

## ETUC Resolution for a More Sustainable and Inclusive Competition Policy

Adopted at the Executive Committee of 22-23 March 2021

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### ETUC KEY MESSAGES

- The EU legal framework on competition must contribute to **sustainable development** in line with the fundamental values, rights, principles and objectives of the Union to ensure coherence between competition, environmental and social policies.
- EU competition law needs to address the challenges stemming from **digitalisation**, to guarantee fair, safe and open digital markets. A level playing field between online and offline markets must be ensured, including for to the respect of fundamental rights and democratic principles.
- To confront the impact of **globalisation** on competition, the EU should identify conditions for the growth of strong and sustainable European undertakings and partnerships in strategic sectors and value-chains of common EU interest. Tackling distortions of competition in the internal market caused by foreign subsidies requires dedicated action.
- More inclusive definitions of **consumer interests** and **relevant markets** are necessary not only to promote sustainable development but also to more effectively address market concentrations and monopolistic tendencies.
- Social and environmental considerations should play a more prominent role in EU **merger control** to prevent adverse effects on sustainable development. More emphasis should be put on behavioural remedies, to safeguard workers' rights and prevent employer monopsony power. Workers and trade unions should be properly involved and consulted throughout merger processes.
- EU **antitrust control** must ensure fair competition, sustainable business practices, inclusive markets and the protection of vulnerable actors. On the one hand, this requires clarifications of the scope for sustainability agreements between competitors. On the other hand, it must also be clarified that collective bargaining agreements as such fall completely outside the remit of antitrust control.
- EU rules on **State aid control** should align with objectives promoting green solutions, quality jobs, just transition and an inclusive recovery. To avoid public funding of undertakings in conflict with sustainability principles, green and social conditionalities and inclusive governance structures must be put in place.
- EU rules on **public procurement** should introduce a clear obligation for eligible contractors to respect the fundamental right of workers to organise and to collective bargaining and ensure full compliance with working conditions as established by collective agreements and/or by law. Sustainable tendering criteria should be strengthened, grasping the full potential of public purchases in speeding up transitions towards climate neutrality, circular economy and upward social convergence.

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## **I. COMPETITION LAW PROMOTING SUSTAINABLE DEVELOPMENT**

Fair, open and well-regulated competition enables businesses to compete on equal terms, while contributing to the prosperity and proper functioning of the internal market. However, increasing concentrations of economic power, capital, innovation and ownership demonstrate that the current approach to EU competition policy and enforcement has not delivered for everyone. Rather than promoting inclusive competition, it has enhanced social inequalities through labour market concentrations, monopsony power, lack of workers' involvement and undermined collective bargaining.<sup>1</sup> Although the EU sets ambitious social and environmental policy objectives, its competition legal framework does not sufficiently take into account sustainable development concerns and the need for coherence across policy areas.

The ETUC is calling for a revision of the EU legal framework on competition to promote fairer, more inclusive and sustainable competition policies as part of the EU social market economy. Competition law must respect and protect social, workers' and trade union rights, and support the creation of quality employment, fairness, just transition and upward social convergence.

### **i) Ensuring coherence with fundamental values, rights, principles and objectives**

The fundamental values, rights, principles and objectives enshrined in the Treaties and the Charter of Fundamental Rights are fully binding on competition law as on any other policy area. Pursuant to Article 3 TEU, the EU shall promote the well-being of its peoples and 'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.'

'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health', as set out by Article 9 TFEU. Similarly, Article 11 TFEU stipulates that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'

In accordance with Article 7 TFEU, 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account'. Consistent with the duty of cooperation under Article 4(4) 3 TEU 'Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' In other words, the EU must ensure coherence across policy areas, including between environmental, labour and competition law.

### **ii) Competition law contributing to inclusive and sustainable markets**

Flagship initiatives such as the European Pillar of Social Rights, the Recovery Plan, the Green Deal and the UN Sustainable Development Goals must be mainstreamed in competition policy considerations, from design and implementation to enforcement and monitoring of compliance. These horizontal policy objectives should be considered in merger, antitrust and State aid control. Competition policy must not only mitigate negative externalities, but actively contribute to the realisation of social and environmental objectives.

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<sup>1</sup> See e.g. OECD (2019): [Industry Concentration in Europe and North America](#), indicating concentration increases in 77 % of European industries, with 4-8 percentage points for average industries during the years 2000-2014. OECD (2017): [Inequality – A Hidden Cost of Market Power](#), estimates market power augments wealth of the richest 10% of the population by 12% to 21%, while also depressing the income of the poorest 20% of the population by between 14% and 19%. Regarding employer monopsony power, see also e.g. OECD (2019): [Executive Summary of the Roundtable on Competition issues in labour markets](#).

Mainstreaming sustainable development in EU policy making and actions require economic, social and environmental considerations to be put on an equal footing. There can be no hierarchisation of sustainability objectives, as the very sustainable development goals of the UN Agenda 2030 are indivisible. Moreover, social and environmental concerns are not opposite interests. Environmental or social progress must not be seen as limited to only certain groups of people or sectors, but as such lies in the general interest.

