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“I’ll call my Union”, said the driver - Collective bargaining of gig workers under EU competition rules

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1. Introduction

The rise of the sharing or gig economy² has enabled a host of new opportunities for private individuals to sell their labor in a flexible way via online platforms, such as Uber and Lyft for ride hailing services, Deliveroo and Just Eat for food delivery, and TaskRabbit or Happy Helper for handyman and cleaning services. Initially, these platforms were meant to offer individuals the possibility of a “gig” via their apps, to earn a little extra money on the weekends and spare time, e.g. by driving others in one’s car. As these platforms have matured, and a growing share of the service providers (“gig workers”) depend on them for their main income, policy makers have been confronted with the claim that the rise of the gig economy has fostered the growth of underpaid or even precarious work.³ Consequently, more and more calls have been made to improve gig workers’ working conditions.

Gig workers are regularly self-employed,⁴ i.e. they do not receive any protection under labor laws, such as paid sick leave or a minimum wage. As each individual gig worker has very little bargaining power vis-à-vis a platform, one option of improving their working conditions would be for them to engage in collective bargaining.⁵ They could organize collectively by forming or joining a union that

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² In a 2017 review commissioned by the UK government, the term gig economy is defined as “people using apps to sell their labour”. See M Taylor, G Marsh, D Nicole and P Broadbent, ‘Good Work: The Taylor Review of Modern Working Practices’ (2017). Available at: <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

³ Ibid. See also C Codagnonge, F Abadie, and F Biagi, ‘The Future of Work in the ‘Sharing Economy’: Market Efficiency and Equitable Opportunities or Unfair Precarisation?’, Office of the European Union Institute for Prospective Technological Studies JRC Science for Policy Report (2016). Available at: <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC101280/jrc101280.pdf>

⁴ Some platforms, however, have decided to offer gig workers ordinary employment contracts, such as the Hilfr platform for cleaning in Denmark, which has chosen to employ its cleaners as business strategy.

⁵ I Lianos, N Countouris and V de Stefano, ‘Re-thinking the competition law/labour law interaction: Promoting a fairer labour market’, *European Labour Law Journal* 10(3)(2019), 291–333, 297. (Lianos et al. 2019)

negotiates working conditions with platforms on their behalf. When it comes to EU competition law, however, collective bargaining of self-employed is met with suspicion. While agreements between worker representatives and employers have generally been excluded from the scope of application of Article 101(1) TFEU to avoid competition law impairing social policy objectives,⁶ the same cannot be said for the collective organization of the self-employed. The EU Court of Justice (ECJ) has scrutinized rules of conduct and decisions by professional associations such as national lawyers',⁷ geologists',⁸ or accountants' associations⁹ strictly under EU competition law. When such agreements restrict competition, they can only be exempted from the application of Article 101 (1) TFEU if they pursue a legitimate objective and do not go beyond what is necessary.¹⁰ As self-employed, collective agreements by gig workers thus run the risk of being found contrary to Article 101 (1) TFEU.¹¹

The current EU Commission has promised to improve the working conditions of gig workers without EU competition law standing in the way.¹² In order to identify problems specific to self-employed engaged in gig economy work, the Commission included in its public consultation of the Digital Services Act Package a questionnaire on the working conditions of gig workers.¹³ The questionnaire includes, e.g. questions relating to the contractual relationships between platforms, service providers and final customers. Gig workers were also specifically asked about the challenges they face as self-employed.¹⁴

In light of these ongoing developments, this contribution seeks for inspiration in general EU law, tax and social security law, as well as US antitrust law to provide a variety of options for EU competition policy makers and courts to allow for collective bargaining of gig workers. Section 2 engages with the legal concept of a “worker” in EU law, tax law and social security law, to understand various approaches to differentiate between workers and self-employed. Section 3 addresses how collective bargaining would be assessed under EU competition rules if gig workers were considered self-employed or “undertakings” for the purposes of Article 101 TFEU. Section 4 gives an overview over the situation of collective bargaining of gig workers under US antitrust law. Section 5 then

⁶ Case C-67/96 *Albany*, 59.

⁷ Case C-309/99 *Wouters*.

⁸ Case C-136/12 *Consiglio Nazionale Dei Geologi*.

⁹ Case C-1/12 *OTO*.

¹⁰ Case C-309/99 *Wouters*, 97-109

¹¹ There have been such examples in the national context: in 2004, the Irish Competition Authority prohibited certain workers deemed self-employed, such as voice over actors, free-lance journalists, and some musicians, from concluding collective agreements setting out minimum rates of pay and other working conditions. That decision ultimately led to a complaint to the European Committee of Social rights that found that the ban of collective bargaining violated the Article 6§2 of the European Social Charter. See European Committee of Social Rights, *Decision on the Merits, Irish Congress of Trade Unions (ICTU) v. Ireland*, Complaint No. 123/2016 (December 12th, 2018),

¹² EU Commission Press Release from 30 June 2020, Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237 - this is a sensible position given that the right to collective bargaining, also for self-employed, is constitutionally enshrined in several Member States and under Article 6§2 of the European Social Charter. See Lianos et al. 2019, 298.

¹³ EU Commission Press Release from 2 June 2020. Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962.

¹⁴ DSA Package Questionnaire, electronic copy with the authors.

synthesizes the prior sections into four possibilities to allow for collective bargaining of gig workers under EU competition rules: (i) by classifying gig workers as employees, (ii) by analysing collective bargaining agreements as “by effect” restrictions of competition under Article 101 (1) TFEU, (iii) by carving a legitimate objective exception for collective bargaining of gig workers, or (iv) by encouraging Member States to enact laws that explicitly allow for collective bargaining in gig economy sectors. We conclude in Section 6.

2. Delineating the legal categories of “worker” and “self-employed”

Within EU competition law, one possibility to analyze collective bargaining agreements is to look at the scope *ratio personæ* of Article 101 TFEU. The addressees of Article 101 TFEU are undertakings. One common reading of the case law of the European Court of Justice has been that workers are not considered undertakings for the purposes of competition law.¹⁵ In line with this argument, labor unions, which represent workers, cannot be considered associations of undertakings. Furthermore, decisions they take or agreements they conclude benefit from immunity under Article 101 TFEU.

This understanding of immunity of collective bargaining agreements under EU competition rules is based on one possible interpretation of the *Albany* case.¹⁶ In this case, The ECJ had to rule on the relationship between collective agreements and the prohibition of anti-competitive agreements in the context of a supplementary pension scheme for workers. The Court acknowledged that such agreements have inherent restrictive effects on competition,¹⁷ but fall outside the prohibition of anti-competitive agreements if they seek to improve conditions of work and employment.¹⁸ Implicitly, the Court referred to the opinion of its Advocate General, who argued that the Treaty is not only about undistorted competition between undertakings but also about promoting social policy through e.g. the conclusion of collective agreements.¹⁹

In *FNV Kunsten*,²⁰ the Court ruled that a union which was representing self-employed was not acting in the interest of workers and was thus an association of undertakings.²¹ Therefore, it did not benefit from an automatic exclusion from the scope of Article 101 TFEU.²² Nevertheless, since the underlying

¹⁵ In some national competition laws, this has been even codified. See e.g. §3 of the Danish Competition Law (Konkurrenceloven) that holds that the provisions of competition law do not apply to work and employment relationships (§ 3: “Loven omfatter ikke løn- og arbejdsforhold”).

¹⁶ Case C-67/96 *Albany*.

¹⁷ Case C-67/96 *Albany*, 59. Yet, according to Advocate General Jacobs, such collective agreements “probably do not have an appreciable restrictive effect on competition between employers”. See Opinion of Advocate General Jacobs in case C-67/96 *Albany*, 182.

¹⁸ Case C-67/96 *Albany*, 60.

¹⁹ Case C-67/96 *Albany*, 54-58.

²⁰ Case C-413/13, *FNV Kunsten*.

²¹ Case C-413/13, *FNV Kunsten*, 28.

²² Case C-413/13, *FNV Kunsten*, 30.

rationale accepted by the Court was the protection of workers, the agreement on minimum pay of self-employed musicians (substitutes) in orchestras could enjoy immunity if the latter were in reality false self-employed and could therefore be assimilated to workers.

The Court's classification rationale is thus 'worker-centric'. This approach has two main implications. Firstly, immunity only covers agreements between the social partners, when they are acting in such capacity and in the interest of workers. Such agreements can be broadly interpreted as covering any agreement between workers and employers and/or their representatives at local, national or branch level. There is thus a presumption that the social partners are not associations of undertakings when they act in such capacity and in the interest of workers. In contrast, a union, which is acting more as a business or is representing the interest of other categories of economic actors than workers would be scrutinized under Article 101 TFEU. Secondly, it follows that only agreements which are directly aimed at the protection of workers (related to pay, including pensions, and working conditions) are covered by the immunity. The core issue is thus who is a 'worker'. This is a disputed and crucial question in respect of gig workers, that we now turn to.

2.1. The definition of a worker in EU Competition Law

In the context of the free movement of workers, a worker is an EU citizen who for a certain duration of time provides services for and under the direction of others.²³ In *FNV Kunsten*, in the context of competition law, the Court elaborated on this definition and emphasised that some self-employed are not undertakings but are workers when their independence is merely notional. This would be the case when they are acting under the direction of another person, do not share that person's commercial risks, and for the duration of the relationship form an integral part of that person's undertaking.²⁴

The preferred contractual set-up proposed by platforms mediating work through an app is that of a commercial contract between independent entities.²⁵ Yet, it follows from *FNV Kunsten*, that the qualification by the parties of the contract, or its classification under national law is not determinant.²⁶ Indeed, a self-employed might be requalified as a worker under EU competition law and this is a matter for the ECJ to decide. The question is here how broad the concept of worker is and whether it can encompass some gig workers. The ECJ relies on a patchwork concept of worker, which draws from various areas of EU law such as free movement law, EU labor law and commercial

²³Case C-53/81 *Levin* and C-66/85 *Lawrie Blum*.

²⁴ C-413/13 *FNV Kunsten*, 36.

²⁵ Yet we find examples of platforms at national level who have chosen the status of employee or agency worker for those providing services that they mediate. In Denmark, we also find one of the first collective agreements for cleaners operating through the Hilfr platform signed by a union and the platform. There is also an agreement of minimum prices for self-employed cleaners operating through the Happy Helper platform, which like that of Hilfr has been criticized by the Danish competition authority (see section 2.3 below). Likewise, several national courts (for example in France, Spain and the United Kingdom), also at supreme level, have requalified contracts between digital platforms and self-employed providers as employment relationships.

