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Collective labour agreements and EU competition law: five reconfigurations

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ABSTRACT

The European Commission has recently begun to reflect on whether competition law is a barrier to the formation of collective labour agreements between industry and atypical workers. The policy focus to date has been on whether and how to extend the antitrust labour exemptions to certain classes of atypical worker. This paper shows how efforts in this direction in the Netherlands and Ireland have revealed that this is a tricky path to pursue. As a result, the paper proposes four additional approaches: three of these indicate that even if atypical workers are treated as undertakings and collective bargains between them and employers fall to be assessed under competition law, many agreements will unlikely have anticompetitive effects and for those that may do so, exemptions are possible. A fifth approach is that active antitrust enforcement against employers imposing unfair terms on atypical workers may function to solve some of the concerns that collective bargaining seeks to address.

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Introduction

Labour lawyers see collective bargaining as a vital ingredient to help safeguard the welfare of workers by reducing the power asymmetry between employers and workers.¹ In contrast, competition lawyers fear collective labour agreements because they resemble cartels between employees and employers.² There is some merit in the

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¹International Labour Organisation, *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98). For a more strategic view of the role of collective bargaining see F Traxler, 'Collective Bargaining in the OECD: Developments, Preconditions and Effects' (1998) 4(2) *European Journal of Industrial Relations* 207, 207–09.

²On this two faced nature see T Boeri and JC van Ours, *The Economics of Imperfect Labor Markets* (2nd edn, 2013) ch.3.

competition lawyer's skepticism about collective labour agreements. After all, if a state was genuinely concerned about protecting workers, it would pass laws to ensure fair remuneration and other working conditions. However, there is only so much that labour laws can achieve. First, labour protections raise the costs to firms who may be placed at a competitive disadvantage and businesses may shift work abroad. Second, increased employee protection may lead some firms to re-label their workers so that they fall outside the protective scope of labour laws. This tactic is inefficient: well-intentioned legislation is frustrated and litigation becomes necessary to clarify the scope of employment protection to respond to firm's tactics.³ For similar reasons, it is unlikely that an employer would unilaterally improve conditions for its workers if this would reduce its market share vis-à-vis its competitors who pay their workers less and sell goods more cheaply. Furthermore, in some jurisdictions collective bargaining is a well-embedded system for shaping labour relations.⁴ In these states, it is expected that collective bargaining plays a prominent role in shaping the employee's working conditions because it can deliver better results than general labour regulation.

Under EU competition law, the place for collective labour agreements has been safeguarded by two antitrust labour exemptions. First, when employees in one firm bargain collectively with their employer, then competition law is inapplicable: employees are not undertakings in this context.⁵ Therefore, the agreement between them and the employer is not one between undertakings. A trade union representing such employees is not an association of undertakings either. Second, when employees in one economic sector bargain collectively with all employers in that sector the European Court of Justice decided that agreements of this kind may fall outside the scope of application of Article 101 TFEU. This result was achieved by reference to Treaty provisions which recognize that the EU is expected, in addition to pursuing a competition policy, to also to promote policies in the social sphere, leading to high levels of employment and social protection.⁶ It followed that "the social policy

³See e.g. *Allonby v Accrington & Rossendale College*, C256/01, EU:C:2004:18, paragraph 18 where the Court explains that the employer re-labelled some workers to escape the high costs of labour law. *Uber BV and others v Aslam and others* [2021] UKSC 5 is another illustration of a firm trying to craft its contracts to escape obligations under labour law.

⁴See generally PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2001) in particular the discussion of coordinated market economies.

⁵See e.g. *Becu*, C-22/98, EU:C:1999:419, paragraph 26.

⁶*Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paras. 54 to 58, where reference is made to Articles 2, 3 and 118 of the EC Treaty as then in force.

objectives pursued by [collective labour] agreements would be seriously undermined if management and labour were subject to Article [101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment”.⁷

The so-called *Albany* exception applies when two conditions are fulfilled: (i) agreements are entered into in the framework of collective bargaining between employers and employees and (ii) they contribute directly to improving the employment and working conditions of workers.⁸ This exception may be interpreted in two ways. One reading is that it stands for the proposition that competitive markets are excluded from certain types of conduct because, on balance, another goal of the Treaty takes priority. A softer reading is that given the low risk of significant anti-competitive effects resulting from collective bargaining, it is safe to apply the exception even at the cost of some false negatives.

The upshot of these two antitrust labour exemptions is that collective bargaining between workers and employers can take place without concerns that competition law would step in to invalidate agreements. However, already at the time of the *Albany* judgment, atypical forms of employment were on the rise: employers seeking to escape the costs imposed on them by EU labour regulation sought ways of recruiting persons with contracts that meant they would not be considered employees.⁹ Today, online platforms have increased the role of atypical labour in the economy further. This encompasses not only visible workers (e.g. the ubiquitous delivery riders) but also more hidden forms of work like domestic workers. From the perspective of EU competition law it remains uncertain if vulnerable atypical workers would be able to engage in collective bargaining with their employers without fearing that competition law would step in. There is a concern that atypical workers are portrayed as self-employed undertakings rather than employees, meaning that collective agreements involving them would fall within the scope of EU competition law.

Corresponding provisions in the existing Treaties are: Article 3 TEU, Articles 3–6 TFEU and Article 151 TFEU, respectively. See also Mededingingswet, Article 16(a) for an example of national competition law achieving a comparable result.

⁷*Albany* (ibid) para. 59.

⁸*FNV Kunsten Informatie en Media v Staat der Nederlanden/FNV*, C-413/13, EU:C:2014:2215, Opinion of AG Wahl para. 24. The term ‘Albany exception’ was coined by AG Fennelly in *Van der Woude*, C-222/98, EU:C:2000:226, para. 30.

⁹H Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law’ (1990) 10(3) OJLS 353.

At a high level, it comes down to the fact that both competition law and labour law work with binary categories: employee/undertaking and worker/independent contractor respectively. Only those classified as employees or workers benefit from the labour law protections and from the antitrust labour exemptions. This binary divide is ill-suited to accommodate atypical workers who fall in between these two categories: they are not fully integrated in the business of the firm hiring them but they are not wholly independent from it either.

The policy concerns that this situation gives rise to are highlighted by a recent decision of the Danish Competition and Consumer Authority which helps to motivate the concerns in this article. The decision concerns Hilfr, an intermediary digital platform which matches cleaners with households. Hilfr had made the following arrangement: cleaners would be divided in two types, “Freelancehilfr” and “Superhilfr”. The latter benefitted from a collective labour agreement with a labour union (the United Federation of Danish Workers). This agreement afforded them (among other benefits) a minimum wage, holiday entitlements, and sick pay. The minimum wages agreed in the labour agreement were also applicable to Freelancehilfr workers, who as the name implies, worked free-lance. Freelancehilfrs would automatically become Superhilfrs after working 100 hours unless they opted out. This agreement had the support of the prime minister.¹⁰ Before the intervention of the competition authority there were 36 Superhilfrs and 180 Freelancehilfers, but one third of the work was carried out by Superhilfrs.¹¹ Both sets of workers were satisfied with the conditions of work, while the platform’s CEO was more ambivalent: “Hilfr has positioned itself in the market as socially responsible compared to other Super platforms. However, it is a challenge to increase the number of Super Hilfrs perhaps due to the lower prices on other platforms”.¹²

Against this background, the Danish competition authority took the view that both types of cleaner were acting as undertakings because Hilfr did not bear any financial risk resulting from the work provided by the cleaners. Accordingly, the antitrust labour exemptions were not applicable and the arrangement between

¹⁰This summary draws on the excellent discussion in A Ilsoe, ‘The Hilfr agreement: Negotiating the platform economy in Denmark’ FAOS Research paper 176 (March 2020). See also the critical reflections found in Z Kilhoffer and others, *Study to Gather Evidence on the Working Conditions of Platform Workers* (2020) 254–55.

