# Fair Remuneration for the Solo Self-Employed: Limits and Possibilities under EU Internal Market Freedoms

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**Abstract**

In recent decades, Union law has considerably strengthened the social protection of employees, while largely excluding the self-employed from comparable safeguards. The traditional notion of the autonomous entrepreneur, organizing legal relations through private autonomy, no longer adequately reflects economic realities. Economically dependent self-employed persons face conditions similar to employees but are significantly more exposed to existential risks. This has triggered growing debate in politics and legal scholarship on extending social protection to vulnerable groups of the self-employed. A prominent proposal is the introduction of statutory minimum remuneration schemes. This article examines the legal constraints under Union law that legislators must consider when designing such regulations. In particular, it addresses the extent to which the fundamental freedoms of the internal market and the Services Directive limit the scope for protective legislation.

**Keywords:** Self-employed; Social protection; Adequate Remuneration; Minimum wage; Internal Market Freedoms; Services Directive; Platform Work

## A. Introduction

Historically, the EU's social policy primarily focused on the protection of employees. In recent years, however, there has been increasing discussion about the need to extend certain forms of social protection to specific categories of self-employed persons. In 2024, Eurofound published a report that supports this need for protection.[1] The study finds that the boundaries between employees and the self-employed are often blurred, leading to bogus self-employment and the misuse of self-employment arrangements. It concludes that economically dependent self-employed persons are in a comparable situation to employees, yet are twice as likely to face existential hardship.

One approach to improving the protection of vulnerable self-employed persons is their inclusion in social security systems. This aspect was already addressed by the Council of the European Union in 2019 through its Recommendation on access to social protection for workers and the self-employed, urging Member States to

1 *Eurofound*, Self-employment in the EU: Job quality and developments in social protection, Publications Office of the European Union, Luxembourg, 2024.

ensure formal and effective coverage.[2] Another means of improving protection is to extend the regulations applicable to employees to certain categories of self-employed persons and to consistently combat bogus self-employment. This is the path taken by the EU Platform Work Directive, which introduces measures to facilitate the determination of the correct employment status of persons performing platform work, including a legal presumption in favour of an employment relationship.[3]

In the end, however, the prevention of existential hardship must be based above all on ensuring that self-employed persons receive an adequate income. Only if they earn a sufficiently high and stable income on a regular basis can they sustainably secure their own livelihood. Whether self-employed persons earn such an adequate income depends on their bargaining power in contractual negotiations. With regard to employees, the ECJ has consistently held "that the worker must be regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose a restriction of his rights on him".[4] By contrast, EU social policy in relation to the self-employed is based on the assumption that they are capable of asserting their own interests and negotiating appropriate contractual terms. As a result, EU law contains no provisions ensuring fair or adequate contractual conditions for self-employed persons. Instead, EU law protects entrepreneurs by prohibiting restrictions on the freedom of establishment and the freedom to provide services (Art. 49 and 56 TFEU) and by guaranteeing the freedom to conduct a business, including the freedom of contract (Art. 16 CFR). The misuse of private (negotiating) power, in contrast, is addressed only within the framework of competition law, namely through the prohibition of cartels (Art. 101 TFEU) and the prohibition of the abuse of a dominant position (Art. 102 TFEU). For solo self-employed persons whose economic existence depends essentially on one or very few clients (economically dependent self-employed), this legal framework provides insufficient protection.

From a human rights perspective, the question arises whether, in light of the empirically evident need for protection among specific groups of self-employed persons and in view of the social human right to fair remuneration (Art. 7 ICESCR, Art. 4 of the Revised European Social Charter), there is a need for improved legal safeguards for economically dependent self-employed persons. This question was explored in the context of the research project "The Right to Adequate Remuneration for Solo-entrepreneurs" funded by the Austrian Science Fund (Österreichischer Wissenschaftsfonds – FWF) and the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG). *Karin Lukas* and *Franziska Pupeter* concluded that Art. 4 ESC entails an obligation for the contracting states to ensure an adequate

2 *Council of the European Union*, Recommendation of 8 November 2019 on access to social protection for workers and the self-employed, OJ C 387/1 of 15/11/2019.

3 Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work, OJ L 2024/2831 of 11/11/2024.

4 ECJ, Case C-55/18, *CCOO*, judgment of 14 May 2019, ECLI:EU:C:2019:402, paras. 44 et seqq.

minimum income also for economically dependent self-employed persons.[5] They further established that such persons are likewise entitled to collective bargaining and collective action rights. An analysis of the legal systems of Germany and Austria revealed that these human rights obligations have not yet been implemented in either country.[6] Accordingly, there is a clear need for legislative action in both legal systems.

The on-going discussion about regulations to protect the self-employed shows that the design of such provisions poses considerable challenges for legislators due to the great heterogeneity of the self-employed group.[7] The self-employed cannot generally be regarded as the weaker party. There are many who can adequately enforce their interests towards their business partners. This raises the difficult question of how to define self-employed persons in need of social protection. Statistically, self-employed persons without employees (so-called solo self-employed persons) are particularly vulnerable.[8] However, this criterion alone is not sufficient to define the group of those in need of protection, as not all solo self-employed persons are vulnerable. A second aspect that may indicate a need for social protection is economic dependency. However, it is already difficult to define what this means. Moreover, this characteristic also does not allow a precise definition of the vulnerable persons.

Furthermore, significant challenges arise not only in determining whether protection should be granted, but also in designing the manner in which it is to be provided. The mere introduction of a minimum hourly wage does not necessarily ensure an adequate income for self-employed service providers, as it fails to account for preparatory and follow-up work as well as the use of own resources. Accordingly, determining an appropriate method for calculating remuneration also presents a legal and practical challenge.