## II. DIGITALISATION IN COMPETITION

Fair, sustainable and inclusive digitalisation will be key in guaranteeing the economic prospects and wellbeing of society. The COVID-19 crisis not only evidences the potential of digitalisation, but also our reliance on digital solutions. However, the last decades' exponential growth of digital markets equally highlights the need to adapt competition and internal market rules to effectively address the specificities of digital markets characterised by platforms with significant network effects and structural competition problems such as incontestable market concentrations and the exacerbation of existing inequalities.<sup>2</sup>

Digital services provided by online intermediaries increasingly function as infrastructure, necessitating public utility-style regulation similar to that of other network industries such as energy, telecoms, postal services and railways. EU-wide enforcement and oversight must be ensured by improved cooperation and information sharing between national enforcement authorities, including clear competences of the Commission to investigate platforms ecosystems and to impose dissuasive sanctions. In addition, a dedicated social policy initiative is needed to address the particular challenges stemming from digital labour platforms, paving the way for improved working conditions and strengthened responsibilities of platforms.<sup>3</sup>

### i) Upholding fair and open digital markets

The emergence of digital platforms with a significant impact on the internal market demonstrates the importance of data as a source of market power. Monopolistic online markets with one or a few big players have resulted in structural competition problems such as tipping markets and lock-in effects for consumers, businesses and workers. These platforms pool resources and competition forces, creating a race to the bottom, devaluing services and restricting the capacity of others to determine their own conditions and conduct in the market.

Against this background, the DSA-DMA Package is needed to safeguard human rights and quality standards, by ensuring transparency, increased responsibility and liability of online intermediaries as well as by preventing unfair practices of large online platforms. Beyond their economic dominance, information society platforms also pose systemic risks of a more societal nature, as regards their impact on democracy, public discourse, media pluralism, data protection and logistics. Dominant platforms not only function as economic 'gate keepers', but also condition how fundamental rights are exercised in the online environment.

The Digital Services Act must empower users and ensure their human rights both online and offline. Private censorship and removal by default must not become an acceptable approach for platforms to quickly deal with content flagged as potentially illegal or harmful. The removal of users or content must provide for clear rules and complaints mechanisms, ensuring that decisions by platforms are open to review by public authorities. The DSA should ensure transparency of algorithms and the use of personal data, banning microtargeting and profiling practices. While all information society platforms must be subject to the same fundamental obligations, additional due diligence requirements and enhanced public supervision are

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<sup>2</sup> See e.g. OECD (2020): [Abuse of Dominance in Digital Markets](#), indicating that 7 out of the 10 largest companies in the world provide digital products.

<sup>3</sup> See [ETUC Resolution on the protection of the rights of nonstandard workers and workers in platform companies \(including the self-employed\)](#), adopted at the Executive Committee Meeting of 28-29 October 2020.

necessary to address the systemic risks that power asymmetries and data harvesting practices of very large online platforms pose to online safety, democracy and fundamental rights.

As an *ex ante* tool complementing existing competition rules, the Digital Markets Act must enable the Commission to pro-actively prevent dominant actors from creating vertical and horizontal constraints on competition between as well as within platforms, while protecting not only business users but also end-users. The behaviours prohibited and prescribed by the DMA must be both future-proof and ensure contestability of current market powers. While quantitative thresholds may be necessary to quickly designate certain platforms as ‘gatekeepers’, case-by-case assessments should remain a credible and effective option. The DMA must prevent platforms from self-preferencing, predatory pricing and killer acquisitions, while ensuring interoperability for both ancillary and core platform services. Data portability and secure access to essential anonymised data is equally key to ensure fair competition. In cases of impossibility or systematic failure to respect these obligations, the DMA must allow to behavioural and structural remedies to be enforced swiftly, including structural unbundling of such digital giants and their online ecosystems as a real option for *ex post* enforcement.

## **ii) Ensuring fair competition between online and offline markets**

As online and offline markets are increasingly intertwined, safeguards in the traditional economy must be extended to digital spaces. Many digital service providers are not limited to only information society services, and the DSA must ensure Member States of destination remain competent to regulate services that take physical expressions on their territory. Products and services that are illegal offline must also be illegal online. National legislators and courts must be competent to deal with infringements and define what constitutes illegal or harmful content, while ensuring respect for fundamental rights, democracy and the rule of law.

Digital platforms cannot build their competitive advantage in a regulatory vacuum. To ensure a level playing field between the online and offline economy, the DSA should be limited to information society services in order not to undermine the scope of application of the 2006/123 Services Directive. Any digital service inherently linked to the provision of a physical service should be bound by the rules governing the relevant offline sector.<sup>4</sup> Pursuant to the country of destination principle, applicable sectoral legislation, including social and labour law as well as relevant collective agreements should apply. This is not only a matter of legal certainty, but of fairness and the protection of workers, consumers, the environment and the general interest.

Digital innovation must not be used as a means to circumvent applicable rules. The DSA should clarify the liability regime for online intermediaries, tightening the conditional liability exemptions for information society services of a mere technical, automatic and passive nature. Any intermediary function is ultimately designed, deployed and maintained by a physical or legal person. In particular, online platforms must be held liable for the services and their individual providers when they exercise control, knowledge or influence over users.