¹¹ibid.

¹²ibid.

workers and Hilfr to set a minimum hourly fee was considered anticompetitive because it created a price floor, limiting competition among workers.¹³ Hilfr committed to resolving the antitrust concern in two ways: by ensuring that it transformed the relationship between it and Superhilfr workers to one of employment by taking on the financial risk of their work and by ensuring that Freelancehilfr workers would be free to set their wages on the platform.

The concern that this decision raises is the following: as long as a category of worker is treated as an undertaking, then any collective bargaining agreement about wages may constitute a competition law infringement. The company managed to counter some of the adverse effects of the competition law assessment by agreeing to employ some of the cleaners, with the result that a collective agreement with these employees no longer fell within the scope of competition law. Nevertheless, freelance cleaners continued to be excluded with the risk that their wages would be suppressed as a result.¹⁴ There may be very good reasons for a person to prefer to work freelance that have little to do with their preference for being treated as an undertaking: they may have family commitments, they may be studying and so unable to commit to a regular working schedule, or it may be the only work they can find. These individuals however, remain vulnerable and are likely to work under poorer conditions than if they were able to bargain collectively.

Drawing on this example, the puzzle, from the perspective of EU Law, is the following. How can we design a policy which allows the economically weak atypical workers like the freelance cleaners in Hilfr to engage in collective bargaining so as to ensure a decent wage and working conditions without fearing the application of EU competition law? In tackling this question the policymaker must ensure that the answer does not allow agreements among economically strong self-employed professionals where such arrangements constitute clear infringements of EU competition law.¹⁵ This question also raises a number of difficult policy choices: in addition to the risk of facilitating collusion, if we over-regulate the platform economy, do we stifle innovation? Do we foreclose new entry into the market for providing platform services with

¹³Danish Competition and Consumer Authority, 'Commitment Decision on the Use of a Minimum Hourly Fee' (26 August 2020) <<https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/>>.

¹⁴N Countouris and V De Stefano, 'Collective-Bargaining Rights for Platform Workers' (6 October 2020) <<https://www.socialeurope.eu/collective-bargaining-rights-for-platform-workers/>>.

¹⁵As in Case COMP/A.38549 – Belgian Architects' Association (24 June 2004).

more burdens and thus cement the dominance of a few large and powerful firms?¹⁶

In this paper we put forward five ways by which EU competition law could be reconfigured to solve this puzzle. We first examine an incremental approach: to widen the class of persons who are treated as employees. This has been undertaken by the ECJ and followed by some Member States. The result is to widen the scope of the antitrust labour exemptions. Second, we discuss how Article 101 TFEU would apply to these agreements if one treats vulnerable workers as undertakings for the purposes of collective bargaining. We show that there are means by which it may be argued that these agreements do not infringe Article 101 TFEU. Subsequently, in we discuss redirecting enforcement towards the demand side of the market and inquire whether certain practices by employers may be condemned as antitrust infringements when they harm competition in labour markets and whether this approach can contribute to addressing the concerns addressed here. In a final section we discuss the five options in the round.

The Commission has recently “committed to improving the working conditions of platform workers”.¹⁷ Scholars have addressed many of the themes in this paper.¹⁸ The contribution to the literature here is twofold: first we take a close look at how Member States have sought to develop the incremental approach canvassed by the ECJ. This allows us to gauge strengths and weaknesses of existing strategies. Second, we create a map of alternative or complementary ways of reconfiguring the relationship between competition law and collective bargaining, allowing for a complete picture of the options available and the challenges each poses.

¹⁶M Canoy and K Hellingman, ‘De Mededingingswet en de onderkant van de arbeidsmarkt’ (2018) 5 M&M 184, 185.

¹⁷The European Commission launches a process to address the issue of collective bargaining for the self-employed’ Brussels, 30 June 2020. See more generally *A European Agenda for the Collaborative Economy*, COM (2016) 356 final (2 June 2016).

¹⁸M Lao, ‘Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption’ (2018) 51 UC Davis L Rev 1543; D Schiek and A Gideon, ‘Outsmarting the Gig-Economy Through Collective Bargaining – EU Competition Law as a Barrier to Smart Cities?’ (2018) 32 (2–3) *International Review of Law, Computers and Technology* 275; V Daskalova, ‘Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?’ 19(3) *German Law Journal* 461 (2019); I Lianos, N Countouris and V De Stefano, ‘Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market’ (2019) 10(3) *European Labour Law Journal* 291.

The first reconfiguration: an incremental approach

The ECJ: false self-employed

One way of addressing the issue at the heart of this paper is to widen the scope of the concept of employee to certain categories of atypical worker. This is the path chosen by the ECJ in *FNV Kunsten Informatie en Media v The Netherlands* (hereinafter FNV).¹⁹ The agreement encompassed orchestra members (who were employees) and substitute players (who were considered self-employed) on the one hand, and orchestras on the other. The Dutch competition authority took exception to the inclusion of self-employed workers in the agreement, considering them to be undertakings.²⁰ Accordingly it doubted that the *Albany* exception could apply.

The ECJ refused to extend the *Albany* exception to all self-employed workers because the Treaty did not contain provisions “encouraging self-employed service providers to open a dialogue with the employers to which they provide services”.²¹ However, it held that some self-employed service providers could be characterized as “false self-employed”. These are persons who provide services in a situation comparable to employees.²² The ECJ suggested that these types of self-employed workers should be treated as employees and thus protected by the antitrust labour exemptions. To make this determination the national court should have regard to a variety of factors, for example whether the worker “does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking”.²³ Furthermore, the ECJ explained that the national court should compare the tasks of the substitutes and those of ordinary orchestra players: did the substitutes have more independence and flexibility in the working hours and the performance of tasks than employees? If this was answered in the negative then the substitutes would be considered as employees

¹⁹*FNV Kunsten Informatie en Media v The Netherlands*, Case C-413/13, EU:C:2014:2411.

²⁰E Grosheide and B ter Haar, ‘Employee-Like Worker: Competitive Entrepreneur or Submissive Employee? Reflections on ECJ, C-413/13, *FNV Kunsten Informatie*’ in M Łaga and others (eds), *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (2017) trace the litigation from start to finish.

²¹*FNV* (above n 19) para. 29.

²²*ibid* para. 31.

²³*ibid* para. 33.

for the purposes of EU competition law, triggering the *Albany* exception.²⁴

When the case returned to the Hague Court of Appeal it was found that substitute players should be treated as false self-employed. This is because they must follow the instructions of the conductor, they must be present for rehearsals and concerts according to the same timetable as orchestra employees, and the times and places of performance are set by the organizers of the concerts. It was not relevant that the substitutes could choose whether to take up a position with an orchestra for a particular performance while musicians employed by the orchestra had to participate in all concerts. The Court of Appeal held that the comparison between orchestra members and substitutes should be made once the substitute has accepted to work for the orchestra on a given project.²⁵

Based on the *FNV* judgment, the Dutch competition authority and the Irish legislator have sought to develop the approach in this judgment further. We first examine these two efforts on their merits and then test how far they are consistent with EU competition law and the possible significance of these developments.

The Dutch guidelines: the side-by-side rule of thumb

In the Netherlands the Authority for Competition and Markets (the ACM) issued Guidelines on price arrangements between self-employed workers. These apply to “self-employed workers whose only commercial activity is the provision of services or creating works through their own labor”.²⁶ It includes workers who use their own equipment (e.g. car or laptop) to provide these services. The Guidelines contain a number of settings where the ACM would allow collective bargaining. The first is a codification of the ECJ’s judgment discussed above. The ACM suggests that it will apply the following rule of thumb to assess whether the self-employed should not be characterized as undertakings: if the “self-employed worker de facto works side-by-side with one or more employees, and is indistinguishable from those employees in day-to-day

²⁴ibid para. 37.