In view of these challenges, this article does not aim to present specific regulatory proposals for protecting vulnerable self-employed workers, but rather to examine the limitations imposed by EU law that legislators must take into account when drafting minimum wage regulations for self-employed workers. The question addressed in the paper is the extent to which the prohibition of restrictions resulting from the freedoms of the internal market sets limits to such a regulation. This includes potential constraints arising from the Services Directive (Directive 2006/123/EC), which concretizes the internal market freedoms. In this context, the freedom to conduct a business under Art. 16 CFR must also be taken into account. With regard to collectively agreed minimum wages for the self-employed, a further question arises as to whether the negotiation of collective agreements for the self-

5 *Lukas/Pupeter*, Nachhaltigkeitsrecht 2024/4, pp. 368–377; *Bertazolli/Pupeter/Lukas*, Roma Tre Law Review, 2025/2.

6 *Lukas/Pupeter*, Nachhaltigkeitsrecht 2024/4, pp. 368–377; *Pupeter/Bertazolli/Lukas,* European Labour Law Journal 2026/1; *Schlachter/Leist*, Hungarian Labour Law E-Journal 2025/1 (in appearance).

7 For an overview, see *Bayreuther*, ZESAR 2020/3, pp. 99 et seqq.

8 *Horemans/Marx*, in: Conen/Reuter (eds.), pp. 80–98.

employed is compatible with the ban on cartels (Art. 101 TFEU). This question is not addressed in the article, but it has been analysed by *Dominik Leist* as part of the aforementioned research project.[9]

## B. No ECJ Precedent on Minimum Remuneration for Vulnerable Self-Employed

The ECJ has not yet explicitly ruled on the compatibility of minimum wages to ensure adequate remuneration and to protect against precarious self-employment. The judgement on the German Official Scale of Fees for Services by Architects and Engineers ("Honorarordnung für Architekten und Ingenieure", for short "HOAI") in the Commission v Germany case provides the most relevant guidance for assessing the framework conditions under EU law.[10] The HOAI regulated the calculation of fees for architectural and engineering services and set fee scales with minimum and maximum amounts for these services, which could only be undercut or exceeded in exceptional cases. In this respect, the HOAI shows certain parallels with the regulations on protection against precarious solo self-employment analysed here, as these would also have to set minimum rates that may not be undercut in principle. The main difference between the minimum rates stipulated in the HOAI and the minimum rates to be assessed here lies in the objectives pursued by the regulations. While the minimum rates at issue here are intended to protect against precarious self-employment in implementation of the right to a fair remuneration under Art. 4 of the European Social Charter (Revised), the rates of the HOAI, according to the Federal Government's explanatory statement, primarily serve to ensure a high-quality standard of architectural and engineering services.[11] The regulation was therefore intended less to protect the service providers and more to protect the service recipients from the effects of price-driven competition. The consequences of this difference with regard to the transferability of the ECJ's assessment for the present subject matter must be considered in more detail below.

Other ECJ decisions addressing fee regulations for self-employed service providers were issued specifically in the context of lawyers.[12] Like the HOAI decision, these rulings focused on protecting consumers and preventing a potential decline in the quality of legal services due to excessive price competition. They were therefore concerned with protecting service recipients rather than service providers themselves and are not directly applicable to the context of minimum remuneration for vulnerable self-employed persons.

9 *Leist*, Italian Labour Law E-Journal 2025/2, pp. 159–188; see also *Pupeter/Bertazolli/Lukas,* European Labour Law Journal 2026/1.

10 ECJ, Case C-377/17, *Commission v Germany*, judgement of 4 July 2019, ECLI:EU:C:2019:562.

11 ECJ, Case C-377/17, *Commission v Germany*, judgement of 4 July 2019, ECLI:EU:C:2019:562, para. 42.

12 ECJ, Joined Cases C-94/04 and C-202/04, *Cipolla*, judgement of 5 December 2006, ECLI:EU:C:2006:758, para. 59; Case C-565/08, *Commission v Italy*, judgement of 29 March 2011, ECLI:EU:C:2011:188.

In conclusion, while the cited case law provides insight into the ECJ's approach to regulating service fees, the specific question of the compatibility of minimum remuneration regulations for vulnerable self-employed persons has not yet been addressed by the Court and should therefore be examined more closely here.

## C. Legal Framework under EU Law for Statutory Minimum Remuneration

### I. Internal Market Freedoms and Statutory Minimum Remuneration

At the level of primary law, the internal market freedoms, specifically the freedom of establishment and the freedom to provide services (Art. 49 and 56 TFEU), are the first point of reference for the review of statutory minimum fees. These freedoms enable EU citizens and companies based in the EU to provide their services in all Member States without discrimination based on nationality or place of business. The freedom of establishment under Art. 49 TFEU protects the founding of a (branch) establishment in another Member State in order to provide services there, while the freedom to provide services (Art. 56 TFEU) enables the cross-border provision of services (within the meaning of Art. 57 AEUV) in another Member State without a (branch) establishment there.

#### 1. Scope of Application: Necessity of a Cross-border Situation

Both the provisions of the TFEU on the freedom of establishment and the provisions on the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State.[13] A cross-border situation is therefore required for the application of internal market freedoms. Such a cross-border element is present in the remuneration regulations for solo self-employed persons as soon as it cannot be ruled out that they apply to self-employed persons from other Member States seeking to establish themselves or to offer their services in the host Member State.[14] This requirement will be fulfilled in almost all cases, especially as it is sufficient if the service provider has their private residence in another Member State (e.g. cross-border commuters).[15]

13 ECJ, Case C-268/15, *Ullens de Schooten*, judgement of 15 November 2016, ECLI:EU:C:2016:874, para. 47 with further references.

