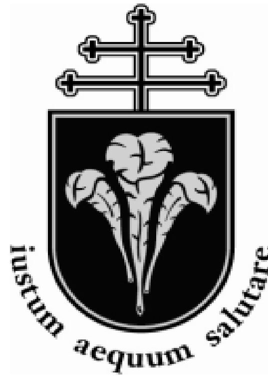

Pázmány Law Working Papers

2021/16

Tihamér TÓTH

Workers and Competition Rules - with a focus on the challenges of the gig-economy

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Introduction

In this paper I will explore the question whether the traditional antitrust concept of an undertaking can provide a meaningful basis to understand and evaluate the developments in labour markets, especially work connected to digital platforms. The clear lines we used to draw between hierarchically organized employer-employee relations versus actions among business actors supplying goods to serve consumer demand have become blurred. Traditional labour relations are evolving, the space of changes accelerated by the mandatory restrictions and voluntary adaptations following the global COVID-pandemia.

Assuming that some of the readers are not experts of competition law, the first section of the paper discusses the personal scope of competition rules comparing three jurisdictions, the EU, the U.S. and Hungary. Special attention will be given to the legal status of natural persons. Before presenting the labour specific exemption both EU and US case law has developed, we will examine what competition law can learn from labour law specific definitions of employees in general and platform workers in particular. I will discuss some of the main features of platform services like Uber and Airbnb which may impact the classification of workers as employees or undertakings. Next, assuming that individuals in some platform markets are subject to competition rules, I will explore how their co-operation can be evaluated under rules prohibiting anti competitive agreements. The hottest topic is the evaluation of collective bargaining agreements: shall these be extended to platform workers as fundamental labour rights, or should these be condemned as serious cartel practices? In addition, vertical price fixing, non-compete clauses, exclusivity will be discussed with reference to traditional competition law concepts like agency, franchise and hub-and-spoke cartels.

2. The personal scope of competition rules

2.1. Persons and undertakings

Although the substantial competition rules in the three jurisdictions discusses in this paper are rather similar, they differ in one thing: the way how the personal scope of the rules is defined in the statutes. The Sherman Act of 1890 prohibits anticompetitive agreements and unilateral conduct that monopolizes or attempts to monopolize the relevant market in the U.S. Section 1 is structured in a way to focus on the subject matter of the unlawful conduct rather than the person: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1] In contrast, Section 2 uses the fairly general term of "person": "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[2] This is the widest personal scope that can be imagined, covering not only business entities, but also natural persons and even government

[1] 15 U.S.C. § 1. The second sentence, providing for sanctions, uses the phrase "person": "Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."
[2] 15 U.S.C. § 2

and other public bodies. In fact, judicial case law had to carve out state governments actions and related private conduct, rationalizing the reach of antitrust.[3] The state-action doctrine provides antitrust immunity if the state's intent to displace competition with regulation is “clearly articulated and affirmatively expressed as state policy”.[4]

European competition law, first codified under the ECSC Treaty of 1952 for the coal and steal sector, and later the EEC Treaty of 1957 with a general economic scope, applied a narrower term to draw the boundaries of competition rules. Article 65 ECSC and Article 81 EEC both used the terms “undertaking” and “associations of undertakings” defining the persons who can engage in anti-competitive conduct. The text has not changed over time, today’s Articles 101 and 102 TFEU still regulate the conduct of undertakings. Through a number of cases decided in the ‘90s, the concept of undertaking has acquired a unique EU law meaning, distinct from similar definitions existing under national competition, company or tax laws.

The European concept of an undertaking has a fairly vague positive and more precise negative dimensions. As early as 1962, the Court held interpreting the ECSC that an undertaking is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long-term economic aim.[5] The first definition of an undertaking under the EEC was delivered in 1984.[6] Accordingly, the term must be understood as “designating an economic unit for the purposes of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal.” An undertaking subject to the rules of competition law can be any person or entity that carries out an *economic activity*.[7] Economic activity is loosely defined as the production of goods, provision of services in a market.[8] Purchasing can also become an economic activity provided that the product is used for another economic activity.[9]

The negative dimension of the definition of an undertaking involves identifying categories of conduct which shall not be covered, and certain features which should be inconclusive. Activities linked to the exercise of *public authority* (law making, law enforcement, protection of the public order and the environment, etc.)[10] and services regulated by the *solidarity* principle (especially in healthcare and social security) are thus excluded from the concept.[11] It is also irrelevant whether the entity is for- or non-profit, the way it is financed, whether it is publicly or privately owned, or whether it was created by law or through a private contract. What is decisive is the economic nature, the function of the activity. The definition of undertaking is thus *functional*, and its boundaries can thus be flexible, depending on how we define the economic character of a conduct.

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[3]*Parker v. Brown* 317 U. S. 341 (1943). The Supreme Court held at 351that `(t)here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations.`

[4]*Cal. Liquor Dealers v. Midcal Aluminum, Inc*, 445 U.S. 97, at 105 (1980). For non-public actors the State should also put in place a mechanism to ensure that private interest do not interfere with the public ones. The test looks into whether the private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

[5] Joined Cases 17/61 and 20/61 Klöckner-Werke and Others[1962] ECR 325, para 341.

[6] Case 170/83 Hydrotherm Gerätebau [1984] ECR 2999, para 11.

[7] C-41/90 Klaus Höfner *and* Fritz Elser v Macrotron GmbH ECLI:EU:C:1991:161, para 21.

[8] Case C-35/96, *Commission v. Italy* (CNSD) [1998] ECR I -03851, para 36.

[9] FENIN

[10] *Calì e Figli* 1997 ECR I -1547.paras 22-23. (exercising environmental control in a see port).

[11] Case C-160/91 *Poucet* [1993] ECR I -637. (compulsory social security system scheme based on principle of solidarity).

As an example, reflecting the labor focus of this book, we should recall *Höfner*. German labor law in the '80s entrusted the federal labor office with the task to provide employment procurement services. The office provided the 'head hunting' services impartially and free of charge. Despite this exclusive right, a private market of recruitment consultants emerged which was tolerated by the federal authority. This legal monopoly was challenged in a private litigation between a company and two managers. The German government argued that the activities of an employment agency do not fall within the scope of the competition rules if they are carried out for free by a public undertaking. However, the Court held that "*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity*."[12] Employment procurement, especially executive recruitment, has not always been, and is not necessarily, carried out by public entities.[13] This case is a good example for the functional definition: the federal labour office exercised mainly public authority functions, and thus was not an undertaking in those respects, however, when it came to the provision of head hunting services, it qualified as an undertaking. Neither the public law nature of the body, nor the provision of public services deprives an activity from its economic nature. It is unclear to what extent the social goal pursued by the legislation and the office was a factor considered by the EUCJ. I believe that if the public monopoly had extended only to regular workers instead of managers, the outcome of the case could have been different. A public service connected to this group of customers of this kind might have escaped the reach of competition rules, unlike the unnecessary public monopolization of an otherwise lucrative market activity.

Concluding this chapter on the definition of the personal scope of competition rules, the Hungarian approach should also be mentioned. The first modern[14] Hungarian competition act of 1990 defined its personal scope precisely. According to Sections 2 and 3, the competition act applied to "entrepreneurs"[15] which were defined as any legal or natural person, or any other business association without legal personality that carries out economic activity. Economic activity at that time was understood as *for-profit* production or the provision of services carried out in business-like way, which was more in harmony with domestic civil law terminology than with the wider EU concept developed by the EU Court of Justice. The currently applicable law was adopted in 1996 following the law harmonization required by the European association agreement. The Competition Act of 1996 applies the same wording as its predecessor, but without defining what an economic or market activity may involve. Section 1 (1) provides that the act applies to "*market practices* carried out by natural and legal persons and branches in Hungary of undertakings domiciled abroad (…)." This wording allows the competition authority to follow the evolving EU jurisprudence on the personal scope of competition law.

For the purposes of this paper, we can conclude that the wording of the U.S. antitrust law gives room for the inclusion of workers, employees into the scope of competition rules, whereas in Europe the response will depend on how broadly the term undertaking can be interpreted. It certainly may include natural persons, but it is not the exact identity of the person which is important, rather the nature of its activity. As we will see, working under the control of another entity, lacking genuine business autonomy means that the conduct is not economic.

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[12] ibid, para 21.
[13] ibid, para 22.
[14] Competition law existed in Hungary between the two world wars as well, just like in most other countries in the region. This regime was swept away by the communist ruling.
[15] The Hungarian term is „vállalkozás".

2.2. The boundaries of an undertaking

There is another aspect of the concept of an undertaking which is relevant for this paper, bearing in mind the employer-employee relation. Competition law belongs to the realm of economic law, economics plays a naturally important role in shaping competition law and policy. Competition policy follows the Coasean view on business entities. According to this view, a firm is characterised as a single decision-taker and pursues a single goal (of profit maximisation); resource allocation within a firm is not guided through prices (as in the market) but through direct managerial control.[16] Instead of legal technicalities, economic reality is the decisive factor.

The European concept of undertaking covers not only one single legal entity, but in many cases a *group* of legal persons. There are several policy goals behind this interpretation. First, agreements relating to prices, market sharing, etc. between companies belonging to the same group shall not be prohibited, since there is no meaningful competition between these entities.[17] Second, this concept plays an important role when it comes to imputing liability to a legal entity and calculating the sanction for an unlawful conduct: the maximum amount of the fine is 10% of turnover which is calculated at the level of the undertaking – that is the group of companies forming one single undertaking.[18] A related concept is economic continuity which comes into play when a legal persons ceases to exist and its activities are transferred to another legal entity.[19] Finally, the single economic unit doctrine may help to establish territorial jurisdiction over conduct which actually occurred outside EU territory.[20]

EU competition law thus focuses on *economic units* instead of legal persons. The EUCJ explained in one of the Polypropylene cartel cases that competition law is “aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision”.[21]

In general, parent and subsidiary companies are considered to form one single undertaking if the subsidiary is directed by the parent company. As I will explain below, the Hungarian competition law applies the “group of entrepreneurs” concept as defined under merger control rules.[22] The EU law definition is provided by case law and provides less legal certainty.[23] It is

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[16] Ronald Coase, “The Nature of the Firm” 1937 Economica vol 4.

[17] As the Hungarian definition of personal scope is a bit different, the Hungarian Competition Act includes an exception for agreements between not independent entities in its Section 11(1).

[18] A related, or maybe a third aspect is connected to economic continuity, a problem related to attributing responsibility to a different legal person who acquired the business assets of the ceased legal entity that had committed the unlawful conduct.

[19] Case C-508/11 P *Eni v Commission* EU:C:2013:289, para 41. Furthermore, legal succession has important implications for private damage actions as well, see for example C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions* EU:C:2019:204. The Court ruled that in a case when all the shares in the companies which participated in a cartel were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the infringement.

[20] Case 48/69 ICI v Commission, ECLI:EU:C:1972:70 (addressing a decision with sanctions to a non-EEC corporation based on the fact that its subsidiary was involved in the cartel).

[21] Case T-11/89 Shell International Chemical Company v Commission [1992] ECR II-757, at para 311.

[22] I. Csongor Nagy argues that this is “an important though rather academic difference between EU and Hungarian competition law”. Nagy, Csongor István: Hungary. International Encyclopedia of Laws: Competition Law. Kluwer, 2016, p. 51.

[23] In the Commission’s practice, some legal entities within one corporate group may form separate undertakings. See: *Copper Plumbing Tubes* (Case COMP/E-1/38.069) Commission Decision C(2004) 2826. These companies

also disturbing that the boundaries of an undertaking seem to be issue specific. When the cartel group exception or the calculation of the fine is at stake, then the whole 'family' counts, when the attribution of liability is the question, then only the parent/subsidiary line is taken into account. Also, the jurisprudence under Article 101 TFEU does not seem to be fully in line with the concepts of undertaking and control under the merger rules.[24]

For this latter situation, there are two conditions that have to be met: the ability and the actual exercise of influence over the conduct of the subsidiary. The Court established a rebuttable presumption that both of the criteria are fulfilled where the parent company owns 100% of the subsidiary.[25] There is no need to prove that the subsidiary actually received instructions from the parent company as to its unlawful behaviour on the market. However, a 100% ownership is not necessarily required, the case law seems to follow the path of merger control rules at large. Thus, a majority shareholders can also qualify as exercising decisive influence over their subsidiaries.[26] The concept of undertaking may include minority shareholdings[27] or veto rights[28] as well if these allow the exercise decisive influence over another company. However, it is unclear whether the single economic unit doctrine can be used "upward", to sanction the subsidiary for the wrongdoing of the parent.[29] Also, it is not yet decided to what extent different subsidiaries would be regarded as one single undertaking if one of them did not participate in the infringement. For merger control rules, the whole group would be one single undertaking, for the purposes of attributing liability for an antitrust infringement, the parent-subsidiary relation is what counts. It is also unlikely that a subsidiary that did not participate or had a decisive influence over the infringing companies would be held liable for the cartel or abuse of dominance.[30]

Consequently, a parent company may be held liable for infringements of its subsidiaries even though it neither was involved in the anticompetitive conduct, nor was aware of it. As any case law based presumptions, this is also rebuttable, though the bar is set rather high. The parent shall prove that it did not exert decisive influence over the subsidiary (in fact, the presumption works as shifting the burden of proof from the competition authority of the plaintiff to the company).

