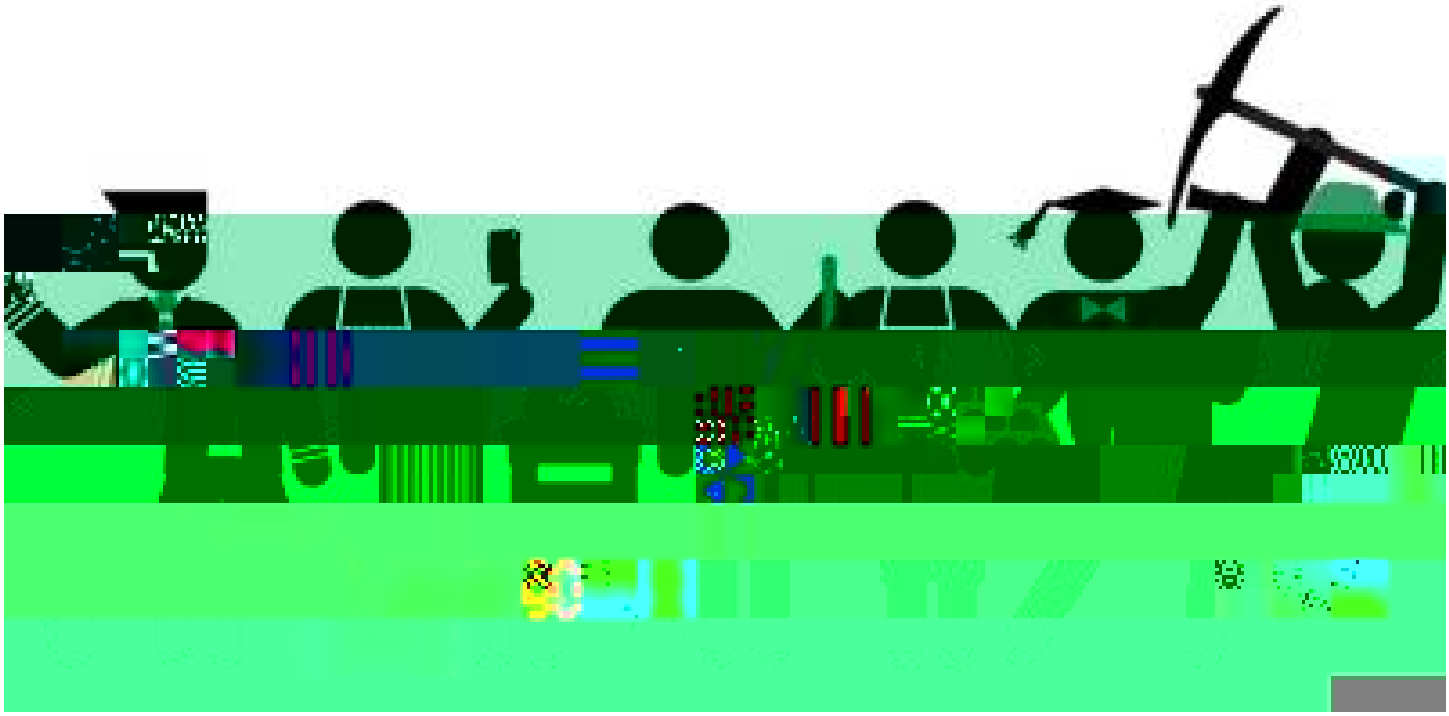

Rethinking the Competition Law/Labour Law Interaction

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Re-thinking the competition law/labour law interaction

Promoting a fairer labour market

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Abstract

The spread of non-standard forms of work, including platform work, has created some friction between labour law and competition law, in particular concerning the collective bargaining of self-

> ‘The defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he receives remuneration’[22].

The circumstance that the EU labour law concept of ‘worker’ derives from the EU free movement concept of worker is quite relevant. The Court’s insistence on the concept of subordination and control in the FMW context is immaterial to the free movement rights enjoyed by EU citizens, since even autonomous self-employed workers can enjoy these freedoms under the rubrics of freedom of establishment and freedom of services. But by carrying the FMW ‘worker’ concept in the EU labour law context, control and subordination can have very clear exclusionary consequences since, as a general rule, self-employed workers do not receive many labour law rights.

