments at its disposal to shape its enforcement of the Dutch Competition Act, and is able to use these instruments, within certain limits, at its own discretion.

3. In what situations is a self-employed worker an undertaking (and in what situations not)?

22. Self-employed workers are a very heterogeneous group; they work in diverse sectors of the economy, from the construction sector to the figurative and performing arts, from the media to consultancy, and from delivery to business services. And this is definitely not an exhaustive list.

23. The simple answer to the question of 'in what situations does a self-employed worker fall under the Dutch Competition Act and its cartel prohibition' is if they conduct activities as an **undertaking**.

24. According to competition law, every economic unit that offers goods or services on a market, is an undertaking. A natural person can also be an undertaking. In that context, it is not about the capacity or qualities of the person in question, but about the *activities* that they are performing at that moment. It is quite possible that someone is an employer for certain activities, and, as such, does not run an undertaking, based on a part-time labor contract, for example, but does run an undertaking of their own outside of that labor contract. The legal form that is chosen to do so, registration with the Chamber of Commerce, the legal form of contracting, and the ownership and financing of the undertaking, or the presence of a profit motive are all not the deciding factors. For self-employed workers that offer their own labor, the key question is whether they *offer services independently* on a market. Self-employed workers who run undertakings, carry the financial and commercial risks of their activities themselves. This means that the purchases, investments, costs, damage, and losses that come with the work that they offer, are paid out of their own pockets.

25. As such, 'independence' is an essential feature of the concept of undertaking. In many cases, self-employed workers consciously choose to be independent, and to offer their activities in competition with other undertakings. In those situations, they have to observe the cartel prohibition: it would lead to distortion of competition if ACM treated undertakings that are active on the same market differently based on their size, internal organization, or legal form.

26. A self-employed worker whose only commercial activity is the provision of services through their own labor is not necessarily truly independent. If their independence is merely nominal, the self-employed worker will not be regarded as an undertaking **for the activities in question** for the purposes of the Dutch Competition Act. Such situations are also referred to as misclassification of self-employed workers (in Dutch, such a contractor is referred to as: *schijnzelfstandige* or 'quasi-self-employed'). As a result thereof, the cartel prohibition does not apply to any possible price arrangements with other quasi-self-employed, and such quasi-self-employed are able to benefit from collective-bargaining agreements.

27. For the question of whether or not a self-employed worker is independent in name only, it needs to be assessed examined whether the self-employed worker is in a situation *that is comparable to that of an employee*.[9] This can only apply to self-employed workers whose only commercial activity is the provision of services through their own labor. This is not about the legal form in which both

[9] Ruling of 4 December 2014, case C-413/13, ECLI:EU:C:2014:2411 (FNV Kunsten Informatie en Media vs. Staat der Nederlanden), https://www.acm.nl/nl/publicaties/publicatie/14074/Antwoord-van-EU-Hof-van-Justitie-over-minimumtarieven-voor-zzpers-in-caos (in Dutch).

parties lay down their employment relationship, but the actual relationships between them.

28. The European court lists the following characteristics for determining whether or not a self-employed worker is in a situation that is comparable to that of an employee:

    - In practice, the self-employed worker does not determine their own market conduct independently, which instead is dictated by their clients. This is even more the case if the self-employed worker only has a single client.

    - The self-employed worker de facto performs specific services for remuneration on the authority of the client. Subordination (the legal or factual obligation to follow instructions as employees also have to do) is an important characteristic of a self-employed worker who is in a situation that is comparable to that of an employee.

    - The self-employed worker acts by order of the client with regard to their schedule, the location and the manner in which the tasks assigned to them are performed. In this regard, the self-employed worker can be compared to an employee who, in practice, does the same work for the client.

    - The self-employed worker does not share in the financial and commercial risks of the client. That is also similar to employees, who are entitled to wages for the work they do, regardless of their employer's market performance.

    - The self-employed worker is admitted to the undertaking for the duration of the employment relationship, and, to the outside world, is part of the undertaking.

29. It is about 'the broad picture', the sum of elements and circumstances that characterize the relationship, and about more than just a snapshot. In order to get this broader picture, ACM uses as a practical **rule of thumb** that, if an self-employed worker de facto works **side-by-side** with one or more employees, and is indistinguishable from those employees in day-to-day operations, the self-employed worker is **not** considered to be an undertaking within the meaning of the Dutch Competition Act.

30. When applying this rule of thumb, self-employed workers can also be in the same situation as employees who do not work for the same client, but for other undertakings that are active in the same sector. As far as ACM is concerned, the comparison is limited to activities within the Netherlands.

