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The EU, Competition and Workers' Rights

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The EU, Competition Law and Workers Rights

Nicola Countouris, Valerio de Stefano & Ioannis Lianos[*]

Abstract: The paper delves into the ways in which EU competition law affects the right of workers to combine with each other and act, collectively, in the furtherance of their rights and interests at work, in particular by means of collective agreements concluded with one or more employers. It begins by opposing the limited 'labour exemption' contained in the recent competition caselaw and contrasts that with a more traditional 'labour law' approach, that would typically see collective bargaining as a fundamental, and universal, labour rights to be enjoyed by all workers, or in the alternative will have to integrate the asymmetry of bargaining power between labour and digital monopsonies. We put forward a more nuanced and balanced approach, by reference to the concept of 'predominantly personal work', that could act as the new watershed concept around which labour rights and competition law could define their respective fields of operation and which may already inspire the recent Commission's proposals enabling self-employed without employees ("solo self-employed") to access the right to bargain collectively on a number of issues with digital platforms.

Keywords: labour exception, solo self -employed, competition law, digital platforms

JEL: J5, J83, K21, K31, L1

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The EU, Competition Law and Workers Rights

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1. Introduction

It is fair to say that EU competition law and policy and workers' rights have had a longstanding and, often, intense relationship. What is widely referred to as the main, if not the only, social right contained in the founding Treaty of Rome of 1957, the 'equal pay' principle contained in what was then Article 119 EC, owes its existence as much to fair competition policy preoccupations as it does to social law concerns.[1] In the 1990s EU competition provisions played an important role in liberalising what back then were national and public employment services, often acting as monopolistic or oligopolistic players in the job intermediation market in a number of EU Member States.[2] With its decision in *Merci Convenzionali*, the Court of Justice of the EU also clarified that the dominant position enjoyed by certain closed profession in particular sectors of the labour market, for instance in dock-work, was likely incompatible with EU competition rules.[3] Although in the successive case of *Becu*, the Court also pointed out that these rules did not necessarily prevent the application of national employment legislation requiring the use of recognised dockers and 'to pay those dockers remuneration far in excess of the wages of their own employees or the wages which they pay to other workers'.[4]

In recent years, this complex and often tense relationship had reached a seemingly stable equilibrium thanks to the, with hindsight narrow but at that time acceptable if not sufficient, compromise struck by the CJEU in the case of *Albany*,[5] a decision that in effect provided a limited and qualified 'labour exemption' from the bulk of EU competition law, for collective agreements concluded by workers and

1 There is a recognition of that in the dicta of Case C-50/96, *Deutsche Telekom v Schröder* [2000] ECR I-743, paragraph 57.

2 Case C-41/90, *Höfner and Elser v Macrotron* [1991] ECR I-1979 Case C-55/96, *Job Centre Coop*, [1997] ECR I-7119. For a historical overview of these cases see Cf. M. Freedland, P. Craig, C. Jacqueson, N. Kountouris, *Public Employment Services and European Law* (OUP, 2007).

3 Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

4 Case C-22/98, *Becu*, paragraph 37.

5 Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

employers.[6] However this equilibrium was substantially disrupted by a more recent judgment, *FNV Kunsten*,[7] where the CJEU essentially argued that collective agreements also concluded on behalf of self-employed professionals would not benefit from the *Albany* exemption, on the ground that genuinely self-employed would be seen as undertakings under Article 101 of the TFEU.

The following sections of this chapter offer a brief account of the main tensions arising between this - admittedly evolving - understanding of EU competition law by the CJEU and what the right to collective bargaining, particularly, though not exclusively, by reference to the right of those growing numbers of workers whose patterns of work often emerge outside the sphere of the standard model of subordinate employment, to enjoy that right.

We begin by exploring the emergence and contours of the limited 'labour exemption' contained in *Albany*, and clearly tested by the *FNV Kunsten* decision. We then move on to suggest that one of the key features of the *Albany* approach is that it tends to see competition law as the rule and labour law as the (limited) exception to that rule. We contrast this approach with a more traditional 'labour law' approach, that would typically see collective bargaining as a fundamental, and universal, labour rights to be enjoyed by all workers. We then move on to suggest, on the basis of earlier jointly published work,[8] a more nuanced a balanced approach to resolve the tensions arising in decisions like *FNV Kunsten*, by reference to the concept of 'predominantly personal work', that could act as the new watershed concept around which labour rights and competition law could define their respective fields of operation. We acknowledge the recent proposals of the European Commission to propose reforms enabling self-employed without employees ("solo self-employed") to access the right to bargain collectively on a number of issues, including working conditions, in view of the asymmetry of bargaining power they dispose vis-à vis certain firms/buyers of labour, often with monopsony power[9].

6 See, C Townley, 'The Concept of "Undertaking": The Boundaries of the Corporation—A Discussion of Agency, Employees and Subdidiaries' in G Amato and C-D Ehlermann (eds) *EC Competition Law: A Critical Assessment* (Hart, 2007), 3, 5.

7 Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411.

8 I. Lianos, N. Countouris and V De Stefano, Re-thinking the competition law/labour law interaction: Promoting a fairer labour market, (2019) 10(3) European Labour Law Journal 291.

9 See, European Commission, Inception Impact Assessment, Collective bargaining agreements for self-employed – scope of application of EU competition rules, Ref. Ares(2021)102652 - 06/01/2021.

2. EU Competition law and the (limited) 'labour exemption'

Normally, competition law is seen as applying to 'undertakings', and most competition law systems exonerate themselves from interfering within the boundaries of the undertaking, in particular with the way workers and management interact. In most legal systems, including the EU, the concept of 'undertaking is widely interpreted as 'an entity engaged in economic activity'[10]. It includes individual persons offering goods or services on a market where they bear financial risk attached to performance of those services[11]. However, EU law recognises that an employee cannot be an undertaking as it does not exercise an autonomous economic activity, in the sense of offering goods or services on a market and bearing the financial risk attached to the performance of such activity. So when workers combine with each other and conclude collective agreements with employers to fix a rate, or a price, for the sale of their labour, competition law systems typically see these practices as something quite distinct from the price fixing practices that undertakings may be engaging in.[12]

In essence, collective agreements concluded by unions on behalf of their workers typically benefit from an exclusion from the scope of EU competition law. Employees/workers cannot be undertakings under EU competition law, as they do not exercise an autonomous economic activity, in the sense of offering goods or services on a market and bearing the financial risk attached to the performance of such activity. By the same token, a labour agreement between an employer and an employee will not fall under the scope of Article 101(1) TFEU, as it will not be an agreement between 'undertakings'[13].