## **III. GLOBALISATION IN COMPETITION**

Challenges stemming from globalisation must be effectively addressed by EU rules on competition, as a complement to industrial policies. European industries are competing on global markets where regulation in terms of competition law, workers’ rights, environmental protection, taxation and social security rules are often even less developed than in Europe. Consequently, the EU competition legal framework should take greater account of geopolitical realities and the need to avoid strategic dependence on third countries.

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<sup>4</sup> See e.g. CJEU rulings [C-434/15 Elite Taxi](#) and [C-320/16 Uber France](#).

### **i) Identifying conditions for emergence of European champions**

In the absence of a global level playing field, EU competition law must ensure compatibility with the growth of strong and sustainable European companies in strategic sectors, while also ensuring that the acquisition or maintenance of market power does not result in anti-competitive behaviours or have a negative impact on innovation, consumers or workers' rights. The EU legal framework must not prevent European companies from exploiting economies of scale to become global players. Globalisation, digitalisation and COVID-19 underline the need for EU strategic autonomy the world markets, to foster not only global competitiveness but also investments, self-sufficiency and the re-shoring of European value-chains.

In merger control, the assessment of the permissibility for European champions on a case-by-case basis should take greater account of long-term market outlooks, the potential strength of foreign competitors and more lenient conditions for companies in third countries. Due account should be taken of possible efficiencies resulting from a merger as well as potential negative impacts on sustainability or autonomy in the event of a prohibited merger. However, the assessment should give due regard not only to the physical presence of such companies on European territory, but also their legal domicile and ownership base. Similarly, the different dimensions that such a championship may entail must be closely scrutinised, be it in terms of capitalisation, revenue, assets or shares of the labour market. Also a relatively small company may be leading in a market which is emerging or of strategic interest.

Likewise, a European champion is not necessarily characterised by one single company, but may consist of partnerships or networks of excellence in strategic sectors or value chains with a common European interest. The promotion of European champions may also entail dedicated actions under State aid and antitrust control to facilitate the market introduction of breakthrough innovations in strategic areas through cooperation agreements or financial support of the final stages of an innovation process. Similarly, the EU framework for Important Projects of Common European Interest can pave the way for new industrial alliances with a view to stimulate innovation and competitiveness. Such projects and cooperation will be key to channel public and private investments towards low carbon technologies, steer innovation and develop common visions and strategies for European value chains and industries.

### **ii) Foreign subsidies and the need for a level playing field**

To ensure a level playing field in the internal market, the EU must tackle distortive effects caused by foreign subsidies, resulting in unfair competitive advantages for companies from third countries operating in the EU, facilitated acquisition of European undertakings or manipulated public procurement procedures. Preserving the political and economic autonomy of the EU and European industries and jobs calls for targeted instruments on foreign subsidies and international procurement. The COVID-19 pandemic underlines the need for action, as falling levels of aggregate demand and increasing liquidity problems put European companies at risk of being targeted by foreign acquisitions underpinned by subsidies.

A holistic definition of foreign subsidies is necessary to include benefits stemming from not only grants, liabilities and tax advantages but also from disrespect of international labour or environmental standards. Foreign competitors in effect receive subsidies when they exploit workers or externalise the costs of pollution. Stakeholders, including social partners, must be able to bring such cases to the Commission. To prevent adverse effects of lengthy investigations, a presumption of distortion must be possible under certain conditions, such as a proven track-record of distortive practices or signs of significant under-bidding. Assessment criteria must be non-exhaustive, considering the overall behaviours of the operator in the market, the character of the subsidy and its effects on competition, sustainable development

and employment. To be efficient, the instrument should be coupled with redressive measures, dissuasive sanctions, and the possibility to prohibit or unroll an acquisition.

While government subsidies and State-owned enterprises are key elements of industrial policy and should be allowed, domestic production must be protected from import surges and unfair competition practices. Therefore, a high threshold of positive benefit must be set for any 'EU interest test' when assessing the permissibility of foreign-subsidised investments or acquisitions. It must ensure transparency and not undermine the overarching objectives of a sustainable and competitive social market economy. A wrongfully designed test might have adverse effects on the internal market, including the labour market. The assessment should depart from EU industrial policy objectives, sustainable development and the need for creation of quality jobs. The procedure must be inclusive and allow for the active involvement of trade unions, especially in the assessment of impacts on jobs and industrial value chains.

#### **IV. CONSUMER INTERESTS AND MARKET DEFINITIONS**

The need to promote sustainable development and more effectively address market concentrations and monopolistic tendencies must be reflected in the fundamental concepts of competition law. To be able to grasp the full reality of market powers, competition policy needs to embrace more inclusive definitions of relevant markets and consumer interests.

##### **i) Promoting a more inclusive consumer welfare standard**

To support sustainable development, EU competition law must adopt a broader approach to the 'consumer welfare standard'. The definition of consumer interests must go beyond price, quality and individual consumers as ultimate beneficiaries of competitiveness. A broader interpretation of its personal scope should include also future consumers or workers as consumers. Quality considerations may be linked to e.g. decent working conditions and production methods, including the improvement of public health through reduced use of toxic pesticides or for the purpose of securing a long-term supply on European territory.

