

## DRAFT GUIDELINES OF THE EUROPEAN COMMISSION ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS REGARDING THE WORKING CONDITIONS OF SOLO SELF-EMPLOYED PERSONS

## CONSULTATION CONTRIBUTION

*The European Confederation of Independent Trade Unions (CESI) is a confederation of more than 40 national and European trade union organisations from over 20 European countries, with a total of more than 5 million individual members. Founded in 1990, CESI advocates improved employment conditions for workers in Europe and a strong social dimension in the EU. CESI represents public and private sector workers.*

CESI considers the European Commission's draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, as set out in the Annex to its Communication C(2021) 8838 final, as an important step towards assuring effective collective bargaining rights of solo self-employed persons. CESI welcomes in particular the European Commission's assessment that Article 101 TFEU on rules applying to undertakings in the Single Market should in the future be interpreted in a narrow manner which does not stand in the way of collective bargaining for the self-employed – because the bargaining of vulnerable groups of workers cannot be equated with illicit cartel-forming under EU competition law.

According to CESI, an exclusion of collective bargaining from the scope of Article 101 TFEU is especially important for precarious solo self-employed persons. In this sense, the fact that many of the genuine solo self-employed in the most precarious conditions might not be covered by the guidelines and left behind remains however problematic.

### ***On the scope of application of the guidelines (section 2)***

CESI generally welcomes a wide scope of the guidelines to cover all collective agreements to the extent that they concern working conditions in the broadest sense (clause 14 in conjunction with clause 16), as well as in principle all forms of collective negotiations including through social partners or other interest representatives (clause 15).

However, in clause 17 the presupposition that the conclusion of collective agreements precedes “a certain degree” of coordination between multiple negotiating parties but that this coordination should remain “necessary and proportionate” is vague and open to interpretation. The European Commission should more clearly spell out how it will assess cases under Article TFEU 101 in terms of “a certain degree” of “necessary and proportionate” coordination between negotiating parties. In any case, the European Commission should interpret both the necessity and the proportionality broadly.

***On the criteria to be considered as ‘comparable to workers’ and thus as falling outside the scope of Article 101 TFEU (section 3)***

CESI agrees with the European Commission’s considerations that (a) economically dependent solo self-employed persons as described in clauses 24 and 25, (b) solo self-employed persons working ‘side-by-side’ with workers, as well as (c) solo self-employed persons working through digital labour platforms (clauses 28-31) should fall within the scope of the guidelines and be exempted from the meaning of Article 101 TFEU.

Importantly, however, the guidelines should not serve as a tool to cement the status of bogus solo self-employment. According to CESI, bogus self-employment remains unlawful, even if complemented by a right to collective bargaining. Regardless of the guidelines, the social partners and the legislators have a clear role to treat bogus self-employed as regular employees and thus endow them with core social and labour rights – including collective bargaining, but also beyond.

***On other solo self-employed persons that can fall outside the scope of Article 101 TFEU (section 4)***

CESI generally welcomes the European Commission’s foreseen abstention from intervention on the basis of Article 101 TFEU in cases of (a) collective agreements concluded by solo self-employed persons with counterparties “of a certain economic strength”, and of (b) collective agreements concluded by self-employed persons pursuant to national legislation, or, for artists and performers, under the EU Copyright Directive 2019/790 (clauses 33-38).

However, relating to clauses 34-35, CESI notes that the criterion of “a certain economic strength” of the counterparties of the self-employed and their position in the market cannot be the only indicators to assess imbalances in bargaining power. This approach is incomplete. The imbalance in the bargaining power of the parties can be caused by various factors other than the market power of the counterparty. These include the number of clients, authority over oneself to make strategic decisions about one’s own economic activity, as well as the specific situation of the labour market and the unemployment rates that vary significantly among the Member State and the vulnerability of the self-employed person depending on the sector, profession and type of employment.

In addition, the European Commission foresees to assess the economic strength of counterparties based on a pre-defined and fixed annual turnover of the counterparty and the size of its staff – regardless of the market in which the self-employed operates (clause 35). Considering the large differences in the markets of the Member States, such a flat-rate approach can be questionable. Indeed, genuine self-employed persons that work with counterparties without a “certain economic strength” might be left out of the scope of the guidelines as they have been drafted and be denied the right to collective bargaining under EU law. The guidelines should be more sensitive to persons in this situation, which are in many cases among the most precarious solo self-employed.

CESI believes that there is a significant need for inclusive policies focusing on the most precarious and vulnerable genuine solo self-employed. It is necessary to detect all those self-employed persons who are facing precarious employment as a result of their self-employment. Only clear-cut criteria that consider the specific circumstances of each sector and the needs of every profession can ensure the effective collective protection of those who need it. It is therefore necessary to extend the collective protection to the most vulnerable on the basis of targeted criteria depending on the sector and profession.