As noted in the introduction, the path to a genuine 'labour exemption' doctrine – which only emerged with the *Albany* judgment - arguably owes its origins to the *Jean Claude Becu* decision, where the CJEU examined a collective labour agreement relating to dock work at the Port of Ghent, made mandatory by Royal Decree, which allowed

10 Case C-41/90, *Höfner and Elser* [1991] ECR I-1979. In the areas of free movement similar conceptual and definitional challenges may arise, cf. N. Countouris and S. Engblom, 'Protection or Protectionism?': A Legal Deconstruction of the Emerging False Dilemma in European Integration' (2015) ELLJ, 20

11 Case C-35/96, *Commission v Italy (customs agents)* [1998] ECR I-3851.

12 See the Opinion of AG Jacobs in Case C-67/96, *Albany International BV* (ECLI:EU:C:1999:28), esp. paras 80-112.

13 See Joined Cases 40–8/73 etc, *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR 1663, para 539 (referring to the situation of an agent forming integral part of the undertaking of a principal). For a discussion, see P Nihoul, 'Do Workers Constitute Undertakings for the Purpose of the Competition Rules?' (2000) 25(4) European L Rev 408.

only duly recognized dockers to perform dock work, and also made the outcome of collective bargaining between employers' and employees' representatives negotiations binding *erga omnes.* The preliminary question sent to the CJEU by the national court involved the possible application of both Articles 102 and 106(1) TFEU to the Belgian Royal Decree. The CJEU assessed if these dock workers could be considered an 'undertaking'. The CJEU held that

> '[...] the employment relationship which recognised dockers have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question for and under the direction of each of those undertakings, so they must be regarded as 'workers' within the meaning of [article 45 TFEU], as interpreted in the case law [...].
>
> Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute undertakings.'[14]

It is worthwhile noticing that in *Becu* the CJEU effectively aligned the concept of 'employee' with the fairly broad definition of (subordinate) 'worker' under Article 45

14 Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV* [1999] ECR I-5665. It is noteworthy that the situation of employees is dealt differently in the EU than in the US. In US law, all 'persons' are subject to the Sherman Act, unless they benefit from an exemption. Labour benefits from a statutory and a non-statutory exemption. The statutory labour exemption (Clayton Antitrust Act, 15 USC §§ 12–27; Norris-La Guardia Act, 29 USC §§ 101–15) enables workers to organize to eliminate competition among themselves, and to pursue their legitimate labour interests, so long as they act in their self-interest and do not combine with a non-labour group. Yet, the statutory labour exemption did not immunize the collective bargaining process or collective bargaining agreements themselves from potential antitrust liability, but covered only labour's organizations unilateral actions. The US courts thus developed the non-statutory basis of the labour exemption in order to remove from antitrust scrutiny restraints in trade that are the product of a collective bargaining agreement between labour and management (see *Local Union No 189, Amalgamated Meat Cutters & Butcher Workmen of N Am v Jewel Tea Co Inc*, 381 US 676 (1965)). These more typically apply to agreements between employees or their unions and employers when the agreements are intimately related to a mandatory subject of bargaining, and do not have 'a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions': *Connell Constr Co v Plumbers & Steamfitters Local Union No 100*, 421 US 616, 635 (1975). According to the US Supreme Court (ibid, 622), '[t]he non statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labour law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labour policy requires tolerance for the lessening of business competition based on differences in wages and working conditions'. Courts have even extended this immunity beyond the expiration of a collective bargaining agreement: see *Brown v NFL*, 518 US 231 (1996). The non-statutory labour exemption has been frequently applied in the field of professional sports, for instance exempting a labour agreement between the US National Football League (NFL) or the National Basketball Association (NBA) and a national union of student-athletes.

TFEU, the 'free movement of workers' Treaty provision[15]. From the Court's reasoning it also followed that workers could not be considered as an undertaking if they were acting collectively as associations of workers. The dock-workers in *Becu*, were let off the EU competition law 'hook', but the Court must have realised that was very much an *ad hoc* decision and fell short of offering a more principled 'labour exemption'.

Since *Becu*, the possible application of Article 101 TFEU to collective agreements concluded between trade unions and associations of employers has led to the development of a fully-fledged exception to the application of EU competition law, for reasons of social policy. EU competition law, as developed by the Court, now provides immunity from competition law to collective labour agreements concluded between associations of workers (labour unions) and employers, when two cumulative conditions are met: (i) they are entered into in the framework of collective bargaining between employers and employees and (ii) they contribute directly to improving the employment and working conditions of workers. This case law does not, however, relate to the concept of 'undertaking' as such, but mostly to that of the restriction of competition and is known as the *Albany* exception.

In *Albany*[16] the Court clearly took the view that it was 'beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers'. However, it was also willing to concede that 'the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [EU competition rules] when seeking jointly to adopt measures to improve conditions of work and employment' (para 59). This concession was premised on various treaty-based textual justifications but also on the understanding that the 'nature and purpose' of the agreement was that of 'improving … working conditions, namely …remuneration' (para 63). The CJEU found that, first, the collective agreement at issue was concluded in the form of a collective agreement and was the outcome of collective negotiations between organisations representing employers and workers, and second, its purpose, the establishment of a supplementary pension scheme aiming to guarantee a certain level

15 See also AG N Wahl Opinion in Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2215, n 4 (using the terms 'employee' and 'worker' interchangeably).

16 Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

of pension for all workers in the sector 'contributed directly to improving one of their working conditions, namely their remuneration',[17] consequently excluding this agreement from the scope of Article 101(1) TFEU.

Exercising a liberal profession has usually being found to constitute an economic activity falling under the scope of competition law if there is no relation of employment[18]. But would the *Albany* exception apply to exclude from the scope of Article 101(1) TFEU collective agreements concluded between the members of liberal professions with regard to the fixing of minimum rates or other agreements restricting competition between them, to the extent that self-employed are considered to be undertakings?[19] The CJEU has examined the categorization of an association acting on behalf of self-employed persons, and has also explored the extension of the *Albany* exception to collective agreements concluded by unions representing both employees and self-employed persons.

