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# “I’LL CALL MY UNION”, SAID THE DRIVER – COLLECTIVE BARGAINING OF GIG WORKERS UNDER EU COMPETITION RULES

Maria José Schmidt-Kessen, Christian Bergqvist, Catherine Jacqueson,  
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## 1. INTRODUCTION

The rise of the sharing or gig economy<sup>1</sup> 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 their 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.<sup>2</sup> Consequently, more and more calls have been made to improve gig workers’ working conditions.

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<sup>1</sup> 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>.

<sup>2</sup> 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

Gig workers are regularly self-employed,<sup>3</sup> 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.<sup>4</sup> They could organize collectively by forming or joining a union that 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,<sup>5</sup> the same cannot be said for the collective organization of self-employed. The EU Court of Justice (ECJ) has scrutinized rules of conduct and decisions by professional associations such as national lawyers',<sup>6</sup> geologists',<sup>7</sup> or accountants' associations<sup>8</sup> 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.<sup>9</sup> As self-employed, collective agreements by gig workers thus run the risk of being found contrary to Article 101 (1) TFEU.<sup>10</sup>

The current EU Commission has promised to improve the working conditions of gig workers without EU competition law standing in the way.<sup>11</sup> In order to identify problems specific to self-employed engaged in gig economy work, the Commission included in its public consultation on the Digital Services Act Package a questionnaire on the working conditions of gig workers.<sup>12</sup> The ques-

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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>.

<sup>3</sup> Some platforms, however, have decided to offer gig workers ordinary employment contracts, e.g. Hilfr in Denmark.

<sup>4</sup> 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).

<sup>5</sup> Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, EU:C:1999:430, 59 (Albany).

<sup>6</sup> Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, EU:C:2002:98. (Wouters).

<sup>7</sup> Case C-136/12, Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v Consiglio nazionale dei geologi, EU:C:2013:489.

<sup>8</sup> Case C-1/12, Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência, EU:C:2013:127.

<sup>9</sup> Case C-309/99, Wouters, 97-109.

<sup>10</sup> There have been such examples in the national context, e.g. in Ireland.

<sup>11</sup> EU Commission Press Release from 30 June 2020, Available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1237](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237).

<sup>12</sup> EU Commission Press Release from 2 June 2020. Available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_962](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962).

tionnaire includes 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.<sup>13</sup>

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 differentiating 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 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 analyzing 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,<sup>14</sup> 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 personae* of Article 101 TFEU. The addressees of Article 101 TFEU are undertakings. One common reading of the case law of the ECJ has been that workers are not considered undertakings for the purposes of competition law.<sup>15</sup> In line with this argument, labor unions, which represent workers, cannot be considered associations of undertakings. Thus, decisions they take or agreements they conclude benefit from immunity under Article 101 TFEU.<sup>16</sup>

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<sup>13</sup> DSA Package Questionnaire, electronic copy with the authors.

<sup>14</sup> On this option and option (i) see also V Daskalova, ‘Regulating the new self-employed in the Uber economy: what role for EU Competition Law?’, *German Law Journal* 19(3), 461-508. (Daskalova 2018).

<sup>15</sup> In some national competition laws, this has been even codified. See e.g. § 3 of the Danish Competition Law (Konkurrenceloven).

<sup>16</sup> In some Member States, the immunity of collective bargaining agreements from competition law interference is explicitly enshrined in law. Swedish competition law, for example, provides in Chapter 1, 2 § of the Swedish Competition Act (*Konkurrenslag* (2008:579)) that competition law does not apply to agreements between employers and workers in relation to wages and other employment conditions (“*Lagen är inte tillämplig på överenskommelser mellan*

This understanding of immunity of collective bargaining agreements under EU competition rules is based on one possible interpretation of the *Albany* case.<sup>17</sup> 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 inherently restrictive effects on competition,<sup>18</sup> but fall outside the prohibition of anti-competitive agreements if they seek to improve conditions of work and employment.<sup>19</sup> 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.<sup>20</sup>

In *FNV Kunsten*,<sup>21</sup> 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.<sup>22</sup> Therefore, its agreements did not benefit from an automatic exclusion from the scope of Article 101 TFEU.<sup>23</sup> Nevertheless, since the underlying 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. First, 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 representing the interest of other categories of economic actors than workers would be scrutinized under Article 101 TFEU. Second, it follows that only agreements which are directly aimed at the protection of workers (related to pay, including pensions, and working conditions)

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*arbetsgivare och arbetstagare om lön eller andra anställningsvillkor*”). This is why collective bargaining agreements between the social partners are considered to be falling out of the scope of Swedish competition law (on this point see K Karlsson & M Bergman, *Konkurrenslagen. En kommentar*, 2<sup>nd</sup> ed. (2015), 70).

