

Background Paper to the ETUC Feedback on the Commission Inception Impact Assessment on Competition Law and Collective Bargaining for Self-employed

The European Commission Directorate-General for Competition on 7 January 2021 published an inception impact assessment for the initiative *Collective bargaining agreements for self-employed – scope of application of EU competition rules*, with its launch foreseen for the second quarter of 2022.

According to this Commission [roadmap](#), the initiative will be elaborated against the background of digitalisation and increased flexibility in the labour market, which have led to the emergence of new forms of work where workers lack bargaining power. The Commission has identified growing uncertainties as regards working conditions and access to collective bargaining for non-standard workers such as self-employed and workers on digital labour platforms. In the words of the Commission, the initiative aims to ensure that EU competition law does not stand in the way of collective bargaining by “those who need it”.

This initiative can be understood in the light of the need for more sustainable competition policies in the EU, but should also be assessed against the recent Commission [proposal for a Directive on adequate minimum wages in the EU](#) of 28 October 2020, as well as the up-coming initiative to improve the working conditions of people providing services through digital labour platforms, as announced in the [Commission Work Programme for 2021](#). In addition, existing EU legal instruments such as the EU the [Copyright Directive](#) and the [Platform to Business Regulation](#) already affirm the need to protect self-employed workers and other non-standard workers, including through access to collective bargaining.¹

While the ETUC recognises the clear need to ensure that competition rules do not in any way limit the access to and exercise of collective bargaining as a fundamental right of all workers, the reasoning put forward by the Commission in its roadmap raises serious concerns, which will be further outlined below.

In particular, the ETUC would like to stress the need for the up-coming Commission initiative to give due regard to the following prerequisites:

- I. **Objective: Safeguarding collective bargaining as a fundamental right of all workers regardless of employment status**
- II. **Scope: Ensuring all self-employed and other non-standard workers are able to enjoy protection under applicable collective agreements**
- III. **Approach: Assessing the state of play of competition law in the light of fundamental labour rights**
- IV. **Context: Understanding the case law of the CJEU and the *de minimis* interpretation of Article 101 TFEU**
- V. **Definitions: Affirming the purpose of collective bargaining, its legitimate actors and compliance with international human rights standards**
- VI. **Form: Respecting the autonomy of social partners in the choice of policy instrument, possible legal basis and procedure**

¹ Articles 19 and 20 of the Copyright Directive [2019/790](#) recognise the possibility of collective bargaining mechanisms for authors and performers or their representatives for the purpose of assuring appropriate and fair remuneration. Also Regulation [2019/1150](#) on Fairness and Transparency of Online Intermediation Services in Recitals 2 and 32 identifies the “increased dependency” and “imbalances in bargaining power” of business users in relation to the “superior bargaining power” of providers of online intermediation services.

I. Objective: Safeguarding collective bargaining as a fundamental right of all workers regardless of employment status

The [Charter of Fundamental Rights of the European Union](#) guarantees the freedom of assembly and association under Article 12, and the right of collective bargaining and action as set out by Article 28. The right to collective bargaining is not in any way contradictory to the freedom to conduct a business in accordance with Article 16 of the Charter. According to its Preamble, the Charter reaffirms the rights as they result from international and European human rights obligations and case law. The EU and its Member States are bound to respect these rights and promote the principles as set out by the Charter when implementing and applying Union law.

The fundamental right to join a union is established by Article 23 of the [UN Universal Declaration of Human Rights](#) (1948) as well as by Article 8 of the [UN International Covenant on Economic, Social and Cultural Rights](#) (1966). The right to unionise is a prerequisite for sound social dialogue and collective bargaining, as recognized by relevant ILO Conventions and their respective Recommendations: the [Convention concerning Freedom of Association and Protection of the Right to Organise](#), No. 87 (1948); the [Convention concerning the right to Application of the Principles of the Right to Organise and to Bargain Collectively](#), No. 98 (1949); the [Labour Relations \(Public Service\) Convention](#), No. 151 (1978); and the [Collective Bargaining Convention](#), No. 154 (1981).

