ELLJ

European Labour Law Journal

Volume 10 Number 3 September 2019

Special issue: Testing the 'Personal Work' Relation: New Trade Union Strategies for New Forms of Employment
Guest editors: Nicola Countouris, Valerio De Stefano and Mark Freedland

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 175–178

DOI: 10.1177/2031952519871134
journals.sagepub.com/home/ell
SAGE

Preface to the ELLJ Special Issue: 'Testing the "personal work" relation: New Trade Union strategies for new forms of employment'

Nicola Countouris
Professor of Labour Law and European Law, University College London, London, UK

Valerio De Stefano
BOFZAP Professor of Labour Law, KU Leuven, Belgium

Mark Freedland
Emeritus Professor of Employment Law and Emeritus Research Fellow in Law at St John's College, the University of Oxford, Oxford, UK; Honorary Professor, Faculty of Laws, University College London, London, UK

This special issue of the *European Labour Law Journal* is entitled '*Testing the "Personal Work Relation": New Trade Union Strategies for New Forms of Employment*'. It follows the publication of a Report commissioned by the European Trade Union Confederation (ETUC) and written by two of the co-editors of this issue, Nicola Countouris and Valerio De Stefano.[1]

In the wake of the launch of the European Pillar of Social Rights by the European Commission, the ETUC launched a call for tenders for this Report. In doing so, it sought to prompt a reflection among its members on the spread of non-standard forms of work and the incessant impact of the processes of digitalisation of the world of work.

The Report written for the ETUC responds and engages with these crucial developments. At the same time, its scope is not limited to the elusive concept of 'digital work'. One of the keystone ideas behind the Report is that most of the allegedly 'new' forms of work are the continuation of

1. Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC 2019).

Corresponding author:
Valerio De Stefano, BOFZAP Professor of Labour Law, KU Leuven, Oude Markt 13, 3000 Leuven, Belgium.
E-mail: valerio.destefano@kuleuven.be

very old work arrangements that are, nowadays, made more seamless, but also more evanescent, by the use of technology.

The critical and central element to be investigated remains, in our opinion, the work component of these arrangements; technology, in fact, acts more as an enabler of management than an emancipator of work in these practices. Many of the workers who are engaged through these arrangements do not enjoy any more freedom or autonomy in carrying out their work than that of other persons hired on very unstable, short, and casual arrangements, such as zero-hour and on-demand workers.

This is why, instead of pigeonholing these alleged 'new' forms of work in a stand-alone analysis, the Report includes them in a broader investigation about how to provide better employment and labour protection to all workers, beyond the binary boundaries of the traditional categories of employment and self-employment.

From an analytical standpoint the Report lies on two main pillars developed by the co-editors of the present special issue. On the one hand it builds on the work initiated by Mark Freedland, and continued with Countouris, on the concept of 'personal work relation'.[2] On the other hand, it draws on the research on 'platform work' by De Stefano, which understands this type of work as a continuation and rebranding of hoary models of casual employment rather than as novel instantiations of self-employment.[3]

Thus, the scope of the Report embraces all the forms of work that, in a number of ways, put the binary classification between employment and self-employment under strain, and it is, by no means, limited to platform work.

The Report expresses the view that the 'personal work' approach offers a robust analytical framework to further worker rights in today's world of work.

One of the crucial insights of the Report is that self-employment has increasingly become a catch-all category in which the most diverse forms of work are being lumped, in total disregard of the vulnerabilities affecting large swathes of weakly positioned workers classified or misclassified as self-employed. In this respect, the 'personal work' approach is useful because it both reveals the artificiality of, and breaks down, the self-employment monolith, and goes beyond contractual classifications in providing access to protection.

To substantiate and develop this claim, the Report analyses two further sets of sources. Firstly, it reviews the legal landscape defining the scope of employment and labour regulation in a number of European countries and contrasts the findings emerging from this analysis with the concept of work underpinning a number of international and European labour law instruments. Secondly, it engages with three distinct reform projects that share a common universalistic intent in re-defining the personal scope of application of labour law, and have been developed by a number of European labour law scholars in cooperation and in synergy with important portions of the labour and trade

2. Mark Freedland, *The Personal Employment Contract* (OUP 2003); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' 46 [2017] Industrial Law Journal 52; Nicola Countouris, *Defining and regulating work relations for the future of work* (ILO 2019).
3. Valerio De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy"' 37 [2016] Comparative Labor Law & Policy Journal 471; Valerio De Stefano, 'Casual Work Beyond Casual Work in the EU: The Underground Casualisation of the European Workforce – and What To Do About It' 7 [2016] European Labour Law Journal 421; Valerio De Stefano, 'Labour is not a technology – Reasserting the Declaration of Philadelphia in Times of Platform-Work and Gig-Economy' [2017] 1.

union movement of Italy, France, and the United Kingdom.[4] We have felt that each of these three documents make vitally important contributions in terms of novel ideas and new proposals for reforming the scope of application of labour law in their respective national systems, while also offering a palette of engaging ideas that could be further explored at a transnational and European level.

The ETUC Report is, of course, based on the original research by its two authors. At the same time, it materially builds upon the insights that the authors were able to gather thanks to the help of several colleagues across Europe. These colleagues gave their time and knowledge to respond to a questionnaire the authors had prepared in order to gain insights on the classification and regulation of employment and self-employment in their respective jurisdictions. The national responses that these colleagues compiled by answering the questionnaire were essential to shape the Report itself. But it became immediately clear that the Report, in spite of its comprehensiveness, could not make justice of the professionalism and insightfulness that clearly transpired from the national responses produced by our experts.

We decided, therefore, to inquire about the possibility of publishing the national responses in a special issue of a law journal. We contacted the editor of the *European Labour Law Journal*, Frank Hendrickx, who generously agreed with our proposal immediately.

This Special Issue, therefore, is primarily composed of the edited and updated version of the national files that informed the preparation of the Report for the ETUC. While reading the original national files, we also realised that, beyond the superficial similarities all the national systems analysed here share concerning our subject matter, a great number of differences and peculiarities continue to distinguish the various legal systems. These differences, among other things, materially influenced the way our colleagues compiled their national files.

