

**UNI Europa Contribution**  
**Brussels, 24 February 2022**

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**Consultation on Draft Guidelines on Collective Bargaining of Self-Employed**

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**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.

We have welcomed the initiative of the European Commission to provide legal certainty and remove barriers that have been hampering the efforts of self-employed workers to associate freely and to collectively bargain setting minimum terms and conditions of employment.

UNI Europa underlines that EU competition policy 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 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.

## 2 The Scope of the Guidelines

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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. The guidelines 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.

The current wording in the draft guidelines does not sufficiently recognise that collective bargaining is part and the result of social dialogue among autonomous social partners. While Member States may define and reform legislation regarding collective bargaining and industrial relations, it is not the competence of EU competition policy to state who could be party to collective negotiations and a collective agreement.

In paragraph (15), the Commission states that “...*these Guidelines apply to all forms of collective negotiations ranging from negotiations through social partners or other associations ...*”. The wording “other associations” should be deleted and a reference to the recognition of social dialogue, the autonomy of social partners, and national industrial relations systems should be introduced. Collective bargaining is the exclusive competence of social partners, representing employers’ associations/single employers and trade union organisations. The guidelines and in particular the wording of paragraph (15) 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.

Such a reference should underline that collective bargaining negotiations on behalf of self-employed persons should primarily be conducted through social partner organisations or by representatives of self-employed persons, where such representatives exist in accordance with national law and practice. These representatives should be freely elected by the self-employed persons and not under the domination, influence, or control of the counterparty.

## 3 Coordinated refusal to supply labour

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The notion of the right to a coordinated refusal to supply labour is referring to a collective action (strike) by self-employed workers. The right to collective action of solo self-employed workers is protected by the ILO principles and the rights to freedom of association and collective bargaining. The right to strike is a corollary to the freedom of association, and inherent to the effective exercise of collective bargaining rights. Freedom of association and the freedom to collective bargaining are guaranteed to everyone without distinction, including self-employed persons.<sup>1</sup> Restricting or conditioning the fundamental right to strike is outside of the scope of competition policy. The right to strike as well as any restrictions are governed by national laws and jurisprudence.<sup>2</sup>

We are concerned that the wording in paragraph (16) sets conditions and restrictions on the right to strike that are not compatible with ILO principles. Therefore, any reference to making the right to strike conditional is to be deleted. Further, it is important to note that strikes are legitimate actions that may not be directed solely at the negotiations of agreements, but

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<sup>1</sup> This principle has been confirmed by the Committee of Experts on the Application of Conventions and Recommendations of the ILO on multiple occasions. For example, in its [examination](#) (2017) of the New Zealand government’s report on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Committee stated “*The Committee must recall once again that the rights enshrined in the Convention, including as to collective bargaining and protection against anti-union discrimination, are fully guaranteed to all workers (regardless of whether they are engaged as employees or as independent contractors) with the sole possible exceptions of the armed forces and the police, as well as public servants who are engaged in the administration of the State.*”

<sup>2</sup> ILO Labour Legislation Guidelines, Chapter V Substantive provisions of labour legislation: [The right to strike](#).

also concern the enforcement of collective agreements and law or the respect for human and fundamental rights. The ILO's supervisory bodies consider that legal restrictions on such forms of action can be justified only where they cease to be peaceful.

Further, we take the view that the provisions in paragraph (16)<sup>3</sup> are weakening the position of solo self-employed workers and their prospects to conclude collective bargaining, especially in situations where there is a high imbalance of power<sup>4</sup>. In the services sectors, solo self-employed workers face very high barriers to take collective action: the freelance nature of the market makes a replacement relatively easy for a counterparty<sup>5</sup>. The coordination among solo self-employed workers is difficult, in particular within chains of sub-contracts that are not always executed at the same location or time. A strike is the last resort and implies that no solution has been found at the bargaining table or during a conflict. It is usually the stronger party that can stall negotiations. Making the right to take collective action conditional and to put the burden of proof on the structurally weaker party will have a strong chill effect adding an additional barrier that solo self-employed would have to overcome. Notwithstanding the provisions of the draft guidelines, solo self-employed workers take a high risk when participating in a collective action since they could be replaced and not be considered for future engagements. Given the current wording, solo self-employed workers would also have to take the risk that a collective action may be challenged as being unnecessary or disproportionate, while the counterparty will have only a limited risk when stalling or refusing any meaningful negotiation. In that way, the current provisions are putting-up barriers to improving working conditions of solo self-employed instead of removing them.