31. Self-employed workers who work side-by-side with employees may be part of the group of vulnerable self-employed workers society is concerned about. However, the application of the rule of thumb is, in principle, not limited to these situations. The side-by-side rule can also apply to better paid self-employed workers, while self-employed workers who are paid lower rates, do not, by definition, work side-by-side with employees.

32. The number of clients that the self-employed worker works for and the duration and the number of

hours associated with the contract are not relevant for the application of the side-by-side rule.

33. Instead of directly hiring a self-employed worker, clients can also use intermediaries (or independent service providers). In such situations, the self-employed workers in question often only have arrangements with the intermediaries, and not with the undertakings for which they actually carry out the assignments. In such cases, for the application of the side-by-side rule, the situation in which the self-employed worker performs the task with the end client must be assessed, instead of their relationship with the intermediary.

34. A variation of this is when self-employed workers offer their labor on online platforms. These platforms exist in various forms, and they can match demand of businesses for personnel and/or demand of consumers with the supply of self-employed workers. Examples are: deliverers (delivery of meals, for example), cleaners, and taxi drivers. For the application of the side-by-side rule, the situation of the self-employed worker who works through an online platform, must be compared with that of employees of the undertakings in the sector in question. In order to assess, for example, whether a delivery person who offers their services through a platform works side-by-side, an assessment must be made of the situation of delivery people who are in paid employment with a snack shop or pizza place, for example.

35. It has been explained above how ACM assesses the side-by-side rule of thumb in certain specific situations. Several additional concrete examples can be found below. In practice, there will also be other situations that will raise questions about how the side-by-side rule should be applied. First and foremost, it is up to market participants to apply the side-by-side rule in such a way that does the most justice to the actual situation.

36. The side-by-side rule of thumb is meant as a tool for self-employed workers to determine whether they are undertakings within the meaning of the Dutch Competition Act. It cannot be ruled out that, besides those working side-by-side with other self-employed workers, others can also be considered undertakings when thoroughly tested against the criteria from the FNV KIEM ruling, mentioned under marginal 28.

37. It should be kept in mind that a self-employed worker *can* qualify as an undertaking for one contract, and fail to qualify as one for the other. This depends on the circumstances in which the activities are performed, and must be assessed on a case-by-case basis.

38. Self-employed workers who do *not* qualify as undertakings within the meaning of the Dutch Competition Act do not fall under the scope of this act, so the cartel prohibition therefore does not apply to them. They are allowed to collaborate for the activities in question, and make price arrangements among each other or with employees and clients (or organizations of either of them). In that case, they are allowed to make the collective arrangements directly with each other, or with employers (or their organizations) as part of a collective-bargaining agreement (provided the collective-bargaining exception applies; more information in chapter 4). Furthermore, they can join trade associations (or establish one themselves) that issue recommended rates or binding rates if such is possible based on their statutes. All of this also applies to self-employed workers who work through platforms, if they do so side-by-side with employees in paid employment (as clarified under

marginal 34).

39. ACM emphasizes that the side-by-side rule of thumb only answers the question of whether or not a self-employed worker is an undertaking within the meaning of competition law. The rule of thumb thus does not say anything about the legal status of self-employed workers on the basis of other areas of law, such as labor law or tax law. Conversely, the legal status of a self-employed worker on the basis of those other areas of law is also not decisive in the assessment of activities of a self-employed worker under competition law. [10]

Case of the substitute musicians

The FNV KIEM case was about musicians who substitute in orchestras, and who sometimes were employed with the orchestra, but often were not.

In its final ruling, the District Court of The Hague ruled: 'Unlike 'real' undertakings, independent substitutes find themselves in a subordinate relationship for the duration of the contractual relationship. Not only do they have to follow the conductor's directions, but they also have to be present for rehearsals and concerts according to a schedule provided to them, all of which is no different from what the musicians who are employed with the orchestra must do. There is no flexibility or independence with regard to scheduling, the location, and the way in which the entrusted tasks are performed.'

Even though the self-employed worker is free to accept a contract or not, it is about the relationship after the contract has been accepted. In the execution of the contract, they do not enjoy any real freedom.

According to ACM, the phrase 'all of which is no different from what the musicians who are employed with the orchestra must do' makes it possible to use the side-by-side rule as a practical rule of thumb. The side-by-side rule will not apply to all situations as literally as it does to orchestra musicians, but ACM does consider the rationale behind it to be clear.