Rather than imposing one single model of editing, in transforming the original answers into the articles of this collection, we thus decided to let the experts free to shape their contribution in the fashion they deemed more suitable to convey the essential elements of their legal systems. Some of the articles published in this Special Issue, therefore, are structured as answers to our original questionnaire. Others, instead, are written as a traditional journal article. We believe that allowing the contributors to organise their discourse without fixed format constraints strengthens the message of every article and, therefore, of the Special Issue.

The Issue is structured as follows. It starts with an Introduction written by Mark Freedland commenting on the Report and laying questions for further analysis. The Executive Summary of the Report follows the Introduction. The national articles are then published, in alphabetical order by the country. We thus have the articles for Austria (by Elisabeth Brameshuber), Belgium (by Mathias Wouters), France (by Emmanuel Dockès), Germany (by Monika Schlachter), Italy (by Elena Gramano & Giovanni Gaudio), Spain (by Adrián Todoli), Sweden (by Samuel Engblom & Magnus Lundberg), and the United Kingdom (by Mark Freedland & Hitesh Dhorajiwala). The Special Issue then includes an article written by Ioannis Lianos, together with Countouris and De Stefano. This article is the result of an on-going reflection of the authors, a competition lawyer and two labour lawyers, around the need to reconcile competition law with the fundamental right to collective bargaining. It is well known that antitrust regulation has recently posed paramount obstacles to the collective labour rights of self-employed workers in several industrialised

4. Emmanuel Dockès (ed.), *Proposition de code du travail 2017* (Dalloz 2017); *Carta dei Diritti Universali del Lavoro* (CGIL 2016); John Hendy, Keith Ewing and Carolyn Jones, *Rolling out the Manifesto for Labour Law* (IER 2018).

countries, including in Europe. This article builds on some of the analyses already present in the Report, but it accompanies them with an in-depth examination of competition law arguments with a view to realigning labour and competition law and with the ultimate goal of re-establishing the right to collective bargaining for all workers. This special issue is concluded by a short essay written by Keith Ewing, John Hendy QC, and Cad Jones that, by building on the work these authors have carried out for the Institute of Employment Rights and referring to the Report, calls for an extension of the scope of employment protection in the direction of universal coverage, as also mandated by ILO instruments. We hope this special issue proves useful to this end.

We are most thankful to all our authors, the Journal, and its editor, Frank Hendrickx. We wish to thank Hitesh Dhorajiwala, Ilda Durri, Harry Stylogiannis, and Mathias Wouters for excellent research assistance. Rahul Rana, from SAGE, made the process of publication of this Special Issue very smooth. We are also grateful to the ETUC, and in particular to Thiébaut Weber and Ignacio 'Nacho' Doreste, for their support throughout the process. We tried to state the law to June 2019. The usual disclaimers apply.

Author contribution

Valerio De Stefano's contribution to this Special Issue was also carried out within the framework of the Odysseus grant 'Employment rights and labour protection in the on-demand economy' that I received from the *FWO Research Foundation – Flanders.*

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 179–182

DOI: 10.1177/2031952519865824
journals.sagepub.com/home/ell
SAGE

New trade union strategies for new forms of employment – A brief analytical and normative foreword

Mark Freedland
Faculty of Law, University of Oxford, UK

The purpose of this Special Issue of the European Labour Law Journal is to present *New Trade Union Strategies for New Forms of Employment* to an audience of labour law scholars. *New Trade Union Strategies* is a research report written by Nicola Countouris and Valerio De Stefano to express the results and conclusions of a two-year research project which they had organised, commissioned by ETUC with financial support from the European Commission. It is an evidence-based policy document: this brief foreword suggests some ways of placing its policy conclusions within an academic framework of labour law theory. This is a framework which, I hasten to acknowledge, is constructed from my own personal viewpoint, and is overtly normative in character. The authors decided to place the idea of the 'personal work relation' at the centre of their inquiry, and the following paragraphs will reflect on the purposes for which they have done so.

An explanation of their decision is provided at the outset, in the Executive Summary (at page 7):-

'The concept of personal work relation captures the fact that in modern labour markets, work can be provided in a variety of ways and through a range of modalities and patterns. These can range from the classic subordinate, bilateral, and continuous provision of employment, to more nuanced and complex forms of work, involving multiple parties and economic entities, and ultimately developing in the realm of autonomy and, in terms of their legal characterisation, self-employment. In developing the present project, one of our main hypotheses was that a concept of worker based on the idea of ''personal work relation'', could usefully capture a wide range of employment statuses across a number of national (and probably supranational) legal systems.'

This 'main hypothesis', which forms the basis of the policy proposals that are canvassed in the Report, is one with which I strongly agree (as might be predicted!), and I am certainly not casting

Corresponding author:
Mark Freedland, Faculty of Law, University of Oxford, UK.
E-mail: mark.freedland@law.ox.ac.uk

doubt on it. Instead, I shall probe into the central premise upon which the authors base their hypothesis; I think that by doing so we might even hope to strengthen the hypothesis. This central premise, as stated in that paragraph of the Executive Summary, is that 'in modern labour markets, work can be provided in a variety of ways and through a range of modalities and patterns'; and the title and general presentation of the Report identify these 'modalities and patterns' as representing 'new forms of work'. It will be useful to investigate the suggestions that these are 'new forms of work' and that they are provided in and by 'modern labour markets'.

I begin by concentrating on the idea that it is 'modern labour markets' which provide the new forms of work with which the Report is concerned. We should I think deal with a preliminary objection which has traditionally been expressed by labour law scholars to the 'market' terminology; it has been felt that the use of that term tends towards a crudely commercial or even commodified view of the ensemble of transactions and practices under which working people are offered and enter into arrangements for work. My own view is that the 'labour market' terminology perhaps once had those difficult connotations but has latterly become a neutral one, largely interchangeable with the notion of the 'labour economy', and simply according an abstract or institutional identity to a certain particular body of economic and social activity. We can be sure that these authors use this terminology in that innocent sense.

