Autoriteit
Consument & Markt

Guidelines

# Price arrangements of self-employed workers

Markets that work well for consumers and businesses

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# Table of contents

# Summary

These Guidelines target self-employed workers who provide services through their own labour. For example cleaners, parcel carriers, artists and archaeologists. These Guidelines specifically target self-employed workers, which have relatively low incomes, precarious income positions, little social security and weak bargaining positions.

The Guidelines explain in which situations self-employed workers are able to make collective arrangements about prices and other (working) conditions without violating the cartel prohibition of the Dutch Competition Act. Furthermore, the Guidelines explain in which situations ACM will not impose fines. These Guidelines are especially useful for parties that (collectively) negotiate with or on behalf of self-employed workers, like employer organizations, trade associations and employee organizations (unions), and their advisors. For individual self-employed workers and other interested individuals, there is an abridged and simplified version (in Dutch) available on ACM's website: Mogelijkheden voor zzp'ers om samen afspraken te maken | ACM.nl

After this summary and prior to the introduction, follows a schematic diagram of these Guidelines on page 5. Thereafter ACM explains in these Guidelines what the cartel prohibition entails, and in what circumstances, in general, the cartel prohibition does not apply. That is the case with **arrangements that fall under the so-called bagatelle exception, or to which the efficiency exception applies**.

The Guidelines continue with an explanation of the concept of 'undertaking'. **Solo self-employed workers should be (re)classified as employees when they are "false self-employed",** thereby disguising an employment relationship. These self-employed workers are not considered to be undertakings within the meaning of the Dutch Competition Act for their activities, just like employees. Therefore, the cartel prohibition does not apply to them. For activities where self-employed workers are *false* self-employed workers, self-employed workers are allowed to make arrangements with each other about prices and other (working) conditions. They are also allowed to negotiate collectively and make arrangements with clients about such aspects.

In addition, employers / clients with employees and quasi or false self-employed workers are allowed to conclude **collective labour agreements**. This exception to the cartel prohibition is based on European case law, and Section 16 of the Dutch Competition Act (Mw).

Besides false self-employed there are also genuine self-employed workers. The cartel prohibition does apply to genuine self-employed workers, because they can be considered undertakings within the meaning of the Dutch Competition Act. For those self-employed workers, anti-competitive arrangements (with each other and collectively with employers) about prices and other working conditions are illegal. However an exception applies where these (genuine) self-employed workers fall under one of the following three categories of self-employed workers.

In accordance with the guidance of the European Commission, **arrangements collectively negotiated with clients regarding prices and other working conditions of self-employed workers that are in situations that are similar to those of employees** fall outside the scope of the cartel prohibition, regardless of whether or not they can be classified as false self-employed workers. That is the case in one or more of the following three categories:

- The self-employed worker is economically dependent on their client;
- The self-employed worker works *de facto* side-by-side with employees;
- The self-employed worker works through a digital labour platform.

Self-employed workers in one of these categories are allowed to negotiate and make arrangements collectively, including collective labour agreements, with clients about their renumeration and other working conditions. This opportunity therefore does not apply if self-employed workers negotiate and make arrangements among themselves only, or if the collective negotiations and arrangements of self-employed workers with clients do not concern working conditions.

**ACM's oversight**

Also, with these Guidelines, ACM explains in what ways it oversees negotiations and arrangements between self-employed workers and collective negotiations and arrangements with clients to which any of the abovementioned, general and specific, exceptions do not apply.

ACM will not impose any fines if self-employed workers have **insufficient bargaining power vis-à-vis their clients**. That is the case if one or more clients cover the entire sector or industry, and if self-employed workers negotiate or make collective arrangements with one or more clients with a total combined annual turnover of more than 2 million euros or with whom at least 10 individuals are employed.

Nor will ACM impose fines in case of **arrangements** regarding working conditions, and price arrangements in particular, which serve **to safeguard the subsistence level** that is necessary for being able to support oneself.

Finally, ACM refers to the European Commission's guidance in case of **legislation that allow for collective negotiations and arrangements on prices and other working conditions** for certain categories of self-employed workers to which the legislation applies.