#### **4 Coordination between the multiple parties**

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Coordination among solo self-employed workers, like those of other workers, and coordination/communication with their counterparts in view of preparing collective bargaining are inherently linked to collective bargaining. In paragraph (17) any references to assessments of necessity and proportionality of collective bargaining and measures inherent to such collective bargaining of self-employed persons under competition law should be deleted. This has never been subject to any assessment under competition law by the European Court of Justice.

Making the communication between parties conditional may also call into question the sharing of information on so-called going rates or sustainable minimum fees<sup>6</sup>. In the past, UNI Europa affiliates have been assisting their solo self-employed members by providing information and guidance regarding sustainable or median fees for specific professions and/or sectors. In the absence of a collective bargaining agreement and a real prospect of engaging a bargaining process in the near future, unions should not be prevented of informing their members about sustainable minimum fees so that they have an orientation on what revenue from solo self-employment may ensure a sustainable and decent living.

At the same time, information and assessments regarding existing fees and rates of pay constitute an important element for collective bargaining processes and can inform social partners when entering negotiation. In a context, where collective bargaining for solo self-employed workers has faced barriers for a long time, it is reasonable to assume that it will

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<sup>3</sup> *"To the extent that it can be shown that such a coordinated refusal to supply labour is necessary and proportionate for the negotiation ..."*

<sup>4</sup> Under section 9 of the UNI Europa contribution, we describe in more detail the vulnerability of services workers that are in a position of imbalance of power.

<sup>5</sup> Contrary to employees, it is relatively easy, from a contractual point of view, to replace a solo self-employed worker in a freelance labour market.

<sup>6</sup> Member unions may collect information on remuneration levels among members and assess them considering basic factors that solo self-employed must take into account such as taxes, insurances, social security to determine what level of fees constitutes a sustainable basis for a professional activity. Surveys, fee calculators and other tools guide solo self-employed without constituting a binding decision by the union.

take time for social partners to build collective bargaining for solo self-employed workers across the many services sectors. Sharing information on existing fees and rates of pay will facilitate discussions and negotiations.

Therefore, it should be clarified in paragraph (17) that in the absence and for the preparation of collective bargaining, trade unions may also share information about sustainable minimum fees, with the objective of improving working conditions of solo self-employed persons.

## **5 Decisions by associations or agreements between solo self-employed persons outside the context of negotiations**

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We consider that information and guidance by trade unions regarding fees and rates of pay that have been practised in a particular market in the past always aim at preparing and achieving a collective bargaining agreement and seek to improve the working conditions of solo self-employed workers.

## **6 The persons covered by these guidelines**

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UNI Europa refers to its earlier submission of 3 February 2021 and reiterates that for the purpose of these guidelines the definition of solo self-employed workers in paragraph (19) should extend to persons who *predominantly* dependent on their own labour which captures better than the current wording (“*primarily*”) that some solo self-employed workers need to invest in their equipment and other assets to provide their own labour.<sup>7</sup>

## **7 Economically dependent solo self-employed persons**

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We agree with the assessment expressed in paragraph (24) that “*solo self-employed persons who provide their services exclusively or predominantly to one counterparty are likely to be in a situation of economic dependence vis-à-vis that counterparty.*” However, the current wording creates some legal uncertainty. It should be indicated that the text of paragraph (25) is a presumption of economic dependence within the meaning of paragraph (24). This would clarify that an economic dependence may also exist when the criteria contained in paragraph 25 are not met.

UNI Europa takes the view that this presumption must also apply to self-employed persons that receive less than 50% of their annual income from a counterparty or a group of contractors. In the services sectors, precarious employment and low pay are widespread throughout the EU Single Market. Due to the intermittent nature of many jobs in services sectors, which have a high percentage of project-based work, solo self-employed workers may have to take on another job/profession to make a decent living. Solo self-employed workers in such an intermittent relationship may be just above or just below the threshold indicated in paragraph (25) from one year to the next. For the solo self-employed workers who are concerned by low-wage, precarious or intermittent work, a total share of 30% or less of the annual income can secure their minimum annual income and - in case of loss - endanger their existence.<sup>8</sup>

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<sup>7</sup> 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 or camera crew that provide their own equipment for audiovisual content production).

<sup>8</sup> We refer to the contribution of the UNI Europa member organisation ver.di, Germany, which underlines that “*many solo self-employed workers are in such a precarious situation that even a third of their income is necessary to secure their livelihood - or that they have to take on another job as a means of earning a living.*” Stellungnahme der ver.di – Vereinte Dienstleistungsgewerkschaft im Rahmen der Konsultation zum Entwurf der „Leitlinien zur Anwendung des EU-Wettbewerbsrechts auf Tarifverträge über die Arbeitsbedingungen von Solo-Selbstständigen“ C (2021) 8838 final, 23 February 2022.