The development of platform work raises interesting questions, not only in the EU but also in other jurisdictions, as to the criteria that would enable courts and public authorities to distinguish between workers and self-employed and have raised questions as to the pre-eminence of the employment test as to whether the alleged employer has the right to control the manner and means of accomplishing the result desired. Of particular interest is the recent judgment of the Supreme Court of California in the *Dynamex* litigation[23]. Emphasizing the

investment in the b

considerably, but by and large these intermediate categories receive more labour rights than the self-employed and fewer than standard workers.[31]

None of these nuances is reflected in the EU labour law distinction between 'workers' and 'self-employed'. The only exception is arguably the right not to be discriminated against, that also applies to 'conditions for access to employment, to self-employment and to occupation' (e.g. Article 3 (1)(a) of Dir. 2000/43).

When it comes to collective bargaining, labour law systems provide strong justifications for allowing workers to combine with each other and agree with employers basic terms and conditions of employment, including pay and working time. These justifications typically revert around the inability of workers to extract 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.

Since labour law is primarily concerned with fairness, it sometimes allows some self-employed persons to either participate in collective bargaining processes or to benefit from their outcomes. This is typically justified on the same fairness and anti-subordination basis as discussed above: 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, the inclusion of self-employed persons in collective bargaining outcomes ensure both fairness and a level playing field. This is increasingly so as human resource management practices and technological changes are bringing to the fore new forms of work that are designed to look like genuinely autonomous employment relationship, while allowing employers and principals to avail themselves of personal work and labour services without having a workforce, at least in the traditional sense.

International and European Labour Law are also adamant about freedom of association and the right to bargain collectively also applying to the self-employed. The ILO Committee on Freedom of Association considers that "by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organizations of their own choosing", therefore, the criterion for "determining the persons covered by that right" is "not based on the existence of an employment relationship,(m)-2 a(r)3 (e)4 (l)-1(lo)]Td forheeat.02 Tw0 (f)3 4 (r)e(or)-73t(he) (e)44 (not)-2

expected ‘to take the necessary measures to: (i) ensure that “self-employed” workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the

competition law systems typically see these practices as something quite distinct from the price fixing practices that undertakings may be engaging in.[39]

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'.[40]

In *Jean Claude Becu* the CJEU examined a collective labour agreement relating to dock work at the Port of Ghent, made mandatory by Royal Decree, which allowed only duly recognized dockers to perform dock work, and also made the outcome of collective bargaining between employers' and employees' representatives 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

It is worthwhile noticing that in *Becu* the CJEU effectively aligned the concept of 'employee' with that of the 'worker' under Article 45 TFEU.[42] 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. It is worth noting that often their contracts of employment tied them to a particular ship owner on a fixed-term basis, and 'as a rule for short periods, and for the purposes of performing clearly defined tasks' (para 25 of *Becu*) . The work relations of dockers are notoriously short and can often last even less than a working day and only amount to the performance of one task, such as loading or unloading a particular cargo from a particular ship. Other patterns can of course be different, but none of this was material to the findings of the Court as its analysis focused on the *nature* of the employment relationships (and it goes without saying that it may have reached a different characterization in a different factual context).[43]

It is fair to say that, since *Becu*, the possibTj -0.004 TcDu(bT Tw 13.58n)-89 (e)3.9.loaa I01 T

…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

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'[51], 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'[52wls]

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[redacted]

dependent worker then it will necessarily be an undertaking. The only exception that

of a dominant position (e.g. excessive pricing), even if this arrangement does not fall under Article 101 TFEU, for instance because of the *Albany* exception.

