



# Guidelines for collective bargaining for solo self-employed workers

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# Executive summary

One phenomenon of the modern world of work is the increase in new, mostly precarious forms of employment that neither correspond to traditional full-time employment protected by labour and social law nor can be qualified as traditional self-employment.

The Commission's initiative to use the guidelines to achieve an improvement in the working conditions of certain self-employed persons should therefore be viewed positively in principle. Regarding the [Commission's Communication on Guidelines on Collective Agreements for Solo Self-Employed Workers](#), AK takes the following position:

## Brief overview

- In view of the problem that social security systems are increasingly being undermined by the blurring of self-employed and employed work, AK calls for separate efforts at EU and national level to prevent opportunities for evasion in the social security sector.
- The guidelines must be consistent with the draft directive on improving the working conditions of platform employees and the case law of the European Court of Justice. Furthermore, the legally rebuttable presumption of the existence of an employment relationship must also be taken into account in the guidelines.
- Collective agreements as such must be completely excluded from antitrust control, regardless of whether they concern typical, atypical employees or economically dependent self-employed persons.
- The new regulation must be designed to strengthen the bargaining power of economically dependent solo self-employed workers whilst not interfering with the national structure of collective law-making.
- The Austrian collective bargaining system guarantees the necessary bargaining power and independence and should therefore also be applied to collective bargaining for solo self-employed workers. Representation of the economically dependent solo self-employed is to be carried out by the existing voluntary employee interest representation as a social partner.
- Consideration of the demands of employees in Austria for an expansion of the definition of employees must continue to have priority, and existing legal regulations must not be watered down.
- The guidelines have the disadvantage that they are not legally binding and only bind the EU Commission. Consequently, there is a lack of the necessary legal certainty for those affected. AK calls for a Block Exemption Regulation (BER) within the meaning of Art 101 (3) TFEU as a more suitable instrument to achieve the objectives of the Guidelines.
- AK criticises the fact that the criterion, which assumes a dependency of solo self-employed persons on an annual income of 50 % from one client, does not take into account that, especially in the "low-wage sector", several contractual relationships exist and thus this threshold as a prerequisite for collective bargaining often cannot be reached.
- Another negative aspect is that agreements between solo self-employed persons, e.g. to work only under certain conditions or not to work for certain clients, are still subject to the antitrust restrictions of Art. 101 TFEU.
- With regards to the two types of agreements provided for in Art 4, where the EU Commission does not initiate proceedings, on a critical note, it should be pointed out that this provision does not provide sufficient legal certainty for the solo self-employed. With regards to the exemption for collective agreements where a national regulation exists, AK calls for an exemption in this regard to be included in the Austrian Cartel Act as well.

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# AK's position

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The efforts of the EU Commission to set up an initiative to enable collective bargaining for solo self-employed workers are initially welcomed. The possibility of negotiating collective agreements has already been called for by AK as part of a solo self-employment project led by AK Upper Austria (between 2016 and 2019). Such a solution would be appropriate to the interests of many individual solo self-employed workers so that they can act and contract largely independently economically and should be aimed at significantly improving their socio-economic position and living and working conditions. However, corresponding regulations and instruments must be legally sound and accurate. Under no circumstances may an exemption under antitrust law contribute to legitimising, concealing, and thus promoting bogus self-employment. Collective bargaining opportunities for solo self-employed workers are critical to establishing minimum standards and rebalancing power in the labour market, both online and offline.

AK's position first addresses the statements in Articles 1 and 2 of the Annex to the Commission's Communication and then subsequently turns to Articles 3 and 4 regarding the guidelines to be applied with regards to collective agreements on the working conditions of solo self-employed workers:

## Social security aspects

The increase in precarious solo self-employment and bogus self-employment is also accompanied by the challenge of ensuring end-to-end social protection for employees. A key parameter is clarification of the question of social security classification for appropriate social security.

Irrespective of the risk of inadequate social security for those affected, this also creates increasing challenges in securing the financing of welfare states as such. The increasing blurring of self-employed and employed work is undermining contribution-financed social security systems. As far as this problem is concerned, the AK demands that separate efforts be made at EU and national level, because collective

agreements to improve working conditions for those affected are not sufficient to solve this issue. One key measure would be to combat bogus self-employment.

