

## Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?

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### Abstract

This paper discusses the role that EU competition law can play in regulating the “new self-employed”—precarious workers formally considered to be micro-enterprises. Specific attention is paid to the newest type of “new self-employed,” namely those engaged via matchmaking platforms arranging for work to be contracted on demand. Despite their unequal bargaining position, self-employed individuals are barred from collective bargaining due to the EU competition rules. This Article argues that the problem will not be solved by modifying the respective tests for “worker” and “undertaking” in EU law, or by introducing exceptions under Article 101 TFEU. This Article then adopts a regulatory approach to canvass the different legal instruments available to address exploitation concerns in the context of the Uber economy, and discusses the role that EU competition law can play in such a regime.

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### A. Introducing the Uber Economy

What does a substitute orchestra musician from the Netherlands, a freelance actor in Ireland, and Microsoft have in common? They have all been subject to competition law enforcement in the EU. Self-employed persons—which include independent contractors, freelancers, and occasional substitutes—are considered “undertakings” and thus fall within the scope of the EU competition law. On its face, this is nothing new; independents such as doctors, lawyers, and self-employed entrepreneurs—have long fallen within the scope of the competition rules, and this arrangement has hardly been questioned. Nevertheless, over the past decades, a new class of self-employed—the so-called “new self-employed”—has emerged. With the developments in information and communication technology and business models, along with the boom of the “sharing” and “on demand” economy, there are increasingly questions about the applicability of the competition rules to this new type of self-employment. What might seem surprising is that the competition law concept of “undertaking” now applies to individuals who seem to share more characteristics with precarious workers than with entrepreneurs. This development requires taking a fresh look at the way competition law deals with its new subjects and, more broadly, the way new forms of labor relationships are regulated.

The departure point for this Article is the fundamental problem justifying the existence of labor regulation; the fact that parties are not in an equal bargaining position and are at risk of abuse of monopsony power.<sup>1</sup> Historically, this problem has been solved by two means: The introduction of labor regulation—labor law—and the explicit permission for workers to bargain collectively. The viability of this regulatory solution, however, is being challenged by developments in business organizations and technology. For the majority of the twentieth century, this regulatory arrangement has covered most humans who sell their labor for a living. Business trends towards vertical disintegration<sup>2</sup> and increasingly lengthy supply chains associated with globalization have increased the number of those selling their labor outside the traditional employment contract. The latest frontier is reached thanks to technology: It is increasingly possible to procure *infinitesimally* small quantities of labor on demand—via matchmaking platforms and crowdsourcing services.

Uber’s name is most often associated with the so-called “sharing” or, as the European Commission puts it, “collaborative” economy; yet, Uber’s success is representative of deeper changes in the marketplace for services, and increasingly, the market for labor. The advent of Uber is symbolic of a platform-based economy in which supply can be matched with demand instantaneously. In this new economy, transactions can be cleared quickly thanks

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<sup>1</sup> See ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* (Princeton University Press ed. 2003).

<sup>2</sup> Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law*, 10(3) OXFORD J. LEGAL STUD. 353 (1990).

to online payment systems like Visa and MasterCard, and quality can be monitored via user reviews. These changes have led to unprecedented possibilities for improving efficiency, but also raise questions of worker exploitation. With fast and widespread Internet connections, a population armed with smartphones, and the availability of online payment processing systems, anyone can join the workforce almost instantaneously. Consumers can be matched online with fellow citizens for small, offline jobs, such as cleaning or transportation. Whereas in the past such transactions might have fallen under the label informal economy, they are increasingly formalized through online platforms. With their formalization, it is also possible for companies to legally hire cheap workers whose services are available on demand for short periods of time. Of course, workers are available not only for offline tasks such as cleaning or driving, but also for tasks strictly completed online. The possibility to complete tasks by breaking them up and hiring people to do small bits of work for pay—crowdwork or crowdsourcing of which the Amazon Mechanical Turk platform is a prominent example<sup>3</sup>—opens up unprecedented possibilities for companies to optimize their use of labor.

These developments have strained the traditional model of labor regulation, which solved a problem of unequal power by creating the legal category of “worker.” The question asked by labor lawyers is: How can labor law adapt and respond to these challenges? Given that the laborers in question are independents, another question becomes relevant—what is the role of commercial law, and, in particular, the role of competition law, in solving or exacerbating the problem at hand? This Article argues that, although competition law is often perceived as a challenge for labor rights, competition law can step in to fill the gap left by labor law. Thus, arguably, competition law can be one of the regulatory tools to address the problem of precarious independents.

This suggestion may take many by surprise as competition law has mainly been applied to restrict the possibilities for the self-employed to bargain collectively. A number of cases from national competition authorities suggest that authorities perceive micro-cartels among self-employed as easy targets for enforcement action. Thus, in 2001 in Ireland, the competition authority decided that self-employed voiceover actors should not set tariffs or contract terms collectively.<sup>4</sup> In 2007, the Dutch Competition Authority issued a reflection document warning that setting minimum tariffs by a union representing self-employed is contrary to competition law.<sup>5</sup> The document—concerning collective bargaining covering self-employed

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<sup>3</sup> Companies, such as Amazon Mechanical Turk, make it possible to complete tasks through “crowdwork”—paying a number of people as little as \$0.01 USD for a couple of minutes of labor—such as tagging pictures or doing translations online.

<sup>4</sup> Agreements between Irish Actors’ Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors. Competition Act 2002 (Competition Authority Decision No E/04/002 Case COM/14/03) (Ir.), [https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/04/E\\_04\\_002-Actors-Fees-Enforcement-Decision.pdf](https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/04/E_04_002-Actors-Fees-Enforcement-Decision.pdf).

<sup>5</sup> Nederlandse Mededingingsautoriteit (Dutch Competition Authority 2007), *Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet: visiedocument* (Collective labor agreements determining fees for self-

orchestra musician substitutes—gave rise to a reference for a preliminary ruling to the European Court of Justice.<sup>6</sup> The implications of this judgment, in which the Court ruled that so called “false self-employed” are not to be considered “undertakings” for the purpose of competition rules, have been under-explored. More broadly, the appropriate approach of competition authorities toward collective agreements concluded by self-employed individuals has not been adequately addressed.

This Article aims to fill the gap in the literature by discussing the possibility for competition law to help solve the problem of unequal bargaining power of the new self-employed. The Article is structured as follows. First, the new subjects of competition law are introduced. Social science literature research shows that there is a big difference between the traditional self-employed,<sup>7</sup> and the so called “new self-employed” who share more characteristics with precarious workers. Second, the Article considers the possibility of addressing the problem by revising the traditional definition of “worker” with the EU law definition of worker, to illustrate the difficulty of solving this issue within labor law. The Article shows that unless the concept of worker is broadened beyond recognition, the newest self-employed will never qualify for status as “worker.” Third, the Article considers the meaning of the concept of “undertaking” under EU competition law and finds that limiting the concept to exclude self-employed workers from its scope is a challenging task. Finally, having established the difficulty of solving the problem by adjusting the definitions, the Article proposes a regulatory approach to solving the problem of unequal bargaining power between the self-employed and their employers and discusses the role competition law can play in designing a new regulatory regime.

## B. The *Newish* Subjects of EU Competition Law

Freelancers have existed for ages—before there was labor law and before there was competition law.<sup>8</sup> They have traditionally fallen within the scope of the competition rules without any question as to the reasonableness of this arrangement.<sup>9</sup> For years, the European Commission has explicitly included self-employed in the category of micro-enterprises in a

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employed and the competition law: a reflection document) (Neth.), <http://docplayer.nl/23777662-Cao-tariefbepalingen-voor-zelfstandigen-en-de-mededingingswet.html>.

<sup>6</sup> Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

<sup>7</sup> As discussed below, the competition rules have always applied to the self-employed, however, this has never caused much question or debate because these self-employed were perceived as genuine entrepreneurs.

<sup>8</sup> The etymology of the word *freelance* takes us back to the Middle Ages when it was used to refer to mercenary knights in possession of a horse and a lance, who would offer their services against payment to persons or states. See OXFORD ENGLISH DICTIONARY, <http://www.oed.com/>.

<sup>9</sup> See *infra* Section 4 which discusses the concept of “undertaking” in EU competition law.

variety of documents.<sup>10</sup> Why does the question come to the fore now? The answer is evident once we consider how the category of “self-employed” has traditionally been defined and contrast this more traditional thinking with the way the population of this category has increased and evolved.

### *I. Not a Traditional Entrepreneur*

Much of the traditional way of thinking about self-employed individuals revolves around the idea of entrepreneur or petty bourgeois.<sup>11</sup> In some professions—namely the so-called liberal professions of medical doctors, lawyers, and accountants—self-employment has long been the standard. Similarly, no questions have been raised regarding the status of small business owners such as independent shopkeepers, farmers, craftsmen, and hairdressers. Throughout the latter half of the twentieth century—when salaried employment became the norm in developed countries—these types of self-employment continued to exist, although in dwindling numbers.<sup>12</sup>

The trend of a steady decline in self-employment was reversed in the last decades of the twentieth century.<sup>13</sup> Presently, in the EU, we observe a growth in the number of individuals self-employed.<sup>14</sup> The increase reflects the rise of a new type of self-employment—with those inflating the ranks differing from the traditional self-employed—in important ways. Data shows that the majority of the self-employed in the EU today are solo self-employed, i.e. without personnel—they do not employ other workers and employer-ship is not the norm.<sup>15</sup>

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<sup>10</sup> See Commission Recommendation concerning the definition of micro, small, and medium-sized enterprises (EC), 2003 O.J. (L124/36), <https://ec.europa.eu/digital-single-market/en/news/new-sme-definition-user-guide-and-model-declaration>. (which provides the following definition of an enterprise: “An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity”).

<sup>11</sup> Giedo Jansen, *Self-Employment as Atypical or Autonomous Work: Diverging Effects on Political Orientations*, 0(0) SOCIO-ECON. REV. 1 (2016).

<sup>12</sup> Karin Schulze Buschoff & Claudia Schmidt, *Adapting Labour Law and Social Security to the Needs of the “New Self-Employed” – Comparing the UK, Germany and the Netherlands*, 19(2) J. EUR. SOC. POL’Y 147, 148 (2009).

<sup>13</sup> *Id.* at 148.

<sup>14</sup> A 2014 survey of 24 European countries shows that 14% of workers are self-employed. The highest numbers of self-employed individuals are in Southern and Eastern European countries, with 30% of the workforce in Greece being self-employed. Further, numbers are rapidly rising in the Netherlands and the UK. See Izzy Hatfield, *Self-employment in Europe*, INST. PUB. POL’Y RES. REPORT, 3, figure 2.1 on 8 (2015). The report uses data from Eurostat.

<sup>15</sup> See Jansen, *supra* note 11, at 4, figure 1. See also André van Stel, Sander Wennekers & Gerard Scholman, *Solo Self-Employed Versus Employer Entrepreneurs: Determinants and Macro-Economic Effects in OECD Countries*, EIM RESEARCH REPORT (2014), <http://ondernemerschap.panteia.nl/pdf-ez/h201212.pdf>.

These “new self-employed”—as they came to be called in social science literature<sup>16</sup>—are often much less independent and financially stable than the traditional self-employed. As summed by Buschoff and Schmidt in an often-cited contribution:

The new self-employed do not correspond to the traditional profile of the entrepreneur, given that they work on their own account and without employees, often in professions with only low capital requirements. A growing share of these workers can be found on the one hand in ‘modern’ service-sector branches (such as education, health, financial and enterprise services) and on the other hand in the construction industry (via outsourcing and subcontracting). Such types of work are often located at the boundary between self-employment and dependent employment, but mostly they are formally defined as self-employment.<sup>17</sup>

The social science literature now commonly draws distinctions between the self-employed and the “new self-employed” in order to account for the radical differences between the members of this category. Unlike the traditional members of the category, the “new self-employed” do not aim to grow a business or employ others in the future; in short, most do not aspire to become entrepreneurs. This finding challenges the established sociological understanding of self-employed as “a relatively homogenous social class with shared interests as entrepreneurs and—potential—employers.”<sup>18</sup> Research shows that many self-employed today vote differently<sup>19</sup> and support policies more closely aligned with the preferences of workers than of employers.<sup>20</sup> These results stand in stark contrast to the common portrayal of self-employed, which emphasizes their entrepreneurial independence,

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<sup>16</sup> The term is often linked to the work of Buschoff & Schmidt, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> Jansen, *supra* note 11.

<sup>19</sup> *Id.* at 22. Jansen’s findings question traditional thinking about self-employed. Theories based on the understanding that self-employed are entrepreneurs predict that they would support more right-wing policies when it comes to labor protection, as their success would depend on the ability to easily hire and fire employees. Furthermore, self-employed supposedly exhibit a stronger preference for work autonomy and a lower preference for job security. Jansen tests these hypotheses empirically and finds that although solo self-employed generally prefer welfare policies to the right of the political spectrum, this is not true for those experiencing income and employment insecurity. Jansen concludes that “vulnerability affects self-employed workers and temporary employees in more or less similar fashion: greater insecurities strengthen left-wing political orientations and weaken right-wing political orientations.”

<sup>20</sup> Fabian Dekker, *Self-Employed Without Employees: Managing Risks in Modern Capitalism*, 38(4) *Pol. & Pol’y* 765, 768 (2010).

desire for business success, and lack of interest in a salaried position. This reality puts in question the much-praised autonomy and flexibility, creativity, and innovativeness touted—especially in the context of the sharing economy. It also prompts us to reconsider major assumptions about the self-employed underpinning the regulatory approach to them.

Scholars trace the growth in the self-employed category to a number of factors and trends. The rise of the new self-employed seems to coincide with the trend in the beginning of the 1980s toward vertical disintegration, triggered by recession. This trend reversed the dominant management thinking throughout much of the twentieth century, which emphasized vertical integration.<sup>21</sup> Cost considerations, changing preferences of management, developments on financial markets, and a high level of unemployment are some of the reasons given for this changing trend.<sup>22</sup> These developments have amounted to a trend in developed countries in which the distinction between employment and commercial activity is breaking down.<sup>23</sup> International trade agreements related to services—such as the General Agreement on Trade in Services (GATS)—have also contributed to this trend.<sup>24</sup> In the EU, provisions on free movement of services have allowed workers from jurisdictions with lower wages to move to higher-wage countries, despite legal restrictions on labor markets. For instance, the ECJ judgment in *Becu* shows that while labor legislation requiring the use of certain dock workers cannot be viewed as a restriction of competition, it should nonetheless not prevent self-employed workers from providing cross-border services.<sup>25</sup>

Much of the development in the growth of the self-employed described above is subsumed under the term bogus or “false self-employment.” However, it is important to emphasize the use of this term, bogus self-employment, does not capture all the developments taking place.

Bogus self-employment is a problematic term because it is modeled after the legal definitions of worker.<sup>26</sup> As noted in a report prepared for the European Commission,

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<sup>21</sup> Collins, *supra* note 2 citing INDUSTRIAL RELATIONS IN BRITAIN 95-98 (GS Bain ed., Oxford 1983).