²⁵Hague Court of Appeal, judgment of 1 September 2015, NL: GHDHA: 2015: 2305, paras 2.6 and 2.7 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:2305>>.

²⁶ACM, Guidelines: *Price Arrangements Between Self-Employed Workers* (updated June 2020) para. 6 <<https://www.acm.nl/sites/default/files/documents/2020-07/guidelines-on-price-arrangements-between-self-employed-workers.pdf>>; ACM News: self-employed workers are allowed to make arrangements about rates in more situations (26 November 2019) <<https://www.acm.nl/en/publications/acm-self-employed-workers-are-allowed-make-arrangements-about-rates-more-situations>>.

operations, the self-employed worker is not considered to be an undertaking within the meaning of the Dutch Competition Act”.²⁷

In addition to the clear case where an employer has some contracts of employment and some contracts with self-employed people doing the same kind of work, the ACM also considers other settings where this rule of thumb may apply. If the firm hires self-employed persons through an agency then the side-by-side rule is applied by comparing agency workers with the employees recruited by that firm. Moreover, the ACM is open to comparing the self-employed not only with employees who work for the same firm as the self-employed but with other employees working elsewhere. Suppose a restaurant has employees whose work is to make food deliveries, and suppose another restaurant relies on a platform to secure delivery drivers who use their own vehicles. According to the ACM the self-employed who are recruited via the platform may be said to work side-by-side with the employees of the other restaurant.

In setting out this approach the ACM is trying to achieve two objectives: on the one hand, it responds to the changes in employment structure that cause harm to those workers who are made vulnerable by new employment practices. On the other hand, it wants to make sure that non-vulnerable workers do not take advantage of this exception to create illegal cartels. To achieve this, it requires considerable evidence from parties who enter into collective labour agreements: they must show which self-employed workers benefit from the collective agreement and why these workers may be said to work side-by-side with employees.

When the self-employed are found to be acting as undertakings in providing their services, however, not all is lost. The ACM provides for three other pathways to legality for collective agreements. Two of these relate to the substantive interpretation of EU competition law, which we discuss in the next section.

The fourth pathway applies when the self-employed enter into a collective bargaining agreement in order to ensure that the employer pays them a wage that guarantees the workers’ subsistence. The background to this was that at the time of writing the Guidelines in 2019 the Dutch Government had reached political agreement to set a minimum wage (EUR 16 per hour) for self-employed workers. According to the ACM one way of ensuring that the self-employed are indeed paid this wage is to allow them to bargain collectively with the person employing them. The aim

²⁷Guidelines (ibid) para. 29.

of the Government and the ACM was to avoid social dumping. However in the summer of 2020 the Government abandoned its commitment to a minimum wage.²⁸ The ACM responded by amending the Guidelines. Rather than cutting this approach out altogether, however, the current version of the Guidelines provides that a collective agreement where the workers are self-employed and is designed to “safeguard their subsistence level” will not be fined by the ACM. However, if such agreements are discovered they would be automatically void, unless the parties are able to adjust them to comply with competition law. This is based on a policy the ACM has applied in other fields of operation, whereby rather than applying a punitive approach parties are encouraged to amend their agreements to comply with competition law.²⁹ The drawback in this context, however, is that it is not clear how one can amend these kinds of collective agreements and still ensure that workers receive the wages they bargained for.

Irish legislation: fully dependent self-employed workers

In Ireland the Competition (Amendment) Act 2017 provides a procedure to exclude certain “relevant categories” of self-employed workers from the application of competition law.³⁰ This legislation had a long gestation period: in 2004 the Irish competition authority ruled against a collective agreement between Irish Actors’ Equity and the Institute of Advertising Practitioners in Ireland in respect of voice-overs provided by freelancers.³¹ Legislation to overturn this was first introduced in 2006, but made little headway. Further proposals in 2012 were not followed through. This was a result of the EU-IMF Memorandum of Understanding with Ireland, whereby in exchange for financial aid Ireland agreed not to introduce further exemptions to the application of competition law.³²

The legislation begins by defining two categories of self-employed worker. The first is false self-employed workers, which the statute

²⁸Dutch Scraps Plans for Forced Minimum Hourly Rate for Freelancers’ *NL Times* (15 June 2020).

²⁹See for example the ACM’s policy on sustainability where a similar commitment not to fine bona fide attempts at compliance.

³⁰Competition Issues in Labour Markets – Note by Ireland 5 June 2019, DAF/COMP/WD(2019)39 <[https://one.oecd.org/document/DAF/COMP/WD\(2019\)39/en/pdf#:~:text=In%202017%2C%20the%20Irish%20parliament,a%20relevant%20category%20of%20self%2D](https://one.oecd.org/document/DAF/COMP/WD(2019)39/en/pdf#:~:text=In%202017%2C%20the%20Irish%20parliament,a%20relevant%20category%20of%20self%2D)>.

³¹Decision of the Competition Authority of 31 August 2004, Case COM 14/03.

³²Seanad Éireann debate – Wednesday, 6 Jul 2016, Vol. 246 No. 11, intervention by Senator Bacik noting that when this proposal was first considered in 2012 the Commission did not see the need for such exemption.

defines in a way which follows closely that in *FNV*: the starting point is that the worker in question performs “the same activity or service as an employee of the other person”; upon this finding then the legislator requires that attention is paid to (inter alia) whether the worker is subordinated, whether the worker is required to follow the instructions of the other person, whether the worker is an integral part of the other person’s undertaking.³³ The second is a “fully dependent self-employed worker”. This is defined by following certain deliberations of the International Labor Organization.³⁴ She is someone “who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract ... and whose main income in respect of the performance of such services under contract is derived from not more than 2 persons”.³⁵

A trade union which represents one of these two relevant categories may apply to the Minister to prescribe the category for the purposes of the Act. If successful then the trade union may engage in collective bargaining on behalf of this category, the prohibition against agreements in the Competition Act is not applicable. The applicant has to show that the workers fall within one of the two relevant categories and that prescribing this group:

(i) will have no or minimal economic effect on the market in which the class of self-employed worker concerned operates, (ii) will not lead to or result in significant costs to the State, and (iii) will not otherwise contravene the requirements of this Act or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services.³⁶

It is not easy to make sense of these three requirements. The first one seems to suggest that if the class of workers is fairly small and the relevant market is wide enough, then the impact on competition is minimal. For example, suppose that a cleaning service has 100 employees and recruits a handful of casual workers via a platform when there are peaks in demand. Since the wages of the vast majority of workers are already likely set by a collective agreement, adding a few more workers to that agreement is hardly comparable to creating a cartel. The second condition appears to be a leftover from the original Bill tabled in 2016. At that time the

³³Competition (Amendment) Act 2017, s.15 D.

³⁴Competition (Amendment) Bill 2016: Report and Final Stages, Seanad Éireann debate – Thursday, 10 Nov 2016, Vol. 248 No. 5, intervention by Deputy Mary Mitchell O’Connor.

³⁵Competition (Amendment) Act 2017, Section 15 D.

³⁶*ibid* S. 15F(2)(b).

proposal was to exclude from the application of competition law collective agreements entered into by trade unions representing certain professionals on the one hand and public bodies on the other.³⁷ The current provision also potentially addresses settings where a group of workers (e.g. doctors) wish to engage in collective bargaining in providing public healthcare. These agreements would risk raising the costs of public bodies.³⁸ Hence this requirement is only relevant when the state is the employer. The final condition appears to ensure that the Government does not infringe its duty of loyalty to the EU by testing that its approval does not distort competition or run contrary to internal market law.