## Economic and competition policy aspects

Particular attention should be paid to consistency with the [Directive on Improving the Working Conditions of Platform Workers \(COM\(2021\) 762\)](#), which is also available in draft form, and to the case law of the ECJ (ECJ, Allonby, C-256/01; Haralambidis, C-270/13) on bogus self-employment. Unfortunately, the draft guidance does not address the ECJ's ruling that a binding fee schedule may contain a restriction on the freedom of establishment guaranteed in Art 49 TFEU and Directive 2006/123 (C-377/17 of 4.7.2019). In the AK' point of view, the economic and competition policy objective of such a regulation should guarantee the enabling and development of market power against supplier monopolies as well as the strengthening of the bargaining power of economically dependent solo self-employed persons.

Collective agreements as such, however, must be completely excluded from antitrust scrutiny, regardless of whether they concern typical, atypical employees or economically de-pendent self-employed persons, including employees and solo self-employed persons on digital work platforms. It is not expedient, to make the fundamental right to collective bargaining of economically dependent self-employed persons dependent on thresholds such as the size or turnover of the employer, as proposed in the guidelines. Collective agreements create a level playing field for employees and economically dependent market participants and companies. They must not be undermined by allowing exceptions for small (but possibly very powerful) companies.

## On the representation of interests and collective agreement negotiations

The aim of the new regulation must be to strengthen the bargaining power of economically dependent solo self-employed workers whilst at the same time not interfering with the national structure of collective law-making.

Collective agreements (or collective bargaining agreements according to the guidelines) are concluded under Austrian labour constitution law between collective bargaining bodies of employers on the one hand and employees on the other. In addition to the statutory interest groups of employers and employees (chambers of commerce), voluntary professional associations are called upon to negotiate collective agreements, provided that they are officially recognised as having the capacity to conclude collective agreements (e.g. the Austrian Federation of Trade Unions and the trade unions on the employee side). For this official recognition, certain requirements must be met, such as independence from opponents; the professional association must have directed its purpose towards the legal organisation of the employment relationships of its members; its sphere of activity must extend over a larger professional and spatial area and it must be characterised by a high number of members. This tried-and-tested system ensures appropriate bargaining power and independence and should therefore also be applied to collective bargaining for solo self-employed workers. Representation of the economically dependent solo self-employed must therefore be carried out by the existing voluntary employee interest representation as a social partner. Thus, in the present guidelines, the EU Commission also specifically emphasises the role of the social partners in the conclusion of collective agreements with reference to the principles of the European Pillar of Social Rights.

In AK's opinion, it is important to ensure that the very desirable solidarity of those affected does not pave the way for solo self-employment, i.e. that the risks are not continued to be passed on to the platform workers. Social security, integration into the social system and the prevention of wage dumping for the core workforce must be guaranteed, whilst the erosion of the collective bargaining systems of salaried employees must be prevented at all costs. Consistency with the planned [Directive on Improving the Working Conditions of Platform Workers \(COM \(2021\) 762\)](#), the core provision of which is a legally rebuttable presumption of an employment relationship in the area of platform work, must therefore be ensured. The **presumption rule must be given priority over solo self-employment** if the criteria defined

therein apply. Consideration of the demands of employees in Austria for an expansion of the definition of employees must continue to have priority, and existing legal regulations must not be watered down.

It should also be noted that the statutory interest groups, as self-governing bodies, must retain their autonomous sphere of action, free from state intervention. Depending on their activity, this automatically makes professionals a statutory member of an interest group or professional association.

This entails that for solo self-employed in the transport sector, in the taxi, rental car, or delivery industry, there is only the possibility to belong to AK as an employee or to WKO as an entrepreneur. In case of doubt, this must be legally examined and determined to before making the correct allocation. It is problematic that many solo and bogus self-employed persons hardly know anything about their rights and possibilities owing to their membership in the interest groups due to their migration background or lack of language skills. From AK's perspective, there is a corresponding need for information which should be regulated in more detail at the level of the Member States as well as at Union level.

## About the guidelines

AK has already issued a [statement on the collective bargaining of solo self-employed workers as part of the public consultation on self-employed collective agreements](#) on 10 May 2021. The planned guidelines, which are intended to provide legal certainty regarding the conclusion of collective agreements in conformity with competition law for solo self-employed persons, are welcomed in principle by the AK.

Critically, however, the guidelines are also likely to contribute to more and more forms of economically dependent self-employment and to the concealment of bogus self-employment. The guidelines also bring with them the significant disadvantage that they are not legally binding and only bind the EU Commission itself. They therefore serve merely as explanations of how EU legislation should be applied and are not binding on either European or national courts. Consequently, the guidelines do not provide legal certainty for the parties concerned, which is why a block exemption regulation (BER) within the meaning of Art 101 (3) TFEU would be a more suitable instrument for achieving the purposes of the guidelines.