14 ECJ, Joined Cases C-159/12 to C-161/12, *Venturini*, judgement of 5 December 2013, ECLI:EU:C:2013:791, para. 25. On the other hand, it is not sufficient if the cross-border connection can only be hypothetically derived from certain circumstances that could speak in favour of such an interest in the abstract, cf. ECJ, Case C-318/15, *Tecnoedi Costruzioni Srl*, judgement of 6 December 2016, ECLI:EU:C:2016:747, para. 22.

15 Cf. ECJ, Case C-470/04, *N*, judgement of 7 September 2006, ECLI:EU:C:2006:525, paras. 24 to 28.

## 2. Prohibition of Restrictions

According to established case law, both Art. 49 and Art. 56 TFEU not only prohibit discrimination, but also prohibit restrictions, which contain measures that are liable to hinder or make less attractive the exercise of the guaranteed freedoms.[16] State-fixed minimum wages could come into conflict with the latter, even if they apply indiscriminately to all solo self-employed workers. It could be argued against the existence of a restriction that setting appropriate minimum wages to ensure a living wage does not necessarily make it less attractive for self-employed persons to set up in the host Member State, but on the contrary could even make it more attractive. However, it is questionable whether the ECJ will follow this argument. This is indicated by the reasoning of the Court of Justice in the "Cipolla" case, which concerned a scale of lawyers' fees. In this case, the Court ruled in favour of a restriction of the freedom of establishment due to the fixed minimum fees. It reasoned as follows: "That prohibition deprives lawyers established in [another] Member State (…) of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad."[17] At first glance, this argument also appears to apply to the minimum wages for solo self-employed workers analysed here.[18] However, there are some differences between lawyers' fees and the regulations analysed here that require a differentiated assessment.

Against this background, it is necessary to examine more closely whether minimum remuneration regulations for solo self-employed workers constitute a restriction on the fundamental freedoms. In applying the above-mentioned formula used by the ECJ to determine the existence of a restriction, significant difficulties often arise when assessing whether a measure renders the exercise of an internal market freedom *"less attractive"*. The ECJ has therefore repeatedly sought to mitigate the breadth and vagueness of its formula by introducing additional criteria. For instance, occurrences that are "too uncertain and indirect" are not to be regarded as restrictions of the fundamental freedoms.[19] It could be argued that the impact of minimum wages on the exercise of internal market freedoms is very uncertain and indirect, because it would also seem plausible that guaranteeing a sufficient income would make the provision of services in another Member State more attractive. Ultimately, however, it must be acknowledged that the broad notion of restriction

16 ECJ, Case C-55/94, *Gebhard*, judgement of 30 November 1995, ECLI:EU:C:1995:411.
17 ECJ, Joined Cases C-94/04 and C-202/04, *Cipolla*, judgement of 5 December 2006, ECLI:EU:C:2006:758, para. 59.
18 See *Bayreuther*, ZESAR 2020/3, p. 99, 102.
19 ECJ, Case C-418/93, *Semeraro Casa Uno*, judgement of 20 June 1996, ECLI:EU:C:1996:242, para. 32; with regard to the free movement of workers: ECJ, Case C-190/98, *Graf,* judgment of 27 January 2000, ECLI:EU:C:2000:49, para. 25; ECJ, Case C-437/17, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH*, judgment of 13 March 2019, ECLI:EU:C:2019:193, para. 40.

gains little clarity from the vague terms "uncertain and indirect", which is why this attempt at clarification by the ECJ has rightly been subject to criticism.

Greater clarity can be found in the ECJ's approach in other decisions, which focuses on whether the measures in question "affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade".[20] The Court has emphasised "that rules of a Member State do not constitute a restriction (…) solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory".[21] On the other hand, a restriction is said to exist in particular if persons from other Member States are "deprived of the opportunity of gaining access to the market of the host Member State under conditions of *normal and effective competition*".[22] With regard to lawyers, the ECJ considered it necessary for lawyers from other Member States to be able to charge lower fees in order to compete "more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad".[23] In view of the still strongly nationalised legal markets within the EU, this consideration makes sense. Lawyers from other member states already face considerable hurdles when accessing the national legal market. If, in this situation, they are also deprived of the opportunity to compete with local lawyers by demanding lower fees, this makes market access considerably more difficult.

However, this argument in general does not apply to economically dependent self-employed persons as the barriers to market access typical of the legal market do not exist in most other markets. Therefore, self-employed workers from other Member States usually can enter the market of the host Member State under conditions of normal and effective competition, even based on a standardised minimum wage. Furthermore, the question arises as to whether there is "*normal and effective competition*" in the affected markets at all. The situation of economically dependent self-employed persons is characterised by the fact that they generally have little influence on the contractual arrangements with their clients. The conditions under which services are provided are therefore often essentially determined unilaterally by the client. As a result, both domestic and foreign self-employed persons often do not receive adequate remuneration. If there is also competition for the lowest prices in this situation, there is no normal and effective competition, but rather wage dumping at the expense of the social security systems. It can therefore be con-

20 ECJ, Case C-201/15, *AGET Iraklis*, judgement of 21 December 2016, ECLI:EU:C:2016:972, para. 49; ECJ, Case C-565/08, *Commission v Italy*, judgment of 29 March 2011, ECLI:EU:C:2011:188, para. 46; ECJ, Case C-518/06, *Commission v Italy*, judgment of 28 April 2009, ECLI:EU:C:2009:270, paras. 64 et seqq.