Therefore, we advocate for amending the text in such a way that it considers the precarious situation of those solo self-employed workers who are in a very fragile and vulnerable position and are unable to determine their level of engagement and work with dominant counterparties. The provisions of paragraph (25) should be amended so that a solo self-employed person is considered to be in a situation of economic dependence if he/she on average earns at least 30% of his/her total annual work-related income from or through a single counterparty.

We welcome that the criterion of economic dependence is not cumulative with the other aspects of their situation that places collective bargaining by self-employed workers outside the scope of article 101. This is important to remove barriers to collective bargaining for all solo self-employed workers in the services sector including those who are working side-by-side with employees or who may deliver some work via digital platforms, that do not meet the criteria of economic dependence. Making the criteria cumulative would de facto exclude the most precarious, intermittent, and low paid solo self-employed workers.

## **8 Solo self-employed persons working “side-by-side” with employees**

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UNI Europa welcomes the recognition of the side-by-side principle. It reflects the diverse and complex situation that solo self-employed workers in need of protection face. If solo self-employed workers are working side-by-side with employees, this indicates that they are equally in need of protection. In the services sectors, the complexity of the financing and the implementation of projects with a series of companies, service providers and the practice of subcontracting results in a wide range of situations where solo self-employed workers are working de facto side-by-side and should be equally protected as the colleagues they work with. In the following situations solo self-employed workers should be considered working side-by-side:

- (1) Where a sectoral agreement is in place, the employer counterpart may encompass a broad range of companies affiliated to the employer federation. Any solo self-employed worker engaged by any of these companies for work that corresponds to that regulated via the collective agreement may be considered to be side-by-side with the workers falling within its scope.
- (2) Where no sectoral agreement is in place, but collective agreements at company or sub-sectoral levels have been agreed for comparable work and solo-self-employed wish to be covered by this existing agreement. Drawing on the principal of Equal Treatment, where collectively bargained provisions outside a given company are considered a relevant comparator for the purposes of establishing infringement of non-discriminatory treatment, we believe that such collectively bargained provisions for comparable work are a relevant reference, in the absence of a sectoral agreement, for establishing side by side conditions in a given sector.<sup>9</sup>
- (3) Where a counterparty may be engaged in a project spanning several countries (e.g.: in the context of a European co-production filmed in various locations for example) any solo self-employed workers engaged by the counterparty at any location for work that corresponds to that regulated via collective agreement at any location may be considered to be ‘side by side’ with the workers falling within its scope.

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<sup>9</sup> This also relates to the scenario raised by the Dutch authority concerning their guidelines, which stipulate that where a given company works only with self-employed (meaning there is no employee equivalent) then collectively bargained provisions for comparable work in other companies will be the basis for the side-by-side principle. Please see also European Arts and Entertainment Alliance response to the Draft Guidelines on Collective Bargaining of Self-Employed, 18 February 2022.

## 9 Enforcement priorities of the Commission

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UNI Europa welcomes the commitment of the Commission “*not intervene against collective agreements between solo self-employed persons and their counterparties in cases where there is a clear imbalance in bargaining power*”.

However, we believe that additional consideration should be given to other situations than those indicated in paragraph (35) where such an imbalance of power may also exist.

We take the view that below the thresholds indicated in paragraph (35), an imbalance in bargaining power exists when a de facto counterparty of a certain economic strength subcontracts work to other counterparties below these thresholds, who engage solo self-employed workers. In the audiovisual sector where UNI Europa affiliates organise creative, technical, and administrative solo self-employed and employed workers, it is frequent that an audiovisual production is outsourced to several small companies who may be responsible for managing and delivering distinct aspects of the production. As a result, camera crew, visual effects technicians, editors and other post-production workers may be all working for the same production that is controlled (budget, production schedule etc.) by a production company or commissioning entity (for example streamers, broadcasters) but are contracted by different smaller companies. The project as whole may have a budget vastly in extent of Eur 2 million and/or employ more than 10 persons. This may not be true of the individual sub-contracted elements.

Such a cascade of subcontracting from the commissioning entity to the production company or a consortium of co-producing production companies to a series of services providers, who engage talent and crew, results in a situation where rates are imposed from the top down. The solo self-employed are contracted at the stage when sub-budgets have been set and they have no or little room for determining their own fees and rates of pay or negotiating better working conditions.

Therefore, it should be clarified in the guidelines that an imbalance in bargaining power may be established where a de facto counterparty of a certain economic strength as presumed in paragraph (25) subcontracts work to another counterparty or several counterparties below these thresholds.