In fact, the 'labour market' terminology has come to have a certain virtue over the 'labour economy' terminology, namely that it has retained a unified connotation encompassing the whole body of arrangements for employing others and working for others. The notion of the 'labour economy' seems to be losing that unity: part of the body of economic and social activity which it once described is now conceptualised as a distinct 'gig economy'. This terminological development actually has very worrying analytical and normative implications, which this Report can help us to understand and to address with new strategies.

In order to do so, and to get to the heart of the problems with which this Report is concerned, we need to remind ourselves of the crucial fact that this vast body of social and economic arrangements for employing others and working for others – this labour market or labour economy – is framed and constituted by various kinds of regulation, of which the most important for our present purposes are those of labour law and collective bargaining. The evolution of the 'gig economy' as a conceptually distinct entity essentially turns upon that crucial fact; it represents the partial separation from the labour economy of a sub-set of arrangements for work, of which a key characteristic is that they largely escape the regulation of labour law and collective bargaining.

That observation enables us to home in on, and more clearly to understand, the 'new forms of work' which are the subject of the *New Strategies* Report. These are, I suggest, forms of work which are in one sense old and in another sense new, and it is important to be clear about the ways in which they combine tradition with modernity – not to any beneficial effect, it must be said. These 'new forms of work' fit with and indeed encapsulate the notion of the 'gig economy'. They essentially consist of arrangements for what used to be known as 'casual work', that is to say that they amount to short-term, often part-time, often intermediated, and typically intermittent, engagements for work, as such representing a departure from and radical contrast with the 'standard contract of employment' model of long-term, full-time, direct, and continuous employment which had predominated in, and had generally characterised, the labour markets of the developed world during most of the second half of the twentieth century.

In one sense, such casual work arrangements are as old as the hills. They were widespread in European labour economies in the pre-industrial era, when the 'journeyman' worker represented an

important paradigm.[1] They remained more significant even in the subsequent industrial era than is often imagined. However, when those old work patterns are revived and extended in the so-called 'gig economy', it is with some key variations and developments which explain and justify their presentation as 'new forms of work'. To understand this, we need to refer back to the notion, which I have just now invoked, of the regulation of labour law and collective bargaining as constituent and central elements in the formation and conduct of labour markets.

It is this constituent layer of regulation which gives us the key to the differences between, on the one hand, the historical manifestations of casual or precarious work as dominant features of labour markets and, on the other hand, the 'new forms of work' which we now associate with the 'gig economy'. The historical times to which I refer largely pre-dated the development of the regulation of labour markets by worker-protective labour law and collective bargaining, and certainly preceded the full flowering of that regulation in the second half of the twentieth century. This gives rise to a curious and subtle contrast between the historically earlier manifestations of casual work and their present manifestations in the 'gig economy' The historically earlier manifestations of casual work occurred at times when the regulation of labour markets by worker-protective labour law and collective bargaining was not well-developed, so employers were not greatly pre-occupied with the need to avoid it. The present-day manifestations of casual work in the gig economy take place when that regulation, albeit weaker than in its heyday, still has a significant impact – enough to ensure that employers have a significant interest in avoiding or minimising that impact. It is their efforts to do so which shape and inform the 'new forms of work' with which the *New Strategies* Report is concerned.

This brings us to the crucial analytical and normative point of our discussion. In previous eras before the twentieth century ascendancy of regulation by labour law and collective bargaining, employers could propose and implement casual work arrangements without special regard to the question of whether or not they came within the scope of such regulation as then existed. During the twentieth century ascendancy of regulation by labour and collective bargaining, that ascendancy in itself served to ensure that secure work arrangements generally (though by no means universally) prevailed over casual ones. In the subsequent and current era of partial de-regulation, it has become possible for employers extensively to re-introduce and re-deploy casual or precarious work arrangements, and at the same time *and by so doing* to place those arrangements outside the scope and reach of regulation by worker-protective labour legislation and collective bargaining.

This rather astonishing facility, which has thus been accorded to employers, amounts to what I have styled in earlier writings as one of the 'paradoxes of precarity'.[2] That is to say, it amounts to giving opportunities to employers to deny or curtail the protection of labour law's regulation to working people by the very act of placing them in work arrangements which are so essentially casual and precarious that it is they who are in the greatest need of that regulatory protection. Many of the casual work engagements which come within the paradigm of the 'gig economy' are constructed in this way; they are engineered so as to fall wholly or partly outside the scope of labour law. And often

1. This theme is ably explored by Jeremias Prassl, under the title of 'Nothing New Under the Sun' in J Prassl, *Humans as a Service – The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018) at pp 73-82.
2. See, in particular, Freedland, Mark R., The Contract of Employment and the Paradoxes of Precarity (June 13, 2016). Oxford Legal Studies Research Paper No. 37/2016. Available at SSRN: https://ssrn.com/abstract=2794877 or http://dx.doi.org/10.2139/ssrn.2794877.

this is not merely incidental to the design of those engagements – it is typically *essential* to the 'business model' of the employing entity that such work relations should exist and function in a zone which is either on the outer margins of the domain of labour law or right outside that domain.

It is crucial to understand the methodology of this kind of relocation of work engagements and work relations outside the domain of labour law. It consists, as is now widely understood, of the legal design and presentation of casual work engagements so that they do not take the form – or at least do not appear to take the form – of those continuous and bi-partite contracts of employment between employer and worker which have constituted the classical paradigm for defining the personal or relational scope of labour law's regulation. This re-casting of work engagements typically involves placing the working person in question on the far side of the line between 'employees' and 'independent contractors' or 'the self-employed' which has traditionally effected the binary divide of the world of work into the contrasting typologies of employment and of personal entrepreneurship – the former but not the latter typology being regarded as identifying the proper realm of labour law. It is that particular kind of re-casting or conceptual re-location of work engagements which gives rise to the 'new forms of work' which are the subject of the *New Strategies* Report.