An excessive focus on efficiency goals or 'consumer-willingness-to-pay' analysis risks undermining open and sustainable markets. Instead, the promotion of objectives such as human rights, quality jobs and just transition requires a fairer distribution of benefits. However, not all sustainability benefits are quantifiable in monetary or non-monetary terms and not all positive effects will benefit everyone directly. The direct benefits of individual consumers cannot outweigh greater societal benefits in the general interest, although they may sometimes also be more indirect, such as the respect for fundamental labour rights in a certain sector or in a third country. By promoting a more inclusive consumer welfare standard, EU competition policy can support quality production and more ethical and sustainable consumption.

##### **ii) Ensuring more inclusive market definitions**

Likewise, sustainable development concerns should be mainstreamed into the Commission Notice on the definition of relevant market. In addressing environmental concerns, the assessments should e.g. look into how a potential merger could affect the choice of environmentally friendly products, services or technologies. The assessment has to go beyond the conventional assessment of choice and innovation, to include e.g. effects on alternative (but not necessarily competing) markets or practices, possible disincentives to shift towards ecological production methods or technologies, or effects on biodiversity or public health.

Similarly, the definition of relevant markets must take due account of labour market considerations, such as the effects of competition or lack of competition on employment and job quality. To identify risks of employer monopsony power, the market assessment should look into issues such as opportunities to switch jobs or retrain as well as workers' possibilities and/or willingness to relocate and/or commute. While the geographic market for a product may

be broad, the labour market may be narrow, and vice versa. In this context, social partners may bring added value to the definition of relevant labour markets.

To assess the impact of global competition, the definition of relevant markets needs to adopt a more dynamic and forward-looking approach, taking greater account of global markets and competition stemming from third countries, be it existing, potential or future competition. Assessments should include considerations such as the ongoing globalisation of industrial value chains, the concentration of market power in these value chains, strategic industrial policies of third countries, the existence of global overcapacities and the level on which prices are set, which is often the global level.

When it comes to digital (often multi-sided) markets, data concentrations must be closely assessed when determining relevant markets and potential distortions of competition. Although the size of a digital undertaking in terms of geographic coverage, market share or turn-over may be relevant for market power, also SMEs can have a large user base and large quantities of data. In particular when it comes to smaller innovative companies, transaction values can point towards risks of increased market concentrations. While being a non-monetary asset, the bundling of data may also allow for significant economies of scale across several market segments with rapidly changing boundaries. Abuses of data also go beyond economic dominance, potentially interfering with data protection, media diversity and fundamental rights.

To grasp the full scale of synergies and interdependencies within larger online and offline ecosystems, a holistic and more structural approach is needed to identify anticompetitive effects, giving due regard also to ownership of capital and rent-seeking behaviours. Potential dominance and abuse should be assessed by approaching the whole ecosystem as a single corporation rather than as distinct operators in different markets. One corporation may not necessarily be dominant in any of the sectors, but through its entire ecosystem it may exercise considerable dominance and influence over consumers, workers, businesses and the public.

## **V. MERGER CONTROL**

Social and environmental considerations should play a more prominent role in EU merger control. Through mergers and acquisitions undertakings may expand their business or specialise, enter new markets or strengthen their managerial power. Therefore, competitive advantages stemming from a merger may have important positive or negative effects on sustainable development considerations for products, services and labour markets.

### **i) Sustainable and inclusive merger assessments**

The merger assessment of economic progress should be complemented with a sustainability clause, introducing an explicit duty of competition authorities to examine not only economic but also environmental and social impacts of mergers.<sup>5</sup> The acquiring undertaking should report on Environmental, Social and Governance (ESG) matters. It should make clear forward-looking statements and binding commitments on the impact on jobs, investments and the environment. Assessment criteria should be expanded to examine the impact of the potential acquisition on employment conditions and the labour market situation in the sector.

Social and environmental assessment criteria are particularly important when the acquiring undertaking has a worse track-record, as well as for the purpose of preventing predatory acquisitions which could have a negative impact on innovation in green technology. The acquiring company should demonstrate compliance with standards such as the Paris Agreement, OECD Multinational Guidelines and the UN Guiding Principles on Business and

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<sup>5</sup> See e.g. CJEU ruling [T-12/93 Vittel](#).



Human Rights. If the subject of acquisition is not compliant, the acquiring undertaking should commit to a roadmap for bringing the acquired undertaking into compliance.

More sustainable rules on merger control should also ensure more inclusive merger processes. A clear right of consultation should be introduced for stakeholders such as workers and trade unions to state their opinion in the process and to attend merger hearings. Similarly, workers and trade unions should be properly involved and consulted in the design of effective and sustainable behavioural remedies. Mergers should be conditioned to the respect of workers' rights over information, consultation and participation as regards the impact of the merger on the workforce. In particular, mergers should not be approved before it is confirmed that negotiations on worker information, consultation and participation in the merged entity have been completed, and that worker entitlements to pensions and other benefits are protected after the merger.

## **ii) Conditionalities and remedies ensuring fairness and sustainability**

The approval of mergers must be made conditional upon sustainability. More emphasis should be put on behavioural remedies to prevent adverse effects on sustainable development, including also labour market concerns of strategic mergers. In terms of employment and job quality, remedies should ensure that the legal certainty of workers is not jeopardised because of prescribed divestments resulting in mass redundancies due to relocation. Workers' information, consultation and participation rights as well as upskilling and reskilling opportunities are crucial in this regard. Acquiring undertakings should also commit to respecting the fundamental rights of workers to bargain collectively and ensuring full compliance with applicable collective agreements and working conditions. If the acquirer fails to respect commitments made to redress negative effects of the merger, it should be possible to unwind the acquisition.

