

ETUC contribution to EC consultation on Shaping competition policy in the era of digitisation

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The European Commission seeks contributions from European stakeholders that are involved in or affected by the digitalisation of the economy. Whereas the consultation is framed on the potential of competition policy to better serve European *consumers*, we believe that this is an opportunity for improving the conditions of workers operating in digital platforms.

Digitalisation is one of the most important drivers of change, not only from a technological but also a societal perspective. Due to digitalisation and the platform economy the world of work is undergoing profound change which makes a new social compromise necessary based on a new appropriate policy framework.

Currently, virtually all of those working via online platforms are classified as self-employed¹. Platform-based work provides new earning potentials for workers, but there are increasing concerns that it can also imply precarious work arrangements. This includes insecurity about pay, more limited access to training or benefits, information asymmetry, the lack of a reliable dispute resolution system, the possibility of privacy violation and the lack of support from colleagues and managers². The ILO has also stressed the concerns about low pay and access to social protection³.

A recent report of the ETUC with a sample of more than 1500 participants tackled the views of trade unions, company level workers and online platform workers on digitalisation and workers' participation. Some participants commented that while they felt like independent workers, they didn't have the same rights as self-employed workers, namely setting their own rates, declaring business expenses and making decisions about working hours. All these are decided by the platforms they work with⁴.

Considering the overrepresentation of the self-employed in the digital economy and the challenge of improving the working conditions of those workers in labour platforms, the ETUC believes that the European Commission, and in particular the Directorate-General for Competition, has a key role to play at this regard.

Collective bargaining is the process of negotiation between unions and employers regarding the terms and conditions of employment of employees, and it is proved to be the most

¹ FORDES, C. et al. The Social Protection of Workers in the Platform Economy. Policy Department A: Economic and Scientific Policy, European Parliament. Brussels, 2017

² Eurofound. New forms of employment. Publications Office of the European Union. Luxembourg, 2015.

³ ILO. Job quality in the platform economy. Issue brief prepared for the 2nd Meeting of the Global Commission on the Future of Work. Geneva, 2018.

⁴ VOSS, E., RIEDE, H. *Numérisation et participation des travailleurs : ce qu'en pensent les syndicats, les travailleurs au niveau de l'entreprise et les travailleurs des plateformes en ligne en Europe*. ETUC. Brussels, 2018.

effective way of improving working conditions. This is a right recognized in the Charter of Fundamental Rights of the European Union and a fundamental right of the European Social Charter of the Council of Europe. Social dialogue and involvement of workers is also one of the principles of the European Pillar of Social Rights.

In this light, competition law, based ultimately on the EU treaty, has had a damaging impact on collective bargaining for self-employed workers, with competition authorities intervening to prevent unions signing agreements. The assumption is that self-employed workers are “undertakings” and, as such, collective bargaining on their behalf is price-fixing and therefore and anti-trust practice to be avoided.

Some examples in which the current interpretation of competition law has had a directly damaging impact on the extent of collective bargaining are the following:

- Denmark, where rulings in 2002 and 2010, first by the competition authority and then by the labour court, have sharply reduced the number of freelance journalists whose terms and conditions are set by collective bargaining;
- Ireland, where the competition authority ruled in 2004 that an agreement covering actors was unlawful. This was only reversed by new legislation in 2017;
- The Netherlands, where a ruling by the competition authority in 2007 led first to a case in European Court and then in the national court, which on a narrow point overturned the competition authority’s decision, but where, despite this, the competition authority has continued to issue very restrictive guidance on collective bargaining for self-employed workers, most recently in February 2017⁵.

However, the international law provides a more encompassing regulatory framework concerning the right of self-employed workers to exert their right to collective bargaining. ILO’s International Conventions No. 87 and No. 98, which regulate freedom of association and the right to organise and which have been ratified by all EU Member States, protect all workers, regardless of their status. The supervisory mechanisms of the ILO have dealt with this issue on several occasions adopting a broader view. For instance, as early as 1983 the Committee of Experts questioned some countries where the self-employed were denied the right to organise, and stated that in view of the fact that ‘they are not specifically excluded from Convention No. 87, all these categories of workers should naturally be covered by the guarantees afforded by the Convention and should, in particular, have the right to establish and join organisations’.

Also, the European Parliament has put forward ambitious proposals for improving the conditions of those working in labour platforms. In June 2017 the European Parliament adopted a Resolution on a European Agenda for the collaborative economy. The resolution, “[u]nderlines the paramount importance of safeguarding workers' rights in the collaborative services – first and foremost the right of workers to organise, the right of collective bargaining and action, in line with national law and practice [...]”⁶. The resolution also makes clear the need for the collaborative economy’s growing self-employed workforce labour to enjoy collective bargaining rights.

⁵ FULTON, L. New Trade Union Strategies for New Forms of Employment. ETUC. Brussels, 2018.

⁶ European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy, 2018. O.J. C 331/18

Last but not least, the opinion of the Section for Employment, Social affairs and Citizenship of the European Economic and Social Committee on the "changing nature of employment relationships and its impact on maintaining a living wage and the impact of technological developments on the social security system and labour law" presents the concerns of the Committee over the fact that "where workers are regarded as self-employed, their right to associate freely may be in question if their association could be regarded as forming a cartel, running a risk of being put in conflict with EU rules on anti-competitive practices. These concerns, which could undermine this fundamental right, need to be addressed and remedied. Guidance is needed around the application of competition rules to self-employed workers in an employee-like situation. In this context, the use of the ILO understanding of "worker" rather than the more narrowly defined "employee", could be helpful to better understand how fundamental principles and rights at work apply, the enjoyment of which EU competition rules should not impede"⁷.

The ETUC therefore calls the Directorate General for Competition to provide interpretative guidelines to clarify the application of competition law to labour law at national level. The fundamental right to organising and to bargaining collectively should prevail over the exception of competition law but not vice versa.

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⁷ Opinion of the Section for Employment, Social affairs and Citizenship on The changing nature of employment relationships and its impact on maintaining a living wage and the impact of technological developments on the social security system and labour law, 2016. OJ C 303