<sup>17</sup> Case C-67/96, *Albany*.

<sup>18</sup> 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.

<sup>19</sup> Case C-67/96 *Albany*, 60.

<sup>20</sup> *Ibid*, 54-58.

<sup>21</sup> Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411 (*FNV Kunsten*).

<sup>22</sup> *Ibid*, 28.

<sup>23</sup> *Ibid*, 30.

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, to which we now turn.

## 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.<sup>24</sup> In *FNV Kunsten*, in the context of competition law, the Court elaborated on this definition and emphasized 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.<sup>25</sup>

The preferred contractual set-up proposed by platforms mediating work through an app is that of a commercial contract between independent entities. Yet, it follows from *FNV Kunsten*, that the qualification by the parties of the contract, or its classification under national law is not determinant.<sup>26</sup> 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 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 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.<sup>27</sup>

### 2.1.1 *The subordination criterion*

The criterion of subordination or control is a core concept of labor law and the Court has interpreted it broadly in various instances. For example, within the context of the EU directive protecting pregnant workers,<sup>28</sup> the Court found

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<sup>24</sup> Case 53/81, *D.M. Levin v Staatssecretaris van Justitie*, EU:C:1982:105 and Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, EU:C:1986:284.

<sup>25</sup> Case C-413/13, *FNV Kunsten*, 36.

<sup>26</sup> *Ibid*, 35.

<sup>27</sup> On these two criteria see also Daskalova 2018, 475-482, and 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).

<sup>28</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992.

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.<sup>29</sup> In *FNV Kunsten*, the Court concluded that there is no subordination if self-employed 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.<sup>30</sup> 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, in principle, 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 service provider enjoys some independence from the platform.<sup>31</sup>

The Court's case law in this respect is not clear. Within the context of the E-commerce Directive,<sup>32</sup> the Court adopted in *Uber* a rather subtle criterion of control adapting it to the realities of the new phenomenon of platform work.<sup>33</sup> Uber drivers could choose their working times and eventually refuse tasks assigned to them. The Court nonetheless found that the company was exercising control over its providers as it determined the price for each ride, collected the money, and ultimately could exclude them from the platform.<sup>34</sup> Yet, it follows from the recent ruling in *Yodel*<sup>35</sup> that the freedom of couriers delivering parcels to choose their tasks and eventually refuse to take them indicated a lack of control of the employer, and thus an absence of employee status pursuant to the Working Time Directive.<sup>36</sup>

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<sup>29</sup> Case C-232/09, *Dita Danosa v LKB Lizings SIA*, EU:C:2010:674.

<sup>30</sup> Case C-413/13, *FNV Kunsten*, 37.

<sup>31</sup> See also Jacobsen Cesko (2020) conducting a concrete analysis of providers of the delivery platform Wolt.

<sup>32</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000.

<sup>33</sup> Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, EU:C:2017:981.

<sup>34</sup> *Ibid.*, 39.

<sup>35</sup> Case C-692/19, *B v Yodel Delivery Network Ltd*, EU:C:2020:288.

<sup>36</sup> 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).

### 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 acknowledge that “this shifting of risk is an expression of economic dependency on the part of the worker or micro-entrepreneur”.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

## 2.2 Employee 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.<sup>41</sup> This approach by the Court is explained by the Court’s historic endeavor to build the EU law system as an autonomous legal system,<sup>42</sup> with autonomous legal concepts, such as the concept of “worker”. It is not an outright dismissal of using tax law as guidance to determine whether an economic actor is a worker

<sup>37</sup> 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).

<sup>38</sup> N Videbæk Muckholm and C Højer Sjøler, ‘Platform work and the Danish model – Legal perspectives’, *Nordic Journal of Commercial Law* (2018), 117-145, 142-143. This argument can be linked to big gig platforms having monopsony power, which is developed in section 5.2.

<sup>39</sup> *Ibid.*

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

<sup>41</sup> E.g. Case C-413/13, *FNV Kunsten*, 36.