<sup>22</sup> Collins, *supra* note 2, at 359-362.

<sup>23</sup> Judy Fudge, *Blurring Legal Boundaries: Regulating for Decent Work*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION 10 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds.) (2012).

<sup>24</sup> *Id.* at 13.

<sup>25</sup> Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECLI:EU:C:1997:282 affirmed in C-22/98 *Becu and Others* [1999] ECLI:EU:C:1999:419, [36].

<sup>26</sup> *Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century*, COM (2006) 708 final (Nov. 22, 2006) (speaking of “persons posing falsely as self-employed workers to circumvent national law.”).

“[b]ogus self-employment can be defined as occurring when an individual is registered as being self-employed, but is de facto bound by an employment relationship.”<sup>27</sup>

Essentially, bogus self-employment is defined as misclassification of workers;<sup>28</sup> the implication being that were it not for the formal legal status, the self-employed person would meet the legal criteria for worker. Bogus self-employment thus refers to fraudulent situations in which a judge—applying the established tests—could detect and unmask. The problem with bogus self-employment is one of enforcement.

Certainly, many of those formally classified as “self-employed” are bogus self-employed; yet, beyond those there are the many self-employed who are precarious, just like workers who fail to meet the criteria for “worker.” The category of new self-employed encompasses also those whose objective employment situation is such that they stand no chance of proving a “worker” status in court. This problem is one of definitions.

The need for solutions is even more pressing given that the gap between the legal definition of “worker” and the circumstances in which the new self-employed find themselves is increasingly widening. The latest developments in labor markets are “on demand” labor, just-in-time labor, crowdwork, and the sharing economy.<sup>29</sup> These are the latest challenges for established legal definitions of “worker,” which rely on the presence of repeated work under the control of a particular employer. This is a truly novel development, which represents possibilities unimaginable a couple of decades ago, and serves to stretch the category of “self-employed” even further. In fact, these developments may well have created what one might call the “newest self-employed.” The novelty of the latest development is best summed up by the CEO of CrowdFlower, a crowd-working service:

Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find

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<sup>27</sup> See *Comparative Report 2015: The Concept of worker Under Article 45 TFEU and Certain Non-Standard Forms of Employment*, at 49 (Apr. 2016), <http://ec.europa.eu/social/BlobServlet?langId=en&docId=15476&>. See also *Atypical Forms of Employment in the Aviation Sector* (2015), [https://www.eurocockpit.be/sites/default/files/report\\_atypical\\_employment\\_in\\_aviation\\_15\\_0212\\_f.pdf](https://www.eurocockpit.be/sites/default/files/report_atypical_employment_in_aviation_15_0212_f.pdf).

<sup>28</sup> *Id.* at 10, 46.

<sup>29</sup> Valerio De Stefano, *The Rise of the “Just-In-Time Workforce”: On-Demand Work, Crowdwork and Labour Protection in the “Gig-Economy”*, in INTERNATIONAL LABOUR OFFICE, *INCLUSIVE LABOUR MARKETS, LABOUR RELATIONS AND WORKING CONDITIONS BRANCH* (2016) (Geneva: ILO, Conditions of work and employment series, No. 71).



them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore.<sup>30</sup>

Nowadays, services such as the Amazon Mechanical Turk allow for just that: The possibility to purchase labor remotely and for a very short period of time. In the case of Amazon's Mechanical Turk, independent service providers perform small tasks or fragments of tasks, such as tagging photographs, proofreading, or processing data. Because the tasks can be broken up into small pieces, the work can be outsourced to a crowd of online and offline freelancers. The platform matches service providers with clients, and processes payment. Just like in the case of Uber, the service provided is matchmaking between two independent parties, not employment. This type of work—fragmented, short-term in nature, done at the independent's discretion, for multiple clients—eschews traditional definitions of an employment relationship. Yet, it gives rise to precisely the type of problem that labor laws and the right to collective bargaining were meant to correct—the potential for exploitation in the context of unequal bargaining power between two contracting partners.

## *II. Precarious Independents: A Problem for Labor Law or a Problem for Competition Law?*

The section above shows that the category of “self-employment” is no longer reserved for the traditional bourgeois or the innovative entrepreneur. Increasingly, this label is attached to independents laboring in very precarious conditions; and while the possibility to hire workers on demand has been seen as expanding opportunities for participation in the economy and access to labor markets,<sup>31</sup> so has it also been associated with the erosion of standards of labor protection and the normalization of precariousness.<sup>32</sup> A number of labor law scholars have commented on these developments, particularly in relation to the sharing economy and the on demand economy.<sup>33</sup> There is currently much debate as to whether those freelancers would meet the labor law criteria for being a “worker” and whether they should deserve protection under labor law.<sup>34</sup> Labor law scholars have discussed the

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<sup>30</sup> Moshe Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, THE NATION (Feb. 5, 2014), <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>.

<sup>31</sup> *A European Agenda for the Collaborative Economy*, COM (2016) 356 final (June 2, 2016).

<sup>32</sup> Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37(3) COMP. LAB. L. & POL'Y J. 653 (2016).

<sup>33</sup> See *id.*; See also Valerio De Stefano, *Non-Standard Workers and Freedom of Association: A Critical Analysis of Restrictions to Collective Rights from A Human Rights Perspective 1* (Working Paper CSDLE “Massimo D’Antona” INT-123/2015, 2015); De Stefano (2016) *supra* note 29; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016); Adrian Todoli-Signes, *‘Uber Economy’: ¿Employee, Self-Employed or a Need of a Special Employment Regulation?* (2015) (SSRN Working Paper) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2703057](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703057).

<sup>34</sup> There are different approaches to define what constitutes a “worker.” Relevant questions include the notion of control—to what extent does the company control or is able to control the worker; the imbalance of power in the

challenges for traditional labor law categories and have called for updated definitions of the “worker” category in order to reflect the changes in society.<sup>35</sup> In their search for legal solutions, some labor law scholars have suggested novel approaches such as focusing on defining the category of employer in functional terms,<sup>36</sup> or thinking about functional definitions of power imbalances.<sup>37</sup>

By contrast, competition law scholars have largely been silent on the issue of the contractual relations between sharing platforms and their contractual relations with the independents physically carrying out the services they mediate.<sup>38</sup> The importance of competition law analysis becomes evident as those engaged in the sharing economy increasingly demand rights and try to organize.<sup>39</sup> Can they do so legally? In the context of these questions, the distinction drawn between “worker” and “undertaking” becomes important. Thus, the definition of worker is important not only to preserve rights under labor law, but also to prevent the application of commercial laws meant to regulate business behavior. Competition laws in various jurisdictions throughout the world have been increasingly applied to collective bargaining agreement efforts of self-employment without personnel—be they engaged via online platforms in the context of the sharing economy or self-employed in other contexts.<sup>40</sup>

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relationship between employer and employee; the extent of integration in the organization in the sense of bearing own commercial risk or not; the availability of entrepreneurial opportunities; the ownership of the tools necessary for production. For a detailed discussion from a US perspective, see Rogers, *supra* note 33, at 479-520. See also De Stefano (2016), *supra* note 29, at 6-10; Guy Davidov, *Freelancers: An Intermediate Group in Labour Law?*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION (Judy Fudge, Shae McCrystal & Kamala Sankaran eds.) (2012) at 171.

<sup>35</sup> Already in 1990, Hugh Collins spoke of a “crisis in legal concepts.” Collins, *supra* note 2, at 369.

<sup>36</sup> Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork* 37 COMP. LAB. L. & POL’Y J. 619 (2016).

<sup>37</sup> See Rogers, *supra* note 33.

<sup>38</sup> Notable exceptions are Marc van der Woude, *The Undertaking and its Employees; Some Reflections on an Ambiguous Relationship*, in LIBER AMICORUM for M. Czucz 657 (Szeged 2016); Julian Nowag, *The UBER-Cartel? UBER Between Labour and Competition Law*, 3 LUND STUDENT EU L. REV. 95 (2016); Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018).

<sup>39</sup> Adrian Chen, *An Uber Labor Movement Born in a Laguardia Parking Lot*, THE NEW YORKER (Feb. 8, 2016), <https://www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot>; *UK-Deliveroo Workers Seek Workers’ Rights and Union Recognition*, STAFFING INDUSTRY ANALYSTS (November 8, 2016), <http://www2.staffingindustry.com/eng/Editorial/Daily-News/UK-Deliveroo-workers-seek-workers-rights-and-union-recognition-39984>.

<sup>40</sup> See CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION (Judy Fudge, Shae McCrystal & Kamala Sankaran eds.) (2012); see also Shae McCrystal, *Organising Independent Contractors: The Impact of Competition Law*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION at 171 (Judy Fudge, Shae McCrystal & Kamala Sankaran eds.) (2012). See also Thomas Buescher, *FedEx Home Delivery v. NLRB, Another Example of Why We Need to Take a Fresh Look at the Common Law Test for Independent Contractor Status*, in ABA LABOR LAW MEETING (2010),

The issue of collective bargaining—including the setting of prices and minimum contractual safeguards—is probably the area in which we observe the most obvious divergence between labor law and competition law. Collective bargaining for workers is considered a fundamental right—often protected in national constitutions—but also under EU law and international law.<sup>41</sup> It is considered a human right as evidence from its presence in sources such as the Universal Declaration of Human Rights,<sup>42</sup> the International Covenant on Social, Economic and Cultural Rights,<sup>43</sup> the European Social Charter, and in the European Convention of Human Rights;<sup>44</sup> it is enshrined in the International Labor Organization (ILO) constitution and various instruments to which many EU Member States are party to.<sup>45</sup> In the EU, this right is protected in Article 28 of the Charter of Fundamental Rights of the European Union, which became binding with the entry into force of the Lisbon Treaty.

At the same time, the collective setting of prices and contract terms—cartelization—is one of the most egregious offenses of the competition rules. Cartels are universally acknowledged as diminishing welfare and efficiency, as well as promoting the private interests of the parties concluding them, at the expense of welfare in society—final consumers in particular. In the context of labor, collective bargaining agreements are accepted despite the fact that they represent a restriction of competition among workers,<sup>46</sup>

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[https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/2010\\_dll\\_buescher.athcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_dll_buescher.athcheckdam.pdf); Camilo Rubiano, *Precarious Work and Access to Collective Bargaining: What are the Legal Obstacles?*, 5 (1) INT'L J. LAB. RES. 133, 144 (2013) (noting that in recent years competition authorities have actively targeted collective bargaining agreements covering the self-employed, and lists the Netherlands, and Denmark as examples).

<sup>41</sup> Bruno Veneziani, *Right of Collective Bargaining and Action (Article 28)*, in EUROPEAN LABOUR LAW AND THE EU CHARTER OF FUNDAMENTAL RIGHTS 53, 56 (Brian Bercusson ed., 2002) (noting that many national constitutions contain the right to collective bargaining and some provide an obligation for negotiation on specific issues with given regularity).

<sup>42</sup> G.A. Res. 217(III) A, A Universal Declaration of Human Rights, at art. 23.4 (Dec. 10, 1948).

<sup>43</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 8 (Jan. 3, 1976) (protecting the right to collective bargaining and industrial action).

<sup>44</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

<sup>45</sup> See International Labour Organization Freedom of Association and Protection of the Right to Organise Convention, *opened for signature* July 9, 1948, CO 87 (entered into force July 4, 1950); see also International Labour Organization Right to Organise and Collective Bargaining Convention, *opened for signature* July 1, 1948, CO 98 (entered into force July 18, 1951).

<sup>46</sup> As decided in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430.

and despite the fact that they can lead to higher consumer prices.<sup>47</sup> By contrast, no such exception exists for companies, be they one-person enterprises or giants like Microsoft.

Thus, the legal distinction between “worker” and “undertaking” implies radically different consequences. Under labor law, collective bargaining is the exercise of a fundamental right; under competition law, it implies not only administrative, but also civil liability,<sup>48</sup> depending on the jurisdiction, possibly also criminal liability. The distinction between “worker” and “undertaking” is thus of crucial importance for this issue.

### *III. The Relevance of the EU Law Dimension*

For the EU Member States, the interpretation of these concepts in EU law is vital. Firstly, EU law has autonomous definitions both for “worker” and for “undertaking.”<sup>49</sup> This means they are not linked to definitions in national law but have an independent meaning in EU law and for the purpose of applying EU law. Furthermore, both definitions claim to be functional rather than formalistic—meaning that the European Court of Justice looks at the situation at hand instead of looking at the legal form. These two notions go hand in hand. For instance, the court has held that a person considered self-employed for the purposes of national law can be considered a worker for the purposes of EU law.<sup>50</sup> In fact, as long as the person meets the EU law criteria for employment, her status is not affected by whether she is considered self-employed in the national system for tax, administrative, or organizational reasons.<sup>51</sup> Similarly, in the field of competition law, the European Court of Justice has interpreted the term “undertaking” to mean that the emphasis is on the activities the undertaking is engaged in, as opposed to the legal status within the domestic legal system or the way in which the “undertaking” is financed.<sup>52</sup>

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<sup>47</sup> Higher wages for workers would translate to higher prices or fewer quantities of the products produced by firms, thus negatively impacting consumer welfare.

<sup>48</sup> See Directive of the European Parliament and of the Council (EU) No. 2014/104 of Nov. 26, 2014, 2014 O.J. (L. 349) (on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union); C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECLI:EU:C:2001:465.

<sup>49</sup> In the case of the term worker, the Court has held that ever since Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECLI:EU:C:1964:19; with respect to the notion of undertaking, since Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161. In *Hoekstra*, the Court established that the concept of worker, for the purpose of applying EU law, is an autonomous concept. In *Höfner and Elser*, the Court held that the concept of ‘undertaking’ for the purpose of EU competition law, is an autonomous concept, not limited to definitions of ‘undertaking’ in the domestic legal system.

<sup>50</sup> Case C-256/01 *Debra Allonby v Accrington & Rossendale College* [2004] ECLI:EU:C:2004:18

<sup>51</sup> Case C-256/01 *Debra Allonby v Accrington & Rossendale College* [2004] ECLI:EU:C:2004:18, [7], confirmed in Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, [35]

<sup>52</sup> This notion of undertaking was first established in Case C-41/90 *Höfner and Elser* and has been upheld ever since.

Furthermore, the reach of EU definitions can extend beyond EU law *strictu sensu*; this is especially true for EU competition law. As the European Court of Justice has held, the interpretation of EU law concepts matters even for purely internal situations when the provisions in question are applied in the same way for EU law.<sup>53</sup> Thus, EU interpretations of the concept of “undertaking” extend their reach beyond the application of EU law, and affect the interpretation of the concept of “undertaking” in national law. This means that for the purposes of applying EU law, the categorization under national labor law is not relevant. The definition of “undertaking” and “worker” for the purposes of EU law, including the charter, is a matter of EU law, ultimately determined by the EU courts. This is one important constraint for national lawmakers. For instance, the Irish parliament voted on an amendment to its competition law for the purpose of allowing self-employed persons to engage in collective bargaining, yet, the Attorney General and the European Commission warned that such an amendment would run counter to the EU competition rules.<sup>54</sup>

In the absence of legal clarity, these matters are increasingly taken up to the courts. Widely covered are the cases of Uber and Lyft drivers contesting their employment status in both the US and UK courts.<sup>55</sup> Nonetheless, the question extends to many other self-employed persons—not necessarily those employed by Uber, but also those employed for on demand

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<sup>53</sup> <sup>53</sup> Case C-413/13 *FNV Kiem*, [18]. See also [19] in which the Court took into account the fact that in adopting the national provisions on competition, the Netherlands legislature explicitly aimed to harmonize its legislation with the European one. See also Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160,[20].