At the level of the Council of Europe, the right to collective bargaining is recognised as an essential element of the freedom of assembly and association under Article 11 of the [European Convention on Human Rights](#) (1950). Similarly, the [European Social Charter](#) (1961, 1996) guarantees the right to organise under Article 5 and the right to bargain collectively under Article 6.

II. Scope: Ensuring all self-employed and other non-standard workers are able to enjoy protection under applicable collective agreements

The Commission roadmap departs from the questionable aim of granting access to collective bargaining for more limited categories of self-employed workers, in particular those “in need of protection”. This approach is problematic as it places emphasis on precarity, vulnerability and formal employment status as decisive elements for the enjoyment of collective bargaining, when in fact it constitutes a universal fundamental right. **Fundamental rights must not be seen as exceptions to competition rules.**

The four scenarios elaborated in the roadmap suggests limiting access to collective bargaining to only certain categories of “solo self-employed providing their own labour”, as follows:

- 1) “through digital labour platforms”;
- 2) “to professional customers of a certain minimum size”;
- 3) “to professional customers of any size with the exception of regulated (and liberal) professions”; or
- 4) “to professional customers of any size” with “no restriction as regards the size of the counterpart” and where “counterparts would be allowed to bargain collectively too, for example across a certain sector” and to be considered also “whether public or semi-public professional associations that unite all professionals exercising regulated professions should be allowed to negotiate on behalf of their members”

“Individuals should be able to know, without complex legal or economic analyses, whether or not EU competition law prevents them from bargaining collectively. [...] The impact assessment will analyze the impacts depending on whether collective agreements could take place also at sectoral level.”

Against this background, it must be recalled that **joining a union, engaging in collective bargaining and enjoying protection under collective agreements are fundamental rights of all workers**, regardless of their status, covering not only genuine self-employed but also other non-standard workers, including workers on digital labour platforms. Therefore, the up-coming initiative must not be limited to only certain categories of 'solo self-employed'. No legal or economic analysis should be required to exercise one's fundamental right to collective bargaining.

Any kind of exceptions under competition rules which would limit the right to collective bargaining to only certain categories of workers or make certain collective agreements subject to approval by National Competition Authorities undermine **fundamental rights, fair conditions and the autonomy of social partners**. The interpretation and application of competition rules must not in any way result in the creation of second-class workers, additional or intermediate employment categories or collective bargaining actors.

Indeed, the Commission roadmap recognises that the ILO core Convention No. 98 (1949) applies also to self-employed workers.² However, the same application holds true also for the ILO core Convention No. 87 (1948), as well as for the supplementing ILO Conventions No. 151 (1978) and No. 154 (1981). The ILO Committee on the Freedom of Association has notably in its case law held that

"by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, 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, who should nevertheless enjoy the right to organize."³

According to the Committee on the Freedom of Association, this entails the obligation to ensure that "workers who are **self-employed could fully enjoy trade union rights** for the purpose of furthering and defending their interest, **including by the means of collective bargaining**".⁴ This right for self-employed workers to access collective bargaining has repeatedly been affirmed also by the ILO Committee of Experts on the Applications of Conventions and Recommendations.⁵

Likewise, the European Court of Human Rights has held that the freedom of association under Article 11 of the Convention applies to self-employed workers.⁶ Also the Council of Europe Committee of Social Rights has clearly affirmed that Article 6§2 of the European Social Charter grants self-employed the right to engage in collective bargaining, concluding that

"an **outright ban on collective bargaining of all self-employed workers** would be excessive as it would run counter to the object and purpose of this provision [...] Although the restriction was provided for by law and could be said to pursue a legitimate aim of ensuring effective and undistorted competition in trade with a view to protecting the rights and freedoms of others, the Committee considers that the ban was **excessive and therefore not necessary in a democratic society** in that the categories of persons included in the notion of 'undertaking' were overinclusive."⁷

² ILO (2012): [Report of the Committee of Experts on the Application of Conventions and Recommendations - General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization](#). First edition, Geneva, § 209.

³ ILO (2018): [Freedom of Association Compilation of decisions of the Committee on Freedom of Association](#). Sixth edition, Geneva, para. 387.

⁴ ILO (2018): [Freedom of Association Compilation of decisions of the Committee on Freedom of Association](#). Sixth edition, Geneva, para. 1285.