²⁶ C-413/13 *FNV Kunsten*, 35.

law. From the Court's case law, two main criteria can be derived to determine whether a person is a worker/employee or self-employed/undertaking: (i) subordination and (ii) the allocation of economic risk between the parties.²⁷

2.1.1. The subordination criterion

The first criterion of subordination is a core concept of labor law and the Court has interpreted it broadly in various instances. For example, within the context of EU labor law and the Directive protecting pregnant workers,²⁸ the Court found that a member of the board of directors was a worker as she reported to the supervisory board on her management, cooperated with the board and could be dismissed by the shareholders of the company.²⁹ In *FNV Kunsten* mentioned above, the Court concluded that there is no subordination if the musicians enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, and the place and manner of performing the rehearsals and concerts.³⁰ It might be difficult to replicate the latter analysis in the situation of gig workers, as there would be no comparable ordinary employees. After all, all those performing gig work for the platform have the same status – typically that of self-employed. The comparison should thus be made with persons performing similar work outside the platform in question. Yet, work mediated through platforms is based on the flexibility of the providers, who can freely choose when they want to be available for the platform and can eventually refuse to take up tasks. This specific feature might plead against the status of a worker as the provider enjoys some independence from the platform.³¹

Yet, the Court's case law in this respect is not clear. Indeed, within the context of the E-commerce Directive,³² the Court adopted in *Uber* a rather subtle criterion of control adapting it to the realities of the new phenomenon of platform work.³³ Thus, Uber drivers could choose their working times and eventually refuse tasks assigned to them. Nevertheless, the Court found that the company was exercising control over its providers as it determined the price for each delivery, collected the money and ultimately could exclude them from the platform.³⁴ Yet, it follows from the recent ruling in *Yodel*³⁵ that the freedom of couriers delivering parcels to choose their tasks and eventually refuse to take

²⁷ On these two criteria see also K Jacobsen Cesko, 'Blurring the Boundaries Between Being an Employee and Self-employed - An EU Competition Law Analysis of the Employment Status of Wolt Couriers', Copenhagen Business School, CBS LAW Research Paper No. 20-32 (2020), Available at SSRN: <https://ssrn.com/abstract=3705203> (Jacobsen Cesko 2020).

²⁸ Directive 92/85/EEC on the Protection of Pregnant Workers.

²⁹ C-232/09 *Danosa*.

³⁰ C-413/13 *FNV Kunsten*, 37.

³¹ See also Jacobsen Cesko (2020) conducting a concrete analysis for providers of the delivery platform Wolt.

³² Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

³³ C-434/15 *Uber Spain*.

³⁴ C-434/15 *Uber Spain*, 39.

³⁵ C-692/19 *Yodel*.

them indicated a lack of control of the employer and thus an absence of employee status pursuant to the Working Time Directive.³⁶

2.1.2. The allocation of economic risk between the parties

In *FNV Kunsten*, the Court also looked at the concept of worker from the perspective of commercial law, looking behind the contractual relationship in terms of who bears the economic risk to determine whether an actor is an employee or self-employed. The Court thus inquired into the economic realities beyond the contractual relationship. The question is yet how far the Court is willing to go down that road. Indeed, business models such as gig platforms are to some extent based on a shifting of risks from the platform business to the performer of the service. Therefore, some have argued that the Court might not be ready to ‘recognise that this shifting of risk is an expression of economic dependency on the worker or micro-entrepreneur’.³⁷ Under such approach, the contractual set-up is not the choice of the gig worker but one imposed by the platform and thus outside the control of the provider.³⁸ This would require the Court’s willingness to move away from a risk approach based on personal dependence to an approach focused on economic dependence.³⁹ The Court did not follow this path in *Yodel*, however, as it did not assess whether the contractual framework was the result of economic dependency of the courier on the platform. Indeed, the plaintiff carried on his business exclusively for one undertaking and did not delegate his tasks to others. Thus, the ruling could be read as an indication that the Court is unwilling to push the boundaries of the concept of worker to include persons who are de facto dependent on one main contractor from which they derive their main income.⁴⁰

2.2. Employees vs self-employed under tax and social security law

The ECJ made clear that the status of “worker” within EU law is not affected by the person being classified for tax purposes under national law as an employee.⁴¹ This approach by the Court is explained by the Court’s historic endeavour to build the EU law system as an autonomous legal system,⁴² with autonomous legal concepts, such as the concept of “worker”. It is not an outright

³⁶ For a more detailed analysis of that case, see C Jacqueson, ‘The internal market at a social turn? Social dumping and the protection of workers’, *European Journal of Social Security* 23(4) (2020). (Jacqueson 2020)

³⁷ D Schieck and A Gideon, ‘Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier’, *CETLS Online paper series* Vol 6 (2018), 14. (Schieck and Gideon 2018)

³⁸ N Videbæk Muckholm and C Højer Sjøler, ‘Platform work and the Danish model – Legal perspectives’, *Nordic Journal of Commercial Law*, 117-145, 142-143. This argument can be linked to big gig platforms having monopoly power, which is developed in section 5.2.

³⁹ Ibid.

⁴⁰ As implicitly argued by Advocate General Wahl in *FNV Kunsten* and by Lianos et al 2019.

⁴¹ E.g. C-413/13, *FNV Kunsten*, 36.

⁴² On the autonomy debate within EU law, see, for example, JW Van Rossem, ‘The Autonomy of EU Law: More is Less?’ In R Wessel and S, Blockmans (eds.), *Between Autonomy and Dependence*. T.M.C. Asser Press, The Hague, The Netherlands (2014)

dismissal of using tax law as guidance to determine whether an economic actor is a worker or self-employed. If the tax status of persons were determined on the basis of EU tax law,⁴³ the Court would be much more likely to use tax principles as an inspiration to inform its analysis under Article 101 TFEU and the question of how to delineate the concept of a worker.

If we look at national law, competition authorities have indeed used a person's classification under tax law as an indicator to determine a person's status as worker or self-employed under competition rules.⁴⁴ In order to complement the analysis under EU competition law and give further inspiration, the case of Swedish tax and social insurance law is utilized with the intention to illustrate how underpinning principles influence the determination, and separation, between employees and employers.⁴⁵

Tax law and social insurance law in Sweden are strongly linked. One could see them as two sides of the same coin; one collects and the other distributes. Despite the relationship, they are designed according to different policies, resulting in natural mismatches between underpinning principles, definitions, rules, and outcomes. For instance, the giving of welfare benefits is considered to be constant and based upon individual needs while the taking through taxation is based upon the ability to pay principle and as such progressive and all encompassing.⁴⁶ Despite their connections as two sides of a revenue collection and distribution system, tax law and social insurance law in Sweden differ on several accounts due to their parallel, but uncoordinated, development.⁴⁷ The Swedish tax system as a whole is based upon the function of a tax being an involuntary contribution without any benefit being received in return. Taxes in Sweden are instead, as of the latest tax reform in 1990s, legitimized through the notion of the state utilizing the revenues efficiently in addition to designing taxes upon principles such as tax neutrality, the ability to pay, and legality. The area of social insurance law is on the other hand founded on socio-political goals strongly linked to work strategy, population, equity, and the burden to provide.⁴⁸

There is no clear dividing line between worker/employee and self-employed when considering tax law and social insurance law. Complicating normal employments in general, but even more so when considering the gig economy and incomes stemming from such activities. As with most other legal systems, the Swedish system has attempted to infuse some coherence between different legal fields. The definitions of employee and employer within tax law have therefore been inspired by labor law. However, the fiscal definition is broader than that within labor law due to the existence of several

⁴³ Taxation has still not been harmonized within the EU. Therefore, EU tax law constitutes of a few directives on primarily corporate taxation in addition to the compliance with EU free movement law (primarily through a strong implementation of the non-discrimination principle) and EU state aid law.

⁴⁴ This is the case, for example, in Danish competition law. See C Bergqvist. *Konkurrenceretten*, DJØF, København (2020), 63.

⁴⁵ A more elaborated description may be found in: Y Lind, 'Voting rights compared to income taxation and welfare benefits through the Swedish lens', *Florida Tax Review* 23(2), 713-742.

⁴⁶ T Erhag, *Fri rörlighet och finansieringen av social trygghet*, Santérus, Stockholm, 84.

⁴⁷ For a more detailed account of this development see H Gustafsson, 'Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och säkerhet', *Lund Studies in Sociology of Law* 14 (2002)

⁴⁸ A Gunnarsson, *Fördelningen av familjens skatter och sociala förmåner*. Iustus, Uppsala (2002), 23.

income categories within tax law, and the possibility to refer an income to several income categories depending of the nature of the company form of the self-employed.

Social insurance law in Sweden does not contain a definition of employee or employer yet we may find some guidance in the Swedish social insurance code, specifically Chapter 25, 7§:

"Remuneration of at least SEK 1,000 per year for work performed on behalf of someone else shall be counted as income from employment. This applies even if the payee is not employed by the payer. The person who has paid such compensation shall then be regarded as the employer, and the person who has performed the work shall be regarded as the employee."

From the above cited legislative text we may deduce that the definition of employee and employer within Swedish social insurance law appears extremely broad, with a capacity to capture more or less anyone paying a remuneration as an employer liable to pay social insurance contributions (payroll taxation). This is of course not the case in reality as there will be exemptions and clarifications, many of them inspired by those within tax law. Of importance is the underlying principle that the contract between parties has no influence when determining employee and employer status.

Instead there is a doctrine of defined circumstances that assists when determining when an individual is to be considered an employee, and thus pay income taxes, and when the person in question should be considered as self-employed, and thus pay income taxation and payroll taxes herself. The example of a contractor helps illustrate the situation where an individual may be, simultaneously, an employee and self-employed. In our case, dealing with providers within the gig-economy, the same principles and doctrine applies. The doctrine includes the following factors that will impact the assessment: i) existence of an employment contract, ii) existence of clear guidelines and instructions for the execution of the work, iii) level of independence when performing the duties, iv) possibility to delegate the workload, v) who supplies the working tools and material needed, vi) number of employers that the individual has.

A contractor, or an Uber driver for that matter, with reference to an overall assessment taking into account above mentioned factors, will have some income being considered employment income while other income may be considered as income due to self-employment and therefore be liable to pay payroll taxation and employment income taxation on the salary from the business and/or business- and capital income taxation on the incomes dependent on the structure of the business set up.⁴⁹

If competition law were to look for guidance in tax law for the delineation between worker and self-employed, in addition to sharing certain criteria such as subordination (existence of clear guidance and instructions for the execution of the work), further factors such as the possibilities to delegate the workload and the number of employers that the individual has, might be useful for competition analysis. These might allow for an evaluation of the gig workers' situation in question that better

⁴⁹ Sweden facilitates a small business owner corporate structure which allows some of the gains to be taxed as capital income rather than business income, resulting in the application of a lower tax rate.

reflects economic realities facing some gig workers that are in need of additional protection through collective bargaining; it would facilitate their classification into a “false self-employed” or “worker” category under competition law.

2.3 Conflicting national approaches on the classification of workers and self-employed under competition rules

As explained in Section 2.1., *Albany* and *FNV Kunsten* set the framework under which national competition authorities assess whether gig workers are considered to be workers/employees or self-employed. In addition, their assessment can be further influenced by national tax and social security law. As we have seen, the ECJ’s guidance on the dividing line between workers and self-employed is relatively vague. Similarly, the approach under Swedish tax and social security rules shows that a multi-factor analysis will be applied, that could lead to both gig workers being classified as employees or self-employed.

The current practice by two national competition authorities illustrates how the relatively vague guidance on drawing the line between workers and self-employed can lead to conflicting approaches under national competition rules. In August 2020, the Danish Competition Authority applied the criteria of *FNV Kunsten* to self-employed cleaners operating through the Hilfr and Happy Helpers platforms and found that they were undertakings, and could thus not enter into an agreement on minimum prices for cleaning services.⁵⁰ The criterion of commercial risk was decisive, as the Competition Authority found that the platform was not responsible for the quality of the work or lack of work of the self-employed cleaner, nor in case of lack of payment by the client. The cleaners thus carried the commercial risk from their activity via the platform.