Under the current approach followed by the EU courts, an association acting on behalf of self-employed persons is to be regarded as an association of undertakings under Article 101(1) TFEU[20]. It has become increasingly clear that a) when the self-employed seek to bargain collectively the terms and conditions of their services, or b) where collective agreements concluded by trade unions for subordinate workers also contain minimum labour costs provision that also apply to self-employed workers, then the exclusion from competition law will not apply to such self-employed workers as competition authorities or courts see them as 'undertakings'.

As for (a), in *Pavlov*, a collective agreement also setting up a pension fund, but concluded by an 'organisation … made up solely of self-employed medical specialists' did not fall under the *Albany* exception and the organisation was seen as acting as an

17 Ibid, paras 62–63.

18 See, for instance, self-employed accountants (Case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127), pharmacists (Case T-23/09, *CNOP & CCG v Commission* [2010] ECR II-5291), medical doctors (Joined Cases C-180–4/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451), and musicians (Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411).

19 See Joined Cases C-180–4/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451; *Belgian Architects Association* (Case 2005/8/CE) Commission Decision [2005] OJ L 4/10.

20 Case C-309/99, *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten,* intervener: *Raad van de Balies van de Europese Gemeenschap* [2002] ECR I-1577. In Wouters, the CJEU examined the compatibility with Article 101 TFEU of a regulation adopted by the Netherlands Bar Association prohibiting lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with members of the professional category of accountants.

association of 'undertakings' and as such subject to competition law[21]. This was so because 'the Treaty did not contain any provisions 'encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions'[22].

As for (b) in *FNV Kunsten* the Court held that 'in so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings'[23], and is therefore also exposed to the full application of EU Competition law rules. An exception to these rules, the Court said in *FNV Kunsten*, is only possible 'if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact "false self-employed", that is to say, service providers in a situation comparable to that of employees'.[24]

This casuistic approach of the European case law provides some limited flexibility to collective bargaining between solo self-employed that may fall under the scope of the *FNV-Kunsten* exception, but this is case-by-case approach is not sufficient to guarantee legal certainty and may act as a disincentive for the collective bargaining of self-employed and freelancers. The scope of the exception is also not clear, as the Court mentions two criteria for defining "false self-employed", that also serve as limiting principles for the exception:

- *Dependence*: 'the person does not determine independently his or her conduct on the market[25], *or* 'the person is economically dependent on a main customer'[26], with the understanding that the person could be dependent on a main customer even if she derives an income from other customers as long as that additional income is marginal or ancillary. The Court accepts that 'a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the

21 Case C-180/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, ECLI:EU:C:2000:428, para. 72.
22 Ibid., para 69.
23 Case C-413/13, FNV Kunsten Informatie en Media v Staat der Nederlanden, ECLI:EU:C:2014:2411, para.
24 Ibid., para. 31.
25 Ibid., para. 33.
26 Opinion of AG Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2215, para 52

market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking'[27].

- *Relationship for specified period of time*: The service should be performed for and 'at direction' of principal, particularly in respect of time, place, and content of work.

These criteria may leave outside the scope of the exception important categories of self-employed, such as those in the creative sector, who may not have autonomy regarding the "time, place, and content" of the task in question and often also incur substantial financial or commercial risks, for instance, through their compensation partly based on revenue percentage. The *FNV Kunsten* exception does not make a distinction between the digital and the offline economy and its application is not subject to any analysis of the structure of the labour market in question, as economic dependency is assessed at the level of the bilateral relation between the "false self-employed" and the principal, rather than on the competitive situation at the (labour) market(s) where the principal is economically active, for instance the existence of a monopsony or a tight oligopsony. The current approach also does not adequately take into account the legal nature of collective bargaining, in particular the fact that it is an internationally recognised fundamental labour right,[28] as well as, at the political level, the way this intersects with the broader debate on sustainable development.

3. Collective bargaining as a Fundamental Labour Right and a feature of sustainable development

Most labour lawyers would see the right to bargain collectively as a fundamental labour right recognised as such by a number of supranational and regional sources, including European and EU ones. Among the international or regional instruments that recognize collective bargaining as a fundamental, and times human, right, we may refer to ILO Conventions 87 and 98, the latter expressly covering 'The Right to Organise and Collective Bargaining', both of which are included in the list of eight ILO conventions treated as 'Fundamental' by the 1998 ILO Declaration on Fundamental Principles and

27 Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411, para 33.

28 De Stefano, V, .'Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards (2021), *International Labour Review*, forthcoming.

Rights at Work. Article 6 of the (Revised) Social Charter protects and seeks to ensure the effective exercise of the right to bargain collectively. And of course article 28 of the Charter of Fundamental Rights of the EU recognizes a 'right to negotiate and conclude collective agreements'.

The right to bargain collectively is also recognised by a number of Constitutions of European countries, either explicitly, or in connection with a constitutionally protected right to freedom of association. In 2012, the ILO General Survey on the Fundamental Conventions found that 'Specific provisions in relation to collective bargaining are present in 66 constitutions'.[29] This fundamental nature of the right to bargain collectively has important legal consequences. This section will illustrate three such consequences, as relevant to the topic of this chapter.

Firstly, if a right is held to be a fundamental or a constitutional right, then it is typically approached as being the rule, a rule that (unless the right is absolute) can be subject to exceptions as long as the latter are justified and proportionate and do not affect the essential content of the right itself.[30]

Secondly, rights that are understood to be fundamental usually point to their personal scope being interpreted broadly. In respect of the scope of the right to bargain collectively protected by C-98, the ILO has consistently held that 'The criterion for determining the persons covered by that right … is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize".[31] And the ILO Committee of FOA has often requested States (in this case the Republic of Korean government):

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29 Report of the Committee of Experts on the Application of Conventions and Recommendations, 'General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (2012). page 4.

30 See Article 52 CFREU. Also cf. Case C-73/16, *Puškár* (para 112 – right to private life); application no. 34503/97, *Demir and Baykara v Turkey* (paras 117-119 – freedom of association).