<sup>42</sup> 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).



or self-employed. If the tax status of persons were determined based on (currently not yet existing) EU tax law,<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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 founded, on the other hand, on socio-political goals strongly linked to work strategy, population, equity, and the burden to provide.<sup>48</sup>

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<sup>43</sup> 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.

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

<sup>45</sup> 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.

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

<sup>47</sup> 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).

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

There is no clear dividing line between worker/employee and self-employed when considering tax law and social insurance law. The question is complicated for 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. The fiscal definition, however, is broader than that within labor law due to the existence of several income categories within tax law, and the possibility to refer an income to several income categories depending on 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 §, that holds that remuneration of at least SEK 1,000 per year for work performed on behalf of someone else shall be counted as income from employment, irrespective of the contractual form. The definition of employee and employer within Swedish social insurance law appears thus extremely broad, with a capacity to require 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 liable to pay income taxes, and when the person in question should be considered as self-employed, and thus be liable to pay income taxation and payroll taxes. The example of a contractor helps illustrate the situation where an individual may be, simultaneously, an employee and self-employed. The same principles and doctrine apply to gig workers. 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) the question of 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 these factors, will have some income being considered employment income while other income may be considered as income due to self-employment. Consequently, the Uber driver might be liable to pay payroll taxation and employment income taxation on the salary from the busi-

ness and/or business- and capital income taxation on the incomes dependent on the structure of the business set up.<sup>49</sup>

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 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. Therefore, they could not enter into an agreement on minimum prices for cleaning services.<sup>50</sup> 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

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<sup>49</sup> 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.

<sup>50</sup> 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 self-employed cleaner. 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.<sup>51</sup> 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 several paths that would allow for collective bargaining for self-employed platform providers, such as applying the *de minimis* doctrine to these agreements or refraining from imposing fines.<sup>52</sup>

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 competition law 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. Article 101 (1) TFEU distinguishes between agreements with an anti-competitive *object* and anti-competitive *effects*. By-object restrictions of competition are condemned mechanically and without careful balancing of different interests.<sup>53</sup> Mitigating factors, e.g. in agreements with a socially desirable purpose or agreements that counter-balance buyer power, can only be accounted for if the agreement itself avoids being labeled a by-object restriction. While it is possible

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<sup>51</sup> 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).

<sup>52</sup> Ibid.

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

to invoke an exemption under Article 101 (3) TFEU, this would put parties to a collective bargaining agreement in a rather weak and precarious position as elaborated in section 3.4. An acceptable solution for collective bargaining agreements essentially rests on the possibility to avoid the label as anti-competitive by object.

### 3.2 Analyzing collective bargaining agreements as by-object vs by-effect restrictions

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.<sup>54</sup> 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, irrespective of the arguments in their favor. Nonetheless, a case can be made for accepting these under Article 101 (1) TFEU if collective bargaining agreements are either assessed as by-effect restrictions of competition, as discussed in this section, or if any restrictions of competition arising from these agreements are considered “ancillary”, as discussed in section 3.3.

The ECJ has held in its case law that regard must be had of the content of an agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part when deciding whether an agreement constitutes a by-object or by-effect restriction.<sup>55</sup> Collective bargaining agreements might actually not fit the prevailing understanding of by-object infringements.

According to the EU Commission, by-object restrictions of competition restrict competition by their very nature and as their sole object, and can be presumed to have negative effects on the market without having to demonstrate them.<sup>56</sup> Consequently, 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 ECJ accepted in *Albany* 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

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<sup>54</sup> Whish & Bailey 2018, 128-132.

<sup>55</sup> Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, recital 25. See also Case C-373/14 P, *Toshiba Corporation v European Commission*, EU:C:2016:26, 26-27; Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission*, EU:C:2014:2204, 51.

