Collective-bargaining rights for platform workers

socialeurope.eu/collective-bargaining-rights-for-platform-workers

Nicola Countouris and Valerio De Stefano

6 October 2020

The pioneering Danish collective agreement on platform-based domestic workers has been vitiated by a misguided ruling by its competition authority.

In 2018, the conclusion of the first collective bargaining agreement concerning platform work was saluted with enthusiasm by many of us. The agreement, signed between a platform and a union in Denmark, debunked many myths about platform work, starting from the flawed idea that, by its very nature, it was not compatible with existing forms of labour protection such as employment rights and collective bargaining.

Nicola Countouris

All the more relevant was the fact that the agreement regulated the labour conditions of domestic workers engaged by a digital platform, Hilfr.dk, to provide work in households. Domestic work in general, and particularly when channelled via platforms, risks remaining invisible. In spite of the fact that, nowadays, a substantial and growing share of care-work, cleaning, housekeeping and babysitting is provided by platform workers, regulators rarely act to include these workers expressly in their agendas.

Valerio De Stefano

Materially undermined

For all these reasons, and arguably many more, the collective agreement between the Danish domestic work platform and the 3F union was excellent news. This agreement, however, is now being materially undermined because of a flawed application of antitrust legislation.

On the basis of the collective agreement, Hilfr.dk and the union had agreed to introduce within the company a new category of worker, with employment status, in parallel with the existing freelance arrangements. All freelances could apply to become employees of the platform and be covered by the collective agreement. After 100 hours of work, workers would be considered to be employees covered by the agreement, unless they actively chose to opt out. Minimum fees were also established for the domestic workers classified as freelances.

The Danish Competition and Consumer Authority has now targeted those minimum fees. The authority sees agreeing on minimum fees for freelance domestic workers as a breach of competition law and has ordered Hilfr to stop paying those fees. This conclusion descends from a narrow regulatory vision, which considers any form of self-employed work as an independent undertaking on the market, such that concerted action with 'competitors' to establish minimum fees would constitute a 'cartel' violating antitrust laws.

This vision neglects fundamental trends long affecting our labour markets, where more and more workers are constrained in a bogus freelance status, their independence merely notional. These workers are normally excluded from the vast bulk of labour protection and, at the same time, do not enjoy the bargaining power and organisational autonomy associated with real, suitably capitalised, undertakings.

'False self-employed'

In its 2014 judgment in the case *FNV Kunsten*, the Court of Justice of the European Union acknowledged that 'in today's economy it is not always easy to establish the status of some self-employed contractors as "undertakings"'. It thus allowed of collective bargaining on behalf of 'false self-employed workers'—those who operate in conditions of dependence on their principals comparable to those of employees. In our commentary together with Prof Ioannis Lianos, we appreciated this opening to reality but also criticised the vagueness of the concept of 'false self-employed'.

The 2014 ruling left it to national courts to ascertain whether such conditions applied, in compliance with competition law. But the court did not provide national actors with a definition of the 'false self-employed' sufficiently broad and at the same time precise to allow access to collective bargaining to all workers not genuinely operating an independent undertaking. The decision of the Danish antitrust authority is clear testament to this: it applies competition law to self-employed domestic workers as if they were undertakings, something that is hardly realistic under any meaningful definition of this concept.

We also argued that this ambiguity was not compatible with other sources of international law which unequivocally recognise the right of self-employed workers to bargain collectively. For instance, the Council of Europe's European Committee of Social Rights declared that self-employed individuals were covered by this right under article 6 of the European Social Charter and that a blanket restriction, based on

competition-law claims, was not compliant. Moreover, the International Labour Organization's Right to Organise and Collective Bargaining Convention (no. 98) of 1949 does not exclude the self-employed from its scope, as constantly recalled by the ILO supervisory bodies, including with reference to *FNV Kunsten*.

Narrow understanding

Ironically, in the context of a free-trade dispute, the European Commission recently took issue with the Republic of Korea's narrow understanding of the notion of 'worker', which—in contrast to ILO standards—did not encompass self-employed truck drivers. EU institutions, however, have not yet been ready to act in accordance with their own preaching.

Only at the end of June did the commissioner for competition, Margarethe Vestager, recognising the great heterogeneity of self-employment, declare that platform workers, together with other self-employed workers, should be allowed to bargain collectively. The commission opened a consultation in this respect.

The case of the platform domestic workers being prevented from bargaining collectively in Denmark should now prompt quick action to solve the paradoxical application of competition law to some of the most vulnerable workers in our labour markets, the 'freelances' who do not enjoy any real work autonomy. One could hardly think of a better example of how antitrust standards are inadequate—or inadequately applied—to regulate complex, contemporary work relations in harmony with international labour standards.

In the case of domestic work, current EU antitrust standards are not only incompatible with the European Social Charter and ILO convention 98 but also clash with the ILO Domestic Workers Convention (189) of 2011. This landmark instrument unequivocally reaffirms at the international level that domestic work deserves no lesser protection than any other form and recognises the right of domestic workers to collective bargaining.

The ILO supervisory bodies have recalled that only domestic work carried out occasionally and not on an occupational basis can be excluded from the scope of the convention. All other types of domestic worker are otherwise protected, regardless of employment status, including in their right to bargain collectively. Since, following the express encouragement of the commission, several EU member states have already ratified convention 189, it is all the more urgent that they not be restricted in upholding this right due to a flawed application of EU laws.

'Personal work'

In a recent contribution for the European Trade Union Confederation, we have advocated adopting a 'personal work' approach to labour protection, to resolve the paradoxical application of competition law to vulnerable workers. All labour rights,

including collective ones, would then apply to all persons who provide work or services in a predominantly personal capacity, not genuinely operating a business undertaking on their own account.

In this definition, self-employed workers who actually run a genuine business would be subject to antitrust law, ensuring no undue restriction of competition. All other self-employed workers, including platform workers, who earn their living mainly or exclusively through their personal work—as opposed to the work of others, or the ownership and exploitation of substantial assets domestic workers clearly do not possess—would thus enjoy their fundamental right to bargain collectively without undue interference from competition authorities.

As the commission moves to lift restrictions on the collective bargaining of self-employed workers, the case of the domestic workers prevented from bargaining collectively in Denmark demonstrates the urgency of such an inclusive approach.

About Nicola Countouris and Valerio De Stefano

Nicola Countouris is director of research at the European Trade Union Institute and co-author with Valerio De Stefano of *New Trade Union Strategies for New Forms of Employment* (ETUC, 2019). De Stefano is the BOFZAP professor of labour law at KU Leuven.