31 ILO Committee on Freedom of Association (2001) Report no 326, Case no 2013, para 416. See also Camilo Rubiano, *Collective bargaining and competition law: a comparative study on the media, arts and entertainment sectors* (International Federation of Musicians 2013). See also the report of the discussion held within the Conference Committee on the Application of Standards (CAS) on the application of C-98 to Irish freelance journalists, held in the 2016 International Labour Conference: ILO, 'Right to Organise and Collective Bargaining Convention, 1949 (No 98) - Ireland (Ratification: 1955)' (ILO, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3082151> accessed 12 January 2020

to take the necessary measures to, among other things "[…] ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, *including by the means of collective bargaining*"; and "(iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate"...[32]

Similarly, in respect of article 6(2) of the ESC, the Committee of Social Rights, in the recent decision on *Irish Congress of Trade Unions (ICTU) v Ireland* (Complaint No 123/2016)[33] affirmed that it "has constantly held that in principle the provisions of Part II of the Charter apply to the self-employed except where the context requires that they be limited to employed persons. No such context obtains in a generalised way for Article 6§2" (para 35 of the decision) and therefore "an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision" (para 40).

Thirdly, the fundamental right nature of certain labour standard means that they are often used in other contexts, for instance in the context of trade agreements, in order to ensure that those contexts are regulated and operate in a way that is compliant and compatible with these fundamental labour rights. It is worth noting, for instance, that as recently as July 2019, the EU Commission issued to the Republic of Korea a Request for the establishment of a Panel of Experts on the grounds that the Korean narrow understanding of the notion of 'worker' —in contrast to ILO standards—did not encompass self-employed truck drivers.[34] The Panel of Experts, with a decision issued in January 2021, eventually agreed that South Korean legislation on this issue, was indeed breaching ILO standards.[35]

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32 ILO Committee on Freedom of Association (2012) Report no 363, Case no 2602, para 461. See further in the same report the recommendations in paras 508 and 1085 - 1087.

33 See, No. 123/2016 Irish Congress of Trade Unions v. Ireland - Processed complaints (coe.int) .

34 European Union, 'Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement - Request for the establishment of a Panel of Experts by the European Union', Brussels, 4 July 2019, available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf accessed 12 January 2020.

35 Panel of Experts Proceeding Constituted Under Article 13.15 of the Eu-Korea Free Trade Agreement Report of the Panel Of Experts – 20 January 2021; available at https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf accessed 20 January 2021.

Arguably, when it comes to the relationship between the right to bargain collectively and EU competition law, the CJEU does not seem to embrace any of three implications arising from the fundamental status of the right to bargain collectively. It neither sees the latter as a primary rule that can be subject to justified and proportionate restrictions (in fact we have argued in our past work[36] it tends to see competition law as the rule, granting limited and qualified 'antitrust immunity' to collective agreements concluded by workers or false self-employed). Nor does it grant a particularly broad concept to the notion of 'worker' transcending the 'worker versus self-employed' divide, perhaps beside the acknowledgment that *false* self-employed ought to be treated accordingly.[37] And it does not deploy in the competition law context any particular doctrine of devise expressly acknowledging the fundamental right nature of the right to bargain collectively as recognised and interpreted by other international or regional bodies.

Finally, collective bargaining is a constitutive element of the social pillar of sustainable development, which includes four pre-eminent policy concepts: equity, awareness for sustainability, participation (the effort to include as many social groups as possible in decision-making processes) and social cohesion[38]. Equality at work, working conditions and rights, contributes to the following, among others, broader Sustainable Development Goals (SDGs): SG1 (no poverty), SG 8 (decent work and economic growth) and SG 10 (reduced inequality). Collective bargaining allows workers to secure a share in economic growth and contributes to adequate working conditions[39], as there is consistent empirical evidence that workers covered by collective bargaining tend to have higher wages than other workers, higher bargaining power of trade unions increases the labour income share and reduced wage dispersion[40]. Elements of social sustainability are included in the broader EU

36 M. Freedland and N. Kountouris 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) ILJ, 52, 62; V. De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) ILJ, 46, 185; V. De Stefano and A. Aloisi, 'Fundamental labour rights, platform work and human rights protection of non-standard workers', in J. Bellace and B. ter Haar (eds.) (2019) *Research Handbook on Labour, Business and Human Rights Law* , Edward Elgar.

37 A point already raised in Case C-256/01, *Allonby*, para 71.

38 For a literature review, see K. Murphy, The social pillar of sustainable development: a literature review and framework for policy analysis, (2012) 8(1) Sustainability: Science, Practice and Policy, 15.

39 European Commission, Employment and Social Developments in Europe – Annual Review, (Luxembourg: Publications Office of the European Union, 2018), at 115.

40 European Commission, Employment and Social Developments in Europe, Annual Review 2019 (2019), Chapter 6, at 213-215.

Commission's new growth strategy of the "Green Deal" agenda, in particular its aim to achieve a "just and inclusive transition to climate neutrality"[41]. Subsequent research has documented the high risks for precarious condition of self-employed without employees (solo self-employed), and in particular platform workers that depend for the their economic activity on one large digital platform or gatekeeper[42]. The recent proposals of the Commission to improve legal certainty around the applicability of EU competition law to collective bargaining by self-employed advances this broader goal so that:

> "EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for solo self-employed where they choose to conclude such agreements, while guaranteeing that consumers and SMEs continue to benefit from competitive prices and innovative business models, including in the digital economy".[43]

These proposals refer to the concept of "solo self-employed", which incorporates in EU competition law for the first time the a concept similar to that of "predominantly personal work" (although arguably narrower to the concept of 'predominantly personal work', though we would suggest that it only makes sense to speak of 'solo self-employed' if some flexibility at the margins is allowed, at least for the purposes of permitting the use of tools and modest amounts of tangible or intangible assets in the performance of 'own work').

4. Collective Bargaining and the concept of 'predominantly personal work'

With a certain degree of approximation, it is possible to suggest that, broadly speaking, there are three alternative *systematically coherent* (as opposed to 'ad hoc' and covering particular professions with 'extensions', 'presumptions of status', or 'exceptions') ways of defining who is a worker for the purposes of labour rights. The more traditional and prevalent way is associated with the idea of subordination to, or control from, an employer. By and large, a notion of worker shaped by reference to the idea of

41 European Commission, Communication, A Strong Social Europe for Just Transitions, available at A Strong Social Europe for Just Transitions (europa.eu) (January 14, 2020).