It is important to understand that liability for the infringement of competition rules is regulated differently from the mainstream of civil/company laws in most Member States. The fundamental principle of limited liability based on the simple rule that stakeholders are not

had separate boards and operational managements, and also acted independently by competing against one another.

[24] Jones notes that "Although the terms control and decisive influence have been defined broadly in these undertaking cases, they are not clearly identical to those utilized in the EUMR context."; in Alison Jones, The boundaries of an undertaking in EU Competition Law; [2012] 8(2) European Competition Journal p. 318.

[25] Case C-97/08 Akzo Nobel NV and Others v Commission, para 61 of the judgment.

[26] In the Banana information cartel case a 80% limited partnership interest was enough to prove the ability to exercise decisive influence. Case C-293/13 P *Del Monte Produce v Commission* EU:C:2015:416, para 29.

[27] T-132/07 *Fuji Electric v Commission* EU:T:2011:344.

[28] C-623/15 P *Toshiba v Commission* EU:C:2017:21.

[29] This question is raised in the preliminary ruling procedure in Case C-882/19 *Sumal: A judge from Barcelon asked whether "*Does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?"

[30] See Benedikt Freund: Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law, in: *GRUR International*, ikab002, https://doi.org/10.1093/grurint/ikab002, 26 March 2021 (relying on AG Menagozzi in Case C-231/11 P *Commission v Siemens* EU:C:2013:578.)

liable for more than the amount they invest in a company does not apply here.[31] From this perspective, this single economic unit based interpretation does not conflict with the principle of personal responsibility, since the "person" is the "undertaking", and not the legal persons making up the undertaking.

The Hungarian Competition Act applies a concept borrowed from merger rules to deal with the economic unit issue. Put it differently, unlike EU law, the same approach is used regardless whether an anti-competitive agreement or an M&A case is at stake. Accordingly, an entrepreneur has direct control over another entrepreneur if it has the majority of the voting rights, it is entitled to appoint the majority of the executives, or is empowered by contract to exercise decisive influence on the controlled entity, or has de facto control.[32] This concept is wider than the EU one in two respects. First, a 50% + ownership is sufficient to create a link between the separate legal persons, whereas EU law relies on a 100% or similarly strong ownership structure. Second, there is no room to rebut a presumption created by the ownership majority, the rule is carved into stone.

The economic unit doctrine also works on the other side of the Atlantic. The US Supreme Court made it clear that a parent and its wholly-owned subsidiary were incapable of conspiring with each other, even if the parent does not actually exercise day-to-day business control.[33]

Before analysing the intra-undertaking relations in more details, we can state that the conduct of an employee in relation to its employer is not a subject that competition rules should regulate. Intra-entity issues are 'family problems' which should not be judged by third parties. Once a person makes the decision to tie herself/himself to a company, her/his independence will be lost and will form an integral part thereof, just like subsidiaries constitute one single undertaking with their parent company.

2.3. The agency exemption

There is another aspect of the term undertaking which may be relevant for the discussion of the status of normal and platform workers. Agents, acting as distributors of another undertaking may be regarded as integral part thereof, just like a worker would be. Distribution and supply agreements may include various restrictions as to resale prices or customers, territories. EU law used the single economic unit concept to exclude genuine agency relations with reference to employer-employee relations from its reach. Principal and agent, just like employer and employee form one single entity: neither agents, nor employees are regarded as separate undertakings, hence their contracts with the principal or the employer are not subject to competition rules.[34] The Court ruled in *Suiker Unie* that "if (...) an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking".[35]

[31] See, for example Frank Easterbrook and Daniel Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89 p.
[32] Section 23(1) of the Competition Act.
[33] Copperweld Corporation v Independence Tube Corporation, 467 US 752, 769, 767- 772 (1984). "With or without a formal 'agreement' the subsidiary acts for the benefit of the parent, its sole shareholder. (…) They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests".
[34] Case C-266/93, Bundeskartellamt v Volkswagen and VAG Leasing GmbH [1995] ECR I-3477, paras 18-19.
[35] Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73,111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 166., para 480.

The Commission's vertical guidelines elaborate on agency agreements. The Commission notes that unlike genuine contract-specific risks, such as financing of stocks, or risks connected to market-specific investments, the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.[36] The Guidelines list a number of additional factors, like that the agent shall not undertake product liability, nor take responsibility for the customer's non-performance of the contract. A genuine agent shall not be obliged to contribute to the advertising budget, nor make market-specific investments. These activities are fairly similar which would not be expected to be performed from an employee either. Consequently, the analogy between the classification of a person as an employee and an agent may come handy.

An important feature of the agency exemption, which is also relevant for the evaluation of work relations, is that it applies only for the period when the agency agreement ties the two persons. Before, and after, the agent company may be regarded as an undertaking, offering its distribution services on the market on which it offers its services to potential principals.[37]

The agency rule shall not be understood as a blanket antitrust exception, the evaluation of these agreements can be rather fact-sensitive. In general, it is not the title or the form of the contract, but its content, especially the allocation of costs and risks between the parties is conclusive. For example, the Commission believed that the prohibition of anticompetitive vertical restrictions should apply to the agreements between Mercedes-Benz and its German commercial agents in the same way as it would apply to an agreement with an independent authorised dealer.[38] According to the Commission's evaluation, the agent bore a considerable part of the risks and costs. For example, he had to buy demonstration vehicles at his own expense which could be sold later only as used cars. In contrast, DaimlerChrysler argued that its agents are *wholly integrated* into the Mercedes-Benz organisation and have the same legal relationship with it as its employees. For the court, it was important that the standardised agency agreements were worded in such a way that the role of the German agent was limited to collecting orders from potential customers, which were passed on to MercedesBenz for approval and implementation. Also, the agent had to negotiate vehicle sales at prices fixed by Mercedes-Benz – this was clause that was condemned by the Commission as a form of unlawful resale price maintenance. They did not buy new vehicles from the manufacturer and the agents were not required to hold a stock of new vehicles either. Therefore, unlike a dealer, the agent did not bear the risk of cars which he held in stock remaining unsold.

The General Court sided with the plaintiff. Unlike the Commission, the judges did not classify it as a price risk that the agents were authorised to grant discounts deducted from his commission. The Commission also overstated the risk born with transport cost. In Germany, Mercedes cars are often delivered at the gate of the factory. Otherwise, the transport cost is born by the agent which is then passed on to the customer. The judges did not believe that the obligation to purchase demonstration vehicles was such as to change the characterisation of the agents. In practice, their purchase price was preferential and agents were able to sell them profitably as used cars. The Commission also failed to show that the guarantee payment is commercially inadequate and so the agents bore a genuine financial risk as regards the obligation to carry out repair work under guarantee.

[36] Guidelines on Vertical Restraints, Brussels, 10.5.2010 SEC(2010) 411 final, point 15.
[37] CEPSA, para 41.
[38] Case T-325/01. DaimlerChrysler AG v Commission, ECLI:EU:T:2005:322.

Hungarian competition law does not condemn restrictions included in genuine agency contracts either. Although agents formally fall under the personal scope of the Competition Act, the practice of the GVH relies on the economic unit doctrine as borrowed from EU case law to exclude the potential of an anti-competitive goal or effect. The qualification shall be carried out in the relevant economic context, thus the evaluation of agency agreements may change from case to case. As an example, for many years, book shops were regarded as agents of the publishers, so that the principal was entitled to set the final price of the books. Recently, however, the GVH has adopted a decision departing from this position.[39] In light of new market developments, especially the increased bargaining power of some book retail chains, the distribution of books is now scrutinized under competition rules. Although the ownership of books remains with the publisher and the shops did not bare significant storage costs either, they do invest into promoting their brand names, organize special author-readers events. It was alien to the nature of a genuine agency relation that the publisher was prohibited to change the price of its books stored at the bookstores for several months following its publication. It was also important that many shops enjoy significant bargaining power in relation to the smaller publishers.

To conclude, the agent forms an integral part of the principal's undertaking if it does not bare any, or only negligible financial and commercial costs and risks linked to sales of goods to third parties on behalf of the principal. Interestingly, the fact that the agent acts for more than one principal in parallel does not make the agent an independent undertaking.[40] The same approach may be helpful to decide whether platform workers are separate undertakings or are integrated into another one.

3. Applying competition rules to individuals

One of the thesis of this paper is that workers, that is natural persons, may qualify as an undertaking for the purposes of competition law. Bearing this on mind, I would like to explore the more general question: under what conditions do individuals have to comply with competition rules? Natural persons may be held liable for competition law infringements in two ways. First, a person may be sanctioned for the infringement committed by a company. Sanctions like this do not exist at EU level, but most Member States[41] introduced some kind of personal liability against managers and employees who were involved in the unlawful action personally or did not exercise their supervisory functions properly. Sanctions range from administrative fines and disqualification orders to imprisonment. The liability of individuals is secondary as it depends upon the liability of their company in the first line. Another option is when the individual is the undertaking, a person directly addressed by the norm. The term ‘undertaking’ can cover anyone who carries out an economic activity. The person does not even have to take the legal form of an individual entrepreneur. The individual may act in its personal capacity, without being able to issue invoices and be a separate subject of tax law. The same applies under US antitrust where the ‘open’ prohibition of the Sherman act reaches anyone who may be in the position to conclude anti-competitive agreements or take part in conspiracies.

An important part of competition law cases connected to individuals in Europe relates to (regulated) professions. In one of these cases, reviewing the Commission’s decision relating to the organization of Italian customs agents, Court took into account that customs agents assume

[39] Vj-96/2009, the explanation relied heavily on the Commission’s Vertical Guidelines.
[40] Case C-279/06, CEPSA [2008] ECR I-6681, para 36.
[41] Among others, Spain, Belgium and Germany.

the financial risks involved in their activity in as much if there was an imbalance between expenditure and receipts, they had to bear the deficit themselves.[42] The conclusion was that intellectual nature of the activity and that it required authorisation, did not as such exclude it from the scope of the competition rules of the Treaty. In *Wouters*, the EUCJ held that members of the Dutch bar who offered legal services for a fee and bore the financial risks carried on economic activities and so constituted undertakings.[43]

In 2004, the Commission, determined to eliminate remaining trade barriers in the European professional services markets, published a document putting this issue on the agenda.[44] The Commission analysed markets in which lawyers, notaries, accountants, architects, engineers and pharmacists operate in the EU and identified five main categories of national legislation or self-regulation that may restrict competition. These related to price regulation (recommended, minimum, fixed or maximum fees)[45], advertising restrictions, entry restrictions with reserved rights and regulations on business structure (i.e. prohibiting multidisciplinary practices).

The Commission emphasized that regulations adopted by professional bodies are decisions of associations of undertakings falling under Article 101 TFEU. This implies that professional service providers qualify as undertakings, since Article 101 prohibits only decisions by associations of undertakings. The Commission makes clear that members of the liberal professions, insofar as they are not employees, are engaged in an economic activity because they provide services against remuneration on markets.[46] Neither the fact that the activity is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources, nor the complexity and technical nature of the services provided nor the fact that the profession is regulated alters this position.[47] Importantly, the Commission also noted that the professional body comes under the scope of competition rules even if professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.[48] Under the jurisprudence of the EUCJ, it makes no difference whether professional bodies have public law status[49] or have certain public interest tasks to perform[50] or act in the public interest.

Another set of cases involving individual relates to *professional sports* activities. The EUCJ pointed out in its *Walrave and Koch* judgment already in 1974 that sport is subject to EU law as long as it constitutes an economic activity.[51] European case law evolved mainly

[42] Case C-35/96 Commission v Italy [1998] ECR I-3851, para 38.
[43] Case C-309/99, Wouters v Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR I-1577, paras 46–49 and 64.
[44] Report on Competition in Professional Services, Communication from the Commission, Brussels, 9.2.2004 COM(2004) 83 final.
[45] The Commission condemned fixed tariffs for Italian customs agents: Commission Decision of 30.6.1993 93/438/EEC CNSD.,(OJ L 203, 13.08.1993).
[46] Indeed, the Court confirmed in *Wouters* op cit note **Hiba! A könyvjelző nem létezik.**, para 48, that lawyers offer, for a fee, services in the form of legal assistance and representation of clients in legal proceedings. Similar reasoning applies for other professions, such as customs agents in the two *CNSD* (T- 513/93 and C-35/96) cases and medical specialist doctors in *Pavlov* op cit note **Hiba! A könyvjelző nem létezik.**.
[47] Point 68. of the Communication.
[48] Point 69. of the Communication.
[49] *Wouters*, paras 65 and 66.
[50] Advocate General Léger in his Opinion in Case C-35/99 *Arduino*, [2002] ECR I -01529, para 56.
[51] C-36/74, Walrave and Koch v. Association Union Cycliste Internationale, ECR 1974 01405. The Court also explained that the Treaty does not affect the composition of sport teams, the formation of which is a question of purely sporting interest and is outside the boundaries of economic activities.

through the application of the free movement rules prohibiting discrimination.[52] The first seminal competition law judgment was delivered in 2006. The EUCJ confirmed in *Meca-Medina* that sporting regulations with economic effects fall also under the egis of competition rules.[53] The case concerned two long distance swimmers from Spain and Slovenia who were banned from competitions for four years due to their failed drugs test. The Court held that a sporting activity qualifies as an economic activity whenever it takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen.[54] It is interesting to note that, in contrast to *Höfner*, *remuneration* seems to be a distinguishing condition for establishing the personal and material scope of competition rules.

