



20 May 2021

### **EC public consultation on collective bargaining agreements for self-employed – scope of application EU competition rules**

#### **Introduction**

1. This position paper constitutes BusinessEurope's response to the Commission's public consultation on collective bargaining, self-employed and competition policy and to the dedicated hearing of the social partners. In view of the broad nature of the questions posed in the public consultation, we have opted not to answer them directly and rather to provide our views by way of this position paper.
2. We appreciate that the Commission is not only running a public consultation on this topic, but also organised a dedicated hearing with social partners on 12 April to discuss it. Whilst this initiative is led by DG Competition, taking into account the potential impact on key social issues, including linked to social partner competences, a close collaboration with us throughout the process is crucial. A cautious, considered and proportionate approach from the Commission is also important.
3. In this respect, we welcome the Commission's intention that this initiative will not interfere with national industrial relations systems, including the modalities of collective bargaining, and that it will not deal with issues regarding the representation of self-employed and those related to (mis)classification of workers and employment status. This is necessary to ensure respect of social partner autonomy and diverse national industrial relations systems, including respecting the fact that it is up to the social partners to decide jointly who they want to cover with their collective agreements. As well as bearing in mind that classification of employment status and the categorisation of employers, self-employed and employees is for the national level.
4. We also welcome the Commission's intention that the initiative will not change the definition of undertaking, as this is important in ensuring the continued effectiveness of competition rules.
5. It is crucial that any initiative does not indirectly address the issues mentioned above or incite/encourage an approach at national level, which would either be of detriment to the autonomy of social partners, disrespect national competences, or harm competition as a whole.
6. Overall, for the reasons set out below, we do not believe that it would be appropriate or necessary to change existing EU competition rules, however it could be useful to clarify EU competition rules by way of guidance, to facilitate that they are respected in an equal manner across Member States. In that context, we agree that competition policy should not act as a barrier to those self-employed that wish to represent themselves, and to jointly negotiate for example training possibilities, insurance



coverage, e.g. for pensions/accidents, reporting information to authorities, e.g. on social security contributions etc. By being able to act collectively, this could strengthen their position in those situations where they may be weak as individuals, either when working through platforms or otherwise. However, we have certain conditions, which are highlighted in the paper.

7. For a number of reasons outlined below, if the Commission decides to bring forward an initiative to create more clarity in this area, we do not believe that a regulation would be the right approach as the initiative does not concern new rules. Interpretative guidance would be a better option. Furthermore, concerning the 4 models suggested for the scope of the initiative, we find that they all raise problems (see point 30 under specific remarks) and more analysis is therefore needed. However, we find that option 1, to limit the initiative to digital platforms, should be excluded, as working through a platform is not equal to having a weak position per se and many of the issues are similar for self-employed in general. Option 2, to limit the scope to professional customers of a certain minimum size and solo self-employed, seems to best catch possible weak positions and protect competition, also in order to allow for development of start-ups, for example in the IT-sector, which Europe needs so much.

### General remarks

8. **Self-employed play a crucial role in the EU economy**, including through digital platforms, in providing products and services to consumers and other businesses, and contributing to economic growth. It is also an important way of bringing undeclared work into the declared economy. While there are different evolutions in the numbers of self-employed in different sectors of activity, self-employment overall has in fact remained stable over the last few years<sup>1</sup>. It is also important to take account of the diversity of self-employed (including those working via platforms), as they are not a homogenous group. It is important to avoid creating barriers to people becoming self-employed, and to avoid stifling the creation and development of new, innovative business models, including platforms, also since these all provide important opportunities to individuals.
9. That is why competition law normally holds **horizontal agreements on prices, payment terms, products, and access, as anti-competitive**. As the self-employed normally would qualify as undertakings in EU competition law, this will thus have to be done with respect for Article 101 TFEU. This means that the law avoids giving unregulated freedom to self-employed workers to form cartels and agree how they provide their services, as this would impede a normal competitive process that encourages a positive outcome for public welfare and customers. Professional service providers sharing markets or colluding to set prices and/or influencing the quality of their work should be prevented. The agreements in question are null and void under EU competition law and thus unenforceable as they raise prices for customers and negatively affect competition.