<sup>56</sup> Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, recital 21.

collective bargaining is a fundamental human right,<sup>57</sup> competition law should not deny it, but follow a careful balancing of the different interests at stake. It thus follows that the balancing exercise should take place outside the strict review standard for agreements falling into the by-object category.<sup>58</sup>

Further arguments supporting that collective agreements should not be considered anti-competitive by object can be found in two recent rulings in *Budapest Bank*<sup>59</sup> and *Generics*.<sup>60</sup> Here the ECJ 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 were capable of having pro-competitive effects, it would most likely not be restrictive by object. In his opinion in *Budapest Bank*, Advocate General Bobek even recommended that the concept of by-object infringements be reserved to obvious infringements that are easily identifiable and that serve no legitimate purpose.<sup>61</sup>

Taking into consideration that a social market economy and safeguarding adequate social protection are core EU values,<sup>62</sup> it would be problematic to extend a strict review to collective agreements covering self-employed at large. It would even be possible to argue that collective bargaining is pro-competitive or benign as it can be used to counterbalance buyer power on the side of the employer and thus yield efficiencies that must be included in the assessment under Article 101 (1) TFEU.<sup>63</sup>

Removing collective agreements, including agreements between self-employed, from the list of by-object infringements should not be considered a *carte blanche* 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

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<sup>57</sup> 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.

<sup>58</sup> An argument outlined by Lianos et al. 2019.

<sup>59</sup> Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265 (*Budapest Bank*), 44 and 82-83.

<sup>60</sup> Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, EU:C:2020:52, 82 and 87-90.

<sup>61</sup> Opinion of Advocate General Bobek in Case C-228/18 *Budapest Bank*, 51.

<sup>62</sup> 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/>.

<sup>63</sup> Lianos et al. 2019. See also sections 4.2.2. and 5.2 below.

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 excluding third parties, would still 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’ interests. 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. The Hague Court of Appeal has already embraced this approach in its Judgment from 22 December 2020.<sup>64</sup> The court rejected the argument that an agreement on compulsory participation of self-employed painters in a pension scheme fell into the category of by-object restrictions of competition. Rather, the court suggested that the agreement had to be examined as to its effects. Enforcers would have to establish this on a case-by-case basis, which would involve a balancing of the different interests and arguments including the pro-competitive elements of collective bargaining agreements.

### 3.3 Applying the ancillary restraints doctrine to collective bargaining agreements

EU case law has given rise to a number of doctrines in which restrictive elements in agreements are considered ancillary to the benign main agreement, and should therefore not be considered in isolation. Even a hardcore infringement under Article 101 (1) TFEU, such as horizontal price fixing, can be considered ancillary provided it is objectively necessary and proportionate for the implementation of the main operation.<sup>65</sup> 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) the implementation of regulatory obligations.

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<sup>64</sup> ECLI:NL:RBDHA:2019:702.

<sup>65</sup> See Case T-111/08, MasterCard, Inc. and Others v European Commission, EU:T:2012:260, 77-79 and Case T-112/99, Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission of the European Communities, EU:T:2001:215 (Métropole), 106.



### 3.3.1 *The concept of ancillary restraints under Article 101*

#### *TFEU applied to collective bargaining*

The doctrine of ancillary restraints<sup>66</sup> developed by the ECJ holds that certain restrictions and obligations attached to horizontal agreements might elude Article 101 (1) TFEU by virtue of being ancillary to a main operation, provided that operation would be impossible to carry out in the absence of the restriction in question.<sup>67</sup> Restrictions are considered ancillary to a main operation if i) directly linked to it ii) necessary for its implementation and iii) proportionate to it.<sup>68</sup>

The doctrine of ancillary restraints could be relevant for situations in which a traditional collective agreement covering (true) employees is extended to self-employed. The line between employed and self-employed might be somewhat blurred as in *FNV Kunsten*, making it difficult to qualify persons within a field of economic activity as employees or self-employed.<sup>69</sup> In particular in sectors where freelancing is increasingly blurring the line, it would seem reasonable to extend a collective agreement to all persons engaging in the same activity regardless of legal status. The same would be true for false self-employed, where the incorrect classification is made by either law or the employer.

The Court of Justice extended the concept of employee to cover self-employed that have the same function as ordinary employees (thus “false self-employed”) in *FNV Kunsten*. The Advocate General<sup>70</sup> 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 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 ensuring equal

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<sup>66</sup> See e.g. Case C-250/92, *Göttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareresselskab AmbA*, EU:C:1994:413, 45 (joint purchasing), Case T-112/99, *Métropole*, 115-117 (satellite TV), Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, EU:C:1966:38, 250 (exclusive distribution) and Case 258/78, *L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities*, EU:C:1982:211, 57-58 (territorial exclusivity in IP-licenses).

<sup>67</sup> Case C-382/12 P, *MasterCard Inc. and Others v European Commission*, EU:C:2014:2201, 91.

