



## Collective Bargaining for Self-Employed

### Scope of Application of EU competition rules

#### Position on the European Commission's Inception Impact Assessment Document of 6 January 2021.

03.02.2021

#### 1 Introduction

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UNI Europa is the European trade union federation for the services sectors and represents 7 million service workers and 272 national trade unions in 50 countries including all EU member states. The services sectors that UNI Europa represents are Commerce, Banking Insurance and Central Banks, Gaming, Graphical and Packaging, Hair and Beauty, Information and Communication Technology Services, Media, Entertainment and Arts, Postal Services and Logistics, Private Care and Social Insurance, Industrial Cleaning and Private Security, Professional Sport and Leisure, Professionals/Managers and Temporary Agency Workers.

Member unions of UNI Europa organise, represent, and collectively bargain for workers, including self-employed workers of various sectors and professions. Workers and trade unions have been facing major challenges to their fundamental rights as competition authorities have taken decisions to restrict or prohibit self-employed workers from collectively bargaining.

We welcome that the European Commission is considering an initiative that could bring an end to the legal uncertainty that continues to hamper the efforts of self-employed workers to associate freely and to collectively bargain setting minimum terms and conditions of employment.

Any future legal instrument aiming to ensure that EU competition law does not stand in the way of collective bargaining must fully implement the principles of the fundamental rights of freedom of association and collective bargaining to all workers, regardless of their employment status including all genuine self-employed<sup>1</sup> and non-standard workers without excluding certain professions or sectors (segments).

Under international law, states have a clear obligation to respect and promote the right to freedom of association and the right to collective bargaining for all workers, irrespective whether they are employed or self-employed. The ILO has determined that collective agreements must not be subject to prior authorisation by the state. Such a requirement constitutes a breach of the fundamental ILO conventions. Joining a union, engaging in collective bargaining, and enjoying protection under collective agreements must not be conditional upon competition rules.

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<sup>1</sup> The Inception Impact Assessment document employs the term "solo self-employed". When using this term in this document and in our online submission, we refer to genuine self-employed workers who are predominantly providing their own labour. In the services sector this includes self-employed workers who have made capital investment in equipment and other assets to provide their labour (e.g. sound technicians that provide their own equipment for audiovisual content production).

We urge the Commission to focus a proposal for a solution on a very restrictive approach that limits the scope of action to rule that collective bargaining and collective agreements including for self-employed workers are not subject to competition law – without exception.

## 2 Context, Problem definition and Subsidiarity Check

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The Inception Impact Assessment document states that the “*Commission aims for dignified and proper working conditions for everyone in the EU.*”

In its publication of 2002 entitled *European labour law and the EU Charter of Fundamental Rights*<sup>2</sup>, the ETUI stressed that “*the right to fair and just working conditions in Article 31 of the EU Charter underlies all the other individual and collective fundamental social rights of workers and elevates this subjective right to the status of a fundamental social right. The general duty in Article 31(1) to respect the worker’s dignity highlights both that the inviolability of human dignity in labour relations is not automatically guaranteed, and a growing awareness of the need to protect the whole personality of the worker in the context of unequal power in determining conditions of employment.*”

UNI Europa considers collective bargaining as the best tool and an efficient, free, and democratic process to set minimum terms and conditions of employment, to achieve dignity at work and to improve working conditions.

There is only one category of workers – it includes both employed ones and those who are self-employed.<sup>3</sup>

In some services sectors so called a-typical forms of employment (short-term employment and solo self-employment) have been a structural element of freelance labour markets for many decades due a set of conditions and factors such as the project-based nature of production. Other sectors have seen a significant shift from regular employment to more a-typical forms of employment recently.

Digitalisation has led to an increase of project-based and micro-task-based work as well as employment via online platforms. Further, it has accentuated the trend to higher levels of self-employment across services sectors.

It is important to note, that the conditions many self-employed platform workers face, and that the Inception Impact Assessment document refers to, have been a reality for self-employed workers in the services sectors for a long time.