Also the likelihood of employer monopsony power must be examined as part of merger control, ensuring socially fair outcomes without prejudice to the sustainability of the sector. If the merger in question would concentrate considerable power to a few undertakings, there is a clear risk of monopsony power which may result in downwards pressure on working conditions and wages – within the undertaking as well as in the sector. Such risk should be addressed already in the merger assessment and closely monitored. In this regard, the respect for workers' right to bargain collectively remains crucial to any merger. Competition law alone cannot remedy employer monopsony powers, but such power imbalances can only be effectively addressed with the help of collective bargaining, including at sectoral level.

## **VI. ANTITRUST CONTROL**

Competition can be a strong driver for sustainable development, in particular when sustainability constitutes a competitive advantage. However, while ensuring strict scrutiny of dominance and distortions, EU competition rules should contribute to the promotion of sustainable business practices, inclusive markets and the protection of vulnerable actors, including workers. There is a need on the one hand to clarify how the current antitrust rules relate to sustainability agreements, and on the other hand to ensure collective bargaining agreements remain completely outside the remit of antitrust control.

### **i) Assessing horizontal cooperation agreements on sustainability**

The promotion of social and environmental progress necessitates a broader and more holistic interpretation of Article 101(3) TFEU in the Commission Guidelines on horizontal cooperation agreements.<sup>6</sup> Greater account should be taken of non-monetary values and non-price efficiencies capable of creating a range of direct or indirect benefits for not only consumers,

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<sup>6</sup> See e.g. CJEU rulings [C-26/76 Metro](#), [C-42/84 Remia](#) and [T- 86/ 95 Compagnie Générale Maritime](#).

but also for workers and citizens. The Guidelines should be updated to ensure legal certainty for cooperative agreements between competitors aimed at achieving environmentally and socially sustainable policy objectives and fairness throughout value chains. Sustainability agreements may e.g. contribute to environment and climate protection, green and socially just transitions, skills development, decent working conditions and respect for human rights.

Openly concluded sustainability agreements should be deemed positive unless an appreciable negative impact on competition is demonstrated, outweighing any sustainability benefits. Permissible agreements must demonstrate effects which cannot be attained by any of the actors acting unilaterally, nor by public authorities, since it might require e.g. taking action outside the EU. Above all, permissibility requires that the positive impacts and objectives in question cannot be effectively achieved through genuine competition under market conditions or e.g. through sectoral legislation. Cooperation must be limited to what is strictly necessary to achieve this aim and not open the door to ‘sustainability washing’. To this end, the close involvement of workers and trade unions in sustainability agreements is also essential.

## **ii) Bringing collective bargaining outside the scope of antitrust control**

EU competition rules on antitrust must be limited to anti-competitive business practices alone, leaving collective agreements outside their remit.<sup>7</sup> Whereas competition law aims to tackle power imbalances between undertakings, labour law and collective bargaining aims to address power imbalances within undertakings. EU competition rules must never stand in the way of collective bargaining, workers’ rights and decent working conditions.

The ETUC calls on the Commission to issue interpretation guidance, clarifying that collective agreements fall completely outside the scope of competition law, regardless of whether they protect employees, self-employed or other non-standard workers, including workers on digital labour platforms. Guidance is necessary to promote a human right compliant and restrictive interpretation of Article 101 TFEU and the concept of ‘undertaking’.

For the purpose of competition law, self-employed and other non-standard workers engaging in collective bargaining are not undertakings. Trade unions are not cartels, and neither are employers when jointly engaging in collective bargaining. Wage-setting is not price-fixing. By establishing minimum standards for working conditions, collective bargaining pursues legitimate social policy objectives which must not be jeopardised by antitrust control.

Joining a union, engaging in collective bargaining, taking collective action and enjoying protection under collective agreements are universal human rights of all workers. These fundamental labour rights are recognised under international and European human rights instruments, including for self-employed and other non-standard workers, and must not be conditional upon competition rules. Formal employment status or precarity are not decisive elements in determining the scope of fundamental rights or of competition law.

Collective bargaining is the exclusive competence of national social partners, representing employers’ associations/single employers and trade union organisations. It is not the role of competition law to regulate working conditions, define what constitutes collective bargaining or what can constitute a collective agreement, who can engage in such negotiations or enjoy protection under collective agreements. Collective agreements derive from social dialogue and collective bargaining, consisting in negotiations between management and labour for the purpose of improving working conditions.

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<sup>7</sup> See e.g. CJEU rulings [C-67/96 Albany](#), [C-22/98 Becu](#), [C-180/98 to C-184/98 Pavlov](#), [C-309/99 Wouters](#) and [C-413/13 FNV Kunsten](#). See also ECSC decision [123/2016 ICTU v. Ireland](#).

In accordance with the law and practice of Member States and national labour market models, only organised, recognised, representative and independent trade unions can legitimately bargain collectively on behalf of employees, self-employed and other non-standards workers. Competition law must not open up for social dumping by legitimising alternative bargaining actors, e.g. ‘yellow’ company unions, wage-fixing practices between employers, so-called ‘workers’ forums’ or ‘charters of good work’ one-sidedly introduced by digital platforms.

