

ETUC position on single market strategy for Europe

Adopted at the ETUC Executive Committee on 16-17 December 2015

Key points

The conflict between the exercise of fundamental rights and economic freedoms and the development of unfair competition in the single market can no longer be ignored. The ETUC recalls the importance of quality jobs, the principle of equal treatment between all workers at the same workplace and urges the EU institutions to adopt a social progress protocol.

Employment regulation and social security cover must apply to workers in the collaborative economy services. Particular attention must be paid to the problem of fake self-employment and undeclared work.

The country of origin principle is unacceptable as it can only lead to downward regulatory competition between the Member States. The ETUC vigorously opposes the introduction of employment related issues in a legislative initiative on a harmonised notification form and/ or a services passport.

Deregulation favours the entry of rogue competitors into the market, driving bona fide enterprises out of business. The ETUC remains firmly opposed the adoption of an SUP and will oppose any attempt at exempting microenterprises and SMEs from social and employment law. Furthermore, any incentive to build artificial structures with a view to evade or minimise company obligations under national law must be removed.

The ETUC urges the Commission to put the protection of employees at the centre of its work plan on bankruptcies, to protect the public purse and to ensure that Directors have a meaningful duty of care. Proper information and consultation rights must also be enforced.

A revised notification procedure in the framework of the services Directive must uphold and encourage high social standards and recognise that Member States are responsible for defining social policy objectives

The Commission should ensure that Member States take appropriate measures for national public authorities to include social and environmental criteria in their public procurement tenders

Social partners must be involved in the work on possible national reforms in the field regulated professions. Health and social care professions should not be part of any horizontal initiative.

European standardisation processes must become more democratic so that companies do not dominate standardisation processes. Furthermore, European standardisation must not encroach upon national labour laws, collective agreements and collective bargaining.

Introduction

On 28 October 2015, the Commission has published a Communication detailing its plans for internal market strategy for 2016 and 2017¹. By the end of 2017, the COM will review progress and consider whether additional action is necessary.

¹ COM (2015) 550 final

The Communication highlights the “great achievements” of the single market and underlines its challenges: economic and financial crisis, unemployment, low level of growth and “excessively burdensome regulations”. The Commission proposes as a response a strategy mainly based on the abolition of economic barriers and practical measures helping SMEs and start-ups to grow and expand.

The Communication displays a simplistic and ineffective vision of the challenges linked to the single market. The strategy does not address the social dimension of the Single Market. The conflict between the exercise of fundamental rights and economic freedoms and the development of unfair competition can no longer be ignored. The ETUC recalls the importance of quality jobs, the principle of equal treatment between all workers at the same workplace and urges the EU institutions to adopt a social progress protocol².

Furthermore, growth and unemployment cannot be tackled by an almost exclusively deregulatory agenda. Rather, consideration should be given as to how single market policy can serve to mobilise investment. The ETUC has been calling for a New Path for Europe with an ambitious European investment programme for sustainable growth and quality jobs for several years. The Investment Plan for Europe (‘Juncker Investment Plan’) partially responds to this. However, the current measures fall short of the level of commitment needed as identified in the ETUC’s own proposals and further efforts are needed³.

a) The (lagging) social dimension of the collaborative economy

The Commission is planning to issue guidance on how EU law and “relevant” provisions of national law apply to collaborative economy business models. In its analysis, the Commission makes reference to health and safety norms, social security and employment protection. However, the Commission fails to put forward any concrete actions in this regard and focusses on the Services Directive, E-Commerce Directive and European consumer legislation as the only regulations in need of clarification.

The ETUC questions the assumptions that collaborative economy increases employment, and benefits workers. The state of the economy, the increase of precarious and low paid jobs, high levels of unemployment are clear factors contributing to the fast development of the collaborative economy.

It follows that services affecting workers’ rights cannot be treated like other activities in the collaborative economy. The current legal vacuum in which those workers are currently operating is unacceptable. The ETUC is adamant that employment regulation and social security cover must apply to workers in the collaborative economy services. Particular attention must therefore be paid to the problem of fake self-employment and undeclared work.

In parallel, the Union must engage Member States in political initiatives aiming at enhancing the rights and protection of genuine self-employed workers. Self-employment is indeed likely to grow as platform capitalism and the collaborative economy expand.

b) Helping SMEs to grow or deregulating Europe?