21 ECJ, Case C-565/08, *Commission v Italy*, judgment of 29 March 2011, ECLI:EU:C:2011:188, para. 49.

22 ECJ, Case C-565/08, *Commission v Italy*, judgment of 29 March 2011, ECLI:EU:C:2011:188, paras. 51 et seqq. (emphasis by the author).

23 ECJ, Joined Cases C-94/04 and C-202/04, *Cipolla*, judgment of 5 December 2006, ECLI:EU:C:2006:75, para. 59.

cluded that minimum fees, which are intended to protect economically dependent self-employed persons from inadequately low remuneration rates, do not hinder the access to the market of a Member State, but rather create the conditions for normal and effective competition based on prices set above a binding minimum floor that safeguards a basic living standard and prevents the externalisation of costs to the social security systems and the general public. For this reason, such minimum remuneration rules for the self-employed should not be regarded as a restriction of internal market freedoms.

This outcome is likewise consistent with objectives of the EU. If the minimum wage sets a livelihood income, this merely restricts the possibility of offering services at a wage that is below the minimum subsistence level. Such dumping charges contradict the objective of the European internal market, which cannot be understood in isolation from the other EU objectives set out in Art. 3 para. 3 TEU, in particular the creation of a highly competitive social market economy aiming at social progress.[24] For this reason a regulation that prevents such dumping fees cannot be regarded as a restriction on the freedom of establishment and/or the freedom to provide services.

### 3. Justification of Restrictions

If, contrary to the position taken here, minimum remuneration rules for the self-employed are considered per se to constitute a restriction on the freedom of establishment or the freedom to provide services, the question arises under what conditions such a restriction may be justified. According to case law, restrictions of those freedoms are permissible if they are applied in a non-discriminatory manner, are justified by imperative requirements in the general interest, are suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it.[25] These requirements will be discussed in more detail below (under IV.).

## II. Services Directive (2006/123/EC) and Statutory Minimum Remuneration

In the Commission v Germany case, the ECJ did not measure the HOAI against the freedom of establishment but used the provisions of the Services Directive (Direc-

24 The ECJ rightly pointed out this connection between economic and social objectives in Case C-201/15, *AGET Iraklis*, judgement of 21 December 2016, ECLI:EU:C:2016:972, paras. 76 et seq.; in this sense, see also ECJ, Case C-438/05, *Viking Line*, judgment of 11 December 2007, ECLI:EU:C:2007:772, paras. 78 et seq..; ECJ, Case C-341/05, *Laval*, judgment of 18 December 2007, ECLI:EU:C:2007:809, paras. 104 et seq. For an interpretation of the fundamental freedoms in the light of Art. 3 TEU see also: *Terhechte*, in Grabitz/Hilf/Nettesheim (eds.), Art. 3 EUV, para. 40.

25 ECJ, Case C-55/94, *Gebhard*, judgment of 30 November 1995, ECLI:EU:C:1995:411, para. 37.

tive 2006/123/EC) as the primary standard of review.[26] Accordingly, there is only room for an examination based on Art. 49 TFEU if the Member State measure at issue does not violate the obligations under the Services Directive. This prioritised examination of the more specific provisions of secondary law is systematically convincing and is already familiar from other areas. For example, in the Laval[27] and Rüffert[28] cases, the ECJ did not measure the restrictions on the freedom to provide services directly against primary law, but against the Posted Workers Directive (Directive 96/71/EC) interpreted in the light of primary law, which, like the Services Directive, was adopted as a coordination directive on the basis of the competence under Art. 53 TFEU (or its predecessor provisions).

### 1. Applicability of the Services Directive to statutory minimum wages

The Services Directive is intended to facilitate the exercise of the freedom of establishment and the freedom to provide services (Art. 1 para. 1 Directive 2006/123/EC). To this end, it defines in the second section of its third chapter which national requirements for service providers are inadmissible (Art. 14) or must be reviewed (Art. 15). According to Art. 15 para. 2 lit. g, the requirements to be reviewed include compliance with fixed minimum and/or maximum prices by the service provider. The ECJ has subsumed the minimum and maximum rates of the HOAI under this standard.[29] The minimum rates examined here differ in their purpose from the fees set out in the HOAI. However, Art. 15 para. 2 lit. g does not refer to the purpose and therefore leaves no room for discretion in interpretation. Statutory minimum fees to protect against precarious self-employment are therefore also covered by this rule.[30] This stands in contrast to the classification adopted here, according to which such provisions do not constitute a restriction of the internal market freedoms. Methodologically, however, this contradiction can be resolved. If the Services Directive is intended to facilitate the exercise of the freedoms of establishment and to provide services, it should only restrict national measures that themselves constitute a restriction of the internal market freedoms. To the extent that the wording of Art. 15 para. 2 lit. g goes beyond this objective – for instance, by covering the minimum remuneration rates examined here – the scope of the Directive may be limited through a teleological reduction. According to the view taken here, minimum remuneration for economically dependent self-employed persons is therefore not subject to review under the Services Directive.

26 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, paras. 56 and 97.
27 ECJ, Case C-341/05, *Laval*, judgment of 18 December 2007, ECLI:EU:C:2007:809, para. 61.
28 ECJ, Case C-346/06, *Rüffert*, judgment of 3 April 2008, ECLI:EU:C:2008:189, paras. 17 et seq., 36.
29 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 56.
30 Cf. *Bayreuther*, ZESAR 2020/3, p. 99, 102; *Kottmann*, NJW 2019/42, p. 3025, 3028.