There is perhaps no possible way, and certainly there is no easy way, of establishing a theoretical consensus as to whether and when this re-locating of work engagements, into a 'gig economy' of casual work wholly or partly outside the realm of labour law, is a legitimate or benign development. Looked at in one way, it can seem to be the proper exercise of freedom of contract, and a way of creating opportunities for 'flexible' employment which would not otherwise be available. Regarded in another way, it appears as an often rather insidious dressing-up of precarity as autonomy for the working people in question. I frankly avow that I generally take the latter view, but I recognise the need for some accommodation of the former one.

In the absence of such a consensus, the authors of this Report have taken a path which promises some practical resolution of that essential difficulty. They have adopted the idea of 'the personal work relation' as a deliberately comprehensive outline category which aspires to be inclusive of all the kinds of work arrangement or engagement which we might wish to bring or hold within the domain of labour law. Within that framework, they have canvassed various more precise categories of inclusion which might be appropriate to the various different aspects or compartments of labour law's regulation at both the individual and the collective levels. By so doing, they seem to me genuinely to be presenting some new strategies for new forms of work, as the title of their document claims, and I warmly commend the resulting Report to the readership of the European Labour Law Journal.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 183–186

DOI: 10.1177/2031952519872323
journals.sagepub.com/home/ell
SAGE

Executive summary of the report 'New trade union strategies for new forms of employment'

Nicola Countouris
Professor of Labour Law and European Law, Faculty of Laws, University College London, UK

Valerio De Stefano
BOF-ZAP Research Professor of Labour Law, Faculty of Law, Katholieke Universiteit Leuven, Leuven, Belgium

The present report explores a number of regulatory, normative, and conceptual dimensions pertaining to work performed in a self-employed capacity. The report was commissioned by the ETUC in 2017 following its call for legal expertise on the topic 'New trade union strategies for new forms of employment'. In line with that call, the report explores a new legal conceptual framework for the analysis of the normative and regulatory challenges arising from the proliferation of 'new forms of employment', and in particular from the growth of forms of work that, by virtue of their being classified as autonomous or quasi-autonomous, fall outside the protective umbrella of labour and social security law.

The main contextual backdrop for the project is the challenge, or set of challenges, arising from the so-called 'digital economy', on the one hand, and the opportunities emerging from the 'European Pillar of Social Rights' initiative, on the other. The report engages with, and offers some answers and possible solutions to, these challenges. It also has a deeper ambition that spans beyond the contingencies generated by particular technological developments or specific EU - or domestic - regulatory agendas. The report seeks to identify a novel analytical framework for reshaping and expanding the personal scope of application of labour law in the 21st century, and to assist the development of a coherent strategy for the ETUC to pursue this expansion on the basis of a set of compelling legal arguments.

From a methodological point of view, the present report was produced on the basis of both original research work carried out by its two authors and on the basis of a number of national reports compiled in respect of a representative sample of national legal systems, namely the Austrian, Belgian, French, Italian, Swedish, Spanish, German, and British systems. These reports

Corresponding author:
Valerio De Stefano, BOF-ZAP Research Professor of Labour Law, Faculty of Law, Katholieke Universiteit Leuven, Oude Markt 13, 3000 Leuven, Belgium.
E-mail: valerio.destefano@kuleuven.be

were authored by a number of national legal experts and we would like to take this opportunity to express our gratitude to our colleagues Professors Elisabeth Brameshuber, Mathias Wouters, Emmanuel Dockès, Elena Gramano and Giovanni Gaudiodo, Samuel Engblom and Magnus Lundberg, Adrian Todoli, Monika Schlachter-Voll, and Mark Freedland.

The idea of 'personal work relation', as originally developed by Professor Mark Freedland and the first author of the present report, sits at the centre of the normative suggestions developed in the present report.[1] The concept of personal work relation captures the fact that in modern labour markets, work can be provided in a variety of ways and through a range of modalities and patterns. These can range from the classic subordinate, bilateral, and continuous provision of employment, to more nuanced and complex forms of work, involving multiple parties and economic entities, and ultimately developing in the realm of autonomy and, in terms of their legal characterisation, self-employment. In developing the present project, one of our main hypotheses was that a concept of worker based on the idea of 'personal work relation', could usefully capture a wide range of employment statuses across a number of national (and probably supranational) legal systems. Ultimately, the idea of 'personal work relation' can be used to define the personal scope of application of labour law as applicable to any person that is *engaged by another to provide labour*, unless that person is *genuinely operating a business on her or his own account*.

The report begins by exploring the question of the adequacy of existing legal and industrial relation systems grappling with the definition of the personal scope of labour protection legislation. Section 4 explores the classic 'who is a worker?' question, offering an assessment of the current state of the law in terms of the personal scope of application of standard employment protection legislation in a number of European countries, and in respect of a number of relevant supranational systems of regulation (mainly the EU, the Council of Europe, and the ILO). Section 5, moves the scope of the analysis beyond standard employment in order to offer a clearer taxonomy of the typologies of work relations that prevail and evolve outside the narrower protective coverage of the bulk of employment protection legislation. In doing so it explores the extent to which the (national or supranational) legal systems covered by the project contemplate intermediate categories of quasi-subordinate or semi-dependent workers (as in the case of the UK, Spain, or Italy/Germany/Austria), while exploring the rights and attributions recognised to workers that are not classified as 'employees'. Section 6 moves on to assess the conceptual boundaries and internal complexities of the notion of self-employment. It argues that this notion has become extremely complex, multifaceted, and conceptually confusing jumbling individual personal work profiles as diverse as that of the Deliveroo cyclist and the owner of the dental practice specialising in prosthetic dentures (both 'owning' their own 'tools'). The category can go as far as including self-employed persons that hire their own employees, and that would be better understood as performing genuine entrepreneurial activities in an employer capacity. Section 7 explores both past and present collective practices seeking to regulate the terms and conditions of employment of a range of personal work providers, both subordinate and autonomous, while section 8 explores the extent to which these collective practices may encounter obstacles arising from a range of area of regulation, including EU competition law, EU law on freedom of establishment and free

1. Mark Freedland, 'Application of labour and employment law beyond the contract of employment' (2007) International Labour Review3; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

movement of services, and by the growing recognition in CJEU case-law of the fundamental freedom to conduct a business.