In contrast, it follows from the latest 2019 Guidelines of the Dutch Competition Authority that the criterion of economic risk is not central. Instead, it refers to the payment of wages and whether it is due regardless of the employer’s market performance.⁵¹ Yet, the Dutch Authority seems to put much emphasis on the freedom of the provider to choose when and where to perform the work compared to a person performing similar work having the status of an employee. This criterion - if applied strictly - would disqualify most platform workers from being considered as workers/employees under competition law. Yet, the Dutch Authority opened a couple of paths that would allow for collective bargaining for self-employed platform providers under the competition rules that will be further explored in Section 3.6 below.

⁵⁰ Decision by the Danish Competition Council of 26. August 2020 regarding minimum prices on Hilfrs platform <https://www.kfst.dk/media/qv5hoinx/20200826-minimumspriser-p%C3%A5-hilfrs-platform.pdf>, Decision by the Danish Competition Council of 26. August 2020 regarding minimum prices on Happy Helpers Platform <https://www.kfst.dk/media/vi2gzmje/20200826-minimumspris-p%C3%A5-happy-helpers-platform.pdf>. The Authority also questioned whether cleaners who have opted for the status of employee and were thus protected by the collective agreement were genuine workers.

⁵¹ Dutch Competition Authority, *Guidelines - Price arrangement between self-employed workers* (2019). Available at <https://www.acm.nl/en/publications/acm-self-employed-workers-are-allowed-make-arrangements-about-rates-more-situations>, 28. (Dutch Competition Authority 2019)

This brief overview on the delineation between workers and self-employed has demonstrated that collective agreements for the protection of gig workers might not be immune from EU or national competition law. Other avenues for entitling some self-employed platform workers – especially the most dependent and vulnerable ones – to collective bargaining might thus be explored in the substantive evaluation of those agreements under Article 101 (1) TFEU or outside the competition law realm all together.

3. Collective bargaining agreements and EU Competition Law

3.1. When does an agreement between self-employed infringe Article 101 (1)?

As established above, agreements between providers in the gig economy would in most situations qualify as agreements between undertakings subject to Article 101 TFEU, and incompatible with Article 101 (1) TFEU if anti-competitive. Naturally, it rests with the enforcers to establish the latter, and it should not be taken for granted that this is the case. In addition to the social purposes normally presented in defence of collective bargaining, some gig workers could be confronted with platforms with buyer power when hiring workers.⁵² Collective bargaining could counteract buyer power, providing a pro-competitive justification for accepting collective bargaining under competition law.

Unfortunately, case law most likely would not allow for this as Article 101 (1) TFEU utilizes a distinction between agreements with an anti-competitive *object* v an anti-competitive *effect*, where the former is condemned mechanically and without careful balancing of different interests and arguments.⁵³ Article 101 TFEU can therefore only accommodate mitigating factors, e.g. a socially desirable purpose or the countering of buyer power, if collective agreements can elude being labelled as anti-competitive by object. Further, in the process of classification, the form, official purpose, or subjective intent are immaterial⁵⁴ as only the actual consequences for competition on the market matter. It is not even relevant if mitigating factors can be identified as condemnation follows mechanically. This is why the review of such agreements can be considered strict. It is possible to invoke different mitigating factors under Article 101 (3) TFEU, but this would put parties to the agreement in a rather weak and precarious position as explained later. An acceptable solution essentially rests on the ability to elude the label as anti-competitive by object, which we now turn to.

⁵² See further OECD, 'Competition in Labour Markets'. Available at: <http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf> (2020), 13-16. (OECD 2020)

⁵³ See further R Whish and D Bailey, *Competition law*, 9th edition, OUP, Oxford (2018), pp. 119-132. (Whish & Bailey 2018)

⁵⁴ See Case C-209/07 *Beef Industry*, 21, Case C-67/13P *Groupement des cartes bancaires*, 54 and Case C-32/11 *Allianz Hungária*, 37.

3.2. Collective bargaining agreements would most likely be a by-object restriction

There continues to be uncertainty surrounding the delimitation between by-object and by-effect restrictions of competition in Article 101 (1) TFEU. Nevertheless, agreements regulating prices, payment terms and access to the market have been held regularly to constitute by-object restrictions.⁵⁵ This means that the core of most collective bargaining agreements, i.e. wage levels, would fall into this category. Had it not been for *Albany*, even traditional collective bargaining agreements might be caught, irrespectively of the arguments that can be submitted in their favor. This gives a bleak outlook for self-employed gig workers' access to engage in collective bargaining. Nonetheless, a case can be made for accepting these under Article 101 (1) TFEU argued along the following different options:

- a) Collective agreements covering self-employed should not be seen as anti-competitive by *object*, allowing possible benefits and efficiencies to be vectored into the assessment and consequently limiting competition intervention to situations where an anti-competitive *effects* can be shown. This would rest on a better definition of the concept of a by-object infringement and an alternative reading of *Albany* allowing for a (re)classification of collective bargaining agreements between self-employed, if at all, as by-effect restrictions.
- b) Restraints in collective agreements covering self-employed are not to be reviewed in isolation if ancillary, either to a traditional collective agreement covering (real) employees or to obligations directed at implementing government regulations, including EU legislation. This option rests on already established concepts of ancillary restraints under Article 101 (1) TFEU and would require a less drastic reorientation of case law than option a). However, it would not cover all forms of collective bargaining in the gig economy, only providing for a partial solution.

Below, both possible lines of argument are explored and developed for the purpose of escaping the straight jacket vested upon agreements classified as anti-competitive by object. As already outlined a by-object classification would preclude a balanced assessment of collective agreements, especially when it comes to taking into consideration that these can counterbalance buying power and thus be potentially benign or even pro-competitive.⁵⁶

3.3. Analysing collective bargaining agreements as by-effect restrictions

Taking into consideration the core object of collective agreements, i.e. the regulation of wages and working hours, replacing the normal competitive process, a label as anti-competitive by object appears unavoidable. If pondered more closely the matter might be less obvious. Case law has found that in the process of identifying by-object infringements, regard must be had of the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms

⁵⁵ Whish & Bailey 2018, 128-132.

⁵⁶ These considerations are further elaborated in the US context in Section 4.2.3 and the EU context in Section 5.3. Reference can also be made to OECD 2020, 13-16.

part.⁵⁷ Collective agreements might actually not fit the prevailing understanding of by-object infringements. While no operative definition of the later has been provided, the European Commission has explained how:⁵⁸

“Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101 (1) TFEU] to demonstrate any actual effects on the market.”

From this, it follows that agreements seeking to attain objectives that could be considered a legitimate public policy objective, might not warrant a label as anti-competitive by object. As already explained, the Court of Justice in *Albany* accepted that collective agreements did not pursue objectives incompatible with the values of the EU Treaties. It could even be argued that since the right to engage in collective bargaining is a fundamental human right,⁵⁹ competition law should not deny it, but follow a careful balancing of the different interests. It thus follows that the balancing exercise should take place outside the strict review standard allotted to agreements held anti-competitive by object.⁶⁰ It also indicates that classification of collective bargaining as anti-competitive by object would be false regardless of their naked content.

Further arguments supporting that collective agreements should not be considered anti-competitive by object can be found in two recent rulings from 2020, *Budapest Bank*⁶¹ and *Generics*.⁶² Here the Court of Justice essentially established that an agreement would only amount to a restriction by object when it has no other plausible purpose but the restriction of competition. Further, if an agreement was capable of having pro-competitive effects it would most likely not be restrictive by object. In preparing *Budapest Bank* Advocate General Bobek⁶³ even recommended that the concept of by-object infringements was reserved to obvious infringements that are easy identifiable noting that:

⁵⁷ EU Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, recital 25. See also Case C-373/14 P *Toshiba*, 26-27; Case C-67/13 P *Groupement des cartes bancaires*, 51.

⁵⁸ EU Commission, *Guidelines on the application of Article 81(3) of the Treaty*, recital 21.

⁵⁹ Protected by e.g. Article 28 of the Charter of Fundamental Rights of the European Union. Collective bargaining is also protected under Article 11 of the European Charter of Fundamental Rights, where the ECtHR held in *Vourdur Olafsson v. Iceland* (Application no. 20161/06) that the protection of freedom of association, which covers collective bargaining of workers, also extends to self-employed. Article 6(2) of the European Social Charter also enshrines the right to collective bargaining, and was interpreted by the European Committee of Social Rights as also extending to collective bargaining for self-employed (see European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland*, Complaint No.123/2016, adopted 12 September 2018, para. 40). Additionally, many national constitutions contain a right to collective bargaining, e.g. Article 37.1 of the Spanish Constitution of 1978.

⁶⁰ An argument outlined by Lianos et al. 2019.

⁶¹ Case C-228/18 *Budapest Bank*, 44 and 82-83.

⁶² Case C-307/18 *Generics and others*, 82 and 87-90.

⁶³ Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank*, 51.

“...if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question.”

On this background it becomes apparent that the concept of being anti-competitive by object, and thus subject to a strict review, should be reserved to agreements serving no legitimate purpose. Taking into consideration that a social market economy and safeguarding adequate social protection are now core Union values,⁶⁴ it would be problematic to extend the strict review at large to collective agreements covering self-employed; at least the most vulnerable and economically dependent. It would even be possible to argue that collective bargaining is pro-competitive or benign as it can be used to counterbalance the buyer power on the side of the employer and thus yield efficiencies that must be included in the assessment under Article 101 (1) TFEU.⁶⁵ It therefore appears incorrect to label collective agreements as anti-competitive by object as they do not seek to attain goals incompatible with EU values. On the contrary, they are in principle perfectly alignable with core EU values like the protection of vulnerable/dependent self-employed and can even produce pro-competitive effects if they counteract buyer power by dominant employers.

3.3.1. Relabeling is not a free pass to restrict competition

Removing collective agreements, including agreements between self-employed, from the list of by-object infringements should not be considered a free pass to evade Article 101 (1) TFEU through collective agreement. As explained earlier, agreements can still be reviewed in light of their effect. Furthermore, the exemption provided by *Albany* is narrow and confined to the core elements of a collective agreement in terms of basic labor and social protections. Attempts to expand beyond these e.g. by reserving activities to union members and thus exclude third parties, would be caught by Article 101 (1) TFEU. The same would apply to collective agreements covering self-employed. Reclassifying collective bargaining as not having an anti-competitive object might not even require overturning *Albany*, if *Albany* is read as not granting immunity under Article 101 (1) TFEU but “merely” establishing that a collective agreement does not pursue an anti-competitive object.

A revised reading of *Albany*, as outlined, might therefore limit competition intervention to situations where collective agreements have an anti-competitive effect. This principle could be extended to collective agreements covering self-employed that, on balance, can be expected to yield significant benefits for the members without seriously affecting consumers' interest. Collective bargaining agreements for self-employed would thus not be per-se legal by virtue of immunity under Article 101 (1) TFEU, but because they do not pursue an anti-competitive object and only warrant condemnation if they have an anti-competitive effect. This would be for enforcers to establish on a case-by-case

⁶⁴ See Article 3 (3) TEU and Article 9 TFEU. See further e.g. Lianos et al. 2019; Jacqueson 2020; and the special issue on the social market economy of the Utrecht Law Review (2019) 15(2) <https://www.utrechtlawreview.org/46/volume/15/issue/2/>.