42 See, for instance, European Parliament, Directorate General for Employment Policies, Precarious Employment, IP/A/EMPL/2014-14Z (2016); U. Brancati et al., New evidence on platform workers in Europe (JRC, 2020); Kilhoffer et al., Study to gather evidence on the working conditions of platform workers, VT/2018/032 (Final Report, March 13th, 2020).

43 European Commission, Inception Impact Assessment, Collective bargaining agreements for self-employed – scope of application of EU competition rules, Ref. Ares(2021)102652 - 06/01/2021, 2.

subordination remains prevalent in most EU member states, and the EU concept of 'worker' remains associated to the concept of subordination or the idea that an activity is carried out 'under the direction or supervision' of an employing entity.[44]

A second idea is associated, directly or indirectly, with the idea of economic dependence from a main employing entity. For instance, the Irish Competition (Amendment) Act 2017 introduced the notion of 'fully dependent self-employed worker', and this notion – we would suggest – is also associated to the idea of economic dependence ('main income in respect of the performance … is derived from not more than 2 persons'[45]).

A third, arguably even broader, concept of worker can be shaped by reference to the concept of 'personal work', which depending on the national definitions one focuses on, can be defined as 'exclusively personal work' or 'predominantly personal work' (the latter resulting a broader conception of worker than the former). For instance, the UK concept of 'worker' contained in s. 230(3) of the Employment Rights Act 1996, or the similarly (but not identically) worded s. 296(1) of the Trade Union Labour Relations Consolidation Act 1992, refer to workers who 'do or perform personally any work or services'. When originally introduced in article 409 of the Italian civil procedure code, the concept of '*lavoratore parasubordinato'*, ('parasubordinate worker') was construed by reference to the idea of a '*prestazione di opera … prevalentemente personale*' ('performance of work … predominantly personal').

While it is clear that these two definitions cover individuals that would otherwise fall on the self-employed side of the binary divide between subordination and autonomy, it should be noted that legislation often seeks to reduce the reach of these 'personal work' based worker concepts. For instance s. 230(3)(b) excludes from the notion of 'worker' all those who provide personal work but do so for another party that is 'a client or customer of any profession or business undertaking carried on by the individual'. And the Italian definition of 'para-subordinate' worker has been modified by labour law statutes over the years, with a more stringent requirement of 'exclusively personal' work being introduced, for instance, by article 2 of legislative decree n. 81 of 15 June 2015 (aka the 'Jobs Act'). There are of course other scope-

44 Case C-232/09, *Ditta Danosa*, ECLI:EU:C:2010:674, para. 56.
45 S. 15D (b).

narrowing devices that can be deployed that can, and indeed often are deployed by statutory definitions.

Similarly, it is possible to expand further worker definitions based on the idea of 'personal work'. For instance, the recent Italian Law n. 128 of 2019 replaced the term *esclusivamente* used by article 2 of the Jobs Act, with that of '*prevalentemente'*. In what arguably constitutes an even more generous expansion of the concept, the 'home worker' definition contained in section 35 of the UK National Minimum Wage Act 1998, provides that an individual is a worker as long as they undertake to perform work or services, 'whether personally or otherwise'. Further expansions can also be achieved by removing a requirement for an individual to perform personal work in a particular workplace or at a particular time (and both statutory provisions referred to in this paragraph actually do so).

So, by and large it is possible to expand the reach of the concept of subordinate worker by reference to the notion of economic dependence or by reference to the notion of personal, or *predominantly personal*, work. We should note two points. Firstly, empirical research on the precise reach of each concept is scant, but the little data we have suggest that the idea of personal work generates a broader personal scope than that of economic dependence.[46] Both are of course broader than a worker definition based on subordination, and clearly span across the concept of autonomy or self-employment. Secondly, it should be noted that the notion of 'personal' work (or more precisely the term 'personal') can refer to two separate concepts. It can refer to the work or service being performed by a person without the use of substitutes (in the opposite case the person could be seen as an employer, especially if the substitutes are his employees). But it can also refer to the work or service being performed without recourse to particular tool or other assets own by the worker (in which case the worker would be seen as being an entrepreneur running a business undertaking, especially if the assets are substantial, let alone prevalent).

Our solution would be that any attempt to expand the reach of collective bargaining beyond the narrow confines of subordinate employment, might want to

46 S. Engblom, 'Measuring the Relationship between Self-employed Workers and their Clients – A Statistical Survey of Labour Law Categories' Paper presented at the conference Professionality, Employment Contracts and Collective Bargaining in the Context of Social Innovation organised by the PhD in Human Capital Formation and Labour Relations, Università degli Studi di Bergamo, ADAPT. 30 November-1 December 2018.

engage with the idea of personality in work.[47] A tentative definition could be based on the following wording:

> 'This Instrument lays down rights to collective bargaining that apply to every worker in the European Union that provides work or services in a predominantly personal capacity and is not genuinely operating a business undertaking on his or her own account'.

Further guidance could be offered in respect of the term 'predominantly' for instance by stressing that self-employed people that employee other staff would be deemed to fail that test, or that a substantial amount of assets, tangible or intangible (which could include capital, equipment, IP rights, etc.) would presumptively suggest an entrepreneurial activity even in the absence of employed staff. This would in effect assist with defining the 'business undertaking' domain.

We are of the view that such a definition would expand the current 'worker' definition deployed by the CJEU. We are also satisfied that it would be compatible with the EU responsibilities and Member States' international and European human rights obligations reported in the previous section. Finally, in the following section, we go on to suggest that it would be compatible with EU competition law.

5. A tentative compromise between labour law and competition law

In previously published work (Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market' (2019) *ELLJ*, 291-333), we suggested that a broader concept of worker, and – in particular – one based on the idea of personal work, could be seen as compatible with the fundamental principles and rules underpinning EU competition law. In that work, we reached those conclusion both by analysing the principles of labour law and competition law, and by analysing the jurisprudence of the CJEU and the Opinions of Advocate Generals.