It is interesting to note that sports have not been on the top of the agenda of the EU Commission's enforcement priorities. The judgments shaping case law were preliminary rulings assisting national judges. Most of the Commission's experience in this field derives from its state aid practice under Article 107 TFEU. The European Commission adopted only one formal decision in the sports sector recently, involving restrictive regulations of a sports association. In its *International Skating Union* ("ISU") decision of 2017, the EU competition authority condemned the speed skate eligibility rules of ISU that could even result in a lifetime ban to participate in ISU activities and competitions if she or he decided to skate at an event not approved by an ISU Member and/or the ISU itself. The General Court approved the Commission decision's most important points in 2020.[55] The core issue discussed in this paper, the personal scope of competition rules was not even raised by the applicants. No one doubted that professional skaters are undertakings, hence the association of national associations is an association of undertakings for the purposes of competition rules.

The plaintiff in the ISU case raised an important legal issue that could also be of relevance to the globalized platform work market: *extraterritorial jurisdiction*. ISU argued that the decision not to approve the Dubai Grand Prix does not fall within the territorial scope of Article 101 TFEU, since that event took place outside the territory of the European Economic Area (EEA). The General Court disagreed. It recalled, first, that the Commission's competence under public international law to find and punish conduct adopted outside the EU may be established on the basis of either the implementation test or the qualified effects test[56] The implementation test justifies the Commission's competence by the place where the alleged conduct was carried out. In accordance with the qualified effects test, the Commission may also justify its competence where the conduct is capable of producing immediate, substantial and foreseeable effects on the territory of the EU[57]. The decision was not specifically directed at the refusal decision in respect of the Dubai Grand Prix as such, this was just used as an example to illustrate the restrictive nature of the eligibility rules. The General Court ruled that in view of the severe and

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[52] I believe that since both competition and free movement rules have the common goal of protecting the single market, classifying an activity as economic should follow the same paths.
[53] Case C-519/04 P, David Meca-Medina and Igor Majcen v. Commission, ECR 2006 I-06991.
[54] ibid, para 23.
[55] Case Case T-93/18 International Skating Union v. Commission, ECLI:EU:T:2020:610. The decision was partially annulled as far as it related to arbitration clauses. The judgment is now at the EUCJ, case number C-124/21 P.

[56] The court relied on *Ahlström Osakeyhtiö and Others* v *Commission* as regards the implementation test, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 16, and on *Intel* v *Commission* as regards the effect doctrine, C-413/14 P, EU:C:2017:632, paragraphs 40 and 47.
[57] The 'qualification' refers to the limitations imposed by public international law principles (the effects must be producing immediate, substantial and foreseeable).

disproportionate penalties, the applicant's eligibility rules prevented others from organizing events *within or outside the EEA*.[58] Consequently, the eligibility rules were capable of producing immediate, substantial and foreseeable effects in the territory of the EU. [59]

The practice of the Hungarian competition authority as regards individuals and their associations has always been in line with that of the EU Commission. There were several cartel cases against associations of professionals, including lawyers[60], pharmacists[61], accountants.[62] The approach of the GVH was to put the emphasis on the nature of the conduct instead of the legal status of the legal or natural person. One of the most recent decision of the GVH imposing a HUF 1 billion fine also relates to the labour market.[63] The GVH found in December 2021 that certain provisions contained in the ethical code of the Association of Hungarian HR Consulting Agencies were unlawful. In addition to the regulation of minimum fees, the prohibition on members enticing the employees of fellow members to switch employers ('no-poaching clause'), which sought to share the sector between members and prevent the free movement of employees on the market, was also determined to be unlawful.

4. The provision of work as a service – the labor exemption

4.1. *The labour market*

The scope of competition law in relation to workers raises two important questions: to what extent can employees be subject of competition norms, and, assuming that employees are excluded from the reach of competition rules, when is their classification as employee under labor law decisive for the application of competition law (i.e. some employees may in fact carry out economic services, while some independent contractors may work under circumstances more similar to those of an employee).

One may argue that the nature of normal markets for goods and services is distinct from labour markets for moral reasons. Providing one's work to another person does not involve the transfer of property. For example, from a Catholic social teaching perspective, the performance of work is a kind of contribution to the fulfilment of creation, hardly detachable from human dignity. Yet, I am not convinced that this should have a conclusive impact on the interpretation of what constitutes economic activity and to what extent a worker shall be subject to competition rules. The exercise of every economic activity can, and indeed should be performed in line with human dignity. I do not see any reason why a different dignity approach should be applied for the provision of a haircut or house cleaning services than to working under the direction of an employer, providing similar or even exactly the same kind of work (trimming your beard or cleaning the house). I am not arguing against the importance of dignity. To the contrary, I believe that ensuring the respect of human dignity shall apply not only to workers, but also to any other individual who is doing a job for another person, regardless of its legal status.

If we were to look at individuals offering their work (including their knowledge, skills and time) just as any other individual entrepreneur, then the *time element* may be of great significance. The actions of a worker in the course of and connected to an employment contract may well be

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[58] It should be noted that the judgment refers to the EU and the EEA inconsistently.
[59] Judgment, para 129.
[60] Vj-119/1996.
[61] Vj-93/2004.
[62] Vj-16/2005.
[63] Vj/61/2017. HUF 1 billion is about EUR 28,5 million.

excluded from the reach of competition rules, whereas conduct connected to a time period before, or following the employment may be relevant for competition rules.

4.2. EU competition law jurisprudence on workers

EU competition law had to deal with situations where the application of competition law to labour relations was at the heart of a case. These cases related to a legal rule unique to EU competition law. Article 106(1) TFEU prohibits Member States to create exclusive, or special rights, or put public undertakings into a situation where another Treaty provision, especially competition rules would be infringed. Before condemning a restrictive state measure, it is essential to clarify whether the related activity comes under the personal and material scope of the competition rules, that is, whether the conduct is of economic nature.

In *Becu*, the EUCJ ruled that dock workers who work for and under the direction of their employers did not constitute separate undertakings, rather, they were incorporated into the undertaking of their employer.[64] SMEG, a Belgian company, operated a grain warehousing business in the Ghent port area. SMEG had certain operations carried out by non-recognised dock workers, contrary to a law from 1972 which provided that such work may be performed only by recognised dockers. The hourly rate of a recognised worker was more than double of the amount paid by SMEG. The Belgian legislation recognised only the occupation of dockers, entrusting the performance of all dock work exclusively to them. Unlike in the *Port of Genova* case, the Member State did not grant any special or exclusive right to a company.

AG Colomer recalled that the wages of recognised dockers were laid down through collective-bargaining negotiations between employers' and employees' representatives. These could be seen as agreements which directly or indirectly fixed prices contrary to Article 101(2)(a) TFEU. He had no doubt that dockers engage in economic activities since they offer, for remuneration, services consisting in various dock duties: loading, unloading, trans-shipment, storage. The AG also emphasized that importance of the "*ability to take on financial risks which gives an operator sufficient significance to be capable of being regarded as an entity genuinely engaged in trade, that is to say to be regarded as an undertaking*"[65]. It was for this reason that employees do not constitute undertakings, but are auxiliary organs forming one economic unit with their company. Dockers perform a functionally different activity from that of any undertaking engaged in the provision of services. This was not called into question by the fact that their contract was not written, or that the period of their employment was short. The decisive factors were that they received orders from them and did not bear any commercial risk.[66]

It is a complex question whether and to what extent the provision of one's work and labour is distinct from the provision of goods and services in a market. This view was explained by AG Jacobs in *Albany*, just one year after *Becu*.[67] Albany International was a textile company that sued the Textile Industry Trade Fund, after Albany refused to pay to the Fund on the ground

[64] Case C-22/98, Criminal Proceedings against Becu, ECLI:EU:C:1999:419. para 26. There was another competition law case involving dock work. In Merci Convenzionali v. Port of Genova the EUCJ held that Article 106(1) of the Treaty, in conjunction with free movement and competition rules, precludes national rules which require an undertaking established in that State to have recourse, for the performance of dock work, to a dock-work company formed exclusively of national workers.

[65] Opinion of Ruiz-Jarabo Colomer delivered on March 25, 1998, point 53.

[66] Opinion, point 56.

[67] Case 67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1996] ECR I-05457. See also e.g., CNSD [1993] OJ L203/27, Cases C-180-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451.

that it requested an exemption from the compulsory affiliation to the Fund. In the Netherlands, supplementary pensions topped up the basic pension. Such supplementary pensions were normally managed by collective schemes covering a sector of the economy, on the basis of compulsory affiliation, from which rule exemptions could be granted.

AG Jacobs acknowledged that the provision of labour could be characterized as the provision of any other service from an economic point of view. However, the legal interpretation of this term, in the context of the text of the Treaty, would lead to a different result.

> "Dependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services."[68]

Jacobs also relied on the wording of Article 101(1)(a) TFEU which refers to 'purchase or selling prices' and to 'other trading conditions' that could be restricted by an agreement between undertakings. Employees, on the contrary, are concerned with 'wages' and 'working conditions'. Since employees cannot be qualified as undertakings, trade unions, or other associations representing employees, are not associations of undertaking either. Whether they are undertakings in their own right, that can be a different question. When trade unions run in their own right supermarkets, savings banks, or travel agencies, competition rules should be applicable to them. In contrast, when they participate in collective bargaining with employers, they act merely as agents for employees belonging to a certain sector and do not provide an economic service in their own right.[69]

The Court followed the path of its AG and created a 'qualified labour exemption'[70] for collective agreements concluded by workers and employers. The judges were aware that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the *social policy objectives* pursued by such agreements would be seriously undermined if management and labour were subject to competition rules when seeking jointly to adopt measures to improve conditions of work and employment.[71] To underpin its point the EUCJ cited various provision of the Treaty emphasizing the importance of social dialogue, a high level of employment and social protection.

My impression is that this sort of reasoning relying on social goal, like social policy considerations, or the proper functioning of a profession, goes beyond the definition of the personal scope of competition rules, and has more in common with the *Wouters* exemption. In Wouters, the lawyers concerned were defined as undertakings, but the competition restrictions were held to be necessary to fulfill another public policy goal, hence the EUCJ's declaration about the non-applicability of the cartel prohibition of Article 101 (1) TFEU.

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[68] Opinion, point 215.
[69] Opinion, points 226-227.
[70] Nicola Countouris Valerio de Stefano and Ioannis Lianos: The EU, Competition Law and Workers Rights, p. 4.; in: S. Mc Crystal, E. McGaughey and S. Paul (eds.), The Cambridge Handbook of Labour in Competition Law, Cambridge University Press 2021.
[71] Ibid, para 59.

Another question raised in *Albany* was whether the pension fund itself should be regarded as an undertaking. Just to recall, it is the nature of the activity that is conclusive as to the combined personal and material scope of competition rules. The same issue arises as regards workers, whose economic position is regulated by social policies. The EUCJ started its argument with reference to *Poucet and Pistre*, where it was held that that concept did not include organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity. Retirement pensions were funded by employed workers, the statutory pension entitlements were not proportional to the contributions paid into the pension scheme, and schemes with a surplus contributed to the financing of those with financial difficulties. This element of *solidarity* made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory.[72]

The EUCJ's conclusion was different in *Albany.* The amount of the benefits provided by the relevant fund depended on the financial results of its investments, and the sectoral pension fund was required to grant exemption to an undertaking under certain conditions. The judges acknowledged the pursuit of a social objective, the solidarity element and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered by insurance companies. These factors did not mean that they would become non-economic, however, it may justify the granting of an exclusive right to the organization.[73]

In 2014, the EUCJ was invited to give a preliminary ruling interpreting competition rules as regards collective agreements. The outcome of *FNV Kunsten*, another reference originating from the Netherlands, was different from *Albany.*[74] FNV and the Netherlands Musicians' Union, on the one hand, and the Association of Foundations for Substitutes in Dutch Orchestras, an employers' association, on the other, concluded a collective labour agreement relating to musicians substituting for members of an orchestra. The collective labour agreement laid down minimum fees not only for substitutes hired under an employment contract but also for self-employed substitutes. The EUCJ ruled that such mixed agreements, where not only workers, but also self-employed persons were involved, are subject to the competition rules of the Treaty. The EUCJ acknowledged that they perform the same activities as employees, service providers are nevertheless undertakings within the meaning of Article 101(1) TFEU, since they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal.[75] The judges followed the opinion of AG Wahl who argued that an organisation representing self-employed persons as well, does not act as a trade union, being a social partner, but acts as an association of undertakings.[76]

The EUCJ's position in *FNV Kunsten* was certainly in line with previous jurisprudence, however, it seems to give more weight to formalities than to economic reality. A more thorough investigation into the economic circumstances of how contracted musicians perform their work could have shown similarities with those of employed orchestra members. Why is a fixed rate among contracted musicians more harmful to society than the same agreement among employees? Treating entities in basically the same situation differently due to the title of their contract does not bring about level playing field. A radical, yet logical solution would be to

[72] Ibid, para 78.
[73] Ibid, para 86.
[74] Case C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden, ECLI:EU:C:2014:2411

[75] Ibid, para 27
[76] Ibid, para 28.

either allow the collective price negotiation for both employed and contracted workers, or prohibit it for both groups. Alternatively, an exemption could be granted to those workers who are really dependent on their employer, just like the mass factory workers of the late 19th century. Protecting those in genuine need is social policy.