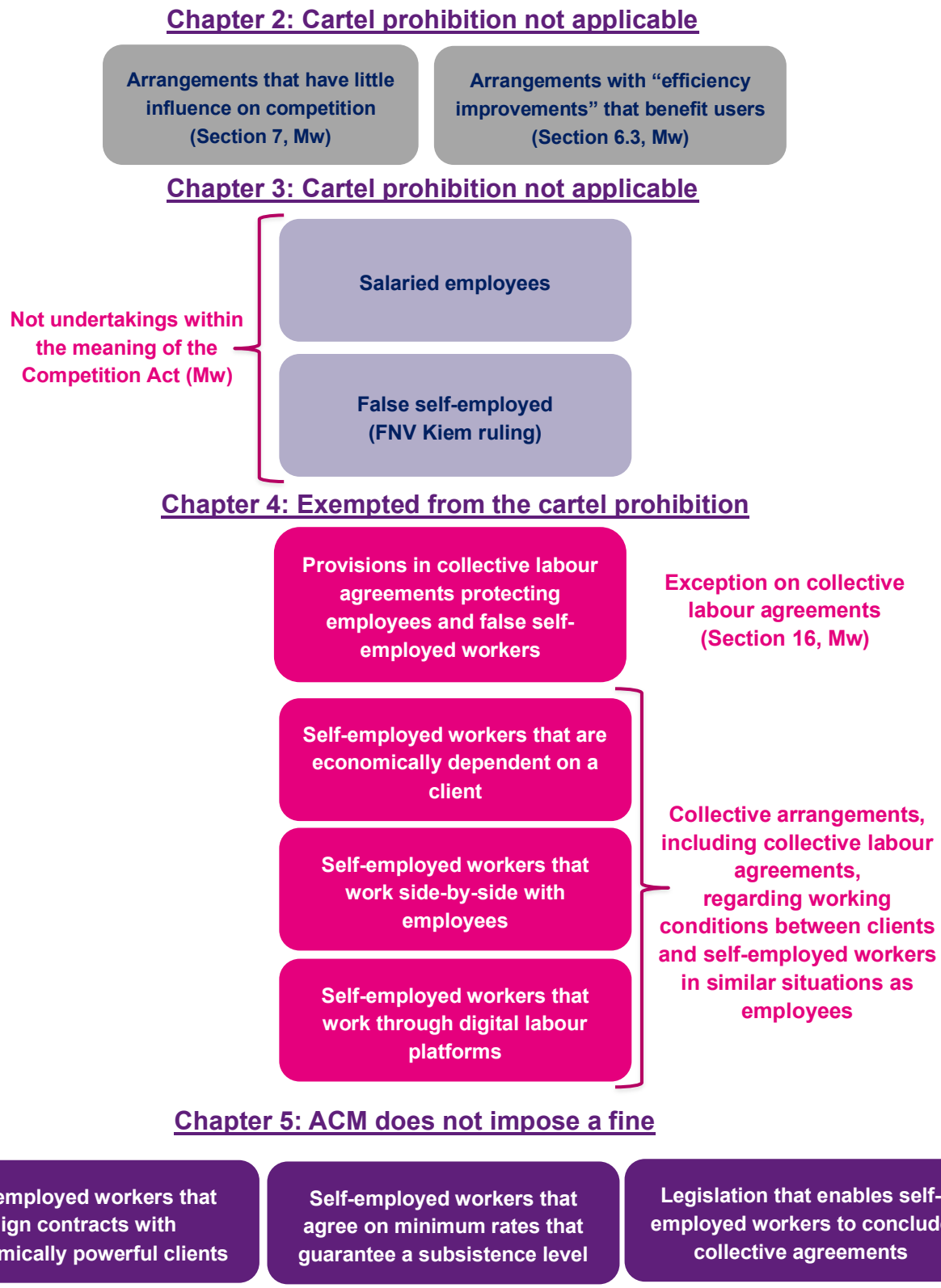
**Closing remark**

These Guidelines replace the Guidelines on price arrangements between self-employed workers of July 2020 of the Netherlands Authority for Consumers and Markets (ACM). These new Guidelines were prompted by the publication on September 29th 2022 of the *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons* of the European Commission.

**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 negotiations and arrangements regarding (working) conditions, such as prices, 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 labour law or tax law.

## Schematic diagram of these Guidelines



# 1 Introduction

1. The Netherlands Authority for Consumers and Markets (ACM) is an independent regulator. ACM's mission is to make 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, and it 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 undertakings are allowed to work together 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 solo self-employed workers whose only commercial activity is the provision of services through their own labour, sometimes creating a work. In the rest of this document, we will refer to them as self-employed workers.

4. The number of flexible employees and self-employed workers in the Netherlands has soared over the past few years.[2] In other Member States of the European Union too, self-employed workers as a share of the economically active population have increased.[3] In addition, digital labour platforms and platform work are on the rise.[4] For all these reasons, the European Commission on September 29th, 2022 published the *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons.*[5]

5. The flexibilization of the labour market, of which the growth in the number of self-employed workers is a manifestation, has positive effects on the economy and on 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 are able to capitalize on the benefits of entrepreneurship to realize a respectable financial position. However, there are also concerns.

6. First of all, there are concerns about the vulnerable positions of certain groups of self-employed workers, particularly at the lower end of the labour 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. Among the economically active population, the percentage of low-income workers is the highest among self-employed workers, and, in that context, some professions carry a greater risk for poverty than other professions.[6]

[1] Guidelines regarding arrangements between competitors | ACM.nl
[2] Statistics Netherlands (CBS), *Aantal flexwerkers in 15 jaar met drie kwart gegroeid* (2019), *Ontwikkelingen flexwerk* (2022) en *Flexwerk in Nederland en de EU* (2022) in (https://www.cbs.nl/nl-nl/dossier/dossier-flexwerk). Flexwerk includes temp jobs, payrolling, and on-call work.
[3] Statistics Netherlands (CBS), *Is elders in de EU het aandeel zzp'ers zo hoog als in Nederland?* (https://www.cbs.nl/nl-nl/dossier/dossier-zzp/is-elders-in-de-eu-het-aandeel-zzp-ers-zo-hoog-als-in-nederland-). Eurofound, *Exploring self-employment in the European Union*, Publications Office of the European Union (2017).
[4] ING Economic Bureau, *Platformen kunnen arbeidsmarkt drastisch veranderen* (november 2018), SER, *Hoe werkt de platformeconomie?* (October 2020) and Eurofound, *Employment and working conditions of selected types of platform work*, Publications Office of the European Union (2018).
[5] 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).
[6] Statistics Netherlands (CBS), *Armoede en sociale uitsluiting 2021*, chapter 4.

7. 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 labour 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 labour negotiations.

8. In a letter to the Dutch House of Representatives, 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 on June 15, 2020, withdrew its previous proposal to introduce a statutory minimum rate for self-employed workers.[7] The Dutch cabinet wrote it still had the ambition of protecting self-employed workers against poverty and preventing clients from hiring them at too low rates, and to prevent clients at the lower end of the labour market from choosing to work with self-employed workers purely because of lower costs.[8] In its letters on the labour market and on self-employed workers of 5 July 2022 and of 16 December 2022, the Dutch Minister of Social Affairs and Employment (SZW) wrote about, among other issues, a more level playing field for employees and self-employed workers, clarification of the assessment of employment relations, the legal presumption of employment status and preventing misclassification of self-employed workers.[9]

9. In light of the above-mentioned developments and concerns information is needed about the latitude that the Dutch Competition Act offers regarding arrangements that can further help improve the position (on the labour market or otherwise) of self-employed workers.[10] 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 (working) conditions under which they offer their services.

