BUSINESSEUROPE

NOTE

Dedicated social partner hearing on collective bargaining, self-employed and competition law, on 12 April 2021

Note for employers discussion

Background

The Commission (DG Competition) has committed to an initiative in this area by end of this year. This will normally be published at the same time as the DG Employment initiative on working conditions of platform workers, following the two-stage social partner consultation. Whilst these are clearly separate initiatives, led by different Commission DGs, there will clearly be links and potentially trading between them.

For the DG Competition initiative, an inception impact assessment was published for consultation in January and a public consultation is open until the end of May. It is not clear whether they will propose a regulation or guidance or another instrument. It is important to note that if a regulation was proposed, the European Parliament would only have a consultative role, i.e. not co-decision, and this would be left to the council. With guidance of course, neither would have a formal role, however, the member states would be consulted, as is usual practice with competition policy. The inception impact assessment already suggests that TFEU article 103(2)c could be used. This gives a possibility to define in various branches of the economy, the scope of the provisions of TFEU articles 101 and 102 enshrining competition policy. In other words, it gives a possibility for exceptions to the rules. However, this article is not mentioned in the commission's background note for the meeting. Therefore, it will be important to clarify the legal basis during the meeting. To note – this article has not been used before and therefore it will be important to understand the full implications of it, including whether this could set a damaging precedent for the functioning of competition law overall.

According to the background note sent by the Commission, it seems that a number of important so-called "principles" have already been decided, which in fact already determine important aspects of the scope of the initiative. This seems to contrast/contradict the various options to be looked at in the impact assessment, which are much broader. It will also be important to clarify this during the meeting.

The background note positively states that this initiative will not deal with the (mis)classification of workers. Also positively, that it will not deal with modalities of collective bargaining systems or representation of self-employed, as these are covered by national law. However, it will be important to emphasise that the existing EU competition law is fully applied and used across member states, to ensure that this does not indirectly impact at national level.

For information: BusinessEurope already highlighted preliminary views on this topic in response to the consultation on the Digital Services Act. This was also discussed jointly with DG Competition at our Industrial Relations Working Group meeting on 16 April. The comments below are based on this. These will of course be discussed with the representatives from SGIeurope and SMEunited and those sectoral employer organisations present at the dedicated hearing. On this basis, we will prepare a reply to the public consultation by DG Competition to be approved internally, before submitting.

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Comments

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 (as highlighted in the commission's background note). 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.

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. 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.

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.

We note positively that this initiative does not aim to remedy any social challenges faced by self-employed. However, we contest the assertion that working conditions of self-employed overall are deteriorating, as this is not backed up by evidence. Furthermore, 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.

Any initiative should be based on ***solid evidence and analysis***, not on perception. As stated in the background document, research by Eurofound 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. We agree with the conclusion that an

approach focusing on these aspects would not be appropriate. This also strongly suggests that the perception of a vulnerable group of solo self-employed, including, for example, those working through platforms, is not actually borne from evidence, but rather more from perception, as 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 as self-employed, you are in a weak position or not, etc.

We fully agree that ***collective negotiations and bargaining are an important tool*** to improve working conditions, although the aim and value of collective bargaining is not so one-sided; it is in fact to find balanced solutions between employers and employees, combining social and economic considerations, including productivity and employment growth for example. At the same time, self-employed, including those offering their services via platforms, carry out their services for and with commercial contractors and are rightly ***considered as undertakings***. Therefore, it is logical that they are subject to the rules on prohibition of price cartels between economic actors. It is also logical that agreements made between self-employed persons generally go against the rules of EU competition policy, as they are considered as restricting or distorting competition within the internal market, when, for example, they directly fix prices, including wages or fees. Therefore, we agree, as stated in the background paper, that solo self-employed should continue to be considered undertakings for the application of competition law, to allow for such competition law to be enforced against unilateral price-setting.

As noted, 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. As highlighted in the commission's background note, however, this is a different situation to self-employed; since they are undertakings/economic operators, the same social/public interest reasons cannot/do not apply.

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. However, national industrial relations systems are diverse and it is ***solely up to Member States and social partners at national level***, in full respect of these systems, to decide if and how to tackle such issues. Therefore, 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. It would also harm national industrial relations systems and would breach the principle of subsidiarity to seek a harmonised approach on this at EU level. Indeed, it is doubtful whether the EU has the legal competence to legislate on matters relating to collective representation at all.