[10] If the self-employed worker carries out the assignment on the basis of a model agreement that was assessed by the Dutch Tax and Customs Administration as part of the Employment Relationships (Deregulation) Act (in Dutch: Wet Deregulering Beoordeling Arbeidsrelaties, DBA), this does not, by definition, rule out the possibility of the self-employed worker working side-by-side. When testing more thoroughly against the criteria in the FNV KIEM ruling, the use of such a model agreement *may* be an indication that the self-employed worker, for this assignment, should be regarded as an undertaking on the basis of competition law.

Examples: undertakings or not?

Copywriter

An independent copywriter is contracted to work 20 hours a week at 'Troglodyte magazine', which also employs various copywriters. She receives an hourly wage. The work that she does at the magazine is exactly the same as the work of her co-workers that are in paid employment, she cannot choose her topics, and she has the same office hours, and also has to follow the instructions of management. The rest of the week, she works on freelance jobs for various media.

For her activities at Troglodyte magazine, the copywriter works side-by-side and will not be considered an undertaking within the meaning of the Dutch Competition Act. Therefore, the cartel prohibition does not apply to arrangements in connection with these activities. If the applicable collective-bargaining agreement (whether or not declared to be generally binding) provides for it, the copywriter falls under its scope. For other activities that the copywriter does, it needs to be assessed separately whether she can be considered an undertaking.

Investigative journalist

A renowned freelance investigative journalist works for various media. Her work is similar to the work of investigative journalists who are in paid employment with her clients, but she has more freedom to determine her methods and the conditions under which she works. She works alone (not in a team), and she determines herself what topics she investigates, how long she will work on these investigations, and when she writes about those topics. Every now and then she attends an editorial meeting to coordinate her work with the newspaper or network in question.

According to the Dutch Competition Act, this investigative journalist does not work side-by-side, and she is an undertaking.

Actor

An actor plays parts in Dutch television series and in plays. He auditions for parts with several casting agencies, and, as such, competes with other actors for parts. If he is offered a part, the client de facto determines his remuneration and availability. A number of theater companies for which the actor performs activities employ a small permanent group of actors that they supplement with freelance actors when necessary for a performance.

The actor is not an undertaking within the meaning of the Dutch Competition Act with regard to the parts for which he rehearses and that he plays as jobs with theater companies. In the theater, he regularly works side-by-side with the employed actors of the theater companies, and he is indistinguishable from them in day-to-day operations.

Parcel carrier

A parcel carrier works for a single, large parcel-delivery service provider. He used to be in paid employment with that provider, but works as a contractor now. The provider no longer has paid employees, and only works with contractors. Other parcel-delivery service providers still work with a mix of paid employees and self-employed workers. For the parcel carrier, not much has changed since he became a self-employed worker. His situation is therefore comparable to that of

employees with other parcel-delivery service providers. However, one of the changes is that he now uses his own van to deliver parcels. The provider determines the rate he receives per parcel, when he has to deliver the parcels, and what clothes to wear and what his van has to look like when delivering parcels.

The situation in which the parcel carrier performs his task can be compared to the situations of paid employees with other parcel-delivery service providers, and is indistinguishable from them. He has the same limited degree of freedom to determine himself how he performs his task, and he has to follow the instructions of the parcel-delivery service provider in the same way as its paid employees. The fact that he uses his own means of transportation does not alter this fact. Therefore, based on the aforementioned rule of thumb, the parcel carrier is not an undertaking within the meaning of the Dutch Competition Act.

Arrangements between self-employed workers who are part of a cooperative, limited partnership or a general partnership

40. If self-employed workers are part of a collaboration that is an economic unit with its participants, such as a cooperative, a general partnership or limited partnership, they are able to make any arrangements they want *within* that economic unit: the cartel prohibition does not apply thereto. Self-employed workers who wish to do so, do give up part of their freedom to the collaboration. In order to be able to use, for example, consistent rates within such a unit, members of the cooperative must comply with the condition that they structurally pursue a joint, economic goal. The cooperative must be able to exercise deciding influence over the individual members' market conduct, and competition among each other cannot exist.

41. In other words, the cooperative is de facto 'the undertaking' that competes with other undertakings in the market, and the participants themselves are no longer undertakings for the contracts or activities that they have transferred to the cooperative. This may not be very attractive for many self-employed workers, but it is good to know that this option exists, for those who are considering it.

