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# Collective bargaining and the limits of competition law

## Protecting the fundamental labour rights of self-employed workers

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## Policy considerations

- An over-inclusive application of EU competition rules restricts access to collective bargaining for self-employed workers, treating collective agreements as illegal cartel agreements.
- EU competition law neglects power imbalances in the labour market and the universal right to collective bargaining, leaving self-employed workers in a vulnerable position without bargaining power.
- A reform of EU competition policies is one step towards addressing this issue. However, such reform becomes unacceptable if it redefines fundamental concepts of collective bargaining or subjects collective agreements to antitrust control.
- This policy brief explains why collective agreements should not be subject to competition law, given their legitimate objective of improving conditions for self-employed workers.
- Self-employed workers enjoy the fundamental right to collective bargaining, while the prerogative to conclude collective agreements on their behalf remains with trade unions as legitimate actors in social dialogue.
- This policy brief, furthermore, calls for a broader discussion on EU competition policy reforms to address negative social impacts resulting from abuses of dominance and monopsony power.

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## The need to address the social impacts of unbalanced market powers

Competition law and collective bargaining both fulfil a dual purpose of preventing abuses of power and ensuring fair competition. However, there are fundamental differences as regards their respective approaches towards ensuring fair conditions in their relevant markets. The view which should be promoted for understanding the relationship between collective bargaining and competition law should nevertheless be one of complementarity, rather than one of tension. As complementary instruments, they can both help to create more socially inclusive and sustainable markets.

In the labour market, however, fair competition is not synonymous with free competition, whereby profit may be prioritised over people. People cannot be subject to the same market dynamics as products and other factors of production, which can be negotiated for the highest profit or the lowest price. This precondition is consolidated in the fundamental International Labour Organization (ILO) principle that 'labour is not a commodity'. As a redistributive power in the labour market, collective bargaining plays a vital role in putting this principle into practice, ensuring a level playing field through establishing standards for decent work and pay.

However, the changing world of work has led to new forms of work where workers are deprived of this vital bargaining power to effectively defend their collective interests. New business models externalise labour costs by shifting economic risks from employers to workers and by stretching self-employment to its limits. Globalisation, digitalisation, outsourcing and increased levels of self-employment in labour-intensive sectors have contributed to the flexibilisation and deterioration of working conditions. Abusive business practices linked to subcontracting, intermediaries and monopsony power are resulting in downward competition pressure on labour costs and conditions. The precarity of self-employed and other non-standard workers is further exacerbated by their struggle to access collective bargaining and protection under collective agreements.

Against this background, social considerations should be given due regard in the ongoing review of the EU competition legal framework. The ambitious agenda of the von der Leyen Commission has embarked on a mission to ensure that EU competition policies also contribute to sustainable development. As part of this review, the Commission has notably launched an initiative 'to ensure that EU competition law does not stand in the way of collective agreements that aim to improve the working conditions of solo self-employed'[1].

The Commission, as the EU's apex competition enforcer, is now recognising that the precarious working conditions of many self-employed and other non-standard workers results from their lack of access to collective bargaining. This initiative is part and parcel of a broader project, including the Commission

1 Commission (2021) Inception impact assessment 'Collective bargaining agreements for self-employed – scope of application of EU competition rules', Ares (2021)102652, 6 January 2021, followed in December 2021 by Draft Guidelines on collective bargaining of self-employed: https://ec.europa.eu/competition-policy/public-consultations/2021-collective-bargaining-2_en

proposal for a directive on adequate minimum wages in the EU, which would also strengthen collective bargaining, the initiative to improve working conditions on digital labour platforms, and the Copyright Directive and Platform-to-Business Regulation, which both affirm the need to protect self-employed workers and other non-standard workers, including through access to collective bargaining.

While the intention to review the application of antitrust rules in relation to collective agreements is laudable, the approach adopted by the Commission may easily do more harm than good if it embarks on an attempt to redefine fundamental concepts of labour law and collective bargaining rather than fundamental concepts of competition law. Overstepping its mandate under competition policy in such a way would constitute a clear infringement of a fundamental right of workers: collective bargaining as a prerogative of trade unions.

This policy brief explains why EU competition rules should be interpreted in a fundamental rights-compliant manner which excludes collective bargaining for self-employed workers from its scope, thereby empowering these workers to address power imbalances in the labour market (I). Furthermore, the interplay between competition law and collective bargaining paves the way for a broader discussion on how to better integrate social considerations into competition policies. It is an opportunity to address more effectively issues such as the negative social impacts of monopsony power, thereby contributing to more socially sustainable and inclusive markets (II).