<sup>54</sup> See *Seanad Deb.* (July 6, 2016) (Ir.), <http://oireachtasdebates.oireachtas.ie/>. Statement by Minister for Jobs, Enterprise and Innovation, Ms. Mary Mitchell O'Connor:

The Attorney General believes the Bill, as drafted, appears to infringe Article 101 of the EU treaty. The European Commission considers that the Bill, as drafted, runs counter to EU competition law. It also believes the proposed exemptions appear very questionable in view of the long-term interest in ensuring efficient use of public budgets. The Government believes section 3, as drafted, goes far beyond the stated policy objective of the Bill of protecting vulnerable self-employed workers. Accordingly, it is the Government's intention to introduce an amendment to this section on Report Stage.

<sup>55</sup> Tracey Lien, *Lyft Settles Worker Misclassification Lawsuit for \$12.25 Million*, LOS ANGELES TIMES (Jan. 27, 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160126-story.html>; Mike Isaac, *Judge Overtakes Uber's Settlement with Drivers*, THE NEW YORK TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html>; but see Mr. Y Aslam, Mr. J Farrar, & Others v. Uber [2016], <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/> (a London employment tribunal found Uber drivers to meet the criteria for “worker;” the London employment tribunal judgment is currently under appeal).

services, be they online or offline. Thus, the status of independent couriers and package deliverers has been contested, both in the UK and in the US.<sup>56</sup>

This section makes the argument that given the fundamental changes brought about by technology and globalization, no possible definition of “worker” will exempt the many independents caught in a precarious labor situation from the application of competition law. In the case of EU law, it argues that the interpretation of worker is rather narrow, whereas the interpretation of the concept of “undertaking” is broad. It also considers the implications of the judgment in the *FNV Kiem* case and concludes that even if it might be considered an exception, its scope is very narrow. In light of this, the following picture emerges: Either the definition of “worker” needs to be broadened in order to accommodate precarious workers, or the approach under competition law needs to be adjusted. The conclusion reached is that in order to cover the most precarious workers engaged in the Uber economy on an on demand basis, the definition of “worker” would have to be stretched beyond recognition, to the point where it loses its core. Given the unattractiveness of this option, this Article proceeds to examine the possibilities for better protection of the most vulnerable independents under competition law.

### C. The Concept of Worker

EU law upholds a clear separation between the categories of “worker” and “undertaking.” The case law is explicit that workers are not to be considered “undertakings” and thus do not fall within the scope of the antitrust rules.<sup>57</sup> In practice, the status of independent service-providers is often unclear. The question thus arises: How can we distinguish genuine undertakings and those who could fulfill the conditions to qualify as a worker? On several occasions, the European Court of Justice has tried to elaborate on criteria to differentiate workers from self-employed—*inter alia*, for the purposes of applying the freedom of

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<sup>56</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Circuit 2009). In the UK, Deliveroo couriers lost a case in which they pressed for the right to collective bargaining. However, the Central Arbitration Committee found that the workers were self-employed. See Sarah Butler, ‘Deliveroo wins right not to give riders minimum wage or holiday pay’ (*The Guardian*, Nov. 14, 2017) <https://www.theguardian.com/business/2017/nov/14/deliveroo-couriers-minimum-wage-holiday-pay>. The decision of the Committee—Case Number: TUR1/985(2016) Nov. 14, 2017—is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/663126/Acceptance\\_Decision.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf).

<sup>57</sup> Case C-22/98 *Becu and Others* [1999] ECLI:EU:C:1999:419.

establishment provisions in an accession treaty,<sup>58</sup> for the purpose of nondiscrimination provisions of EU law,<sup>59</sup> and for the purpose of competition law.<sup>60</sup>

Although the definition of worker varies depending on the area of EU law,<sup>61</sup> the European Court of Justice has been remarkably consistent regarding the core definition of what an employment relationship entails. The court has held that, “it is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration.”<sup>62</sup> This test is based on criteria that labor lawyers are familiar with, namely, subordination, commercial independence, and the stable nature of the employment relationship. The following section will examine these criteria and evaluate to what extent they will be met by a worker engaged in the Uber economy—be it an Uber driver, or an on demand crowdworker. The conclusion is that traditional labor law testing criteria fail to capture this new breed of worker—the precarious on-demand self-employed individual.

### *1. The Subordination Requirement*

One of the key factors in testing for employment—in the EU or elsewhere—is the subordination requirement. This requirement is sometimes known as a “control test,” and is one of the recognized criteria of testing for the existence of an employment relationship in the labor laws of different jurisdictions.<sup>63</sup> This test seems to be largely based on the traditional concept of a worker, as evident in the AG Jacobs’ opinion in the *Albany* case:

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

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<sup>58</sup> Case C-268/99 *Jany and Others* [2001] ECLI:EU:C:2001:616.

<sup>59</sup> Case C-256/01 *Allonby*.

<sup>60</sup> C-22/98 *Becu and Others* [1999] ECLI:EU:C:1999:419; Case C-309/99 *Wouters and others* [2002] ECLI:EU:C:2002:98; Case C-413/13 *FNV Kiem*.

<sup>61</sup> Case C-85/96 *Martinez Sala* [1998] ECLI:EU:C:1998:217, [ 31]. In this case the Court held that the definition of worker for the purposes of ex. Art. 48 EC (free movement of workers) could differ from the definition of “worker” for the purpose of ex. Art 51 EC (regarding powers of the Council to adopt measures related to social security of workers).

<sup>62</sup> Case C-413/13 *FNV Kiem*, para. 34.

<sup>63</sup> Collins, *supra* note 2, at 369; Rogers, *supra* note 33.

employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community . . . or national law.<sup>64</sup>

Under traditional employment, this requirement seems to be a sensible one. The employer controls the labor process by specifying what kind of work needs to be done, how it is to be done, with what materials, and when and where it is to be done. The employer is consequently the one who bears the risk—be it financial, commercial, or legal risk of liability. However, this understanding fails to take into account the changing nature of both salaried work and self-employment. According to Buschoff and Schmidt, we observe a trend in which “dependent employment is increasingly associated with self-governed and autonomous work organization . . . while some types of work that are classified as self-employment are characterized by a reduction in entrepreneurial freedom as regards the provision of a service or by economic dependence on a single principal.”<sup>65</sup> Thus, independents are not necessarily entrepreneurial; however, dependent workers often exhibit a lot of freedom and independence.

In light of the changing nature of work, the criterion is even more vague and susceptible to diverging interpretations. The case law of the European Court of Justice does not allow for a precise pinpointing of the concept of subordination. For example, in *Allonby*, a case concerning a self-employed school teacher who was previously employed as a teacher by the same college, but was re-hired as an independent after her contract was terminated, the court noted: “[I]t is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.”<sup>66</sup>

Similarly, in its judgment in *FNV Kiem*, discussed below, the court held that what mattered for substitute musicians was:

[I]n particular, that their relationship with the orchestra concerned is not one of subordination during the contractual relationship, so that they enjoy more independence and flexibility than employees who

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<sup>64</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] Opinion of Advocate General Jacobs [1999] ECLI:EU:C:1999:28, [215].

<sup>65</sup> Buschoff & Schmidt, *supra* note 12, at 150.

<sup>66</sup> Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 2014 ECLI:EU:C:2014:2411.



perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned, in other words, the rehearsals and concerts.<sup>67</sup>

Thus, on its face, there seems to be consistency in the court's judgments and the criterion seems a sensible part of a test.

In a contemporary context, this prong of the test, however, has loopholes and is open to abuse. The example of scheduling flexibility quickly reveals the shortcomings of this criterion. Ironically, in *FNV Kiem* the Court of Justice did not consider whether self-employed substitute musicians were deprived of flexibility, and thus, there was no question that they were to be considered self-employed. At the same time, one can easily wonder whether a self-employed musician does in fact have a choice of when, where, and how to play with an orchestra. The judgment went against expectations that a self-employed musician who has to play with the orchestra at the given time and place has limited flexibility, that a construction worker who has to perform the work on the designated site in collaboration with others would have limited flexibility, and that bus drivers who are expected to respect a certain schedule would have limited flexibility.<sup>68</sup>

Furthermore, flexibility might be restricted in practice, yet difficult to prove in court. According to media reports—although some of those engaged in on-demand work via applications such as Uber and Handy do work on an occasional basis—many regard this as a fulltime job. The platforms themselves also seem to value a stable workforce—a number of newspaper articles suggest that work schedules are enforced, sometimes in subtle and other times in not-so-subtle ways. Accounts of self-employed individuals providing services through companies such as Hermes,<sup>69</sup> or Handy, make clear that workers have shifts and that they can be penalized for failing to take assignments or to fill shifts.<sup>70</sup> In the case of

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<sup>67</sup> *Id.*

<sup>68</sup> Frans J.L. Pennings, *Exceptie van de mededingingsbepalingen voor (schijn)zelfstandigen: de zaak FNV Kiem*, 4 NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT 111, 116 (2015).

<sup>69</sup> Robert Booth, *'There's No Compassion': Hermes Cut Driver's Work as Wife was Dying: Peter Jamieson asked to switch delivery days to take his wife to hospital, but says company refused, then withdrew his work*, THE GUARDIAN (Sept. 11, 2016), <https://www.theguardian.com/uk-news/2016/sep/11/hermes-driver-lost-rounds-asking-swap-days>. According to the driver, contractor Hermes refused to give him future assignments because he did not fulfill the shifts he was assigned.

<sup>70</sup> Homa Khaleeli, *The Truth About Working for Deliveroo, Uber and the On-Demand Economy*, THE GUARDIAN (June 15, 2016), <https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy>. To quote from the article:

We are employed as "independent contractors" but that's just ridiculous legal mumbo-jumbo, to allow the company to duck its responsibilities. It's not flexible either. We used to have a system

Uber, drivers have expressed worry that if they decide not to take a ride booked through Uber, their Uber rating would be affected, thus negatively impacting the ability to perform work for Uber in the future.<sup>71</sup> The company need not explicitly enforce minimum working hours or shifts; more nuanced practices, such as indirect punishment via user ratings, might mean that the driver's flexibility is *de facto* restricted. This was recognized by Advocate General Szpunar in his opinion in the *Uber Systems Spain* case, which the ECJ decided in December 2017.<sup>72</sup> According to AG Szpunar, "one should not be fooled by appearances"—even though Uber does not exercise control in the traditional way labor is managed, it nonetheless exercises control—and perhaps more so than the control that an employer exercises over his or her employees.<sup>73</sup> While the AG stops short of declaring that Uber's drivers must necessarily be classified as employees,<sup>74</sup> it nonetheless makes strong arguments as to why they should be considered as such.<sup>75</sup>

Companies careful to avoid a finding of an employment relationship may adopt contractual approaches, rely on technology to avoid the appearance of fixed schedules, or place caps on the amount of work performed. Such compliance mechanisms could be automatically enforced, for example, by blocking a user's account after a certain amount of time is spent on the platform, or by making the platform available to the freelancer for a fixed number of hours per day. Similarly, platform operators may take measures to warn corporate users of the danger of repeated interactions with the same freelancer. It is worth considering the disclaimer on the Amazon Mechanical Turk website: "You acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees,

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where you could swap shifts with people but they said it was too chaotic. Now you do the same shifts every week. [Deliveroo says that while work sessions are booked in advance in London, its riders prioritise flexibility and are free to tell Deliveroo when they wish to work and for how long. They say this flexibility would be lost if riders had to fit into the current structures for employees, resulting in benefits such as sick pay.]

<sup>71</sup> Sheelah Kolhatkar, *Juno Takes on Uber*, THE NEW YORKER (Oct. 10, 2016), <https://www.newyorker.com/magazine/2016/10/10/juno-takes-on-uber>. A driver notes that switching between the two apps is risky "because if you turned down an Uber pickup to take one from Juno your Uber rating might take a hit."

<sup>72</sup> See Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Sys. Spain* SL, 2017 ECLI:EU:C:2017:981.

<sup>73</sup> *Id.* at paras. 51-52.

<sup>74</sup> *Id.* at para. 54.

<sup>75</sup> *Id.* at paras. 44-55 (*the AG makes arguments related to the control exercised by Uber over its drivers, including use of ratings, control of prices, limited discretion, algorithm-based management*); *Id.* at paras. 63-64 where the AG argues Uber drivers do not pursue independent economic activity).

repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status.”<sup>76</sup>

In its communication on the collaborative economy, the Commission reaches the conclusion that most independents engaged via sharing platforms will fail to meet the criteria of a “worker.” The Commission notes that for the subordination criterion to be met, “the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions.”<sup>77</sup> The Commission’s analysis suggests that the subordination criterion is fulfilled when the platform will restrict the provider’s choice of services to be provided, and direct how and when they will be carried out. With respect to payment, the Commission notes that, “where the collaborative platform is merely processing the payment deposited by a user and passes it on to the provider of the underlying service, this does not imply that the collaborative platform is determining the remuneration.”<sup>78</sup> As to whether or not the worker is dependent, it does not matter that there is actual supervision or management. The Commission’s analysis seems to suggest that, in most cases, independents will not fulfill this criterion.

On the other hand, some scholars have noted that in practice, many of the sharing economy platforms do supervise the performance of the services. This supervision is accomplished by setting internal standards for quality of service and enforcing those through user ratings. Platforms do make suggestions as to what the Uber experience should feel like, for example, the availability of an umbrella in the car, playing jazz music, etc. While these are merely suggestions, they easily become norms in which consumers accept as standards of service and use to judge the driver in the rankings.<sup>79</sup> Ratings are certainly important and can serve as the basis for ending contractual relationships, which has led some to call them an endless probation period.<sup>80</sup> Subordination is a difficult criterion, especially since in some cases it will be more visible than others. The comparison will be especially difficult where work performed by self-employed persons does not have a salaried equivalent.

As evident, this prong of the test is not only ambiguous for independents claiming a “worker” status; it is open to manipulation by employers eager to avoid the consequence of labor regulations. Smart companies can exploit the deficiencies of the concept of subordination to take measures to avoid the classification of their contractors as employees. Thus, the

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<sup>76</sup> Aloisi, *supra* note 32, at 669.

<sup>77</sup> European Commission, *A European Agenda for the Collaborative Economy*, *supra* note 31, at 12 (referring to the criteria in *Jany*).