⁶⁵ Lianos et al. 2019; OECD 2020.

basis, which would involve a balancing of the different interests and arguments including the pro-competitive elements of collective bargaining agreements.

3.4. Applying the ancillary restraints doctrine to collective bargaining agreements

EU case law has given rise to a number of doctrines in which restrictive elements are considered ancillary to the main agreement, making it meaningless to evaluate them in isolation. This can cover even a hardcore infringement under Article 101 (1) TFEU, as horizontal price fixing, provided it is objectively necessary for the implementation of the main operation, and proportionate.⁶⁶ Under the ancillary restraints doctrine a collective agreement covering self-employed might escape the application of Article 101 (1) TFEU if linked to either a) a traditional collective agreement or b) directed at implementing regulatory obligations.

3.4.1 The concept of ancillary restraints under Article 101 TFEU

The doctrine of ancillary restraints⁶⁷ developed by the Court of Justice holds that certain commercial restrictions and obligations linked to horizontal agreements that neither can nor should be appraised in isolation from the underlying arrangement might elude Article 101 (1) TFEU by virtue of being ancillary to a main operation, provided:⁶⁸

“...that operation would be impossible to carry out in the absence of the restriction in question. [...] The fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the ‘objective necessity’ required in order for it to be classified as ancillary.”

From this follows that restrictions are considered ancillary to a main operation if i) directly linked to it ii) necessary for its implementation and iii) proportionate to it.⁶⁹ It should also carry some weight if they are iv) adopted at the same time as the main operation and not subsequently⁷⁰ and v) confined to the parties without limiting the commercial freedom of third parties.⁷¹ Finally, vi) the main operation must be pro-competitive or neutral and vii) the assessment be objective and undertaken in isolation from the parties subjective intent.⁷²

⁶⁶ See Case T-111/08 *MasterCard*, 77-79 and Case T-112/99 *Metropole*, 106.

⁶⁷ See e.g. Case C-250/92 *Gøttrup-Klim - DLG*, 45 and Case T-112/99 *Metropole*, 115-117 for examples of partnerships regarding joint purchasing and satellite-tv respectively, where different purchase and non-compete clauses were accepted as necessary for bringing the partnerships about and therefore ancillary to them. See also Case C-56/65 *Société Technique Minière*, 250 and Case C-258/78 *L.C. Nungesser KG and Kurt Eisele*, 57-58 involving the distribution of machines and the granting of IP-licenses. Here the ECJ expressed understanding for the use of exclusivity provisions if required to open new markets.

⁶⁸ Case C-382/12 P *MasterCard*, 91.

⁶⁹ See EU Commission, *Guidelines on the application of Article 81(3) of the Treaty*, recital 28-31. For further analysis see J Faull and A Nikpay, *The EC Law of Competition*, 3rd edition, OUP, Oxford (2014), 255-260. (Faull & Nikpay 2014)

⁷⁰ Case C-179/16 *F Hoffmann-La Roche*, 73.

⁷¹ Case C-179/16 *F Hoffmann-La Roche*, 72.

⁷² *Guidelines on the application of Article 81(3) of the Treaty*, recital 18 (2).

3.4.2 Applied to collective bargaining

The doctrine of ancillary restraints was developed for the purpose of enabling the successful implementation of beneficial commercial agreements but should not be reserved to this. In particular, the doctrine could be relevant to situations in which a traditional collective agreement covering (true) employees is extended to self-employed. Different reasons could be provided to justify this extension. The line between employed and self-employed might, for example, be somewhat blurred as in *KNV Kunsten*, making it difficult, if not impossible, to qualify persons within a field of economic activity as employees or self-employed.⁷³ In particular in sectors where freelancing is increasingly blurring the line, it would be pragmatic and reasonable to extend the collective agreement to all persons engaging in the same activity regardless of legal status. Another comparable situation might be the case of false self-employed, where an extension of the protection of collective bargaining agreements would seem sensible. Here the incorrect classification is made by either law or the employer.⁷⁴

The Court of Justice accordingly extended the concept of employee to cover self-employed that in practice function as other employees referred to as false-self-employed in *FNV Kunsten*. Thereby solving a practical problem focusing on the reality of the relationship rather than formalities as official classification. The Advocate General⁷⁵ even suggested to adopt a broader reading of *Albany* allowing collective agreements to cover (real) self-employed if the aim was to prevent social dumping. While the Court of Justice did not follow the Advocate General, there is much merit to the his recommendation, as employers might be inclined to replace traditional employees with self-employed for the purpose of preventing collective bargaining and undermining the functions of unions. Under this broad reading of *Albany*, traditional collective agreements could be extended to cover self-employed if confined to ensure equal treatment regardless of legal status (employed or self-employed). However, it cannot be (ab)used to grant e.g. employers better terms or to artificially inflate the costs of using self-employed⁷⁶ for the purpose of limiting this. Neither should the unions negotiating collective agreements promote e.g. the use of traditional employment purely in their self-interest, nor take other steps directed at restricting the freedom of third parties.

Instead of following the social dumping argumentation of the Advocate General, the Court provided in *FNV Kunsten* for a moderate expansion of *Albany* accepting that a collective agreement could be extended to cover self-employed if integrated in the employer's organisation, and thus being de facto employed. The Court thereby provided a solution to false-self-employed but left other groups excluded. Since the gig economy is here to stay, however, there will likely be ample future opportunities to revisit the question. This might provide a push for a more advanced ancillary restraints doctrine where additional restraints on competition due to including self-employed in existing collective bargaining agreements might be found to be justified if required to protect the ability to undertake collective bargaining, which is a fundamental right guaranteed by the EU Charter.

⁷³ See also e.g. Case C-413/13 *FNV Kunsten*, 32.

⁷⁴ Employers might also have an incentive to apply incorrect labeling for the purposes of undermining unions and collective agreements or, alternatively, to avoid burdensome social regulation and taxes.

⁷⁵ See Opinion of Advocate General Wahl in Case C-413/13 *FNV Kunsten*, 77-79.

⁷⁶ See Opinion of Advocate General Wahl in Case C-413/13 *FNV Kunsten*, 93.

Such a version of the ancillary restraints doctrine would require that the extension of collective bargaining agreements to self-employed must be i) ancillary to a traditional collective agreement ii) necessary for the protection of the traditional collective bargaining agreement and iii) confined to the parties without limiting the commercial freedom of third parties. Finally, vi) the traditional collective agreement must be permissible under the principles established in *Albany*. This would not permanently remedy the problems presented by self-employment in the gig economy but allow for accommodation of some self-employed.

3.4.3. A regulatory ancillary restraints doctrine in line with *Wouters*

It has been contemplated⁷⁷ whether a doctrine of “regulatory” ancillary restraints could allow restrictions resulting from implementing regulatory obligations to elude Article 101 TFEU by virtue of being unrelated to the operation of economic activities. The scope of the doctrine remains open, however, and rests on the Court of Justice ruling in *Wouters*⁷⁸ that has not been embraced subsequently. *Wouters* was a preliminary reference procedure in which the Court of Justice established that if an otherwise anti-competitive agreement had a legitimate general interest objective and the restriction of competition did not go beyond what was necessary, it fell outside the scope of Article 101 (1) TFEU.⁷⁹ The ruling established a practice allowing some restrictions to elude Article 101 TFEU completely by virtue of being surrogates for regulation. The General Court attempted to develop this further in *Meca-Medina*,⁸⁰ but was overturned on appeal by the Court of Justice finding the adopted anti-doping rules were covered by Article 101 TFEU, even though they did not infringe the provision.

Taken together, *Wouters* and *Meca-Medina* establish a doctrine allowing restrictions resulting from the implementation of regulatory obligations to elude Article 101 TFEU. In line with these cases, the European Commission⁸¹ has noted that restrictions directed at protecting public safety and health can be permissible under Article 101 (1) TFEU even when those restrictions would otherwise be seen as by-object infringements of competition. Against this, it becomes apparent that some restrictions can elude condemnation under Article 101 (1) TFEU by virtue of being substitutes for regulation and pursuing objectives that correspond to EU values. This possible doctrine of regulatory ancillary restraints has, regardless of the uncertainty about its nature and scope, direct relevance for collective agreements and self-employed. Not only because a social market economy and the securing of adequate social protection are Union objectives but also because Member States regularly enjoy a margin of discretion when implementing EU law, e.g. in the case of EU Directives. Member States can thus delegate the implementation of EU law to the representatives of workers and employers through

⁷⁷ See e.g. Whish & Bailey 2018, 138-141 and Faull and Nikpay 2014, 253-255.

⁷⁸ Case C-309/99 *Wouters*, 97 and 107. Some of the same considerations can be seen in case T-144/99 *Institute of Professional Representatives*, 78; Case C-184/13 *API*, 48 and 55; case AT.40.208 - *ISU*, 210-266 and Joined Cases C-427/16 and 428/16 *CHEZ Elektro Bulgaria*, 54.

⁷⁹ For further on possible readings of *Wouters* see Whish & Bailey 2018, 138-141.

⁸⁰ Case T-313/02 *David Meca-Medina and Igor Majcen*, 42-47. Overturned by Case C-519/04 P *David Meca-Medina and Igor Majcen*, 30-34.

⁸¹ See EU Commission, *Guidelines on Vertical Restraints*, recital 60 and EU Commission, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, section 1.

collective agreement.⁸² Article 101 (1) TFEU should not prevent this even if involving genuine self-employed beyond the exemption provided by *Albany* and *FNV Kunsten*, as long as it is i) proportionate and ii) confined to securing correct and full implementation of the regulatory obligations from the original act. A revisit of *Wouters* and *Meca-Medina* for the purpose of developing a more advanced regulatory ancillary restraints doctrine would not be perfect but would resolve some of the problems presented by self-employment in the gig economy.

3.5 The possibility of an individual exemption under Article 101 (3) TFEU

Article 101 (3) TFEU allows for individual exemptions of agreements violating Article 101 (1) TFEU regardless of being restrictive by object or effect,⁸³ if the parties can show that the agreement generates i) considerable efficiencies that are ii) passed on to consumers and iii) the restriction of competition is necessary to achieve those efficiency gains iv) without eliminating all competition. While collective agreements might be squeezed into fitting most of these requirements, it would require some creativity to explain how consumers would benefit from this.⁸⁴ Granted, that a pro-competitive story can be provided when confronted with strong buyers as already outlined. However, this might not be sufficient. A collective agreement covering self-employed is inescapably directed at improving the income of self-employed, but this would hardly be passed on to end-users but pocketed by the self-employed. In addition, Article 101 (3) TFEU only accepts efficiencies from the improved production or distribution of goods and services and not the reduction of competition.⁸⁵ Improving working conditions and countering the buyer power of dominant employers would not strictly fall into this category of efficiencies.

Exempting collective bargaining under Article 101 (3) TFEU would thus require some substantial bending of the requirements and purpose of Article 101 (3) TFEU. Furthermore, the burden of proof under Article 101 (3) TFEU remains with the parties to the agreement, allocating this to an already weak party. This would be a very precarious position on which to rest the legitimacy of a collective agreement. Additionally, external parties might have an incentive to challenge any collective agreement that invokes an individual exemption under Article 101 (3) TFEU, creating further risks for collective agreements. In contrast to the time prior to Regulation 1/2003, it is no longer possible to notify the agreement to the European Commission or the national competition authorities⁸⁶ for pre-approval, reducing legal certainty and increasing the legal risks further. In sum, individually exempting collective agreements between self-employed under Article 101 (3) TFEU would neither be feasible nor desirable and entail substantial legal risks, including large fines and enforcement

⁸² See e.g. Case C-143/83 *Commission v Denmark*.