Company law

The Commission identifies regulation as the main obstacle preventing SMEs and start-ups to grow. The strategy, however, fails to provide wider solutions to relaunch the economy. The Commission also fails to analyse unfair competition as a source of

² ETUC proposal for a Social Progress Protocol https://www.etuc.org/sites/www.etuc.org/files/CES-Depliant_Economic_Freedom_s-Uk_2_2010_1.pdf

³ ETUC new path for Europe <https://www.etuc.org/documents/new-path-europe-etuc-plan-investment-sustainable-growth-and-quality-jobs#.VlcjDnarS71>

difficulties for genuine SMEs. Removing all barriers and fair rules of the game favour the entry of rogue competitors into the market, driving bona fide enterprises out of business. The proposal for an SUP is an illustration of the short term vision of EU company law. By providing simplistic and cheap registration procedures, the SUP proposal generates strong concerns with regard to fiscal evasion, workers' rights and sustainable corporate governance in general. If adopted, this Directive would be an open invitation to companies of all sizes to minimise their responsibilities under national law. The ETUC remains firmly opposed the adoption of an SUP.

Similarly, the ETUC will oppose any attempt at exempting microenterprises and SMEs from social and employment law, which should apply to all workers regarding of the size or turnover of their employer.

The Strategy makes a vague reference to an ongoing fight against letterbox companies, and fails to propose any action in this regard. The ETUC considers that a priority for the future of EU company law should be to regulate company mobility in the EU, ensuring that the company registers its seat in a Member State where it conducts genuine business activities. Any incentive to build artificial structures with a view to evade or minimise company obligations under national law must be removed. Concrete action in this regard is more urgent than further deregulation of company law – a most likely aim pursued by the revision of the cross-border merger Directive and the introduction of a new cross-border divisions Directive.

The ETUC notes the Commission's plans to look at digital solutions in particular in relation to the registration and filing of company documents and information. The ETUC stresses that such plans cannot be done to the detriment of transparency and enforcement of national legal obligations. Considerable improvement is needed in this regard.

Bankruptcy

According to the Commission, the disruptive effects of bankruptcy deter people from entrepreneurial activity. The single market strategy therefore foresees a legislative proposal on insolvency, including early restructuring and second chance. The ETUC is concerned that the Commission fails to evaluate the increasing misuse of bankruptcy procedures such as informal insolvencies and tactical bankruptcies, which imply complete lack of information and consultation and leaving employees high and dry with months of unpaid wages and other benefits. Workers with occupational diseases, recent sickness leaves, elderly and pregnant workers are often victims of tactical bankruptcies. Such bankruptcies are also used to decrease the salaries of the transferred workers and to replace their permanent contracts by a precarious one in the newly created company.

The ETUC urges the Commission to put the protection of employees at the centre of its work plan on bankruptcies. We call on the Commission to ensure that the initiative reinforces the existing protection and that the necessary measures are taken to protect the interests of workers, protect the public purse and Directors have a meaningful duty of care. Proper information and consultation rights must be enforced. The recent crisis has thrown a spotlight on significant deficiencies in the protection for workers in bankruptcy situations.

c) No creeping back of the country of origin principle

The ETUC opposes the country of origin principle, which can only lead to downward regulatory competition between the Member States.

Services passport

The Commission announces its intention to launch a legislative initiative introducing a harmonised notification form to notify to host countries, in one place, the information

required under the host country legislation, including on posted workers. This proposal will also include a 'services passport' which would enable companies – and possibly individuals – wishing to provide cross-border services to receive a document in their home country, certifying that the company is complying with all relevant regulations of the host Member State.

The ETUC vigorously opposes the introduction of issues affecting workers, including posting related matters, in this legislative initiative. The information to be provided by companies with regard to their employees relates to the protection of the worker himself and cannot therefore be assimilated to other information relating to the company. The competent authorities in the host country must continue to be able to have specific access to the key documents, for instance to verify the existence of genuine posting. Furthermore, the services Directive itself does specify that Directive 96/71/EC takes precedence over free movement of services.