As far as the underlying principles of the two disciplines it is easy so see how an extension of collective bargaining to all those providing predominantly personal work is justifiable and necessary. Generally speaking, when it comes to collective bargaining, labour law systems provide strong justifications for allowing workers to combine with each other and agree with employers terms and conditions of employment, including

47 See our broader suggestions and analysis contained in N. Countouris and V. De Stefano, New trade union strategies for new forms of employment (ETUC, 2019).

pay and working time. These justifications typically revert around the inability of workers to secure a fair price for their labour on an individual bargaining basis: by the very fact of being labourers, and in consideration of their need to constantly sell their labour in order to make a living, workers are ultimately not in a position truly to negotiate terms of employment, that are therefore typically imposed on them. By protecting the right to collective bargaining, labour law seeks to redress this imbalance of power and achieve fair outcomes for workers.

Some self-employed persons (and in particular those earning their living through their personal work) can benefit from the same rationale: by virtue of not being able to rely on any substantial capital assets, and by selling labour or labour intensive services that could easily act as cheap substitutes for the personal labour offered by standard workers, their inclusion in collective bargaining outcomes ensure both fairness (for themselves) and a level playing field (between them and the other workers). As we have suggested in our work, self-employment has become a very heterogeneous category, partly due to various technological and human resource management changes, partly due to the legal strictures of the 'subordinate employee' category. One cannot take a formalistic approach to the self-employed definition. A similar point – and moving on to the competition law side of the analysis – is raised by AG Wahl in *FNV Kunsten*.

The European Committee of Social Rights, in its decision concerning the right to collective bargaining of self-employed workers against the background of competition law, observed: "the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider." This, according to the Committee "has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers". It is the opinion of the Committee that "[t]hese developments must be taken into account when determining the scope of [the right to bargain collectively under the ESC] in respect of self-employed workers."[48]

48 European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v Ireland* (Complaint No 123/2016), para. 37.

This makes all the more convenient to adopt a notion of worker, relevant under EU and competition law, which is substance-oriented and non-formalistic. The scope of this notion cannot be influenced by the labels attached to work arranged either by the parties or by national legislations, often for aims that have nothing or little to do with the reality of the working activity to be performed, such as tax or social-security reasons.

We believe that a careful reading of the case law of the CJEU also justifies this approach. In *FNV Kunsten* the Court reiterated: "From that point of view, the Court has previously held that the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional"[49]. This is a statement completely in line with settled precedents such as *Allonby*.[50] Crucially, the Court restated this principle when assessing the notion of workers that do not bear relevance for competition law and after considering – echoing the opinion of AG Wahl – "in today's economy it is not always easy to establish the status of some self-employed contractors as 'undertakings'".[51]

We believe these considerations to be paramount, together with the observation "that, according to settled case-law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".[52]

Excluding workers that are dependent on their counterpart from the notion of "undertaking" relevant under article 101 TFUE regardless of their classification as employees or self-employed persons would, therefore, be in line with the broader policy rationales underpinning the relevant case law of the CJEU and would be entirely consistent with the aims of competition law.

The recent proposals of the Commission for a specific regime for solo self-employed is compatible with the emphasis put on the concept of personal work. In one

49 Case C-413/13, *FNV Kunsten*, para. 35
50 Case C-256/01, *Allonby*, para 71.
51 Case C-413/13, *FNV Kunsten*, para 32
52 *Ibid.* para 33.

of its regulatory options however, Option 1, the Commission however limits the scope of its proposal for "platform workers" and in the specific context of the digital economy, which is characterised by a high degree of economic concentration with the strong position of some global digital platforms, some of which are active in various economic sectors. As it is succinctly summarised by Marinescu and Hovenkamp the "key message from economic theory is that as one moves away from the competitive equilibrium towards a situation of monopsony in the (labour) market, wages and production both generally tend to decrease"[53]. Labour market power may have different sources. First, with the rise of economic concentration, it is highly likely that a few firms would operate in a given labour market, that is in a given labour market only one or few employers will be able to hire from the available pool of workers[54], may hold monopsony power. This provides them the power to reduce wages below what the workers would have been paid had the labour market be competitive. The monopsonist may thus enjoy a higher monopsony surplus, reducing by the same the surplus left to labour. This is not just a theoretical possibility as there has been recent empirical research documenting the rise of labour market concentration in the US[55]. This has not been only associated with the emergence of the digital economy, and may indeed be observed in other, more traditional sectors. Hence, one may argue that the Commission's proposals focusing only on digital platforms risk being under-inclusive (as well as failing to address the 'mischief' they are purported to address, i.e. the strictures arising from *FNV Kunsten*, a case that did not emerge in the digital economy).

53 I. Marinescu & H.J. Hovenkamp, Anticompetitive Mergers in Labor Markets, (2018). Faculty Scholarship at Penn Law. 1965. https://scholarship.law.upenn.edu/faculty_scholarship/1965 11.

54 E. A. Posner, G. Weyl & S. Naidu, Antitrust Remedies for Labor Market Power, (2018) 132 Harvard Law Review 536, 539.

55 See, J. Azar, I. Marinescu & M. Steinbaum, Labour Market Concentration, IZA Institute of Labour Economics (December 2017), available at https://www.econstor.eu/bitstream/10419/177058/1/dp11254.pdf (documenting labour market concentration for over 8,000 geographic-occupational labour markets in the US and finding that the average market is highly concentrated, this concentration being associated with a 17% decline in posted wages, therefore suggesting that concentration increases labour market power). These results were supplemented by a subsequent study exploring estimates of labour market concentration to cover almost all online job postings in the United States for the year 2016 compiling an HHI (Herfindahl-Hirschman index) for each commuting zone by 6-digit SOC occupation: J. Azar, I. Marinescu, M. Steinbaum, B. Taska, Concentration in US Labor Markets: Evidence from Online Vacancy Data (August 10, 2018). Available at SSRN: https://ssrn.com/abstract=3133344 (finding that the average labour market has an HHI of 4,378, or the equivalent of 2.3 recruiting employers and that 60% of labor markets are highly concentrated (above 2,500 HHI). The HHI is a concept developed by economists and used by many competition authorities as a screen to assess likely market power of two or more merging firms. It is derived by adding the square of the market share of every firm in the market. This emphasises the importance for competition by the larger firms.

The concept of "digital labour platform" used by the Commission in its proposals risks being under-inclusive as some platforms may have a hybrid nature, as they operate partly online and partly offline.