⁵ ILO (2012): [Report of the Committee of Experts on the Application of Conventions and Recommendations - General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization](#). First edition, Geneva, § 53 and 209.

⁶ ECtHR judgment *Vörður Ólafsson v. Iceland*, application no. [20161/06](#), 27 July 2010.

⁷ European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland*, Complaint No. [123/2016](#), 12 September 2018, § 40 and 98.

III. Approach: Assessing the state of play of competition law in the light of fundamental labour rights

In its roadmap, the Commission recognises that competition law can be an obstacle for individuals who are not employees to bargain collectively to improve their working conditions: “The initiative seeks to achieve this objective by providing legal certainty about the applicability of EU competition law to collective bargaining by self-employed.”

Under EU competition law, Article 101 TFEU prohibits agreements between undertakings that restrict competition. However, in the interpretation and application of competition rules an **overinclusive understanding of ‘undertakings’ effectively creates obstacles for self-employed and other non-standard workers to access collective bargaining**. This observation reveals a discrepancy between the concepts of ‘worker’ and ‘self-employed’ under labour law, on the one hand, and the concepts of ‘worker’ and ‘undertaking’ under competition law, on the other hand.

This policy incoherence must be remedied by ensuring that all workers can enjoy their fundamental rights, including the right to collective bargaining. Collective agreements must not be deemed prohibited by competition rules as horizontal agreements between undertakings. **Formal employment status is not the decisive element for determining neither the scope of fundamental rights nor the applicability of competition law.**

Fundamental rights cannot be made conditional upon competition rules, but competition law must be interpreted in the light of fundamental rights, thereby ensuring that collective bargaining is fully excluded from the remit of Article 101 TFEU and national competition rules. The purpose of competition law is not to regulate working conditions and wages negotiated by trade unions, but anti-competitive business practices alone.

In other words, **all collective agreements must be considered to fall completely outside the scope of competition law**, regardless of whether they protect employees or self-employed and other non-standard workers, including workers on digital labour platforms. In the same way as none of these workers should be considered undertakings for the purpose of competition law, **neither should trade unions organising, representing and negotiating on behalf of these workers be considered as cartels**. In this regard, it must also be recognised that collective agreements may cover both employees as well as self-employed and other non-standard workers.

Above all, collective bargaining aims to strike a fair balance by setting **minimum standards** for decent work, thereby also creating a level playing field in the market. Instead of restricting competition, collective bargaining promotes fair competition. **Wage-setting is not price-fixing**, labour is not a commodity.

IV. Context: Understanding the case law of the CJEU and the de minimis interpretation of Article 101 TFEU

In its roadmap, the Commission points out that “collective bargaining between employees and employers is outside the scope of EU competition law”, as held by the Court of Justice of the European Union. However, the approach taken by the Court goes further, which requires a closer examination to fully understand the current legal state of play as regards the relationship between competition law and collective bargaining. On the one hand, the Court has affirmed that competition law does not apply to the labour market, while on the other hand also recognising that the binary distinction between employees and employers does not sufficiently guarantee this separation of competition and labour law. Consequently, the case law of the Court supports a more restrictive interpretation of the concept of ‘undertaking’ and the scope of Article 101 TFEU.

First of all, as affirmed by the CJEU in *Albany*

“the social policy objectives pursued by **such agreements would be seriously undermined** if management and labour were subject to [EU competition rules] when seeking jointly to adopt measures to improve conditions of work and employment”.⁸

In *FNV Kunsten*, the CJEU took this conclusion one step further, affirming that Article 101 TFEU does not prevent a

“collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact **‘false self-employed’**, that is to say, service providers in a situation **comparable** to that of employees.”⁹

In other words, the situation of the self-employed workers in question did not have to be identical, but it sufficed that the situation was *comparable*. This line of reasoning was further developed by Advocate General Wahl in his Opinion in *FNV Kunsten*, stating that

“from the perspective of a worker, there is really **no difference** if he is replaced by a less costly worker or by a less costly self-employed person” [...] **‘preventing social dumping’** is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that may also constitute one of the core subjects of negotiation.”¹⁰

In fact, this conclusion is also supported by the case law of the ILO Committee on the Freedom of Association, stating that

