

Briefing for Executive Vice-President VESTAGER
Meeting with [REDACTED]
European Trade Union Confederation (ETUC)
14 October 2021

SUMMARY

- The meeting will be with [REDACTED] of the European Trade Union Confederation (ETUC).
- Date: 14 October 2021.
- BASIS request: LTT and background on collective bargaining initiative (+ ETUC views with defensives) + CVs

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COLLECTIVE BARGAINING FOR THE SELF-EMPLOYED

LINE TO TAKE

- There is a relatively high level of self-employment in the EU due to the global process of subcontracting and outsourcing of business and personal service activities as well as, more recently, due to the digitalisation of the production processes including the rise of the platform economy. While this development has increased the flexibility and accessibility of the labour market, it has also led to the deterioration of working conditions in the platform economy and beyond. Some solo self-employed are in a weak position vis-à-vis certain digital platform or professional customers. Collective agreements are generally an important tool to improve working conditions.
- Competition law does already now not stand in the way in allowing employees, included so called false self-employed, to bargain collectively without risking an infringement of Article 101 TFEU, which prohibits anticompetitive agreements between “undertakings”. However, genuine self-employed are generally seen by courts and competition authorities as “undertakings” and risk infringing Article 101 TFEU if they negotiate collectively their fees and other trading conditions even if they are in a particular weak position.
- The role of a competition policy is not to address social challenges faced by self-employed individuals. However, EU competition rules should not prevent self-employed in a weak position from engaging in collective negotiations or agreements to improve their working conditions. Any action in this field must ensure that consumers and small and medium-sized enterprises keep on benefitting from competitive prices and innovative business models, including in the digital economy.
- After having consulted various stakeholders, including social partners, the Commission is finalising the impact assessment of its initiative and the four options it contains. The Commission will publish draft guidelines for public consultation on 8 December and ETUC is invited to express its views.
- The initiative will answer the many calls from the European Parliament for a broader collective bargaining coverage and complement other initiatives of the Commission taken under the social chapter of the TFEU, such as the one specifically dedicated to platform work or the one on fair minimum wages.

BACKGROUND

KEY MILESTONES

- **In June 2020, the Commission launched this initiative** to ensure that EU competition law is not standing in the way of collective agreements for solo self-employed who are in a weak position.
- **On 6 January 2021, the Commission published an inception impact assessment** describing the problem and outlining four policy options, which would remove from the scope of Article 101 TFEU collective negotiations/agreements by *certain* self-employed without employees:
 - Option 1 - only concerns platform workers;

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- Option 2 - concerns platform workers as well as other solo self-employed providing their services to professional customers of a certain size;
 - Option 3 - concerns all solo self-employed excluding regulated/liberal professions;
 - Option 4 - concerns all solo self-employed.
- **On 5 March 2021**, the Commission launched a more in-depth **open public consultation** with a questionnaire (closed on 31 May) to support the impact assessment of the policy options.
- **On 12 April 2021**, the Commission held a dedicated meeting with the EU Social Partners (i.e. business representatives and trade unions) and ETUC took an active part in it. Although not mandatory, this meeting was deemed necessary since the improvement of working conditions – a social policy objective – will serve as a justification to remove collective negotiations/agreements by some solo self-employed from the scope of Article 101 TFEU.
- **On 15 June 2021**, during the European Competition Day in Portugal, Executive Vice-President Vestager announced that the outcome of the initiative would be in the form of guidelines.
- **On 8 December 2021**, the Commission will publish a draft of the guidelines for public consultation.

