
Kluwer Competition Law Blog

European Commission Invites Comments regarding Collective Bargaining for the Self-Employed

Peter Citron (Editor) (White & Case, Belgium) and David Little (Latham & Watkins LLP) · Wednesday, January 13th, 2021

On 6 January 2020, the European Commission (EC) published an [inception impact assessment](#) that invites comments on the scope of application of EU competition law to collective bargaining agreements for the self-employed.

The EC will launch in the first half of 2021 a more detailed public consultation, with a view to the possible adoption of a Council Regulation or an EC Communication in the second quarter of 2022.

The inception impact assessment and public consultation will be of interest to those operating in the platform economy. Their implications are potentially broader, however, and may influence the future application of EU competition rules, and perhaps national employment and tax laws, beyond this sector.

Background

The EC has identified that digitalisation and the need for increased flexibility in the labour market have led to the emergence of new forms of work. Specifically:

- A growing number of individuals are engaged in platform work.
- Outside the platform economy, a growing number of individuals have entered into commercial service contracts.

The EC considers that these new forms of work may introduce uncertainty regarding working conditions and access to collective bargaining. According to the EC, the evidence shows that:

- Platform workers are often not involved in the determination of the price of their services and may lack the bargaining power on an individual basis to negotiate their terms and conditions.
- Individuals who have entered into commercial service contracts (e.g., independent contractors and freelance workers) may face similar challenges as platform workers in terms of representation, earnings, and social protection.

- Solo self-employed workers (self-employed without employees) may face unbalanced negotiation power vis-à-vis certain firms/buyers of labour with monopsony power, leading the workers to be price-takers with little say over their working conditions.
- One-quarter of all self-employed workers in the EU experience unfavourable working conditions (including lower levels of income).

Application of EU Competition Law

The Court of Justice of the European Union has recognized that collective bargaining between employers and employees is outside the scope of EU competition law^[i], as employees do not qualify as “undertakings” under EU law. However, self-employed workers are considered undertakings, and any agreement between self-employed workers to negotiate collectively for better terms and conditions, in principle, infringes Article 101 Treaty on the Functioning of the European Union (TFEU) (which prohibits agreements between undertakings with the object or effect of restricting competition).

According to the EC, collective bargaining can be a powerful tool to achieve improved working conditions. However, for individuals who are not employees, competition law can be an obstacle for collectively bargaining to improve their situation.

Reforms at the EU Member State Level

Some EU Member States have adapted their national competition or labour law regimes to allow collective bargaining by the self-employed, although these measures have not removed EU competition law obstacles.

- Certain Member States have provided the right to collectively bargain in an extended definition of who is considered an employee as far as labour relations legislation is concerned. For example, in the Netherlands, self-employed workers who work “side by side” with employees are recognized under the definition of worker and, therefore, can invoke employee rights under Dutch law, including rights to collective bargaining. In November 2019, the Dutch competition authority published [Guidelines on price arrangements between self-employed workers](#) confirming this approach.
- Other Member States have introduced explicit legal exemptions from enforcing the prohibition of collective bargaining for sectors/occupations in which self-employed workers are likely to be in asymmetric power dynamics with their employer. Austria and France, for example, have exemptions for freelance musicians, actors, performing artists, or journalists.

Objectives

The EC’s initiative aims to ensure that “EU competition law does not stand in the way

of initiatives to improve working conditions through collective agreements for solo self-employed where they choose to conclude such agreements, while guaranteeing that consumers and SMEs continue to benefit from competitive prices and innovative business models, including in the digital economy”.

- The initiative seeks to clarify when certain self-employed and their counterparts may collectively bargain without the risk of infringing EU competition law.
- The negotiations and resulting agreements should be confined to the improvement of the working conditions (including fees) of the self-employed.
- The initiative does not cover collective negotiations or agreements concerning trading conditions (such as prices charged) to private consumers or unilateral price-fixing.
- The initiative will not introduce any obligation on any parties to enter into such negotiations or to conclude collective agreements. The initiative will only clarify that EU competition law does not stand in the way of such agreements if the parties concerned choose to enter into them.

Policy Options

The EC is considering four options (outlined in the table below), which differ with respect to the categories of worker that will be covered by the initiative.