Note how the applicant trade union is put in the invidious position of having to show a negative: that the prescription is not damaging to the public interest criteria identified. Furthermore, the dissenting members of the European Committee on Social Rights, who was called to review Ireland's support for collective bargaining, feared that the legislation "leaves room for all sorts of subjective interpretation by the executive".³⁹ This may be ameliorated by the Minister's obligation to consult interested parties, which seems to include the competition authority, and also would be employers both of whom appear well-placed to comment on such an application.⁴⁰

Finally, the legislation also automatically exempts some specific classes of worker: "actors engaged as voice-over actors, musicians engaged as session musicians, journalists engaged as freelance journalists".⁴¹ The reason for selecting these is not based on any overarching principle. While Senator Bacik who proposed the Bill considered that the application of competition law had had a "chilling effect" on unions generally,⁴² debates in the Seanad and the Dáil (the upper and

³⁷Competition (Amendment) Bill 2016 (No. 8 of 2016).

³⁸This would also seem to raise state aid issues. Some members of the Dáil expressed reservations that the legislation would not afford protection for collective bargaining by healthcare providers, see Competition (Amendment) Bill 2016 [Seanad]: Second Stage, Dáil Éireann debate – Tuesday, 28 Feb 2017, Vol. 940 No. 3, Deputy O'Connor (at the time Minister for Jobs, Enterprise and Innovation).

³⁹ECSR, Decision on the Merits: Irish Congress of Trade Unions v. Ireland, Complaint No. 123/2016 (12/09/2018) Joint dissenting opinion of Petros Stangos and Barbara Kresal (<https://hudoc.esc.coe.int/eng/?i=cc-123-2016-dmerits-en>). The majority took the view that absent evidence that certain parties found it difficult to apply for exemption, there was no infringement of Article 6(2) of the Charter (which imposes a duty to promote collective bargaining). However it recalled that the Minister should have regard to Ireland's obligations under the Charter. For further discussion, see B. Rombouts, 'ICTU v. Ireland: Expanding the Scope of Self-employed Workers Entitled to Collective Bargaining Rights in Relation to Competition Law Prohibitions' (2019) 5(1) International Labour Rights Case Law 17.

⁴⁰Competition (Amendment) Act 2017, S. 15 F (5).

⁴¹ibid Schedule 4.

⁴²Seanad Éireann debate – Wednesday, 20 Jan 2016, Vol. 245 No. 4.

lower houses of the Irish legislature respectively) suggest that the three classes of worker that have been included are those who lobbied for the legislation.⁴³ The legislative history does not provide sufficient evidence to suggest that these classes of worker would fulfil the criteria for prescription in the Act. At the time of writing it does not appear that any group of workers have been certified under this amendment.⁴⁴

National reconfigurations and EU Law

Above we have examined two national reform efforts on their merits. Both the ACM and the Irish legislator have tried to advance the cause of vulnerable self-employed workers by trying to open further the window of opportunity created by the ECJ in *FNV*. It is clear that both struggled to align domestic policy considerations with the importance that the EU places on undistorted competition.

First, both provided re-interpretations of domestic competition law only. This is naturally problematic because as soon as an agreement affects trade between Member States then the NCA is obliged to apply Article 101 TFEU in parallel with national competition law and it has a duty to ensure that its interpretation of national law is aligned with Article 101 TFEU. Pessimistically then, reforms of national competition law of this kind are a dead letter: it is well-known that the Court has read the notion of “effect on trade” very broadly indeed, so that it is going to be fairly hard to find agreements to which EU Law is inapplicable.⁴⁵ As a result of this, the only way for these reconfigurations to work is if they stick closely to what is allowed under EU Law, which explains the attempts of both the ACM and the Irish legislator to circumscribe their approaches and extend *FNV* slightly in the hope that the ECJ may follow. In other words, while both legal orders pretend that their policy choices are only having an impact on national competition law, they know that *de facto* EU Law will apply and so their policy choices are framed with EU Law in mind.

⁴³Seanad Éireann debate – Wednesday, 6 Jul 2016, Vol. 246 No. 11, interventions by Senators Gavan and Craughwell, Competition (Amendment) Bill 2016 [Seanad]: Second Stage, Dáil Éireann debate – Tuesday, 28 Feb 2017, Vol. 940 No. 3.

⁴⁴EFC, ‘European Commission Consultation on Collective Bargaining for Platform Workers’ (12 August 2020) <<https://www.efc.ie/news/european-commission-consultation-on-collective-bargaining-for-platform-workers/>>.

⁴⁵Commission Notice ‘Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty’ [2004] OJ C101/81.

Nevertheless, critics will question the extent to which these two approaches are consistent with EU Law. The blanket exclusion of the Irish legislation for some categories is in stark contrast to the case-by-case approach recommended in the Dutch Guidelines, and it is the latter that is closer to the spirit of the ECJ's judgment. For example, it is not clear that all freelance journalists require the protection afforded by collective bargaining: some may be so popular that they can command high fees. On the other hand, for categories of self-employed who must apply for certification under the Irish scheme the approach seems unnecessarily restrictive: the ECJ provides that once the person may be considered as a worker and not as an undertaking, then their right to be included in a collective bargaining agreement is recognized automatically. Thus a process of notification to the competition authority would suffice instead of requiring ministerial certification. The Dutch scheme may be challenged for reading the *FNV* precedent too widely and risk under-enforcing competition law if the side-by-side rule compares workers of two different entities.

On the other hand, the two approaches may well conform with EU Law. The intention of these initiatives is clear: waiters recruited through a platform can claim that they work side by side with waiters who have employment contracts even if these work in a different establishment; a delivery driver who uses their truck to make deliveries for one trader should be entitled to bargain collectively because they depend on that single contract. Conversely these definitions try and exclude relatively well-off professionals who are less dependent on a single employer and whose skill-set and reputation can be used to leverage a decent pay without collective bargaining. From this perspective the Irish scheme may draw support from the teleological reading that led to the *Albany* judgment. Likewise, the approach in the Dutch Guidelines might survive scrutiny under EU Law for the rule of thumb is just a first indicator: the parties and the ACM will then apply closely the criteria set out in *FNV* to test more closely if the workers in question are in fact false self-employed. On the other hand, some express concern that this incremental approach is too narrow as well as legally uncertain.⁴⁶ However states have to be cautious lest their policymaking falls foul of EU Law.

⁴⁶Daskalova (above n 18).

Finally, by crafting two different approaches to excluding the application of competition law, the Commission's usual line of attack against national initiatives can return: there must be a harmonized approach across the EU. At a macro level the differences are obvious: the Dutch ACM is merely interpreting the case-law while the Irish legislation has excluded certain categories from the application of competition law. More specifically it is worth noting that while Irish law applies to all freelance journalists, the Dutch Guidelines discuss journalists who work on a freelance basis and suggest that there may be circumstances when these do not work side-by-side with journalists employed by the newspaper (e.g. when they work for several newspapers, attend editorial meetings occasionally and determine which stories to pursue). Already in their infancy, inconsistencies emerge, suggesting that joint action by all NCAs and the Commission is superior to individual initiatives.⁴⁷

The Commission seems to be open to considering extending the antitrust labour exemptions whether by a regulation excluding the application of competition law or by Guidelines.⁴⁸ This has the support of some scholars who have called for a fundamental reassessment of the labour exemptions in light of changes brought about by the Lisbon Treaty, in particular the coming into force of the Charter of Fundamental Rights as well as a large number of international agreements recognizing the importance of affording vulnerable workers the right to bargain collectively.⁴⁹ However the challenge to widening the scope of the labour exemptions by widening the concept of employee requires a careful selection to distinguish vulnerable workers and those offering services where society expects competition between actors. The attempts by the Irish and the Dutch described here show how difficult it is to develop a policy simply by widening the category of employee. It is for this reason that we turn to considering alternatives.

Substantive assessment

In this section we move away from widening the notion of employees and explore what options are available if the vulnerable atypical worker is treated as an undertaking.

⁴⁷Conversely individual initiatives may well serve to cajole the Commission into action.