## 2. Services Covered by the Directive

If one does not follow the view taken here, the applicability of the Directive depends on whether the services in question fall within the scope of the Directive. According to Art. 2 para. 1 the Directive applies to services supplied by providers established in a Member State. The scope of application is therefore broader than that of the internal market freedoms under Art. 49 and 56 TFEU, as it is not necessary for the situation to have a cross-border dimension.[31]

Service providers can be both natural and legal persons in accordance with Art. 4 No. 2. The Directive therefore also covers solo self-employed persons who provide services.

The term "service" is defined in Art. 4 No. 1 as any self-employed economic activity, normally provided for remuneration, as referred to in ex. Art. 50 of the EC Treaty (now Art. 57 TFEU). Accordingly, for the purposes of the Directive, "services" must be delineated by excluding those activities that fall within the scope of the rules governing the free movement of goods, capital, and persons (cf. Art. 57 TFEU). Consequently, economic activities limited to the sale of goods, such as those carried out by solo self-employed sellers on marketplace platforms, do not fall within the scope of the Directive. By contrast, activities in the gastronomy sector – such as preparing, serving and selling food – are generally classified as services, meaning that the provisions of the Services Directive apply.[32]

Art. 2 para. 2 excludes some services from the scope of the Directive. This also includes services that are sometimes also provided by solo self-employed persons, e.g. services in the field of transport including taxis and ambulances (lit. d),[33] healthcare services (lit. f),[34] social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State (lit. j), and private security services (lit. k). But these services are not completely exempt from scrutiny under EU law, but only from scrutiny under the Services Directive. They are therefore to be measured directly against primary law, in particular the freedom of establishment (Art. 49 TFEU).

31 *Bayreuther*, ZESAR 2020/3, p. 99, 102.

32 ECJ, Case C-137/09, *Josemans*, judgment of 16 December 2010, ECLI:EU:C:2010:774, para. 49.

33 Cf. recital 21.

34 According to recital 22 this exclusion should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided; see on this exception in connection with day and night care centres for the elderly: ECJ, Case C-57/12, *Femarbel*, judgment of 11 July 2013, ECLI:EU:C:2013:517, paras. 34 et seq.

### 3. Standard of justification

Even if, contrary to the view taken here, Art. 15 para. 2 lit. g of the Directive were to apply, this would not in itself render minimum remuneration rules for the self-employed unlawful. Unlike the prohibited requirements listed in Art. 14, the requirements set out in Art. 15 must be assessed and may therefore be justified under the conditions laid down in Art. 15 para. 3. Accordingly, the following conditions must be met:

> 1) requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;
> 2) requirements must be justified by an overriding reason relating to the public interest;
> 3) requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

This standard corresponds to the standard developed by the ECJ for the justification of restrictions of internal market freedoms by overriding reasons in the public interest.[35] It is therefore ultimately irrelevant for the justification of minimum fee regulations whether they are to be measured against the Services Directive or directly against Art. 49 or 56 TFEU.

## III. Freedom to Conduct a Business (Art. 16 CFR) and Statutory Minimum Remuneration

A further legal standard against which minimum wages must be measured is the Charter of Fundamental Rights, which can also restrict Member States' scope for action. Art. 16 CFR guarantees the freedom to conduct a business including the freedom of contract.[36] In particular, freedom of contract extends to the freedom to determine the price of a service.[37] As the statutory minimum fees for the self-employed prohibits contractual agreements on lower fees, it could be argued that this will lead to a restriction of contractual freedom. However, this would presuppose that the scope of application of the Charter is affected. According to Art. 51 para. 1 CFR, the Charter addressed to the Member States only when they are implementing EU law. The ECJ interprets this provision to mean that the Charter applies if a leg-

35 *Cornils*, in: Schlachter/Ohler (eds.), Art. 15 para. 1.
36 ECJ, Case C-283/11, *Sky Österreich*, judgment of 21 January 2013, ECLI:EU:C:2013:28, para. 42.
37 ECJ, Case C-283/11, *Sky Österreich*, judgment of 21 January 2013, ECLI:EU:C:2013:28, para. 43.

islation falls within the scope of EU law.[38] This has been assumed, inter alia, where national legislation is liable to obstruct one of the EU's fundamental freedoms and the Member State concerned relies on overriding reasons in the public interest to justify such an obstacle.[39] It follows from this that the statutory minimum wage regulations would also have to be measured against Art. 16 CFR if, contrary to the view expressed here, one were to assume that there is a restriction of the internal market freedoms under Art. 49 and 56 TFEU. Assuming this is the case, however, it is questionable whether the minimum fees can actually be regarded as an obstruction of contractual freedom.

According to the case law of the ECJ, not every formal restriction of the parties' scope of action is sufficient to affect contractual freedom. In the case "Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie)" which concerned a standard form contract drawn up by one of the contracting parties, the ECJ rejected an interference with the freedom of contract because the applicants "did not have bargaining power as regards the content of the agreements concluded".[40] The economically dependent self-employed, to whom the statutory minimum fees apply, also generally have no bargaining power and therefore only have the choice of accepting or rejecting the contract offered to them. For this reason, according to the principles of the above-mentioned judgement, an interference with the freedom of contract should also be rejected under the circumstances examined here in most cases.