Albany shows that the interpretation of the solidarity dimension of an activity is not straightforward. Small differences may move a scheme from the non-economic sphere to the competitive one. Another seminal, more recent case concerning solidarity versus economic activity related to the Slovak health care system, where the Commission and the EU courts reached different decisions.[77] In *Dovera*, the EUCJ's Grand Chamber, following its AG's opinion, set aside the General court's judgment in June 2020, confirming its case-law that competition rules (in this case, state aid rules) do not apply to health insurance bodies operating under State supervision in the context of a social security scheme that is pursuing a social objective and applies the principle of solidarity. The EUCJ focused on the extent of solidarity and state supervision. It held that he existence of a certain amount of competition as regards the quality and scope of services provided in the Slovak compulsory health insurance scheme, were not such as to call into question the social and solidarity-based nature of the activity. These included the ability of insurers to offer additional services free of charge, the right of the insured to choose his insurer and switch annually. Although the insurance bodies had to seek and distribute profits, this was strictly regulated by law with a view to preserve the viability and continuity of compulsory health insurance in the country.

The discussion of these may lead us to conclude that if the relationship between workers and employer have features resembling *solidarity*, then its qualification as non-economic activity is justified. In a standard factory setting the wages of workers performing a job are the same and is not directly connected to the actual quantity and quality of their work.[78] This can be interpreted as some kind of solidarity among the workers: there are individuals who work a bit less, others are more diligent, yet they receive the same wage. On the other hand, if the remuneration of a worker depended on her or his individual work performance (hours, quality), then it may support an argument that the activity is dominantly economic, similar to that of an individual entrepreneur. Following *Dovera*, the existence of financial incentives which create some bounded competition between the workers would not change the solidarity and thus non-economic qualification. This could help argue that some categories of employees should be treated like independent economic actors.

4.3. The Hungarian practice

During the thirty years of modern competition law enforcement in Hungary, the potential conflict between labour and competition laws has not materialized. Employment related issues arise from time to time during merger control procedures whenever the contract includes non-compete provisions. The GVH has only recently intervened in the market for HR consultants imposing huge fines because of anti-competitive clauses in their ethical code.[79] On the other hand, collective agreements, or more generally, the classification of workers as undertakings

[77] C-262/18 P and C-271/18 P Dôvera zdravotná poisťovňa, ECLI:EU:C:2020:450. The Commission found that the activity carried out by SZP and VšZP was non-economic in nature and that those bodies were consequently not undertakings within the meaning of Article 107(1) TFEU. The General Court disagreed. The EUCJ sided with the Commission.

[78] Admittedly, the quality of the work will have an impact in the long term in both a negative (firing the lazy worker) and a positive way (annual rewards). These consequences are, however, subject to the discretion of the employer.

[79] Vj/61/2017, see also at footnote 64.

has never been considered by the national competition authority. One of the reasons may relate to the subject matter scope of the Competition Act, the rules of which apply unless other acts do not regulate a given topic differently.[80] Since the Labour Act includes detailed provisions about company specific and economic sector wide collective agreements, evaluating the anti-competitive effects of these agreements has never been on the agenda.

4.4. U.S. case law

On the other side of the Atlantic, neither workers, nor labour unions were originally excluded from the rather general scope of the Sherman Act. Interestingly, the Ohio senator giving his name to the bill, believed that the act would not cover labour relations. Sanjukta M. Paul cites Senator Sherman responding to a question during the debate of the bill: "*combinations of workingmen to promote their interests, promote their welfare, and increase their pay are not affected in the slightest degree, nor can they be included in the words or intent of the bill*."[81] Paul notes, reviewing the adoption process of the antitrust bill and the early jurisdiction of courts, that "*the Sherman Act, originally the child of a republicanism that opposed huge conglomerations of capital and sought to protect the small enterprise and artisan of traditional American economic life, soon enough became a weapon against the working people who labored for those new conglomerations.*"[82]

In 1914, the adoption of the Clayton Act created the statutory labour exemption.[83] This was interpreted to apply only to relations between an employer and its existing employees. This resulted in the adoption of the Norris-LaGuardia Act of 1932, which broadened the scope of the labour exemption, expressly favouring arrangements of labour organization, representation, and negotiation of terms and conditions of employment.[84] The labour exemption granted by later statutes brought labour union specific arrangements into the sphere of legality, regardless of their potential anti-competitive effects. This reflects the victory of social policy favouring fundamental labour rights over the value of free competition among workers in the labour market.

The exemption was built on the existence of an employment legal relationship. A union of independent contractor truckers could thus not have benefited from the benefits of the labour exemption.[85] The dominant view was driven by the Supreme Court's *Columbia River Packers*

[80] Section 1(1) of the Competition Act. This provision does, of course, not restrict the enforcement of EU competition rules by the GVH, yet it may have had an impact on the overall attitude of the authority.

[81] Sanjkuta M. Paul, The enduring ambiguities of antitrust liability for worker collective action, Loyola University Chicago Law Journal (Vol. 47. 2016), pp 969-1048, at p. 999.

[82] Id. at p. 1000.

[83] 38 Stat. 738 (1914), codified at 29 U.S.C. section 52. Section 20 of the Clayton Act reads: "*No restraining order or injunction shall be granted by any court . . . in any case between an employer and employees (...) involving, or growing out of, a dispute concerning terms or conditions of employment. (...) And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor (...); nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

[84] 47 Stat. 70 (1932), codified at 29 U.S.C. sections 101-115. Section 2 provides that „*Whereas under prevailing economic conditions (...) the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, (...) it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment.*"

[85] *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 126 (3d Cir. 1974).

Association v. Hinton[103] decision and provides that independent contractors are not exempt from the restrictions posed by antitrust rules.[86]

The existence of a labour exemption highlights the importance of how labour laws define workers. Competition rules may allow another laws, like labour law to restrict its field of application. The qualification of a person as an employee under labour law should take into account similar factors than competition law would rely on to establish that someone is not an undertaking. Consequently, the legal status of individuals under national labour laws has an influence on the lawfulness of co-operations taking place on and in relation to the platform. This topic will be explored in the next section.

5. Worker: employee or independent contractor/self-employed?

The qualification of a person's status has legal implications. Labor law provides special protection for workers. In the EU, labour law is mainly regulated at national level. A distinctive factor in most jurisdictions, including also the EU internal market rules, is subordination, a sort of economic dependence and hierarchy: an employee is a person who acts under the direction and supervision of an employing entity. The natural person offers her or his work, skills, time, in essence an important part of her or his life to the employer. From the perspective of a company, workers bring about additional costs, both in terms of additional privileges like minimum wage requirements and also in the form of higher taxes and social security expenses. Relying on the performance of an individual in the form of an entrepreneurial contract is often more cost-effective than employing the person as a worker.

The cartel prohibition poses serious restrictions on how they can co-operate with each other to improve their working and living conditions. A situation like this is good for the employers, who, due to the lack of worker status will spend less on wages and social contributions which in turn may enhance their competitiveness and could ultimately benefit consumers of the platform. From the worker's perspective, being an unemployed individual entrepreneur comes with more freedom, maybe with better tax conditions. However, this comes at a price of less social security protection and an exposure to competition law enforcement.

Labour law reflects on market developments in many jurisdictions. The evolving nature of work may have on impact on how employees are defined. Special rights and obligations granted by labour, tax and social security laws, and also technological development contributed to the rise of various legal constructs of how work can be performed. In Europe, 13% of employed people aged between 20-64 years in the EU are self-employed.[87] A view years before, Eurostat reported that 32.6 million persons aged 15 to 74, accounting for 14% of total employment were self-employed in 2018.[88] In relation to the legal classification of self-employed people, it was interesting that in the Netherlands 31.3% of the self-employed declared that their client(s) had control over their working time in 2017.[89] In addition, one in three of the economically dependent self-employed wished to work as an employee.

[86] *Columbia River Packers Association v. Hinton,* 315 U.S. 143 (1942).
[87] Second quarter of 2021, as reported by Eurostat, https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20211123-2.
[88] Almost one in every three people in employment in Greece was self-employed in 2018 (30%) and around one in five in Italy (22%), Poland (18%) and Romania (17%). https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/edn-20190430-1
[89] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Self-employment_statistics

In the U.S., about 15.5 million people, 10% of the workforce was independent contractors in 2018, according to a report of the U.S. Bureau of Labor Statistics.[90] This is a fairly conservative figure, the methodology would not include many who work for online platforms and also excludes those who might have another primary job. Other estimates put this number at 20%.[91] Other researches indicate that 25-35 % of workers in the U.S. participate in the gig economy in some capacity.[92]

S. Paul lists these different categories of independent contract workers who would formally not benefit from the U.S. labour exemption and thus any collective action on their part to raise their living conditions, etc. would fall under the cartel prohibition:

a) self-employed on paper, but work in large facilities, often as professionals
b) "soft professionals": IT, massage, repair, artists, people whose work is often not easily replacable,
c) "working class" contractors, i.e. drivers, constructions and healthcare workers who have little formal education, and
d) small farmers, commodity producers.[93]

In the U.S., due to the legal nature of the Sherman Act, participating in a cartel would make these workers criminals.

With more and more non-traditional workers, the distinction between employees and self-employed or individual contractors. The grey zone consist mainly of dependent contractors ('vulnerable' self-employed), casual workers (intermittent workers, voucher based-workers) and also some Gig-economy workers. Instead of looking at the heading of their contract, if any, the content and nature of the work becomes more important.

As a solution, international organizations often support the extension of legal protection to individuals working under a contract, but performing work similar to employees. The OECD Employment Outlook of 2019 stated that policy-makers should ensure that a correct qualification of the employment relationship is performed and provide collective bargaining rights to workers who may be unduly excluded.[94] The OECD thus believes that the status of employee under labour law should be extended to specific groups of workers in the 'grey zone' between employee and self-employed. The document favours he introduction of exemptions from the cartel prohibition for specific categories of occupations, where workers are most likely to have weak bargaining power, no influence on the content of their contractual conditions or few alternatives for switching jobs.[95]

Paul names three factors which could help avoid the misqualification of an individual as an entrepreneur instead of an employee: (i) the level of control exerted, (ii) the operations of which the work is part and (iii) the economic realities, including the relative power of the parties.[96]

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[90] Available at: https://www.bls.gov/news.release/conemp.nr0.htm. See article at https://www.npr.org/2018/06/07/617863204/one-in-10-workers-are-independent-contractors-labor-department-says?t=1626170002948

[91] NPR/Marrist poll (2018), http://maristpoll.marist.edu/nprmarist-poll-results-january-2018-picture-of-work/#sthash.SvIXg4WI.dpbs

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available at: https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/employingindependentcontractors.aspx.

[93] Paul., pp. 984-985.

[94] EMO; OECD, 2019a., p. 207.

[95] Ibid, pp. 208-209.

[96] Paul, pp 986-987.

Another important factor I would add is that an employee does not normally provide the capital and/or the tools for the job. It is the employer who invests, creates the conditions, the "hardware", while the employee is providing her or his work, skills, the "software". In the sharing economy this is not always the case. In many instances the platform worker is using its own vehicle, laptop, bike, etc. These are strong reasons to qualify them as undertakings for the purposes of competition law instead of employees.

The power to give instructions can also be a complicated matter. Many organizations do not function in a hierarchical structure as the old-fashioned Ford factory. Employers often just set the targets and leave their employees significant freedom to meet those goals. The same is true for most self-employed individuals – they enjoy legal and formal independence from their contractor, yet in reality, they have to meet a goal set by the other party. It is true, that they are flexible as to the timing and place of work, but is this also not true for many traditional employees in the post-COVID home office word?

Another example for presenting the difference between a worker and an undertaking is the allocation of expenses occurred in relation to work performance. Under labor law, this must always be covered by the employer. The practice of most platforms, whereby make platform workers pay all the expenses related to using their own tools and equipment suggests that platform operators picture these individuals more like independent undertakings. Gyulavári, advocating an extended labor law protection, argues that this is unfair and that platforms should also compensate the platform worker for using her own computer, car, bike etc.[97]

In addition to the relative bargaining power, the tools used to perform the work, and the number of employers/business partners should be decisive. My argument is that we should reconsider the pros and cons of minimum price/wage agreements and the collective negotiations required to meet such a goal regardless whether the persons are formally categorized as employees or undertakings. Relative market power should play an important role in this evaluation. At a policy level, we should have less concerns about collective actions by individuals who do not represent a significant portion of the relevant market, while the employer/business partner possess significant purchasing power.

The more the lines between employment and contractual relations is blurred, the less clear the labour exemption will become for competition law enforcers. Such uncertainty under labour law could force competition lawyers to create their own concepts, distinctions and rely on a case-by case evaluation of both formally employment and contractual relations, focusing on economic reality instead of formal labour law concepts. Such an approach would not help the consistency of a jurisdiction's legal system, nor would enhance legal certainty.

These developments leading to the re-qualification of employees may occur in case law or take the form of new laws.[98] In the EU, about half of the Member States have taken actions directly relevant to regulating the employment status of *platform workers*. Most of these are particular to on-location platform work. Some countries are considering the introduction of a rebuttable presumption of employment (the Netherlands, Spain) as a means to reduce uncertainty, or placing the burden of proving that an employment relationship does not exist on the platform (Germany).

[97] Gyulavári, 9. o.
[98] Commission consultation document at footnote 1, p. 8.