	Type of self-employed worker	Policy description
Option 1	All solo self-employed workers who provide their own labour through digital labour platforms.	Only individuals who provide their own labour through platforms would have access to collective bargaining. In addition to platform work, this option includes traditional professions in the off-line economy (as long as they are not covered by other specific competition law provisions included in sectoral instruments ^[ii]). This option includes a minimum size threshold for the counterparty with whom the self-employed worker may bargain collectively. For the purposes of determining the minimum size of the counterparty, the use of the definition/thresholds of the SMEs could be considered.
Option 2	All solo self-employed workers who provide their own labour through digital labour platforms or to professional customers of a certain minimum size.	
Option 3	All solo self-employed workers who provide their own labour through digital platforms or to professional customers of any size with the exception of regulated (and liberal) professions.	Under this option, self-employed workers who exercise regulated/liberal professions would not be covered by the EC’s initiative.

Type of self-employed worker	Policy description
Option 4 All solo self-employed workers who provide their own labour through digital labour platforms or to professional customers of any size.	Under this option, there would be no restriction to the size of the counterparty in the collective bargaining agreement. Those counterparts would be allowed to bargain collectively too, for example, across a certain sector, mirroring traditional collective bargaining. This may ensure that small businesses could gain enough countervailing bargaining power against solo self-employed workers negotiating jointly. Under this option, the EC may further analyse whether public or semi-public professional associations that unite all professionals exercising regulated professions should be allowed to negotiate on behalf of their members. The option (as with all options) would not permit unilateral price-setting agreements.

Interaction with Tax and Employment Law

Whether the EC's initiative will affect the classification of self-employed workers from a tax and employment law perspective remains to be seen. The distinction between employees and self-employed workers is important under tax and employment law given that a company can, in a worst case scenario, incur material reclassification liabilities (such as backdated employment taxes and employee vacation leave pay) if it has incorrectly classified its workforce for legal purposes. As the EC's initiative evolves, companies should continue to ensure that their workforce is properly classified in accordance with applicable law to reduce any reclassification liability risks.

Next Steps – Timeline

3 February 2021: Deadline for feedback on the EC's inception impact assessment

First half of 2021: EC will launch an open public consultation

Q2/2022: Council Regulation or an EC Communication

[i] The CJEU has also held that EU competition law should not apply to collective

bargaining by self-employed workers who are determined by a judge to be misclassified as self-employed (the so-called “false self-employed”).

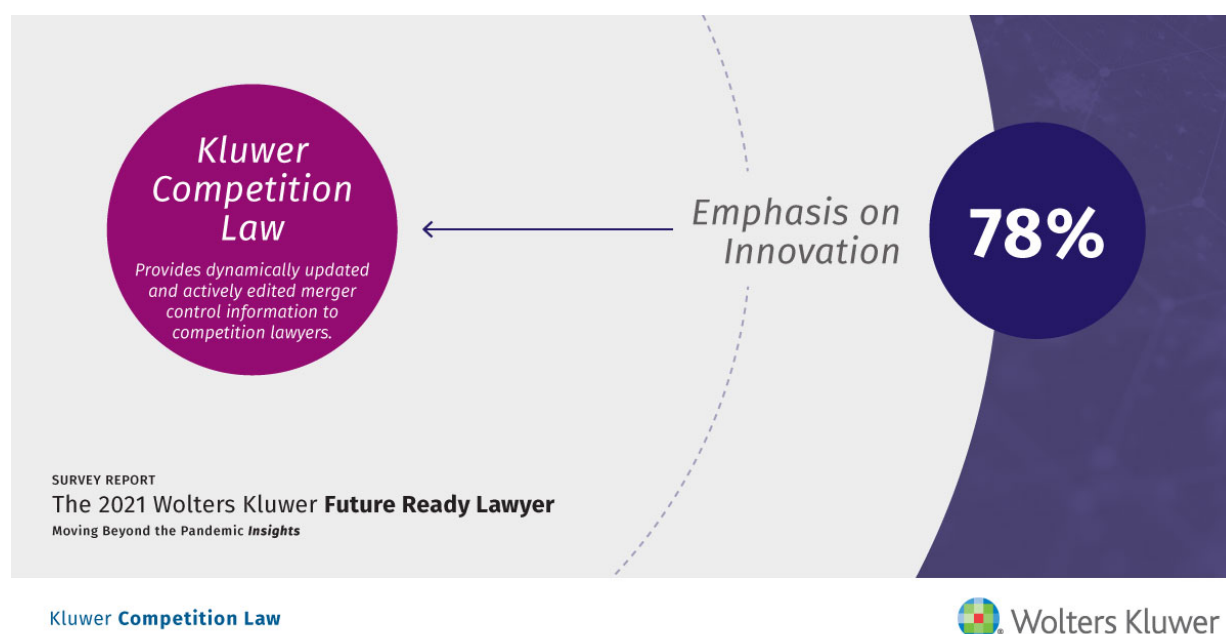
[ii] For example, there are specific EC provisions that govern the application of Article 101 TFEU to individuals active in the production and trade of agricultural products.

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