MAIN FEEDBACK FROM STAKEHOLDERS

- The initiative has gathered a lot of interest, which transpired through the online responses to the inception impact assessment (more than 300 comments) and the open public consultation (more than 270 contributions), as well as at the dedicated meeting with the EU social partners.
- The majority of the online comments/contributions came from **citizens**, mainly self-employed. Most of them support the initiative and are in favour of option 4 covering all solo self-employed.
- **Social partners**, on both side of the employers/employees divide seem to be keen on preserving the key role they play at national level. Hence, they favour guidelines at EU level. **Trade Unions**, especially in the cultural sector, tend to see collective bargaining as a fundamental right protected by international conventions, so anyone regardless of his/her status should be entitled to negotiate collectively (i.e. something close to option 4) – ETUC shares that point of view (see below). **Business and Business representatives** tend to be more sceptical about the initiative. They are generally afraid that the initiative would blur the lines between employees and self-employed. More particularly, representatives of smaller companies fear that the initiative would create discrimination amongst the self-employed as a whole and disadvantage self-employed with employees in particular. **Platforms** do not seem to be opposed to the initiative as long as it applies beyond the platform economy.
- **Public authorities** of the Members States generally acknowledge the issue faced by self-employed in relation to collective bargaining, but are divided about the way to

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address it. **Taking the example of the national competition authorities, no consensus emerged about the options:** France and Romania prefer option 1 (only platform workers); Austria and Czechia prefer option 2 (limitation of the size of the counterpart), Greece, Luxembourg, Poland and The Netherlands are in favour of option 4 (all solo self-employed). Some national competition authorities are not satisfied with any option, this is the case of Belgium and Portugal, whilst Bulgaria thinks EU competition law should continue to apply.

- Outside the framework of the public consultations and the dedicated meeting, members of the **Council** have also showed a great interest in our initiative, including through the Working Party on Competition. The same applies to **the European Parliament**, which has adopted an additional resolution on 16 September, where it expressed its belief that EU competition law must not hinder the improvement of the working conditions and social protection of solo self-employed platform workers through collective bargaining.

THE EC'S CURRENT POSITION

- From early on the Commission acknowledged that, any policy option had to respect certain **proportionality safeguards**, in order to avoid undue harm to consumers:
 - the guidelines will cover, (i) only solo self-employed (ii) providing their own labour to or through a digital platform or a professional customer and (iii) when they negotiate with companies, i.e. NOT with consumers;
 - the collective negotiations/agreement should be confined to improving working conditions, including fees vis-à-vis counterparts but NOT fees or trading conditions towards consumers;
 - as in traditional collective bargaining negotiations, the counterparts should also be entitled to bargain collectively vis-à-vis a group of solo self-employed or their representatives.
- [CONFIDENTIAL] At the meeting with Executive Vice-President Vestager on 16 July, it was agreed that option 4 – despite being the preferred option in the open public consultation – bears the risk of including some solo self-employed who are not in a weak position. [REDACTED]
[REDACTED]
[REDACTED] It was therefore decided to go for a new hybrid option. This option will create a dual system.
- First, it would **exclude** collective agreements from the scope of Article 101 TFEU when they are concluded by solo self-employed who are in a situation comparable to workers. This is considered to be the case when they: (i) work through digital platforms; (ii) are economically dependent, because they work exclusively or predominantly for a company; (iii) work “side by side” with workers in the same company; or (iv) are authors and performers wishing to ensure a fair remuneration for their works as mentioned in the Copyright Directive.
- Second, the Commission will state that it will **not intervene** (priority setting) under Article 101 TFEU against collective agreements (i) when they are concluded by solo

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self-employed with professional customers beyond a certain minimum size (for the moment, the threshold is an annual aggregate turnover exceeding EUR 2 million or a workforce of more than 10 workers); or (ii) when they are authorised under national law [END OF CONFIDENTIAL].

ETUC'S POSITION

- Throughout the initiative, the team has had many contacts with ETUC, be it bilaterally, at the dedicated meeting or at various forums. ETUC also had direct contacts with the Executive Vice President and with Commissioner Schmit, in relation to this initiative.
- ETUC's view seems to have evolved. They were initially of the opinion that this initiative should have taken place through the TFEU's social policy chapter, which gives social partners a prominent role. They seem now to have acknowledged the need for a clarification of the application of Article 101 TFEU.
- Further to the dedicated meeting, ETUC has expressed its support for removing the competition obstacle to collective agreements by self-employed. However, ETUC has mentioned some "prerequisite" that the initiative would have to meet to address their remaining "concerns". In a nutshell, the initiative should ultimately lead to "interpretation guideline" that would:
 - remove collective agreements from the scope of competition law and for that purpose self-employed should not be considered as undertakings;
 - safeguard the fundamental right to collective bargaining, which self-employed are entitled to under international instruments and the EU Charter of Fundamental rights;
 - not distinguish between the solo self-employed predominantly providing their own labour, e.g. on the basis of the size of the professional customers they work for;
 - respect the exclusive competence of national social partners when it comes to collective bargaining, i.e. alternative trade unions for self-employed cannot be created.