Articles 106(1) and 106(2) TFEU also subject to the discipline of Articles 101 and 102 TFEU public undertakings and undertakings to which Member States grant special or exclusive rights. One may refer to the collecting society model, put in place for the collective management of copyright rights by authors and other creatives, which benefitted from a *de facto* or statutory monopoly in each Member State and whose activities were regulated under domestic legislation and national regulatory measures that widely differed in their approach, at least until the implementation of the 2014 Collective Rights Management Directive[56]. Collecting societies were organised in some Member States more than in others, according to the principle of solidarity, as they required all right holders to pay the same fee for the administration of their rights and relied on cross-subsidisation of the less successful artist by the most successful ones, for instance through the organisation of hardship funds that represented for some collecting societies a substantial amount of transfers for social purposes[57]. The collecting society model has nevertheless been subject to strict competition law scrutiny and was gradually transformed with the increasing emphasis put, in particular since the Commission's recommendation 2005/737/EC in 2005, on promoting cross-border competition between collecting societies, thus progressively breaking the monopoly positions they benefitted from[58]. The agreements concluded by collecting societies have been since assessed under Article 101 TFEU, in recent years, for several dimensions of their activity[59].

According to Article 106(2) TFEU, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly

[56] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, [2014] OJ L 84/72. The Directive sets out the standards that EU Collective Management Organisations (CMOs) which choose to engage in multi-territorial licensing of online musical rights must meet.

[57] See, the discussion in S. Schroff & J. Street, The politics of the Digital Single Market: culture vs. competition vs. copyright, (2018) 21(10) Information, Communication & Society 1305, 1317, detailing that in 2011, the German GEMA distributed 5.9% of its distributable income for social purposes, including pensions, hardship funds and promotion, the French SACEM 7% and the Spanish SGAE 9.6%.

[58] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ L 276/54.

[59] See, for instance, representation agreements in which a collecting society appoints another society to administer rights on its behalf in a foreign territory, which were scrutinised in the CISAC decision because of territorial restrictions, to the extent that each society can issue licenses only for its own territory and users could only obtain a licence from their local collecting society, as the granted licence was limited to the domestic territory of the collecting society: see European Commission, Case COMP/C2/38.698 – CISAC (2008), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf

(i) they are entered into in the framework of

the way the interaction between these two areas of law has been conceptualised leads to a conceptual and normative mismatch between the categories and purposes of the two disciplines, despite some effort made to avoid any normative conflicts that would arise out of the determination of the boundaries of each discipline. Hence, in cases like *Albany*, competition law made the necessary adjustments so as to enable labour to collectively bargain wages and working conditions, even if such collective bargaining may reduce the degree of competition in the labour market. The focus of competition law on product markets, rather than labour markets in this context may also have served well in order to avoid any conflict.

This approach of mutual ignorance, with some openness for the occasional re-adjustment, frustrates the goals of both areas of law. This frustration may well have been manageable in the past, but the emergence of the New Economy Business Model has multiplied the areas of friction to the extent that the traditional categories of 'work' and 'undertaking' or 'self-employed' could not be stretched so as to ensure adequate protection for new forms of labour. To this one may add the multiplication of 'framing struggles' as each area of law made efforts to extend its own scope of application, sometimes without any in-depth consideration of the social effects of such strategy of legal imperialism.

It is also worth noting that in its most recent case law, the CJEU has taken a more circumspect view of the implications for the scope of EU competition law of the distinction between workers and self-employed persons, suggesting that the effective scope of

III. Breaking the dichotomy: building a continuum of legal protection for labour

A. A Changing Legal Landscape: The Treaty of Lisbon, the Charter, and Regulating for a Highly Competitive Social Market Economy

The seeds of a more complementary vision of the relation between labour law and competition law dates may be found in some case law of the Court pre-dating the cataclysmic changes to the organisation of economic activity brought by the digital revolution. The Court's exclusion of collective agreements concluded by workers from EU Competition Law, clearly expressed in *Albany,* was premised on various treaty-based textual justifications[77], and a recognition that the Treaties themselves 'promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers'[78]. By contrast, in *Pavlov*, such an exclusion was denied when self-employed are covered by collective agreement since 'the Treaty contains no provisions, […] encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment'[79]and this point was reiterated in *FNV Kunsten*[80].