<sup>68</sup> Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, recital 28-31. For further analysis see J Faull and A Nikpay, *The EC Law of Competition*, 3<sup>rd</sup> edition, OUP, Oxford (2014), 255-260. (Faull & Nikpay 2014).

<sup>69</sup> See also e.g. Case C-413/13, *FNV Kunsten*, 32.

<sup>70</sup> See Opinion of Advocate General Wahl in Case C-413/13, *FNV Kunsten*, 77-79.



treatment regardless of legal status. Such an extension, however, should not go beyond what is necessary in light of the goal of preventing social dumping.<sup>71</sup>

In *FNV Kunsten*, the Court only provided a solution for so-called false self-employed and not all self-employed. Since the gig economy is here to stay, however, there will likely be ample future opportunities to revisit the question of whether genuine self-employed could benefit from collective bargaining. 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 collective agreements. Such a version of the ancillary restraints doctrine would require that the extension of collective bargaining agreements to self-employed are 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*.

### 3.3.2 A regulatory ancillary restraints doctrine in line with *Wouters*

It has been contemplated<sup>72</sup> whether a doctrine of “regulatory” ancillary restraints could allow restrictions resulting from implementing regulatory obligations to elude Article 101 TFEU. The scope of the doctrine remains open, however, and rests on the ECJ ruling in *Wouters*<sup>73</sup> that has not been embraced subsequently. *Wouters* was a preliminary reference procedure in which the ECJ established that if an otherwise anti-competitive agreement pursued a legitimate regulatory objective and the inherent restriction of competition did not go beyond what was necessary, it fell outside the scope of Article 101 (1) TFEU.<sup>74</sup> The General Court attempted to develop the doctrine further in *Meca-Medina*,<sup>75</sup> but was overturned on appeal by the ECJ. In line with these cases, the EU Commis-

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<sup>71</sup> Ibid, 93.

<sup>72</sup> See e.g. Whish & Bailey 2018, 138-141 and Faull and Nikpay 2014, 253-255.

<sup>73</sup> 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 before the European Patent Office v Commission of the European Communities*, EU:T:2001:105, 78; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API – Anonima Petroli Italiana SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Others*, EU:C:2014:2147 (API), 48 and 55; Case AT.40.208 – *ISU*, 210-266 and Joined Cases C-427/16 and 428/16, „CHEZ Elektro Bulgaria“ AD v Yordan Kotsev and „FrontEx International“ EAD v Emil Yanakiev, EU:C:2017:890 (*CHEZ Elektro Bulgaria*), 54.

<sup>74</sup> See further Whish & Bailey 2018, 138-141.

<sup>75</sup> Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, EU:T:2004:282, 42-47. Overturned by Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*, EU:C:2006:492, 30-34.

sion<sup>76</sup> 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.

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 collective agreement.<sup>77</sup> Article 101 (1) TFEU should not prevent this even if it involves 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 collective bargaining in the gig economy.

### 3.4 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,<sup>78</sup> 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 most of these requirements, it would require some creativity to explain how consumers would benefit from them.<sup>79</sup>

As a collective agreement covering self-employed is inescapably directed at improving the income of self-employed and this wage increase would hardly be passed on to end-users, the criteria for an individual exemption would likely not be met by collective agreements. In addition, Article 101 (3) TFEU only accepts efficiencies from the improved production or distribution of goods and

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<sup>76</sup> See Communication from the Commission – Notice – Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, recital 60 and Communication from the 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), OJ C 291, 30.8.2014, section 1.

<sup>77</sup> See e.g. Case 143/83, Commission of the European Communities v Kingdom of Denmark, ECLI:EU:C:1985:34.

<sup>78</sup> Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, recital 20.

<sup>79</sup> An attempt can be found in Dutch Competition Authority 2019.

services and not the reduction of competition.<sup>80</sup> Improving working conditions and countering buyer power of dominant employers would not strictly fall into this category of efficiencies.

Furthermore, the burden of proof under Article 101 (3) TFEU rests with the parties to the agreement, allocating the burden to an already weak party. 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 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 problems. The EU Commission could alleviate some of the legal risk by providing guidance in this regard, in a separate notice or by virtue of updating the Article 101 (3) notice,<sup>81</sup> or even in the form of a new block exemption regulation.

#### 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.<sup>82</sup> On its face, such collective organization could be subject to automatic prohibition and liability as a *per se* violation of Section 1 of the Sherman Act.