<sup>78</sup> *Id.*

<sup>79</sup> Todoli-Signes, *supra* note 33, at 7.

<sup>80</sup> Aloisi, *supra* note 32, at 671.

problem still stands that precarious independents dealing with much more powerful contracting partners will not fall under the labor rules but will instead fall under the competition rules.

## *II. The Independence and Commercial Risk Requirement*

The European Court of Justice has held that one of the main differences between a “worker” and an “undertaking” is that an undertaking is an economic entity which bears its own financial and commercial risk and assumes responsibility for any damages flowing from its operations or caused by its workers.

The perversion of this requirement is that although commercial independence is the case for many self-employed individuals, it is also not necessarily the first choice for many of them. The social science literature speaks of persons pushed into self-employment, because for many of them this is hardly a matter of choice, but of necessity. According to Buschhoff and Schmidt, some self-employed are opportunity start-ups while others are necessity start-ups. Dekker distinguishes between voluntary self-employed and involuntary self-employed: The former choose this option in order to take advantage of better possibilities—be it higher profits or more flexibility in type of work and working hours; the latter aspire for employment but have been pushed into self-employment because of crisis or necessity.<sup>81</sup> According to Professor of social security law Mies Westerveld, “these workers fall through the cracks with regard to both protective labour laws and opportunity-creating business laws.”<sup>82</sup>

Discontent about risk is evident in the number of lawsuits and media reports. Independents engaged via online platforms such as Uber, Handy, Task Rabbit, and AirBnB have lamented the fact that they are forced to bear their own risk when doing jobs for customers, and that they are not covered by any sort of insurance policy from the company.<sup>83</sup> Excluding the issue of liability, which is increasingly tackled by mandatory insurance that independents themselves pay for, there is, of course, the so-called commercial risk. In order to freelance, one does need to own some assets: In the case of Uber, a car and a smartphone; in the case of online crowdwork, a computer and an Internet connection. Many define the sharing

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<sup>81</sup> Fabian Dekker, *Self-Employed Without Employees: Managing Risks in Modern Capitalism*, 38(4) *Pol. & Pol'y* 765, 768 (2010).

<sup>82</sup> Mies Westerveld, *The Stepchild of Labour Law: The Complex Relationship Between Independent Labour and Social Insurance*, Inaugural lecture at the University of Amsterdam (Dec. 2, 2011).

<sup>83</sup> Many independents have expressed their concern about the lack of protection from the platform and the fact that when serving a client, they find themselves “on their own.” Uber drivers, Handy cleaners, and Airbnb hosts have all expressed worry about their personal safety and their property. While some companies—such as Handy—practice blacklisting problematic customers who harass workers, their own responsibility does not seem to stretch far. See Khaleeli, *supra* note 70.

economy business model as optimizing the use of underutilized assets, suggesting occasional participation and sharing of already owned assets, for example, a home, a car, a bike, or a computer. In reality, ownership of assets is problematic, as evidenced by the growing market for Uber-suited car leases and Uber car financing, with Uber itself being a prominent player in that market.<sup>84</sup>

Yet, the notion that self-employment is voluntary seems entrenched in EU law. AG Wahl noted in his Opinion in *FNV Kiem* that “the higher risks and responsibilities borne by the self-employed are, on the other hand, meant to be compensated by the possibility of retaining all profit generated by the business.”<sup>85</sup> The possibility for profit, growing a business, or developing own customer base is an empirical question that could be tested in court. For instance, the argument made by Uber—in the context of a lawsuit in front of a UK employment tribunal—is that Uber helps drivers grow as entrepreneurs. This argument was rejected by the tribunal. The judge reasoned:

The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous. In each case, the ‘business’ consists of a man with a car seeking to make a living by driving it. Ms[.] Bertram spoke of Uber assisting the drivers to “grow” their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Nor can Uber’s function sensibly be characterized as supplying drivers with “leads”. That suggests that the driver is put into contact with a possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber’s terms.<sup>86</sup>

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<sup>84</sup> See UBER, <https://www.uber.com/en-AU/drive/vehicle-solutions/>; Leslie Hook, *Uber Hitches a Ride with Car Finance Schemes*, FINANCIAL TIMES (Aug. 11, 2016), <https://www.ft.com/content/921289f6-5dd1-11e6-bb77-a121aa8abd95>. Nicole Arata, *5 Ways to Get a Car You Need to Drive for Uber or Lyft*, USA TODAY (Jan. 8, 2017), <https://www.usatoday.com/story/money/personalfinance/2017/01/08/5-ways-get-car-you-need-drive-uber-lyft/96214312/>. According to discussions on the informal forum of Uber drivers, this is a way for Uber to create “indentured drivers”; see *Uber & the Auto Loan Bubble*, UBERPEOPLE.NET, (last edited Aug. 24, 2016), <https://uberpeople.net/threads/uber-the-auto-loan-bubble-an-analysis.98564/>.

<sup>85</sup> Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] Opinion of Advocate General Wahl ECLI:EU:C:2014:2215, [45].

<sup>86</sup> Mr. Y Aslam, Mr. J Farrar, & Others v. Uber [2016], para. 90, <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>

The commercial independence prong of the employment test could potentially be improved by testing for entrepreneurship, or possibility of profitability—accomplished by showing that the risk taken by choosing self-employment could, in theory, be rewarded by gain, notwithstanding the possibility of a loss. The EU law test for a “worker,” however, specifically rules out such considerations.

In the past, the European Court of Justice has rejected an entrepreneurship test in the context of claims of self-employment. The court was presented with the choice to adopt a stricter entrepreneurship test in the *Jany* case.<sup>87</sup> In this case, the Netherlands government sought to clarify whether sex workers from Poland and the Czech Republic could take advantage of provisions under the Association Agreements to take up work as self-employed in the Netherlands.<sup>88</sup> The Netherlands government argued that there should be some minimum requirements for the category of self-employment, such as: That the work in question must be skilled work, that a business plan must be available, that the business operator should be in charge of managing the business and not only performing the work, and that the business operator must invest and have long-term commitments.<sup>89</sup> The court, however, did not accept these additional requirements.

Curiously, however, in the context of competition law, the European Court of Justice has also rejected stricter entrepreneurship criteria, such as a requirement that an economic activity should require a “combination of material, non-material and human resources.”<sup>90</sup> Thus, one need not be tested for genuine entrepreneurship in order to be treated as an enterprise under EU competition law. At the same time, a position of commercial independence, whether desired or not, is enough to rule out the application of labor law. This situation reflects the broad scope of the EU competition provisions and the much narrower scope of the concept of “worker.”

### *III. Marginal and Ancillary Activity for Multiple Clients*

Another major roadblock in the concept of work and “worker” relates to the requirement that the relationship with the client is one of a certain stability or a long-term nature. This is a big challenge for the newest type of self-employed persons—those performing work on demand for different clients, and especially those engaged in crowd-sourcing work.

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<sup>87</sup> Case C-268/99 *Jany and Others*.

<sup>88</sup> Under the Association Agreements at the time, they could not benefit from the free movement of workers provisions but could benefit from the freedom of establishment.

<sup>89</sup> Case C-268/99 *Jany and Others*, [24], question 5.

<sup>90</sup> Case C-35/96 *Commission v Italy (CNSD)* [1998] ECLI:EU:C:1998:303, [38].

On numerous occasions, the European Court of Justice has held that the concept of work excludes “marginal and ancillary activity.”<sup>91</sup> The court stated in *Asscher*:

It is settled law that any person who pursues an activity which is effective and genuine, *to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary*, is to be treated as a 'worker' within the meaning of Article 48 of the Treaty. According to the case-law, the essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.<sup>92</sup>

With respect to this requirement, the European Commission is of the opinion that, in the case of the collaborative economy, most participants would not qualify as workers, although the actual outcome might differ in court.<sup>93</sup> When it comes to member state labor law, national courts differ in their assessment as to the necessary threshold—in terms of time spent working or wages earned—in order to qualify as a worker.<sup>94</sup>

This issue—perhaps more than any other—reveals the fundamental flaws of the “worker” category, to which all forms of labor law protection are linked. The question is: Can the traditional concept of “worker” possibly be broadened to include persons who provide services to multiple clients on an irregular basis, and often for short periods of time, for example, as little as ten minutes? If that would be possible, then the newest type of self-employed—on demand workers engaged via matchmaking or crowdsourcing platforms—could be covered.

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<sup>91</sup> For instance, the issue of working for a limited number of hours has been discussed by the Court with respect to the so called “zero hour” or “on-call” contracts. The Court has considered that the existence of such a contract could indicate an employment relationship, but that it is up to the national courts to determine this while taking into account the duration of activities and irregular nature. See Herwig Verschueren, *Being Economically Active: How It Still Matters*, in *RESIDENCE, EMPLOYMENT AND SOCIAL RIGHTS OF MOBILE PERSONS: ON HOW EU LAW DEFINES WHERE THEY BELONG* 187, 199 (Verschueren ed., Intersentia, 2016). In the *Raulin* case, the Court determined that work for limited hours could be an indication that the activity in question is of purely marginal or ancillary nature. See Case C-357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:87, [11-14].

<sup>92</sup> Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën (Asscher)* [1996] ECLI:EU:C:1996:251, [25-26](emphasis added).

<sup>93</sup> *A European Agenda for the Collaborative Economy*, *supra* note 31, at 13.

<sup>94</sup> O'Brien, Spaventa & de Coninck, *supra* note 27, at 27-29.

There are also downsides to stretching the definition of a “worker” to cover even the most limited participation in labor markets—making the category of “worker” overinclusive. Doing so would put strain on the current system of labor protection, as it would extend protection to individuals whose interaction with labor markets is sporadic. As a side effect, it could even incentivize more traditional “self-employed,” such as members of the liberal profession, to adapt their behavior in order to take advantage of protections.

#### *IV. Blurring Conceptual Boundaries*

Project-based, on demand work, in a self-employed capacity is arguably on its way to becoming the norm.<sup>95</sup> This argument resonates with the European Commission, which notes that the rise of the sharing economy is indicative of a “structural shift.” This structural shift is already visible through the increase in temporary and part-time work, with people holding multiple jobs, and the increasingly blurry distinction between workers and those self-employed.<sup>96</sup> Importantly, these developments affect not only the markets for menial labor, such as parcel delivery; they are expected to affect knowledge workers as well.<sup>97</sup> The challenge is how to regulate the new labor markets in order to preserve the dignity and livelihood of workers, while also tapping into the potential for efficiency and increased labor participation opening up through new forms of work.

The above section shows that the concept of a worker is not flexible enough to accommodate the developments of labor markets. This challenge is summed up by Judge Chhabria’s metaphor in the case against Uber’s competitor, Lyft: Deciding whether the self-employed drivers are workers or employees would amount to being “handed a square peg and asked to choose between two round holes.”<sup>98</sup> Given the difficulties in constructing a labor law definition that would encompass vulnerable self-employed, it is worth considering whether there is a possibility for self-employed to escape the application of the competition laws.

#### **D. The Concept of ‘Undertaking: Broad Concept, Narrow Exception**

The EU competition provisions are addressed to “undertakings” of all sizes—big and small. There is no “*de minimis*” ruling when it comes to the definition of the concept of undertaking. Once an entity is deemed to fulfill the criteria for an “undertaking,” the EU rules

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<sup>95</sup> Fudge, *supra* note 23; LYNDA GRATTON, *THE SHIFT: THE FUTURE OF WORK IS ALREADY HERE* (2011).

<sup>96</sup> *A European Agenda for the Collaborative Economy*, *supra* note 31, at 11.

<sup>97</sup> Gratton, *supra* note 95.

<sup>98</sup> See Brishen Rogers, *Redefining Employment for the Modern Economy*, in *AMERICAN CONSTITUTION SOCIETY FOR LAW & POLICY* 4 (Issue Brief Oct. 2016). See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).



on competition apply. The key question is whether one is engaged in what the European Court of Justice calls economic activity—a concept referring to the placing of goods or services on the market.<sup>99</sup> The concept of undertaking has long been applied to various self-employed individuals including farmers and butchers,<sup>100</sup> self-employed opera singers,<sup>101</sup> boat owners providing water transport services,<sup>102</sup> inventor-consultants,<sup>103</sup> independent professionals such as lawyers<sup>104</sup> and doctors,<sup>105</sup> and independently employed customs agents.<sup>106</sup> At the national level, freelance actors<sup>107</sup> and substitute musicians<sup>108</sup> have also been considered “undertakings” for the purpose of applying national competition rules.

Therefore, we should turn to the case law in which workers had to be distinguished from undertakings for the purpose of applying competition law.<sup>109</sup> Based on the case law, the following criteria can be distinguished: The engagement in economic activity and commercial independence. Economic activity essentially requires that the undertaking be

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<sup>99</sup> See e.g. Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECLI:EU:C:2000:428, [75]; Case C-475/99 *Ambulanz Glöckner v. Landkreis Aüdwestpflaz* [2001] ECLI:EU:C:2001:577, [19]; Case C-118/85 *Commission of the European Communities v Italian Republic* [1987] ECLI:EU:C:1987:283, [7]; Case C-35/96 *Commission of the European Communities v Italian Republic (CNSD)* [1998] ECLI:EU:C:1998:303, [36]; Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [2006] ECLI:EU:C:2006:453, [25].

<sup>100</sup> Joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) (T-217/03) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others (T-245/03) v Commission of the European Communities (French beef)* [2006] ECLI:EU:T:2006:391.

<sup>101</sup> 1978 O.J. (L 157) 15.6.

<sup>102</sup> See 1985 O.J. (L 219) 17.8. (applying rules of competition to transport by rail, road, and inland waterways).

<sup>103</sup> 1976 O.J. (L 254/40) 17.9, at 45.

<sup>104</sup> Case C-309/99 *Wouters and others* [2002] ECLI:EU:C:2002:98; C-35/99 *Arduino* [2002] ECLI:EU:C:2002:97.

<sup>105</sup> Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECLI:EU:C:2000:428.

<sup>106</sup> See Case C-35/96 *Commission v Italy* [1998] ECLI:EU:C:1998:303, [37-38].

<sup>107</sup> Competition Act 2002 (Competition Authority Decision No E/04/002 Case COM/14/03) (Ir.), [https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E\\_04\\_002-Actors-Fees-Enforcement-Decision.pdf](https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/E_04_002-Actors-Fees-Enforcement-Decision.pdf) (agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors).

<sup>108</sup> See Case C-413/13 *FNV Kiem*; see also Dutch Competition Authority 2007 (Nederlandse Mededingingsautoriteit), *Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet: visiedocument* (Collective labor agreements determining fees for self-employed and the competition law: a reflection document) (Neth.), <http://docplayer.nl/23777662-Cao-tariefbepalingen-voor-zelfstandigen-en-de-mededingingswet.html>.