Concerning other areas of regulation, the ETUC questions the feasibility of a services passport. It is unrealistic to expect that public authorities of the country of origin have the required expertise to properly interpret and apply the law of another Member State. Furthermore, the Commission is silent on vital points such as the period of time for which the passport would be valid and in which circumstances the company would be required to update its information. This raises serious questions with regard to potential encouragement to fraud.

In any case, services passports must not replace or diminish the responsibilities of the host Member States to carry out the necessary inspections and control measures on their territory. Failing that, the services passport would mark the return of the country of origin principle of the Bolkestein proposal.

Notification procedure

The strategy recalls that the services Directive obliges Member States to notify the Commission of new regulatory measures affecting the cross-border provision of services. The Commission notes a number of shortcomings on this procedure, deploring in particular a general lack of compliance by the Member States. The Commission therefore proposes legislative action allowing for "a more upstream verification of the justification and proportionality of new national regulations restricting the free movement of services". In particular, the Commission is planning to declare void any national legislation which has not been notified.

The ETUC fears that such sanction would be disproportionate and would ultimately lead to further deregulation in Europe. The ETUC is not opposed to a reform of the notification procedure but to the extent that it enables a framework which upholds and encourages high social standards and recognises that Member States are responsible for defining the social policy objectives. The Commission (and the ECJ) should only intervene in case of manifest error of appreciation and the burden of proof should lie with the Commission to show that a proposed legislation is disproportionate, taking public interest into account. Member States should also be given sufficient time to amend a legislation that is found to be incompatible with the services Directive. In any case, the ETUC opposes that draft legislation is already notified to the Commission. Moreover, "transparency for stakeholders" must not be interpreted as giving them the power to stall the legislative process. National, democratic law-making must indeed be fully respected.

d) Towards fairer public procurement

The strategy proposes to build capacity within the Commission to offer advice to public authorities preparing procurement processes. This is meant to support Member States in correctly applying relevant EU legislation. The Commission also proposes to collect more information on public contracts and to review the Remedies Directive.

The ETUC recalls the introduction of a mandatory social clause in the revised public procurement framework (Art 18.2 of Directive 2002/24). This new provision obliges the Member States to take appropriate measures to ensure that labour law and collective agreements are complied with in a public procurement procedure. The revised public procurement framework also contains additional social considerations, aiming at fostering greener, more social tendering processes.

The ETUC urges the Commission and the Member States to secure an effective transposition of these vital provisions into national legislation. Furthermore, the Commission should ensure that public authorities are aware of the possibilities and requirements to include social and environmental criteria in their tenders and are actively encouraged through guidance and training initiatives to take full advantage of these. Problems of 'abnormally low bids' and other social dumping practices in procurement should be better addressed (for example giving trade unions the right to challenge these practices through the Remedies Directive).

e) Regulated professions

The Commission intends to reduce the number of regulated professions (eg: legal professions, accountants, real estate agents, physiotherapists etc.). However, reducing the number of regulated professions should not be an aim in itself. Any review of regulated professions should not be driven by the exclusive objective of free movement. Regulation of professions can be indispensable to ensure the quality and safety of employment and services, and the protection of workers' rights. A proper balance between free movement of services, sound qualifications and high standards is therefore necessary. In any case, health and social care professions must not be part of any horizontal initiative.

Social partners must be involved in the work on possible national reforms in the field. It is important to take into account that putting this into the European Semester process does not mean that all stakeholders will have a seat at the table, in particular professional associations who are not so often social partners.

f) Standardisation

The Commission proposes a 'joint initiative' with the European Standardisation community to promote standardisation of services. The ETUC recalls that workers provide services and that labour law and collective agreements are the preferential regulatory instruments to ensure quality of services and jobs. Furthermore, the Commission takes a too rosy view of voluntary standards and self-regulation⁴.

The ETUC demands that European standardisation processes are made more democratic and that companies do not dominate standardisation processes. Furthermore, the Commission must refrain from pushing for European standards in areas not covered by the Services Directive and / or where demand for cross-border services is low. Finally, social partners' initiatives to regulate services, including through social partner agreements, should be supported.

⁴ See [the first global review of self-regulation is published](#). It was commissioned by Britain's Royal Society for the Protection of Birds, but it covers every sector and shows that in almost all cases – 82% of the 161 schemes it assessed voluntary measures have failed to meet their objectives.