Any initiative aiming to address the tensions between collective bargaining and competition law must respect the autonomy of social partners when it comes to the choice of policy instrument, possible legal basis and the Treaty-based procedure for social partner consultation. A competition policy initiative must be limited to defining the scope of Article 101 TFEU by clarifying concepts of competition law, and not by altering fundamental concepts of collective bargaining or national industrial relation systems.

## **VII. STATE AID CONTROL**

To ensure that public funds are not used to support undertakings or innovations contributing to environmental or social dumping, EU rules on State aid must fully respect and promote sustainable development. Sustainable State aid should promote green solutions, quality jobs and a just transition. At the same time, the policy response to COVID-19 also demonstrates the importance of State aid in sustaining livelihoods in times of crisis. While there is an urgent need to support jobs and businesses, the EU’s recovery represents an opportunity for a ‘levelling up’ in terms of access to good quality employment and climate-friendly industries.

### **i) Investing in just transitions and a people’s recovery**

The objective of –55% GHG emissions by 2030 and carbon neutrality by 2050 requires massive changes in technologies and industrial processes. To achieve this, State aid control must align with the objectives of the Green Deal and the new Industrial Strategy for Europe to provide public authorities with an enabling framework. EU rules on State aid must support Member States in ensuring a phase out of environmentally harmful subsidies. The need to prevent negative externalities should be given due regard in the design EU State aid rules.

To palliate the shortcomings of the EU Emission Trading System, State aid rules should give sufficient flexibility to public authorities to develop effective climate neutral industrial strategies. It should e.g. allow for tools such as Carbon Contracts for Differences which enables governments to guarantee investors in innovative climate-friendly technologies and practices a fixed price that rewards CO2 reductions above the current price levels in the EU ETS.

Nonetheless, State aid rules promoting support to sustainable businesses must not deepen the divide between Member States depending on their capacities to generate public funding. The transition to a climate neutral and circular economy will impact some regions and sectors more than others. Regions highly dependent on energy intensive industries will be particularly affected. In such cases, competition policies must not result in massive layoffs, but instead support workers in transition. For this purpose, State aid rules need to also take developmental, cohesive, and territorial differences between Member States and regions into account.

To this end, the use of State aid must be complemented by an increased European investment capacity and solidarity mechanisms. Special regimes for granting State aid to the benefit of regions under the Just Transition mechanism should be considered. Governance structures should include partnership also involving social partners. Trade union representatives and works councils should be informed and consulted to ensure that State aid received by the company is used in a way that ensures the preservation and creation of quality employment, including re-skilling, up-skilling and social dialogue with a view to facilitate just transitions.

## **ii) Ensuring inclusive assessment and sustainable conditionalities**

When assessing the compatibility of an aid, due regard must be given to social and environmental considerations as opposed to potential negative effects on trade and competition. The 'do no harm', 'precautionary' and 'polluter pays' principles should apply to EU State aid control, to prevent competitiveness based on poor social and environmental standards or tax evasion. State-sanctioned tax, environmental and social dumping within the internal market should amount to illegal State aid and be challenged by judicial review. In cases of unlawful aid, trade unions must also be considered legitimate 'interested parties'.

Green and social State aid conditionalities should be introduced in the form of a sustainability duty, thereby avoiding public funding of damaging or counter-productive projects. Beyond prohibitions on environmental and social harm, it must also be possible to ensure State aid actively supports compliance with environmental and social legislation and standards. The less commitments towards environmentally and socially positive actions that a beneficiary of State aid is able to provide, the stricter this compatibility assessment should be.

To ensure State aid contributes to accelerate the transition to a carbon neutral economy, aid should be conditional upon the respect of the 'do no significant harm' principle and prioritise the financing of sustainable activities in line with the Taxonomy Regulation 2020/852. To prevent any 'sustainability washing', authorities must be able to properly verify claims made by companies. At the same time, all sectors must be ensured access to the resources they need to reach climate neutrality and the Green Deal objectives. Therefore, industrial sectors in need of massive investments to decarbonise must not be barred from receiving State aid.

In addition to environmental conditionalities, State aid rules should be complemented with stronger social and governance requirements to steer investments towards activities that create decent jobs and facilitate the transition of workers. Social conditionalities for State aid should be aligned with social clauses under EU rules on public procurement with a view to promote worker's rights. It should be ensured that State aid is not granted to economic operators which do not respect the fundamental right to collective bargaining, disregard information, consultation and participation rights or engage in social dumping. State aid must be conditional upon businesses putting in place fair pay, gender equality and employment plans through trade union recognition and collective agreements.

Against the background of the COVID-19 crisis, it is imperative that State aid supports positive changes in corporate priorities and practice. Therefore, it is regrettable that the Commission's Temporary Framework to support the economy during the pandemic has not imposed any clear-cut obligations or limitations on granted aid to further the EU's sustainability goals. Public support should be made conditional upon requirements such as employment and location guarantees, restrictions of dividend payments, limitations of profit-related compensations for managing directors and board members. Likewise, massive bailouts for companies of strategic interest or delivering services of general economic interest should be conditioned in a way that enables governments to influence corporate behaviour, e.g. by taking equity shares in exchange for its support, thereby ensuring company resources are used responsibly and fairly.