It is necessary to respect the ***large diversity of situations across Member States,*** including:

- systems, in which self-employed cannot be member of a trade union or be covered by collective agreements;
- self-employed joining/being represented in existing trade unions;
- creation of new trade unions to represent certain categories of workers (including platform workers), which in some cases negotiate working conditions de facto;
- creation of independent unions of platform workers extending certain (employee) labour rights and protections and collective bargaining possibilities to specific occupations or to specific categories of workers (e.g. dependent self-employed);
- creation of associations of self-employed, which depending on the national legislation may have the right to negotiate a collective agreement without infringing anti-trust regulation;
- exemptions at national level to competition rules prohibiting cartels for certain forms of self-employed, sectors or occupations, thereby giving them a right to negotiate;
- co-operatives, other informal structures or private companies organising and providing services to self-employed, e.g. help with invoicing, access to training, or pooling resources to offer sick, maternity and holiday pay, but not giving the legal possibility to bargain collectively or sign agreements;

Whilst we agree that in business transactions there may be differences between the ***bargaining power of solo self-employed*** and that of other companies, 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, we do not agree that certain groups of self-employed, including (as suggested) those working via digital platforms, have lower bargaining power per se, as this can only be seen on a case-by-case basis.

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 bargaining.

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.

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 also fits

with what is stated in the background document – that any initiative does should not go beyond what is necessary to achieve its objective, i.e. that it must be proportionate.

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 collective bargaining/negotiations or to organise collective representation. This would disrespect national and social partner competence. We are pleased to note that the background recognises that it is for member states to specify modalities for collective bargaining and collective agreements. However, it is important that the design and implementation of any initiative safeguards this also at national level.

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.

At the same time, we ***agree that competition policy should not act as a barrier to those self-employed that wish to, having the possibility to represent themselves, including collectively***. However, this should not be confused with collective agreement coverage, 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.

It would also be helpful to have ***more legal certainty*** and ***clarity*** in terms of the application of current competition rules.

We therefore believe that the best way to deal with this issue would be to issue interpretative guidance. Given the dynamic developments in this area, this would also be the best way to ensure that any initiative is future proof.

Further specific 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.
- Discussions on prices, fees, including wages must not be permitted, as this would breach rules on cartels and be detrimental to competition. As noted, the commission has already taken action in the past again unilateral collective agreements where self-employed fixed the price they charged to their clients. This is the right approach and should be maintained. We agree with the statement in the background paper that, “collective bargaining/negotiations would not cover

unilateral price fixing by self-employed nor trading conditions applied to private consumers". (NB: to clarify exactly what is meant by the commission).

- We support the statement in the background note that "conclusion of collective bargaining agreements has to be based on an agreement 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 collectively bargain with the solo self-employed. ***Question for discussion in employers group:*** Should this apply only to bilateral agreements between a company and group of self-employed or also to a group of companies buying services from a broader group of self-employed?
- As stated in the background paper, in some member states, collective agreements are negotiated at ***sectoral level***. National rules and practices must be followed in this respect, as well as not mixing collective bargaining 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 collective 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 collective 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/bargaining/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.

We are also aware that ***solutions are being developed outside social dialogue structures***, such as in the form of self-regulation initiatives or codes of conduct, or providing possibilities for collective representation to some categories of self-employed, as is the case in some countries or by some platforms. This 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.

Preliminary comments on options:

Whilst we broadly agree with the principles outlined in the background note, the options outlined for the impact assessment are in fact broader. It is important that the commission clarifies the intended approach. At this stage, ***it is not possible for us to take a position on the different options. However, we have provided some preliminary comments on where we see potential risks/challenges.***

The ***framing of the different options,*** i.e. that different groups of self-employed 'would have access to collective bargaining under EU competition law', is not appropriate. Firstly, this does not fit with the rationale in the rest of the paper, in particular the crucial point that this initiative should not go into the design of collective bargaining systems, as this is a national and social partner competence, bearing in mind that who is given access to collective bargaining is a key part of this competence. This also suggests that competition law gives access to collective bargaining, whereas any initiative should be focused on taking away obstacles in competition policy, for those who wish to do so, rather than giving access per se.

The focus of ***option 1*** on self-employed working through digital labour platforms 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.

We do not agree that most platform workers have generally low bargaining power, as this depends on their tasks/sector of activity, supply and demand for the service they provide, skills and competences, and how platform operates.

Option 2 gets round some of the issues mentioned above related to option 1. In particular, this would ensure that smaller platforms are left out of scope of possible collective representation solutions for self-employed, which would be important in avoiding unbalanced bargaining power. The commission proposes to consider using the EU SME definition. ***To discuss with employer participants***: would this be a good approach? However, this option 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 already highlighted above.

Whilst ***option 3*** is based on a logical assumption that regulated and liberal professions in general have more bargaining power compared to solo self-employed, this will not always be the case. 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.

Option 4 is likely to create an imbalance of negotiating power with smaller clients/platforms and may lead to negative effects overall on competition.