10. These Guidelines only concern self-employed workers whose only commercial activity is the provision of services through their own labour, sometimes, for example in case of photographers, copywriters, plasterers, bricklayers and webdevelopers, additionally creating a work. 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.

11. ACM does not grant exemptions to 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 the observance of competition rules, and for answering the question whether an exception to the cartel prohibition applies to their situation. These guidelines are an aid in finding those answers.

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[7] See by the way the Decree of 24 june 2020 to amend the Decree tariffs in criminal cases of 2003, the Decree sworn interpreters and translators and the Decree on legal costs administrative law with regard to setting minimum tariffs and guaranteeing of the quality and integrity of sworn interpreters and translators, Decree of 24-06-2020, Stb. 2020, 220 and of 24-06-2020, Stb. 2020, 221.
[8] See Dutch House of Representatives, parliamentary year 2019 - 2020, 31311, progress letter "Working as a self-employed worker" (in Dutch: Voortgangsbrief 'Werken als Zelfstandige'), 15 June 2020.
[9] See Dutch House of Representatives, parliamentary year 2021 – 2022, 29544, no 1112, 5 July 2022 and progress letter "Working with and as self-employed" (in Dutch: "Voortgangsbrief werken met en als zelfstandige(n)"), 16 december 2022. See also the letter "Cabinet's response to memo 'Taking back the platform economy' of June 3, 2022" (in Dutch: "Kabinetsreactie op initiatiefnota 'Herovering van de platformeconomie') (35230, no 4) and the letter "Cabinet's response to reports ARK and ADR" (in Dutch: "Kabinetsreactie rapporten ARK en ADR") of 24 June 2022, No. 1094, of the State Secretary of Finance and the Minister of Social Affairs and Employment to the Dutch House of Representatives.
[10] In addition, other parts of the Dutch Competition Act (for example the prohibition of abuse of a dominant position) or other laws that ACM enforces may benefit self-employed workers. For example, in certain cases, consumer protection laws can also protect self-employed workers that work from home; see https://www.acm.nl/nl/publicaties/acm-aanpassing-consumentenwetgeving-moet-mensen-beter-beschermen and https://www.acm.nl/nl/publicaties/geef-ondernemers-een-woonhuis-energie-tegen-consumentenvoorwaarden .

12. The explanations in these Guidelines primarily target clients (or the lawyers and policy advisors employed by them) that hire self-employed workers, employer organizations and employee organizations (unions), trade associations that protect the interests of self-employed workers, and advisors specialized in areas such as collective labour law. An abridged version (in Dutch) is available on ACM's website, targeting individual self-employed workers and other interested individuals. Mogelijkheden voor zzp'ers om samen afspraken te maken | ACM.nl

13. These guidelines replace the previous version, the Guidelines on price arrangements between self-employed workers of July 2020. Any changes compared to the previous version are mainly prompted by the European Commission's Guidelines that have since been published. In line with the objective of the legislator, ACM aims to interpret and apply the Competition Act as much as possible in accordance with European competition law, taking into account the specific circumstances in the Netherlands.

### *Reader's guide*

14. After the introduction in **chapter 1,** ACM in **chapter 2** explains what the cartel prohibition entails, and in what situations it is not applicable.

15. The Guidelines subsequently continue with the following chapters.

16. First, the cartel prohibition only applies to undertakings (and association of undertakings). In **chapter 3** of these Guidelines, ACM discusses this topic, and explains in what situations self-employed workers are considered undertakings within the meaning of the Dutch Competition Act, and in what situations not.

17. Second, it is explained in **chapter 4** what collective arrangements on working conditions between clients and self-employed workers, regardless of whether or not they are considered undertakings within the meaning of the Dutch Competition Act, do not fall under the scope of the cartel prohibition according to these Guidelines. In this chapter, ACM will also discuss a specific exception for collective labour agreements.

18. Finally, **chapter 5** of these Guidelines explains how, in its enforcement, ACM assesses arrangements between solo self-employed workers and arrangements with their counterparties. ACM mentions some situations where it does not impose fines.

# 2 What does the cartel prohibition mean?

19. 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.*'

20. 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 [11] 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.

21. The concept of 'price-fixing agreements' should be interpreted broadly: 'directly or indirectly fix[ing] purchasing or selling prices'[12] 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'.

22. 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.

23. 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 labour and services from self-employed workers.

## *In what situations does the cartel prohibition not apply?*

24. The cartel prohibition does not apply to arrangements that are not anticompetitive. Furthermore, the application of the cartel prohibition has been restricted in several ways. Arrangements, even price-fixing agreements, may be allowed by competition law in exceptional circumstances, despite their anticompetitive nature. Below, ACM explains the bagatelle exception and the exception for efficiency improvements. Collective arrangements on wage, price, tariff or fee and other working conditions between solo self-employed workers and their clients that do not fall under the scope of the cartel prohibition according to these Guidelines are mentioned in chapter 4.

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

### *Bagatelle exception*

25. The Dutch Competition Act contains an exception to the cartel prohibition for small-scale arrangements that have little influence on competition. This 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.

26. 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 combined turnover in the preceding calendar year was no more than 1,100,000 euros if it concerns undertakings whose activities are primarily aimed at delivering services.

27. The cartel prohibition does not apply to arrangements between competitors with a very small combined market share either. 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.