## **VIII. PUBLIC PROCUREMENT<sup>8</sup>**

With 14 % of European GDP being spent on public procurement each year, EU public procurement and concession rules have a big potential in speeding up transitions towards climate neutrality, circular economy, upward social convergence and increased collective bargaining coverage. By strategically using their purchasing power, more than 250,000 public

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<sup>8</sup> This chapter on public procurement was adopted at the ETUC Executive Committee on 4 June 2021 as an addendum to the Resolution for a More Sustainable and Inclusive Competition Policy

buyers across Europe could stimulate the demand for a greener and more socially responsible economy. However, 55% of procurement procedures still use lowest price as the only award criterion for public contracts.<sup>9</sup> Although the Public Procurement and Concessions Directives 2014/23, 2014/24 and 2014/25 were a step forward in anchoring social and environmental sustainability standards, national transposition has often fallen short of ensuring compliance with in particular the standards included in the 'social clauses', which also in themselves are still insufficient in guaranteeing that the right to collective bargaining is respected by all companies awarded public contracts. Moreover, the implementation of approaches such as the most economically advantageous tender, life-cycle costs, 'best value' and sustainability considerations has been slow or piecemeal.

### **i) Need for binding measures to ensure collective bargaining**

Collective agreements ensure the protection of workers' rights, decent working conditions and fair wages while guaranteeing a level playing field among competitors for public contracts. As a prerequisite, any future revision of the Public Procurement Directives must therefore introduce an obligation to recognise the right of workers to organise and to collective bargaining, as a fundamental condition for economic operators to be eligible for a public tender. All economic operators involved (including subcontractors and franchisers) should as a condition for the award of public procurement contracts be required to comply with working conditions established by international, European Union, national law and collective agreements, thereby fully respecting the autonomy of the social partners. To promote the highest labour standards, the European legal framework on public procurement and concessions should aim to ensure that public contracts are awarded to companies that engage in collective bargaining. Full respect for the conditions defined in ILO Convention C94 on Labour Clauses (Public Contracts) should be guaranteed. The ETUC seeks a clear political undertaking by the European Commission on this particular change, followed by a swift legislative initiative.<sup>10</sup>

### **ii) Stronger incentives to promote social and environmental progress**

The existing European legal framework allows for the consideration of social and environmental aspects throughout the procurement and concessions cycle, from preliminary market consultation, through to the use of reservations, exclusions and the light regime, to award criteria and contract performance conditions. However, it does not contain any binding incentives to actively tie the use of public money to sustainability, including improving social partners' capacity to collectively bargain. It merely outlines how to procure sustainably, once (and if) the contracting authority wishes to do so. In addition, contracting authorities are still often unaware of their possibilities and obligations in terms of promoting environmental and social progress.

The Commission should use the Guidance Notice on Socially Responsible Public Procurement<sup>11</sup> to encourage public buyers to promote quality employment, decent work and social inclusion. While the Guidance recognises obligations stemming from collective agreements, it does not actively promote measures to increase collective bargaining coverage. The Commission should take dedicated action to ensure that Member States guarantee that companies which are awarded public contracts respect the right to collective bargaining. Preference should be given to companies which engage in collective bargaining and apply a collective agreement negotiated with trade unions. In addition, public procurement procedures should be used to promote equality, commit to corporate social responsibility, have stable

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<sup>9</sup> Commission Communication on Making Public Procurement work in and for Europe, [COM\(2017\) 572 final](#), 3.10.2017.

<sup>10</sup> The ETUC expresses its support for the UNI Europa campaign 'No public contracts for companies without collective agreement'.

<sup>11</sup> Commission Notice "Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)" [C\(2021\) 3573 final](#), 26.5.2021.

employment, favouring open-ended contracts and life-long learning opportunities, quality apprenticeship schemes and initiatives for people with disabilities and other disadvantaged groups, etc.

In addition, the Commission should make clear that public entities are always obliged to ensure that economic operators comply with fundamental social rights, including the right to collective bargaining as well as other social and environmental standards in the performance of public contracts, independently of any sustainability criteria used in the process. As confirmed by the Court of Justice of the European Union<sup>12</sup>, the general principles of procurement as set out by Article 18 of Directive 2014/24<sup>13</sup> constitute cardinal requirements with which Member States must always ensure full compliance. According to this Article, compliance must be ensured with respect to applicable obligations in the fields of environmental, social and labour law established by EU, international<sup>14</sup> or national law and collective agreements. However, evidence shows this requirement is largely violated and several Member States do not have an environment that properly protects the right to organise and bargain collectively in practice. Social partners should be effectively involved, in order to ensure a proper implementation and enforcement of the social clauses in public procurement.