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<sup>1</sup> Eurofound's webpage "[The many faces of self-employment in Europe](#)" based on its study exploring self-employment in the European Union.



10. We support the fact that the future competition policy initiative will not deal with issues related to **misclassification of workers and employment status**. If workers are found to be falsely classified as self-employed, according to national rules, they should be reclassified as employees, including all the rights and obligations that this entails. This includes access to collective bargaining and coverage of collective agreements, in line with national industrial relations systems. This does not require further measures at EU level and any attempt to undermine or subjugate competition law to address this issue is not appropriate. However, as set out in [BusinessEurope's response to the Commission's first stage social partner consultation on working conditions of platform workers](#), a number of actions can be taken, i.e. to encourage Member States to assess the different characteristics of workers to determine whether they are more appropriately classified as an employee or self-employed, and facilitating mutual learning.
11. The aim of this initiative should not be to remedy social challenges faced by self-employed, as this is not the task of competition policy and other actions would be more appropriate in this respect, e.g. implementation of the council recommendation on access to social protection, where necessary in relation to self-employed.
12. The **working conditions of self-employed** cannot be seen in a generic way, as they depend on different factors, including the tasks they are doing and the economic sector they operate in. We also do not believe that it makes sense to distinguish between self-employed providing services via platforms and those providing services otherwise. They just happen to conduct business through different means.
13. Any initiative should be based on **solid evidence and analysis**, not on perception. Research by Eurofound done on behalf of the Commission has shown that where solo self-employed are "vulnerable", this is not strongly correlated with the sectors of activity, occupation or education of self-employed. It is therefore logical that an approach focusing on these aspects would not be appropriate. This also strongly suggests that the perception of a vulnerable group of self-employed, including, for example, those working through platforms, or an assertion that the conditions of self-employed overall are deteriorating, is not actually borne from evidence, but rather more from perception. The situation of self-employed depends on many different factors, including not only those highlighted above, but also supply and demand, earning potential, whether the labour market is functioning well or not and therefore whether a self-employed is in a weak position or not. This cannot be determined in a horizontal or generalised way.
14. **Collective bargaining and collective agreements are an important tool** to find balanced solutions between employers and employees, combining social aspects, e.g. improving working conditions, with economic considerations, e.g. productivity and employment growth. As recognised by the commission, the possibility for **exemptions** to be made for agreements or bargaining practices that **promote economic progress and in relation to public interest**, has been interpreted in case law of the European Court of Justice (ECJ) as exempting collective agreements for employees from the scope of competition law. Also, whilst article 101 of the TFEU does not explicitly include an exemption from competition rules for agreements on pay and working conditions, this is the case in some national laws. This is of course



a decision for the national level if the agreements are not infringing EU competition law. For justified and valid social reasons, collective agreements establish a type of price cartel for employees, by setting wages.