Furthermore, digital platforms are quite diverse and their business models evolve continuously. For instance, Airbnb may not be qualified as a digital labour platform if one takes into account its main function as a rental online marketplace, but Airbnb has also added to its initial business model the Airbnb Experiences offering a variety of activities provided by local "expert hosts", which may be qualified as a "digital labour platform". The personal scope of the new collective bargaining regime also varies, from the more restrictive option 1, which only covers "solo self-employed" in the digital economy, to the more expansive option 4, which would also cover small auto-entrepreneurs businesses (including potentially what some may see as small businesses without employees), and is reminiscent of the efforts made in other jurisdictions, such as Australia, to provide small business and agribusiness the possibility to obtain protection from competition law enforcement for collective bargaining under certain specific circumstances and through a specific authorisation process[56], or through some form of class exemption for certain businesses[57]. A broad interpretation and application of Option 4 could even go beyond the rationale for a specific regime recognizing the concept of "predominately personal work" and may eventually be linked to the general perspective of John Kenneth Galbraith on the role of countervailing powers in capitalism and his general indifference to concentrations of economic power, to the extent that government provides countervailing powers "freedom to develop and to determine how it may best do so"[58]. The justification for such regime will be in this case purely economic - the monopsonistic power of digital platforms and the negative welfare effects this monopsony may have on labour markets.

The result of labour monopsony or more generally labour market power is that the workers are paid below their marginal revenue product. As noted by the latest OECD Outlook 2019 publication, '[w]hile most of this evidence typically refers to

56 ACCC, Small business collective bargaining (December 2018), available at Small business collective bargaining guidelines | ACCC .

57 See, Collective bargaining class exemption | ACCC (which will be ready to use in 2021).

58 J. K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (Mifflin Co. 1952), 143.

employees, there are some studies quantifying the extent to which independent contractors, including platform workers, may be exposed to monopsony power'. [59]

In light of the above, we argue that, taking a labour law perspective, the notion of "false self-employed" workers whose collective bargaining should be excluded from the scope of EU competition law does not only cover the persons who are entirely misclassified as self-employed under national laws, and should, therefore, fall under the scope of all employment and labour protection relevant in national regimes. The exclusion should also concern all those workers who, despite not meeting all the requirements to be classified as "employees" under those regimes, are not "undertakings" under article 101 TFUE because they are not truly independent from their principals, but are fully dependent on their personal work.

This distinction is arguably reflected in the recently approved Irish Competition (Amendment) Act 2017. This legislation, as we stated above, aimed at reconciling the right to collective bargaining with antitrust principles, distinguished between the "false self-employed workers" and the "fully dependent self-employed" workers, under the premise that both these categories are relevant for collective bargaining. Importantly, the European Committee of Social Rights considered this Act a successful step considered forward towards compliance of antitrust standards with the fundamental right to collective bargaining under article 6(2) of the European Social Charter.

Furthermore, one may also take a competition law and economics perspective and add to the aforementioned labour law justification an economic rationale for the emergence of countervailing powers that will balance the negative effects of monopsony resulting from the rise of digital platforms and their impact on labour markets.

An additional thought is needed, at this point, to conclude our reasoning. Identifying the scope of the exemptions from competition law in this area cannot neglect one of the fundamental aims of collective agreements, namely the prevention of what is often termed '*social dumping'* against or between different typologies of

59 OECD, *Employment Outlook 2019*, (Paris, 2019), p.154, referring in particular to the studies by Dube et al. 'Monopsony in Online Labor Markets', *American Economic Review: Insights* (forthcoming) providing evidence that workers on Amazon Mechanical Turk can have a residual labour supply elasticity as low as 0.1, while Chevalier et al. 'The Value of Flexible Work: Evidence from Uber Drivers', *Journal of Political Economy* (forthcoming) find values comprised between 1 and 2 for Uber drivers.

workers. Similar observations have been expressed both by AG Wahl in his opinion in *FNV Kunsten* and the Committee of Social Rights in its decision in *ICTU v Ireland*.

AG Wahl, in particular, observed that one of the very reasons collective agreements are stipulated is "the elimination of wage competition between workers [which] implies that an employer can under no circumstances hire other workers for a salary below that set out in the collective agreement". He also remarked that if employers could replace workers with other individuals to whom they do not have to apply the remuneration established in the collective agreement, the position of workers would be significantly weakened. In this respect, he pointed out, it would make no difference for the relevant workers to be replaced by less costly employees or by less costly self-employed persons. The aims and effects of the collective agreement would be, in both cases, irremediably jeopardised. He thus concluded that when the risks of social dumping are concrete, preventing them would be "an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation".[60] We find this justification for a competition law exception eminently sensible and compatible with the similar and functionally equivalent labour law justification outlined above.

Following a similar reasoning, the Committee on Social Rights, in the aforementioned decision, opined that 'collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract'. This contrasts with competition law 'where the grouping of interests of suppliers endanger fair prices for consumers'. In determining who should enjoy the right to collective bargaining 'it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour'; what matters, instead, is whether "*providers of labour*" have "substantial influence on the content of [their] contractual conditions". If this were not the case, considering them "undertakings" under antitrust law would be "over-

60 Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, para. 76-94.

inclusive", and depriving them of their right to bargain collectively would be incompatible with the European Social Charter.[61]

This had been the case in Ireland before the introduction of the Irish Competition (Amendment) Act 2017. The Committee found a breach of article 6(2) ESC in that case also because it was not clear 'that permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees)'. This finding reinforces the argument that the need to eliminate the risk of social dumping is a valid reason to include self-employed workers in collective agreements.[62]

Taking into account what we argued so far, we suggest that beyond the "false self-employed" and the "economically dependent" categories mentioned above a further exemption from antitrust restrictions should be granted to those self-employed persons providing predominantly personal work in sectors and industries where the absence of a collective agreement covering their terms and conditions of employment may significantly weaken the negotiating position of workers in the industry by raising a risk of social dumping or substitution. In line with the arguments presented by AG Wahl, we believe that also this exemption would be entirely compatible with EU competition law.