⁴⁸Inception Impact Assessment Collective bargaining agreements for self-employed – scope of application of EU competition rules (Ares(2021)102652).

⁴⁹Lianos, Countouris and De Stefano (above n 18). In a similar vein, Schiek and Gideon (above n 18).

A second reconfiguration: another exclusion pathway

In some controversial case-law, the Court has found that while EU competition law normally has precedence over other policies, there are instances where other considerations have more weight. In *Wouters*, for example, the Court had to consider the legitimacy of a decision by the Dutch Bar Association to disallow the creation of joint ventures between lawyers and accountants. The Court agreed that this ban could be justified having regard to domestic policy considerations relating to the provision of legal services even if other Member States did not prevent the operation of such joint ventures.⁵⁰ Here the effective provision of legal services justified a restriction of competition. This judgment follows the same spirit as *Albany* but rather than drawing on the Treaty to establish an exception to the application of competition law, it draws on the policy considerations at play in the relevant jurisdiction.

There are two advantages to applying this approach to determining whether collective bargaining between a specific group of self-employed and their employers should be excluded from the application of competition law. The first is that the competition authority or court reviewing a collective labour agreement can go beyond labels (are the parties employees or self-employed) and ask whether the agreement under scrutiny should be tolerated because of the protection it affords to a class of vulnerable self-employed persons. This forces one to confront the substantive issue at play: are the atypical workers under consideration vulnerable? And can collective bargaining be seen as a reasonable way to protect them? In other words, rather than asking whether the persons doing the work are employees and applying the “control” tests used by the ECJ, the emphasis is on the unevenness of the bargaining relationship and if this warrants the disapplication of competition law to protect the weaker side. This would allow competition authorities to identify indicators of vulnerability. This may be achieved by examining the perspective of the person providing the service (e.g. by exploring how far individuals are economically dependent on the firm or whether they bring special skills that gives some workers the capacity to bargain for a higher wage) or from the perspective of the firm hiring them (e.g. by determining their labour market power).⁵¹

⁵⁰*Wouters and Others*, C-309/99, EU:C:2002:98.

⁵¹Labour market power is discussed further below at (n 62–66).

The second advantage of this approach is that while the antitrust labour exemptions as presently interpreted provide a rule that is applicable across all Member States without distinction, the *Wouters* approach would allow enforcers to accept certain forms of collective bargaining involving vulnerable atypical workers in one jurisdiction while not in others if the economic conditions differ between the two Member States. For instance, suppose that in Member State A there is a minimum wage for gig economy workers, which is strictly enforced, but that a similar law is not found in Member State B for the same class of workers. It may then be that allowing collective wage bargaining for vulnerable workers in Member State B is justifiable as it is a necessary means of safeguarding their welfare, while it may not be needed in Member State A. For example in Denmark, the system of industrial relations is largely based on collective agreements between trade unions and employers and Denmark has no statutory minimum wage.⁵² This explains why an arrangement such as the one in *Hilfr* appeared particularly apt.

Having said this, the precise scope of the *Wouters* rule is highly contested. While some take the view that it may operate as a general standard by which superior policy considerations may arise that justify the exclusion of competition law, others take the view that this line of case-law applies only when the Member State has delegated regulatory tasks to private parties.⁵³ The ECJ has held back on a definitive interpretation of the scope of the rule.⁵⁴ Furthermore, it remains casuistic and may end up being as complex to apply as the *Albany* exception.

A third reconfiguration: are collective labour agreements restrictive of competition?

From a competition law perspective, a collective labour agreement is in part horizontal (among providers of the service and among employers) and in part vertical (between the two sides of the labour market). The theory of harm would have to show that the agreements cause an anti-competitive increase in the cost of labour, which leads to employers being forced to recruit fewer workers (a misallocation of resources in the labour market). Those demanding a consumer welfare standard

⁵²Isøe (above n 10) 5.

⁵³R Whish and D Bailey, *Competition Law* (8th edn, 2018) 138–41.

⁵⁴G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' 42(5) *European Law Review* 635 review the cases where *Wouters* is cited.

would add that the competition authority should also show that the agreement also causes harm to the buyers of the service at hand. Take the *FNV* case as an example: the theory of harm would be that higher rates for self-employed musicians leads to fewer concerts being scheduled harming the orchestras and reduced numbers of concerts harm the consumer.

Conceptually, it is important to discuss whether the theory of harm requires a showing of harm to consumers or whether showing a misallocation of resources in the labour market suffices. Some take the view that the standard of legality requires one to show harm to consumer welfare, however others claim that in EU competition law the focus is on practices that distort the competitive process, so proving a distortion only on one market is enough.⁵⁵ There is no need to solve this juristic squabble in this paper and both approaches are considered. How then to test whether these agreements harm competition? Two considerations appear relevant.

The first, and most conventional, is to require the adoption of a market power screen coupled with an evaluation of the effects of the collective bargaining agreement.⁵⁶ Take for example the *Hilfr* case discussed in the introduction: suppose this is seen as an agreement whereby the freelancers collude to fix a wage, with *Hilfr* facilitating the collusive practice. It might “look and smell” like a hub and spoke cartel.⁵⁷ However, it is a clear illustration where a collective agreement between one undertaking and just some one hundred cleaners can hardly be said to be harmful to competition if the market for cleaning services is competitive. Freelancers who prefer to work for lower wages are free to join other platforms where they may secure more working hours for lower wages. As *Hilfer*’s CEO indicated, the firm made a business choice to create a model where households were aware that a *Hilfr* cleaner was paid a decent wage.⁵⁸ In this context the labour market is not distorted, and the agreement was designed to improve competition by attracting ethical households. If the competitive process among workers is not distorted, a fortiori there is no reduction in consumer welfare.

⁵⁵Ex multis, see L Lovdahl Gormsen, ‘The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’ (2007) 3(2) *European Competition Journal* 329.

⁵⁶The ACM also considers this approach but in a more limited way: it explains that some agreements are de minimis and thus fall outside the prohibition. Guidelines (above n 26) ch.5.

⁵⁷This draws on the metaphor used by AG Bobek in *Budapest Bank*, C-228/18, EU:C:2019:678, paragraph 51.

⁵⁸Above (n 12).

Related, one can consider whether the terms of the agreement are such as to have a significant impact on competition. AG Jacobs in *Albany International* took the view that compulsory affiliation to a pension fund for all competitors was not likely to have an appreciable effect on competition: on the labour market employers were still free to attract workers by competing on other aspects of the employment package and on the market for products or services, it was unlikely that the agreement would distort competition for its effect on the cost of production was minimal.⁵⁹ Similar reasoning is found in the judgment of the Hague Court of Appeal in *Zelfstandigen Bouw and others v Stichting Bedrijfstakpensioenfondsvoor het Schilders-, Afwerkings- en Glaszetbedrijf*.⁶⁰ This was also an action against compulsory affiliation to a pension fund. The court explained that as a result of the agreement self-employed painters did not compete in terms of the costs of the pension scheme. However, the costs of the pension scheme were relatively small and so the agreement was unlikely to have a substantial effect on competition in the market for painting services.⁶¹

The second approach is for the competition authority to observe the market power of the employers relative to that of the atypical workers. In a competitive market employers strive to offer the best wages and conditions they can to attract the best workers so as to increase output. In this setting collective bargaining is not necessary. Therefore collective bargaining is a remedy when employers have enough economic power to reduce the price they pay for labour, causing harm to workers. They can do so because they take advantage of the difficulty workers have to find alternative work that pays more. It appears that this market power is more pervasive than one might at first imagine, even with the presence of online platforms, which themselves appear to have monopsony power.⁶² It follows that in cases where one can make out the existence of employers with market power, then there is a credible concern that this power harms the welfare of workers. Market power might be measured by considering whether an employer is able to set wages at levels below the competitive level or by the ability to wage-discriminate: that is, charging similar workers different prices.⁶³ The latter is visible in the *FNV* case: absent a collective

⁵⁹*Albany International*, C-67/96, EU:C:1999:28, Opinion of AG Jacobs, paragraph 182. See also *Pavlov*, C-180/98, EU:C:2000:428, paras. 93–97.

