BUSINESSEUROPE

CONSULTATION RESPONSE

Draft Guidelines on application of competition law and collective bargaining of solo self-employed

1. We ***support the objective to provide clarity*** on the interplay between collective representation of solo self-employed and competition policy. We also support the goal to avoid that competition policy acts as a barrier to certain solo self-employed that wish to represent themselves collectively and to jointly negotiate certain working conditions with another company. We agree that by being able to act collectively, this could strengthen their position in those situations where they may be weak as individuals.

2. We appreciate that the Commission has opted for a ***proportionate and appropriate way forward by proposing guidelines*** rather than regulation. Guidelines are the best tool to achieve the objectives highlighted above, in a way which respects social partner autonomy and diverse national industrial relations systems, including collective bargaining, as well as leaving room to the Commission to enforce competition policy. This is important in ensuring respect of the EU Treaty in the areas of social and competition policy.

3. To meet these conditions, the ***content and scope of application*** of the guidelines must also be appropriate and proportionate. And their application/interpretation by the Commission, national authorities, and other relevant actors, must always take account of the specific context.

4. ***This means firstly that*** application/interpretation of the guidelines must not lead to an obligation, even implicit, for solo self-employed or for the companies that they do business with to engage in negotiations or to organise collective representation. The participation of solo self-employed workers to adapted forms of collective representation for the self-employed need to remain voluntary for the self-employed and the other companies they do business with, distinct from and fully compatible with existing forms of collective bargaining for employees. Moreover, it is up to the social partners to decide jointly who they want to cover with their collective agreements. Accordingly, any possibility for self-employed workers to be covered by existing forms of collective bargaining for employees can only be envisaged if both sides of social partners agree with this. Lastly, whilst this is clearly not the aim of the guidelines, the Commission must safeguard their proper application and avoid misuse by national governments or others.

5. The guidelines also need to be applied in a way which respects each specific national industrial relations system. For example, in those systems where only employees can be members of a trade union and covered by collective agreements, clearly the application of the guidelines cannot go beyond this.

6. ***Secondly,*** application of the guidelines must not excessively reduce the scope of the Commission to take action to enforce competition policy. Allowing the Commission to make full use of existing rules is essential to ensure full respect of the EU Treaty and avoid incoherent application of competition policy across the EU. It must also

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safeguard against any national governments using the guidelines to restrict competition.

7. The guidelines must also respect the ***diversity regarding how digital platforms operate and solo self-employed persons interactions with them***, bearing in mind that these are not all based on a relationship of dependency, as the solo self-employed are generally free to provide services to different platforms and choose when they work.

8. Unfortunately, there are ***some aspects of the draft guidelines which run counter to the conditions highlighted above.*** This concerns in particular the use of certain terminology, the broad scope of application, and the exemption of fees from competition rules, when these are covered by joint agreements between solo self-employed and other companies, and reflecting the diversity of platforms. These aspects are explained below.

9. Whilst the draft guidelines are a stand-alone initiative, it is important to ensure ***consistency with the proposed directive on working conditions of platform workers***. BusinessEurope will provide its views on the proposed directive in due course. We note already that to ensure clarity in who is covered by the guidelines, it will be necessary to amend the proposed directive. The proposed rebuttable presumption of employment equals to unjustified political intervention in defining in EU law the legal characterisation of platform work by leading to a de-facto employee status for many platform workers who in fact often prefer to perform their tasks as self-employed. However, the guidelines apply to solo self-employed providing services through platforms. This creates a lack of clarity regarding their application. This should be remedied by ensuring that the directive allows platform workers to be either employees or self-employed, in a neutral way. It is also crucial that coverage of a solo self-employed by a 'collective agreement' is not used as a justification of employment status.

Need to adapt terminology

10. The use of terminology 'collective agreement' and 'collective bargaining' in the draft guidelines is not appropriate in relation to solo self-employed, as this does not adequately respect national and social partner competence on collective bargaining.