The proposals for a Directive on Adequate Minimum Wages in the European Union<sup>15</sup> and a Directive on Gender Pay Transparency<sup>16</sup> should further clarify and reinforce the obligation to comply with the legally binding procurement principles under Article 18 of Directive 2014/24, Article 30 of Directive 2014/23 and Article 36 of Directive 2014/25, including by strengthening their enforcement. The ETUC strongly believes that the Directive on Adequate Minimum Wages must ensure that Member States take effective measures to make sure that economic operators performing public procurement or concession contracts recognise trade unions and the right of workers to organise, participate in collective bargaining, and comply with remuneration and other working conditions as established by law or collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist, as well as with other collective agreements, and international, Union and national social law.<sup>17</sup> Likewise, economic operators must comply with obligations relating to equal pay between men and women for equal work or work of equal value. In case of infringement of such obligations, they should become subject to exclusion, termination and penalties. In particular, procuring entities should be required to exclude any economic operator which fails to comply with pay transparency obligations or has a pay gap of more than 5 %.

The need for effective monitoring and enforcement of the social clauses in public procurement calls for a revision of the EU directives on public procurement and concessions, while ensuring full respect for national labour market models. To uphold the principle of equal treatment for all workers performing under a public contract, procuring entities must ensure that contractors comply with obligations relating to equal remuneration and working conditions, in particular as also set out by the revised 2018/957 Directive on the Posting of Workers.

Moreover, trade unions should be empowered to bargain by enjoying access to information about suppliers and subcontractors, who need to be documented to be able to perform work

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<sup>12</sup> CJEU judgement in case [C-395/18 Tim SpA](#) of 30 January 2020, § 38-39.

<sup>13</sup> This interpretation of Article 18 of Directive 2014/24 must also be considered to apply to the corresponding Article 30 of Directive 2014/23 and Article 36 of Directive 2014/25.

<sup>14</sup> Including, amongst others, ILO Conventions C87 on Freedom of Association and C98 on Right to Organise and Collective Bargaining.

<sup>15</sup> Commission proposal for a Directive on adequate minimum wages in the European Union, [COM\(2020\) 682 final](#), 28.10.2020.

<sup>16</sup> Commission proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, [COM\(2021\) 93 final](#), 4.3.2021.

<sup>17</sup> This is in line with the amendments put forward by the European Parliament co-rapporteurs Dennis Radtke and Agnes Jongerius in their [draft report](#) of 6 April 2021 on the Directive on Adequate Minimum Wages in the European Union.

under a public contract. Enhanced monitoring and joint and several liabilities throughout the full chain, including dissuasive fines and sanctions, should be introduced to ensure compliance with applicable social and environmental standards in supply chains, including in cross-border situations, to prevent wage dumping and circumvention of working conditions that derive from collective agreements through artificial arrangements. People working side by side in the same workplace and in the same activity must enjoy equal working conditions and protection under the same collective agreement, making sure the most favourable condition always apply.

To facilitate exclusions from tender procedures, Member States should be able to publicly blacklist companies which have been convicted of noncompliance with social and environmental standards. The obligation for procuring entities to ensure such exclusion of contractors and subcontractors who engage in dumping and abusive practices (such as the use of undeclared and underdeclared work or the non-payment of wages or social security contributions) should be clearly affirmed, including also the conditions for self-cleaning of contractors.

To ensure environmental and social progress, sustainability considerations must become compulsory parts of the basic 'best-price-quality-ratio' assessment. Due regard should be given to collective bargaining coverage as well as environmental and circular economy objectives. However, environmental considerations must not be used to justify social dumping or vice versa. In the same vein, innovation criteria must not open for the circumvention of social standards.

Trade unions and environmental organisations should be properly involved in defining contract requirements and in selecting contractors. Transparency requirements should also be used to ensure details about public contracts are public, and that preference is given to contractors who publicly declare profit and tax payments and who do not engage in tax havens. Furthermore, it should be possible for competing contractors, social partners and workers to report irregularities, including by giving trade unions the right to challenge abusive practices through the Public Procurement Remedies Directives.

### **iii) Coherence of public procurement with other policies and instruments**

Against the background of the COVID-19 crisis, it is crucial that public procurement stemming from national stimulus programmes contributes to economic and social resilience as well as to a fair and sustainable recovery for all through collective bargaining and the creation of quality jobs. In this regard, public procurement procedures involving resources stemming from EU funds should be conditional upon their effective contribution to the full respect of workers and trade union rights, the implementation of the Green Deal and the European Pillar of Social Rights, as well as the UN Sustainable Development Goals, the UN Guiding Principles on Business and Human Rights and the Paris Climate Agreement. To ensure public money is spent in a fair and sustainable way, services provided directly by authorities must not be put out to tender for the sole purpose of reducing labour costs or avoiding social obligations. National and local authorities must always be able to determine themselves how to deliver public services within their own capacity, including how to best ensure accessibility, quality and sustainability. Public procurement is only one way of providing services, and in-house provision of public services should always remain a valid option.

Finally, public procurement rules must not prevent Member States from pursuing national efforts to tackle social and environmental dumping and, where necessary, to combat corruption and criminal organisations as well as preventing serious and fatal accidents at work and tackling illegal and undeclared work. Procuring authorities must be able to introduce conditionalities such as imposing the application of collective agreements, excluding bids involving noncompliance or abusive practices, limiting the number of subcontractors including

the levels of the subcontracting chain both horizontally and vertically, applying restrictive rules for (cross-border) temporary work agencies especially regarding posting, prohibiting cash payments and requiring salaries to be paid to individual bank accounts, etc.