⁶⁰Judgment of 22 December 2020, NL:RBDHA:2019:702.

⁶¹*ibid* paras 5.22–5.28.

⁶²See generally T Philippon, *The Great Reversal* (2019) ch.15.

agreement that included all musicians, orchestras would likely be able to recruit substitutes at lower rates, excluding employee musicians.⁶⁴ In this framework the anticompetitive effects are the lower wages/poorer working conditions that suppliers of labour are offered. From this perspective, it may be claimed that agreements designed to counterbalance employers' market power may not be restrictive of competition in the labour market. High levels of concentration lead to reductions in wages.⁶⁵ In these contexts then, collective bargaining may serve to redress the imbalance of power that exists between workers and those who hire them so that wages are set at a competitive level.⁶⁶ We can draw inspiration the case-law on collective purchasing agreements by farmers' cooperatives. In brief the Court found that an agreement among a cooperative to purchase certain raw materials (e.g. fertilizers) in bulk and which prevented members of the cooperative from joining other cooperatives buying the same product was not anticompetitive, for it would allow a single cooperative to gain sufficient countervailing power to the concentrate upstream market. Indeed, said the Court, it "may even have beneficial effects on competition".⁶⁷ Similarly here, a collectively bargained agreement including all workers resets the competitive balance between the two sides.

One possible objection to this second line of argument is that it ignores the risk that the higher wages may harm consumers of the finished product, so that the agreement solves one market failure by causing another. To this there are two responses. The first is that if, absent the agreement, workers would be paid lower wages this would likely reduce demand for that work and thus reduce output, to the detriment of consumers. Therefore, fixing the market failure on the labour market side serves also to benefit consumers. A second response could be to concede the risk, but claim that competition law should give greater weight to the market failure in the labour markets. In the US there is an emerging stream of scholarship that accuses courts and

⁶³J Azar, I Marinescu and M Steinbaum, 'Antitrust and Labor Market Power' *econfip Research Paper* (May 2019) 4.

⁶⁴This is the social dumping noted by AG Whal in *FNV* (above n 8) on which he constructed his approach to applying Albany to the facts: allowing collective bargaining by the self-employed protects the employees.

⁶⁵OECD *Competition in Labour Markets* (2020) 8.

⁶⁶In a similar vein it is argued that that absence of worker protection for self-employed strengthens employers' monopsony power. See M Steinbaum, 'Antitrust Implications of Labor Platforms' *CPI Antitrust Chronicle* (May 2018).

⁶⁷*Gottrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, Case C-250/92, EU: C:1994:413, para.34.

agencies of placing too much emphasis on consumer welfare as a litmus test for legality and overlooking labour markets.⁶⁸ Drawing on this perspective the focus of attention should be on the state of competition in labour markets only: provided the agreement rebalances that market then it does not infringe Article 101, even if it may have effects on other, related markets.

A fourth reconfiguration: exemption

On the basis of our discussion above, the need to have recourse to the exemption in Article 101(3) TFEU would only arise if atypical workers have such significant economic power that there is a risk that a collective agreement among them might harm competition in the demand side of the labour market, raising costs for employers that lack countervailing power to keep wages competitive. Nevertheless, there are plausible gains that may be pleaded to secure an exemption. Two issues should be confronted, a legal question about how to apply Article 101(3) TFEU and an economic question about what evidence may be used to secure an exemption. They are particularly tricky when considering the first two criteria of exemption: the improvement in the production or distribution of goods or technical and economic progress and the “fair share” requirement.

As for the first criterion the ECJ noted early on that a distribution system that serves to make a supply chain work smoothly “constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavorable, comes within the framework of the objectives to which reference may be had pursuant to Article [101 (3)]”.⁶⁹ In authorizing a crisis cartel the Commission noted that the closure of certain plants would take place “in acceptable social conditions”.⁷⁰ More generally Article 9 TFEU directs the Union to take into account “the promotion of a high level of employment, the guarantee of adequate social protection” in all its policies. It follows that improvements in the functioning of labour markets can be accommodated within

⁶⁸S Vaheesan and M Buck, ‘Antitrust’s Monopsony Problem’ (2 February 2020) (available at promarket.org).

⁶⁹*Metro SB-Großmärkte v Commission*, Case 26/76, EU:C:1977:167, para.43.

⁷⁰Case IV/34.456 – *Stichting Baksteen* [1994] OJ L 131/15, para.27. AG Jacobs points to other cases and decisions which have ‘recognised the possibility of taking account of social grounds in that context, in particular by interpreting the conditions of Article [101(3)] broadly so as to include concerns for employment.’ *Albany International* (above n 60) para 191.

the framework of the first condition of Article 101(3). This approach does not conform with the more restrictive reading some like to give to this provision today, however.⁷¹

The second requirement proves more difficult to surmount for two reasons: the first is that some language versions of the Treaty read this as requiring a benefit to consumers. Thus one has to show how the improvement of the conditions of employment of the worker leads also to an improvement in the welfare of the person buying the goods or services that are produced with the assistance of the worker. Second the Commission requires that consumers are fully compensated for the losses they incur.⁷² However, this reading is problematic for two reasons: first some language versions of the Treaty speak of “users” obtaining a benefit, and not consumers. The second problem is the Commission interprets this requirement as one which requires proof that the user is fully compensated for the losses suffered, while the Treaty merely requires that they obtain a fair share of the benefits of the agreement.

The consumer-welfare reading of Article 101(3) might be challenged as it is based on an emphasis on markets for products and an insufficient regard for factor markets. If collective labour agreements are used to achieve an improvement in working conditions, then it may be argued that the users in this context should be present and future workers, who can take advantage of the agreement to enter this job market. In other words, looking for a benefit elsewhere seems out of line with the demand of Article 9 TFEU to guarantee social protection. The workers are the beneficiaries that Article 101(3) should look at in this context.

The ACM’s Guidelines try and circumvent the consumer pass-on problem by characterizing collective agreements as horizontal, e.g. atypical workers agreeing the wages they wish to receive from their employer. The example they provide is an agreement among some workers to a minimum wage that allows the workers to buy employment insurance. Having this insurance benefits them and makes workers more keen to enter this market. When it comes to the pass-on requirement, the ACM suggests that the consumer is the person hiring the workers, so that it must be shown what benefit they receive by agreeing to pay a higher wage. In this respect the task is to show whether, for example, the quality of the work carried out by the atypical workers improves as a result of the agreement on higher wages. It may also be shown that

⁷¹Commission Notice – Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, section 3.2 where reference is made to efficiency gains.

⁷²ibid paragraphs 85–86.

users “see the social protection of self-employed workers safeguarded by the arrangements as a quality improvement of the service or product that the self-employed workers in question have helped create with their efforts, and for which they are prepared to pay the expected price increase”.⁷³ This approach however seems overly optimistic as most buyers prefer cheaper services.

Turning to the evidence that may be brought to bear, it has been suggested that a well-functioning system of collective bargaining can serve to yield productive efficiencies by spreading the use of best practices among employers and that dialogue between workers and employers can foster the design of better performing working methods. It can also help anticipate the skill needs of workers as technology changes and identify what life-long training is necessary for workers, as well as bring to the employers’ attention concerns about an adequate balance between work and life.⁷⁴ In other words, it can serve to improve efficiency and equity. The difficulty in factoring these benefits in Article 101(3) is that they are very hard to measure and they look like positive spin-offs from collective bargaining rather than directly related to agreements on wages or other benefits. Furthermore, in assessing efficiencies the proportionality standard is often used to discuss how far the design of the restrictive practice may be amended to remove restrictions of competition that are not necessary to achieve the efficiencies pleaded.⁷⁵ However, as some aspects of collective bargaining may be regulated by national law, competition law intervention can hardly suggest modifications to the design of collective bargaining.⁷⁶ Some economic models suggest that industry-level collective bargaining performs less well than firm-level collective bargaining in ensuring full employment.⁷⁷ However, the data is not sufficiently conclusive to suggest that certain forms of collective wage bargaining perform better than others.⁷⁸

⁷³Guidelines (above n 26) para.69.