The question arises, however, whether this type of collective organization could benefit from the labor exemption and thus enjoy immunity from antitrust law.<sup>83</sup> Alternatively, there could be grounds for not applying a *per se* rule to these agreements, but rather a rule of reason approach.<sup>84</sup> This could allow some collective bargaining agreements improving the situation of gig workers that create efficiencies to escape liability under US antitrust rules.

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<sup>80</sup> See e.g. Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, recital 247.

<sup>81</sup> Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004.

<sup>82</sup> M Anderson and M Huffman, *Labor Organization in Ride Sharing – Unionization or Cartelization?*, *Vand. J. Ent. Tech. L.* (2021) (forthcoming) (citing sources). (Anderson & Huffman 2021).

<sup>83</sup> 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.

<sup>84</sup> 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.

## 4.1 Labor Exemption from Antitrust Challenge

### 4.1.1 *Origins and development of the labor exemption from antitrust*

The labor exemption from antitrust liability permits collective action by labor organizations. 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.

The statutory labor exemption is premised on Section 20 of the Clayton Act<sup>85</sup> and Section 2 of the Norris-LaGuardia Act.<sup>86</sup> In 1941 in *US v. Hutcheson*,<sup>87</sup> the Supreme Court considered a criminal complaint brought under the Sherman Act by the Justice Department against the Carpenters' Union for engaging in a strike aimed against another professional union and not the company suffering immediate economic losses from the strike. The Supreme Court found that there was no violation of the Sherman Act because the statutory exemptions in the Clayton and Norris LaGuardia Act prevailed.

Case law following *Hutcheson* has established three requirements for the statutory labor exemption: i) conduct of a labor organization or union in the course of a labor dispute, ii) union acting in its own self-interest, and iii) union acting unilaterally and not in combination with non-unions.<sup>88</sup>

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.<sup>89</sup> The dominant interpretation of that requirement rests on the Supreme Court's 1942 decision in *Columbia River Packers Association v. Hinton*<sup>90</sup> 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*,<sup>91</sup> seemingly allowing for collective organization by independent contractors. The *Musicians* 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*

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<sup>85</sup> 38 Stat. 738 (1914), codified at 29 U.S.C. section 52.

<sup>86</sup> Norris-LaGuardia Act section 2, 29 U.S.C. 102. (47 Stat. 70 (1932), codified at 29 U.S.C. sections 101–115).

<sup>87</sup> *United States v. Hutcheson*, 312 U.S. 219, 227-28 (1941).

<sup>88</sup> *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).

<sup>89</sup> See *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 126 (3d Cir. 1974).

<sup>90</sup> 315 U.S. 143 (1942).

<sup>91</sup> 391 U.S. 99 (1968).

other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.”<sup>92</sup> The Court found the requisite competition among the orchestra leaders and other musicians to establish the economic relationship needed for labor group status.<sup>93</sup>

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

The line of cases building on *Columbia River Packers* 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. The impact on rights to organize is, however, ambiguous, because those rights are creatures of federal law rather than state law.<sup>94</sup> The State of California attempted this approach, leading to threats that ride-share firms would cease operations 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. Uber and Lyft were held to be in violation of AB-5 for failing to treat drivers as employees, and in reaction threatened to shut down their business in California. California courts stayed the injunctions requiring the firms to treat drivers as employees until the outcome of a referendum on the question.<sup>95</sup>

On 3 Nov. 2020, California voters approved a proposition which defines “transportation (rideshare) and delivery drivers as independent contractors” by a large margin and committed to a process of identifying labor and wage policies specific to app-based drivers.<sup>96</sup> 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 this when faced with the loss of ride-share services if AB-5 were enforced against the enterprises.

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<sup>92</sup> *Id.* at 106.

<sup>93</sup> *Id.* at 109-11.

<sup>94</sup> M Lao, ‘Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption’, 51 *U.C. Davis L. Rev.* 1543 (2018). (Lao 2018).

<sup>95</sup> *People v. Uber Techs., Inc.*, Order on Motion for Preliminary Injunction, No. CGC-20-584402, at 5 (Super. Ct. Cal. Aug. 10, 2020).

<sup>96</sup> 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.