4. In what situations does the exception for collective-bargaining agreements apply to the cartel prohibition?

42. In collective-bargaining agreements, employers and employees (or their organizations) make arrangements about terms of employment, such as wages and pensions. Such arrangements are, in principle, anticompetitive because they interfere with competition on the buyer's market for labor, and because they harmonize employers' labor costs, which reduces their margins to compete on price. However, Section 16 of the Dutch Competition Act contains an exception to the cartel prohibition in order not to hinder too severely the parties to collective-bargaining agreements in protecting or improving labor conditions and employment. This is the exception for collective-bargaining agreements.[11]

43. According to this exception, provisions in collective-bargaining agreements do not fall under the cartel prohibition if they meet the following two criteria:

- They are the result of a social dialog between employers' and employees' organizations.
- They directly lead to an improvement of conditions of employment for employees and/or protection of employment.

44. From the FNV KIEM ruling mentioned in chapter 3, it follows that, in collective-bargaining agreements, provisions can be included regarding the rates of self-employed workers if these self-employed workers are not undertakings. After all, quasi-self-employed workers are equated with employees. From the employers' perspective, trade unions are then simply seen as employees' organizations, and the second criterion has also been met. Even though the self-employed workers involved are not undertakings, the employers (their clients) obviously *are*, and employers' organizations are associations of undertakings. This means that employers are not free to make arrangements collectively, outside of the exception for collective-bargaining agreements, with self-employed workers who are not undertakings.

45. The exception for collective-bargaining agreements does not apply to self-employed workers who *are* undertakings. They cannot use this exception to make arrangements with clients or organizations of clients in the form of a collective-bargaining agreement, because in that case, such agreements are not the result of a 'social dialog'. This is also true when the traditional unions represent self-employed workers who are undertakings, because in that case, the union is seen as an association of undertakings, which means that there is no social dialog between organizations of employers and employees. [12] The possibility of employees also benefiting from minimum rates for the self-employed workers in question, does not alter this fact. The fact that the exception for collective-bargaining agreements cannot be invoked, does not rule out that other exceptions to the cartel prohibition can be invoked, which will be discussed in chapters 5 and 6.

46. In order to determine whether the exception for collective-bargaining agreements is applicable, the

[11] The exception for collective-bargaining agreements has been adopted from European case law. The exception thus also applies to the European cartel prohibition of Article 101 of the Treaty on the Functioning of the European Union.
[12] FNV KIEM ruling (footnote 9), marginals 28-30.

following is important. Using the criteria mentioned in chapter 3, parties to a collective-bargaining agreement have to distinguish different types of self-employed workers who may work in the relevant sector or undertaking instead of lumping everyone together. After all, it is possible that only a subset of those self-employed workers does not qualify as undertakings within the meaning of the Dutch Competition Act.

47. Parties to a collective-bargaining agreement have to make clear and transparent, with factual and concrete data, which self-employed workers they *do* consider and which self-employed workers they do *not* consider to be undertakings. It must be clear that the rate provisions in the agreement only apply to the self-employed workers who are not undertakings within the meaning of the Dutch Competition Act, because they are de facto indistinguishable from the employees with whom they work side-by-side when performing their activities. These self-employed workers have to collect and document as much factual and concrete data as possible about the work situation of the self-employed workers that fall under such an agreement, in order to be able to determine whether that work situation is comparable to that of employees. Think of a factual description of the activities and working conditions or an independent labor-market study into self-employed workers (surveys, interviews, etc.).

The case of the 2015 – 2017 collective-bargaining agreement for architectural firms

The 2015 – 2017 collective-bargaining agreement for Architectural Firms contained several provisions about minimum rates for so-called ‘independent professionals’. ACM assessed these rate provisions, and concluded that it was not plausible that they met the exception for collective-bargaining agreements.

One of the reasons was that they were about *all* types of independent professionals hired by an architectural firm, such as professionals in architecture, project coordination, support, etc., and that no distinction was made between ‘real’ independent professionals (undertakings within the meaning of the Dutch Competition Act) and professionals that were de facto in the same work situation as employees.

5. In what situations does the bagatelle exception apply to the cartel prohibition?

48. Another statutory exception to the cartel prohibition is the so-called bagatelle exception in Section 7 of the Dutch Competition Act. Sometimes, the influence (actual or potential) of the undertakings involved on competition is expected in advance to be so little, that their mutual arrangements are exempted from the cartel prohibition.

49. The cartel prohibition does not apply to arrangements made among a limited number of small undertakings.[13] This exception applies if no more than eight undertakings are involved in the agreement, of which the collective turnover in the preceding calendar year was no more than 5,500,000 euros if it concerns undertakings whose activities are primarily aimed at delivering goods, and no more than 1,100,000 euros in the case of services, which will always be the case with the self-employed workers for whom these guidelines were written.