<sup>109</sup> Case C-22/98 *Becu and Others* [1999] ECLI:EU:C:1999:419, Case C-309/99 *Wouters and others* [2002] ECLI:EU:C:2002:98; Case C-413/13 *FNV Kiem*.

engaged in the provision of goods or services on the market.<sup>110</sup> Unlike the requirement for workers that marginal and ancillary activity be excluded, there is no similar requirement with respect to economic activity.<sup>111</sup> With respect to commercial independence, the analysis in the case law of the European Court of Justice mirrors the analysis applied to distinguish workers from self-employed persons. Commercial independence requires that the entity is in fact a separate entity—-independent from the principal.<sup>112</sup> A key factor in establishing independence is determining who bears responsibility for commercial risk.<sup>113</sup> Importantly, just as it rejected the need for self-employed to meet any entrepreneurship criteria, the court has not required that an undertaking behave like a company. Thus, there is no need for investment or a “combination of material, non-material, and human resources.”<sup>114</sup>

Given the above, it is not surprising that the self-employed qualify as undertakings. Still, the question about the application of the competition rules to agreements between self-employed individuals was not answered until the ECJ’s December 2014 *FNV Kiem* judgment. In this judgment, the court was asked to clarify whether self-employed substitute orchestra musicians could benefit from provisions of a collective bargaining agreement. The judgment has implications for all types of freelancers and was welcomed by many commentators. The main critique in the section below is that the judgment essentially preserves the traditional distinction between “worker” and “undertaking,” while carving out an exception for self-employed who meet the criteria for “worker.” Thus, while the judgment is to be praised for acknowledging the problem of bogus self-employment, it does not change much for the “new self-employed”—especially those who stand no chance of meeting the “worker” criteria in the first place.

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<sup>110</sup> Case C-35/96 *Commission v Italy (CNSD)* [1998] ECLI:EU:C:1998:303, [36].

<sup>111</sup> There exists so called *de minimis* exceptions from the competition rules. These are linked—particularly in the case of Article 101 TFEU—to the notion of “appreciability” of the restriction of competition and not to the concept of undertaking as such. See *infra* section D.I.

<sup>112</sup> Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECLI:EU:C:2006:784, [45]; Case C-413/13 *FNV Kiem*, [27].

<sup>113</sup> 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 1663, [541]; Case C-35/96 *Commission v Italy (CNSD)*, [37], Case C-413/13 *FNV Kiem*, [33].

<sup>114</sup> Case C-35/96 *Commission v Italy (CNSD)*, [38].

*I. The FNV Kiem Judgment*

The reference for a preliminary ruling arose in the context of a dispute concerning a reflection document issued by the Dutch competition authority.<sup>115</sup> The document stated that a collective labor agreement fixing minimum tariffs—concluded on behalf of self-employed workers—is incompatible with the competition rules. The self-employed in question were substitute orchestra musicians, and the trade union represented both those regularly employed as orchestra musicians and the substitutes who had a freelance status. After the opinion was issued, negotiations between the employers' association and the union broke down. The union started proceedings with the purpose of obtaining a declaration that it is not contrary to Dutch or EU competition law for self-employed substitutes to conclude a collective bargaining agreement setting minimum tariffs with the employers. The national court referred two questions, essentially reflecting the two cumulative criteria established in previous case law related to competition law and collective bargaining.<sup>116</sup> First, it asked if minimum-fee provisions in a collective bargaining agreement covering self-employed individuals who perform for an employer the same work as regular employees, could be seen as falling outside the scope of Article 101 TFEU on the ground that these provisions are included in a collective labor agreement. Second, the court asked if the provisions could be interpreted as falling outside the scope of Article 101 on the ground that they improve the working conditions of workers.<sup>117</sup>

In response to the questions, the Advocate General did not address the functional similarity between self-employed substitutes and employed musicians, and their equal position with respect to being in a weaker bargaining position. In fact, he considered that drawing a distinction between self-employed and workers would be workable, despite the heterogeneity of the self-employed category.<sup>118</sup> Instead, he suggested carving an exception for collective bargaining agreements depending on the purpose they pursue. His proposed solution was for trade unions to be able to conclude agreements which affect self-employed

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<sup>115</sup> Dutch Competition Authority 2007 (Nederlandse Mededingingsautoriteit), *Caotariefbepalingen voor zelfstandigen en de Mededingingswet: visiedocument* (Collective labor agreements determining fees for self-employed and the competition law: a reflection document) (Neth.), <http://docplayer.nl/23777662-Caotariefbepalingen-voor-zelfstandigen-en-de-mededingingswet.html>.

<sup>116</sup> C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430; C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Brentjens)* [1999] ECLI:EU:C:1999:434; C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven (Drijvende Bokken)* [1999] ECLI:EU:C:1999:437; C-222/98 *Hendrik van der Woude v Stichting Beatrixoord (van der Woude)* [2000] ECLI:EU:C:2000:475.

<sup>117</sup> Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 2014 ECLI:EU:C:2014:2411 (Dec. 4, 2014).

<sup>118</sup> Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 2014 ECLI:EU:C:2014:2411 (Dec. 4, 2014).

but only when doing so is for the purpose of preventing social dumping. This would be verified by following a two-step test. First, courts would have to ascertain the presence of “a real and serious risk of social dumping”—as in where there is evidence that workers are likely to be replaced with self-employed—and the provisions in the collective bargaining agreement need to be essential to preventing this outcome.<sup>119</sup> Second, the provisions in question would have to pass a proportionality analysis to make sure that the provisions do not go beyond what is necessary to improve the situation of workers.<sup>120</sup> The Advocate General’s approach is firmly premised on the idea that the self-employed cannot escape the scope of the competition rules, and that while the Treaties aim to promote the protection of workers, they never mention the protection of the self-employed.

The court did not follow this approach. Instead, it made a distinction between two types of self-employed—genuine self-employed and “false self-employed.” The result of FNV is as follows: On the one hand, it is confirmed that the self-employed are to be considered undertakings for the purpose of competition law; in this case, there is no exception for making collective bargaining agreements. On the other hand, should these self-employed be “false self-employed”—in the sense of performing the same work as regular workers—a collective bargaining agreement covering them would fall outside the scope of the competition rules.<sup>121</sup>

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<sup>119</sup> *Id.* at para. 89.

<sup>120</sup> *Id.* at para. 92.

<sup>121</sup> Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 2014 ECLI:EU:C:2014:2411 (Dec. 4, 2014). In the words of the Court:

[ . . . O]n a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees’ organisations and perform for an employer, under a works or service contract, the same activity as that employer’s employed workers, are ‘false self-employed’, in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

## II. *FNV Kiem*: A Narrow Escape for the Bogus Self-Employed

The judgment in *FNV Kiem* was quickly welcomed as an affirmation of the ECJ's intention to support measures enhancing solidarity and the spirit of worker protection.<sup>122</sup> Nonetheless, there are reasons to remain skeptical about the impact of the court's judgment. Commentators noted that the criteria for determining whether a self-employed worker is false or genuine are vague and open to misinterpretation.<sup>123</sup> The judgment does not articulate clear criteria for when a worker classifies as "false self-employed," but makes it an empirical test based on the definition of a worker—effectively leaving it for the national courts to identify criteria to determine whether the function performed by the self-employed is essentially the same as the function performed by regular employees.

Essentially, the judgment in *FNV Kiem* is an affirmation of the "worker" test, which probes for subordination and commercial independence. Thus, it only addresses the problem of the bogus self-employed but not for the "new self-employed." The difference is worth repeating: Bogus self-employed are misclassified workers and a court should be capable of recognizing that they satisfy the criteria for the legal status of a "worker." Thus, the *FNV Kiem* ruling seems irrelevant for the situation of the "new self-employed."<sup>124</sup> For instance, it provides no solution for situations in which there are no other regular employees to compare against. When freelancers provide services via platforms arranging for crowdsourcing work or when they work on demand, the service they provide cannot be compared with the job done by a regular employee because no such employee exists in the organization in question. The ruling is also irrelevant to the status of those self-employed whose employers will take the necessary measures to avoid a finding of an employment relationship. These freelancers will continue to fall under the competition rules and will be—just as utility companies or high-tech giants such as Microsoft—subject to the same rules and prohibitions.

There is a further implication for the judgment and that has to do with the viability of the traditional model of industrial relations. *FNV Kiem* does nothing to remedy the legal

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<sup>122</sup> See e.g. Sebastian Rombouts, 'European Court of Justice – 18/12/2014 – fnv Kunsten Informatie en Media v. Staat der Nederlanden' *International Labor Rights Case Law*, Volume 1, Issue 2, pages 147 – 158; See also Laurens Ankersmit, *Albany Revisited: The Court Directs NCA to Carry a More Social Tune*, EUROPEAN LAW BLOG (March 3, 2015), <http://europeanlawblog.eu/?p=2695>.

<sup>123</sup> Joost Huidijk, *De toepasselijkheid van cao's op zelfstandigen: wat zegt het mededingingsrecht?*, AKD BLOG (April 16, 2015), <http://blogs.akd.nl/2015/de-toepasselijkheid-van-caos-op-zelfstandigen-wat-zegt-het-mededingingsrecht/>. The author—a lawyer practicing EU and competition law at a Dutch law firm—notes that there is much uncertainty over whether a self-employed worker will be considered "false self-employed" or genuine self-employed. See also Pennings, *supra* note 68.

<sup>124</sup> Importantly, the criteria are based on a comparison with what a typical worker does, but in many cases, there will be no immediately available comparison. The challenge is for those self-employed engaged in novel types of work for which no clear equivalents in terms of salaried labor exist. One could compare the work done by a regular worker under an employment contract and compare it to the work done by a substitute.

uncertainty for a trade union aiming to increase its membership by attracting self-employed. Essentially, a trade union and employer's organization who make an agreement covering self-employed, face a rebuttable presumption of cartelization unless they can show that the self-employed in question are bogus self-employed.<sup>125</sup> This is a big risk for both parties, as antitrust fines can be as high as up to 10% of the global turnover of the entity. The consequences of legal uncertainty were already anticipated in the opinion of AG Wahl, who expressed doubts about the approach ultimately taken by the court.<sup>126</sup> In his view:

I do not see how it could be in the interests of the social partners to negotiate and enter into collective agreements whose validity in a number of specific cases is at best uncertain, and thus easily the source of dispute, and which, as a result, fail to set the labour standards in the sector covered.<sup>127</sup>

Such uncertainty threatens to further weaken the position of trade unions, which have been in decline throughout the Western world in the past decades.<sup>128</sup>

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<sup>125</sup> In this case, the cartel would be vertical, so employers would also be liable if they enter into the agreement.

<sup>126</sup> Case C-413/13 *FNV Kiem*, Opinion of Advocate General Wahl, [63]. In his view, the distinction between self-employed and worker was workable, and despite the heterogenous nature of the class of self-employed he did not recommend carving out an exception.

<sup>127</sup> *Id.* at para. 64.

<sup>128</sup> For instance, in 2017, the British Department for Business, Energy & Industrial Strategy and the UK Office for National Statistics released figures showing plummeting union membership over the past decades. The item made international news. See Alexandra Topping, *Union Membership has Plunged to an All-Time Low, Says DBEIS*, THE GUARDIAN (June 1, 2017) <https://www.theguardian.com/politics/2017/jun/01/union-membership-has-plunged-to-an-all-time-low-says-ons>. See also Gavin Kelly, *Trade Unions — Adapt to the Modern World or Die*, FINANCIAL TIMES (June 1, 2017) <https://www.ft.com/content/f65a8510-4626-11e7-8d27-59b4dd6296b8>. According to data from Eurofound, between 2003 and 2008, ten Member States recorded an overall increase in union membership while 12 Member States recorded an overall decrease. According to the study, "Overall membership for all 97 trade union centres and sets of 'other' trade unions, for which data are available, declined by about 1.9% over the 2003–2008 period. In the EU15 [Members of the EU before 2004] and Norway, the decline in union membership stood at about 0.4%, while in the NMS [new member states] it amounted to around 10.6%." See EURWORK (European Observatory of Working Life), TRADE UNION MEMBERSHIP 2003–2008 (Report published on Sept. 21, 2009) <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/trade-union-membership-2003-2008#hd2>.

### E. Beyond Definitions: In Search of an Exception to the Cartel Prohibition for the New Self-Employed

It is certainly regrettable that the ECJ did not seize the opportunity to recognize the difference between the “new self-employed” and the traditional self-employed, and to appreciate that the former category is much broader than bogus self-employed. Nevertheless, criticism of the outcome in *FNV Kiem* should also be realistic: There is no easy teleological solution to the problem of unequal bargaining power of the precarious self-employed. Adjustments of the definitions of “worker” or “undertaking” can have undesirable side effects.

In the case of defining a “worker”—including gig workers—would mean broadening the scope of the term beyond recognition with the consequence, that even occasional transactions can imply the existence of a labor relationship. Such an outcome destroys the much-needed flexibility in labor markets that the EU has been pursuing.<sup>129</sup> Proposals for a category in between “worker” and “entrepreneur” also have serious shortcomings. Although in theory a good idea, the introduction of such “discounted rights categories” can lead to arbitrage with the ultimate effect being further erosion of workers’ rights when actual workers are misclassified as dependent contractors.<sup>130</sup>

At the same time, adjusting the scope of the term “undertaking” to exclude self-employed from the scope of the competition rules could lead to the undesirable consequences associated with cartels—namely, higher prices, lower quality, and less innovation. Certainly, giving a *carte blanche* for price fixing to all self-employed—or even just to the self-employed without personnel—is quite problematic. Allowing doctors, lawyers, or accountants, but also locksmiths, craftsmen, or plumbers to price-fix would be severely damaging for the consumers of such services, and it is probably unnecessary. Finally, it is not clear if adjusting definitions would be effective in the long run as companies also adjust their business models to the updated legal categories.

A less drastic approach might be to search for exceptions to the cartel prohibition specifically related to collective bargaining. The Advocate General in *FNV Kiem* proposed a solution on the basis of the judgment in *Albany*, but the court decided not to follow this approach.<sup>131</sup>

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<sup>129</sup> *Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century*, *supra* note 26. The European Union has been striving to achieve “flexicurity”—a combination of flexible labor markets with a generous safety net and active labor policy to encourage employment.

<sup>130</sup> For an extensive discussion of the merits of a third category and a comparison of the experiences of Canada, Italy, and Spain with such a third category of rights; see MA Cherry and A Aloisi, “*Dependent Contractors in the Gig Economy: A Comparative Approach*,” 66 *AM. U. L. REV.* 635 (2017).

<sup>131</sup> Labor law professor Frans Pennings argues that the AG’s approach is quite difficult for the national courts and, furthermore, of limited practical usefulness. It means that one has to be able to show the fact that in the absence

This section explores other possibilities for avoiding the prohibition within Article 101 TFEU by first looking at the possibilities for escaping Art. 101 (1) TFEU and secondly, by considering the possibilities for exemption under Art. 101 (3) TFEU. Finally, the section comments on the enforcement priorities of competition law authorities.