However, even if one were to assume an interference, this can be justified under Art. 52 CFR. To this end, the interference must be provided for by law, respect the essence of the rights and freedoms and, in accordance with the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.[41] These requirements correspond in fact with the aforementioned justification requirements of the EU fundamental freedoms. The ECJ therefore assumes that "examination of the restriction represented by national legislation from the point of view of Art. 49 and 56 TFEU also covers possible limitations of the exercise of the rights and freedoms laid down in Art. 15 to 17 of the Charter of Fundamental Rights, so that a separate examination of the freedom to conduct a business is not necessary".[42]

38 ECJ, Case C-617/10, *Åkerberg Fransson*, judgment of 26 February 2013, ECLI:EU:C:2013:105, para. 19.

39 ECJ, Case C-201/15, *AGET Iraklis*, judgment of 21 December 2016, ECLI:EU:C:2016:972, paras. 63 et seq.

40 ECJ, Joined Cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie)*, judgment of 15 April 2021, ECLI:EU:C:2021:280, para. 60.

41 ECJ, Case C-201/15, *AGET Iraklis*, judgment of 21 December 2016, ECLI:EU:C:2016:972, para. 70.

42 ECJ, Case C-322/16, *Global Starnet*, judgment of 20 December 2017, ECLI:EU:C:2017:985, para. 50.

## IV. Justification of minimum wage regulations for solo self-employed persons

Assuming a restriction on internal market freedoms or requirements for service providers subject to review under Art. 15 of the Services Directive, the compatibility of minimum wages for self-employed persons with EU law ultimately depends on whether such regulations can be justified under the criteria outlined above (under I.3. and II.3.). The first condition, that the regulations must not be discriminatory, should generally not cause any problems when structuring the remuneration regulations.[43] It is therefore mainly a question of whether such regulations can be based on an overriding reason in the public interest and whether they stand up to a proportionality test.

### 1. Overriding reason in the public interest

#### *a) Recognized reasons in HOAI case*

In the context of justifying the provisions of the HOAI, the ECJ, in accordance with its established case law, has recognised the quality of the work and the protection of consumers as overriding reasons in the public interest.[44] In some sectors, a minimum wage to protect against precarious self-employment could possibly also be based on these objectives. The ECJ has explicitly recognised "that it cannot be a priori ruled out that the setting of a minimum tariff may make it possible to ensure that service providers are not encouraged, in a context such as that of a market characterised by the presence of an extremely high number of service providers, to engage in competition that results in offering services at a discount, with the risk of deterioration in the quality of services provided".[45] It would therefore have to be shown that the market covered by the minimum charge is characterised by the risk of ruinous price competition leading to a deterioration in the quality of services provided.

In the case of precarious self-employed persons, however, low prices stem primarily from their limited bargaining power vis-à-vis clients, rather than being mainly the result of ruinous competition. While this can lead to low prices that might, in principle, pose a risk to service quality, clients, given their economic leverage, are able to monitor performance and exclude providers who fail to meet their expectations. Low prices therefore do not necessarily entail a deterioration in quality. Any justification for a minimum wage on the grounds of protecting service

43 See in the context of ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para.68.

44 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, paras. 70 et seqq.

45 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 78; in this sense, also the earlier case-law: ECJ, Joined Cases C-94/04 and C-202/04, *Cipolla*, judgment of 5 December 2006, ECLI:EU:C:2006:758, para. 67.

quality would thus need to demonstrate the existence of particular circumstances in which quality risks actually arise.

### *b) Other recognised reasons*

Recital 40 of the Services Directive lists other overriding reasons recognised by ECJ that could justify a minimum wage regulation. These include social policy objectives, the protection of workers, including the social protection of workers and the maintenance of the financial balance of the social security system. The extent to which this also applies to self-employed persons is shown by the ECJ ruling in the Commission v Belgium case on the so-called "Limosa" notification obligation for providers of cross-border services. There, the ECJ states the following: "On that point, it is sufficient to state that the objective of combating fraud, particularly social security fraud, and preventing abuse, in particular detecting "bogus self-employed persons" and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, *including self-employed service providers*."[46] Accordingly, the ECJ considers the protection of self-employed persons to be an overriding reason in the public interest in the same way as the protection of employees.

### *c) International law obligations as an overriding reason*

As already mentioned, international law requires the guarantee of adequate remuneration for vulnerable solo self-employed persons. The question therefore arises as to whether the fulfilment of this member state's obligation under international human rights standards could constitute an overriding reason in the public interest.

The ECJ has taken into account international human rights obligations in the Laval and Viking Line cases, in which it considered the guarantees of the European Social Charter and ILO Convention No. 87 in order to recognise the right to take collective action as a fundamental right that may constitute an overriding reason of public interest.[47] This reference of international standards can be explained by the fact that the Charter of Fundamental Rights had not yet entered into force at that time. The ECJ therefore had to prove that the right to take collective action, as a fundamental right, is an integral part of the general principles of Community law. Thus, the ECJ did not directly recognise the implementation of international law requirements as an overriding reason in the public interest, but used the international human rights guarantees to demonstrate that a particular right is part of the general

46 ECJ, Case C-577/10, *Limosa*, judgment of 19 December 2012, ECLI:EU:C:2012:814, para. 45 (emphasis by the author).

47 ECJ, Case C-438/05, *Viking Line*, judgment of 11 December 2007, ECLI:EU:C:2007:772, para. 43; ECJ, Case C-341/05, *Laval*, judgment of 18 December 2007, ECLI:EU:C:2007:809, para. 90.

principles of Community law. The protection of this right is a legitimate interest that can justify a restriction of the fundamental freedoms guaranteed by the Treaty.[48] The question arises as to whether this approach could also be considered with regard to the right to fair remuneration analysed here. The entry into force of the Charter in 2009 will not prevent this, since it does not preclude the recognition of new general principles relating to international guarantees, as follows from Art. 6 para. 3 TEU. However, a general principle in the sense of a right to adequate remuneration for solo self-employed persons cannot be established, because not every right guaranteed under international law can automatically be regarded as a general principle of EU law. Rather, as follows from Art. 6 para. 3 TEU, a common legal basis in fundamental rights in the national law of the Member States is required in order to adopt a general principle of EU law. Such a consensus cannot be recognised with regard to the protection of economically dependent self-employed persons.[49]