“Protection against acts of anti-union discrimination would appear to be inadequate if an employer can resort to subcontracting as a means of **evading in practice the rights of freedom of association and collective bargaining**.”¹¹

Similarly, in *Becu* the CJEU established that individual providers of labour cannot be considered as separate undertakings for the purpose of competition law when forming an integral part of another undertaking:

“It must therefore be concluded that the employment relationship which recognised dockers have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question **for and under the direction of each of those undertakings**, so that they must be regarded as ‘workers’ [...]. Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus **form an economic unit** with each of them, dockers do not therefore in themselves constitute ‘undertakings’ within the meaning of Community competition law.”¹²

As notably held by the CJEU in *Wouters*, in addition it must be recognised that

“**not every agreement** between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily **falls within the prohibition** laid down in [Article 101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall **context** in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its **objectives**, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability”.¹³

Finally, in *Pavlov* the CJEU established that although

“the Treaty contains no provisions [...] encouraging the members of the **liberal professions** to conclude collective agreements with a view to improving their terms of employment and working conditions [...] a

⁸ CJEU judgment [C-67/96 Albany](#), 21 September 1999, § 59.

⁹ CJEU judgement [C-413/13 FNV Kunsten](#), 4 December 2014, § 31.

¹⁰ Opinion of Advocate General Wahl in [C-413/13 FNV Kunsten](#), 11 September 2014, § 76 and 79.

¹¹ ILO (2018): [Freedom of Association Compilation of decisions of the Committee on Freedom of Association](#). Sixth edition, Geneva, § 1082.

¹² CJEU judgment [C-22/98 Becu](#), 16 September 1999, § 26.

¹³ CJEU judgment [C-309/99 Wouters](#), 19 February 2002, § 97.

decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme **does not appreciably restrict competition** within the common market.”¹⁴

The case law of the CJEU clearly supports a *de minimis* interpretation and application of Article 101 TFEU, which is further justified by the obligation to take into account the Union’s fundamental values and overarching policy objectives as set out by Articles 3 TEU and 9 TFEU, including also the EU Charter of Fundamental Rights, when interpreting competition rules. As affirmed by the Court in *Iraklis*

“in respect of the **overriding reasons in the public interest** [...] the European Union is not only to establish an internal market but is also to work for the **sustainable development** of Europe, which is based, in particular, on a highly competitive **social market economy** aiming at full employment and **social progress**, and it is to promote, inter alia, social protection”.¹⁵

V. ***Definitions: Affirming the purpose of collective bargaining, its legitimate actors and compliance with international human rights standards***

It is not for EU competition law to define what constitutes permissible collective agreements. Also, the definition of collective bargaining included in the Commission roadmap raises serious and specific concerns as regards its compliance with applicable human rights standards. It risks undermining not only the autonomy of social partners but also the very purpose of collective bargaining.

“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.”

“Neither collective negotiations/agreements concerning trading conditions (such as prices charged) to private consumers nor unilateral price fixing would be covered by this initiative. In addition, the initiative would not introduce any obligation on any of the parties to enter into such negotiations or to conclude collective agreements”.

For the purpose of questioning the legitimacy of this definition, it must be recalled that **trade unions and employers as social partners** remain the only legitimate actors to engage in collective bargaining as an intrinsic element of social dialogue. Still, together with the increased flexibilization of the labour market and employer’s attempt to evade obligations, trade unions more and more often also witness how individual employers refuse to bargain or by-pass trade unions by concluding ‘agreements’ with obscure and non-recognised organisations. Such behaviours contribute to social dumping through substitution, triggering a race to the bottom as regards workers’ rights and their working conditions. Any Commission initiative envisaged by this roadmap must not legitimise in any way company (‘yellow’) unions under the influence of employers, solidarist associations, wage-fixing practices between employers, ‘workers’ forums’ or so called ‘charters of good work’ one-sidedly established by some digital labour platforms.

The **prerogative of trade unions** when it comes to engaging in collective bargaining and concluding collective agreements is notably affirmed by the case law of the ILO Committee on the Freedom of Association:

“the term ‘collective agreements’ means all agreements in writing regarding working conditions and terms of employment concluded **between an employer, a group of employers or one or more employers organisations, on the one hand, and one or more representative workers organisations**, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other. In this respect, the Committee has emphasized that the said Recommendation stresses the role of **workers**

¹⁴ CJEU judgment [C-180/98 to C-184/98 Pavlov](#), 12 September 2000, § 69 and 97.