28. ACM uses as a starting point that an appreciable influence on trade between member states does not occur when self-employed workers make an agreement that will stay below a 5%-market share threshold and the aggregate annual turnover of the services covered by the agreement does not exceed 40 million euro. In that case, the cartel prohibition does not apply, and self-employed workers can make rate agreements with each other. Agreements, which do not fall within the criteria set out here, are not automatically capable of appreciably affecting trade between Member States, but require a further analysis.[14]

29. 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*[15] 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.*

*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*

[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] COMMISSION NOTICE, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004/C 101/07).
[15] https://www.acm.nl/nl/publicaties/leidraad-samenwerking-tussen-concurrenten (in Dutch).

*not apply to those arrangements (second bagatelle exception). They may proceed with their plan.*

## *Exception for efficiency improvements*

30. Section 6, paragraph 3 of the Dutch Competition Act provides for a statutory exception to the cartel prohibition for efficiency improvements (positive economic benefits) that offset the restriction of competition and that are, on balance, more economical for direct and indirect buyers.

31. 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'.

32. Section 6, paragraph 3 of the Dutch Competition Act imposes four criteria on the statutory exception to the cartel prohibition for efficiency improvements that offset the restriction of competition. The four cumulative conditions that have to be met can be reinterpreted for 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.

33. 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. In practice, it is not very often that the four cumulative conditions of this exception can be met. Therefore, it is recommended, to first ascertain whether the situations explained in chapters 4 and/or 5 are applicable.

*Ad a: Do the arrangements safeguard an objectively justified level of social protection?*

34. Social protection can prevent and reduce income risks in the short and long term. Suppose that self-employed workers are forced to offer such low rates for their own labour that they are unable to achieve a minimum income based on a 40-hour working week that safeguards an objectively established level of social protection. 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 an objectively justified minimum level of income or other working conditions, including training, safety and health, insurance and social security. Bringing about that level is considered an efficiency improvement, only when it supports and/or improves the (social) requirements for productivity and the (social) conditions for work performance.[16]

[16] 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,

35. It is important that the self-employed workers involved are able to substantiate objectively the income level and the level of social protection that they wish to guarantee through collective arrangements, as well as the efficiency improvement. 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 into account as well, so that the minimum income can be safeguarded.

36. In order to be able to invoke this exception, it is important that the benefits of the arrangements that mitigate the 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.

*Ad b: Are the arrangements necessary, and do they not go beyond what is necessary?*

37. The necessity requirement means that the arrangements are reasonably necessary for achieving the objective (safeguarding an objectively justified level of social protection). 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. Therefore, anticompetitive arrangements always have to be compared with other arrangements that have the same objectives but are less anticompetitive

*Ad c: Will a fair share of the benefits of the arrangements benefit the direct and indirect buyers?*

38. 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 workers in question.

39. 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. [17]

40. 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 better. Another possibility is that buyers themselves 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.

*Ad d. Will sufficient room for competition still remain?*

41. 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

comes within the framework of the objectives to which reference may be had pursuant to Article [101, paragraph 3]' (marginal 43).

[17] 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.

active in a certain market necessarily have to take part in the arrangements. After all, the entrepreneurial freedom of self-employed workers that 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. Are the ‘outsiders’ 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.

# 3 Self-employed workers to which the cartel prohibition does not apply

## *The concept of 'undertaking' according to competition law*

42. 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. The question of whether a self-employed worker falls under the scope of the Dutch Competition Act and, by extension, the cartel prohibition depends on whether or not they conduct activities as an undertaking.[18]

43. Every economic unit that offers goods or services on a market, is an undertaking, regardless of that entity or the way in which that entity is financed. This means that natural persons can also be undertakings within the meaning of competition law. Self-employed workers that run undertakings, carry the financial and commercial risks of their activities themselves. All costs are paid out of their own pockets. For self-employed workers that offer their own labour, the key question is whether they *offer services independently on a market.*

44. If self-employed workers are part of a collaboration that is an economic unit with its members, 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. One of the conditions is that the members of that collaboration structurally pursue a joint economic goal, and that the collaboration (the economic unit) must be able to exercise deciding influence over the individual members' market conduct. Self-employed workers who wish to do so, do give up part of their freedom to the collaboration. In other words, the collaboration, not the members themselves, is *de facto* 'the undertaking' that competes with other undertakings in the market.

45. Certain activities can be performed as salaried employee. For those activities, individuals are not considered undertakings, and the cartel prohibition do not apply to those activities. It is possible that, next to those activities, the same individual runs an undertaking (their own or otherwise) by offering goods or services on the market. Competition law *does* apply to those other activities.

## *False (misclassified) self-employed workers*

46. Solo self-employed workers that offer services independently on a market are, in principle, undertakings within the meaning of competition law. However, a self-employed worker whose only commercial activity is the provision of services through their own labour is not necessarily always truly independent. If their independence is merely nominal, the self-employed worker will, for the activities in question, not be regarded as an undertaking, according to competition law, but as an employee or a worker according to article 153 (1) TFEU.[19] Such situations are also referred to as misclassification of self-employed workers (in Dutch, such a contractor is referred to as: *schijnzelfstandige* or 'false self-employed'). Ultimately, it is for the competent authorities or courts

[18] According to competition law, the concept of undertaking does not say anything about the legal status of self-employed workers on the basis of other areas of law, such as labour 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.
[19] Ruling of 13 januari 2004, case C-256/01, ECLI:EU:C:2004:18 (Allonby), considerations 66-71. Also see article 45 (1) TFEU.

to decide whether someone should be (re)classified as an employee and not be classified as an undertaking within the meaning of competition law.