## 4.2 Analyzing agreements

In the absence of immunity, the question arises how to analyze collective bargaining agreements under Section 1 of the Sherman Act, which governs “contract[s], combination[s]..., or conspirac[ies] in restraint of trade.”<sup>97</sup> US antitrust law offers three categories of analysis of agreements that are not subject to immunity: *per se* illegality, the rule of reason, and a hybrid standard termed the “quick look”. 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.<sup>98</sup> 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 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.<sup>99</sup> 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.<sup>100</sup>

### 4.2.1 Defining “Efficiency”

US courts have established the clear position that only economic effects constitute efficiencies that will counteract a plaintiff’s showing of likely competitive harm.<sup>101</sup> Legitimate economic effects might include reductions in transaction costs or an increase in an alternative form of competition. As one example, vertical agreements may be permitted because restrictions in intra-brand competition are offset by increases in inter-brand competition.<sup>102</sup>

Non-economic benefits are broadly understood to not be legitimate efficiency arguments in support of an otherwise harmful agreement. Importantly

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<sup>97</sup> 15 U.S.C. 1.

<sup>98</sup> 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).

<sup>99</sup> 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).

<sup>100</sup> See *California Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999).

<sup>101</sup> *National Soc’y of Prof. Eng’rs v. U.S.*, 435 U.S. 679 (1978).

<sup>102</sup> *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Leegin Creative Leather Prods., Inc. v. PSKS Inc.*, 551 U.S. 877 (2007).

for the discussion here, benefits to workers would ordinarily not be considered an efficiency that might overcome proof of 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 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.<sup>103</sup> The *Overlap Group* case can be 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.

#### 4.2.2 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, which might permit 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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<sup>103</sup> *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993).

<sup>104</sup> 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](https://papers.ssrn.com/abstract_id=3582673) (visited Aug. 24, 2020).

<sup>105</sup> Lao 2018.

<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> However, US law has generally not accepted these efficiency gains as justifications for concerted action. A change 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.<sup>109</sup>

This approach 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, leading to a similar reduction in output in the consumer market. In this way, labor interests and consumer interests are aligned rather than in opposition.

This description is subject to an important caveat. There is some evidence that labor markets may be characterized by increased output as wages decrease at the lower end of the wage range, if workers’ options are sufficiently limited and a decrease in the price of labor perversely increases rather than decreases output.<sup>110</sup> In such a market, workers’ 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. The response of labor output to wage reduction 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.<sup>111</sup>

However, there is anecdotal evidence that ride-sharing markets may share this characteristic. Observations suggest that some local ride-share markets involve workers committed to ride-sharing 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”

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<sup>107</sup> Anderson & Huffman 2021.

<sup>108</sup> See RD Blair and JL Harrison, *Monopsony in Law and Economics*, CUP, Cambridge (2010), 45-46.

<sup>109</sup> E.g., *Brown University*, 5 F.3d 658.

<sup>110</sup> Anderson & Huffman 2021.

<sup>111</sup> 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://ieindia.org/workpap/wp265.pdf>.



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.<sup>112</sup> 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 classified as independent contractors rather than employees, 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.<sup>113</sup> 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.<sup>114</sup> Such an approach would establish the personal scope of Article 101 (1) TFEU on a case-by-case basis by analyzing 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 “false self-employed”, they should be classified as workers for competition law purposes.

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<sup>112</sup> 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>.

<sup>113</sup> This approach is similar to the labor exemption rule under US antitrust law discussed in Section 4.1.

<sup>114</sup> Schieck & Gideon 2018, 287; Lianos et al. 2019, 312 f.

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 3.2, 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 deserving gig workers 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. 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 “locked-in” gig workers, which are at risk of social dumping, and economically independent “fallow asset” gig workers should benefit from immunity.<sup>115</sup>

## 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 analyze individual collective agreements as a by-effect restriction of competition, as outlined in section 3.2. above. 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.<sup>116</sup> In addition, the economic effects of the agreement on the market will be measured. If the agreement does

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<sup>115</sup> Anderson & Huffman (2021) introduce two models, a “lock in” and “fallow asset” model of gig economy labor markets, see section 4.2.2. above.

<sup>116</sup> See Communication from the 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), OJ C 291, 30.8.2014 that holds

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.<sup>117</sup>

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.<sup>118</sup> 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”.<sup>119</sup> In a monopsony situation, an employer might possess the bargaining power of driving wages and other working conditions below competitive levels, eventually leading to market failure. Especially in the gig economy, the platforms’ business model might be conducive to creating monopsony power for the platform.<sup>120</sup>

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 bargaining agreements as, if at all, restrictions of competition by effect under Article 101 TFEU.<sup>121</sup> 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.<sup>122</sup>

### 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 3.3.2. above. One could imagine a collective agreement for gig workers being

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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.