In Ireland, the Competition Amendment Act 2017 introduced specific rules on collective agreements.[99] According to the Irish law following ILO deliberations, a *fully dependent self-employed worker* is

a) "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 (whether express or implied, and if express, whether orally or in writing), and
b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons;"

The act also defines *false self-employed persons* who meets these conditions:

a) "performs for a person ('other person'), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person,
b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship,
c) is required to follow the instructions of the other person regarding the time, place and content of his or her work,
d) does not share in the other person's commercial risk,
e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and
f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking."

This detailed definition seems to be in line with the EU Court's *FNV Kunsten* judgment. It is interesting to note that this definition was codified in the competition act, although this is expected to have an impact across the whole national legal system.

Defining the boundaries of employees and self-employed (undertakings, for the purposes of competition law) may also be clarified through case law. In a recent UK court procedure, Uber argued that it acted solely as a technology provider with its subsidiary, *Uber London*, acting as a booking agent for drivers who are approved by Uber London to use the Uber app. A contract is made between the driver and the passenger whereby the driver agrees to provide transportation services to the passenger. The fare is calculated by the Uber app and paid by the passenger to Uber BV, which deducts 20% and pays the balance to the driver. Uber characterised this process as collecting payment on behalf of the driver and charging a "service fee" to the driver for the use of its technology and other services. Uber also emphasised that drivers do not work under a regulated schedule. In conclusion, drivers are independent contractors who work under contracts made with customers and do not work for Uber.

The Supreme Court disagreed. It started with recalling the very purpose of labour law the employment legislation: to protect vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work.[100] The judges held unanimously that drivers work for Uber. First, it is Uber that sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. Second, the contract terms were imposed by Uber and drivers could not negotiate them. Third, once a driver has logged onto the Uber app, the driver's choice whether to accept requests for rides is constrained by

[99] Available at: http://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/html.
[100] Point 70 of the judgment.

Uber.[101] Fourth, Uber also forces their drivers to deliver high level services.[102] Finally, Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip. All in all, Uber drivers are in a „position of subordination and dependency (…) such that they have little or no ability to improve their economic position through professional or entrepreneurial skill."[103] The Supreme Court also held olds that working time included any period when the driver was logged into the Uber app within the territory in which the driver was licensed to operate and was ready and willing to accept trips.[104]

Such a judicial interpretation would very likely be followed by competition law enforcers in the UK, and maybe in other countries worldwide. This case supports thus the conclusion that Uber drivers are not independent market agents, competing with each other, thus their conduct is not bound by competition law.

I would like to close this chapter with another gig-economy related case. The *State of California* adopted laws providing for a preferential treatment of platform workers, deviating from the federal rules.[105] California, just like the UK Supreme Court, classified a substantial number of gig-economy workers as employees rather than as independent contractors. As a result, two ride sharing companies, Uber and Lyft were held to be in violation of this law for failing to treat drivers as employees.[106] The State argued that by improperly classifying Uber drivers as independent contractors, the company secured an unfair advantage against competitors, while causing the public significant losses of tax revenue. The court of appeal affirmed a preliminary injunction in August 2020 that prohibits Uber and Lift to classify their drivers as independent contractors.[107] A view months later, however, California voters approved a proposition defining transportation and delivery drivers as "independent contractors and adopt labor" and started a process of identifying labour and wage policies specific to app-based drivers.[108] Apparently, locals did not want these companies to terminate their services in the sunny state.

There is also an antitrust case going on against Uber in California. Chief Magistrate Judge Spero denied Uber's motion to dismiss a monopolization complaint filed by Sidecar, a former ride-hailing company that claims it had been driven out of business by Uber's alleged anticompetitive practices.[109] Sidecar argues that Uber engaged in predatory pricing on both sides of the ride-hailing market: offering above-market payments to drivers, and offering below-market fares to passengers.

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[101] If too many trip requests are declined or cancelled, the driver is automatically logged off the Uber app for ten minutes. This restricts the driver's freedom to how to respond to an offer.

[102] A driver who fails to maintain a required average rating will receive a series of warnings and,ultimatelly, can have its relationship with Uber terminated.

[103] Point 101. of the judgment.

[104] Point 136 of the judgment.

[105] California Assembly Bill 5 (AB-5) took effect in January 2020.

[106] People v. Uber Techs., Inc., Order on Motion for Preliminary Injunction, No. CGC-20-584402, at 5 (Super. Ct. Cal. Aug. 10, 2020)Case No. 3-18-cv-07440-CSV., . The case is now (July, 2021) in discovery phase, trial is scheduled for July, 2022.

[107] Opinion available at: https://law.justia.com/cases/california/court-of-appeal/2020/a160701.html

[108] 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).

[109] *SC Innovations, Inc. v. Uber Technologies, Inc*., No. 18-cv-07440-JCS, 2020 WL 2097611 (N.D. Cal., May 1, 2020) The case is now (July, 2021) in discovery phase, trial is scheduled for July, 2022.

6. Models of co-ordination in platform markets

Before analyzing the most important competition law issues related to platform work, we should recall the most important features of these market structures. Digital platform or gig work is a well-known phenomenon without a clear legal definition. The EU Commission's consultation document relies on a Eurofound study from 2018, according to which platform work is 'a form of employment that uses an online platform to enable organisations or individuals to access other organisations or individuals to solve problems or to provide services in exchange for payment'.[110] The main characteristics of platform work are the following:

- paid work is organised through an online platform,
- three parties are involved: the online platform, the client and the worker,
- the aim is to carry out specific tasks or solve specific problems;
- the work is contracted out;
- jobs are broken down into tasks;
- services are provided on demand.

Platform work is closely linked to the phenomenon of sharing economy, when individuals interact to buy or sell goods and services directly with each other, with or without a platform. An OECD report of 2015 discussing sharing economy refers to a variety of online platforms specialised in 'matching demand and supply in specific markets, enabling peer-to-peer (P2P) sales and rentals'. It identifies three categorizes: (i) P2P selling (i.e. eBay and Etsy), (ii) P2P sharing (i.e. Airbnb, Uber, TaskRabbit), and (iii) crowdsourcing (i.e. Mechanical Turks, Kickstarter, AngelList).[111]

The FTC sharing economy report of 2016 identified the following key features of sharing economy companies:[112]

a) there are three players: the platform, suppliers and consumers;
b) many and small individual suppliers and consumers;
c) suppliers who provide their services use their existing assets, so barriers to entry are relatively low;
d) market are "thick" enabling liquidity;
e) the platform company solves the trust problem, providing safety and reliability for both consumers and suppliers;
f) the platform charges a fee for its matching services.

The EU Commission makes a distinction between two kinds of platform works: on-location labour platforms (like passenger transport, deliveries) and online labour platforms (where the tasks are not location-dependent, e.g. encoding data, translation work, or design projects).[113]

Others classify two main forms of platform workers, such as 'crowdsourcing' and 'on-demand work via apps'.[114] Crowd work is performed through online platforms that put connect an

[110] Ibid at 1., p. 4. Eurofound (2018), Employment and working conditions of selected types of platform work, Publications Office of the European Union, Luxembourg.
[111] OECD. (2015b). New Form of Work in the Sharing Economy. Background for Discussion. Paris: OECD, Working Party on Measurement and Analysis of the Digital Economy, DSTI/ICCP/IIS(2015) 3.
[112] FTC Report, pp 16-20.
[113] Ibid, p. 6.
[114] De Stefano, V. and Aloisi, A. (2018): *Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers.* Bocconi Legal Studies Research Paper No. 1, https://www.researchgate.net/publication/323766255_Fundamental_Labour_Rights_Platform_Work_and_Human-Rights_Protection_of_Non-Standard_Workers (accessed: 3.12.2019), p. 6.

indefinite number of businesses with individuals on a global basis. The nature of crowd work tasks may require both low skills (i.e. photo framing) and high skills activities i.e. (car design). On-demand work via apps includes the performance of local services (i.e. transport, cleaning food delivery). The platforms running these apps typically set various minimum quality standards of service, selection and management of the workforce.

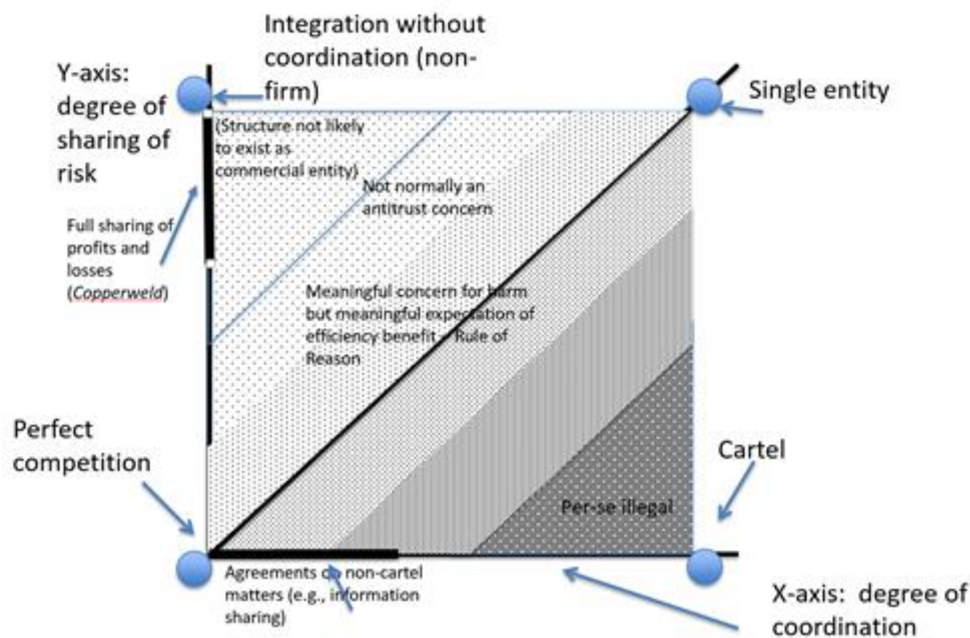
Competition and regulatory issues of platforms closely resemble the more general issue of how to deal with *two- or multi-sided markets*. These involve situations where a platform enables the transaction of two or more groups of users with each other and where at least one of these groups benefit from having a growing number of users on the other side.[115] A typical feature of platform related digital services is that the two (or more) sides of the market are individuals, whereas the platform matching them is an often powerful corporation.

Sharing economy services often bring about *regulatory disruptions*, especially in their growing phase after they start to grow up from their infant status. Platform companies compete with existing services, but by using sophisticated new structures, they avoid existing regulations, face less costs, thereby gain market share quickly. It takes some time for regulators to decide what is best for society: deregulating traditional services or extending the regulation to the platform company. Many European countries imposed strict regulations on Uber or Airbnb which had a chilling effect on these companies and their partners.[116]

Digital platforms are manifold, from large companies like Uber, to small food deliveries in Bangladesh. Platforms are organized in different ways which means that the status of their platform workers may vary. Consequently, regulators, including those shaping labour and competition laws, should resist the idea of a homogenous form of work deserving of one-size-fits-all interventions.[117]

Anderson and Huffman distinguish between various platforms as regards the degree of *integration* and *risk sharing* between the platform operator company and the individual workers. They conclude that antitrust law should allow increased levels of coordination when a sharing economy enterprise involves increased levels of risk-sharing. We borrow their graph to illustrate this theory.[118]

[115] See, for example: Cristiano Codagnone and Bertin Martens (2016). Scoping the Sharing Economy: Origins, Definitions, Impact and Regulatory Issues. Institute for Prospective Technological Studies Digital Economy Working Paper 2016/01. JRC100369, p. 8.
[116] In Hungary, for example, following demonstrations by taxi drivers, Uber was practically banned through transport regulation in 2016. AirBnb services can also be regulated by municipalities, limiting the period when entire apartments can function as hotels.
[117] Aloisi, A.: *Platform Work in the EU: Lessons learned, legal developments and challenges ahead.* Directorate General for Employment, Social Affairs and Inclusion, 20 November 2020, 2.
[118] p. 919.



7. Competition law analysis of platform relations

7.1. Introduction

It is economic reality that labour markets exist. There is competition among employers who are qualified for a job. On the other side of the market, employees also compete for a lucrative job. In the labour market, companies are on the demand side, while workers are the suppliers. Just like in other traditional markets, the relationship between supply and demand determines the price (here the wage), the output, and quality of the service/product supplied. Just because work is inherently linked to our human nature, we should not exclude competition rules where there is competition, and there may be unjustified competition restrictions. Yet, an OECD note on competition and labour market issues recalls that that "competition law enforcement has been so far limited, competition authorities may have an increased role to play in labour input markets, particularly in addressing anticompetitive agreements that artificially creates monopsony power, abuses of monopsony power and merger transactions leading to increased monopsony power."[119] It is true that labour markets are heavily regulated by labour law.[120] However, there are also other traditional markets with intense state regulation to ensure safety, or the provision of high quality public services. Yet, competition rules do apply in such markets.

In this section of the paper I will give a quick overview of the competition law toolkit used to consider the pros and cons of competition restrictions and then we discuss how competition rules could apply to the most frequent restrictions related to the operation of platform work, covering both horizontal (relations between competitors) and vertical (relations between supplier and distributor) aspects.

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[119] OECD (2020), *Competition in Labour Markets; available at:*
http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm
[120] Gyulavári lists the following rights, among others, that have special relevance in the gig economy: establishment, amendment and termination of employment; working time and rest periods; minimum wage (including reimbursement of expenses) collective rights and collective bargaining. Gyulavári…5.o.