47. In the FNV KIEM ruling, the Court of Justice of the European Union decided on the basis of which criteria in a specific case there is the aforementioned nominal self-employment or false self-employment, thereby disguising an employment relationship. For example, it needs to be determined whether the self-employed worker is in a situation *that is comparable to that of employees*.[20] This can only apply to self-employed workers whose only commercial activity is the provision of services through their own labour, regardless of the legal form in which both parties have laid down their employment relationship. This is about the actual relationship that exists between both parties.

48. The Court of the Justice of the European Union considers a self-employed worker to be a *false* self-employed worker, that should not be classified as an undertaking, but as an employee, if:[21]
    a) They act under the direction of their employer as regards, in particular, their freedom to choose the time, place and content of their work; and
    b) They do not share in the employer's commercial risks; and
    c) for the duration of that relationship, they form an integral part of that employer's undertaking.[22]

*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 Court of Appeal of The Hague ruled:[23]
"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. The substitute musicians in this example are false self-employed workers, and, under competition law, do not qualify as undertakings.

*Examples: undertaking or not?*[24]

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,

[20] Ruling of 4 December 2014, case C-413/13, ECLI:EU:C:2014:2411, considerations 33 – 37 and 42 (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).
[21] FNV KIEM ruling, considerations 31-37. See also the ruling of the Court of Justice in case C-692/19, 22 April 2020, ECLI:EU:C:2020:288 (Yodel), considerations 27-31 (for case specific factors that indicate genuine self-employment see considerations 32, 43 and 45).
[22] Ruling of 16 september 1999, case C-22/98, ECLI:EU:C:1999:419 (Becu), consideration 26.
[23] Ruling of 1 september 2015 of the Court of Appeal of The Hague, ECLI:NL:GHDHA:2015:2305 (see considerations 2.3, 2.4 en 2.6).
[24] See for comparison "Labour agreement – or not?" in the ruling of the District Court of Amsterdam in case ECLI:NL:RBAMS:2021:545 (Dutch Ballet Orchestra).

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, this so-called independent copywriter would be considered a false self-employed worker, disguising an employment relationship, and should not be classified as an undertaking within the meaning of competition law, but as an employee. Therefore, the cartel prohibition does not apply to arrangements in connection with these activities. If the applicable collective labour 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.

This investigative journalist works as a genuine self-employed worker and, according to competition law, 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. He is, like the permanent actors, an integral part of the theater companies.

The actor independently offers his services in competition with other actors on a market, but loses his independence after getting an assignment. This actor is not an undertaking within the meaning of the competition rules, but should, with regard to the parts for which he rehearses and that he plays as jobs with theater companies, be (re)classified as an employee.

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 any paid employees, and only works with independent 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. 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 is that of a false self-employed worker, according to competition law. He has a 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. The fact that he uses his own means of transportation does not alter this fact. Therefore, the parcel carrier should not be classified as an undertaking within the meaning of competition law, but as an employee.

49. If false self-employment, thereby disguising an employment relationship, can be established by applying the aforementioned criteria, it means that the self-employed worker cannot be

considered an undertaking according to competition law for that activity, but should be (re)classified as an employee. That means that these self-employed workers do not fall under the scope of the Dutch Competition Act, so the cartel prohibition therefore does not apply to them. They are allowed to collaborate for the activities in question, and make price-fixing agreements 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 labour agreement (see the next chapter). 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.

# 4 Collective arrangements about working conditions between self-employed workers and clients outside of the cartel prohibition

50. This chapter only concerns arrangements that have been negotiated and/or made collectively between, on the one hand, certain categories of self-employed workers and, on the other hand, their clients to which they offer their services ('collective arrangements'), insofar those arrangements, given their nature and objective, concern the working conditions of such self-employed workers.[25] The working conditions concern aspects such as pay, working hours and schedules, vacation, leave, the physical workplace, training, safety and health, insurance and social security, and the conditions under which self-employed workers can suspend offering services, for example in response to violations of the agreement that concerns the working conditions.

51. The coordination among self-employed workers themselves and among clients themselves, insofar they are necessary and proportionate, also fall under this chapter (also if the collective negotiations collapse).[26] In addition, situations where self-employed workers wish to join an already existing collective agreement between self-employed workers and their clients fall under this chapter.

52. This chapter does not concern decisions of collaborations between self-employed workers or agreements between self-employed workers outside of the context of negotiations (or preparations thereof) with clients for improving the labour conditions of self-employed workers. More specifically, this chapter does not concern agreements that go beyond the regulation regarding working conditions by setting conditions (in particular: prices) under which services by self-employed workers or the clients are offered to consumers. This chapter also does not concern agreements between clients that unilaterally set the working conditions, including the hourly rates, of service providers.

## *Collective labour agreements*

53. In the abovementioned FNV KIEM ruling and previous European case law[27], it has been considered that collective labour agreements fall outside the scope of the cartel prohibition. Moreover, Section 16 of the Dutch Competition Act contains a statutory exception to the cartel prohibition.[28] In collective labour agreements, employers (or organizations thereof) and employees make arrangements about working conditions, such as pay and pensions. Such arrangements are, in principle, anticompetitive, because they restrict competition on the demand side of the labour market, and because they harmonize salary costs of employers. This reduces their margins to compete on price. However, in order not to impede severely parties to such