The Inception Impact Assessment document notes that “*People working through platforms are often not involved in the determination of the price of their services and may lack the individual bargaining power to negotiate their terms and conditions.*”

This is true for most solo self-employed workers in many services sectors. For example, self-employed workers in the audiovisual production sector lack the power to negotiate their terms and conditions. The price for their service is overwhelmingly set unilaterally by a production company. While individual negotiations may be possible at times, there are no guaranteed minimum standards to ensure dignified working conditions. Furthermore, a self-employed worker may work alongside employed colleagues on the same production and two sets of standards apply. Pressure to a race to the bottom is inherent in such a context. Surveys among

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<sup>2</sup> <https://www.etui.org/sites/default/files/EuropeanLabourLawShort%20Web%20version.pdf>

<sup>3</sup> “*The practice of the International Labour Conference has been to give the broadest possible meaning to the term “workers”. On many occasions, it has been emphasized that, if the subject matter of a given instrument is not limited only to employed workers, or the instrument does not provide for any specific exclusion in respect of one or more categories of workers, then “worker” is understood to cover all workers*” ([http://learning.italo.org/ilo/jur/en/2\\_2\\_2\\_7.htm](http://learning.italo.org/ilo/jur/en/2_2_2_7.htm))

professionals reveal that the worsening of working conditions go hand in hand with a rise of self-employment and the absence of minimum standards.

Whether she or he is contracted "offline" or "online" does not significantly determine the bargaining power of a self-employed worker. Instead, it is the lack of the ability of self-employed to collectively bargain and consequently the absence of minimum terms and conditions that protect individuals and raise standards over time via regular rounds of collective bargaining.

### **3 Objectives and Policy options**

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The Commission presents and gives a preliminary assessment of four different policy options, all based on Article 103(2)c of the Treaty. The Commission envisages to propose a Council regulation or come forward with a Communication.

The Commission states that the objective is “*to ensure that the working conditions of (some) self-employed ... improve*”. It is the view of UNI Europa that the objective of any instrument in the framework of this initiative should seek to ensure that all (not some) solo self-employed and other non-standard workers have access to collective bargaining so that they can collectively negotiate and improve terms and conditions. Formal employment status or precarity are not decisive elements in determining the scope of fundamental rights or competition law.

The initiative must align with established definitions of collective bargaining in applicable human rights instruments, ensuring full respect for national industrial systems and collective bargaining practices. It is not the role of competition law to regulate working conditions, or define what constitutes collective bargaining, who can engage in such negotiations or enjoy protection under collective agreements.

Collective bargaining is the exclusive competence of social partners, representing employers' associations/single employers and trade union organisations. The initiative must not open the way for social dumping by legitimising alternative bargaining actors, e.g. 'yellow' company unions, wage-fixing between employers, 'workers' forums' or 'charters of good work' one-sidedly introduced by digital platforms.

Among the four options presented only option 4 contains a non-discriminatory, non-arbitrary approach that would ensure that all solo self-employed workers could have access to collective bargaining. Under Option 4, all solo self-employed providing their own labour through digital labour platforms or to professional customers of any size would have access to collective bargaining. There would be no restriction as regards the size of the counterpart in the collective bargaining/agreement.

Options 1, 2 and 3 all fall short of the crucial test whether an instrument could ensure that all workers in the EU can exercise - without discrimination and freely - their fundamental rights of freedom of association and collective bargaining.

Under Option 1, only individuals providing their own labour through platforms would have access to collective bargaining. The scope and solution proposed is too narrow and would deny self-employed workers that are not engaged via platforms the right to collective bargaining. This is simply an arbitrary solution ignoring the fact that most self-employed workers who are not engaged through platforms face the same issues as platform workers. Quite frankly, they have been waiting for and pleading in court with national and EU authorities for a solution for a long time. It is neither sustainable nor fair to create labour markets via an instrument where different rights and working conditions apply depending on whether a worker has been contracted online or offline for effectively the same job.

Furthermore, it is important to underline the unsolved problem of bogus-self-employment caused by platforms. While platforms workers generally fulfil the criteria of employees, by and large platforms aim at denying them this status. We take the view that most workers on platforms are not genuine self-employed workers but bogus-self-employed workers.

Under Option 2, all solo self-employed providing their own labour through digital labour platforms or to professional customers of a certain minimum size would have access to collective bargaining. While this option would achieve at first sight an inclusive approach covering all self-employed workers, it would de facto exclude many self-employed workers from the right to collectively bargain as most companies in the EU are SMEs. Within SMEs, most companies are small or micro enterprises including in the services sectors. Further, this option could lead to the emergence of sub-contracting chains as companies may be tempted to reduce core permanent staff simply to avoid the threshold of the minimum size set by the provisions of such an instrument.

Under option 3, All solo self-employed providing their own labour through digital platforms or to professional customers of any size with the exception of regulated (and liberal) professions. Under this option, self-employed exercising regulated/liberal professions would not be covered by the initiative. The Commission argues that regulated/liberal professions are often perceived as not being in a position of weakness. Perception is not an acceptable criterion to determine a policy option. Moreover, its discriminatory to exclude people from the right to collective bargaining belonging to a specific profession.