### *I. Agreements Not Restricting Competition Under Article 101 TFEU*

Are there circumstances under which collective setting of tariffs by freelancers could fall outside the scope of Article 101(1) TFEU? In general, restrictive measures taken by trade associations—even those entered into with the blessing of a Member State—have not escaped the competition rules.<sup>132</sup> Nonetheless, there are few situations in which a measure restricting competition at first sight can nonetheless be deemed as not “restrictive of competition” within the meaning of Article 101(1) TFEU. The criteria for fulfilling this condition are rather strict—the measure has to be in pursuit of the public interest and the restriction has to be proportionate. The case law on the liberal professions can be instructive in this regard. In *Wouters*, the court held that a decision by a professional association of lawyers to prohibit partnerships involving lawyers and accountants fell outside the scope of Article 101(1) TFEU on grounds of pursuing a public interest.<sup>133</sup> Thus, although lawyers were held to be undertakings, and the Dutch bar—an association of undertakings—the measure was excluded from Article 101(1) TFEU. In doing so, the court took into account the proportionality of the measure and the fact that it pursued a public objective.<sup>134</sup>

With respect to the joint setting of minimum tariffs by the self-employed, two cases against Italy provide some insight. In *CNSD*, a national measure requiring the National Council of Customs Agents—the customs agents were self-employed—to adopt compulsory tariffs for all agents was found to be in breach of Article 101(1) TFEU.<sup>135</sup> At the same time, in another case against Italy, the Court found that a national measure permitting the fixing of minimum and maximum tariffs for the services of lawyers and notaries was exempt from Article 101 TFEU.<sup>136</sup> The main difference between the two cases seems to lie in the extent to which

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of agreement replacing workers with independents has already taken place—a point in time at which a collective bargaining agreement is probably too late. See Pennings, *supra* note 68, at 114.

<sup>132</sup> See Case C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair (BNIC v Clair)* [1985] ECLI:EU:C:1985:33; Joined cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission of the European Communities* [2008] ECLI:EU:C:2008:741.

<sup>133</sup> Case C-309/99 *Wouters and others*, [97].

<sup>134</sup> *Id.* at paras. 109-110.

<sup>135</sup> Case C-35/96 *Commission v Italy (CNSD)* [1998].

<sup>136</sup> Case C-35/99 *Arduino* [2002] ECLI:EU:C:2002:97.



there was supervision in the public interest. In the *Arduino* case, the court found that the governance structure was sufficiently robust to prevent conflicts of interest so the setting of tariffs was allowed;<sup>137</sup> contrarily in *CNSD*, the court found such safeguards to be lacking.<sup>138</sup>

The obvious conclusion is that the scope of these exceptions is rather limited, and it can hardly be said that a collective bargaining agreement by the self-employed would meet public interest criteria. But even if that could be argued that a certain group of self-employed could benefit from an exception, the problem will remain for the rest of the self-employed. It is unlikely to be able to show that a variety of crowd-workers are similar enough to seek protection as a group.<sup>139</sup>

Another suggestion for protecting independents could be a so-called *de minimis* exemption for micro cartels, when those are concluded by vulnerable independents. Under EU law, there is the *de minimis* exception first articulated by the court in *Völk v. Vervaecke* case.<sup>140</sup> The Commission guidelines regarding the *de minimis* exception clarified that this exception does not apply to agreements that have the object of restricting competition.<sup>141</sup> Agreements fixing prices and limiting output are generally considered restrictions by object, which is the type of category that collective bargaining on wages and terms of labor would fall under. These agreements are considered so egregious that they are not permitted at any level of market share. For instance, in the 2013 judgment in *Schenker*, the court found that a cartel with a maximum market share of less than 4% of the relevant market in Austria was in breach of Article 101 TFEU.<sup>142</sup> There is, of course, the possibility that *de minimis* exemptions will be adopted in national competition law. However, there might be thresholds at the national level and, in any case the applicability of national *de minimis* exemptions is limited by the

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<sup>137</sup> *Id.* at para. 44.

<sup>138</sup> Case C-35/96 *Commission v Italy (CNSD)*, [43].

<sup>139</sup> Some organizing, however, is taking place. A notable development in this respect is, for instance, the Ride Share Drivers United organization which seeks improvement of the conditions for Uber drivers. See RideShare Drivers United, AUS & USA, <http://ridesharedriversunited.com/>.

<sup>140</sup> Case C 5/69 [1969]. In it the Court held that: "[...] An agreement falls outside the prohibition in [Article 101] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question." In this case, one of the parties had 0.08% market share of the Community market, 0.2% in Germany and 0.6% in Belgium and Luxembourg.

<sup>141</sup> 2014 O.J. (C 291) 30.8 (European Commission, Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice)).

<sup>142</sup> See Case C-681/11 *Bundeswettbewerbsbehörde, Bundeskartellanwalt v Schenker & Co. AG and Others (Schenker)* [2013]. Importantly, the judgment went against an assurance, which had been issued by the Austrian competition authority that such an agreement would be exempt.

presence of cross-border effects.<sup>143</sup> Although introducing an exemption by setting certain thresholds is possible, it is not clear whether it would be effective in providing a counter-balance to the bargaining power of large platforms; questions of determining market share might also make freelancers uneasy about transgressing the boundary of the exception.

Article 101(3) TFEU provides a possibility to exempt restrictions on competition on grounds of furthering technological progress or improving outcomes for consumers. In the case of agreements aiming to improve the position of suppliers—which might result in price increases for consumers and does not result in clear advantages in terms of efficiency—the first two criteria of the four cumulative conditions of the test will certainly not be met. An additional exception to 101(3)—along the lines of the requirement in *Albany* that an agreement serves to improve the condition of workers—could be conceived; yet again, the issue is how to prevent such an exception from misuse by companies eager to raise prices. It is a difficult question of how the cartel prohibition can be modified in such a way so as to protect freelancers, while also preventing misuse by companies eager to raise prices.

## *II. Condoning and Adjusting Enforcement Priorities?*

Prosecuting cartels has not always been the priority for the EU Commission.<sup>144</sup> Nevertheless, with the modernization of EU competition law, fighting cartels has become core business for the EU Commission and national enforcers. Cartel investigations are also an important element of evaluating the efficiency of national authorities: If an authority is evaluated on the number of decisions taken or on what they have delivered in terms of overcharges to consumers prevented, cartel investigations score on both points. Cartel cases also tend to be relatively clear-cut, in the sense that proving the existence of the agreement suffices for showing a breach. By contrast, cases involving abuses of power require more sophisticated argumentation and theories of harm.

Although one might wonder whether national competition authorities would be willing to expend time and resources to prosecute very small cartels, practice shows that they do. For instance, the Dutch competition authority has a track record of investigating small cartels. In 2011, the authority fined ten window-cleaning enterprises in the city of The Hague for agreeing to split the market—the market in this case being the streets of the De Hoornse

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<sup>143</sup> For instance, self-employed without personnel in the Netherlands may enjoy exemption from the competition rules provided: (1) [T]hat they meet certain turnover criteria (5.5 million euros), and (2) that there are no more than 8 enterprises involved. We should stress, however, that an effect on cross-border trade is easily found in EU competition law, so it is to be doubted to what extent such national exceptions have any meaning in practice.

<sup>144</sup> See *Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, at 5, COM (1999), 101 final (April 28, 1999). See also Imelda Maher, *Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary*, 38(1) *J. L. & Soc'y* 119 (2011).

Zoom suburb.<sup>145</sup> The cleaners in question were small enterprises with limited turnover. They were fined 1000 euros each, except for one cleaner who, due to his old age and other circumstances was not active in the business anymore, and who only received a symbolic fine of 1 euro.<sup>146</sup> Similarly, a cleaner's branch organization was found in breach of competition law for agreements on annual price increases, to the consequence being million euro fines.<sup>147</sup> Most of the enterprises in question were small enterprises, likely including many self-employed individuals.<sup>148</sup> Other national authorities have also prosecuted cartels involving micro and small enterprises.<sup>149</sup>

This Article in no way argues that competition authorities should stop fighting cartels. Even small and local cartels can be harmful to consumers and, more generally, to a growth and innovation oriented economy. It does, however, raise the issue of what we might consider one-sided enforcement: Fighting cartels among suppliers—in this case, precarious suppliers of labor—while failing to take measures against abuses by powerful contracting partners such as platforms.

#### F. The Self-Employed in an Uber Economy: A Regulatory Perspective

It should be evident by now that the issue of protecting the “new self-employed” by the traditional mechanism of collective bargaining is not just a matter of political will. As shown, in some jurisdictions such as Ireland, there is a clear legislative desire to exempt vulnerable independents from the competition provisions.<sup>150</sup> It is also not only a problem of pro-trade

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<sup>145</sup> *NMa Fines Window Cleaners in The Hague for Cartel Activities*, NMA NEWS (Dec. 29, 2011), <https://www.acm.nl/en/publications/publication/6721/NMa-fines-window-cleaners-in-The-Hague-for-cartel-activities/> (a Dutch language press release with a summary of the decision is available at <https://www.acm.nl/nl/publicaties/publicatie/6623/NMa-beboet-kartelafpraak-Haagse-glazenwassers/>).

<sup>146</sup> The glass cleaner in question received a symbolic fine of 1 euro. See *Samenvatting van het besluit van de NMa van*, NMA NEWS (Dec. 20, 2011), <https://www.acm.nl/nl/publicaties/publicatie/6623/NMa-beboet-kartelafpraak-Haagse-glazenwassers/>.

<sup>147</sup> See, *NMa geeft schoonmakers miljoenenboete*, NU.NL (Mar. 19, 2003), <http://www.nu.nl/economie/122827/nma-geeft-schoonmakers-miljoenenboete.html> (according to the article, the branch organization OSB numbered 650 cleaning business – for the most part, small undertakings).

<sup>148</sup> *Id.*

<sup>149</sup> Consider the *VEBIC* case which was subject to a preliminary reference before the Court of Justice. Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC) VZW*. [2010] ECLI:EU:C:2010:739 (the infringement in question was a price agreement between artisan bakers, ice-cream and chocolate makers in Belgium).

<sup>150</sup> The 2001 decision of the Irish Competition Authority restricting the possibility of freelance actors to bargain collectively has caused much outrage in Irish society, and multiple legislation attempts have since been made to address the issue of the right to collective bargaining for vulnerable self-employed, especially artists, musicians and freelance journalists. In 2010, a legislative proposal was made to amend the competition rules; however, the proposal was rejected because of concerns with compliance with the IMF/EU Financial Support program which did

EU laws versus more socially oriented national policies. Rather, it is a fundamental problem of blurring boundaries between legal categories such as “worker” and “enterprise”—a problem reflective of fundamental changes in society brought by changes in business organization, globalization, and technology.

In this situation, it is worth “going back to basics”<sup>151</sup> and considering the fundamental problem that the law is trying to solve. The problem is one of economic dependence and power imbalances, and the likelihood that this will lead to exploitation and unfairness.<sup>152</sup> Historically, the way to solve this problem in the context of labor provision was to provide a minimum floor of protection via labor law, complemented by the possibility for collective bargaining. By allowing workers to join forces—something which companies are forbidden from doing—society ensures that unfair outcomes can be avoided; the decision to exclude antitrust rules from application was a conscious one.<sup>153</sup> As this Article has shown, however, once labor becomes a service and workers become contractors, this mechanism for protection is no longer applicable. Furthermore, as argued, given the frontier of on-time, piece-by-piece contracting, no definition of “worker” can be conceived that will cover—in any meaningful way—all types of modern labor market engagement. Thus, we are left with a problem and no remedy.

One approach is to reject the technological developments despite the promise of efficiency and increased opportunity for labor market participation. Another approach is to search for a new remedy to the problem of vulnerability and precariousness in the context of business to business (B2B) contracting for services provided by small independents. The question then becomes: What kind of regulatory strategy or strategies could solve the problem?

Looking to the legal literature and existing legal remedies, we see that there is no immediate solution to this type of problem. The problem of unfair practices or exploitation in the context of B2B relations has been recognized by policymakers and in the literature.<sup>154</sup>

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not allow for additional exemptions from competition law. Since then, two more attempts for legislative amendment have been made—in 2014 and 2016. Remarkably, in 2016, the proposal secured the support of all parties. See *Seanad Deb.* (July 10, 2014 & July 6, 2016) (Ir.), <http://oireachtasdebates.oireachtas.ie/>; see also European Labor Law Network website, ‘ECJ Case C-413/13 (FNV Kunsten Informatie en Media)’ <[http://www.labourlawnetwork.eu/national\\_labour\\_law/implications\\_of\\_ecj\\_rulings/\\_implications\\_of\\_ecj\\_ruling\\_s/prm/191/v\\_\\_detail/id\\_\\_5332/category\\_\\_17/index.html](http://www.labourlawnetwork.eu/national_labour_law/implications_of_ecj_rulings/_implications_of_ecj_ruling_s/prm/191/v__detail/id__5332/category__17/index.html)>; Tim Dawson & Séamus Dooley, *Irish Freelances Shorten the Road to the Promised Land*, THE FREELANCE BULLETIN (July 7, 2016).

<sup>151</sup> As argued by Brishen Rogers in Rogers, *supra* note 33, at 479.

<sup>152</sup> *Id.* See also Collins, *supra* note 2; Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century, *supra* note 26.

<sup>153</sup> Pietro Ichino, *Collective Bargaining and Antitrust Laws: An Open Issue*, 17 (2) INT’L J. COMP. LAB. L. & INDUS. REL. 185 (2001).

<sup>154</sup> See *Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe* COM (2013) 37 final (Jan. 31, 2013); Jules Stuyck, *Do We Need ‘Consumer Protection’ for Small Businesses*

Currently, however, the legal system does not have a clear and convincing answer to the question of how unfair trading terms in B2B relations characterized by power imbalances should be regulated.

A look to the experience of farmers and small food producers is instructive in this respect. Small food producers have been complaining about unfair trading practices and abuse of power by supermarket chains for decades.<sup>155</sup> Still, there is no clear solution to this problem. A number of approaches have been put forth to address this problem: Private law (contract law) and private regulatory regimes such as codes of conduct whether mandated by a government<sup>156</sup> or proposed by private parties<sup>157</sup>; and solutions through public law—both via competition law and sector-specific regulation. Experimentation is taking place at the national level to design the appropriate regulatory regime to deal with this issue.<sup>158</sup>

Given the difficulties in solving the problem via the labor rules, alternative possibilities—and combination of regulatory tools—are worth exploring. The regulatory perspective considers the possibilities for addressing a given societal problem by brainstorming about possible

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*at the EU Level?*, in VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION 359, 359-368 (Purnhagen & Rott eds., 2014); Victoria Daskalova, *The Monopsony Paradox: Buyer Power and Enforcement of the EU Antitrust Provisions* (PhD thesis, 2016); Martijn Hesselink, *Unfair Terms in Contracts between Businesses*, in CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW WORKING PAPER SERIES NO. 2011/07, 1 (2011).

<sup>155</sup> See generally *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Better Functioning Food Supply Chain in Europe* COM (2009) 0591 final (Oct. 28, 2009), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0591>; *European Competition Network Food Subgroup, ECN Activities in the Food Sector: Report on Competition Law Enforcement and Market Monitoring Activities by European Competition Authorities in the Food Sector* (May 24, 2012), [http://ec.europa.eu/competition/ecn/food\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/food_report_en.pdf); *Communication from the Commission, Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain*, COM (2014) 472 final (July 15, 2014).