[25] The collective negotiations and the collective arrangements may have been made through the social partners or other associations of self-employed workers or through direct negotiations between a group of self-employed workers and their clients or associations of those counterparts. In addition, it may concern situations in which self-employed workers wish to fall under an already existing collective agreement that has been concluded between the client for which they work and a group of employers or self-employed workers.
[26] For example, this chapter concerns the coordination between clients themselves in order to decide on a compensation range that they can discuss with self-employed workers (or representatives thereof) during collective negotiations. That falls under this chapter insofar it is necessary and proportionate for the collective negotiations or the conclusion of a collective agreement. Such situations do not constitute an anticompetitive agreement to which the cartel prohibition applies. An anticompetitive agreement may exist if the clients use the information that is exchanged through the coordination as a starting point for unilaterally setting minimum compensations for self-employed workers (including others). That goes beyond what is necessary, and is not proportionate to conducting and concluding collective negotiations with self-employed workers.
[27] Among other rulings, the ruling of 21 September 1999 of the Court of Justice in the case C-67/96, Albany, ECLI:EU:C:1999:430.
[28] This does not apply if collective labour agreements (or provisions thereof) are used as a cover for a cartel.

collective labour agreements in the protection or improvement of employment and the terms thereof, collective labour agreements are exempted from the cartel prohibition as laid down in Section 16 of the Dutch Competition Act. This is the exception for collective labour agreements.

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

- They are the result of a social dialogue between employers' and employees' organizations (including false self-employed workers); and
- They directly lead to an improvement of conditions of employment for employees (and self-employed workers) and/or protection of employment.

55. From the FNV KIEM ruling, it follows that, in collective labour agreements, provisions can be included regarding the rates of self-employed workers if those workers are false self-employed workers, thereby disguising an employment relationship, and thus not undertakings. After all, they are equated with employees (see previous chapter). On a case-by-case basis the FNV KIEM-criteria need to be applied in order to determine whether the worker is false self-employed and thus cannot be considered an undertaking, according to competition law, but should be reclassified as an employee for that activity.

56. However, the exception for collective labour agreements does not apply to self-employed workers that are undertakings. Such is the case if they are not employees and also not false self-employed workers. They cannot take advantage of the exception for collective labour agreements to make arrangements regarding rates with clients (or organizations of clients) in the form of a collective labour agreement, because, in that case, such arrangements are not the result of a 'social dialog'. This is also the case if traditional unions represent self-employed workers that are undertakings.[29] If the exception for collective labour agreements does not apply, there can still be collective agreements about working conditions from the following three categories of collective agreements that fall outside the scope of the cartel prohibition.

*The case of the collective labour agreement for architectural firms 2015 – 2017*

The collective labour agreement for Architectural Firms 2015 – 2017 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 labour 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 working situation as employees.

## *Other collective arrangements about working conditions*

57. In its *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, the European Commission explains that there are three categories of agreements about working conditions that are negotiated collectively between self-employed workers and their clients that fall outside the scope of the cartel prohibition. These are collective agreements about working conditions of self-employed workers that are in situations comparable to those of employees, regardless of whether they can be

[29] FNV KIEM ruling, considerations 28-30.

(re)classified as employees as in the case of false self-employed workers (see previous chapter). According to the European Commission and ACM, these are the following three categories[30]:

a) Economically dependent self-employed workers;
b) Self-employed workers working "side-by-side" with employees;
c) Self-employed workers working through digital labour platforms.

- **Ad a: Economically dependent self-employed workers**

58. Self-employed workers that provide their services exclusively or predominantly to one client are likely to be economic dependent vis-à-vis that client. In general, such self-employed workers do not determine their conduct independently on the market and are largely dependent on their client, forming an integral part of its business. In addition, they are more likely to receive directions on how their work should be carried out.

59. Self-employed workers are considered to be economic dependent if over a period of one or two years they earn on average at least 50% of their total annual work-related income from a single client.[31] That is why collective agreements relating to the improvement of working conditions concluded between such self-employed workers and their clients fall outside the cartel prohibition.[32]

- **Ad b: Self-employed workers working "side-by-side" with employees**

60. Self-employed workers that perform the same or similar tasks "side-by-side" with employees for the same client are in a situation comparable to that of employees. They provide services under the direction of their client, and do not bear the commercial risks of the client's activity or they enjoy any independence as regards the performance of the economic activity concerned.[33] In practice, there are cases where these self-employed workers are not (yet) (re)classified as employees by the competent authorities or courts, but for the purpose of improving their working conditions should be able to benefit from collective negotiations. For example, collective agreements in the Netherlands apply to employees and self-employed workers that are active in the same sector, such as the performing arts.[34]

61. Therefore, collective agreements relating to working conditions between a client and self-employed workers that perform the same or similar tasks "side-by-side" with workers for the same counterparty fall outside the scope of the cartel prohibition.[35] Also in case of false self-employment, where the self-employed workers in question are not (yet) (re)classified as employees. The same applies to collective agreements about working conditions which cover both employees and self-employed workers with different counterparties in the same sector or industry.

[30] See part III of the *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons* of the European Commission.
[31] This also applies if the self-employed worker carries out work less than a year for the same client.
[32] With regard to this category, if self-employed workers sign a contract with a main contractor or intermediary, the organization or undertaking can be taken into consideration where and/or for what the activities are actually carried out.
[33] With regard to the "side-by-side"-category in the Netherlands, self-employed workers may also be in the same situation as employees that do not work for the same client, but for other undertakings that are active in the same sector or industry.
[34] See for example Article 14 of the collective labour agreement that was concluded in the performing arts sector between the Arts Union (in Dutch: de Kunstenbond) and the Dutch Association of Performing Arts (NAPK) for the period of January 1, 2020 through December 31, 2021, available at https://www.napk.nl/wp-content/uploads/2019/12/Cao-TD-2020-2021.pdf .
[35] With regard to this category, if self-employed workers sign a contract with a main contractor or intermediary, the organization or undertaking can be taken into consideration where and/or for what the activities are actually carried out.