⁸³ EU Commission, *Guidelines on the application of Article 81(3) of the Treaty*, recital 20.

⁸⁴ An attempt can be found in Dutch Competition Authority 2019.

⁸⁵ See e.g. EU Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, recital 247.

⁸⁶ Article 1 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

problems. The European Commission could, of course, provide guidance, either in separate notice or by virtue of updating the Article 101 (3) notice.⁸⁷

3.6 Other options - de minimis or no enforcement

Other paths to an acceptable solution might be available. The Dutch Competition Authority has e.g. issued a set of Guidelines on price arrangement between self-employed workers (2019),⁸⁸ indicating that some might be able to elude Article 101 (1) by virtue of being de minimis. Alternately, the agency will waive the option of imposing fines on agreements on minimum rates between self-employed workers, that are not higher than necessary of safeguarding the subsistence level. While these options might provide for relief in the most obvious cases, this legal position would not be sustainable on a union level. First and foremost as both paths only have been accepted by one out of the EU's 27 National Competition Authorities (NCAs), not to mention the European Commission.

Secondly, and equally important, does the de minimum option rest on a creative reading of case law. In *Expedia*,⁸⁹ the Court of Justice explicitly ruled that the concept of de minimis did not apply to restrictions by object as these always restricted competition, making it somewhat surprising that the Dutch Competition Authority suggests this option. While different NCAs remain free to set priorities, would this option be at odds with EU competition law, unless case law develops into a specific direction, as indicated earlier.

Thirdly, the Dutch Competition Authority has waived the right to levy fines, but this cannot bind courts in respect to enforcement. A collective agreement between self-employed could still end up being null and void and thus unenforceable, and as already outlined, would some third party have a strong incentive to exploit this, the very purpose of collective bargaining would be defeated.

4. US Antitrust Law Perspective

Under US antitrust law, just as under EU competition law, collective bargaining among gig workers runs the risk of being seen as a horizontal agreement on the most competitively sensitive of topics - primarily, price and output - even if the coordination constitutes formal organization among themselves in a form not unlike a traditional labor union.⁹⁰ Prima facie, such collective organization could be subject to automatic prohibition and liability as a *per se* violation of Section 1 of the Sherman Act.

⁸⁷ *Guidelines on the application of Article 81(3) of the Treaty.*

⁸⁸ See Dutch Competition Authority 2019.

⁸⁹ Case C-226/11 *Expedia*, 35-37. See also EU Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, recital 2.

⁹⁰ M Anderson and M Huffman, *Labor Organization in Ride Sharing - Unionization or Cartelization?*, *Vand. J. Ent. Tech. L.* (2021) (forthcoming) (citing news sources). (Anderson & Huffmann 2021)

The question arises, however, whether this type of collective organization could benefit from the labor exemption and enjoy immunity from antitrust law.⁹¹ Alternatively, there could be grounds for not applying a per se rule to these agreements, but rather a rule of reason approach.⁹² This could allow some collective bargaining agreements improving the situation of gig workers that create efficiencies to escape liability under US antitrust rules.

4.1 Labor Exemption from Antitrust Challenge

4.1.1. Origins and development of the labor exemption from antitrust

The labor exemption from antitrust is both a statutory and a common-law exception from antitrust liability for conduct by labor organizations, without considering its effect on consumers. The labor exemption is, in effect, a per se rule of *legality*, finding conduct permissible regardless of possible anticompetitive effects because of a social policy favoring labor organization over competition among workers in the labor market.

In 1941 in *US v. Hutcheson*,⁹³ the Supreme Court considered a challenge to conduct by the Carpenters' Union in its attempt to move certain jobs at brewer Anheuser-Busch related to the erection and dismantling of machinery to its membership rather than that of the Machinists' Union. The Carpenters' struck both Anheuser-Busch and its construction company contractors, including picketing and publications intended to convince union members to boycott Anheuser-Busch beer. The Justice Department brought a criminal complaint, arguing that the strike in reality targeted the rival Machinists' union and thus did not qualify for the statutory labor exemption.⁹⁴ The Supreme Court held otherwise, noting: "*an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.*"⁹⁵

The *Hutcheson* Court analyzed the two sections on which the statutory exemption is premised, Section 20 of the Clayton Act and Section 2 of the Norris-LaGuardia Act. The relevant parts of Section 20 of the Clayton Act state:

"No restraining order or injunction shall be granted by any court . . . in any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . ."

⁹¹ This analysis is conducted in Section 4.1. of this paper and can be compared to the considerations on how to distinguish employees from self-employed under EU law in Section 2 of this paper, in the sense that the classification of a gig worker as "worker" is decisive.

⁹² This analysis is conducted in Section 4.2. of this paper and can be compared to a certain extent to our analysis under Article 101 TFEU in Section 3, as it is concerned with a substantive appraisal of the agreement itself.

⁹³ *United States v. Hutcheson*, 312 U.S. 219, 227-28 (1941).

⁹⁴ *Id.* at 227 (issue was whether conduct in a controversy with a rival union violated the Sherman Act).

⁹⁵ *Id.* at 229.

*"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor . . . ; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."*⁹⁶

Interpretations of Section 20 substantially narrowed the exemption's application in the decades immediately following its adoption, restricting it to disputes between an employer and its employees.⁹⁷ Congress responded to these narrowing interpretations with the 1932 Norris-LaGuardia Act,⁹⁸ which broadened the scope of the labor exemption. Norris-LaGuardia section 2 declared a national policy favoring labor organization, representation, and negotiation of terms and conditions of employment:

*Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment"*⁹⁹

Case law has established three requirements for the statutory exemption:

1. conduct of a labor organization or union in the course of a labor dispute;
2. union acting in its own self interest; and
3. union acting unilaterally and not in combination with non-unions.¹⁰⁰

The necessity that the conduct be that of a labor organization or union in the course of a labor dispute has led to holdings requiring an employment relationship.¹⁰¹ In a leading case, due to the lack of an employer-employee relationship, the Third Circuit Court of Appeals in *Conley Motor Express v. Russell* refused to apply the statutory labor exemption to immunize picketing by a purported union of independent contractor truckers against the trucking enterprise to which they provided their services and leased equipment.¹⁰²

⁹⁶38 Stat. 738 (1914), codified at 29 U.S.C. section 52.

⁹⁷*Hutcheson*, 312 U.S. 230-31. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472 (1921) ("'Terms or conditions of employment' are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.").

⁹⁸47 Stat. 70 (1932), codified at 29 U.S.C. sections 101-115.

⁹⁹Norris-LaGuardia Act section 2, 29 U.S.C. 102.

¹⁰⁰*H.A. Artists & Assoc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714-15 (1981) (quoting *U.S. v. Hutcheson*, 312 U.S. at 232).

¹⁰¹See *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 126 (3d Cir. 1974) (holding that independent contractor truckers could not avail themselves of the statutory labor exemption because of the lack of an employer-employee relationship) (citing *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145-47 (1942)).

¹⁰²*Conley Motor Express*, 500 F.2d at 127 ("appellants have failed to show that the employer-employee relationship forms the matrix of their controversy with Conley"). Section 13(c) of the Norris-LaGuardia Act,

Like much of U.S. antitrust, the foundational case law defining the labor exemption contains ambiguities. The dominant interpretation of the employment requirement rests on the Supreme Court's 1942 decision in *Columbia River Packers Association v. Hinton*¹⁰³ and provides that independent contractors do not have the requisite employment relationship for their collective activity to be exempt under the statutory exemption. A competing view is represented by the Supreme Court's 1968 holding in *American Federation of Musicians v. Carroll*,¹⁰⁴ seemingly allowing for organization by independent contractors.

In *Columbia River Packers*, the plaintiff was an owner-operator of canneries in the Pacific Northwest. Defendants were a union of independent fishers, its officers, its members, and two other fish cannery operations. The Court noted that the union members were independent fishers, who owned or leased their boats and pursued their work without oversight or control by the canneries. The fishers did not seek employment with the plaintiff cannery operator, but instead sought to collectively impose on the plaintiff a contract term in which the plaintiff agreed only to purchase fish from union members. This “*dispute among businessmen over the terms of a contract for the sale of fish*” was not a “*controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment.*” The Court refused to apply the statutory exemption.¹⁰⁵

Courts following *Columbia River Packers* have interpreted the holding to prevent independent contractors from taking advantage of the statutory labor exemption.¹⁰⁶ *L.A. Provision & Meat Drivers Union v. U.S.*¹⁰⁷ held that “grease peddlers,” working as middle-men in purchasing grease from restaurants and selling it overseas, who joined forces under the auspices of defendant union to establish fixed purchase and sale prices for grease “for the purpose of increasing the margin between the prices they paid for grease and the prices at which they sold it to the processors,”¹⁰⁸ lacked the employment relationship required for the labor exemption.¹⁰⁹

which justifies the holding in *Conley Motor Express*, is on its face not unambiguous. That subsection reads, “The term “labor dispute” includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*” 29 U.S.C. 113(c). This has been held to leave room in the exemption for “jurisdictional disputes” between employers and unions, like that at issue in *U.S. v. Hutcheson*, 312 U.S. 219, where none of the union’s members are employees of the disputing employer. See, e.g., *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, (1938) (picketing to encourage employer to “employ[...] negro clerks in its stores in the regular course of personnel changes” protected by the statutory exemption).¹⁰³ 315 U.S. 143 (1942).

¹⁰⁴ 391 U.S. 99 (1968).

¹⁰⁵ *Columbia River Packers*, 315 U.S. at 144-45 (quoting 29 U.S.C. 113(c)).

¹⁰⁶ “Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur.” *H. A. Artists & Assocs. v. Actors’ Equity Ass’n*, 451 U.S. 704, 717 & n.20 (1981) (citing *Columbia River Packers*, 315 U.S. at 143, and *L.A. Meat & Provision Drivers Union v. U.S.*, 371 U.S. 94 (1962)).

¹⁰⁷ 371 U.S. 94 (1962).

¹⁰⁸ *Id.* at 96-97.

¹⁰⁹ *Id.* at 99-100. A dissent by Justice Douglas argued that the union had an interest in increasing the profits to the competing independent grease peddlers. *Id.* at 110-12.

In *American Federation Of Musicians v. Carroll*,¹¹⁰ the Court considered the case of independent musicians banding together under a unilateral set of bylaws and regulations by which they established minimum prices and other common contract terms for performances. Irrespective of their status as self-employed the Court treated the union of musicians and orchestra leaders as a “labor group,” based on the “*presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.*”¹¹¹ The Court found the requisite competition among the orchestra leaders and other musicians to establish the economic relationship needed for labor group status.¹¹²

4.1.2. Collective bargaining of gig workers in light of the labor exemption

The line of cases building on *Columbia River Packers*, and in particular the cases including *L.A. Meat & Provision Drivers* and *Conley Motor Express*, presents the strongest analogies to gig workers, leading to the conclusion that they lack the requisite employment relationship to take advantage of the labor exemption. Given the non-applicability of the existing labor exemption to gig workers, by default labor organization among them would be illegal *per se* under Section 1 of the Sherman Act.