To the extent that this might have been an accurate description of the Treaty provisions at the time the *Albany* and *Pavlov* decisions were adopted, the coming into force of the Treaty of Lisbon in 2009 radically re-shaped the legal landscape and the Treaty sources on which the CJEU founds its case law. It is arguable that some of these changes also provide the context for the more nuanced and circumspect approach adopted in *FNV Kunsten*, both in the Court's judgment and, in particular, in AG Wahl's Opinion. Three such changes are worth mentioning in outline here, with the following section 5 drawing a number of normative implications from these changes.

Firstly, since 2009, the Charter of Fundamental Rights of the EU has come into force and the Charter recognises, in Article 28, that 'Workers and employers, or their respective

of the new model of 'social market economy' enshrined in Article 3(3) TEU. Judgments of the CJEU have already pointed out that both Article 9 TFEU and Article 3(3) TEU can play a fundamental role in expanding the Court's understanding of the social policy justification[81], and it is fair to suggest that Article 9 TFEU, as all other horizontal integration clauses should provide interpretative guidance to the EU institutions when interpreting and applying the concepts of Article 101(1) and 101(3) TFEU.

We consider that these changes, jointly and severally, should first suggest a reformulation of the concepts of 'undertaking', 'agreement' and 'restriction of competition' in both Articles 101(1) and 101(3) TFEU, with a view of reconciling or reducing the gulf between the *Albany* and the *Pavlov* approaches. We also claim that they also make possible the abandonment of the dominant perception of these two fields as antagonistic in favour of a more complementary relation reconciling the different approaches and enabling for the first time a more systematic and congruent use of both legal tools in order to strengthen the protection of labour. Hence, in the next Section (B) we will explore the various strategies of reconciliation between labour law and competition law, while still adhering to the categorical thinking approach and viewing these two disciplines as two distinct legal fields, although not as isolated from each other as in the past. In the final Section (C) we move a step further and taking a problems approach dare to imagine a strategy that would aim to integrate the concepts and some of the tools of each discipline to each other, repurposing them for the occasion in order to address common concerns so that any action taken in one or the other context is mutually reinforced and the goals of both areas of law duly satisfied. Although this exercise requires some long-term investment and cannot be completed in this paper, for demonstration purposes we explore how competition law has already been re-designed and re-purposed in order to apply in labour markets, and ensure a higher degree of protection for labour.

B. A Reconciliation between the Competition Law and Labour Law Approaches

It is arguably possible to identify four main strategies to review and develop the interaction between competition law and labour law, taking into account their conceptualisation as separate legal fields with their own purposes and tools. The first consists in adopting a case-by-case analysis, examini

consistency of EU law[82], in particular in the context of the application of the proportionality principle (2). A third option is to a categorical thinking, as opposed to case-by-case analysis, approach, by either expanding the existing category of 'workers', therefore excluding the application of competition law in these situations (3). The common characteristic of the above options is that they operate with regard to the personal scope of competition law, attempting to establish clear boundaries as to whom is subject to it, and who is not. Another strategy would be to focus on the material scope of competition law, the concept of restriction of competition, which needs to be re-interpreted in conformity with the emphasis put recently by EU law on social market economy and collective bargaining, thus going beyond the strict confines of the legal consistency principle, in search of what we would characterize values-consistency (4).hne

Figure 1: Dissecting the Category of 'Work' (compensated)

We are inspired here by the classic distinction between 'hierarchy', conceived as a centralized pole of economic organization of production regulated by the employment contract and characterized by the hierarchical position of management[83], and the 'market', considered as a decentralised institution that relies, in order to function, on price signals emitted by consumers/users of labour (as the archetypical market in our case will be labour markets), to which workers strive to respond. The key concept characterizing hierarchy is the full control of labour to the extent that this is integrated in an existing hierarchical structure. Of course, labour here is compensated though the payment of a wage by the employer. We do not distinguish for the purposes of this study between employers that are corporations and employers that are physical persons. Waged work is not the only category of supervised labour that may be integrated into the hierarchy. It is also possible to think of certain dependent professionals, for instance lawyers acting for a significant part of their time as in-house council for corporations, as also integrated into the boundaries of the firm.