¹⁵ CJEU judgment [C-201/15 Iraklis](#), 21 December 2016.

organizations as one of the parties in collective bargaining. Direct negotiation between the undertaking and its employees, by-passing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted.” (§ 1344)

“Collective agreements with the non-unionized workers should not be used to undermine the rights of workers belonging to the trade unions.” (§ 1347)

“Recalling the importance of the **independence of the parties in collective bargaining**, negotiations should not be conducted on behalf of employees or their organizations by bargaining representatives appointed by or under the domination of employers or their organizations” (§ 1214)

“The necessary legislative and other measures should be taken to **guarantee that solidarist associations do not get involved in trade union activities**” (§ 1223)

“Protection must be ensured against any acts of interference by employers designed to promote the establishment of workers organizations under the domination of an employer” (§ 1224)

“Since **solidarist associations** are financed partly by employers, are comprised of workers but also of senior staff or personnel having the employers confidence and are often started up by employers, they **cannot play the role of independent organizations in the collective bargaining process**, a process which should be carried out between an employer (or an employers’ organization) and one or more workers organizations totally independent of each other” (§ 1227)

“The Committee has recalled that legislative or other 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**” (§ 1230).¹⁶

Consequently, for the purpose of ensuring that the EU legal framework complies with applicable human rights standards, respects the autonomy of social partners and promotes **collective bargaining**, this prerogative must be understood as genuine and balanced negotiations between **organised, representative and recognised social partners** in accordance with national laws and traditions. In addition to Article 28 of the EU Charter of Fundamental Rights, also Article 152 TFEU affirms that

“The Union **recognises and promotes the role of the social partners** at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, **respecting their autonomy.**”

Furthermore, the concept of **collective bargaining** has been elaborated on also by the CJEU in its case law concerning the tensions between competition law and collective agreements. Notably in *Albany*, the Court established that a legitimate collective agreement

“First [...] derive[s] from **social dialogue** [...] and is the outcome of collective negotiations between organisations representing employers and workers”

“Second [...] as far as its purpose is concerned, that agreement [...] contributes directly to **improving** one of their **working conditions**”.¹⁷

In addition to the requirement of involving legitimate bargaining actors, the improvement of working conditions has also been affirmed as a fundamental element of collective bargaining according to the case law of the ILO Committee on the Freedom of Association:

“trade unions should have the right, through collective bargaining or other lawful means, to seek to **improve the living and working conditions** of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof.”

¹⁶ ILO (2018): *Freedom of Association Compilation of decisions of the Committee on Freedom of Association*. Sixth edition, Geneva, § 1344, 1347, 1214, 1223, 1224, 1227 and 1230.

¹⁷ CJEU judgment [C-67/96 Albany](#), 21 September 1999, § 62-63.

“One of the main objectives of workers in exercising their right to organize is to **bargain collectively their terms and conditions of employment**. Provisions which ban trade unions from engaging in collective bargaining therefore unavoidably frustrate the **main objective and activity for which such unions are set up**. This is contrary not only to Article 4 of Convention No. 98 but also Article 3 of Convention No. 87 which provides that **trade unions shall have the right to exercise their activities and formulate their programmes in full freedom**.”¹⁸

VI. *Form: Respecting the autonomy of social partners in the choice of policy instrument, possible legal basis and procedure*

Finally, the alternatives put forward by the Commission when it comes to the choice of policy instrument, possible legal basis and procedure raise serious concerns in relation the obligation to respect the autonomy of social partners as enshrined in the Treaties. According to the roadmap

“the Commission will consider different policy options that may be implemented through a Council Regulation or a Commission Communication”.

“If the initiative leads to a legislative instrument, the legal basis for this initiative could be Article 103(2)c of the Treaty. The initiative thus falls within the scope of the EU competition policy, which, pursuant to Article 3(1)(b) of the Treaty, is an area of exclusive competence of the EU.”