11. As already explained in our response to the previous public consultation on this topic, such terms are restricted to the agreements/bargaining by mandated social partner organisations representing employers and workers and/or their representatives in line with national industrial relations systems. Since collective agreements in their true sense, i.e. for employees, are already outside the scope of article 101, use of this terminology blurs the distinction between solo self-employed and employees. This disrespects national and social partner competences to determine who is covered by collective agreements, as well as weakening the unique position of social partners. It would also create a lack of clarity, including in application of competition rules and these guidelines.

12. A clearer distinction needs to be made in the draft guidelines, by changing the wording related to solo self-employed to 'collective representation', 'collective or joint negotiations' and 'joint agreements', and by keeping participation in collective representation voluntary for the self-employed and those companies with which they do business.

13. Point 16 of the draft guidelines is problematic. It suggests that where solo self-employed decide to suspend services to a counterparty, because it is not willing to enter into negotiations, this can (under certain conditions) also be part of the exemption from article 101. Whilst the guidelines are in the field of competition policy, it is important to note that according to the EU Treaty article 153 (social policy), the EU does not have competence to intervene on the right to strike or the right to impose lock-outs. Whilst this is not directly the issue of point 16, it seems to go against the spirit of it. In the case of smaller counterparties in particular, it would also put them in an unduly weak bargaining position. We suggest to either delete this point of the draft guidelines or to amend it so that the impact on competition is assessed at the same level as the impact on the possibility to come to an agreement.

14. Whilst we agree with point 36 in the draft guidelines in terms of respecting existing national legislation/measures, this must also be applied in terms of respect of national industrial relations systems. This clause cannot only be used to grant rights of certain solo self-employed to collective negotiation but also, where it is in line with national rules, to exclude this. This should be specified in point 36. This point also raises concerns as it reduces the scope of the commission to intervene to enforce competition rules, where national measures go against these. There cannot be such a categorical approach, i.e. 'the commission shall not intervene'. Rather, the commission should weigh up the benefits and disadvantages from a social and competition point of view to taking action against member states or not to enforce competition policy.

Need to uphold competition rules regarding fees/pricing

15. We support the fact that the guidelines are restricted to working conditions, as this provides the necessary balance between supporting collective access of certain solo self-employed in a weak bargaining position to training, insurance coverage, pensions etc, and safeguarding enforcement of competition rules on market/commercial aspects. Points 14 and 18 of the draft guidelines are important in this respect.

16. However, we are strongly concerned about the possibility provided by the guidelines to exempt from competition policy joint agreements/negotiations of solo self-employed with other undertakings setting fees/prices. For example, in example 1 following point 18 in the draft guidelines, we do not agree that the fixing of fees between a group of solo self-employed riders towards the platform they provide services to, should be excluded from article 101. In this and other cases, it would give unregulated freedom to solo self-employed to collude to directly fix prices, including wages and fees. This would make null and void a central principle of competition policy, distorting competition in the internal market.

17. Agreements between self-employed, who are competing with each other to provide certain services, to fix prices, constitutes a "hard core" cartel. These agreements are anticompetitive by nature; they raise prices and restrict supply, making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. Such cartels are rightly condemned as the most egregious violations of competition law.

18. We encourage the Commission to amend the guidelines so that it can continue to apply treaty article 101 in such cases. This should not only apply in the case of price fixing by solo self-employed in relation to private consumers, but also in solo self-employed interactions with other undertakings.

19. Also, whilst the guidelines are in the field of competition policy, it is important to note that according to the EU Treaty article 153 (social policy) and related rulings to the European Court of Justice, the EU does not have competence to take action on the level of pay.

Overly broad scope likely to harm competition

20. As indicated in our response to the previous public consultation on this topic, we support the restricted application of the guidelines to solo self-employed. This makes sense given that in principle they are in a weaker position vis-à-vis other undertakings. We also continue to support the approach to not limit the scope to solo self-employed providing services through digital platforms, as certain other solo self-employed may be in a similar bargaining position with other undertakings or regarding working conditions.