While waged work constitutes one pole of 'work', the other one is constituted by labour expended in order to manage capital, own or capital borrowed in financial markets. The second pole of 'work' relies on the use of capital, the most extreme scenario being that labour becomes marginal or ancillary to the use of capital. This may include different forms of entrepreneurship (e.g. a restaurant owner that is at the same time the restaurant chef). In the middle, lie a certain number of alternative working arrangements that associate a worker to a specific task, but without integrating the worker in the hierarchy, as the worker remains in principle free to also provide work for other 'employers', although this formal freedom may be regulated, for instance, by non-competition clauses in the contractual relation. This category includes part-time workers, or gig and app work. This type of work has considerably increased in importance the last three decades.

The 'gig' economy is usually understood to include chiefly two forms of work[84]: 'crowdwork' and 'work on-demand via apps'. The first term is usually referred to working activities that imply completing a series of tasks through online platforms. Typically, these platforms put in contact an indefinite number of organisations and individuals through the internet, potentially allowing connecting clients and workers on a global basis. IT platforms are used to source work 'from an anonymous group of "bidders", who are referred to as the crowd, the provider and the worker frequently not having direct contact[85]. "Work on-demand via apps", instead, is a form of work in which the execution of traditional working activities

[83] Depending of course on the theory of the firm one may adopt.
[84]

TFEU will not apply to these agreements[95]. The CJEU in

should not incur substantial financial or commercial risks. For instance, compensation partly based on revenue percentage would arguably create financial or commercial risk.

We note nevertheless that the reliance on the concept of economic dependence to exclude some self-employed workers from the EU concept of undertaking is arguably compatible with the idea in competition law that undertakings should behave as autonomous economic entities. Schiek and Gideon argue that in a number of sectors of the labour market 'multinational companies and other employers endeavour to shift the commercial risk onto the economically dependent self-employed persons', and they 'suggest that a truly economic approach to the notion of worker would recognise that this shifting of risk is an expression of economic dependency on the part of the worker or micro-entrepreneur'. This arguably requires 'the Albany exclusion [to] be rephrased through a functional interpretation of the notion of undertaking in EU competition law. This would support an exclusion for all collective bargaining processes aimed at overcoming economic dependency of economically dependent service providers, irrespective from whether they are self-employed or not'.[100]

The concept of economic dependence is well-understood in EU competition law and initially formed the main reason pure agency agreements were excluded from the scope of Article 101(1) TFEU. In *Suiker Unie*, the CJEU used two criteria to define the scope of the agency agreement regime. First, the agent should not bear any financial risk of the transaction. Second, the agent should not engage in the activities of both agent and one of independent trader in respect of the same market.[101] The aim of the test is to verify the degree of autonomy of the agent with respect to the principal, which is determined according to the criterion of economic dependency. Being economically dependent or independent does not only result from the economic size of the agent or the fact that he also acts as an independent trader in respect of the same product market. As clarified by the Court in its successive jurisprudence, it may also be implied by other circumstances, such as the fact that the agent works for other

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undertaking and the agreement between agent and principal will be subject to Article 101(1) as any other vertical agreement'.[104] Although the CJEU expressed doubts on the criterion of economic dependence in *Volkswagen*[105], by emphasizing the allocation of risks between the principal and the agent and the Commission followed by definitively abandoning the economic dependence criterion in the 2000 Vertical restraints guidelines for that of the allocation of risks[106], we consider that there are close relations between the concept of economic dependence and the criterion of the allocation of risks between principal and agent that is now used in order to distinguish situations of 'genuine' commercial agency which benefit from some limited

a categorisation approach that would classify certain types of activity as more conducive to be considered as leading to a false self-employed status and specific criteria that if satisfied would establish a rebuttable presumption that the collective agreement was concluded by false self-

law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods

persons who would probably do the same job for a lower remuneration'[110]. As such, the AG concluded that

> 'For all those reasons, I take the view that preventing social dumping is 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'[111].