50. The cartel prohibition does not apply either to arrangements between undertakings with small market shares. The idea is that, if undertakings have a very small combined market share, they are not able to restrict competition effectively. Two requirements apply to this exception:

- The combined market share of the undertakings cannot be higher than 10% on any of the markets involved.
- Trade between European Union member states cannot be appreciably influenced by this agreement.

51. ACM uses as a starting point that an appreciable influence of trade between member states is not likely to occur when self-employed workers make an agreement that will stay below the 10%-market share threshold. In that case, the cartel prohibition does not apply and self-employed workers can make rate agreements with each other.

52. Self-employed workers do have to take into account that the 10% market share will be achieved quickly on the *relevant* market, because the rate agreement's aim is to be able to raise rates by restricting mutual competition. In order to do so, a market share of more than 10% is necessary, generally speaking. Thus, a sound and objective market definition, documented in advance, is necessary in order to be able to invoke the bagatelle exemption. The Guidelines regarding Collaborations between competitors [14] provides more information about market definitions.

Example: Bagatelle

Imagine an independent choirmaster wishing to make arrangements with three other choirmasters in the city of Utrecht. If their combined turnover does not exceed 1.1 million euros, they do not need to think about what the relevant market is, and whether or not their arrangements restrict competition, because they fall under the first bagatelle exception: the cartel prohibition therefore does not apply.

[13] https://www.acm.nl/sites/default/files/documents/2019-02/concurrenten-mogen-samenwerken-maar-er-zijn-grenzen-26-2-2019.pdf (in Dutch).
[14] https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten (in Dutch).

The same goes for 20 freelance copywriters who, at an event organized by their trade organization, come up with a plan to start using minimum rates. Assuming that, in the Netherlands, they have a combined market share of less than 10%, the cartel prohibition does not apply to those arrangements (second bagatelle exception). They may proceed with their plan.

6. In what situations does the exception for efficiency improvements apply?

53. This statutory exception to the cartel prohibition can be found in Section 6, paragraph 3 of the Dutch Competition Act, and applies to arrangements between undertakings that do restrict competition but that, nevertheless, on balance, increase consumer welfare and that also sufficiently benefit the users of the products or services of the undertakings involved. By 'users', we mean direct and indirect buyers (current and future). The benefits are described in the law as '[to] contribute to the improvement of production or distribution, or to the promotion of technical or economic progress'. This is also referred to in short as 'efficiency improvements'.

54. When applying the concept of 'efficiency improvements', ACM uses a broad interpretation. These improvements may also encompass, for example, protection of the environment, animal welfare or the promotion of economic sustainability. It should be benefits that are achieved (from an objective point of view) by the agreement, and should not be just benefits in the eyes of the parties to the arrangements.

55. Safeguarding the social protection of employees and self-employed workers whose only commercial activity is the provision of services through their own labor, can be considered a benefit for the application of this exception or improvement of the general requirements for production.[15] This is the perspective from which ACM will test against the four requirements that the Dutch Competition Act has set for the application of this exception.

Application of the exception to self-employed workers

56. The four cumulative conditions that have to be met can be reinterpreted for the self-employed workers for whom these guidelines are meant, and who (as undertakings) wish to negotiate collectively, want to make arrangements about minimum rates or for whom a trade organization wishes to issue recommended rates (binding or otherwise):

    a) The arrangements safeguard an objectively justified level of social protection;
    b) Without the arrangements, this protection will not be established, and the arrangements do not go beyond what is necessary for achieving this objective;
    c) The direct and indirect buyers will get a fair share of the benefits of the arrangements;
    d) Sufficient room still remains for competition between the self-employed workers.

57. These four conditions will be further explained below. The burden of proving whether these conditions have been met lies with the self-employed workers (or the organizations representing them) that wish to invoke this exception.

[15] In the Metro SB-Großmärkte ruling of 25 October 1977 (ECLI:EU:C:1977:167), the Court once before considered that '*the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavorable, comes within the framework of the objectives to which reference may be had pursuant to Article [101, paragraph 3]*' (marginal 43).

a) Do the arrangements safeguard a minimum objectively justified level of social protection?

58. Suppose that self-employed workers are forced to offer such low rates for their own labor, that they are unable to achieve a minimum income based on a 40-hour working week, undesirable effects may subsequently arise for themselves, for employees with whom they compete, and for society at large. Self-employed workers in a certain sector may get caught up in a 'race to the bottom', as a result of which, everyone would end up working below the minimum income level.