21. However, the scope of solo self-employed to whom the guidelines will apply, is too broad. We are strongly concerned that this will have a negative impact on competition policy, by providing too many exemptions to the rules. Also, given the guidelines do not cover agreements which go beyond the regulation of working conditions (as clearly stated in point 18), it is not acceptable to take into account economic arguments when determining which solo self-employed are covered. For example, point 24 of the draft guidelines in relation to economically dependent solo self-employed rightly acknowledges the need to assess whether the person receives direction on how their work should be carried out. This is a key characteristic determined in court and national definitions, in relation to employee status. However, whether they provide their services exclusively to one counterparty, or their situation on the market, are not relevant in the case of these guidelines, as they are not related to working conditions.

22. In particular, coverage of solo self-employed with one client, when only 50% of their business is with them (point 25), is an excessively broad scope. Even with larger undertakings, this is not proof of a weaker bargaining position per se. This depends on factors such as market share of different operators, economic sector, supply and demand for the products/services/tasks they provide, and skills and competence. We are concerned that this would allow for disrespect of competition rules in too

many instances and it does not accurately reflect a situation of dependency. Also, this could set a dangerous precedent for the respect of competition rules overall. In any case, this is not related to working conditions, so should not even be in scope of these guidelines.

23. This point is also relevant in relation to section 4 of the draft guidelines. Whilst we appreciate the nuance in the approach of the commission that it will not intervene in cases covered by section 4, rather than excluding them automatically from article 101, we still question whether this section goes too far in terms of assuming a weaker bargaining position. This is particularly the case for counterparties with 10 staff headcount. The application of this part of the guidelines should be tightened to ensure that it is only in very specific cases of unbalanced bargaining power.

24. A similar reasoning should prevail in terms of solo self-employed working side-by-side with employees. The simple fact that a solo self-employed works side-by-side with workers should not lead to any conclusion about the true nature of a relationship. What matters are the real conditions under which self-employment is performed, in particular the degree of freedom that the self-employed person enjoys in terms of when and how to perform their tasks.

25. In relation to solo self-employed providing services through digital platforms, unfortunately the guidelines do not give the full diverse picture (in particular in point 28). There are many different forms of interaction with platforms, which are not all based on a relationship of dependency, as the solo self-employed are generally free to provide services to different platforms simultaneously and choose when they work. We do however appreciate the clarification in point 30 that the guidelines do not apply to platforms which simply provide a means for solo self-employed to reach end-users/customers by displaying available service providers. The draft guidelines should be revised to reflect this more diverse picture.

26. The draft guidelines (point 5) rightly highlight the criteria used in previous court rulings to determine false self-employed. They also rightly acknowledge that where organisations represent such workers, examples need to be seen on a case-by-case basis, depending on the facts of the specific case. However, in point 16 of the draft guidelines, the approach is much too broad, referring in a blanket way to solo self-employed 'in a situation comparable to that of workers', and that the guidelines would apply irrespective of whether they are classified as false self-employed. Also, given that member states have competence regarding who is classified as an employee, self-employed, any third category of worker, and an employer, such examples also have to be seen in the light of these national definitions, which may be based on different criteria to that used by the courts.

27. Rather, the final guidelines should recognise that the self-employed cannot be judged to be in a comparable situation to employees solely in view of their client base, or based on whether they work side-by-side with workers or not. Also, the more precise of notion of "employees" should be preferred to "workers" for the sake of clarity. The European Court of Justice already clarified in the Yodel case what

criteria are important to consider when it comes to recognising genuine self-employment relationships in the context of platform work, as follows:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer, and
- to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

28. To ensure certainty of the persons covered by the guidelines, it is important to stick to clear notions rather than vague comparisons. The draft guidelines should therefore be amended so that persons are considered to be in a comparable situation to workers when this is based on the criteria listed by the European Court of Justice in the Yodel case and/or national criteria, or where solo self-employed have been reclassified as workers as a result of other court rulings (e.g. classifying false self-employment). The specific characteristics of the case should also be considered.

29. To ensure a more proportionate scope, we also encourage the Commission to include one of the useful options outlined in the previous consultation: the proposal to limit the scope to solo self-employed and professional customers of a minimum size. 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. We suggest using the EU SME definition.

30. We acknowledge that there is a lack of clarity regarding the classification of platform workers, due to different national approaches and different court rulings. It is important that guidelines and legislation allow for a neutral approach regarding the status of those providing services through platforms, allowing work both as employees and self-employed.