FIEC is the European Construction Industry Federation, representing via its 32 National Member Federations in 27 countries (24 EU, Norway, Switzerland and Ukraine) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.

POSITION PAPER 24/02/2022

EC draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons
FIEC contribution to the consultation

Background:

Simultaneously with the proposal for a directive on working conditions in digital platforms, the European Commission presented draft guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. These draft guidelines define the terms and conditions of employment which would allow "solo" self-employed workers to enter into collective agreements.

General comment:

In the construction sector, we observe that in most EU Member States, there is a large segment of companies considered as solo self-employed persons. Behind this phenomenon are people who for various reasons have chosen to run their own company without hiring staff. The reasons are probably as many as the number of companies.

The proposed guidelines risk undermining the situation for this large group of entrepreneurs. It risks forcing them into a set of rules, which they have actively chosen not to be bound by. It also risks weakening the entrepreneurial spirit across EU Member States, in a time when free enterprising is pivotal to EU's economic resilience and growth.

The ambition of the Commission to clarify the boundaries of EU competition law is welcome insofar as it strictly refers to and summarises established case law of the EU Court of Justice.

However, FIEC firmly rejects the additional reasoning and stated priorities that the Commission describes, as they will lead to very problematic consequences on the labour market, the internal market in general and also regarding the predictability and homogeneity of the rules.

The Commission's proposal seems to be based on intentions and desired effects rather than on evidence and real consequences. Nowhere does the Commission refer to the normative effect that "collective bargaining" can have and the effects on contractual freedom. There is also no assessment to other possible effects, such as price increases or other effects on employment, services and prices.

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Specific comments:

First, competition law is an area where the EU has exclusive competence under the Treaty and the goal is full harmonization. Social policy on the other hand is an area with minimum standards where EU competence is limited and issues such as collective representation, right of associations and right to strike or right to impose lockouts either require full agreement or are completely excluded from EU competence. Given the far-reaching consequences that the Commission's proposal leads to, it is to be regarded as breaching the Treaty and introducing legal uncertainty, since competition law thereby indirectly regulates social policy issues.

Indeed, the Commission's proposal does not take into account the specific legal systems of the individual Member States. In an attempt to clarify the rules of the market (Article 101 TFUE), the Commission appears not to take account of the fact that the conditions for collective bargaining fall within national competence.

In particular, as regards the terms "collective agreement" and "collective bargaining", they cover specific meaning and realities at national level, which is not reflected in the Commission's proposal. Indeed, such terms are restricted to the agreements/bargaining by mandated social partner organisations representing employers and workers and/or their representatives in line with national industrial relations systems.

Second, introducing the type of guidelines on relationships that are purely business-related is also contrary to the whole purpose of collective agreements, since collective agreements aim at a relationship which is not based on a business-relation.

Here, the Commission allows "collective agreements" to be concluded outside the employment relationship.

By opening up the possibility for self-employed workers to negotiate "collective agreements" with "counterparties", it creates de facto a new hybrid status., whose consequences are multiple:

- Risk of creating a subordination link between the counterparty and the self-employed, which, to date, has been determined by the courts on the basis of clues corresponding to aspects covered by the guidelines (e.g. rest periods, working hours, holidays, etc.). This would lead to legal uncertainty for the company, as its relationship with a self-employed worker could be reclassified in an employment relationship;

- Risk of creating competition between employee and self-employed status, in favour of the latter. With the same working conditions, a company will have more interest in using a self-employed worker than an employee, taking into account the cost and the risk that the latter weighs in relation to the former;

- Risk of destabilising the current social model and the financing of social protection (e.g. pension, accidents, maternity, training, etc.) which is based on the social contributions paid by the employer on behalf of the employee.

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Moreover, this will undermine the social dialogue at national level. Indeed, in principle, the negotiations are organised between the representatives of the employees (i.e. trade unions) and the representatives of the employers (i.e. professional organisations). We can question the organisation of such negotiations between solo self-employed workers (represented by whom?) and professional organisations.

Third, the Commission states that these draft guidelines "*cover a wide range of solo self-employed people: people who are economically dependent or work side-by-side with other workers in the online and offline world, people who work through platforms or, people who negotiate their working conditions with counterparties of some economic strength, or who participate in collective bargaining agreements in line with the Copyright Directive and national labour law provisions*".

Considering these wide-ranging criteria, it is thus clear that the new guidelines will in principle cover all types of self-employed persons without employees.

Fourth, the proposed guidelines undermine both freedom or trade and freedom of contract in that the possibility for the actors of a free market to determine the price of a service, or certain services, risks being restricted. For most solo self-employed, the price of the service is a very important tool for successful competition.

Excluding large and important parts of the market players from competition rules, in the way proposed by the Commission, can lead to very negative consequences. This undeniably leads to a too strong position for certain solo self-employed persons who should rightly be regarded as companies and where immunity from competition rules pose a risk of imbalances on the labor market and cartel situations. This in turn risks increasing costs for counterparties and, in the long run, consumers. In addition, it can lead to more players than would otherwise be appropriate choosing to go into solo self-employment instead of working as an employee, only on the basis of the possibilities to act outside the application of the competition rules.

- With regard to the **specific guidelines**:

The Commission makes a very artificial distinction between sole self-employed who could legally sign "collective agreements", such as those who can use certain goods or assets to provide their services (the Commission uses the example of a musician using an instrument) and other solo self-employed, for whom such agreements should not be possible, e.g. where the economic activity consists solely in the sharing or exploitation of goods or assets, or the resale of goods or services (the Commission uses the example of a person renting out a home).

- With regard to the **proposed criteria**:
    - "economic dependency": It is not at all uncommon for a majority of a company's income to be derived from one or a few customer companies.
    - "working alongside": It is also very common in the construction sector for solo self-employed to work side by side with the construction companies' own employees, without there being any reason for collective regulation of the working conditions of the sole self-employed.

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- "counterparties of a certain economic strength": the economic thresholds proposed (more than 2 million euros turnover or at least 10 employees) appears to be extremely low. According to the European definition[1], this corresponds to small companies, which are generally not equipped for collective bargaining. Taking into account the possible cumulation, this would mean that micro-enterprises (less than €2 million turnover and/or less than 10 employees) would also be likely to be considered as "counterparties", and would therefore find themselves involved in collective bargaining against solo self-employed workers.

Finally, the Commission's reasoning seems to be based on the assumption that the market is static, where solo self-employed would forever stay solo self-employed. This does not correspond to reality. Solo self-employed are in different situations depending on individual choices, in which stages of business-life they are and on how the business and market develops. They may be in a start-up phase, aiming to grow by hiring or may look for different ways of growth.

Conclusion:

FIEC does not see any justification for issuing these guidelines and does not agree with the approach taken by the Commission.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003H0361

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