Sections 9 and 10 are more normative in character and explore and assess a number of alternative reform approaches currently developing at a national and supranational level. In particular, they elaborate on a set of reform proposals recently developed by Ewing, Hendy and Jones, in their *Manifesto for Labour Law*, and in their more recent publication *Rolling out the Manifesto for Labour Law* advocating a broader construction of the personal scope of domestic labour rights, by referring to any person 'engaged by another to provide labour' and that 'is not genuinely operating a business on his or her own account',[2] and a broad concept of 'employing entity'. The sections also comment on the proposals recently developed by Emmanuel Dockés and a number of other French academics, seeking to extend the scope of application of domestic labour law by reference to a finer-grained classification of 'dependent' employees and 'autonomous' or 'externalised' salaried workers,[3] and on the broad and far reaching personal scope advocated in Art. 1 of CGIL's *Carta dei diritti universali del lavoro - Nuovo statuto di tutte le lavoratrici e di tutti i lavoratori* (2016). Section 9 also critically explores the approach suggested by labour economists such as Harris and Kruger[4] that an intermediate category of 'independent worker' or 'dependent contractor' ought to be introduced and generalised and become the new regulatory paradigm for the application of some (not all) employment protection legislation.

The concluding section articulates the view that a range of fundamental labour and social rights have a universalistic vocation and ought to be applied to all those providing personal work and services including, under certain circumstances, workers that are currently perceived as self-employed professionals, and that may be availing themselves of a limited and ancillary amount of capital or third-party services as an non-substantial contribution to their pre-dominantly personal labour provision. This requires both an extension of the coverage of these rights and their re-elaboration for the purposes of applying them to particular modalities of personal work (for instance a right to regular working hours for casual and on-call/zero-hours workers as a guarantee to 'fair and just working conditions'). We believe, and have argued in the present report, that there are sound normative reasons to advocate such extensions. Crucially it is also our view that an extension of the scope of the employment relationship should not result in a watering down of the substantive labour law protections enjoyed by workers.

Author contribution

Valerio De Stefano's contribution to this publication was also carried out within the framework of the Odysseus grant 'Employment rights and labour protection in the on-demand economy' received from the *FWO Research Foundation – Flanders*;

2. Keith D. Ewing, John Hendy, and Carolyn Jones (eds.), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (IER 2016) 35; and [1] Keith D. Ewing, John Hendy, and Carolyn Jones (eds.), *Rolling out the Manifesto for Labour Law* (IER 2018) 36.
3. Emmanuel Dockés (ed.), *Proposition de Code du Travail* (Dalloz 2017), arts L. 11 -1 - L. 11-18.
4. Seth D. Harris and Alan B. Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker' (2015) The Hamilton Project, Discussion Paper 2015-10 < http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf> accessed 30 January 2019

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

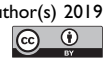
Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 187–197



DOI: 10.1177/2031952519865390
journals.sagepub.com/home/ell


The 'personal work relationship' in Austria

Elisabeth Brameshuber
WU Vienna University of Economics and Business, Vienna, Austria

Abstract
When assessing the personal work relationship in Austria, first the contractual relationship needs to be scrutinised. Following the differentiation between employees, semi-dependent workers (with the sub-category of employee-like working persons) and businesspersons, all, only some, or none, of the statutes and laws falling under the category of 'individual labour law' (e.g. Working Hours Act, Holidays Act etc) apply. Collective bargaining agreements, providing, amongst others, for minimum wages (N.B. there is no statutory minimum wage in Austria), can be concluded for employees only, though (with very few and specific exceptions for persons in the media sector). This paper analyses the legal situations of the different categories of working persons and critically assesses the non-application of most labour laws, including collective bargaining agreements, to employee-like working persons. It questions whether, from a teleological point of view, a different assessment would be necessary.

Keywords
Semi-dependent worker, employee-like working person, means of production, freelancer, journalist, collective bargaining agreements, maternity protection act, social security law, tax law, uber, taxi driver, purposive approach, teleological interpretation

The main concept of 'working person'

Under Austrian (labour) law, generally speaking three categories of working persons exist: employees, semi-dependent workers and businesspersons. However, as regards the application of some specific labour laws, a further differentiation needs to be made within the category of semi-dependent workers. The categorisation made by individual labour law is crucial since it extends to collective labour law and – with some marginal deviations – to social security law.

Corresponding author:
Elisabeth Brameshuber, Assistant Professor, WU Vienna University of Economics and Business, Institute for Austrian and European Labour Law and Social Security Law, Welthandelsplatz 1, D3, 1020 Vienna, Austria.
E-mail: elisabeth.brameshuber@wu.ac.at

Employees vs. businesspersons/entrepreneurs

The basic definition of the 'Dienstnehmer/Arbeitnehmer' (employee) – being understood as the person that benefits from the whole range of labour (protection) legislation, and to whom collective bargaining agreements apply – can be found to some extent in § 1151 ABGB.[1] According to § 1151 para 1 ABGB, a so-called 'Dienstvertrag' (employment contract) is a contract under which two parties agree that one (the employee) provides his/her services to the other (the employer) for a certain amount of time. § 1151 para 1 ABGB juxtaposes this concept of the 'Dienstvertrag' with the concept of the so-called 'Werkvertrag' (service contract), under which the parties agree that one party provides a certain success (delivering a specific outcome/completing a designated task) to the other in exchange for payment.[2] Those working under a service contract can be classed as businesspersons or entrepreneurs. Therefore, in contrast to employees, businesspersons can be described as persons who perform a service contract, who owe a certain success and who bear the full risk of the success/failure of their work. These persons are not obliged to provide their services in person but can use substitutes.[3] To the underlying contract, contract and commercial law apply (e.g. the rules on liability for defects).