## I. Excluding collective bargaining from the scope of antitrust control

Due to an extensive definition of the notion of 'undertaking', collective agreements concluded by self-employed workers run the risk of being annulled by EU competition authorities, as part of the prohibition of horizonal cooperation agreements between businesses (cartels). Self-employed workers have been targeted in this over-inclusive approach to antitrust control, independently of whether they are entrepreneurs, employ their own staff, work as solo self-employed or are in fact bogus self-employed. The interpretation of what constitutes a cartel agreement under Article 101 TFEU (Treaty on the Functioning of the European Union) and under national competition rules is incoherent, resulting in legal uncertainty for workers and business, with a chilling effect on collective bargaining.

Moreover, the proliferation of contractual arrangements in the labour market, often with the express aim of avoiding contracts of employment under labour law, sheds light on a discrepancy between competition and labour law as regards the concepts of 'worker' and 'undertaking' in relation to self-employment. By barring their access to collective bargaining, competition law prevents self-employed workers from exercising a universal human right. In fact, formal employment status is not a decisive element for determining the scope of either competition law or fundamental labour rights. As competition rules should apply only to anti-competitive trading conditions and price-fixing

practices, self-employed workers should have the right to collectively bargain their working conditions, including the fees they charge for the work or service they provide to undertakings. Wage-fixing is not price-fixing – trade unions are not cartels.

**a. Consolidating the *de minimis* interpretation of Article 101 TFEU**

In a range of landmark rulings, the Court of Justice of the European Union (CJEU) has made the case for a more coherent approach to competition enforcement through a more restrictive application of Article 101 TFEU, and with due regard to the social objectives pursued by collective bargaining. In the cases *Albany* C-67/96, *FNV Kunsten* C-413/13, *Wouters* C-309/99, and *Pavlov C-180/98 to C-184/98*, the CJEU ruled that collective agreements improving the working conditions and protection of self-employed workers must be considered as pursuing legitimate objectives in the public interest, thereby justifying restrictions to competition law.

To promote a more coherent application of EU competition rules at national level, the Commission should consolidate this *de minimis* interpretation of Article 101 as part of its initiative on collective bargaining for the self-employed. By removing competition law obstacles for the solo self-employed to access collective bargaining, EU competition authorities could pave the way for a more sustainable and fundamental rights-compliant application of antitrust control while remaining within the limits of their attributed competences. While competition enforcement should continue to apply to, for example, price-fixing agreements involving the reselling of goods by self-employed persons, its purpose is not meant to be the regulation of working conditions and pay negotiated by trade unions. Self-employed workers should not have to prove that their collective agreements are without impact on competition or submit them to competition authorities for approval.

A Commission initiative in the form of interpretation guidance could easily confirm the exclusion of collective agreements from the scope of Article 101 and national competition rules, regardless of the status of the workers covered by those collective agreements, be they employees, self-employed or other non-standard workers, including workers on digital labour platforms. In doing so, the Commission would avoid the discriminatory system currently in place, whereby formal employment categories are used to determine the scope of competition law. It would also remedy the fragmented approach reflected in the different policy options put forward in the Commission's present initiative, which runs the risk of ensuring only limited rather than full access to collective bargaining for the solo self-employed. Neither the employment status, profession, sector or vulnerability of the self-employed worker nor the size of the negotiating counterpart are decisive elements in determining the scope of competition law or that of fundamental rights. However, the Draft Guidelines issued on 9 December 2021 imply that the fundamental right to collective bargaining of self-employed workers could be made conditional upon thresholds regarding the size or turnover of the counterpart in the negotiations. This exception for micro-enterprises is questionable as it leaves the door open to the circumvention of

labour rights through abusive subcontracting. Collective agreements establish a level playing field for both workers and business, which must not be undermined by allowing for exceptions.

### b. Collective bargaining as a fundamental right of all workers regardless of employment status

Not only should the Guidelines consolidate the *de minimis* interpretation of Article 101 TFEU, demonstrating the importance of social objectives as legitimate restrictions to antitrust control. The Commission should also use this opportunity to promote a more fundamental rights-compliant interpretation of EU competition rules, as the right to collective bargaining is a universal human right of all workers regardless of employment status, covering not only standard employees but also non-standard workers, including the genuine 'solo' self-employed.