⁷⁴‘Facing the Future of Work: How to Make the Most of Collective Bargaining’ in *OECD Employment Outlook 2019: The Future of Work* (OECD 2019) <<https://doi.org/10.1787/332a956e-en>>.

⁷⁵Such an approach may be found in a number of pre-2004 exemption decisions, more recently it may be seen in adjustments undertakings make in commitment decisions.

⁷⁶Eurofound, *Pay in Europe in Different Wage-Bargaining Regimes* (2015, Publications Office of the European Union, Luxembourg) 12. However, note that the austerity programmes agreed by certain Member States with the IMF the European Commission and the ECB entailed reforms which affected national systems of collective bargaining. See P Marginson, ‘Coordinated Bargaining in Europe: From Incremental Corrosion to Frontal Assault?’(2015) 21(2) *European Journal of Industrial Relations* 97.

⁷⁷Eurofound (above n 76) 8.

⁷⁸TS Aidt and Z Tzannatos, ‘Trade Unions, Collective Bargaining and Macroeconomic Performance: A Review’ (2008) 39(4) *Industrial Relations Journal* 258.

An alternative might be to assess the success of existing collective bargaining systems and use this as a basis for determining whether extending collective bargaining to vulnerable workers in any given case can be expected to be equally beneficial. For example, in a setting where there is an existing collective bargaining agreement between employees and industry then the positive effects of this agreement can be utilized to show that by including vulnerable workers who would work side by side with employees can be equally beneficial to the organization of work.

In sum, the application of Article 101(3) is quite tricky: the kinds of effects to measure range from the likely productive efficiency of collective bargaining to macroeconomic impacts on overall employment. Moreover, at times one is asked to judge a process rather than a specific action. In a typical exemption case (e.g. a joint venture) parties may show that the agreement yields a new product by revealing evidence about how rational it would be for the two businesses to cooperate. In contrast, when it comes to authorizing collective bargaining one is determining whether to allow the two sides to cooperate for an unspecified number of times over an unspecified number of issues pertaining to wages and other working conditions and suggesting that this relationship yields a number of benefits. Given the Commission's current trend to quantify efficiency gains, this makes the successful application of Article 101(3) a remote prospect, even with a more progressive legal interpretation of the requirements for exemption suggested here.

Taking stock

This discussion yields two overall observations. The first is that collective agreements among undertakings and self-employed workers who cannot be classed as employees are not object restrictions and should be tested for their anticompetitive effects. We have seen that a number of scenarios can be identified where the risk to competition is unlikely: when the market share of the two sides is limited, when the terms of the collective agreement are unlikely to harm competition, and when the collective agreement on the side of atypical workers serves as rebalancing the relationship between supply and demand. It is thus likely that a good number of collective labour agreements would not be prohibited even if competition law were to apply.

The second issue that this discussion gives rise to is the multiple ways in which parties may seek to justify anticompetitive agreements and the lack of clarity as to how these ways relate to one another. In brief, the *Albany* exception provides a form-based analysis (collective industry-level labour agreements designed to promote the conditions of employment are excluded provided they protect employees) based on a teleological reading of the Treaty; an effects-based exemption is found in Article 101(3); and finally a mixed form and effects assessment is found in the *Wouters* rule whereby some restrictive practices are said not to infringe Article 101 TFEU if they pursue a legitimate objective and if the restriction is proportionate to that objective. As matters stand any of these three might be claimed for all types of collective bargaining agreements, and they overlap. The existence of exemptions based on the case-law has probably a lot to do with the procedural incident that led to the *Albany* and *Wouters* judgments: had the parties notified these under Regulation 17/62 the Commission might have issued an individual exemption and applied Article 101(3). By the time the ECJ received these disputes via the preliminary reference procedure it was too late to invite a notification and the Court did its best to resolve the issue expeditiously by creating two exclusionary rules which overlap with Article 101(3) TFEU. These two judgments thus are part of a wider category of pre-moderization case-law where the ECJ carried out the Article 101(3) assessment under Article 101(1) for the sake of expediency.⁷⁹ However, now that this case-law is in place the task is to interpret it in the best way to ensure that it applies to safeguard the aims of the Treaties. The *Albany* exception is clearly limited to settings where employees are concerned so when it applies, the other justifications are inapplicable and unnecessary. More complex is finding a clean dividing line between the other two pathways. Those scholars who see the *Wouters* exception as being linked to a state-based regulatory objective are able to isolate this easily enough as a *lex specialis*. This approach then leaves Article 101(3) as applicable in all other settings where the other two rules do not apply. Conversely the ECJ appears to suggest that the *Wouters* rule and Article 101(3) TFEU may apply to the same facts.⁸⁰ If so, then when it comes to deciding which rule to choose as between *Wouters* and Article 101(3), this may hinge upon the role Member

⁷⁹R Whish and B Sufrin, 'Article 85 and the Rule of Reason' (1987) YEL 1 contains other examples of instances where the Court reached some reasonable results under Article 101(1) which some might have considered merited analysis under Article 101(3).

⁸⁰See e.g. *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, C-1/12, ECLI:EU:C:2013:127.

States see for collective bargaining – going back to the *Hilfr* case, we have a Member State that places much reliance on collective bargaining as a means of regulating relations between capital and labour and a Prime Minister who endorsed the agreement. Arguably the *Wouters* rule may apply here.

In addition to the above substantive issues, this discussion also reveals a procedural frailty in the current enforcement architecture: by focusing on the importance of self-assessment when reforming its procedures, the Commission ignored the importance of having a pathway to secure legal certainty for novel forms of agreement that may come up. Guidelines can only help so much and are often based on knowledge obtained by the Commission through enforcement. Furthermore, by denying NCAs the competence to issue non-infringement decisions this limits further the possibility of providing *ex post* guidance.

This means that while it is arguable that collective bargaining agreements which seek to include vulnerable workers who are treated as undertakings may be assessed positively under Article 101 TFEU, the mix of complex overlapping methods of analysis to determine compliance and the absence of an *ex ante* procedure to secure formal clearance means that the moves described in this section may not be welcomed by the stakeholders in this debate. A commitment by the competition authority not to impose a fine if it finds an infringement of Article 101(1) provides meagre gains since the agreement is automatically void anyway. On a more positive note, however, it appears that a good number of collective agreements may well be found to have no anticompetitive effects, and testing this line of reasoning further through decisional practice would likely facilitate the ease with which atypical workers can engage in collective bargaining. Policy-wise then the Commission could explore a soft law document that examines more granularly which types of collective bargaining agreements raise competition concerns and which do not. This may be more fruitful than tinkering with the definition of employee so as to extend the antitrust labour exemptions.

A fifth reconfiguration: competition law on the offensive

An increasing number of scholars have suggested that competition law should be enforced against restrictive practices that harm workers.⁸¹

⁸¹ Marinescu and EA Posner, 'Why Has Antitrust Law Failed Workers?' (2020) 105 *Cornell Law Review* 1343.