Based on the definition in § 1151 ABGB,[4] doctrine and courts in their case law have developed several key criteria that have to be fulfilled in order to tell whether a contract is actually an employment contract or a service contract. Note, though, that a contractual relationship does not have to fulfil all of the following criteria in order to be classed as employment contract, but in an overall assessment these criteria have to prevail over others that would favour a service contract or any other form of contractual relationship. As soon as the following criteria prevail, a situation of personal dependency is established, which leads to the classification of a contractual relationship as employment contract. The main criterion is the personal subordination, meaning that the person works under the command of the employer, who has the authority to decide on where, when, and under which circumstances (i.e. that the employer is in control of the employee's behaviour) the person provides her time and services. Any success that follows from the time and services provided by the employee is the employer's success, not the employee's. In exchange, any failure falls back on the employer as well. Thus, the employer bears the risk of success/failure, not the employee. Therefore, the employee provides her time and services and is obliged to work diligently, but with the means provided by the employer. More generally speaking, the employee is integrated into the employer's organisation. The employer has the disciplinary authority, meaning in particular that she can ultimately terminate the employment relationship. Last but not least, the employee is obliged to provide the services in person according to § 1153 ABGB; according to

1. Allgemeines bürgerliches Gesetzbuch (Civil Code) originally from 1811, but § 1151 was introduced in its current version in 1916 only, as part of the so-called third partial-amendment.
2. Note that for the employment contract, § 1152 ABGB also establishes that – unless agreed otherwise – the employee is entitled to adequate wages in exchange for his/her services.
3. Note that although the provision of the services in person is one crucial element of an employment contract, the use of substitutes in extraordinary circumstances, especially when such a right is established in the contract, does not necessarily prevent the contract from being classed as employment contract as long as all other decisive criteria are met (*Rebhahn, Robert* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 90).
4. Similar definitions can be found in § 6 para 1 AngG (Angestelltengesetz, White Collar Workers Act 1921), and § 72 GewO (Gewerbeordnung, Industry Trade Act 1859) which apply to white- and blue-collar workers, respectively. However, when it comes to the scope of this contribution, the differentiation between white- and blue-collar workers is of no importance, since both categories are only sub-categories of the employee/employment status.

doctrine and the courts' case law, any general possibility to delegate the provision of time and services to another person, apart from exceptional circumstances,[5] leads to the conclusion that there is no personal dependency, i.e. that the key-element of the employment relationship is missing.[6]

Semi-dependent workers and employee-like working persons

Yet, the Austrian system also provides for an intermediate category of working persons, namely those providing their services for a certain amount of time under a so-called 'freier Dienstvertrag' (N.B. in private law terminology, this is also a continuous obligation, like the employment contract, and, contrary to the service contract, which ends with the completion of the designated task).[7] To these working persons [in German *freie Dienstnehmer*; hereafter: semi-dependent workers (SDW)], only some of the rights employees are entitled to apply. There is no legal definition of this category of working persons in the Civil Code. However, over the years, the courts in their case law developed criteria that allow differentiating between employees and these SDW. Apart from the fact that these persons provide their services as a continuous obligation, the focus lies on the parties' ability to arrange the work relationship as 'free' as possibly, i.e. with as little constraints as regards working time or the way the services are delivered. Thus, the contracting partner's ability to give orders/commands is limited. Furthermore, an SDW is just or barely integrated into the contracting partner's organisation.[8] In conclusion, the personal dependence of these SDW is reduced. Examples of SDW are:[9] an MD who, besides working independently in his own doctor's office, also provides his services to a company (in this respect, he was under no authority of anyone from the company, and he could decide independently about his working hours);[10] a freelance journalist who was not bound to any working hours and who was completely free in deciding when and where to work (no obligation to attend any meetings etc);[11] an attorney at law who advised a company as external adviser for a monthly fee.[12]

It is of the utmost importance, though, to bear in mind that all these cases were single-case decisions. The answer to the question whether the services are provided under an employment contract or under a 'freier Dienstvertrag', thus as SDW, depends on the facts of the single case. Thus, not every MD, freelance journalist or external attorney providing their services is an SDW. As soon as the criteria of personal dependence prevail, they might as well perform their services as employees. The mere fact that the contract is called a 'Dienstvertrag' (employment contract) or

5. The parties to the employment contract may agree that the employee can delegate her obligation to work in exceptional circumstances to a third person. If such an agreement for example allows for the delegation to a specific person only or if the employer has to agree to any delegation, or if only minor tasks can be delegated, the contract can still be classed as employment contract. Cf. Rebhahn, Robert in Neumayr/Reissner, ZellKomm3 § 1151 ABGB (1.1.2018, rdb.at) paras 90 et seq.
6. For all that with many examples *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 56 et seq; *Marhold, Franz/Friedrich, Michael*, Österreichisches Arbeitsrecht (3 rd edn 2016) 32 et seq.
7. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) paras 127, 129 et seq.
8. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) paras 127 et seq.
9. See for further references *Marhold/Friedrich*, Österreichisches Arbeitsrecht (3 rd edn 2016) 42.
10. Supreme Court of Justice (OGH) 3 July 1956, 4 Ob 67/56, Arb 6487.
11. OGH 15 June 1988, 9 ObA 108/88, RdW 1988, 429.
12. OGH 13 July 1995, 8 ObA 264/95, Arb 11.440.