DEFENSIVES

WHY DON'T YOU EXCLUDE SOLO SELF-EMPLOYED FROM THE CONCEPT OF "UNDERTAKING"?

- Solo self-employed would still be considered "undertakings" under the initiative. Competition enforcers still need to be able to intervene when they jointly fix prices vis-à-vis consumers. Only if the solo self-employed belong to the category defined by the option chosen and conclude with their professional counterparts an agreement on their working conditions that would respect certain safeguards, would that agreement be excluded from the scope of Article 101 TFEU.

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SELF-EMPLOYED HAVE THE RIGHT TO BARGAIN COLLECTIVELY IN THE SAME WAY AS EMPLOYEES DO

- Any person, regardless of his/her employment status, enjoys freedom of association under international instruments (i.e. the ILO and Council of Europe conventions) and under the EU Charter of Fundamental Rights. The same is not true for the right to collective bargaining. Under international instruments, self-employed persons are neither automatically included, nor automatically excluded from its scope but a case-by-case assessment is required. Under the EU Charter of Fundamental Rights, the reference to the concept of “worker” also implies an assessment. Namely whether for a certain period of time a person, regardless of its notional status as employed or self-employed, performs services for and under the direction of another person in return for which he receives remuneration.
- Nevertheless, with this initiative, the Commission will clarify when collective agreements by solo self-employed would be excluded from the scope of Article 101 TFEU on the basis of the relevant case law of the Court of Justice of the European Union.

WOULD THE INITIATIVE COVER ALL SOLO SELF-EMPLOYED PREDOMINANTLY PROVIDING THEIR OWN LABOUR?

- The Commission is finalising its assessment of the different options, which all concern solo self-employed relying on their own labour. The broadest option – i.e. option 4 – provides that, under certain circumstances, the competition law obstacle to collective agreements would be removed for all solo self-employed providing their own labour through digital labour platforms or to professional customers of any size. The Commission understands that this is the option preferred by ETUC.

THE INITIATIVE REFERS TO COLLECTIVE BARGAINING BUT DOES NOT GIVE A ROLE TO SOCIAL PARTNERS

- For this competition law initiative, collective bargaining refers broadly to collective negotiations and/or agreements aiming at improving working conditions and not to its narrower sense under labour law. It only aims at removing the competition law obstacle and not at regulating who would represent and negotiate for the self-employed. This will in principle be a matter for national law.
- Similarly, it will not touch upon the other modalities of collective bargaining such as the extension of a collective bargaining agreement to a whole sector and/or the whole territory of a Member State. However, the Commission is finalising its assessment of the different economic impact of this initiative within the internal market.

WHY ARTICLE 154 TFEU - WHEREBY BEFORE SUBMITTING PROPOSALS IN THE SOCIAL POLICY FIELD SOCIAL PARTNERS ARE CONSULTED - HAS NOT BEEN USED?

- Since the initiative is limited to clarifying the boundaries of competition law in relation to collectively bargaining by the solo self-employed, it does not concern substantive working conditions of workers as such. For this reason, the consultation process set out in Article 154 TFEU on social policy, and applicable only to initiatives based on Article 153 TFEU, does not apply to this initiative.

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- Nevertheless, the Commission would like to thank ETUC for its participation throughout the consultation process and especially at the dedicated meeting organised in April this year. It also invites ETUC to provide its opinion on the draft guidelines that will be published for consultation on 8 December.

Contacts:

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 University of Twente
 
 Faculty of Engineering Technology
 
 Department of Industrial Engineering

Government	Percentage
Current government	85%
Previous government	15%

Response	Percentage
Yes, the current system is the best way to run the country	55%
No, the current system is not the best way to run the country	45%

Device Type	Percentage of Respondents
Smartphone	85%
Tablet	45%
Smartwatch	25%
Smart TV	15%
Smart Home Device	10%