The enjoyment of collective labour rights for self-employed workers has been recognised under a range of international legal acts, including ILO Conventions C87 (1948) and C98 (1949) as well as supplementing Conventions C151 (1978) and C154 (1981). The ILO Committee on the Freedom of Association has held that determining the personal scope is not based on the existence of an employment relationship, which is often non-existent – for example, in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, all of whom should nevertheless have the right to organise. It follows an obligation to ensure that workers who are self-employed fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining.[2]

Furthermore, the European Court of Human Rights has confirmed that the freedom of association granted under Article 11 of the European Convention on Human Rights applies to self-employed workers (see ECtHR *Vörður Ólafsson v. Iceland* No. 20161/06). The Council of Europe Committee of Social Rights has, moreover, clearly affirmed that Article 6(2) of the European Social Charter grants self-employed workers the right to collective bargaining, concluding that an over-inclusive approach to the notion of 'undertaking' effectively resulting in a ban on collective bargaining for self-employed workers runs counter to the object and purpose of that right. Collective bargaining is 'justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract. [...] In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour' (*ICTU v. Ireland*, Complaint No. 123/2016123/2016).

At EU level, collective labour rights are elevated to the status of primary law by the Charter of Fundamental Rights, which is binding on

2 ILO (2018) Freedom of association. Compilation of decisions of the Committee on Freedom of Association, 6th ed., Geneva, ILO, § 387 and 1285.

the Union and its Member States when acting within the scope of EU law. The Charter guarantees at least the same level of protection as the European Convention on Human Rights and is to be interpreted in line with international obligations, including the European Social Charter. To this end, 'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions' (Art. 12). Moreover: 'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels' (Art. 28).

### c. Collective bargaining as a prerogative of trade unions

The social policy chapter of the TFEU concretises the obligations of the EU as regards collective bargaining. In accordance with Article 152, the Union recognises and promotes the role of the social partners, taking into account the diversity of national systems. It should facilitate dialogue between the social partners, respecting their autonomy. Article 156, meanwhile, sets out the role of the Commission in encouraging cooperation between the Member States in matters relating to the right of association and collective bargaining, amongst others.

When it comes to the conclusion of collective agreements capable of justifying restrictions to competition law, the CJEU recognises the social partners as the only legitimate actors to engage in collective bargaining. Following the reasoning of the Court in *Albany* C-67/96, a collective agreement concluded between management and labour is excluded from the scope of Article 101 TFEU if it fulfils two conditions. Firstly, the agreement needs to derive from social dialogue. Secondly, the agreement needs to contribute directly to improving working conditions.

Organising, representing and bargaining on behalf of labour remains a trade union prerogative, as consistently affirmed by the ILO Committee on the Freedom of Association. Legitimacy, autonomy and independence are key features of well-functioning industrial relations systems. Attempts to dilute the collective rights of workers and trade unions by blurring these fundamental bargaining concepts or by allocating such prerogatives to other actors have been forcefully condemned by the Committee: 'measures have to be taken in order to ensure that organizations that are separate from trade unions do not assume responsibility for trade union activities' (ILO (2018)[3], § 1230; see also e.g. § 1214, 1224 and 1237). Provisions which ban trade unions from engaging in collective bargaining are deemed unlawful, as 'public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof' (§ 1232 and 1234).

Given the reciprocal nature of collective bargaining as an intrinsic element of social dialogue, it is not only a collective right of (self-employed)

3 ILO (2018) Freedom of association. Compilation of decisions of the Committee on Freedom of Association, 6th ed., Geneva, ILO.

workers and trade unions representing labour, but also of management and organisations representing employers. Consequently, undertakings engaging self-employed labour also have the right to bargain collectively, but on the side of management. Self-employed entrepreneurs with employees of their own have access to collective bargaining, but in their capacity as employers.

Therefore, the Commission's competition policy initiative must be strictly limited to the interpretation and scope of Article 101, with a view to clarifying fundamental concepts of competition law, and not to altering fundamental concepts of collective bargaining or national industrial relation systems. It is not the role of competition law to regulate working conditions or categories of employment, nor to define what constitutes collective bargaining or a collective agreement, who can engage in such negotiations, or who should enjoy protection under collective agreements. Nor can labour law or collective bargaining be stretched and altered to solve other competition issues of a social nature, as will be demonstrated in the rest of this policy brief. Such approaches create more damage than they resolve problems.