In the following paragraphs of his Opinion the AG goes on to illustrate how this rationale is supported by the case law[112]. He notes that for this justification to apply, there should be a concrete risk of a substitution by self-employed workers[113]. This is further elaborated as requiring the existence of 'a real and serious risk of social dumping, and, if so, whether the provisions in question are necessary to prevent such dumping. There must be an actual possibility that, without the provisions in question, a not insignificant number of workers might be replaced with self-employed persons at lower costs[114]', which requires the assessment that there be an 'actual possibility that, without the provisions in question, a not insignificant number of workers might be replaced with self-empl3 (s)-1 ( )81s Td (-)Tj - y04 -0(e5 0.17[(e4 (l)-11)0.6

Charter. As the 2017 Act removed the restriction to Article 6§2 of the Charter the Committee did not have an issue with the amendment.

3. A new concept of ‘worker’

A further option might be that of either expanding the concept of ‘worker’ for all areas of EU law, or decoupling the ‘worker’ definition in EU competition law from the ‘worker’ definition in EU labour law. While the ‘worker’ concept in labour law is, and could remain predominantly attached to the notion of subordination and control, the notion of ‘worker’ in EU competition law could develop in ways that take into account more specifically the regulatory rationales of competition law (in particular the presence of concentration and market power in particular sectors) and maintain a meaningful distinction between ‘worker’ and ‘undertaking’ for the discipline.

The current definition of ‘worker’ adopted in EU Competition law cases replicatesipline.c8TJ 0 Tc 0

into account that over-

It is arguable that this decision fundamentally recasts the scope of Article 28 of the CFREU, and that this provision should also be understood as not automatically excluding or banning self-employed workers from the right to bargain collectively.

The Committee of Social Rights also noted that 'the right to bargain collectively is not an absolute right and that it may be restricted by law where this pursues a legitimate aim and is necessary in a democratic society' and that '[i] this respect it cannot be automatically presumed that restrictions following from competition law […] do not pursue a legitimate aim and/or are not necessary in a democratic society, for example to protect the rights and freedoms of others' (paragraph 36). Therefore EU competition law may also be considered as justifiably restricting the scope of Article 28 CFREU.

However, in our view, these developments call into question the assumption on which *Pavlov* and *FNV Kunsten* excluded automatically collective agreements covering self-employed workers from the *Albany* exception. Given the expanded personal scope of Article 28 CFREU, it is arguably no longer the case that 'the Treaty contains no provisions, […] encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment'.

These developments require EU institutions to consider the possibility that collective agreements applying to self-employed workers providing personal work and services may be considered as falling outside the scope of EU competition law, if they meet the same conditions that collective agreements covering workers are expected to fulfil, and if the self-employed

number of negative effects. First, it may increase prices for consumers, if these high costs would be passed on to the consumers in the commodity market, hence workers may lose as

Hence, it has been suggested that policy-

suppression the monosponist orchestrating cartels between supplies to reduce the wage of their workers and then pass on some of the savings to the monopsonist upstream[167]. Some of these theories of harm are more speculative[168]. For instance, predatory hiring as an abuse of a dominant position where the incumbent monopsonist raises wages above the workers' marginal revenue product in order to exclude a new competitor from the market, as this would not be able to make profits and following th

take the form of lower wages, but may also relate to the quality of the employment relation,

arising from growing income inequality, and actually by distorting the very markets that competition law is, or should be, tasked with regulating and protecting.

The European Union is based on respect for democracy and social rights. According to Article 3 (3) of the Treaty on the European Union, the Union shall establish an internal market with a *highly competitive social market* economy, aiming at full employment and social progress and will work to 'promote social justice and protection'. We believe that this dual commitment – to a competitive economy which promotes social justice – should be honoured and reflected in the application of EU competition law.

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As the various articles in the present special issue of the European Labour Law Journal point out, EU Member States still value the importance of collective bargaining as an essential tool for labour market regulation. The comparative perspectives contained therein have by and large corroborated the narrative and normative arguments underlying the ETUC report *New Trade Union Strategies for New Forms of Employment* and the finding that it may be both possible and desirable for labour law to embrace a broader concept of worker, shaped by reference to the idea of personal work relation. We see the suggestions contained in the present article, and the central recommendation of realigning the goals of competition law and those of labour law in the context of national collective bargaining processes, as an essential part of a reform agenda that, in our view, should unite both the European labour movement, EU institutions, and that essential and vibrant part of European capitalism that values the long term viability of Europe's 'highly competitive social market economy'.