Further ambiguity is created by the division into different groups of solo self-employed: the Commission divides solo self-employed into those to which Art 101 TFEU does not apply, others to which the Commission does not want to take antitrust action, and still others to which a violation of Art 101 TFEU is to be examined on a case-by-case basis. This leads to legal uncertainty on the part of those affected as to which group they belong to and consequently which options they have to conclude collective agreements with their counterparts. The criteria on the basis of which the classification into groups is made also do not do justice to the reality of numerous solo self-employed persons and their interests that deserve protection.

### Art 3 – Agreements not falling under Art 101 TFEU

The definition under item 24 assumes that a solo self-employed person offers his/her services exclusively or predominantly to a contractual partner. In particular, if 50% of the annual income is generated by a contractual partner, dependency – comparable to that of salaried employees – exists.

However, this criterion overlooks the fact that many solo self-employed workers in the low-wage sector have to take on several jobs on a regular basis and in economic dependence in order to finance their livelihood, but remain below the 50% pa in each case. Affected solo self-employed workers will not benefit from the Commission's now-proposed guidelines unless they meet another criterion leading to the application of the guidelines. This is a factual element that the ECJ expressly emphasised in the Albany case as an important indication of bogus self-employment. The example presented in the guidelines concerns highly qualified architects.

AK explicitly points out that persons in the arts and culture sector, for example, often work as solo self-employed persons on behalf of several clients, on the one hand, and as salaried employees, on the other. As a result, they often fall below the *de minimis* threshold. AK draws attention to the fact that in the “low-wage sector” there are often multiple employment relationships – even outside of digital platforms – and that the self-employed persons concerned therefore do not find sufficient legal and social protection in this proposed guideline.

Furthermore, it is to be criticised that agreements between solo self-employed persons without connection to negotiations with a counterpart, which restrict the freedom of principals to procure labour, are excluded from the scope of the guidelines (items

16-18). Agreements between solo self-employed persons, for example, to work only under certain conditions or not to work for certain clients thus continue to be subject to the antitrust restrictions of Art 101 TFEU. However, it is precisely the boycott of certain powerful clients or certain conditions that can be an effective means for organised solo self-employed workers to balance the typical power imbalance between them and the clients. Such measures are comparable to strikes by employees, which are covered by the right to collective bargaining and collective action in Art 28 CFREU and, as part of labour law, must of course be treated strictly separately from competition and antitrust law. If the Commission's guidelines are to clarify that certain collective agreements do not fall within the scope of Art 101 TFEU, then this must also apply to collective actions.

In turn, items 28-31 describe work contexts that occur both in the field of digital platforms and in other forms of organisation. Decisive for the difficult working conditions of the solo self-employed are primarily the circumstances that they have no or only very little influence on the working conditions and that they come to their clients predominantly or exclusively via a single intermediary. The restriction to organisation by means of websites or applications for mobile devices (apps) appears too restrictive in the view of AK and should also apply to “analogue” forms of organisation.

### Art. 4 – Agreements on which the EU Commission does not take action

Art 4 provides for two types of agreements for which the EU Commission will not initiate proceedings:

a) Collective agreements of the solo self-employed with a counterpart that has a certain economic strength (more than two million euro in sales or more than 10 employees): As already mentioned above, the envisaged instrument does not represent sufficient legal certainty for these solo self-employed in particular. The restriction of the scope of application of the guidelines must be rejected as it does not do justice to the interests of economically dependent self-employed persons who wish to exercise their fundamental right to collective bargaining.

b) As regards collective bargaining agreements, insofar as either a national regulation, granting the right to collective bargaining to the parties concerned or a national exemption from the ban on cartels exists: In the opinion of AK, the EU Commission transfers the responsibility for this to the national legislator through this provision. **AK therefore sees an urgent need to**

**include an exemption in this respect in the Austrian Cartel Act.**

In summary, AK considers the European Commission's approach of granting an exemption from EU competition law for solo self-employed persons entering collective negotiations to be fair and objectively required. However, the initiative must not interfere with the national structure of collective legislation or lead to a dilution of the concept of employees or an erosion of the level of protection for employees. Instead, it should be a measure for intervention due to an undesirable development also identified by the European Commission.



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## About Us

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The Austrian Federal Chamber of Labour (AK) represents by law the interests of about 3.8 million employees and consumers in Austria. It acts on behalf of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the AK EUROPA Office established in 1991 in Brussels are the representation of AK towards the European Institutions and interest groups. Other objectives are the monitoring of EU policies and transferring relevant information from Brussels to Austria, as well as to lobbying the expertise developed in Austria and positions of the Austrian Federal Chamber of Labour in Brussels.