15. However, this is a **completely different situation to self-employed**, who carry out their services for and with commercial contractors (whether via platforms or otherwise) and are therefore rightly considered as undertakings. This means that the same social/public interest reasons cannot/do not apply. It is also logical that they are subject to the rules on prohibition of price cartels between economic actors and that agreements made between self-employed persons to directly fix prices, including wages and fees, generally go against the rules of EU competition policy, as they are considered as restricting or distorting competition within the internal market. This means that self-employed should continue to be considered undertakings for the application of competition law, to allow for it to be enforced against unilateral price-setting.
16. It is important to ensure that the terminology used fits the context of any future initiative, and respects EU treaty obligations, as well as being used in a careful way to avoid misunderstandings and legal uncertainty. Given that the basis of any future initiative would be competition policy, we urge the commission to avoid using terminology such as collective bargaining and collective agreements, which are restricted in EU law to mandated social partner organisations representing employers and workers and/or their representatives in line with national industrial relations systems<sup>2</sup>. This is based on national definitions (e.g of employer, worker, employee self-employed etc), bearing in mind that an employment relationship is between an employer and an employee, whereas this is obviously not the case for solo self-employed, who do not have employees.
17. For the solo self-employed, speaking about collective representation, collective or joint negotiations and joint agreements, code of conducts, business conditions and similar arrangements, would be more appropriate. Using terminology like collective bargaining and collective agreements, which applies in the context of an employment relationship, risks blurring the distinction between self-employed and employees at EU level, which would cause legal uncertainty and confusion, water down the unique position of social partners and interfere with national definitions.
18. A key issue in ensuring that competition rules function properly, is making sure that **self-employed cannot collectively set fees/prices in their interactions with any other undertaking**, not only in consumer-facing services, but also in other business

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<sup>2</sup> See for example Article 6 TFEU giving legal force to article 28 in the Charter of Fundamental Rights of the European Union, which defines collective bargaining as negotiations between workers and employers.

**Article 28 Right of collective bargaining and action**

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.



to business transactions. In such cases, it is important to avoid speaking about a relationship between an employer and a self-employed – as this suggests similarities to an employment relationship, whereas they are two undertakings according to competition rules. Such collective setting of fees by self-employed, including by way of collective negotiations or joint agreements should continue to be covered by Treaty article 101, prohibiting cartels. Any initiative must avoid changing these rules, as it would be detrimental to the overall functioning of competition policy. Also, allowing an exemption for some self-employed from article 101, in relation to setting fees or prices, would risk of blurring the distinction between self-employed and employees, whereas the way to distinguish is for the national level to decide on. This could also mean that the commission inadvertently moves away from one of its key principles, i.e. to not deal with the issue of classification of employment status. It could also indirectly change the definition of undertaking, by exempting some self-employed from the competition rules that cover undertakings.

### Specific remarks

19. There is **a large diversity of situations across Member States, which needs to be respected**. A one-size-fits all approach is not appropriate and what works in one member state may be completely out of the question in another. For example, we note that in some member states, self-employed, including platform workers, can already be members of trade unions, set up associations, or are already covered by collective bargaining. In some countries, new trade unions have been set up to represent certain categories of workers (including platform workers) and negotiate working conditions or extend labour rights to specific categories of workers (e.g. dependent self-employed). However, in other systems, it is illegal for self-employed to be a member of a trade union or be covered by collective agreements. It is **solely up to Member States and social partners at national level**, to decide if and how to tackle such issues, and the EU cannot determine or indirectly impact who is covered by collective representation, collective bargaining or collective agreements at national level. This would harm national industrial relations systems and would breach the principle of subsidiarity - the EU does not have the legal competence to legislate on matters relating to collective representation at all and in any case could only be adopted by unanimity.
20. In business transactions, there may be differences between the **bargaining power of solo self-employed** and that of other companies, but this cannot be generalised, as it depends on many different factors including market share of different operators, economic sector, products/services they provide, skills and competences. Therefore, it would be wrong to assume that certain groups of self-employed, including those working via digital platforms, have lower bargaining power per se, as this can only be seen on a case-by-case basis.
21. When it comes to self-employed working via platforms, it is also important to recall that the **Platform to Business regulation** legally requires platforms to provide for transparency and access to the terms and conditions they apply, as well as other measures (e.g. setting out possible future reasons for suspension of work, notifying any changes to their terms and conditions at least 15 days before making them,