It is possible that state law redefinition of the sharing-economy workforce as employees would import all the protections of the employer/employee relationship, including the right to organize.¹¹³ The impact on rights to organize is, however, ambiguous, because those rights are creatures of federal law rather than state law.¹¹⁴ The State of California attempted this approach, leading to threats that ride-share firms would cease operations in the state. Ongoing litigation presents uncertainty as to the state of the labor market for ride sharing in the state. California Assembly Bill 5 (AB-5) took effect in January 2020, reclassifying a substantial number of gig-economy workers as employees rather than as contractors.¹¹⁵ In fact, despite robust challenges to the law’s application to their business model, both Uber and Lyft were held to be in violation of AB-5 for failing to treat

¹¹⁰ 391 U.S. 99 (1968).

¹¹¹ *Id.* at 106.

¹¹² *Id.* at 109-11.

¹¹³ There is another concern with treating ride-sharing drivers as employees, which speaks to the conceptual idea of ride-sharing as a use of fallow assets (unused car, leisure time) rather than as a primary means of earning a living. Creating an employee/employer relationship threatens the fallow assets business model, which undermines the innovative core of the enterprise.

¹¹⁴ Professor Lao argued in 2016 that granting organizing rights under federal law without importing state law employment protections would be an effective approach, decoupling the organization right from other employment protections. M Lao, ‘Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption’, 51 *U.S. Davis L. Rev.* 1543 (2018). (Lao 2018)

¹¹⁵ This approach imported three definitional elements of independent contractor status from a recent California Supreme Court decision. If shown, it would justify independent contractor status - leaving the default relationship as an employment relationship. Those elements would be difficult for e.g. ride-sharing enterprises such as Uber or Lyft to meet: (1) freedom from control and direction, (2) work performed outside the hiring entity’s usual business, and (3) the person is customarily engaged in independently established trade of the same nature. Elements (2) and (3), in particular, would be challenging for a ride-sharing enterprise to meet.

drivers as employees.¹¹⁶ Uber and Lyft threatened to close their services in California, asserting their inability to provide employment benefits. This assertion gains some weight in light of reports of years of the firms' non-profitability.¹¹⁷ The California courts stayed the injunction requiring the firms to treat drivers as employees, delaying any actual decision whether to withdraw services from the state.

On 3 Nov. 2020, California voters approved a proposition which defines "transportation (rideshare) and delivery drivers as independent contractors and adopt labor" by a large margin and committed to a process of identifying labor and wage policies specific to app-based drivers.¹¹⁸ It is tempting to conclude that the economic realities of the Uber and Lyft business models made it impossible to treat the enterprises as employers, and that California voters recognized that when faced with the loss of ride-share services if AB-5 were enforced against the enterprises.

4.2 Analyzing agreements

If we conclude that collective bargaining agreements would likely not qualify for the labor exemption, i.e., there would be no immunity, the question arises how to analyze these under Section 1 of the Sherman Act, which governs agreements "in restraint of trade."¹¹⁹ US antitrust law offers three categories of analysis of agreements that are not subject to immunity. Those categories - *per se* illegality, the rule of reason, and the quick look rule of reason - are differentiated primarily by the process under which the harms, and any possible benefits, from the agreement are analyzed. A rule of *per se* illegality imposes automatic liability on proof of one of the few agreements still subject to the rule - including agreements to fix prices, to restrict output, to rig bids, and to divide markets among horizontal competitors.¹²⁰

4.2.1 Rule of Reason

The rule of reason is the dominant mode of analysis in US antitrust law, and applies to most agreements under Section 1 of the Sherman Act. It emerged in the law of agreement and is sometimes dated to Judge Taft's 1898 opinion for the Court of Appeals in *Addyston Pipe & Steel Co.*, differentiating between agreements that are illegal *per se* and those that may be legal if ancillary - defined as

¹¹⁶ *People v. Uber Techs., Inc.*, Order on Motion for Preliminary Injunction, No. CGC-20-584402, at 5 (Super. Ct. Cal. Aug. 10, 2020) (issuing preliminary injunction because "Defendants' drivers do not perform work that is 'outside the usual course' of their business").

¹¹⁷ A Hawkins, 'Uber lost \$8.5 billion in 2019' 6 Feb. 2020 The Verge, available at <https://www.theverge.com/2020/2/6/21126965/uber-q4-earnings-report-net-loss-revenue-profit-2019#:~:text=Overall%2C%20Uber%20says%20it%20lost,due%20to%20stock%2Dbased%20compensatio>[n](#). On the basis of non-profitability of ride sharing, Professor Lao argued that recognizing labor organization rights should not imply state law employment status, with attendant benefits. See Lao 2018.

¹¹⁸ See Voter Guide, California Secretary of State, 'Prop. 22: Exempts App-Based Transportation and Delivery Companies from providing benefits to certain drivers. Initiative Statute'. Available at <https://voterguide.sos.ca.gov/propositions/22/>; [https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)). The vote was 53% in favor and 42% opposed.

¹¹⁹ 15 U.S.C. 1.

¹²⁰ Agreements to engage in product ties nominally are subject to this treatment, though in practice the law treats them differently. See *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).

reasonably necessary to the achievement of a legitimate objective and proportionate to that objective.

The rule of reason functions by acknowledging economic benefits that may flow from an agreement and shifting the burdens between the parties, with the plaintiff or enforcer first proving the agreement bears a likelihood of harming consumers.¹²¹ The defendant may then assert the economic benefit, returning the burden to the plaintiff to show the harm outweighs that benefit. This leaves the question what form of “economic benefit” the defendant may rely on to pose against the plaintiff’s proof of harm. The burden-shifting is the core of the rule of reason. Under a hybrid standard, frequently termed the “quick look,” a mere showing of conduct that is likely to produce marketplace harm produces a presumption (which the defendant may rebut) of a violation.

Although there is some ambiguity as to the nature of the burden imposed on a defendant in the second step of the rule of reason inquiry, the better approach is to consider the defendant’s burden as being to produce evidence refuting the showing of harm, rather than to prove the refutation (a burden of production rather than a burden of proof). At the end of the burden-shifting, the plaintiff bears the burden of proving that, net - considering the harms and efficiencies from the agreement - it causes harm to competition.¹²²

4.2.2 Defining “Efficiency”

The question of what constitutes “efficiency” under US law differs substantially from many other competition law regimes globally. US courts have established the clear position that only economic effects constitute efficiencies that will counteract a plaintiff’s showing of likely competitive harm.¹²³ Legitimate economic effects might include reductions in transaction costs or an increase in an alternative form of competition, with the typical example being vertical agreements permitted because restrictions in intra-brand competition are offset by increases in inter-brand competition.¹²⁴

¹²¹ This is in contrast with the *per se* rule, where the burden does not shift because the presumption of harm from the conduct is irrebuttable. *See, e.g., U.S. v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

¹²² *See* Anderson & Huffman 2021, 43-44.

¹²³ *National Soc’y of Prof. Eng’rs v. U.S.*, 435 U.S. 679 (1978) (argument that agreement among defendant engineers was necessary to maintain quality and safety standards in engineering did not overcome competition concerns).

¹²⁴ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (vertical market allocation agreement may be justified by competition between brands); *Leegin Creative Leather Prods., Inc. v. PSKS Inc.*, 551 U.S. 877 (2007) (increase in interbrand competition may justify a decrease in intra-brand competition from a resale price maintenance agreement). As examples of illegitimate non-economic benefits, in *Society of Professional Engineers*, defendants had established a no-bid scheme, preventing engineers from bidding against each other for work. The predictable result was to limit competition and increase prices in the market for engineering services on building projects. The defendants asserted that the agreement was necessary to ensure engineers were not inclined to bid prices so low that their services would suffer, leading to safety concerns. Defendant lawyers in *Goldfarb v. Virginia State Bar* argued in support of a bar-association-orchestrated price fix for legal services based on the need to ensure quality representation. While safety concerns in engineering and quality concerns in legal services are presumably legitimate, they are not the kinds of efficiency claims that replace competitive dynamics in terms of providing consumer benefit. The NCAA in *Board of Regents of Univ. of Oklahoma* failed to convince the Supreme Court that its desire to create a unique product, the “college game-

Other social, environmental, or otherwise non-economic benefits are broadly understood to not be legitimate efficiency arguments in support of an otherwise harmful agreement. Importantly for the discussion here, benefits to workers would ordinarily not be considered an efficiency that might overcome proof of (future) consumer harm from an agreement. However, the difference between economic and non-economic benefits is not always self-evident. In the *Overlap Group* case, one US court accepted as a justification the argument that a market allocation among elite schools with regard to recruitment of elite applicants was justified by the defendant schools' desire to maintain a diverse student body.¹²⁵ The *Overlap Group* case is best understood as a case analyzing a sort of labor market: that for talented students to populate universities. The horizontal agreement targeting the talent market operated to the benefit of the university's consumers, ordinary students, who gained from studying alongside the elite recruits. Seen from that perspective, *Overlap Group* is one indication that courts may be amenable to arguments about efficiencies realized in labor markets that can be shown to benefit consumer markets.

4.2.3 Applying to Labor Markets

Given the narrow definition of "efficiency" under U.S. antitrust law, it is not surprising that to date, courts have not identified benefits to workers as an efficiency justifying organization among independent contractors. However, economics supports taking this step, as a middle ground between the *per se* (prohibition) treatment of collective organization by gig workers - the current state of the law - and *per se* legality of such conduct that would arise if the labor exemption were extended to cover these workers.

Scholars studying the possible treatment of gig workers under U.S. antitrust law have identified four primary approaches to permitting collective organization. Eric Posner argues the "control" test used to differentiate between employees and contractors is insufficient, preferring a market realities test that differentiates between "discrete work" - typically performed by contractors, who move easily among contracts - and "relational work" - typically performed by employees, who are locked in to relationships with a single employer due to specialized skills or knowledge.¹²⁶ Marina Lao proposes an approach that decouples the control test for employment from the right to labor organization, which would permit labor organization even where state law employment protections do not apply.¹²⁷ Hiba Hafiz argues that antitrust analysis in the context of labor organization should proceed in cooperation with labor regulators, including the National Labor Relations Board.¹²⁸

day product," was a justification supporting an unlawful restriction on the output of television broadcasting of college football games (468 U.S. 85 (1984)).

¹²⁵ *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993).

¹²⁶ E Posner, 'The Economic Basis of the Independent Contractor/Employee Distinction', University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 909 (June 6, 2020), available at https://papers.ssrn.com/abstract_id=3582673 (visited Aug. 24, 2020).

¹²⁷ Lao 2018.