“Besides targeted consultation meetings (also with social partners), the Commission will launch an open public consultation as part of the impact assessment process (foreseen for the first half of 2021).”

It must be recalled that **collective bargaining pertains to social policy and is the exclusive competence of social partners**. It is an **intrinsic element of social dialogue** and should not be dealt with directly by an open public consultation. Any Commission consultation in relation to social policy issues should respect the obligation of a dedicated social partner consultation as set out in Articles 151 to 155 TFEU, providing amongst others that

“The Union and the Member States, having in mind **fundamental social rights** such as those set out in the **European Social Charter signed at Turin** on 18 October 1961 and in the **1989 Community Charter of the Fundamental Social Rights of Workers**, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, **dialogue between management and labour**, the development of human resources with a view to lasting high employment and the combating of exclusion.” (Article 151 TFEU)

“The Commission shall have the task of **promoting the consultation of management and labour** at Union level and shall **take any relevant measure to facilitate their dialogue** by ensuring balanced support for the parties.” (Article 154.1 TFEU)

Likewise, the Commission has committed to the [European Pillar of Social Rights](#) and its Principle 8 on social dialogue and involvement of workers, notably stating that

“The social partners shall be **consulted on the design and implementation of economic, employment and social policies** according to national practices. They shall be **encouraged to negotiate and conclude collective agreements** in matters relevant to them, while **respecting their autonomy** and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.”

“Support for increased capacity of social partners to **promote social dialogue** shall be encouraged.”

For all these reasons, using a competition legal base to address issues relating to working conditions would be unacceptable, as any EU initiative in relation to collective bargaining must respect the Treaty-based procedure for social partner consultation.

¹⁸ ILO (2018): [Freedom of Association Compilation of decisions of the Committee on Freedom of Association](#). Sixth edition, Geneva, § 1232 and 1234.

This competition policy initiative should instead be limited to defining the scope of Article 101 TFEU and national competition rules by **clarifying fundamental concepts of competition law**, and not by altering fundamental concepts of collective bargaining or national industrial relation systems. The Commission should promote a more **restrictive interpretation of the scope of application of competition law in full compliance with fundamental rights**, thereby clarifying that self-employed and other non-standards workers must **not be considered as ‘undertakings’** for the purpose of competition law when legitimately engaging in collective bargaining.

Ensuring the fundamental right to collective bargaining in any other way than through its full exclusion from the scope of competition policy would be unacceptable, as it would make collective bargaining conditional upon competition rules and thereby risk reproducing the devastating consequences of the CJEU ruling in *Laval*¹⁹, namely the **unlawful subordination of collective bargaining and other fundamental labour rights to internal market rules**. Such consequences would inevitably result in a breach of the EU Charter of Fundamental Rights, the European Convention on Human Rights, the European Social Charter and applicable ILO Conventions. In a trade union complaint following the CJEU ruling in *Laval*, the European Committee of Social Rights indeed confirmed that the subsequent amendments to national legislation effectively violated the European Social Charter and the right to bargaining collectively:

“The facilitation of free cross-border movement of services and the promotion of the freedom of an employer to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than **core labour rights, including the right to collective action to demand further and better protection of the economic and social rights** and interests of workers.”²⁰

The up-coming competition policy initiative **must not affect in any way the exercise of fundamental rights** as recognised in Member States and at Union level, as well as by European and international human rights instruments, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor must it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice. In cases of conflict, the exercise of the right to collective bargaining must take precedence over economic freedoms.

In conclusion, the envisaged Commission initiative must remain limited to the mere removal of competition obstacles to collective bargaining. This should be done by issuing **interpretation guidance, to confirm that collective agreements are fully excluded from the scope of Article 101 TFEU 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**. Collective bargaining, collective agreements, bargaining actors or employment categories should not be defined for the purpose of competition policy or be subject to a competition legal base. Instead, the Commission should promote an **interpretation of competition law in full respect of fundamental rights**. It should issue **guidance promoting a restrictive interpretation of Article 101 TFEU**, thereby **preventing an overinclusive understanding of ‘undertakings’ for the purpose of competition law**.

¹⁹ CJEU judgment [C-341/05 Laval](#), 18 December 2007.

²⁰ European Committee of Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. [85/2012](#), 5 February 2014, § 122.