- **Ad c: Self-employed workers working through digital labour platforms**

62. The emergence of the online-platform economy and the provision of labour through digital labour platforms has created a new reality for certain self-employed workers, which find themselves in a situation comparable to that of employees vis-à-vis the digital labour platforms through or to which they provide their labour.[36] Self-employed workers 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 room for negotiating their working conditions, including their remuneration. Digital labour platforms are usually able to impose unilaterally the terms and conditions of their relationship, without prior information or consultation of the self-employed workers.

63. For the purposes of these Guidelines, and in accordance with the guidance of the European Commission, the term 'digital labour platform' means[37] any natural or legal person providing a commercial service that meets all of the following requirements:

    1. The platform performs the service, at least in part, at a distance through electronic means, such as a website or a mobile application; and
    2. The platform performs the service at the request of a recipient of the service; and
    3. This involves, as a necessary and essential component, the organization of work performed by individuals, irrespective of whether that work is performed online or in a certain location.

64. 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. Organising work 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 these service providers. 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.

65. In light of the above recitals, collective agreements between self-employed workers and digital labour platforms that, by their nature and purpose, aim at improving working conditions fall outside the scope of the cartel prohibition, even if the self-employed workers in question are not (yet) (re)classified as employees as in the case of false self-employed workers.

[36] ACM establishes that Dutch case law contains examples of cases where self-employed workers that work for digital platforms are classified as employees. For example, see the ruling of the Amsterdam Court of Appeal of 16 February 2021, ECLI:NL:GHAMS:2021:392 (Deliveroo), the ruling of the Amsterdam Court of Appeal of 21 December 2021, ECLI:NL:GHAMS:2021:3978 (Deliveroo), the conclusion of prosecutor-general De Bock of 17 June 2022, ECLI:NL:PHR:2022:578 (Deliveroo) and the ruling of the sub-district judge of the District Court of Amsterdam of 13 September 2021, ECLI:NL:RBAMS:2021:5029 (Uber). See also the ruling of the Amsterdam Court of Appeal of 21 September 2021, ECLI:NL:GHAMS:2021:2741 (Helpling).

[37] See also Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM/2021/762 final of 9 December 2021. The definition of the term "digital labour platform" can be reconsidered by the European Commission if the definition in the Platform Work Directive gives reason to do so.

# 5 How does ACM conduct oversight of arrangements between and with self-employed workers?

## *ACM will not impose any fines if self-employed workers have insufficient bargaining power vis-à-vis their clients*

66. In some cases, self-employed workers that are not in situations comparable to those of salaried employees may have weak bargaining positions vis-à-vis their clients, and are therefore not sufficiently able to influence their working conditions. As a result thereof, even if their collective agreements with clients would be considered not to fall outside the scope of the cartel prohibition, these self-employed workers can be faced with problems that are similar to those of self-employed workers that *are* in situations that are comparable to those of employees, and that can take advantage of these Guidelines.

67. In accordance with the enforcement priorities of the European Commission, ACM does not impose any fines if self-employed workers collectively negotiate or conclude collective agreements regarding working conditions with one or multiple clients that represent the entire sector, or if self-employed workers negotiate or conclude collective agreements with a client that has an annual turnover of over 2 million euros or that employs at least 10 individuals, or with multiple clients that, together, exceed these thresholds. Mainly in these circumstances, self-employed workers are deemed to have insufficient bargaining power vis-à-vis their counterparty or counterparties to influence their working conditions. ACM can however impose fines if, given their scarcity, expertise, qualifications or the essential importance of their services, self-employed workers clearly appear to enjoy more than sufficient bargaining power vis-à-vis these clients.

## *ACM will not impose any fines on arrangements between and with self-employed workers that set a minimum rate for self-employed workers for safeguarding the subsistence level*

68. In the introduction of these Guidelines (see marginal 6), 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 do not restrict competition by object, but solely aim to guarantee the subsistence level, and do not go beyond that objective. Such arrangements should always be assessed in the context of the situation without those arrangements.

69. The right to subsistence has been laid down in Article 20 of the Constitution of the Netherlands. This right guarantees the ability to live a decent existence. Article 34 of the Charter of Fundamental Rights of the European Union also guarantees the right to social security and social assistance.[38] In the Netherlands, the right to social assistance (in Dutch: bijstand), which is the social assistance to cover essential living expenses, has been laid down in the Participation Act (in Dutch: Participatiewet).[39] In the Netherlands, the subsistence level is based on the level of social assistance for a single person. If without arrangements between and with self-employed workers prices and remunerations would lead them ending up below the statutory subsistence

[38] See also Articles 13 and 30 of the European Social Charter, Article 3.3 of the Treaty on the European Union and Articles 9 and 151 of the Treaty on the Functioning of the European Union. Furthermore, see the Interinstitutional Proclamation on the European Pillar of Social Rights of the European Parliament, the Council and the Commission of 17 November 2017, points 12 and 14.

[39] Act of July 2, 2014, amending the Work and Social Assistance Act, Sheltered Employment Act, Work and Employment (Young Disabled Persons) Act and several other acts aimed at promoting participation in the job market for people with capacity for work, and harmonization of these regulations (in Dutch: Wet van 2 juli 2014 tot wijziging van de Wet werk en bijstand, de Wet sociale werkvoorziening, de Wet werk en arbeidsondersteuning jonggehandicapten en enige andere wetten gericht op bevordering deelname aan de arbeidsmarkt voor mensen met arbeidsvermogen en harmonisatie van deze regelingen). See, among other provisions, Articles 5, 11 and 19 of the Participation Act.

level a situation may arise, that runs counter to the principle of being able to lead a life of dignity.[40] That is not a situation that the competition rules are intended to protect.[41]

70. That is why 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 cover essential living expenses (statutory subsistence level). These arrangements protect self-employed workers against poverty, by preventing them from working (or having to work) on assignments at too low rates.