'freier Dienstvertrag', is of no importance at all if the actual performance of the contract does not follow the form.[13]

As regards the application of labour law or of some specific provisions of labour law to these persons, a further differentiation needs to be made between SDW who are, as just described, rather free in carrying out their services, and persons who are regarded as employee-like persons. The characteristics of the latter group (employee-like working persons) are that they, without being employees, provide their services on behalf of and at the expense of another person and that they are to be regarded as employee-like because of their economic dependence.[14] However, this is not a specific type of contract, but rather a typological concept. Thus, from a contract law point of view, these employee-like working persons might be SDW who provide their services as a continuous obligation, but they might occasionally also provide their services under a services contract.[15] Therefore, the typological concept of 'employee-likeliness' is added to the underlying contract. The main criterion to which also some statutes refer to when extending their personal scope of application to these employee-like working persons is the economic dependence. However, this does not only refer to economic dependence stricto sensu, meaning that the person is dependent on the earnings she makes from working for one or very few persons, but the courts in their case law follow an overall-assessment, i.e. that in every single case, several elements/criteria are assessed.[16] The most important one is that the employee-like working person does not offer her services on the market, but rather works for one or very few persons only. Further criteria taken into account are that the economic success of the work done belongs to the contractual partner and not the working person, that the working person is economically subordinated and therefore works for the economic purposes of the contractual partner (i.e. that she is not an undertaking/businessperson). In some cases, the courts also referred to a stronger integration into the contractual partner's organisation.[17]

Excursus. The (non-)importance of 'means of production'. When it comes to deciding about the personal dependence of a working person, above all the criteria referred to under 'Employees vs. businesspersons/entrepreneurs' are to be considered. Thus, as soon as the working person works under the command and authority of another person and this other person can assign the working time and working place (and how the work should be performed), the question as to whether the working person owns some of the means of production is of hardly any/no importance. Yet, if these criteria (personal dependence because of authority of the 'employer') are given to a minor extent, the question whether the working person owns some means of production can be, but it does not necessarily have to be decisive. Furthermore, it has to be taken into account that even an employee

13. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 65.
14. Cf. for example the description in § 1 para 1 DHG (Employees' Liability Act): Die Vorschriften dieses Bundesgesetzes gelten für Dienstnehmer . . . in einem privatrechtlichen oder in einem öffentlich-rechtlichen Dienst(Lehr)verhältnis (im folgenden als Dienstnehmer bezeichnet). Sie sind auf Heimarbeiter und Personen, die gemäß § 3 des Heimarbeitsgesetzes 1960 den Entgeltschutz für Heimarbeit genießen, ferner auf *sonstige Personen, die, ohne in einem Dienstverhältnis zu stehen, im Auftrag und für Rechnung bestimmter anderer Personen Arbeit leisten und wegen wirtschaftlicher Unselbständigkeit als arbeitnehmerähnlich anzusehen sind, im Verhältnis zu ihren Auftraggebern sinngemäß anzuwenden*.
15. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 123.
16. Cf. OGH, 8 February 1996, 8 ObS 1, 10/96.
17. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 125.

can own some 'means of production' (mobile phone, car, e.g.). Although the use of only marginal or ancillary means of production owned by the employee would not automatically lead to disqualifying the employment relationship, employers might nevertheless try to convince employees to make use of means of production that the employees own in order to disqualify them as employees. Furthermore, there are cases where it is rather difficult to decide whether the means of production are marginal or ancillary. Such cases involve training and teaching especially, where often the intangible assets (know-how, above all) are neither marginal nor ancillary, but essential to the provision of the services. From an Austrian law point of view, in such cases it would be necessary to focus on the other, more decisive criteria in order to assess whether the person providing the services is personally dependent or not.[18]

Despite all that, in a broader sense, the criterion 'means of production' is decisive under Austrian law as well, namely in terms of social security law. In case a working person provides time-related services in economic dependence substantially in person and without substantial ('wesentliche') 'means of production' that she owns, and in case the contract is concluded with a businessperson, social security follows basically the same rules as social security for employees, unless some exceptions in place apply.[19] Yet, as soon as the working person performs the work/provides the time-related services with their own substantial 'means of production', she is classified as an 'independent' businessperson to whom another social security regime applies (which basically means that she alone has to pay all contributions).[20] However, it is highly contentious what 'substantial' means of production are. To give three case law examples (note that all the facts of the case have to be taken into account), the Supreme Administrative Court held that an aerobics trainer who provided her own gymnastic balls, CDs, CD player and rubber bands did not own substantial means of production,[21] whereas this was answered in the affirmative in the case of office equipment, laser scales and the car used by an agent,[22] and also in the case of a bike of a courier used for business purposes only.[23] Furthermore, it has to be taken into account that social security law strongly relies on tax law notions. In the first case, the means of production were not used as economic goods under tax law whereas the office equipment of the agent and the courier's bike were used as economic goods under tax law. It could be deducted from the Supreme Administrative Court's case law to use the similar tax law notion of 'substantial' means of production (goods that are economically used that are worth more than EUR 400) also for the purposes of social security law.[24]

18. Cf. for Austrian social security law and the Supreme Administrative Court that had to deal with this question VwGH (Supreme Administrative Court) 21 September 2015, Ra 2015/08/0045.
19. Cf. § 4 para 4 General Social Insurance Act (Allgemeines Sozialversicherungsgesetz – ASVG).
20. Cf. § 2 (1) 4 Social Insurance Act for Trade and Industry (Gewerblichen Sozialversicherungsgesetz – GSVG).
21. VwGH 24 January 2006, 2004/08/0101.
22. VwGH 15 May 2013, 2012/08/0163.
23. VwGH 11 December 2013, 2013/08/0030.
24. Cf. the case of a bike courier who owned a bike worth more than EUR 400 for business purposes only VwGH 11 December 2013, 2013/08/0030.

Legal presumptions for particular non-standard employment relationships

When it comes to legal presumptions for 'particular non-standard employment relationships', the ORF-Gesetz (Law on the Austrian Broadcasting Corporation) has to be mentioned. According to its § 32 para 4, all persons in charge of the programme/who are journalists are either employees or so-called 'freie Mitarbeiter' (freelancers). Yet, the ORF-Gesetz does not provide for any specific labour relationship related norms regarding freelance journalists.