59. Employees with whom they compete, too, can experience drawbacks, for example when self-employed workers undermine their bargaining positions and the existing terms of employment, especially those concerning pay, but also those concerning other terms of employment, such as working hours. This is also referred to as social dumping. Finally, society at large could also be harmed by it, because this group of self-employed workers is usually not insured against occupational disability, and has no money to save, which means that, if they suffer a setback, they will have to apply for social security benefits immediately. From that perspective, having an objectively established level of social protection and arrangements that bring about that level are considered an efficiency improvement, as it supports and/or improves the requirements for production and labor performance.

60. It is important that the self-employed workers involved are able to substantiate objectively the subsistence level that they wish to guarantee through collective arrangements. They can do so, for example, using generally accepted standards established by agencies such as the Dutch Employee Insurance Agency (UWV) or the National Institute for Family Finance Information (Nibud), official policy objectives of relevant ministries or policy studies of ministries, research agencies or official government positions. In that context, the costs that self-employed workers incur in connection with their services and activities can be taken in account as well, so that the minimum income can be safeguarded.

61. In order to be able to invoke this exception, it is important that the benefits of the arrangements that mitigate these undesirable effects are substantiated and quantified if possible. After all, these benefits should outweigh the restriction of competition that is the result of such arrangements. A substantiated estimate of the benefits is also important for the tests against the other requirements.

b) Are the arrangements necessary, and do they not go beyond what is necessary for the purpose of safeguarding the objectively justified level of social protection?

62. The necessity requirement means that the arrangements are reasonably necessary for achieving the objective. The parties to the arrangements have to make a plausible case that, realistically speaking, no other, less far-reaching arrangements are conceivable that are able to realize the same result. They are able to do so, for example, by showing that a collective agreement is necessary because none of the competitors can afford to change their behavior independently (either as the first one to do so or by themselves).

63. Therefore, anticompetitive arrangements always have to be compared with other arrangements that have the same objectives but are less anticompetitive. In some sectors, market participants on both sides of the market make arrangements that are less of an impingement on free enterprise. For example, a code for responsible market behavior (Brede Code Verantwoordelijk Marktgedrag) exists, which is signed by major clients (such as the Netherlands largest employers' association AWVN, the central government, Dutch Railways NS, Schiphol airport, and UWV), contractors, trade unions, and intermediaries. This code contains arrangements about the procurement of services. The code concerns the cleaning and window-cleaning sectors, the catering sector, and the security sector. One element of this code is that clients do not exclusively choose their contractors based on the lowest price, but that they also choose the 'economically most advantageous offer', based on quality. In this way, it is prevented that contractors only able to compete on price, without restricting their freedom to determine their own rates.

64. Another example of arrangements that go less far than fixed minimum rates, is the establishment of quality standards. In some cases, such standards have been imposed by the government, but, in other sectors, such arrangements have been made by the sector itself in order to prevent a race to the bottom.

c) Will a fair share of the benefits of the arrangements benefit the direct and indirect buyers?

65. A fair share of the benefits of the arrangements must benefit the direct or indirect, current or future buyers of the services provided by the self-employed worker in question.

66. Any benefits for people outside the circle of buyers (either directly or indirectly, and either current or future) of the services of the self-employed worker in question are not included in the tests against this requirement.

67. The idea behind this exclusion is that the ones that suffer from drawbacks from the arrangements, because they have to pay the agreed upon higher rates, have to be compensated in some way and at some point in time. The net effect should be at least zero for them, meaning that, on balance, they cannot be worse off. These benefits can be reaped by the direct buyers but can also be reaped (partially or in full) by buyers that are further down the production chain. At the end of the day, that also includes consumers. [16]

68. Buyers can benefit from this arrangement, since the agreed upon higher rate also comes with a quality improvement, or because the continuity, quality and diversity of services can be safeguarded. Rate arrangements between self-employed workers can prevent self-employed workers from getting dragged into a race to the bottom in terms of price, with the risk that, in the long run, the quality of the services performed will decline and/or the risk that self-employed workers who offer high-quality services are eliminated by adverse selection. However, if clients *are* able to assess the quality of the services offered, they will be able to select their contractors based

[16] The reason for this requirement is that it is not a duty of ACM's (as a body that is not legitimized in a democratic fashion) to redistribute welfare. Therefore, ACM can only determine that it is justified that buyers will pay more for the services of self-employed workers that have made arrangements with each other, if at least a fair share of the benefits of those arrangements will benefit those buyers.

on price *and* quality, so that the identified risks do not necessarily have to occur as a result of price competition. Quality can be assessed based on qualification schemes, reviews, quality requirements or quality standards, among other ways.[17] Since the risk of loss of quality certainly does not occur everywhere, the self-employed workers involved have to demonstrate the link between their rate arrangement and the safeguarding of quality. They also have to a make plausible case that buyers (direct and indirect) benefit from the safeguarding of quality or the promotion thereof, for example based on studies into market trends or benchmarks of the current and expected quality level of the services in the sector.