7.2. Competition law tools weighing the positive and negative effects of restrictions

Since some of the readers of this paper might not have a competition law background, before diving more deeply into the consideration of platform specific competition issues, I would like to give a short summary of the relevant competition rules. Restrictive agreements related to platform work can be justified in various ways. Using the European terminology, it can be argued that a restriction (i) falls outside the scope of competition rules (non-economic activities), (ii) the restriction is necessary for the proper functioning of a market (a sort of ancillary doctrine and public policy rule of reason), (iii) the restriction of competition is of minor importance (de minimis exemption), (iv) the restriction is block-exempted by a regulations, or (v) it can be justified through an individual exemption.

EU and harmonized national competition laws prohibit agreements, concerted practices between undertakings, as well as decisions by associations of undertakings which either have the aim or effect to harm competition. Such anti-competitive practices may be exempted from the prohibition, either by a specific block exemption regulation (i.e. on distribution or R&D contracts), or through a detailed analysis of the individual effects of the agreement. In the course of this individual exemption, one shall consider any positive effects on the economy, the production and distribution, whether consumers get a fair share of that benefit, plus it should be ensured that the agreement includes only restrictions which are strictly necessary to achieve these benefits, without eliminating rivalry in the relevant market. Although case law may evolve over time, and the term economic development could be interpreted widely, right now, it is more likely that positive effects going beyond the realm of competition, like social or cohesion objectives cannot be taken into account when balancing the positive effects with the actual or potential restrictions of competition. According to a well-established dogma, price fixing and market allocation schemes are anti-competitive by their aim and are clearly prohibited regardless of their market effects.

As we have seen in the previous chapters, a restrictive practice may fall outside the scope of competition rules if the actors are not undertakings, that is, the conduct is not economic in nature. In addition, EU case law developed an exemption for minor restrictions of competition. According to the practice of the EU Commission, the prohibition of Article 101(1) TFEU shall not apply if the combined market share of the competing undertakings is below 10%. In case of vertical, mainly distribution agreements, this threshold is 15%. Hungarian competition law follows the same logic, with the minor difference that this de minimis exception is codified in the Competition Act.

Furthermore, according to the jurisprudence of the EUCJ testing the limits of the textual interpretation of Article 101(1) TFEU, not every agreement between undertakings or every decision of an association of undertakings which restricts competition falls under the prohibition of Article 101 TFEU. This approach could be labelled as a public policy rule of reason exception. In *Wouters*, the professional regulation prohibiting multidisciplinary practices with accountants, despite its inherent negative effects on competition, was necessary for the proper practice of the profession, as organised in the Netherlands. In its Report on Competition in Professional Services, the Commission also emphasized, building on the Wouters case law that restrictions objectively necessary to guarantee the proper practice of the profession fall outside the scope of the prohibition.[121]

[121] Advocate General Jacobs in his Opinion in Case C-67/96 *Albany* [1999] ECR I -5863.

Meca-Medina is similar to *Wouters* in as much the EUCJ ruled that the restrictive rules of a sports association may fall outside Article 101 TFEU if the negative effects are inherent in the pursuit of the legitimate sports objectives provided that they are proportionate to these objectives. Relying on *Meca-Medina*, the Commission considered the *Wouters* exception in its *ISU decision*. Legitimate objectives justifying the competition restriction could involve: the protection of the integrity of the sport, the protection of health and safety, the organisation and proper conduct of the sport, promoting solidarity (equal distribution of revenues to all the clubs participating in the same competition, or redistribution of revenues from elite level to low level), and the protection of the volunteer model of sport. On the other hand, the protection of economic and financial interests and the prevention of free riding were not accepted as legitimate objectives.[122] The review court agreed that since ISU organises events and also has the power to authorise events organised by third parties, it must ensure, to avoid a conflict of interests, that those third parties are not unduly deprived of market access to the point that competition on that market is distorted.[123] Since the existence of a restriction of competition by object was properly substantiated by the Commission based on the content and objectives of the eligibility rules and of their context, there was no need to take into account the organization's subjective intent to exclude competing organisers.

U.S. antitrust walks a different path, yet the outcome of the evaluation of most anti-competitive agreements is the same. Since there are no exemption provided by the wording of Section 1 of the Sherman Act, judicial interpretation of the concept "in restrain of trade" was required to filter out unharmful contracts, or combinations which included some kind of restriction on the parties' behaviour. As a result, only practices that unreasonably restrict trade are caught by the prohibition. Courts would apply one of the following three standards nowadays. First, overlapping with the European "by object" concept, the *per se rule* is followed in cases where the restriction at stake is so inherently anticompetitive that there is no need to analyse its effects on the market or the existence of an objective competitive justification.[124] The catalogue of per se restrictions includes horizontal price fixing (vertical price fixing not any more), horizontal market allocation, bid-rigging, group boycotts, some types of tying agreements. Price fixing and market allocation may only be accepted if they are encillary to an otherwise lawful co-operation, like the creation of a joint venture with positive economic effects.[125]

For restraints not fitting into the per se category, the analysis of the market effects, in various depths, is required. In its full-blown form, the rule of reason apprach involves for the plaintiff (i) the definition of the relevant market, (ii) identifying the market power of the defendant, and (iii) the existence of anticompetitive effects. In turn, the defendant can prove that positive effects outweigh negative effects, and can justify the restricion.[126] The third option is a sub-section of the rule of reason analysis. The so called 'quick look' does not require the plaintiff to go through all the steps of the full-blown rule of reason, it is sufficient to prove that the conduct appears so likely to have anticompetitive effects. That is the case when an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have negative effect on consumers.[127] This means practically that the plaintiff bears less costs, the burden of proof shifts more quickly to the defendant.

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[122] ISU decision, points 54-58.
[123] ISU judgment, para 75.
[124] See, for example *U.S. v Socony-Vacuum Oil Co., 310 U.S 150 (1940).*
[125] FTC and DoJ Antitrust Guidelines for Collaborations Among Competitors, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf
[126] See, for example: *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).*
[127] *California Dental Ass'n v. FTC, 526 U.S. 756 (1999).*

As far as labour matters are concerned, EU case law excluded agreements between employees as falling outside the personal scope of competition rules. U.S. law provides immunity for some agreements through specific legislation. Yet, since the exact scope of the labour exemption is far from clear, there may be restrictions which require a case-by-case competition law analysis.

7.3. Selected competition law issues in platform markets[128]

7.3.1. Horizontal restrictions: collective bargaining

One of the most important horizontal issues where competition law may seriously limit the abilities of platform workers is their right to *bargain collectively* for better wages, working conditions, and other benefits like paid holidays and social security. For labour lawyers, exercising collective rights is a fundamental principle under ILO Conventions.[129] Gyulavári suggests that unrestricted provision of these rights would be particularly important for platform workers due to their vulnerable and individualized labour market position. He suggests that collective rights should be ensured for all persons performing work personally, irrespective of its legal form. This should include the right to

- collective bargaining,
- join and form a trade union, or other special forms of interest representations,
- information and consultation,
- participation, representation in works councils, and
- strike and collective action.

Countouris and his co-authors argue that most labour lawyers would see the right to bargain collectively as a fundamental labour right protected by international and EU legal instruments.[130]

On the other hand, competition lawyers would condemn most of these agreements, if concluded by undertakings, as evil cartels. It makes a huge difference whether one is characterized as an employee, or an individual entrepreneur.[131] Creating associations, councils and other forms of gatherings is not unlawful per se. However, meeting with competitors under the egis of such associations and discussing prices and other sensitive business information does not provide an umbrella against competition law investigations. Competing undertakings shall be careful not to exchange sensitive, especially price related information concerning their businesses, since this may be condemned as an information sharing cartel. Organizing a strike translates into a collective boycott in the realm of competition law.

It is a crucial question to what extent competition law and policy could and should consider goals of other public policies. Both EU and Hungarian competition rules clearly state that they apply, 'unless otherwise provided' either by the TFEU or acts of Parliament. The concurrent

[128] In this section I will focus on bi-or multilateral actions, that is cartels and vertical restrictions. As shown by the Sidecar litigation in California, monopolization, abuse of dominance may also be a legal base challenging unilateral conduct of powerful platform companies.
[129] EU law follows a more restrictive approach in terms of personal and material scope (Article 153 TFEU).
[130] See footnote…, p. 11. They cite the ILO Conventions 87 and 98, as well as Article 28 of the Charter of Fundamental Rights of the EU.
[131] There are legal obstacles in force in several countries to the organization of self-employed workers in trade unions, see for example S. Engblom, 'Atypical Work in the Digital Age – Outline of a Trade Union Strategy for the Gig Economy', (2017), p. 225.

rule has to be very specific and clear to change the universal reach of competition rules. This means, for example, that the right to bargain collectively would be not challenged under competition rules, however, when this negotiation covered prices/wages, it would be regarded as an anti-competitive agreement, provided that employees could be characterized as undertakings. For example, France extended the rights of collective action, freedom of association and collective bargaining to platform workers.[132] Would this limit the application of competition law prohibitions? Most probably yes, if we take into account French competition law. National legal regimes often provide for an antitrust exemption if a certain activity is expressly regulated by another statute. However, national rules would not preempt the application of supranational EU competition rules. Even if France were to decide that platform workers should be categorized as traditional employees and thus be exempted form French competition rules, the EU Commission, the EU Courts, and most probably also the French Competition Authority, enforcing Article 101 TFEU could disagree if the conditions for defining the platform worker as an undertaking as interpreted by EU case law are fulfilled.

This tension between national and EU competition rules on the one hand, and international labour law has arisen in Ireland recently. In 2016, the Irish Congress of Trade Unions ICTU lodged a collective complaint against Ireland with the European Committee on Social Rights (Council of Europe) regarding an alleged breach of Article 6.2 of the European Social Charter. This was prompted by a decision of the Irish Competition Authority in the Actors' Equity case.[133] The competition authority found an infringement of competition rules through a fee-setting arrangement between the trade union representing actors (Actors' Equity) and
and the Institute of Advertising Practitioners in 2004. These actors provided services to advertisers as, for example, voice-over actors in radio advertisements. The actors were found to be self-employed persons, and were thus classified as undertakings. The Committee found that the ban on collective bargaining was not necessary in a democratic society and thus the situation before the entry into force of the 2017 Act amending Irish competition law was in breach of the Charter.

In the aftermath of the public debate prompted by the national competition authority's decision, an amendment of the competition act adopted in 2017. This provides for a specific exemption for three named categories of self-employed workers: voice-over actors, session musicians, and freelance journalists.[134] I should note that such exceptions apply only to national competition rules and do not restrict the applicability of EU competition rules. Yet, the EUCJ may take into account these national developments when interpreting EU law in a preliminary ruling procedure. In Ireland, these individuals have now the right to bargain collectively with employers in relation to working conditions and terms of employment, including pay rates. Under strictly defined conditions, other groups of self-employed workers could also be allowed to bargain collectively. In the course of the preparation of this amendment, the government refused to include general practitioners (family doctors contracted by the State) and other self-employed professionals providing services to the State under similar contracts to collectively negotiate.[135] The group of self-employed professionals potentially affected included barristers

[132] Daugareilh I., Degryse D. and Pochet P. (eds.) (2019), The platform economy and social law: Key issues in comparative perspective, Brussels: ETUI, https://www.etui.org/sites/default/files/WP-2019.10-EN-v3-WEB.pdf, p. 55.

[133] Case E/04/002. Decision available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_04_002-Actors-Fees-Enforcement-Decision.pdf.

[134] I should note that such exceptions apply only to national competition rules and do not restrict the applicability of EU competition rules.

[135] See Irish note to the OECD, 5 June, 2019, available at https://one.oecd.org/document/DAF/COMP/WD(2019)39/en/pdf., section 2.2.2.

and solicitors providing services under the Free Legal Aid Scheme; dentists, pharmacists, opticians, veterinary surgeons etc.

As the Irish case proves, competition lawyers believe that individuals who do not qualify as genuine employees should not be exempt from the competition law prohibition. However, Countouris and his co-authors believe that the personal scope of this collective bargaining right should be interpreted broadly, covering also self-employed people like agricultural workers and members of liberal professions.[136] They cite the report of the ILO Committee on Freedom of Association that requested the South-Korean government to ensure that this fundamental trade union right should also extend to self-employed workers.[137] This issue was also discussed recently within the framework of the EU-Korean free trade regime, where a Panel of Experts decided in 2021 that the South-Korean legislation excluding self-employed truck drivers from the category of 'workers' was in breach of ILO standards.[138]

From a competition law perspective, if the *Wouters*-like creative exception is not applied, collective bargaining would most likely fall under the by-object restrictions, since it involves regulating prices and other price/wage terms. One important implication is that the de minimis rule relating by-effect analysis would not apply, even collaborations between just a view workers would be caught by Article 101(1) TFEU. This does not mean, however, that the collective bargaining would be prohibited at the end. Even by-object restrictions may be exempted under Article 101(3), as noted for example by the EUCJ in *Irish Beef*, involving an output limitation cartel arrangement.[139] For an individual exemption, four cumulative conditions have to be fulfilled: the anti-competitive agreement (i) creates efficiencies or contributes to economic development, (ii) some part of these benefits are passed on to consumers, while (iii) the restriction of competition is necessary to achieve those positive goals and (iv) does not eliminate all competition. The general problem with price related restrictions is that consumers would not benefit, to the contrary, they would ultimately pay the bill of collective agreements guaranteeing better working conditions. Although competition takes many forms beyond pricing, experience is that higher prices can always never be justified by other, often long term benefits to consumers.