- creating a mechanism for handling complaints). Providing information can support better negotiating.
22. Specifically regarding platform workers, there are differences in terms of the level and frequency of their activity on the platform, whether it is their main source of income or not, and the fact that they often work not through one but a number of different platforms. This is also true to self-employed per se, who are a very diverse group, in terms of the level of their activity, their income, whether they have income from other sources, etc. This would make it ***inherently difficult to copy-paste salaried employment collective bargaining arrangements*** to such a diverse group and it would not allow for legitimate representation of their different interests. Also, there is an issue of freedom of choice for self-employed, including platform workers, who may not want to be collectively represented or to collectively bargain.
  23. For all the reasons stated above, ***we do not believe that it would be appropriate or necessary to change existing EU competition rules*** to allow self-employed persons, including those working on platforms, to engage in collective bargaining. This is also important in ensuring that any initiative does not go beyond what is necessary to achieve its objective, i.e. that it is proportionate.
  24. Above all, ***any initiative should neither directly or indirectly (at EU or at national level) lead to an obligation for self-employed or for the companies that they do business with*** to engage in negotiations or to organise collective representation. This would disrespect national and social partner competence, as it is for member states to specify modalities for collective bargaining and collective agreements.
  25. However, it is important that the design and implementation of any initiative safeguards this also at national level and avoids inciting/encouraging such practices. This means that ***the commission should make full use of existing competition rules***, fulfilling its role to ensure full respect of the EU Treaty. Unfortunately, recently, a less coherent approach to competition policy across member states has developed, despite this being an area of harmonised EU policy. There are tools in place to ensure competition policy works and these should be used to their full potential. This includes the possibility for the commission to take cases back from national competition authorities and override decisions, as well as highlighting that a national decision is invalid as it is not in line with EU competition law. Full use of the existing rules is also important to avoid that any initiative is used by national governments to restrict competition.
  26. At the same time, we ***agree that competition policy should not act as a barrier to those self-employed that wish to and where necessary, having the possibility to represent themselves, including collectively and to jointly negotiate***, e.g. on training, insurances etc. However, this should not be confused with collective agreement coverage or collective bargaining, which is for employees, determined in respect of national industrial relations systems. We also have some further key conditions in this respect, which are highlighted below.
  27. It would also be helpful to have ***more legal certainty*** and ***clarity*** in terms of the application of current competition rules.



28. ***We therefore believe that the best way to deal with this issue would be to issue interpretative guidance, not regulation.*** Given the dynamic developments in this area, this would also be the best way to ensure that any initiative is future proof. This would also allow for a flexible approach and the possibility to highlight concrete examples and explain the different court rulings. However, such guidance should fulfil the **following conditions**:

- Any initiative should be restricted to creating a safe harbour under competition law, for self-employed who wish to voluntarily work together to collectively discuss issues, which are covered within the understanding (including interpretation of the ECJ) of public interest (i.e. working conditions) with an entity that they are conducting business with. However, the exception to this should be discussions on prices, fees, including wages. This must not be permitted, as this would breach rules on cartels and be detrimental to competition. We note that the commission has already taken action in the past against unilateral collective agreements where self-employed fixed the price they charged to their clients. This is the right approach and should be maintained. This should not only apply in the case of price fixing by self-employed applied to private consumers, but also in self-employed interactions with other undertakings.
- Conclusion of agreements has to be between both sides, not a unilateral action. It would be important that the possibility goes both ways, i.e. that companies would also be allowed to bargain jointly with the solo self-employed. This should apply both to bilateral agreements between a company and group of self-employed, as well as to a group of companies buying services from a broader group of self-employed. It is also important that companies have a safe harbour, particularly taking into account those that use multiple apps, including in the same sector.
- In some member states, collective agreements are negotiated between workers and employers, and/or their mandated representatives at **sectoral level**. National rules and practices must be followed in this respect, as well as not mixing collective negotiations for self-employed with regular collective agreements entered into by social partners. At the same time, it is important to **ensure that the business models of platforms are not undermined** by any initiative based on sectoral bargaining. Where representatives of specific groups of platform workers who provide services through multiple platforms are able to negotiate simultaneously with numerous platforms, this can give the representatives an unequal bargaining power, in particular vis-à-vis smaller platforms. This would also not respect the diverse ways in which platforms operate, as well as the fact that platforms are individual business entities, rather than having agreements across a given sector.
- It is also important to avoid that agreements lead to excessive costs for platforms or lead to increases in the final price for consumers.
- It is important to ensure that any access to collective representation/negotiating does not lead to automatic classification of self-employed as employees at national level or in the courts. This would force self-employed into being employees with not only rights but also many obligations: in an employment relationship, the employer, for example, decides when and where an employee works, what tasks they need to complete, how and by when. It also comes with