<sup>156</sup> See e.g. The UK Groceries Code Adjudicator Act 2013, ch. 19 (Eng.), [https://www.legislation.gov.uk/ukpga/2013/19/pdfs/ukpga\\_20130019\\_en.pdf](https://www.legislation.gov.uk/ukpga/2013/19/pdfs/ukpga_20130019_en.pdf).

<sup>157</sup> A prominent example at the EU level is the code of conduct developed by European food and drink producers and supermarkets in the context of the Supply Chain Initiative endorsed by the European Commission. See *Principles of Good Practice in vertical relationships in the Food Supply Chain* (Nov. 29, 2011), <http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain>; see also EUROPEAN COMMISSION, *Code of Conduct, Vertical relationships in the Food Supply Chain: Principles of Good Practice*, (Nov. 29, 2011), <https://ec.europa.eu/digital-single-market/en/content/vertical-relationships-food-supply-chain-principles-good-practice-b2b-platform-0> (the code is accompanied by a business-to-business (B2B) Platform for enforcement of the principles).

<sup>158</sup> For a helpful overview of the varied legal landscape with respect to stricter rules aimed to address power imbalances in the food supply chain see Justine Stefanelli & Philip Marsden, *Models of Enforcement in Europe for Relations in the Food Supply Chain*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (Apr. 23, 2012), <http://www.anilact.pt/documentos/hlf001.pdf>; see also EUROPEAN COMMISSION, *Final Report of the Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices* (Feb. 26, 2014), [http://ec.europa.eu/internal\\_market/retail/docs/140711-study-utp-legal-framework\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf).

sources of solutions. Given that the issue concerns relatively novel technologies and business models, the element of timing is also important. Hence, the distinction between *ex ante* public regulation or *ex ante* private regulation, and *ex post* public regulation or *ex post* private regulation is made. Distinction between *ex ante* and *ex post* tools provokes thought on the timing of regulatory intervention. Regulation requiring licensing before allowing a given business model on the market increases the entry costs of a business, but provides legal certainty; *ex post* interventions in which a business model/technology can be prohibited after it has entered the market and its effects are known seem more permissive at first, but allow for regulators—or injured parties—to intervene once more information is available.

Thinking in terms of these quadrants of regulation can help in the brainstorming for solutions to the problem of regulating the relationship between self-employed workers and platforms.<sup>159</sup> This is summarized in the figure below.

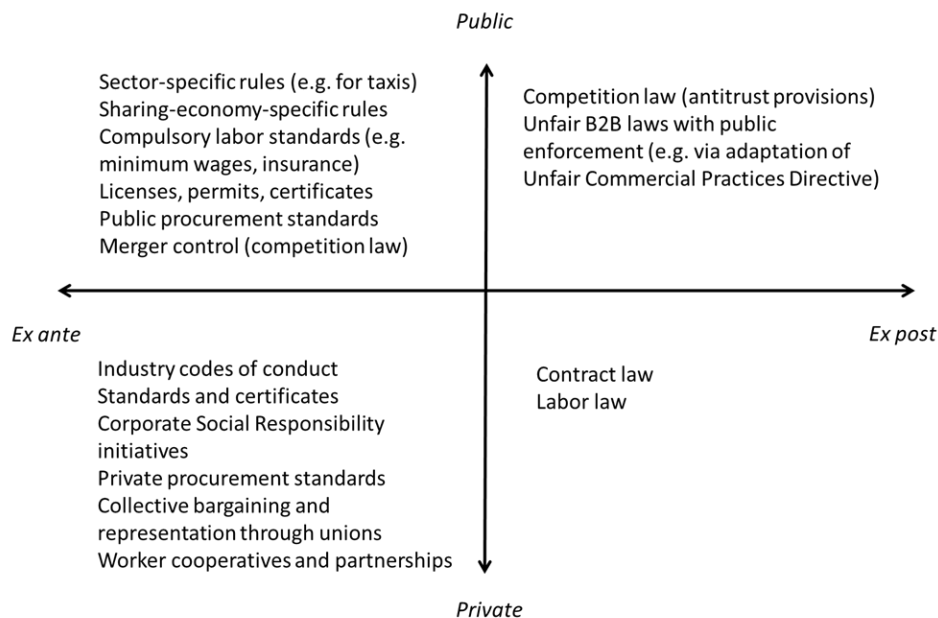


Figure 1. Quadrants of regulation

<sup>159</sup> Inspiration is drawn from Walker Smith, *Regulation and the Risk of Inaction*, in *AUTONOMES FAHREN: TECHNISCHE, RECHTLICHE UND GESELLSCHAFTLICHE ASPEKTE* 593-609 (Maurer et al ed.; Springer 2015) and his graph of regulatory quadrants which is adapted for the purpose of this paper.

One option is a regulatory approach with a focus on a particular sector, business model, or practice; for example, rules for service providers in a particular sector—such as the rules governing the liberal professions—or rules targeting the sharing economy or certain practices, below minimum wage payments, or unfair terms. This is a challenging approach, as rules might be under-inclusive, would have to be set up *ex ante*, and the process of creating rules and setting up an enforcement system might be a lengthy process.

There is also the possibility of an *ex ante* private regulatory approach—for example, by means of codes of conduct. A company—or industry—can commit to a high level of protection for contractors by means of an individual or industry-wide code of conduct. There is evidence of some crowdsourcing companies experimenting along these lines.<sup>160</sup> Websites allowing for comparison of best rates and contract terms for crowdworkers also exist, although the legal implications of such exchanges of information are not certain.<sup>161</sup>

With respect to *ex post* private rules, the most important regulatory tool to consider is contract law and labor law. Arguably, European contract law is not yet equipped to deal with unfair B2B practices.<sup>162</sup> When it comes to service contracts—which escape the parameters of labor law—we run into the problem of freedom of contract.<sup>163</sup> The assumption of relative equality of the parties to a contract is suspended in fields of law in which one party is presumed by law to be the weaker one, for example consumer protection law, or labor law. In the context of contract law itself, this assumption can be set aside; however, this is usually done in cases where the principle of freedom of contract was blatantly compromised—as in the case of unconscionability or duress—which require specific circumstances. They ensure that no grave procedural flaws mar the outcome of the bargaining process; yet, they do not question the outcome on grounds of market failure—such as when the price paid is abusive because of substantial imbalance in bargaining power. Furthermore, contract law depends on private enforcement, which is problematic because the most vulnerable contractors can face barriers to enforcement. Such barriers can be linked to resources—access to legal advice, money, and time. These have been recognized as a problem in the case of

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<sup>160</sup> There is evidence that some companies have started introducing minimum requirements for fair treatment of their independent contractors. De Stefano refers to the Code of Conduct Paid Crowdsourcing to which three crowdwork platforms in Germany have already agreed and which is endorsed by the German Crowdsourcing Association. See CROWDSOURCING CODE OF CONDUCT, <http://crowdsourcing-code.com/>; see also de Stefano, *supra* note 29, at 24.

<sup>161</sup> See e.g. FAIR CROWD WORK, <http://www.faircrowdwork.org/en> (the website allows crowdworkers to check for the best online rates).

<sup>162</sup> Hesselink, *supra* note 154; Stuyck, *supra* note 154.

<sup>163</sup> Collins, *supra* note 2, at 375-376.

enforcement of the competition rules by small and medium-sized enterprises (SMEs).<sup>164</sup> For small companies depending on trading with large ones, there are additional barriers—namely, the fear of retaliation when contesting the ongoing trading practices of an important customer.<sup>165</sup>

Under the current system, labor law intervenes *ex post* because the default assumption is that a freelancer is not an employee until a court decides otherwise. Some scholars propose changing this default option by assuming freelancers are employees until proven otherwise.<sup>166</sup> This is an interesting proposition, which would mean that labor law enforcement becomes *ex ante*. Nonetheless, it is not certain what the practical implications of such a strategy would be in terms of accessibility of labor markets and increasing workforce participation.

### G. The Role of Competition Law

Competition law is one of the main legal disciplines concerned with ensuring that competition is present on the market—in particular that companies do not manipulate the rules of the game by means of conspiracy, and that powerful companies do not abuse their power. With respect to abuse, it is notable that the abuse of power can be directed toward trading partners—customers or suppliers—as well as towards competitors. Thus, competition law has a twofold role to play: First, to keep markets open, and second, to intervene in cases where market power is abused.

#### *I. Keeping Markets Open – Ensuring Platform Competition from Labor’s Perspective*

Keeping markets open would mean ensuring that the self-employed have a sufficient choice of platforms they can contract with. An implication for antitrust enforcement is that platform competition must be assessed from the perspective of all users, not just consumers.<sup>167</sup> This means making sure that not just final consumers—the persons ordering rides or cleaning services—have a choice of apps, but also that providers—the drivers, cleaners or crowdworkers—have a choice of contracting parties. Merger control certainly

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<sup>164</sup> ANTITRUST FOR SMALL AND MIDDLE SIZE UNDERTAKINGS AND IMAGE PROTECTION FROM NON-COMPETITORS (Pranvera Këllezhi, Bruce Kilpatrick & Pierre Kobel eds., 2014).

<sup>165</sup> See Temple Lang, *Reprisals and Overreaction by Dominant Companies as an Anti-Competitive Abuse under Article 82(B)*, 29(1) EUR. COMPETITION L. REV. 13 (2008); see also Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, *supra* note 154, at 7 and 17 discussing the so-called “fear factor”.

<sup>166</sup> See Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 682-684 (2017).

<sup>167</sup> Currently, antitrust enforcement emphasizes consumer choice as part of a commitment to consumer welfare.



has an important role to play in this regard; however, agreements and technical specifications which might restrict mobility and multi-homing for the self-employed should also be scrutinized.

Ensuring choice of contracting partners means ensuring that drivers can multi-home—be available on several platforms. This requires scrutinizing agreements or proposed mergers for barriers to switching and multi-homing. These barriers can be contractual—along the lines of most-favored-nation clauses—or they can be technological—using algorithms or code to make switching *de facto* more difficult. Anecdotal evidence from Uber drivers suggests that the Uber app consumes a lot of data and battery,<sup>168</sup> which makes one wonder if it is possible to run several competing apps on the same device at the same time.

Portability of user ratings is another action point for antitrust authorities. Ensuring portability of user ratings is also key in making switching between platforms possible. In that case, a contractor who has to start building up a reputation with every new service is at a disadvantage. The 2016, EU General Data Protection Regulation recognized that it is important for consumers to be able to transfer their personal data.<sup>169</sup> The regulation protects this right for natural persons in relation to their personal data; it is not clear if the right would extend to “undertakings” where the data is necessary for professional purposes. Technological or contractual restrictions to switching should be carefully investigated by antitrust authorities, so that platform competition can work to the benefit of all users.

## *II. Preventing Abuse of Monopsony Power*

A second—and less often considered tool of EU competition law—is the prohibition of exploitative abuse by companies in a dominant position. Arguably, making sure that powerful companies do not exploit their trading partners was the original goal of Article 102 of the TFEU.<sup>170</sup> This is evident from the text of TFEU Article 102 paragraphs (a) and (b), which explicitly list the following as examples of abuse by the dominant company: “(a) [D]irectly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers.”

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<sup>168</sup> See the blog for Uber drivers, *Uber App and it[s] Effect on Cellular Data Usage*, UBERPEOPLE.NET (posts from June 16, 2016), <https://uberpeople.net/threads/uber-app-and-it-effect-on-cellular-data-usage.24123/>.

<sup>169</sup> See Commission Regulation 2016/679, 2016 O.J. (L 119) 4.5 (regulation on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>170</sup> See RENÉ JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION: A COMPARATIVE STUDY OF THE AMERICAN AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER (1970); see also Pinar Akman, *Searching for the Long-Lost Soul of Article 82EC*, 29(2) OXFORD J. LEGAL STUD. 267 (2009).

Paragraph (a) speaks of unfairness toward contractual partners—be they consumers or suppliers—that the dominant undertaking deals with. Paragraph (b) seems to refer to restrictions that could impact social welfare and which manifest themselves in consumer harm.

These paragraphs are at the heart of the doctrine known as exploitative abuse in EU competition law. The logic of exploitative abuse is that competition law exists not only to protect the horizontal competitors of the dominant undertaking; rather, it also protects the weaker contractual partners of such an undertaking. It recognizes that a company in a dominant position can take actions that not only seek to eliminate its competitors, but which may—simultaneously or after competitors have been excluded—harm its business partners. As such, the concept of exploitative abuse resonates with the market failure of the economic concepts of monopoly or monopsony, in which a single undertaking determines the trading conditions—price and contract terms—for, respectively, its customers or suppliers. A monopolist can harm its customers by raising prices or restricting output; a monopsonist can harm its suppliers by decreasing its payment and restricting purchases.

In the case of markets for labor, the monopsony model is usually used.<sup>171</sup> Monopsony theory might explain why Uber's rates have been going down, and why the rates of other companies—once they consolidate their position—are likely to go down. When it has signed up enough drivers, Uber can afford to increase the fee that it charges drivers or respectively, decrease the portion of what drivers get. The same holds for other sharing economy platforms that charge fees for matching customers and suppliers. Price discrimination—possible via online tools—can increase Uber's ability to extract even more surplus from its drivers by allowing it to segment those most dependent on the platform and those most likely to walk away. Such price discrimination<sup>172</sup> can lead to a further reduction of fees for some drivers, and it allows the dominant platform to extract the maximum rents for itself.

Surely, monopsonistic exploitation is only plausible in the absence of readily available outside options—or very inelastic labor supply. Some may argue that given the low level of qualifications of sharing economy workers or crowdworkers, switching to take advantage of better rates is possible. When a number of apps are available, the argument goes that workers should no longer be dependent. Of course, this is an empirical question that has to be worked out in individual cases. Nonetheless, it is worth considering that switching is more difficult in the presence of relationship-specific investments—such as cars specifically fitted

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<sup>171</sup> Labor purchasing is the classic example of a monopsony used in economics textbooks. See Manning, *supra* note 1.

<sup>172</sup> One of the main concerns of drivers is the lack of transparency in compensation, for instance, with respect to bonuses. See Mareike Mohlmann, Lior Zalmanson, & Ola Henfridsson, *Who is Driving the Car? How do Uber Drivers Regain Control in the Face of Algorithmic Management*, Presented at the 4<sup>th</sup> International Workshop on the Sharing Economy held in Lund, Sweden (June 15, 2017).

for the Uber model. Workers who make platform-specific investments can find themselves in a classic hold-up situation.<sup>173</sup> Such situations make freelancers susceptible to exploitation even when the company is not a complete monopsonist in the classic sense.