This is motivated by economic studies that have shown increased market power in labour markets. Market power is measured by industry concentration, labour market frictions (e.g. workers are unwilling to relocate) and informational gaps about job opportunities and the relative quality of work in different workplaces. These factors may combine to confer on employers monopsony power that they can use at the expense of workers. Even if the exercise of labour monopsony power does not result in increased prices for consumers, it is argued that competition law can apply to measures that reduce the welfare of workers because the competitive process in the labour market is dented or because the employer sets wages below what would be set in a competitive market.⁸² The OECD has released a study recently that summarizes some of the enforcement actions that have been taken by agencies and recommended by scholars.⁸³ It is beyond the scope of this paper to discuss these save to suggest that enforcement action could serve as the “functional equivalent” of collective bargaining in some instances: in other words the same result could be reached either by suspending the application of competition law to allow for collective bargaining or by applying competition law against restrictive practices that harm the labour market.⁸⁴ Some examples can serve to illustrate this complementarity.

First, competition authorities can consider horizontal agreements among employers, e.g. challenging collusion among employers that makes labour mobility more difficult by the use of no-poaching clauses.⁸⁵ Arguably a collective bargaining process may also lead to employees and employers agreeing to remove no-poaching clauses except in settings when these are justified (e.g. the protection of trade secrets). Whether demanded by employees or required by a competition authority, the removal of these clauses enhances labour market competition.

Second, one might also focus on vertical restraints – i.e. the contract between employer and service provider. For example, suppose that the terms of a contract make worker mobility more difficult (e.g. an Uber driver is unable to take their user ratings to another platform). This

⁸²See generally, S Naidu, EA Posner and G Weyl, ‘Antitrust Remedies for Labour Market Power’ 132 *Harvard Law Review* 536.

⁸³OECD *Competition in Labour Markets* (2020).

⁸⁴Functional equivalence is a term in comparative law which points to two seemingly different looking rules in two jurisdictions that serve the same function.

⁸⁵*In re NCAA Grant-in-Aid Cap Antitrust Litigation* US Court of Appeals for the 9th Circuit (18 May 2020) approving a focus on collusion harming student athletes.

might be challenged as foreclosing the capacity of labour suppliers to switch, harming competition.⁸⁶ Or consider an exclusivity agreement whereby a gig worker offering its services to one platform cannot join other platforms at the same time. This can serve to foreclose workers and also foreclose market access for new platforms. If a worker's performance is monitored by an algorithm, the worker can argue that a refusal by a platform to explain how this works would restrict its capacity to decide whether to continue to work for a given platform thus harming competition in labour markets. These might also be aspects of the labour relation that would be removed or significantly amended as a result of collective bargaining between workers and employer. In this example competition law enforcement is the functional equivalent of collective bargaining. A national competition authority or the Commission may thus consider enforcing competition law against agreements between employers and atypical workers to identify what kinds of clauses cause anticompetitive harm to the worker, and develop guidelines to ensure these contracts provide good working conditions for atypical workers. Public enforcement could quickly generate a set of precedents that could be then used by workers' organizations to vet a number of contracts that contain offending clauses that harm the interests of workers.

Third, perhaps more speculatively, one can consider the application of Article 102 TFEU to dominant firms: the fixing of unfairly low wages or unfair terms to self-employed workers could be read as an abuse of dominance. Reluctance to use competition law to control prices is well-known. However, during an antitrust case the authority will have established benchmarks for determining competitive prices which can be used as an orientation for the parties.⁸⁷ It follows that a possible remedy to a finding of excessively low wages is to allow for collective bargaining as a means to facilitate finding a competitive price, much like in *Gazprom* where the commitment decision required negotiations to achieve a fair price.⁸⁸ When it comes to unfair terms, the limited amount of case-law suggests that a term imposed by a dominant undertaking may be deemed unfair if results in a significant imbalance between the two parties to the contract.⁸⁹ Even if it is understandable that competition authorities would be loath to rewrite contracts, in egregious cases this provision may be applicable.

⁸⁶Daskalova (above n 18) and OECD (above n 83) 38–39.

⁸⁷E.g. Case AT.39816 – *Upstream gas supplies in Central and Eastern Europe* (24 May 2018).

⁸⁸*ibid.*

⁸⁹Case 127/73, *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313, paragraph 15.

Conclusion

The OECD reports that in some jurisdictions (France, Italy, and Spain), “independent unions of platform workers are negotiating working conditions for their members even if they are classified as self-employed without any intervention from national antitrust authorities”.⁹⁰ These authorities might have simply decided to de-prioritize enforcement in this area, but this hardly amounts to a credible long-run approach to managing the relationship between securing competitive markets and protecting vulnerable workers. Now that the Commission appears interested in confronting this issue, this article has indicated a number of possible reconfigurations of EU competition policy that may be considered. We summarize these here noting that each requires a different set of trade-offs.

The first reconfiguration, is to develop the concept of employee incrementally, much along the lines of the Irish and the Dutch efforts and thereby extend the labour antitrust exemptions. The advantage of this approach is that by defining which workers are not to be treated as independent contractors then the collective agreements that they enter into will fall outside the scope of competition law automatically. This approach retains the binary category: a person is either acting as an employee or as an undertaking, but it increases the size of the former category. The downside is it risks being over or under inclusive. If it is over-inclusive it follows that we would facilitate illegal cartels, if under-inclusive that some vulnerable workers will not be protected. Another concern is that it is quite static, while labour markets may evolve in ways that makes classifications obsolete. Extending the scope of the concept of employee might be aided by Member States extending labour law protections to atypical workers. For example French labour law recognizes independent workers who use one or more platforms to exercise their profession.⁹¹ It imposes on platforms a set of social obligations and allows these workers to form a trade union organization, to join it, and to assert their collective interests through it.⁹² This right to bargain collectively is subject to EU competition law, but as more states extend the

⁹⁰OECD Input to the Netherlands Independent Commission on the Regulation of Work (Commissie Reguleren van Werk) (2019) 62.

⁹¹Code du travail, Article L 7341-1 (as amended by 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).

⁹²Code du travail, Article L 7342-6 (as amended by Loi n 2016-1088).

scope of protection in this manner, the more the ECJ will become willing to extend the scope of the notion of employee.⁹³

The second set of reconfigurations instead tries to address the problem from a substantive perspective. Assuming that the worker is treated as operating as an undertaking then the following approaches could be explored: (i) by focusing on the labour market effects one can test whether the agreement does indeed restrict competition: some agreements would likely fall outside Article 101 TFEU for lack of anticompetitive harm; other agreements may be saved because they serve to counter monopsony power; others may have no appreciable effect on the goods or services supplied to consumers; (ii) by focusing on the policy objectives being pursued by the parties the *Wouters* exception could be invoked which would save these agreements when the restrictions of competition are deemed necessary to safeguard legitimate objectives, in this case a set of vulnerable atypical workers; (iii) finally it may be possible to show that an agreement is overall beneficial and deserving of exemption. Of these the most promising avenue is the first: by testing for possible anticompetitive effects on the labour market it is arguable that few collective bargaining agreements would be found to restrict competition law. Guidelines can emerge to explain what types of collective bargaining are unlikely to harm competition and how the exemption provision may be interpreted.

The final reconfiguration switches tack and suggests that targeting enforcement towards contracts between employers and vulnerable workers may allow competition authorities to challenge terms that cause harm to workers – this route serves similar purposes to collective bargaining. Insofar as vulnerable workers do not benefit from the *Albany* exception and are therefore unwilling to risk engaging in collective bargaining, this serves as an alternative. On the one hand, it is not likely that this approach can address all the concerns that workers have. On the other, if a good amount of cases is brought this might facilitate the design of a block exemption regulation that sets out what sort of contracts between employers and atypical workers may be exempted and what clauses are to be black-listed.

In sum, a combination of these five reconfigurations may be the way forward to tackle the plight of atypical workers. In the long term this can yield a reassessment of how to apply competition law to labour markets as well as to soft law guidance on how to design collective

⁹³Spain to Grant Gig Delivery Workers Employee Rights' *Financial Times* (11 March 2021).

bargaining agreements and on identifying which terms of contracts set by employers with market power risk infringing competition law.

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