71. Finally, ACM refers to the European Commission's guidance in case of legislation that allow for collective negotiations and arrangements on prices and other working conditions for certain categories of self-employed workers to which the legislation applies. This concerns national laws that, with a view to social objectives, i) expressly grants self-employed workers in certain professions the right to collective negotiations or ii) excludes collective agreements of self-employed workers in certain professions from the scope of national competition law. The same goes for EU regulations that, in order to strengthen the bargaining position vis-à-vis clients, grants self-employed workers (or groups thereof) the right to collective bargaining and arrangements, for example, the copyright directive[42] that offers authors and performers the opportunity to strengthen their contractual positions in order to ensure a fair remuneration in their exploitation contracts.[43]

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

72. 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.

73. 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 that the latter does not comply with the Dutch Competition Act after all[44], 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.

74. Self-employed workers that wish to make collective arrangements about rates (minimum rates or otherwise) are responsible themselves for compliance with competition rules, and for answering the question whether the exceptions apply. These guidelines may help them make such

[40] In the determination of the minimum rate, indirect costs and any costs that are directly related to the assignment can be taken into account next to the compensation for the hours that are directly related to the assignment. In addition, insurance premiums or reservations for sickness and disability risks with loss of income can be important to calculate the minimum rate.
[41] As acknowledged by the European courts competition rules are there to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union. Ruling in case C-52/09, TeliaSonera, february 17th 2011, ECLI:EU:C:2011:83, consideration 22, C-377/20, ENEL, may 12th 2022, ECLI:EU:C:2022:379, consideration 41 and case T-458/09, Slovak Telekom, march 22nd 2012, ECLI:EU:T:2012:145, consideration 38.
[42] Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 (OJ L 130 of 17.5.2019, page 92).
[43] Collective negotiations can also be used in the cases that are listed in Article 19, paragraph 5, Article 20, paragraph 1, and Article 22, paragraph 5, of Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 (OJ L 130 of 17.5.2019, page 92).
[44] For example, because the self-employed workers in question were incorrectly not classified as undertakings, or because the bagatelle exception was applied incorrectly.

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.

*Example: a collective labour agreement for cleaners and the application of the Guidelines*

*Following collective labour negotiations in the cleaning sector, a new collective labour agreement was concluded between unions and employers. The collective labour agreement was declared generally binding, which means that a small group of remaining employers (particularly SMEs/SMBs), too, are bound by the collective labour agreement. A pay increase has been included in the collective labour agreement. The arrangements do not serve as an objective to reach a certain level of cleaning quality. Under a code for responsible market conduct, market participants already seek to achieve high quality. The unions represented employees (union members or otherwise) as well as self-employed workers (union members or otherwise). With regard to the self-employed workers, it has been determined that they are assumed to be employees if they earn less than 140% of the collective labour salary for cleaners. The self-employed workers practically do the same work as the employees, yet with more autonomy, at times they decided themselves, and they are less associated with the employer's organization or the client, than employees are. One group of self-employed workers works for a single client most of their time, and earns there at least 80% of their annual incomes, while another group works for multiple clients, and earns less than 50% of their annual incomes with each client. The former group of self-employed workers works together with the employees at the same time.*

*Employees are not undertakings within the meaning of the Dutch Competition Act, but the employers or clients* are*. In order to fall under the 'exeption for collective labour agreements' and thus outside the scope of the cartel prohibition, the collective labour agreement must be the result of the 'social dialog' between employees and employers and the provisions must result in an improvement of the working conditions. For the employees, that is the case here. (see chapter 4)*

*The assumption laid down in the collective labour agreement that self-employed workers that are paid less than 140% of the collective labour salary are employees, does not automatically mean that these are false self-employed workers. In that context, factors and circumstances should have been determined (by the parties to the collective labour agreement), which make clear that the criteria for false self-employment from the FNV Kiem ruling by the Court of Justice have been met. The exception for collective labour agreements does not apply to the 'real' self-employed workers in this example.[45] (see chapter 3)*

*The group of self-employed workers that, for most of their time, perform cleaning work for a single client, is allowed to conclude a collective agreement (or have one concluded on their behalf) with clients about working conditions. After all, those self-employed workers earn, on average, at least 50% of their total annual professional income from a single client. Even if this were not the case, these self-employed workers would still be allowed to make collective arrangements (or have them made on their behalf) about their working conditions, because these self-employed workers work 'side-by-side' with employees, that (almost) do the same job, even though they were not (yet) considered to be false self-employed workers. (see chapter 4)*

*With regard to the group of self-employed workers that works for multiple clients, the foregoing does not apply. Insofar the provisions in the collective labour agreement about pay are applicable to that group, they fall under the scope of the cartel prohibition. ACM will nonetheless not impose any fines if and to the extent that the collective arrangements about the working conditions were made with various clients with an annual turnover (either individually or combined) of over 2 million euros and with more than 10 employees. Furthermore, non-intervention fits the guidelines of the European Commission because the outcome of the collective negotiations have been declared universally binding* for the self-employed cleaners by the Minister of Social Affairs and Employment *pursuant to the Declaration of Universally Binding and Non-Binding Status of provisions of collective labour agreements Act.[46] (see chapter 5)*

[45] See Operative part V in the Order of the Minister of Social Affairs and Employment of 29 september 2021 of declaring universally binding the provisions of the collective labour agreement for architectural firms, Staatscourant 2021, 40400.
[46] See in comparison the non-binding declaration of a provision in a collective labour agreement because of the disadvantage for unrepresented self-employed workers, Order of the Minister of Social Affairs and Employment of 2 september 2014 of universally declaring binding the provisions of the collective labour agreement for Painters and Decorators, Finishing Contractors and Glaziers in the Netherlands, Staatscourant 2014, 19770.