### *d) Interim Conclusions*

The recognition of the right to fair remuneration for solo self-employed workers under international law does not automatically constitute an overriding reason in the public interest on the basis of ECJ case law. However, it would be conceivable to take into account the requirements of international law in the interpretation of the Charter of Fundamental Rights, which, according to its preamble, reaffirms the rights as they result from human rights standards. For example, the right of every worker to working conditions that respect his or her dignity under Art. 31 CFR could be interpreted as also applying to self-employed workers.[50] It would follow that the protection of this fundamental right would be an overriding reason in the public interest. Ultimately, however, this is not relevant to the outcome, because the protection of self-employed service-providers is recognised in ECJ case law as an overriding reason in the public interest, regardless whether it is recognised as a fundamental right or not. In addition, a further overriding reason could be ensuring the quality of the work if the minimum wage also serve this objective. However, the latter is only likely to apply in rare cases.

48 Cf. ECJ, Case C-112/00, *Schmidberger*, judgment of 12 June 2003, ECLI:EU:C:2003:333, para. 74; ECJ, Case C-36/02, *Omega*, judgment of 14 October 2004, ECLI:EU:C:2004:614, para. 35.

49 On the lack of establishment in the legal systems of the Member States, see *Eurofound*, Regulating minimum wages and other forms of pay for the self-employed, Publications Office of the European Union, Luxembourg, 2022, pp. 41 et seqq.; see also the national reports in *Schubert* (ed.), pp. 9-223.

50 In this sense, *Kröll* in: Holoubek/Lienbacher (eds.), Art. 31 CFR para. 18; *Klein* in: Düwell/Boecken/Diller/Hanau (eds.), Art. 31 CFR, para. 16; *Bogg/Ford* in Peers/Hervey/Kenner/Ward, Art. 31 CFR paras.31,39 et seqq.; contrary opinion *Schubert* in: Franzen/Gallner/Oetker (eds.), Art. 31 CFR, para.9. Whether the right to fair and just working conditions under Art. 31 para. 1 CFR also encompasses remuneration is a matter of controversy (see *Schlachter*, SR 2019/3, pp. 165,171 et seqq.; for the author's view, see *Klein* in: Düwell/Boecken/Diller/Hanau (eds.), Art. 31 CFR para. 22).

## 2. Proportionality test

### *a) Suitability*

To pass the proportionality test, the minimum wage must first of all be suitable for securing the attainment of the objective pursued. Two conclusions can be drawn from the HOAI decision:

#### aa) The Burden of Proof

Firstly, the ECJ has commented on the burden of proof. The Commission had claimed that Germany has not demonstrated that removal of the minimum tariffs would entail a decrease in quality.[51] The ECJ did not agree with this view, but ruled that "it is the task of that Member State not to produce such evidence but solely to demonstrate that the HOAI is capable of making a significant contribution to the objectives pursued by limiting the risk of deterioration in the quality of planning services".[52] The decision allows a two-stage examination to be derived. In a first step, the ECJ states that the Federal Republic of Germany has sufficiently demonstrated the risk of a decrease in quality (and thus the need for protective measures).[53] In the second step, it states that the setting of minimum prices is a suitable measure to prevent the risk of a decrease in quality.[54]

Applied to the minimum wages analysed here, these findings suggest, that it must first be demonstrated that the risk of unfair remuneration actually exists. It must therefore be demonstrated that the persons covered by the minimum wage are in need of protection. An orientation for this issue is provided by international law. The European Committee of Social Rights considers that the minimum wage paid must not be less than 60% of the national net average wage.[55] If a significant number of the self-employed persons concerned earn an income below this threshold, it can be assumed that there is a need of protection. Demonstrating the need for protection is more likely to succeed the more clearly the scope of application of the regulation is defined.

In the second step, it must then be demonstrated that the statutory minimum wage is capable of making a significant contribution to preventing precarious self-employment. In this context, the specific design of the regulation becomes relevant. As already outlined in the introduction, the mere definition of an hourly wage is

51 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 85.
52 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 85.
53 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 81.
54 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 83.
55 *European Committee of Social Rights*, Digest of the case law of the European Committee of Social Rights, 2022, p. 73.

not sufficient in many cases and therefore not suitable for actually improving the economic situation of the self-employed in these cases. This is another aspect that argues in favour of specific regulations with clearly defined scopes of application.

bb) The Coherence Principle

Secondly, the ECJ addresses the coherence principle in the HOAI decision. This principle, which is part of the suitability test, requires that the national regulation genuinely reflects a concern to attain its objective in a consistent and systematic manner.[56] The HOAI did not fulfil these requirements because planning services in Germany could also be provided by service providers who had not demonstrated their professional capacity to do so and did not fall within the scope of the HOAI.[57] The Court emphasises "it is clear that that such minimum tariffs cannot be suitable for attaining such an objective if, [...] the provision of the services subject to those tariffs is not itself circumscribed by minimal safeguards that ensure the quality of those services".[58] These statements result in requirements for the design of minimum wages for vulnerable self-employed persons. Such regulations are only suitable if they actually pursue their objective in a coherent and systematic manner. This is particularly relevant when designing the scope of application. Exceptions generally harbour the risk of undermining the coherence of the regulation and must therefore be objectively founded and must not lead to gaps in protection. However, this does not mean that the minimum wage must apply to all self-employed persons. The legislator can aim to protect only certain groups of self-employed persons (e.g. depending on the activity, profession or sector) through statutory minimum conditions. This could make sense, as not all self-employed persons are equally in need of protection and there is no universal solution that fits all. The demand for coherent and systematic regulation is therefore not incompatible with a specific definition of the scope of application, as long as this definition is reasonable and consistent. Rather, coherent and systematic pursuit of the goal of protecting vulnerable self-employed persons requires that the regulations address the various specific needs.

cc) Interim Conclusions

To summarise, there are three requirements for the suitability of a minimum wage regulation: Firstly, it must be demonstrated that there is a need for protection. Secondly, the regulation must be designed in such a way that it can make a significant contribution to protect the self-employed. Thirdly, the regulation must pursue the objective of protecting the self-employed in a systematic and consistent manner.