## II. Addressing the social limitations of EU competition law

So far, this policy brief has attempted to demonstrate the limits of competition law and the importance of collective bargaining to rebalancing power relations in the labour market. What collective bargaining can best deliver is the protection of self-employed workers by preventing abusive outsourcing and subcontracting or bogus self-employment, developed as business models to transfer risks and the costs of labour to individual workers while maintaining them in a quasi-employment relationship. While the objective of the dedicated Commission initiative should be limited to the promotion of a more restrictive and fundamental rights-compliant interpretation of Article 101 TFEU, it nevertheless sheds light on the need to also address social impacts more broadly as part of the ongoing competition policy review, in order to ensure the reform makes a meaningful contribution to creating more socially sustainable and inclusive markets.

However, the limits of collective bargaining cannot be stretched in an attempt to alleviate limitations of the current EU legal framework to address other competition issues with social implications. After all, the fundamental values and objectives of the social market economy and social progress enshrined in Articles 3 TEU (Treaty on European Union) and 9 TFEU are binding on competition law in the same way as on any other policy area.

Next to bringing collective bargaining outside the scope of antitrust control, competition policy should also explore complementary ways to remedy adverse social impacts resulting from, for example, abuse of dominance, unfair business practices, monopsony situations and the lack of market power of intermediaries and small businesses unable to determine their own terms and conditions. Such behaviours and situations may have considerable negative social impacts, including a downward pressure on working conditions and remuneration. Effectively addressing negative social externalities in competition therefore requires a more holistic approach to enforcement, mainstreaming

social considerations across antitrust, merger and state aid control. Likewise, social impacts should be considered when defining relevant markets and for the purpose of promoting a more inclusive definition of consumer interests.

To briefly explore the potential of antitrust control, which has been of relevance for this policy brief, Articles 101 and 102 TFEU (prohibiting abuse of dominance) remain key to ensuring more socially considerate competition enforcement. Attention should be paid to socially abusive practices as part of unfair trading conditions when investigating possible abuses of dominance under Article 102. Likewise, social aspects should be taken into account in the appreciation of criteria under Article 101(3) for permissible cooperation agreements. As notably held by the CJEU in *Remia* C-42/84, the provision of employment can be considered a legitimate objective of cooperation between competitors 'because it improves the general conditions of production, especially when market conditions are unfavourable'.

The block exemptions for cooperation agreements under Article 101(3) TFEU could help promote non-monetary values and non-price efficiencies (i.e. cooperation between companies that results in other positive outcomes than lower prices for consumers) capable of creating a range of direct or indirect benefits for workers and citizens. When it comes to the ongoing review of the Horizontal Block Exemption Regulations and Guidelines, it should aim to ensure that sustainability agreements can be put in place by competitors as a tool to promote not only environmental but also social policy objectives and fairness throughout value chains. Such agreements could contribute to, for example, socially just transitions and respect for human rights, with close involvement of workers and trade unions.

Furthermore, it should be explored how vertical cooperation agreements could accommodate social conditions in supply chains, including in relation to intermediaries and franchisers. By way of example, self-employed individuals involved in re-selling activities can under certain conditions fall within the categories set up by the Vertical Block Exemption Regulation. In the same vein, EU legislation based on Article 42 TFEU provides for specific provisions as regards the application of Article 101 TFEU to individuals active in the production and trade of agricultural products.

## Conclusions: promoting social fairness through collective bargaining and more sustainable competition policies

Examining competition enforcement from the perspective of social fairness sheds light on the negative social impacts of an increasing concentration of economic power, capital, innovation and ownership. Social inequalities are underpinned by labour market concentrations, employer monopsony power, lack of worker involvement, and undermined collective bargaining. This policy brief has made the case for the ongoing review of the EU competition legal

framework as an opportunity to promote more socially inclusive and sustainable markets. Two ways have been identified, which are complementary and in no way mutually exclusive.

The Commission should consolidate the CJEU *de minimis* interpretation of Article 101 TFEU, giving due regard to social policy justifications and thereby promoting a fundamental rights-compliant and more restrictive approach to antitrust control. Collective bargaining is the key counteracting force to the casualisation and commodification of labour. To ensure legal certainty, guidance should clarify that collective agreements fall completely outside the scope of competition law, regardless of whether they protect employees, the self-employed, or other non-standard workers.

At the same time, EU competition enforcement should develop approaches for effectively assessing and addressing social impacts in all relevant markets. Competition policy must not only mitigate negative externalities, but also actively contribute to the realisation of social and environmental objectives. Here, ensuring policy coherence is key. Competition law must respect and protect social, workers' and trade union rights, and support the creation of quality employment, just transition and upward social convergence. To grasp the full potential of the pending review of the EU legal framework on competition, a discussion must be begun now on how competition policies can contribute to a fairer, more inclusive and sustainable social market economy.



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