Applying Article 102 of the TFEU—or its national equivalents—could be a useful tool of intervention in cases when powerful online platforms impose unfair prices or terms on their suppliers—in this case, the self-employed. There are barriers to applying Article 102 TFEU in such cases that have nothing to do with the self-employed. From a positive law perspective, the doctrine of exploitative abuse has been affirmed in a number of European Commission decisions<sup>174</sup> and court judgments.<sup>175</sup> Thus, there can be no question that EU competition law aims to protect the victims of monopolists and monopsonists,<sup>176</sup> and can be used in the context of unfair trading terms imposed by one contractual partner on another.

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<sup>173</sup> Media reports that Uber's car loans have the effect of tying people to the company. One reason for that is that Uber offers car loans to people with poor credit scores. This makes it difficult for those who signed up to leave the job, even in the face of falling compensation. Rebecca Smith, deputy director at the US National Employment Law Project, states in an interview for the Financial Times: "It is a car lease that comes from your employer and makes it impossible for you to leave your job before it is paid off." See Leslie Hook, *Uber Hitches a Ride with Car Finance Schemes*, FINANCIAL TIMES (Aug. 11, 2016), <https://www.ft.com/content/921289f6-5dd1-11e6-bb77-a121aa8abd95>. In Australia, a driver deactivated from Uber's platform was left in debt and filed a court case against Uber. One of his car loans was via Uber. The case is currently under appeal. See AAP, *WA Man Mike Oze-Igiehon Fails in Damages Claim Against Uber*, PERTHNOW (Dec. 9, 2016), <http://www.perthnow.com.au/news/western-australia/wa-man-mike-ozeigiehon-fails-in-damages-claim-against-uber/news-story/7b494ef5148af47582fdb35e7479fd5>. Similar stories reported by Georgia Wilkins, *Dumped Uber Driver Pleads for Explanation*, THE AGE (May 21, 2016), <http://www.theage.com.au/business/consumer-affairs/dumped-uber-driver-pleads-for-explanation-20160519-goZ0dl?deviceType=text>.

<sup>174</sup> See 1974 O.J. (L 29) 3.2 (General Motors Continental); 1975 O.J. (L 95) 9.4 (Chiquita); 1984 O.J. (L 207) 2.8 (British Leyland). For more recent decisions, see 2001 O.J. (L 331) (Deutsche Post AG – Interception of cross-border mail); 2001 O.J. (L 166) 1 (DSD); Case COMP/C-2/37.761; Euromax v/IMAX Decision of 25.03.2004; Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg.

<sup>175</sup> Case 26-75 *General Motors Continental NV v Commission of the European Communities* [1975] ECLI:EU:C:1975:150; Case C- 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22; Case 226/84 *British Leyland Public Limited Company v Commission of the European Communities* [1986] ECLI:EU:C:1986:421; Case 30/87 *Bodson v Pompes Funèbres des Régions Libérées* [1988] ECLI:EU:C:1988:225; Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECLI:EU:C:1989:319 (SACEM I); Joined Cases 110/88, 241/88 and 242/88 *François Lucazeau v SACEM and others* [1989] ECLI:EU:C:1989:326 (SACEM II); Case 66/86 *Ahmed Saeed Flugreisen and Siver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECLI:EU:C:1989:140; Case 298/83 *Comité des industries cinématographique des Communautés européennes (CICCE)* [1985] ECLI:EU:C:1985:150; Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECLI:EU:C:1994:368, (Crespelle); Case C-242/95 *G-T Link A/S v De Danske Statsbaner (DSB)* [1997] ECLI:EU:C:1997:376 ; Case C-340/99 *TNT Traco SpA v Poste Italiane SpA* [2001] ECLI:EU:C:2001:281; Case C-385/07 *P Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECLI:EU:C:2009:456.

<sup>176</sup> For an early argument to this effect, see Joliet, *supra* note 170, at 243. On monopsony and the application of the EU competition rules to it, see Daskalova, *supra* note 154; More generally on monopsony, see ROGER BLAIR & JEFFREY

From a normative perspective, however, the doctrine remains a controversial one.<sup>177</sup> The doctrine is difficult to reconcile with the more economic approach pursued by the European Commission.<sup>178</sup> Although in principle, economists are sympathetic about arguments related to efficiency losses, their concerns are primarily related to enforcement errors—type I versus type II<sup>179</sup>—inherent in establishing this type of abuse. Over-deterrence is considered especially problematic as it threatens to chill competition and scare companies away from potentially efficient commercial practices. The prevailing viewpoint is that in order to avoid chilling competition, a sophisticated economic analysis is necessary; however, this type of analysis is difficult, expensive, and requires a lot of data that authorities and plaintiffs often do not have. Economists caution—with good reason—that authorities need to be rigorous in testing exploitative abuse claims for fear of unmeritorious claims.<sup>180</sup> This is one reason explaining authorities' reserved stance toward exploitative practices. This mismatch between the normative preferences of enforcers and the positive law has led to a dearth of case law and decision practice.<sup>181</sup> The European Commission in recent years has avoided excessive pricing cases with the notable exception of the telecommunications markets,<sup>182</sup> and, most recently, pharmaceutical markets.<sup>183</sup>

Arguably, the tides are changing but perhaps not in the direction most beneficial to the self-employed. In a speech delivered in November 2016, commissioner for competition Margarethe Vestager argued for more enforcement of the competition rules on abuse of dominance in cases involving consumers. The prioritization of consumer interests over

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HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (2010); specifically on the economics of monopsony in labor markets, see Manning, *supra* note 1.

<sup>177</sup> Konkurrensvverket (Swedish Competition Authority), *The Pros and Cons of High Prices* (Swed.), <http://www.konkurrensvverket.se/globalassets/english/research/the-pros-and-cons-of-high-prices-14mb.pdf>.

<sup>178</sup> See *Report by the EAGCP on an Economic Approach to Article 82* (July, 2005), [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf).

<sup>179</sup> Type I error stands for under-enforcement and type II stands for over-enforcement. The prevailing opinion is that under-enforcement is preferable to over-enforcement because over-enforcement tends to chill competition.

<sup>180</sup> See Bruce Lyons, *The Paradox of the Exclusion of Exploitative Abuse*, CCP Working Paper 08-1, 1 (2007).

<sup>181</sup> ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW: TEXTS, CASES, AND MATERIALS* 573 (6<sup>th</sup> ed. 2016); Alexandr Svetlicinii & Marco Botta, *Article 102 TFEU As A Tool for Market Regulation: "Excessive Enforcement" Against "Excessive Prices" in the New EU Member States and Candidate Countries*, 8(3) EUR. COMPETITION J. 473, 473 (2012). Svetlicinii and Botta note, however, that the sentiment toward exploitative abuse is not shared by enforcers in the new Member States.

<sup>182</sup> *Id.* at 567.

<sup>183</sup> See European Commission Press Release IP/17/1323, *Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines* (May 15, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1323\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1323_en.htm).

producer interests has been a defining characteristic of EU competition law following the modernization in 2004. Although the courts have confirmed that competition law is not only about the protection of consumer welfare,<sup>184</sup> the Commission still very much prioritizes infringements that are likely to impact consumers rather than producers.<sup>185</sup> In this sense, Europe has very much departed from its producerist past and prioritizes the interests of consumers over the interest of producers.<sup>186</sup> The focus on consumers in this case may be problematic.

From a pragmatic point of view, an additional limitation to the usefulness of Article 102 TFEU is the underdeveloped methodology for testing unfairness. Although it is accepted that companies in a dominant position can be found guilty of a breach of Article 102 TFEU when acting unfairly, there is little agreement on the methodology for determining unfairness. The Court has given some indications about when a price imposed by a dominant seller is to be considered excessively high,<sup>187</sup> and even fewer indications as to when a price imposed by a dominant purchaser is to be considered excessively low.<sup>188</sup>

Finally, the doctrine under Article 102 TFEU only covers dominant companies. The markets in question are rapidly developing and competition is growing. Exploitation in the context of superior bargaining power is possible—as we know from the debate on supermarkets, but it cannot be accommodated within the dominance doctrine—simply because not one company will be in a position of dominance. This brings us back to the original problem – that there is no legal solution to the unfair terms in the context of B2B relations where there is a serious imbalance in bargaining powers. The answer is: Competition law may help, but it does not solve all the problems related to unequal bargaining power.

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<sup>184</sup> The Court ruled to this effect in *Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline v Commission* [2009] ECLI:EU:C:2009:610; see the discussion in Victoria Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?*, 11(1) *Competition L. Rev.*, 133 (2015).

<sup>185</sup> Margrethe Vestager, *Protecting Consumers from Exploitation*, Speech at the Chillin' Competition Conference in Brussels, Nov. 21, 2016), [http://ec.europa.eu/commission/2014-2019/vestager/announcements/protecting-consumers-exploitation\\_en](http://ec.europa.eu/commission/2014-2019/vestager/announcements/protecting-consumers-exploitation_en); Margrethe Vestager, *Setting Priorities in Antitrust*, Speech at GCLC in Brussels, (Feb. 1, 2016), [http://ec.europa.eu/commission/2014-2019/vestager/announcements/setting-priorities-antitrust\\_en](http://ec.europa.eu/commission/2014-2019/vestager/announcements/setting-priorities-antitrust_en).

<sup>186</sup> James Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117(3) *YALE L. J.* 340 (2007).

<sup>187</sup> *Case C- 27/76 United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, [250-253].

<sup>188</sup> *See Case 298/83 Comité des industries cinématographique des Communautés européennes (CICCE)* [1985] ECLI:EU:C:1985:150; some indications are available in European Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013 O.J. (C 167) 56.

*III. Carving Out Safe Harbors from the Cartel Prohibition*

The above discussion shows that under the current doctrine, Article 101 TFEU offers limited possibility for exceptions to the collective bargaining rules for the self-employed. The judgment in *FNV Kiem* confirmed this. Yet, there are reasons to think that some things about Article 101 TFEU might have to change to take into account the changes brought about by new technologies and business models. Markets with numerous atomistic suppliers providing a substitutable service, where power is concentrated in the hands of a few customers—the platforms who act as gatekeepers—might justify some limited forms of collaboration by the suppliers. John Kirkwood argues that in such conditions, exception to the cartel prohibition would be justified. He calls that “a limited defense for collusion to control buyer power.”<sup>189</sup> He sets three cumulative criteria for such a defense: The presence of legally acquired, substantial, persistent, and durable monopsony power; a procompetitive downstream effect of the collusion; and no creation of downstream market power as a result of the collusion.<sup>190</sup> It might be difficult for dynamic, rapidly changing markets to meet the criteria set by Kirkwood. Yet, the analysis invites reflection; are there circumstances under which competitor collaboration can be tolerated? And, if the circumstances change rapidly, is it possible to set parameters for types of collaboration which are acceptable?

One idea is for regulators to designate safe pockets of collaboration, thus specifying the key parameters on which collective action can take place. Alternatively, regulators can intervene by setting price floors for earnings, or respectively ceilings for the fee charged by the platform, and by introducing some basic rights—right to data portability; right not to be deactivated for no reason; and right to non-discrimination. An example of one such development is the statutory setting of minimum wages for the self-employed. Proposals for such minimum wages have been considered in the UK<sup>191</sup> and in the Netherlands.<sup>192</sup> A combination of statutory limits, soft industry-wide measures, and competition law enforcement could provide a more flexible and effective legal solution than mono-disciplinary action, for example, within labor law only or competition law only.

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<sup>189</sup> See John Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69(1) U. MIAMI L. REV. 1, 51 (2014).

<sup>190</sup> *Id.* at 52.

<sup>191</sup> See e.g. Larry Elliott, *UK Minimum Wage Law 'Should Cover More Self-Employed Workers'*, THE GUARDIAN, (July 4, 2017), <https://www.theguardian.com/society/2017/jul/04/uk-minimum-wage-self-employed-uber-resolution-foundation>.

<sup>192</sup> See *PvdA wil minimumloon voor zzp'ers*, RTL NIEUWS, (Oct. 24, 2016), <https://www.rtlnieuws.nl/geld-en-werk/pvda-wil-minimumloon-voor-zzpers>.

## H. Conclusions

Part of the enthusiasm for companies like Uber stems from a deep dislike of cartels and a deep dislike of limitation of economic choices and opportunities for participation in the economy. The development of the sharing economy is often framed in terms of increased competition and improved consumer choice. Uber is sometimes seen as the revolutionary who dares to break into markets dominated by law-backed cartels of taxi drivers, thus delivering benefits to consumers, but also opening labor possibilities for independents. Yet, one should not be blind to the possibility that today's revolutionaries will be the merciless dictators of tomorrow. One-sided enforcement targeting supplier cartels of the self-employed, while not taking steps to limit possibilities for abuses of power by platforms and large purchasers of services is questionable—if not necessarily from a consumer welfare perspective, then surely from a social justice perspective.

This Article introduced the problem of applying the same rules that apply to companies—the competition rules—to the “new self-employed.” It has provided evidence to show that the category of “self-employed” is a wildly heterogeneous one. Within that group, we can distinguish between traditional self-employed and the “new self-employed” who are characterized by the absence of personnel, and lack of entrepreneurial characteristics. The group is home to wealthy service providers, entrepreneurs, and highly vulnerable service-providers. The labor laws and the right to collective bargaining do not apply to this group of people unless it can be shown that they fulfill the traditional tests for “worker.” Yet—as argued on the basis of the EU law definition of a “worker”—this legal category is not likely to cover many of the “new self-employed,” and especially those engaged in the on demand economy. Rather than providing an effective exception, the judgment in *FNV Kiem* confirmed the traditional approach to defining a “worker” by holding that bogus self-employed should fulfill the criteria for “worker.” As a result, the concept of “worker” remains narrowly construed. At the same time, the concept of “undertaking” under the competition rules remains a broad one, thus making competition law applicable to all self-employed, including the most precarious one.

Looking for an exception to the collective bargaining prohibition within the competition rules has proved to be a difficult task, leading to the question: What other possibilities are there to address this problem? Analyzing the problem with the help of regulatory quadrants revealed various opportunities for addressing this issue. It remains a question for further research what the optimal mix of tools for solving the problem of unequal bargaining power between self-employed and their contract partners is.

In an improved regulatory regime, competition law can certainly play a meaningful role. First, it can ensure that competition among platforms remains robust so that the self-employed have a real choice of whom they can contract with. Second, competition law can ensure that matchmakers do not abuse their power vis-à-vis service providers. In this way,

competition law can be a complementary regulatory tool. Furthermore, competition law can be an important residual remedy in those cases not covered by sector-specific regulation or labor law. Competition law—as a form of generally applicable regulation—has the potential to address problems for those most vulnerable service-providers who will never—despite revisions of the concept of “worker”—achieve protection under the labor laws.

It is conceivable that a combination of instruments—such as codes of conduct, sector-specific rules, or rules targeting particular business models—might solve the problem for some of the “new self-employed.” Private strategies such as cooperatives or partnerships of self-employed service providers could also help independents improve their bargaining strength. Still, the concern remains for the most disenfranchised independents who are incapable of organizing, and who do not fit within classes of workers or groups protected by specific regulation. This is where competition law should be of help, not of harm.