6. Conclusions. Regulating the work of workers but not the price of services.

Admittedly, exemptions from competition law could be granted, in principle, on a *ad hoc* basis when a collective agreement is reached in respect of some categories of self-employed persons subject to the parties to those agreements submitting them to designated bodies or authorities for approval. We maintain that this approach would be excessively burdensome for both the social partners and antitrust authorities. It is important that self-employed and their unions and small businesses are offered legal certainty as to the possible application of competition law to collective bargaining initiatives. According to the authors this may not be achieved through a clarification of

61 *ICTU v Ireland*, Complaint No 123/2016, paragraph 38. Emphasis added.

62 European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v Ireland* (Complaint No 123/2016), para. 38 and 96-101.

the existing law with the publication of guidelines, but will require a categorical exception approach that would determine from the outset the personal and material scope of the exception.

Indeed, a case-by-case approach would imply for social partners entering into negotiations and stipulating a collective agreement with the idea that this could later be nullified – it would materially disincentivize collective bargaining in this respect, something that would be entirely at odds with both the recognition of collective bargaining as a fundamental right and with international standards that mandate the promotion of collective bargaining mechanisms. We note that the ILO both discourages and regulates tightly requirements that prior approval be obtained before a collective agreement can come into force.[63] The ETUC resisted the Commission Proposals discussed above, partly on the basis of this principled point.[64]

Such an approach could also literally swamp antitrust authorities with an unforeseeable number of applications, something that could paralyse the authorities and materially defer the possibility to apply the content of the agreements. Working conditions and the need for certainty of workers and businesses would materially suffer.

We also maintain that such an approach would substantially restrict the ability of trade unions to reach out to self-employed workers and to organize them. One of the essential aims of collective organisation is the possibility to conclude collective agreements. This is why the right to collective bargaining is considered to be an essential element of freedom of association into trade unions under ILO Fundamental Conventions, the European Convention of Human Rights and the Council of Europe. If trade unions were to be discouraged from reaching out to self-employed workers, knowing that after spending significant time and resources to organise them and concluding collective agreements on their behalf, these agreements could be nullified under antitrust regulations, it would impair not only the right to bargain collectively but also freedom of association.

63 See CFA, 'Compilation of decisions of the Committee on Freedom of Association' (6th ed., 2018) paragraphs 1420-1470 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf

64 ETUC, 'Background Paper to the ETUC Feedback on the Commission Inception Impact Assessment on Competition Law and Collective Bargaining for Self-employed (3 February 2021), at page 3.

It would, therefore, be essential to adopt a standard that would dissipate doubts of workers, trade unions, employers, principals and their organisations on these matters. To this aim, we think that reversing the existing approach that considers collective bargaining an exception to competition law principles is essential. As we argued above, we believe this objective could be fulfilled by adopting an instrument based on the idea that:

> "rights to collective bargaining […] apply to every worker in the European Union that provides work or services in a predominantly personal capacity and is not genuinely operating a business undertaking on his or her own account".

We suggest that this notion would adequately encompass all the 3 categories of persons that should be covered by collective bargaining rights beyond people who are already classified as "employees" *strictu sensu*.

Importantly, we maintain that this notion is limited and sufficiently precise to comply with the existing functional understanding of "undertaking" under present competition law standards and case law. We have argued that excluding persons that do not provide work or services in a "predominantly personal capacity" and are genuinely operating a business undertaking on their own account would comply with this functional understanding and would not require revising the notion of undertaking at the substantial level. At the same time, this approach would acknowledge that the current notion of "self-employment" cannot serve as a functional equivalent of "undertaking", in line with the findings of AG Wahl and the CJEU that accepted that in today's world of work the formalistic distinction between employees and self-employed workers became too blurred to act as a decisive criterion.

We are conscious that a similar expansion of the personal scope of application of the right to bargain collectively may raise some concerns in terms of the exercise *ratione materiae* of this right. We can see an anxiety mounting, in particular, in respect of whether allowing the social partners to agree terms and conditions of work for some self-employed persons could have negative effects on the products and services markets in which these self-employed operate.

To engage with these anxieties, we would suggest that, as general principle, 'it is for the parties concerned to decide on the subjects for negotiation'.[65] Limiting collective bargaining to 'price negotiations' would be an undue restriction. The ILO CFA has typically asked Governments 'to identify, in consultation with the social partners concerned, the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate'.[66] But it is clear that these mechanisms and their outcomes cannot be unduly restrictive.

We would also like to point out that neither this important clarification, nor our proposals, would necessarily have the effect of expanding the scope of collective bargaining beyond its traditional material scope. Collective bargaining is, by definition, (at least) a bilateral exercise. Collective agreements are reached by workers, broadly understood, and their employers or principals. These employers and principals are the ones who have access to the relevant market and act independently on it. Collective bargaining, therefore, does not determine the final price of a good or service on the market. It is employers and principals that make these prices, also taking into account labour costs that are directly affected by applicable collective agreements. The fact that these labour costs affect prices as a cost or factor of production, is independent from the employment status of the labour providers that contribute to the production process.

Recognising the right to bargain collectively to all providers of personal work, as defined in this chapter, would not tamper with this circumstance. It would uphold and sustain fundamental labour rights, it would provide clarity, it would protect workers who do not have substantial influence on their working conditions, it would prevent social dumping against employees – it would not, however, fix the final price of a good or service in the market (certainly no more so than collective agreements applicable to workers employed under traditional contacts of employment). Therefore, it is entirely compatible with competition law principles and standards, and any provisions that sought to clarify that point would be equally compatible with labour law principles.

65 See CFA, 'Compilation of decisions of the Committee on Freedom of Association' (6th ed., 2018) para 1289, available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf

66 Ibid., para 1285.

This exception could also be extended to small businesses, in the like of the regime for small business collective bargaining in Australia, in particular in the presence of significant monopsony power at the other side of the market, but choosing this option would also entail specific limitations to be added in the regulation so as to ensure that there would be no exemption granted to the exchange of commercially sensitive information about pricing or to anything that would amount to a unilateral price-setting agreement. The exception cshould in this case be subject to a notification and authorisation process.

We conclude by noting the efforts currently being performed by the EU Commission in the context of its proposals on the 'Digital Services Act Package'. According to Commissioner Vestager, the package, among other priorities, should also 'ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules' and that recognises that 'rules are not there to stop workers forming a union but in today's labour market the concept "worker" and "self-employed" have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed. We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions'. We trust that the policy suggestions contained in the present chapter could assist with clarifying some of the key distinctions and concepts emerging in this, admittedly, complex debate.