<sup>117</sup> Anderson & Huffman 2021.

<sup>118</sup> OECD, *Competition in Labour Markets*. Available at: <http://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf> (2020), 7. (OECD 2020).

<sup>119</sup> Ibid; Council of Economic Advisers Issue Brief, “Labor Market Monopsony: Trends, Consequences, and Policy Responses”, October 2016, [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf), 2.

<sup>120</sup> OECD 2020, 36-37.

<sup>121</sup> On the requirement to interpret the category of restrictions of competition by object see section 3.2 above, and e.g. Case C-307/18 *Generics*, 67.

<sup>122</sup> Lianos et al. 2019, 329. OECD 2020, 32 f.

subject to a proportionality test à la *Wouters* under Article 101 (1) TFEU. 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 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.<sup>123</sup> 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 would be forced to step in as arbiter of labor regulations, standards, and minimum wages. Usually, these questions are decided either by the legislature or to the social partners. As suggested in the US context by Hafiz,<sup>124</sup> 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 Encouraging 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.<sup>125</sup> The Court justified the application of Article 101 and 102 TFEU to state measures by interpreting these provisions jointly with Articles 3(3) TFEU (the EU’s goal of creating an Internal Market), 4(3) TEU (enshrining the principle of loyal cooperation

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<sup>123</sup> On the social policy rationales for collective bargaining of gig-workers see, e.g., Schieck & Gideon 2018, 283.

<sup>124</sup> Hafiz 2020.

<sup>125</sup> See, e.g. Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v SARL “Au blé vert” and others*, EU:C:1985:1, and Case 311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418.

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.<sup>126</sup> In cases of setting tariffs for road haulage by regulation, for example, this requirement means that Member States are 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 matter.<sup>127</sup> 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.<sup>128</sup>

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,<sup>129</sup> 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.<sup>130</sup> Otherwise, the Italian government will step in and regulate minimum wages and other guarantees for gig workers in the food delivery sector. Negotiations between the Italian government, delivery platforms, and unions is still ongoing in Italy at the time of publication.<sup>131</sup> Under the current Italian

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<sup>126</sup> In Case 267/86, *Pascal Van Eycke v ASPA NV*, EU:C:1988:427, 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, *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano*, EU:C:2005:96, the Court seems to have reduced the state action doctrine to the last criterion.

<sup>127</sup> See, e.g. Case C-185/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG*, EU:C:1993:886, and Case C-184/13, *API*.

<sup>128</sup> *Joined Cases C 427/16 and C 428/16, CHEZ Elektro Bulgaria*.

<sup>129</sup> 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.

<sup>130</sup> 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>.

<sup>131</sup> On these current developments see, e.g. S Sciorilli Borelli & D Ghiglione, 'Italy Emerges as Next Front in Gig Economy Labour Battle', April 4, 2021, *Financial Times*, available at: <https://www.ft.com/content/6bf8ea68-d035-4cc0-a367-a545c2814355>.

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.<sup>132</sup>

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 appears to put 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.<sup>133</sup>

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 km.<sup>134</sup> 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 market integration is a highly ranking policy concern, 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 Uber could be subject to a variety of national regulations,<sup>135</sup> it did not accept

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<sup>132</sup> 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.

<sup>133</sup> Proposals are underway in the State of New York, see C Opfer and K 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>.

<sup>134</sup> 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,fa%20from%20time%20to%20time%22>.

<sup>135</sup> Case C-320/16, Criminal proceedings against Uber France, EU:C:2018:221.

such a fragmented approach for other transport services<sup>136</sup> and short-term rental platforms.<sup>137</sup> The question of whether a fragmented approach within the EU 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.

Analyzing 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 complications since 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.

Allowing for a *Wouters* type exception or “legitimate objective” 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 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 through

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<sup>136</sup> Case C-62/19, *Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul București prin Primar General and Consiliul General al Municipiului București*, EU:C:2020:980.

<sup>137</sup> Case C-390/18, *Criminal proceedings against X (Airbnb Ireland)*, EU:C:2019:1112.

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.