Other authors argue that despite the inherent upward price-effects, such collective deals should be analysed as by-effect restrictions of competition, as they are significantly different from traditional naked collusions, and due to their social character, they do not seek to attain goals incompatible with core EU values.[140] Unlike a price cartel which is by its nature secretive, collective bargaining is often reported even in the media. Such an approach would indeed fit in well with the broader framework of the EU Treaties, allowing to harmonize various EU goals better than to try interpret the individual exemption rules so widely that the outcome may be disconnected with its actual wording. Such an interpretation would certainly require a ruling from the EUCJ.

Following the *FNV Kunsten* judgment, the Dutch competition authority (ACM) issued its guidelines on how to deal with collaborative price arrangements between self-employed

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[136] Ibid at p. 12.

[137] ILO Committee on Freedom of Association (2012) Report no 363, Case no 2602, para 461.

[138] The report is available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf.

[139] C-209/07 *Beef Industry Development and Barry Brothers*; ECLI:EU:C:2008:643

[140] Schmidt-Kessen, Maria José and Bergqvist, Christian and Jacqueson, Catherine and Lind, Yvette and Huffman, Max, 'I'll call my Union', said the driver - Collective bargaining of Gig Workers under EU Competition Rules (December 7, 2020). Copenhagen Business School, CBS LAW Research Paper No. 20-43, Available at SSRN: https://ssrn.com/abstract=3744177, p. 14.

workers who use their own equipment (e.g. car, bike or computer) to provide their services.[141] The ACM will likely not find competition rules applicable if the individual works side-by-side in an identical manner with other employees.[142] If the platform worker constitutes an undertaking, there are still several ways how their co-operation can be cleared under competition rules. The ACM also noted that they are not going to intervene if the collective agreement's goal is to secure a normal income. The difficulty with this approach is how to set a just income level. In countries where there are legal rules or collective agreements on a minimum wages, may serve such a reference point.

Since labour law is predominantly regulated at national level, national competition regimes may also feel tempted to introduce labour specific exemptions at that level (see the Dutch and Irish examples). A former exemption that existed under Hungarian law as regards countervailing supplier power between 1991 and 1997 could also be reinvented. The law at that time provided for a special exemption for anti-competitive agreements concluded by small market players with a view to create a level playing field with a dominant supplier or buyer. Although such an exemption has to be applied carefully, it could provide a tool for small individuals to bargain collectively. Most competition regimes do not seem much harm with *collective buying arrangements* by small businesses. If the joint market share of these entities is not more than 10%, then they are saved by the de mininimis exception, if they are bigger, but still not reaching a level of dominance, individual exemption under Article 101(3) TFEU can be substantiated. This favourable treatment is available even if these agreements set an identical purchase price, thus exclude a form of price competition between competing small business entities.

As far as U.S. antitrust is concerned, collective price agreements would be subject to automatic prohibition as a *per se* violation of Section 1 of the Sherman Act. Even if such agreements would be analyzed under the more permissive rule of reason test, analyzing the positive and negative market effects of the agreement, the narrow definition of what constitutes economic efficiencies would make the legalization of such agreements rather difficult. Anderson and Huffman develop an argument though, so that organization by workers can overcome market inefficiencies created by buyers of labour with monopsony power by exerting countervailing power, moving the price for labour up and closer to the equilibrium price.[143] This would lead to more labour output and increases the level of production for the benefit of consumers. Ultimately, the effect of labour organization is to lower prices to the consumer.

A similar approach, considering factors going beyond price competition is represented by the Australian Competition and Consumer Act that permits business entities to engage in collective negotiations with their suppliers if they result in overall public benefits. They have also introduced recently a class exemption for collective bargaining for small businesses, agribusinesses and franchisees.[144] A rule like this acknowledges that such small business entities, in some cases individuals, may be able to negotiate more efficiently with larger businesses, and achieve better terms and conditions, than they can on their own. The class exemption covers three kind of co-operation: (i) a business entity or independent contractor

[141] Available at: https://www.acm.nl/sites/default/files/documents/2020-07/guidelines-on-price-arrangements-between-self-employed-workers.pdf.

[142] Ibid, point 29.

[143] M Anderson and M Huffman, *Labor Organization in Ride Sharing - Unionization or Cartelization?*, V*and. J. Ent. Tech. L.* (2021) (forthcoming).

[144] See: ACCC Guidelines on collective bargaining class exemption, June 2021. Available at: https://www.accc.gov.au/system/files/public-registers/documents/Collective%20bargaining%20class%20exemption%20-%20Guidelines%20June%202021.pdf

with aggregated turnover of less than $10 million[145] to form a collective bargaining group to negotiate with suppliers, (ii) franchisees collectively bargain with their franchisor regardless of their size and (iii) fuel retailers to collectively bargain with their fuel wholesaler regardless of their size. The favorable competition law treatment has also its limits in Australia: the collaboration shall not extend to a collective boycott.

In Europe, the EU Commission has announced an **initiative, connected to the public consultation of the Digital Services Act,** to ensure that EU competition law should not prohibit collective bargaining by self-employed individuals, including those working through platforms.[146] The Commission will consider how to balance the right to conclude collective agreements promoting the well-being of platform workers/contractors, with the right of consumers and SMEs to benefit from competitive prices and innovative business models in the digital economy. Margrethe **Vestager**, in charge of competition policy, emphasised in June 2020 that *"The Commission has committed to improving the working conditions of platform workers during this mandate. (...) As already stressed on previous occasions the competition rules are not there to stop workers forming a union but in today's labour market the concept "worker" and "self-employed" have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed. We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions."*[147]

As a next step, the Commission published a set of initiatives in December 2021 to improve the working conditions in platform work.[148] Among these, draft guidelines aim to clarify the application of EU competition law to collective agreements of solo self-employed people. The draft Guidelines aim to bring legal certainty and make sure that EU competition law does not stand in the way of certain solo self-employed people's efforts to improve collectively their working conditions, including remuneration, in cases where they are in a relatively weak position, for example where they face a significant imbalance in bargaining power. *A key concept to distinguish these self-employed, including platform workers is economic dependence. This will be assumed whenever the worker earns 50% or more of her/his annual income from the same counterparty.*[149] *As the guidelines cannot change EU law, the Commission, by explaining its priorities, declares that it will not actively enforce the law against these collective agreements.*

There is a similar attitude on the other side of the Atlantic. FTC Commissioner Slaughter noted that the misclassification issues as regards self-employed and employees should be solved by legislation, till then she urged that the FTC should not use its limited resources to bring enforcement actions against such collective action by platform workers.[150]

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[145] This amount is consistent with the threshold used by the Australian Tax Office to determine if a business is a 'small business entity' for tax concession purposes. Guidelines, ibid, at p. 4.
[146] Inception impact assessment on "Collective bargaining agreements for self-employed – scope of application of EU competition rules" launched in January 2021.
[147] EU Commission Press release of June 20, 2020. IP/20/1237. available at: https://ec.europa.eu/commission/presscorner/detail/pt/IP_20_1237
[148] See Commission press release December 9, 2021. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605. These draft guidelines were published following the submission of this book-chapter, so a detailed analysis thereof is not included here.
[149] Point 25 of the draft guidelines.
[150] New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, remarks of Commissioner Rebecca Kelly Slaughter, FTC Workshop on Non-Compete Clauses in the Workplace Washington, DC January 9, 2020. Available at: https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf , p. 7.

7.3.2. Vertical restrictions of competition

Vertical restrictions, which are concluded between a manufacturer and its distributors, or a supplier and its business partners are also the subject matter of competition policy. They often include restrictions that have an effect on third-parties, creating artificial entry barriers, limiting consumer choice and other benefits in the long run. However, due to their inherent efficiencies, most vertical restrictions can be justified from a competition policy perspective, as long as none of the parties has significant market power.[151] On the other hand, restrictions fixing the price consumers have to pay, or eliminating intra-brand trade between EU Member States, qualify as by object anti-competitive restrictions, often subject to heavy fines.

In the U.S., the welfare oriented jurisprudence on vertical restraints became much less worried about inequalities of bargaining power and the anti-competitive effects that could be effectuated through them and more concerned about efficiencies after the late 1970s.[152] Unlike in Europe, the Chicago school driven U.S. antitrust provided room for suppliers to outsource their distribution while retaining economic control over it, without infringing antitrust rules. Intra-brand competition was sacrificed on the altar of protecting intra-brand competition. EU competition policy, to a great extent shaped by integration goals, took a different path and condemned most forms of vertical price and resale restriction as serious anti-competitive agreements.

Competition rules on vertical restrictions may be analogous to most labour relations. Economic power and subordination are relevant for rules protecting the weaker party are relevant in both realms.[153] EU competition rules, in addition to protect consumer welfare and the process of integration, also strive to preserve economic independence for legally independent resellers. Manufacturers often tend to exercise control over the activities of their distributors, just like employers over their employees.

The case of *franchise agreements* is a good example, since many platform markets show similarities with this model of distribution. The franchisor, just like an owner of a platform, owns a set of intellectual properties and know-how, and licences these to independent companies under strict conditions. Franchising thereby enables the franchisor to establish, with limited investments, a uniform network for the distribution of his products.

In the EU, the *Pronuptia* case in 1986 was the first franchising judgment by the EUCJ case submitted to the EUCJ.[154] The Court ruled that restrictions of a franchise agreement which are essential to the working of the franchise system (like provisions ensuring that competitors do not benefit from the know-how or which maintain the identity and reputation of the network) do not harm competition:

> „Rather than a method of distribution, it is a way for an undertaking to derive financial benefit from its expertise, without investing its own capital (…) and gives traders who do not have the necessary experience access to methods which they could not have

[151] In the EU vertical block exemption regulation, this is reflected in the 30% market share threshold which is a condition to the applicability of the exemption.

[152] Monopsony and the Business Model of Gig Economy Platforms – Note by Marshall Steinbaum, point 11., available at: https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf

[153] This can be witnessed especially under EU rules applicable to the distribution of new vehicles.

[154] In the U.S., United States, there is no distinctions between franchising and other types of distribution systems, which require essentially a rule of reason analysis.

> learned without considerable effort and allows them to benefit from the reputation of the franchisor's name (...) Such a system, which allows the franchisor to profit from his success, does not in itself restrict competition."[155]

The Court's reasoning as to why franchise restrictions themselves are not anti-competitive, could also be applied for the organization of many platforms. Companies relying on sharing of resources owned by their contractors enhance through their technology and brand image the conclusion of transactions between individuals who othwerwise would not have traded with each other. Such an approach would imply that most restrictions related to the functioning of a platform would be held ancillary, hence not restricting competition in the market.

7.3.3. Non-compete clauses

Bridging these two subchapters of the paper, according to the Commission's vertical guidelines, a non-compete obligation on the goods or services purchased by the franchisee may also fall outside Article 101(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network.[156]

Non-compete contracts between companies, but also those between the employer and their employees can raise competition law issues. Such agreements are fairly common, and could cause important competition restrictions in certain industries where the employee's talent and knowledge, once she or he leaves the former employer, may create a new competitive force. A ban a parallel employment or any other activity competing with the employer's business can be justified, however, post-employment non-compete clauses, that is, when the service provider agrees not to be engaged in competing activities in a specific geographic market for a defined period of time, can be socially harmful. EU competition rules, for example, tolerate such post-non-compete restrictions, among other conditions, only if they do not last longer than one year.[157]

Non-compete provisions between an employer and employee, if concluded between what we call undertakings, would qualify as a vertical restriction. In this scenario, if we treat the employee just an individual subject to an employment relation, then, at least EU and national competition laws could not cover such agreements, since one of the parties is not an undertaking. However, if we argued that since the non-compete clause does not relate to the current employment relationship, but to a time when the individual is not an employee anymore, rather a subject in the labour market seeking a new job, then she or he could be classified as a "sleeping" undertaking whose status will be re-activated upon the termination of the employment relation.[158] U.S. antitrust does not face this terminology and personal scope issue. For example, the Illinois Attorney General settled a case with Jimmy John's, whose sandwich

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[155] Case 161/84, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, ECLI:EU:C:1986:41, para 24.

[156] European Commission's Guidelines on Vertical Restraints, SEC(2010) 41, point 190. 2).

[157] Vertical Block Exemption Regulation, Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *OJ L 102, 23.4.2010, p. 1–7, Article 5 (3)(d).*

[158] Reacting to this phenomenon, President Joe Biden signed an executive order in July 2021, which seeks to ban or limit worker non-compete agreements. A Forbes article warns that the ban could create a crisis for many corporate executives. Jul 9, 2021, Edward Segal, how Biden's Proposed Ban On Non-Compete Agreements Would Impact Companies; available at: https://www.forbes.com/sites/edwardsegal/2021/07/09/how-bidens-proposed-ban-on-non-compete-agreements-would-impact-companies/?sh=57cc6c3b74e0

makers were prevented for a period of two years from working at competing businesses that earn 10 % of their revenue from selling sandwiches.[159] The restriction applied not only to the three mile radius around the Jimmy John's where the worker was employed, but also to any sandwich business located within three miles of any Jimmy John's shop anywhere in the country.