¹²⁸ H Hafiz, 'Labor's Antitrust Paradox', 86 *U. Chi. L. Rev.* 381 (2020). (Hafiz 2020)

Anderson and Huffman identify a fourth approach, which hews closer to the broader understanding of efficiencies recognized in non-U.S. jurisdictions. Organization by workers can overcome market inefficiencies created by buyers of labor with monopsony power by exerting countervailing power, moving the price for labor up and closer to the equilibrium price.¹²⁹ This brings more labor output into the market and increases the level of production in the consumer market. The effect of labor organization is to lower prices to the consumer. In this way consumers and workers are united in opposition to the buyer of labor/producer of consumer services. This observation about the efficiency gains from labor organization is neither original nor controversial.¹³⁰ However, US law has generally not accepted these efficiency gains as justifications for concerted action. It could be accomplished as a matter of common law development, as courts have considerable leeway to consider economic evidence in their determinations whether to apply a *per se* rule or allow presentation of efficiencies under the rule of reason.¹³¹

The approach of taking into consideration efficiency effects from countervailing power through labor organization, may permit collective organization if the labor market in question reflects monopsony power and downward pressure on wages and benefits. In such a market the price of labor can be expected to be below the equilibrium level with output commensurately reduced. This characteristic is subject to an important caveat. If the labor supply curve is a traditional upward-sloping curve, below-equilibrium price for labor will depress output. However, there is some evidence that markets may be characterized by a C-shaped supply curve, which reflects normal increases in output at higher price points in across part of the range of possible wages, but increased output as wages decrease at the lower end of the wage range. In a labor market where workers' options are sufficiently limited that they will continue working even for low wages, as long as necessary to cover living expenses, a decrease in the price of labor perversely increases rather than decreases output.¹³² In this market worker interests are truly oppositional to consumer interests, because decreased labor price both increases output and, by reducing the cost structure of the producer, may decrease consumer prices. Whether a particular labor market is characterized by the traditional upward-sloping supply curve or a C-shaped supply curve is an empirical question. Existing research that demonstrates this shape of the labor supply curve empirically tends to arise in subsistence markets in the developing world.¹³³

There is anecdotal evidence that the C-shaped supply curve arises in ride-sharing markets. Observations suggest that some local ride-share markets involve workers committed to ride-sharing

¹²⁹ Anderson & Huffman 2021.

¹³⁰ See RD Blair and JL Harrison, *Monopsony in Law and Economics*, CUP, Cambridge (2010), 45-46 (monopsonist buyer of labor faces higher marginal cost of labor than competitive buyer, so will purchase, leading to reduced output in the downstream product or service market and higher consumer prices).

¹³¹ E.g., *Brown University*, 5 F.3d 658 (court applied rule of reason to agreement after determination that the effect of agreement on tuition could not be shown to be harmful).

¹³² Anderson & Huffman 2021.

¹³³ P Dasgupta & B Goldar, 'Female Labor Supply in Rural India: An Econometric Analysis', 49 *Ind. J. Lab. Econ.* 293 (2005). Available at <https://web.archive.org/web/20160107205245/http://iegingia.org/workpap/wp265.pdf> ("The bottom segment of the curve is downward sloping (or forward falling), which implies that if the wage level is low, then any further decline in wage rate may lead to increase in the supply of labour.").

as a primary source of income, in a non-trivial number of cases purchasing an automobile specifically for use on a ride-sharing platform. Anderson and Huffman refer to this as the “locked-in” model (as distinct from a “fallow assets” model in which workers are otherwise employed and already own their vehicle). News media narratives identify anecdotes of this in ride-sharing and in the economically comparable owner-operator long-haul trucking labor market.¹³⁴ It is possible that in rare cases the price of ride-sharing labor is sufficiently low that organizing to raise that price will decrease, rather than increase, the output.

In sum, assuming gig workers are (1) classified as independent contractors rather than employees and (2) are contracting with the platform, which is the service provider to consumers, the rule of reason can be used to analyze the overall competitive effect of an agreement among the gig workers in the form of collective organization or otherwise. Importantly, taking into account worker interests as an efficiency would require a change in the current interpretation of US law to permit consideration of worker interests in the rule of reason calculation. However, such a change can be justified without fundamentally rewriting US antitrust law’s core principles.

5. Four possibilities to allow for collective bargaining of self-employed in the gig economy under EU competition law

5.1. Classifying gig workers as employees

The first option to allow for collective bargaining of self-employed in the gig economy would be to treat them as employees or workers for the purposes of EU competition law.¹³⁵ Employees are not considered to be undertakings under EU competition law since they are incorporated into their employer’s organization.¹³⁶ According to *Albany*, as long as collective bargaining is a means of worker protection in order to achieve social policy objectives, EU competition law does not apply.¹³⁷

¹³⁴ M Wood, ‘Uber drivers struggle to pay subprime auto loans,’ May 13, 2015 NPR Marketplace, available at <https://www.marketplace.org/2015/05/13/uber-drivers-struggle-pay-subprime-auto-loans/>. A similar example, also reported by NPR, relates to lease-to-own transactions in long-haul trucking. K Romer and S Gonzalez, ‘Big Rigged,’ Aug. 14, 2020 Planet Money, available at <https://www.npr.org/2020/08/10/901110994/big-rigged>. *Contra* T Bellon, ‘Study Suggests most Uber, Lyft Drivers in Seattle not Poorly Paid,’ July 8, 2020 Tech. News, available at <https://www.reuters.com/article/us-uberseattle-pay/study-suggests-most-uber-lyft-drivers-in-seattle-not-poorly-paid-idUSKBN2493CG> (visited Aug. 21, 2020) (citing L Hyman et al., Platform Driving in Seattle, Cornell ILR School Institute for Workplace Studies (July 6, 2020) (finding median earnings after expenses of \$23.95 hourly, with 92% of drivers making more than the city minimum wage for Seattle of \$16.39)).

¹³⁵ This approach is similar to the labor exemption rule under US antitrust law discussed in Section 4.1.

¹³⁶ Case C-22/98 *Becu*, 26.

¹³⁷ Case C-67/96 *Albany*.

Building on the *FNV Kunsten* case, as well as the approach we can observe under national tax law and EU labor law, it would be possible to adopt a functional interpretation of the concept of a worker in EU law.¹³⁸ Such an approach would establish the personal scope of Article 101 (1) TFEU on a case-by-case basis by analysing the relationship between the platform and the gig worker. If there is a relationship of dependence, control or subordination (in terms of time, place, and content of the work) and allocation of economic risk between the parties that indicate that the gig workers of a platform might be a “false self-employed”, they should be classified as workers for competition law purposes.

As has been explained in Section 2.1., however, the *FNV Kunsten* criteria might be under-inclusive, i.e. they might not adequately reflect that shifting the economic risk from a platform to a gig worker in the contractual relationship might create economic *dependence*, rather than *independence*. In order to ensure that the legal categorization of “false self-employed” reflects reality, courts and competition authorities should also observe whether there is a risk of social dumping and thus clear economic dependency, irrespective of flexible elements or risk allocation in the contractual relationship between the gig worker and the platform. Additionally, as pointed out in Section 3.3, this case-by-case analysis should include an analysis as to whether an established trade union is representing the group of gig workers in question, and whether the agreement really pursues a genuine social objective.

While such an approach might have much merit in protecting some gig workers deserving protection from competition law interference in collective agreements, there might also be drawbacks in applying such an approach. When looking at tax law, the differential treatment of individuals based on their categorization as “employee” or “self-employed” opens the door to legal, but possibly public purpose-defeating tax planning schemes. To take an example, one could imagine an individual who is working full-time and will benefit from having a side income (e.g. from gig work or from working as a contractor) assigned as incomes from activities as self-employed. The worker’s main employer will already be liable for her payroll taxes (healthcare, pension payments etc. in the Swedish system) while the worker may use corporate structures for small business owners to tax plan and have her side incomes classified partially as capital income (30% taxation compared to 33-55% tax in Sweden, depending on the municipality of residence and the total amount of income during the year, as higher incomes will be subject to state taxation as well) in addition to not having to pay any payroll taxation on those incomes.

In a competition law context, one could imagine that an overly broad construction of the concept of a worker might invite some groups of self-employed to seek immunity from competition law enforcement while actually engaging in anti-competitive behavior. Similarly, including a social-dumping rationale into the test might make it very difficult to judge whether a collective agreement covering a group of both economically dependent “lock-in” gig workers, which are at risk of social dumping, and genuinely independent “fallow asset” gig workers should benefit from immunity.¹³⁹

¹³⁸ Schieck & Gideon 2018, 287; Lianos et al. 2019, 312 f.

¹³⁹ Anderson & Huffmann (2021) introduce two models, a “lock in” and “fallow asset” model of gig economy labor markets, see section 4.2.2. above.

5.2. Analyzing collective bargaining agreements as a by-effect restriction of competition

The second option to allow for collective bargaining of self-employed in the gig economy would be to analyse individual collective agreements as a by-effects restriction of competition, as outlined in section 3.3. above. In contrast to the first solution, the exclusion of collective bargaining agreements for gig workers from the application of EU competition law would not be done in a formalistic sense by relying on legal categories. Rather, each collective agreement would be scrutinized as to its effects on the market in order to determine the question of intervention under competition law on a case-by-case basis.

First of all, an agreement that falls into the by-effects restriction “box” benefits from the application of the *de minimis* doctrine: if it only affects a small share of the relevant market, it will not be found in violation of Article 101 (1) TFEU.¹⁴⁰ In addition, the economic effects of the agreement on the market will be measured. If the agreement does not lead to higher prices for consumers or negatively impacts other parameters of competition appreciably, there will be no violation of Article 101 (1) TFEU. In this context, collective bargaining could actually be pro-competitive in countering monopsony power of platforms, especially in the case of dominant gig platforms. A similar suggestion has been made by Anderson and Huffman in the US antitrust law context as explained in Section 4.2.3.¹⁴¹

As a recent OECD Report remarks, buyers with market power, in this case large gig work platforms, might constrain or suppress sellers, in this case gig workers, in commercial relationships.¹⁴² The situation of only one single buyer on the market, is generally referred to as monopsony. In the context of labor markets monopsony can be defined as “any case where firms have some labor market power that allows them to determine wages”.¹⁴³ In a monopsony situation, an employer might possess the bargaining power of driving wages below competitive levels, eventually leading to market failure. Especially in the gig economy, the platforms’ business model might actually be designed to achieve such excessively low wage levels.¹⁴⁴

In this context, collective bargaining agreements would be a means to counteract monopsony power, and to recalibrate wages at competitive levels. From this perspective, collective bargaining might be efficient, and thus pro-competitive. This would be an important argument for classifying collective

¹⁴⁰ See EU Commission *De Minimis Notice* (2014/C 291/01) that holds that agreements between competitors that are not by-object restrictions of competition and cover less than 10% of the relevant market are not an appreciable restriction of competition.

¹⁴¹ Anderson & Huffman 2021.

¹⁴² OECD 2020, 7.

¹⁴³ *Ibid.*

¹⁴⁴ OECD 2020.

bargaining agreements as, if at all, restrictions of competition by effect under Article 101 TFEU.¹⁴⁵ For competition authorities and courts to undertake such an analysis would, however, require the adaptation of current tools to the measuring of market power in labor markets.¹⁴⁶

5.3. Carving a legitimate objective exception for collective bargaining

The third option to allow for collective bargaining of self-employed in the gig economy would be to carve out a legitimate objective exception for collective bargaining of gig workers under EU competition law, as outlined in Section 3.4.3. above. One possibility would be to follow the approach under the *Wouters* exception.¹⁴⁷ In *Wouters*, the ECJ was asked to assess the compatibility of a decision of the Dutch bar association to prohibit partnerships between lawyers and accountants with Article 101 (1) TFEU. The Court held, first, that members of the Dutch bar, i.e. individual lawyers, were undertakings for the purposes of EU competition law since they provided services for their clients (drafting of opinions, contracts, representation before courts) and bore the financial risks for their activity.¹⁴⁸ Consequently, the Dutch bar was an association of undertakings.¹⁴⁹ The Court also found that the prohibition of partnerships between lawyers and accountants was a restriction of competition.¹⁵⁰ The Court went on, however, to create what is often referred to as the *Wouters* exception: it was important to take into account the overall context of an agreement, its objectives, and whether the consequential effects restrictive of competition were inherent and necessary to the pursuit of those objectives.¹⁵¹ If a restrictive agreement had a legitimate objective and the restriction did not go beyond what was necessary, it fell outside the scope of Article 101 (1) TFEU. In the concrete case, the Court found that the prohibition of accountant-lawyer partnerships existed to safeguard professional ethics and to ensure that “ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”.¹⁵² According to the Court this was a legitimate objective, and there were no less restrictive means available.¹⁵³ The rule by the Dutch bar association thus fell outside the scope of Article 101 (1) TFEU.¹⁵⁴

In a similar light, one could imagine a collective agreement for gig workers to be scrutinized under Article 101 (1) TFEU by being subject to a proportionality test à la *Wouters*. Under this approach, gig workers would be considered undertakings, and the collective bargaining agreements, which, e.g. set a minimum fee for providing services via the platform, would be considered prima facie a restriction

¹⁴⁵ On the requirement to interpret the category of restrictions of competition by object see section 3.3 above, and e.g. Case C-307/18 *Generics*, 67.