69. Another possibility is that buyers themselves, too, see the social protection of self-employed workers safeguarded by the arrangements as a quality improvement of the service or product that the self-employed workers in question have helped create with their efforts, and for which they are prepared to pay the expected price increase. In that situation, too, it is important that the self-employed workers involved objectively substantiate and, if possible, quantify this appreciation of their social protection by buyers and their willingness to pay a higher price for it. They can do so, for example, by putting forward studies of research agencies or surveys among buyers. Such substantiations may also concern the willingness of end-users / consumers to pay for the expected price increase of the eventual product or the eventual service that they buy and that is provided through the more expensive labor of the self-employed worker in question.

d) Will sufficient room for competition still remain?

70. With regard to the condition that arrangements cannot eliminate competition in respect of a substantial part of the services involved, the first question is about what group of the self-employed workers takes part in the arrangements. After all, not all self-employed workers that are active in a certain market necessarily have to take part in the arrangements. After all, the entrepreneurial freedom of self-employed workers who qualify as undertakings means they are free *not* to take part in collective arrangements about minimum rates and also that they cannot be bound by such arrangements against their will. The 'outsiders' are able to create sufficient competitive pressure. In addition, in many cases, there is also the possibility of sufficient competition on other aspects than the agreed upon price, such as quality, service, speed, and availability of the services of the self-employed workers involved. Furthermore, another consideration is that those who are able to do so, have a realistic opportunity to price their own services *above* the minimum rate that was agreed upon. As long as users are sufficiently able to assess such aspects on which self-employed workers are able to compete with each other, it means that sufficient room for competition between self-employed workers remains despite the arrangements about minimum rates.

Example: application of the exception for efficiency improvements

In the construction industry, independent carpenters[18] argue that, because of competition with each other, their rates are so low that their social protection is under pressure. Therefore, a group of

[17] The existence of such standards (or the ability to create them) is also important for the tests against the necessity requirement (under b).
[18] In this example, the starting point is that the independent carpenters are undertakings within the meaning of the Dutch Competition Act, and that they do not fall under the scope of the bagatelle exception.

independent carpenters make collective arrangements about higher rates so that they can properly insure themselves against a number of business risks, such as unemployment and occupational disability. They agree to start charging 35 euros per hour for their services.

This collective arrangement about a minimum hourly rate of 35 euros restricts competition between independent carpenters, because they are not free to offer their services for a lower rate. This rate arrangement therefore violates the cartel prohibition at first glance. However, the independent carpenters are able to invoke the exception for efficiency improvements. In order to do so, they have to make a plausible case that the requirements for the application of this exception have been met.

Being able to insure oneself against business risks is an important part of the social protection of self-employed workers. The self-employed workers have to substantiate objectively the level of insurance that they wish to take out. In order to do so, they can use, for example, generally accepted standards for insuring against business risks by self-employed workers in the construction industry. The self-employed workers involved have to quantify the expected benefits as much as possible, for example by indicating how many independent carpenters would be able to take out the expected insurances if they were to charge the planned rates.

In addition, the independent carpenters have to make a plausible case that the rate arrangement is necessary for enabling them to take out the identified insurances, and to follow professional training. They can argue, for example, that, with the current rates in the market, they cannot afford the identified insurances, and that the hourly rate has to be at least 35 euros in order to be able to do so. In that context, they can substantiate this argument by showing that a collective arrangement about this is necessary, because individual independent carpenters cannot afford to charge 35 euros per hour (or to be the first one to do so), because then they will not be hired in the current market. In this context, the carpenters will have to prove that a less far-reaching arrangement to achieve their goal, for example an arrangement to introduce a certification or qualification scheme on a voluntary basis, will not have the desired effects.

Furthermore, the carpenters will have to make a plausible case that a fair share of the benefits of the arrangement will benefit their buyers. For example, they can conduct a survey among their buyers, showing that these buyers consider the improvement of the social protection of the carpenters to be a quality improvement of their services for which they are prepared to pay the expected higher rate. For such a survey, the carpenters can look at the benefits for, on the one hand, direct buyers, such as the construction businesses that hire them, and, on the other hand, indirect buyers, such as government agencies, real estate developers, or consumers who hire construction businesses to construct buildings.