Non-compete agreements between undertakings are subject to competition rules without any doubt. *Non-poaching* and wage fixing agreements between undertakings would be seen as a sort of cartel. The problem with non-poaching and non-compete agreements is that they hinder employees to seek higher wages, better benefits and working conditions by changing employers. The DOJ and FTC explained in their joint guidance in 2016, that wage-fixing (agreements among firms to fix salaries at a certain level), and non-poaching (agreement among firms not to solicit each other's employees) infringe Section 1 of the Sherman Act and could also be subject to criminal enforcement.[160] In a joint antitrust statement, the agencies recalled that they have challenged unlawful wage-fixing and no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data.[161] After a view civil cases, the DoJ launched its first criminal investigation against the owner of a therapist staffing company who allegedly agreed with rivals to lower wages for physical therapists in December 2020.[162] In another criminal investigation started one month later, the DoJ is targeting health care company SCA, a unit of UnitedHealth Group for agreeing not to poach each others' senior employees.[163] Assistant Attorney General Makan Delrahim of the DoJ's Antitrust Division emphasized that "*A freely competitive employment market is essential to the health of our economy and the mobility of American workers. (…) the division will ensure that companies who illegally deprive employees of competitive opportunities are not immune from our antitrust laws.*"[164]

7.3.4. Vertical price fixing

In the EU, as long as a strict „by object" anti-competitive approach is followed, the manufacturer, or platform operators have no realistic chance to justify the a reslae price setting practice. Setting the consumer price, or a minimum price level is a hard core restriction of competition. This is a 'dogmatic' prohibition in as much even very small companies without any market power are barred from intervening with the consumer prices. This does not apply if the distributor is not an independent undertaking, i.e. is a subsidiary of the seller, or acts as a genuine agent. On the other hand, setting a price ceiling, or simply recommending prices, without trying to enforce them in practice, are allowed.

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[159] Press Release, Illinois Attorney General, Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements (Dec. 6, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.

[160] ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, October 2016, available at: https://www.justice.gov/atr/file/903511/download.

[161] JOINT ANTITRUST STATEMENT REGARDING COVID-19 AND COMPETITION IN LABOR MARKETS, April 2020, available at: https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

[162] United States v. Neeraj Jindal, Case No. 4:20-CR-358 (E.D. Tex. Dec. 09, 2020).

[163] U.S. vs. Surgical Care Affiliates, LLC et al., Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021). Indictment available at: https://www.justice.gov/opa/press-release/file/1351266/download.

[164] DoJ press release of January 7, 2021, available at: https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion

The U.S. policy is more lenient, vertical price restraints after *Leegin* come under a rule of reason interpretation where the pros and cons of such a restraint are balanced. In *Leegin*, the U.S. Supreme Court held that minimum resale price maintenance agreements are not per se unlawful under federal antitrust law, but should be evaluated under a rule of reason analysis like most other vertical restraints.[165] The *Leegin* court overruled century-old precedent[166] holding that such agreements were per se unlawful. This ruling does not make resle price restrictions lawful, but at least allows the manufacturer, or in the case of gig-economy, the platform operator to justify the restriction.

This is important since some gig economy platforms *fix the prices* that their independent service providers have to charge to consumers. If the contractor is regarded as an independent undertaking, agreements like this are prohibited under competition rules. Platforms operators resorting to this strategy would find it difficult to justify their policy. As Anderson and Huffman rightly observe, it would be rather difficult for Uber to prove the logical nexus between the procompetitive effects of entry and the agreement on price. An argument that price competition needs to be eliminated faces a high hurdle.[167]

7.3.5. Hub-and-spoke price cartel

Vertical retail price restrictions can have similar effects to horizontal price cartels. *Hub and spoke* agreements, not uncommon in the retail trade business, have both vertical and horizontal features. According to a definition provided by the OECD, hub-and-spoke arrangements are *„cartels that are not co-ordinated through direct exchanges between the horizontal competitors, but through indirect exchanges via a vertically related supplier or retailer.”* Price co-ordination through a platform can be considered as a hub-and-spoke cartel.

In order to find an infringement of competition rules, a tacit agreement shall be proven among the individuals using the same platform. However, the level of proof is far from clear. In the U.S., the rim connecting the horizontal spokes draws the line between presumptively legal vertical agreements and illegal horizontal agreements. U.S. courts rejected rimless wheel theories, and considered such cases mostly as mere parallel conduct that does not imply an illegal agreement. For example, in Toys “R” Us (TRU), the dominant discount retailer for toys in those days, pressured the leading toy manufacturers into boycotting sales to so-called “warehouse” clubs, which sold at even lower prices. The Seventh Circuit Court ruled that the agreement, the rim, was inferred from direct communication evidence between TRU and the toy manufacturers, showing that TRU told each manufacturer that it was speaking to the other manufacturers in parallel, and assuring them of the intentions of the other manufacturers.[168] This was further supported by a parallel and sudden change in policy by mannufacturers: fewer sales to warehouse clubs, contradictory to rational business policy. Furthermore, TRU also served as a central point to settle complaints by the manufacturers.

In the EU, the Commission has not challenged yet a classical hub-and-spoke arrangement. Insights into the legal assessment under European law can be derived mostly from Member States, especially, the United Kingdom. The Competition Appeal Tribunal laid down the following test:

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[165] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).
[166] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
[167] Anderson and Huffman, pp. 913 and 916. Uber requires its drivers to charge the price determined by the Uber pricing algorythm.
[168] Toys “R” Us v FTC, No. 98-4107, judgment of August 1, 2000.

> "if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition."[169]

The complexity of proving all these objective and subjective elements makes hub-and-spoke cartel cases difficult to win for an authority or plaintiff, hence this theory of competition harm will not very often arise in platform markets either.

In a recent class action litigation against Uber, alleging a horizontal price conspiracy between Uber and the Uber drivers, Judge Rakoff rejected the defendant's argument that the agreement with drivers created a bundle of vertical agreements subject to a less strict antitrust scrutiny. The judge denied the motion to dismiss the price fixing conspiracy claim with a reference to hub and spoke agreements.[170]

7.3.6. Exclusivity

The possibility of *multi-homing* is an important feature of many digital markets, including platform works. This means essentially, that users may use different platforms, in some cases on different tools, in parallel. Multi-homing is important for competition, since it may help counter the economic power that large platforms benefit from.[171]

Restricting multi-homing may take the form of prohibitions, or the withdrawal of advantages, binding the service provider to the dominant platform. There are also 'natural' reasons for single homing by a service provider. In the ride-hailing industry, for example, drivers may find it difficult to use more than one app while driving. Platforms often offer incentives for both their service providers and their customers. For example, they may pay bonuses to drivers who completed a certain number of trips or have the best customer ratings.

Such practices have effects similar to exclusive dealing which can be allowed under some conditions, depending upon the market structure and the length of such a commitment. For example, EU rules exempt exclusivity clauses up to five years if both parties have market shares of less than 30% of the relevant market.

8. Conclusions

Selling one's labour to another entity on a lasting basis and for remuneration is a sort of economic activity which, like any other economic activity, could fall, at least in theory, under

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[169] Case Nos 2005/1071, 1074 and 1623 Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading, (2006) EVCA Civ 1318, para 141. https://www.catribunal.org.uk/sites/default/files/Jdg_CoA_1014Argos_Little_JJB191006.pdf.

[170] 819-820.

[171] PPMI: Study on "Support to the Observatory for the Online Platform Economy", Analytical paper #7, Multi-homing: obstacles, opportunities, facilitating factors (2021); available at: https://platformobservatory.eu/app/uploads/2021/01/AP-7-Multihoming-Jan-2021-EC-final-for-pbl.pdf.

the scrutiny of competition rules. The same applies to platform related work in the digital economy. Yet, once a person becomes an employee, agreements with other employees or their organizations on the one hand, and agreements between employer and employee, on the other, are, as a rule, are immune from competition rules.

Platform work creates challenges for both competition and labour policies. Should, as a response, the scope of labour law be extended to cover gig economy workers, the reach of competition law would likely be narrower. In the EU, the primacy of EU competition law over national labour laws may pose a problem though. Unless an EU law exemption for certain labour matters is construed either through legislation or case law, expansive national labour laws themselves could not restrict the reach of EU law prohibitions.

The reaction of the EU Court of Justice on how to treat non-traditional workers was to extend the scope of the definition of an employee and thereby limit the reach of competition law (the *Albany* labour exemption). The *FNV Kunsten* court held that some self-employed individuals should be characterized as "false self-employed" and thus their co-operation should be excluded from competition law. The de jure exclusion of some categories of self-employed people from the scope of national competition rules may not be an ideal solution, let alone for the legal uncertainty it brings about. National rules cannot overwrite EU competition norms, they will be applicable only if the matter has no relation to the European single market. This may be true for some local platform services, however, as a rule, digital platform widen and not narrow the geographic markets, hence a potential impact on trade between Member States will be there. A case-by-case approach could bring about more benefits, tailoring the application of broadly worded competition rules to market realities. Not each every individual working on a digital platform is in a weak bargaining position similar to an employee. Even if we categorize platform workers using both their own tools and the platform of the digital company, the individual exemption route could help justify those horizontal and vertical co-operations, which are necessary for the long-term existence of such a platform based service.

The Commission's draft guidelines, even if they do not expressly legitimise collective agreements among platform workers as such, are a welcome development to clarify that the EU competition authority when will abstain from investigating such agreements. I am not advocating that agreements between either employees or self-employed gig-workers seeking to secure a fair income should be condemned at the outset. My point is that we should have the same regulatory approach, regardless whether labour law (miss)classifies these individuals as employees or non-employees. From this point of you, the CJEU's ruling on the Dutch musicians sets a good precedent: self-employed musicians should be regulated the same way as employed musicians if the characteristics of their work is almost identical. The same regulation, the level playing field can be either an exemption from competition rules or a subordination to those rules. Both outcomes are acceptable from a fairness point of view. The unfavourable result would be treating these two categories differently just because of the different title of their contracts.

In reality, the distinction between employees and independent contractors/undertakings is oversimplified by law. Considering the extent to which a person is *independent* from its employers/business partner, we could place her or him somewhere in a *spectrum*, rather than make a binary choice. This is true both for traditional and digital platform markets. At the one extreme, we have crowd workers spending their mandatory working hours in a factory, using the tools provided and following the orders of their employer. On the other end of the spectrum there is a medical service provider, or a lawyer who could not be instructed and would fully

bear the risks of her or his actions. Labour law (and most probably also tax and social security) laws would draw a line between these two categories, making the unavoidable mistake of granting the employed status to either too many or too view people. Competition law seems to provide less legal certainty with its unique and flexible 'undertaking' concept, yet, by taking into account the economic context of the conduct, it would grasp the reality much better, reflecting the different colours instead of taking a black and white snapshot of the relevant activity.

Competition law should apply to actions taken by market actors, regardless of their legal classification under corporate, tax, or even labour laws. Any person who is capable to create and trade with goods, provide services doing that on a longer term, and as a rule for some profit, or at least as a way of life, should respect competition rules which protect free and fair marketplaces. Ideally, the reasoning for qualifying a person as an employee under labour law should be the same for excluding a person from the personal scope from competition rules.

As regards platforms, the level of integration may have an impact on whom we consider as a competing entity. Comparing Uber with Airbnb, I would assume that most people have no doubt that individuals renting their home in the same geographic location would be identified as competitors, competing both with other individuals using Airbnb, but also with hotel and apartment owners. As regards Uber, however, even if there are arguments supporting the undertaking status of drivers, no one would really think that Uber drivers are competing against each other. Similarly, in a franchise systems, independent companies operating under a McDonalds franchise would not be expected to compete against each other. When a consumer chooses among the available transport modalities, no one would seriously consider picking one Uber driver against another one. Rather, the question would be whether to take public transport, a traditional taxi, Uber, or other transport services.

Any realistic definition of the personal scope of competition rules should also include individuals who are employed by an undertaking, as long as their activity goes beyond the traditional employment relationship. For example, an agreement between waitresses not to work for a hotel or bar in town unless they receive a 30% increase in their wages has the same social welfare effects as if hotel and bar owners agreed to increase the wages of their waitresses by 30%. Both actions should have the same competition law consequences. We can picture waitresses as potential service providers for other employees, bearing the risks of changing their workplaces, just like an undertaking bears risks and provides services. U.S. antitrust law that does not clearly identify the subjects of antitrust may serve this purpose better than the European one that anchored the subjective scope of competition law to the "undertaking". Yet, the EUCJ jurisprudence defining this phrase broadly, could ultimately achieve the same goal.

In sum, I believe that both labour law's worker and competition law's undertaking concept are flexible enough so that they could complement each other, avoiding overlapping areas causing concerns for legal certainty.

I am not advocating that agreements between individuals seeking to secure a fair income should be condemned at the outset. My point is that we should have the same regulatory approach, regardless whether labour law (miss)classifies these individuals as employees or non-employees. From this point of you, the EUCJ's ruling on the Dutch musicians sets a good precedent: self-employed musicians should be regulated the same way as employed musicians if the characteristics of their work is almost identical. The same regulation, the level playing field can be either an exemption from competition rules or a subordination to those rules. Both

outcomes are acceptable from a fairness point of view. The unfavourable result would be treating these two categories differently just because of the different title of their contracts.

Even if some platform workers were regarded as undertakings, subjects of competition rules, exceptionally, there may be good reasons for tolerating such agreements restricting their economic freedoms. I have presented a view examples to what extent existing competition law tools can be used to justify gig-economy specific restrictions.