¹⁴⁶ Lianos et al. 2019, 329.

¹⁴⁷ Case C-309/99 *Wouters*

¹⁴⁸ Case C-309/99 *Wouters*, 46-49

¹⁴⁹ Case C-309/99 *Wouters*, 58.

¹⁵⁰ Case C-309/99 *Wouters*, 86-87.

¹⁵¹ Case C-309/99 *Wouters*, 97.

¹⁵² Case C-309/99 *Wouters*, 97.

¹⁵³ Case C-309/99 *Wouters*, 100-109

¹⁵⁴ Case C-309/99 *Wouters*, 110.

of competition, possibly by object. In a second step, it would have to be established whether the collective bargaining agreement has a legitimate objective. Ensuring the social policy objective of providing minimum labor protections for gig workers could be considered such an objective.¹⁵⁵ Lastly, the collective agreement would have to meet a necessity test. At this point, courts or competition authorities might be required to investigate, e.g. which wage level meets the necessity requirement.

The problem with such an approach is that competition authorities might be forced to step in as arbiter of labor regulations, standards, and minimum wages. These are usually questions left either to the legislature or to the social partners. As suggested in the US context by Hafiz,¹⁵⁶ a close collaboration between labor regulators and competition authorities could be an option. Nonetheless, given very diverse labor law cultures in the EU, it would be difficult to imagine that a universal approach under competition law to these questions could emerge, jeopardizing the harmonious development of competition law in the EU.

5.4. Encourage Member States to legislate in order to allow for collective bargaining (application of the state action doctrine)

A final option to allow for collective bargaining of self-employed in the gig economy would be to allow for EU Member States to pass legislation that explicitly requires the establishment of agreements between gig economy platforms and unions. From an EU competition law perspective, this would move collective agreements for gig workers into the realm of the state action doctrine. Under this doctrine, national legislation can be scrutinized under EU competition rules to ensure the *effet utile* of EU law.¹⁵⁷ The Court justified the application of Article 101 and 102 TFEU, which are directed at undertakings, to state measures by interpreting them jointly with now Articles 3(3) TFEU and the EU's goal of creating an Internal Market, Article 4(3) TEU enshrining the principle of loyalty between Member States and the EU, and Protocol 27, which requires a system of undistorted competition for the Internal Market.

Under the state action doctrine, Member States can only enact legislation contrary to Articles 101 and 102 TFEU as long as there is no delegation of state responsibility to private entities to determine measures of economic regulation.¹⁵⁸ In cases of setting tariffs for road haulage by regulation, for example, this requirement means that Member States were allowed to include industry representatives in the committees setting the level of the tariffs, but the committees have to set the tariff level in light of public interest objectives, and the state has to have the final word on the

¹⁵⁵ On the social policy rationales for collective bargaining of gig-workers see, e.g., Schieck & Gideon 2018, 283.

¹⁵⁶ Hafiz 2020.

¹⁵⁷ See, e.g. Case 229/83 *Leclerc* and C-311/85 *Vlaamse Reisbureaus*.

¹⁵⁸ Under Case 267/86 *Van Eycke* the Court provided three criteria for States not to breach Articles 101 or 102 TFEU: there should be no law or administrative practice that (i) prescribes or (ii) reinforces the violation of competition rules, or that (iii) delegates state responsibility to private parties to determine measures of economic regulation. Later, in Case C-250/03 *Mauri*, the Court seems to have reduced the state action doctrine to the last criterion.

matter.¹⁵⁹ Where national law leaves it exclusively to economic operators to determine tariffs or minimum fees for a profession, without requiring those levels to be compliant with a clear public interest objective, no immunity from the application of competition rules will be available.¹⁶⁰

In light of the EU state action doctrine, it would be possible to imagine a system where state authorities would have to approve collective bargaining agreements struck between platforms and gig worker representatives to achieve public interest objectives, such as the social protection of gig workers. The agreements could probably still be scrutinized under EU free movement law,¹⁶¹ but would be immune under EU competition law.

Developments in this direction have already taken place in various EU Member States. The Italian Parliament, for example, passed a law in November 2019 that obliged delivery platforms to agree on a contract with labor unions within the next 12 months.¹⁶² Otherwise, the Italian government will step in and regulate minimum wages and other guarantees for gig workers in the food delivery sector. Under the Italian approach, gig workers maintain their status as self-employed under Italian law. Similarly, the French Parliament has regulated work mediated through platforms and allowed self-employed platform providers to defend their interests through collective bargaining.¹⁶³

As explained above, these national regulatory interventions could possibly enjoy immunity from EU competition law interference if the state maintains a degree of control over the process. Nevertheless this seems to put again the level playing field for platform businesses in jeopardy within the EU Internal Market, and it risks that some gig workers remain unprotected in jurisdictions where direct regulatory interventions by the state in the labor market are very limited and are usually left to the social partners.

In the US context, there have been attempts to legalize collective bargaining on a localized basis, where greater labor protections are more politically palatable. The City of Seattle (Washington) tried this with a collective bargaining law encompassing Uber and Lyft drivers. On challenge by the enterprises together with the business organization U.S. Chamber of Commerce, the law was struck down as violating Section 1 of the Sherman Act and not covered by the State Action exemption from antitrust. A similar law might be successful if adopted by a U.S. state, rather than a city, if the particular state had a sufficiently strong policy favoring worker organization that might provide a basis for the state action exemption.¹⁶⁴

¹⁵⁹ See, e.g. Case C-185/91 *Güterfernverkehr Reiff*, and Case C-184/13 *API*.

¹⁶⁰ Joined Cases C 427/16 and C 428/16, *CHEZ Elektro Bulgaria v. Yordan Kotsev*.

¹⁶¹ On this point, see D Gerard, 'EU Competition Policy after Lisbon: Time to Review the State Action Doctrine?' *Journal of European Competition Law and Practice* 1(3) (2010), 202-210.

¹⁶² Decreto Legge n. 101/2019 convertito in l. 3.11.2019 n. 128 recante «Disposizioni urgenti per la tutela del lavoro e la risoluzione delle crisi aziendali»
<https://www.gazzettaufficiale.it/eli/id/2019/11/02/19A06843/sg>

¹⁶³ See loi n°2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, *JORF n°0184 du 9 août 2016*.

¹⁶⁴ New York City is reported to be considering a labor organization proposal for ride-share drivers and expects to be able to craft legislation that would take advantage of the state-action exemption. C Opfer and K

The question remains whether localized collective bargaining would undermine the economic model of gig platforms, which is characterized by enterprises with global reach. The answer is almost certainly not. Ride-sharing markets, for example, are inherently local, with average trip lengths in single-digit kilometers.¹⁶⁵ The success of app-based ride-sharing turns on the ability of the pricing algorithm to adjust for local market conditions. In the context of the EU, however, where a high-ranked policy concern is market integration, the creation of a level playing field for gig platforms might be a core concern. If we look at the case law of the ECJ, we see two different tendencies: while the Court found that gig platforms regarding transport services (in particular the Uber model) could be subject to a variety of national regulations,¹⁶⁶ the Court did not accept such a fragmented approach for short-term rental platforms in the *Airbnb Ireland* case.¹⁶⁷ The question of whether, within the EU, a fragmented approach towards collective bargaining to protect gig workers is tolerable remains to be seen.

6. Conclusion

In this paper, we show that there are several options, but no simple, ideal solution to allow for collective bargaining of self-employed gig workers under EU competition law. The current criteria for distinguishing workers/employees from self-employed/undertakings do not allow for the classification of most gig workers as “employees” for competition law purposes. If the legal category of “employee” were broadened, however, this could lead to self-employed which should not be allowed to fix prices in the form of collective bargaining agreements to unjustifiably benefit from immunity under competition rules.

Analysing collective bargaining agreements as restrictions of competition by effect might lead to allowing for less intrusion by competition law into collective bargaining agreements, but is fraught with the complication that competition authorities would have to adapt their market analysis tools to better investigate monopsony or buyer power by platforms. It could thus take time until competition authorities are ready to conduct the kind of by-effects analysis necessary to scrutinize collective bargaining agreements in their market context.

Clukey, ‘Uber, Lyft Drivers Could Form Unions Under New York Proposal,’ 2 Dec. 2019 Bloomberglaw.com, available at <https://news.bloomberglaw.com/daily-labor-report/new-york-proposal-aims-to-let-uber-lyft-drivers-form-unions>.

¹⁶⁵ H Campbell, ‘Just How Far Is Your Uber Driver Willing To Take You?’, 24 March 2015 Forbes.com (reporting an average trip length of 5.41 miles in 2015). Available at <https://www.forbes.com/sites/harrycampbell/2015/03/24/just-how-far-is-your-uber-driver-willing-to-take-you/?sh=622d7bcf597c#:~:text=According%20to%20Sherpashare%2C%20a%20company,fare%20from%20time%20to%20time%22>.

¹⁶⁶ Case C-320/16 *Uber France*.

¹⁶⁷ Case C-390/18 *Airbnb Ireland*.

Allowing for a *Wouters* type exception or “legitimate aim” justification under competition rules to enable collective bargaining for gig workers, subject to a proportionality test, is a third option. This option would put competition authorities, however, in the uncomfortable position of having to act as regulatory arbiter in a labor context, which is not their field of expertise. It would require them to judge whether working conditions, including wage levels of gig workers are sufficient, a task that is usually reserved to labor regulators and social partners.

The fourth avenue to allow for collective bargaining by gig workers would be to allow national legislatures to enact statutes which require collective bargaining for gig workers, as e.g. in Italy or France. If national legislation were designed in a way that it complies with the requirements of the state action doctrine under EU competition law, there would be no EU competition law interference possible with the collective bargaining agreements concluded pursuant to national legislation. While this risks creating a patchwork of different national approaches to collective bargaining in the gig economy, this could be prevented either through a harmonizing EU instrument, such as a Directive. Even without legislative intervention at EU level, the unequal conditions for collective bargaining for gig workers across Member States might be less of a concern for the EU Internal Market, as many forms of gig work are of a local nature. It might thus appear the most pragmatic solution in terms of creating legal certainty for gig workers and their representatives to have national legislation introducing (compulsory) collective bargaining for certain categories of gig workers.