56 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, paras. 89 et seqq.
57 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 92.
58 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 92.

*b) Necessity*

The second requirement is that the minimum wage must not go beyond what is necessary to attain that objective and it must not be possible to replace the minimum wage with other, less restrictive measures that achieve the same result. In this respect, the HOAI decision also sets standards with regard to the burden of proof. With reference to its earlier case law, the ECJ states, that the Member State must "demonstrate that its legislation is appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions".[59] Otherwise, the Member State concerned would in practice be deprived of its regulatory competence in the field in question.[60] With regard to the HOAI, the ECJ emphasised the existing uncertainties arising from the predictive nature of the assessment. The requirements set out in the HOAI must be justifiable at the time of their introduction. Justification must therefore also be possible even in the absence of empirical evidence directly comparing the effects of the chosen measure with those of alternative options.[61] This is particularly important in the context of minimum wages for the self-employed, as their impact can only be predicted. It is sufficient if it may reasonably be concluded from the evidence submitted – whether through statistical data or other means[62] – that the objectives pursued cannot be attained by less restrictive measures.[63]

Once it has been demonstrated that the self-employed are structurally in need of protection, the minimum wage will generally be necessary to ensure the protection of the self-employed. If they are unable to negotiate appropriate remuneration due to their structural weakness and there are no functioning collective bargaining procedures, there will generally be no less restrictive measures available. The possibility of providing the self-employed with guidance on the pricing of services[64] cannot be regarded as a less restrictive measure to achieve the objective, as the inadequate remuneration does not result from a lack of information, but from the lack of bargaining power.

59 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 64.
60 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 64.
61 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 65.
62 ECJ, Case C-16/23, *FA.RO. di YK & C.*, judgment of 17 October 2024, ECLI:EU:C:2024:886, para. 92.
63 ECJ, Case C 333/14, *The Scotch Whisky Association*, judgment of 23 December 2015, ECLI:EU:C:2015:845, para. 56.
64 ECJ, Case C-377/17, *Commission v Germany*, judgment of 4 July 2019, ECLI:EU:C:2019:562, para. 95.

### c) Appropriateness

Appropriateness is not specifically mentioned as a requirement in Art. 15 para. 3 of Directive (2006/23/EC). It also plays a subordinate role as a separate point of examination in the case law of the ECJ and is instead examined in the context of necessity. In cases where it is explicitly addressed, the ECJ requires that the disadvantages caused by the measure in question must not be disproportionate to the aims pursued.[65] This means that a judgemental comparison must be made between the objectives pursued and the disadvantages resulting from the minimum wage. The objective of protecting vulnerable self-employed persons and ensuring fair remuneration pursued by the minimum wage is of considerable importance, as it is based on human rights on the one hand and on Art. 3 para. 3 TEU and Art. 9 TFEU on the other. In contrast, the impact on the freedom of establishment and freedom to provide services – if one wants to assume a restriction at all – is marginal, as already explained above (under point I.2.). The disadvantages caused by the minimum wage are therefore not disproportionate to the objective pursued.

## D. Summary

The protection of economically dependent self-employed persons is moving slowly into the focus of European social policy. Currently, only a few minimum wages apply to self-employed workers in Europe. However, Art. 4 of the ESC requires those Member States that have accepted it as legally binding to ensure fair remuneration for vulnerable self-employed workers. Generally, EU law does not prevent the implementation of this human rights obligation. The primary standard of review is the Services Directive. Insofar as this does not apply, statutory minimum wages for the self-employed must be measured against the freedom of establishment and the freedom to provide services. There are good reasons why such minimum wage regulations should not be regarded as a restriction of internal market freedoms or as a requirement needing justification within the meaning of the Services Directive. If one takes a different view, the minimum wage regulations can be justified based on the Services Directive and the case law of the ECJ. The ECJ has already recognised the social protection of the self-employed as an overriding reason in the public interest. If there is a risk of unfair remuneration, minimum wages are necessary to achieve this objective by providing a significant contribution to ensuring fair remuneration. Less restrictive measures than the establishment of a statutory minimum wage are generally not apparent in these cases, unless appropriate wages are agreed in collective bargaining. Considering the justification requirements and the burden of proof on the Member States, it is recommended that the Member States legislate based on

65 ECJ, Case C-15/15, *New Valmar*, judgment of 21 June 2016, ECLI:EU:C:2016:464, para. 53.; ECJ, Joined Cases C-379/08 and C-380/08, *ERG and Others*, judgment of 9 March 2010, ECLI:EU:C:2010:127, para. 86.; ECJ, Case C-170/08, *Nijemeisland*, judgment of 11 June 2009, ECLI:EU:C:2009:369, para. 41.

empirical findings. When designing the regulations, it must also be ensured that the regulations pursue the objective systematically and consistently and that the scope of application of the regulations corresponds to the empirically established need for protection.

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