financial/contractual obligations, such as employee contributions, adherence to specific insurance schemes etc. People often choose the flexibility and autonomy offered through self-employment as they are not bound by contractual obligations towards an employer and can organise and control their own schedule or bring a business idea to fruition. This individual decision must be respected, including avoiding forcing self-employed into an undesired employment status. It also could endanger potential job creation as being solo self-employed contributes to entrepreneurialism. In some cases it can be a first step into working life, where people either remain self-employed or become employers or employees later.

29. Solutions may be found involving trade unions, as it is the case in some countries - it is for trade unions, employers organisations and other actors at the national level to decide who to represent and how. At the same time, ***solutions are also being developed outside social dialogue structures***, such as in the form of self-regulation initiatives or codes of conduct, providing possibilities for collective representation to some categories of self-employed, as is the case in some countries or by some platforms. There are also informal structures or private companies providing services to self-employed, e.g. help with invoicing, access to training, or pooling resources to offer sick, maternity and holiday pay, without giving the legal possibility to bargain collectively or sign agreements. These different options should be supported. In such cases, it is important that the ***role of recognized social partners is respected*** and only the recognised social partner organisations should have the mandate/right to negotiate and implement collective agreements. Furthermore, the decision on which are the recognised social partner organisation is for the national level, according to their industrial relations system.
30. In terms of the scope of the initiative, (based on the options set out in the online consultation), we find that guidance is the right tool to provide more clarity for different groups of self-employed, also bearing in mind the need for an initiative to be future proof due to dynamic developments in this area. It would allow more easily for adaptations over time, which would be preferable to a regulatory approach, which would require setting a strict application to certain groups.
- ***Covering only self-employed working through digital labour platforms*** - this does not seem appropriate, as many of the issues raised apply equally to other solo self-employed. They just happen to conduct business through different means. This may also lead to unfair competition between self-employed. Also, determining on-line and off-line services is not so easy, as there is often a blurring between them. Also, we do not believe that most platform workers have low bargaining power per se, as this depends on their tasks/sector of activity, supply and demand for the service they provide, skills and competences, and how the platform operates.
  - ***Covering solo self-employed providing their own labour through digital labour platforms and other solo self-employed in the offline economy, insofar as this concerns professional customers of a minimum size*** – this gets round some of the issues mentioned above related to the first option. In particular, this would ensure that smaller platforms are left out of scope of possible collective representation/negotiating solutions for self-employed, which would be important in avoiding unbalanced bargaining power. Using



the EU SME definition could be a useful approach. However, this does not deal with the point that even with larger platform providers, those providing services through them, may not be in a weak bargaining position, depending on the various factors highlighted above.

- ***Solo self-employed providing their own labour through digital labour platforms and other solo self-employed in the off-line economy, insofar as regulated and liberal professions are excluded*** - this is based on a logical assumption that regulated and liberal professions in general have more bargaining power compared to solo self-employed. However, this is not always true. Therefore, this can only be seen on a case-by-case basis according to many different factors. Also, it would be difficult to identify regulated and liberal professions, as this differs between member states and there is no definition of liberal professions at EU level. Finally, some platform work is in fact regulated and licenced (e.g. ride hailing) and others could be in the future. Therefore, this may cause legal uncertainty.
- ***All solo self-employed providing their own labour through digital labour platforms in the off-line economy*** - this is likely to create an imbalance of negotiating power with smaller clients/platforms and may lead to negative effects overall on competition and the possibility for start-ups to establish themselves.