Lastly, the independent carpenters have to make a plausible case that sufficient room for competition among each other will remain. First, they can argue that they make arrangements about a minimum rate, and not about a fixed rate, so that the ones who can charge an hourly rate higher than 35 euros remain free to do so. In addition, they can show what group of the independent carpenters joins in the arrangement. If, for example, only half of the independent carpenters join in the agreement, sufficient competition will remain. They can also show whether they compete with each

other on other aspects than price. For example, if clients attach great value to speed and availability, then they can continue to compete on these aspects with each other.

7. How does ACM conduct oversight of arrangements between and with self-employed workers?

ACM will not impose any fines on arrangements between and with self-employed workers that aim to set a minimum rate for self-employed workers that is not higher than necessary for safeguarding the subsistence level.

71. In the introduction of these Guidelines (see marginal 5), ACM already noted that society's concerns primarily focus on the 'lower end of the labor market' and on the dire situations that some are in. ACM will therefore exercise restraint when it comes to taking action against arrangements that solely aim to guarantee the subsistence level, and do not go beyond that objective.

72. ACM will not impose any fines for arrangements between and with self-employed workers that aim to set a minimum rate that is not higher, and its scope cannot be larger than necessary for being able to support oneself. With regard to such a minimum rate, ACM uses the following basic principles: [19] [20]

- The subsistence level is based on the level of social security assistance (or welfare assistance) for a single person;
- The minimum rate will ensure that self-employed workers are able to support themselves, and, additionally, can take out insurance or save some money in case they get sick or are unable to work, coupled with a loss of income;
- Self-employed workers that work fulltime (meaning 40 hours a week, 46 weeks a year) may be able to earn at least the subsistence level, taking into account the average share of billable hours (67% in 2012);
- The rate applies to all hours directly related to the assignment, while any costs directly related to the assignment have to be charged on top of that;
- A surcharge of 15% for indirect costs may be taken into account.

Oversight on arrangements between and with self-employed workers that have been made within the context of these Guidelines

73. Some are under the impression that the Dutch Competition Act prohibits many forms of collaboration, and that fines are constantly looming. In practice, ACM's regulatory toolkit consists of a much larger range of instruments to urge market participants to observe competition rules (education, binding instructions, orders subject to periodic penalty payments, or declaring market participants' commitments binding).

[19] In its letter to the Dutch House of Representatives of June 15, 2020, titled in Dutch 'Voortgang uitwerking maatregelen 'werken als zelfstandige'' (which roughly translates to 'Progress of fleshing out measures regarding 'working as a self-employed worker''), the Dutch cabinet cancelled its previous plans that it would introduce a statutory minimum rate for self-employed workers. However, the cabinet still wishes to protect self-employed workers against poverty, and to prevent them from being hired at too low a rate, and to prevent clients at the lower end of the labor market from choosing to work with self-employed workers solely because of the lower costs. See Dutch House of Representatives, parliamentary year 2019 - 2020, 31311, *Voortgangsbrief ' Werken als Zelfstandige'*, 15 juni 2020.

[20] See Dutch House of Representatives, parliamentary year 2018 – 2019, 31311, no 219. In this letter, these same basic principles were also used in the plans for a statutory minimum rate.

74. For ACM, solving competition problems is central to its efforts. Therefore, ACM focuses on adjusting the undesirable elements of the collaboration swiftly and effectively, while taking into account the context in which the arrangements were made. On the other hand, ACM looks differently at secret price-fixing agreements that were made circumspectly in the proverbial backrooms, than at agreements made, in good faith and sincerely, on the basis of a careful analysis of these guidelines between self-employed workers or their representative authorities and clients. If it turns out that the latter does not comply with the Dutch Competition Act after all[21], and the parties involved (if necessary at ACM's request) expeditiously make the necessary adjustments, ACM will not see any reason for taking enforcement action involving the imposition of a fine.

76. Self-employed workers that wish to make collective arrangements about minimum rates are responsible themselves for compliance with competition rules, and for answering the question whether the exceptions apply. These guidelines may help them make such assessments. If necessary, they can obviously also seek external assistance for the assessment of planned initiatives. If it turns out that, when discussing broader, concrete questions, they still need more certainty about the options and possible risks of their planned arrangements, they can always sit down with ACM to discuss these.

[21] For example, because the self-employed workers in question were incorrectly not classified as undertakings, or because the bagatelle exception was applied incorrectly.