Furthermore, the Law for Journalists (Journalistengesetz) provides that for permanent freelance journalists who work mainly in person for a media corporation (except the ORF) and who have no business structure of their own, collective bargaining agreements can be concluded.[25] However, these are labelled as so-called 'Gesamtverträge', in contrast to 'regular' collective bargaining agreements according to the ArbVG,[26] which are called 'Kollektivverträge'. The concluding partners can be any collective bargaining partners that have been lawfully awarded that right.[27]

Another legal presumption is made for some specific working persons who perform their work at home (so-called 'Heimarbeiter'). To these persons, the 'Heimarbeitsgesetz' (Act on work performed at home) applies. Yet, due to a lack of personal dependence, these Heimarbeiter are not classed as employees.[28] Furthermore, it is commonly acknowledged that the Heimarbeitsgesetz does not apply to 'modern' forms of work at home (i.e. to persons working remotely on their laptop or to 'classic' platform workers who perform a task for a platform on their computer, usually from home), since it applies to persons performing manual work only. Thus, the possibility to conclude so-called 'Gesamtverträge',[29] which are agreements similar to collective bargaining agreements, for these persons, is of limited relevance. Academics have advocated for an extension of the scope of application of the Heimarbeitsgesetz to crowdworkers, de lege ferenda, and not de lege lata, though.[30]

Applicable labour law provisions for semi-dependent workers and employee-like working persons

The whole range of labour law provisions applies to employees only. As regards other working persons, when it comes to individual labour law, a differentiation needs to be made between SDW on the one hand and employee-like working persons on the other hand. Yet, it has to be borne in mind that also SDW might be employee-like working persons, as long as they additionally are, after an overall-assessment of the situation, also economically dependent from their contractual partner.

One exception in place worth mentioning regarding the personal scope of application of specific statutes exists in respect of the Act on Specific Retirement Provisions for Employees and Self-Employed Persons. This Act (Betriebliches Mitarbeiter- und Selbständigen-Vorsorgegesetz, BMSVG) applies not only to employees and SDW, but also to businesspersons, thus to any person

25. §§ 16 et seq. Journalistengesetz.
26. Arbeitsverfassungsgesetz, Labour Constitution Act.
27. Cf. also *Risak, Martin*, Kollektive Rechtsetzung auch für Nicht-Arbeitnehmer? ZAS 2002, 165 (168)
28. Cf. in more detail *Risak*, Kollektive Rechtsetzung auch für Nicht-Arbeitnehmer? ZAS 2002, 165 (167).
29. Cf. §§ 43 et seq. Heimarbeitsgesetz. Such a Heimarbeitsgesamtvertrag exists, e.g. in the textile industry (https://www.wko.at/service/kollektivvertrag/rahmen-kv-arbeiter-textilindustrie-2019.pdf, 19 June 2019) – Annex 1.
30. *Risak, Martin*, Crowdwork. Erste rechtliche Annäherungen an eine "neue" Arbeitsform, ZAS 2015/3.

generating income from work. Since 2008, also businesspersons mandatorily have to pay 1.83% of their monthly income to a 'retirement fund' (Vorsorgekasse). The latest when retiring, they are entitled to the payment of a lump-sum or of monthly payments related to their contributions. As the distinguished reader might have noted, though, this system can be compared to a second pillar of pension insurance. Hence, it is only partially true that the BMSVG grants labour rights to businesspersons.

Preliminary observation: Collective bargaining agreements for employees only

As regards collective labour law, the assessment is quite easy: according to prevailing opinion, collective bargaining agreements can be concluded for employees only.[31] Although the respective norms in the Labour Constitution Act[32] apply to 'any employment relationship' based on a private law contract (§ 1 para 1),[33] collective bargaining agreements are defined as agreements between collective bargaining partners for the employer's side on the one hand and for the employee's side on the other.[34] Furthermore, collective bargaining agreements regulate rights and obligations between employers and employees.[35] In addition, in order to conclude a collective bargaining agreement, any association has to fulfil certain criteria, amongst others the representation of the interests of 'employees' or 'employers'.[36] It is most doubtful whether the respective legal body (the so-called 'Bundeseinigungsamt' which is an administrative body established within the Ministry for Social Affairs) that decides on whether an association – apart from the Austrian Economic Chambers and the Chambers of Labour who enjoy that right ex lege – can conclude collective bargaining agreements, would allow [and therefore extend the meaning of the term

31. Cf. the references at *Mosler, Rudolf*, Ist das ArbVG noch aktuell? - Kollektive Rechtsgestaltung, DRdA 2014, 511 (514). However, de lege ferenda, *Mosler* and *Risak*, for example, argue that the scope of application of collective bargaining agreements and the possibility to conclude collective bargaining agreements, respectively, should be extended to employee-like working persons; *Mosler*, DRdA 2014, 514; *Risak*, ZAS 2002, 169 et seq.
32. ArbVG – Arbeitsverfassungsgesetz.
33. ‚Die Bestimmungen des I. Teiles gelten – soweit im folgenden nicht anderes bestimmt ist – für Arbeitsverhältnisse aller Art, die auf einem privatrechtlichen Vertrag beruhen.' A broad interpretation might allow for subsuming SDW under that provision as well (*Mosler, Rudolf*, Ist das ArbVG noch aktuell? - Kollektive Rechtsgestaltung, DRdA 2014, 511). However, all following norms in the Labour Constitution Act are based on the binary approach.
34. § 2 para 1 ArbVG: Kollektivverträge sind Vereinbarungen, die zwischen kollektivvertragsfähigen Körperschaften der Arbeitgeber einerseits und der Arbeitnehmer andererseits schriftlich abgeschlossen werden.
35. § 2 para 2 (2) ArbVG: Durch Kollektivverträge können geregelt werden: die gegenseitigen aus dem Arbeitsverhältnis entspringenden Rechte und Pflichten der Arbeitgeber und der Arbeitnehmer.
36. § 4 ArbVG: (1) Kollektivvertragsfähig sind gesetzliche Interessenvertretungen der Arbeitgeber und der Arbeitnehmer, denen unmittelbar oder mittelbar die Aufgabe obliegt, auf die Regelung von Arbeitsbedingungen hinzuwirken und deren Willensbildung in der Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gegenüber der anderen Seite unabhängig ist.

    (2) Kollektivvertragsfähig sind die auf freiwilliger Mitgliedschaft beruhenden Berufsvereinigungen der Arbeitgeber und der Arbeitnehmer, welche

    1. sich nach ihren Statuten zur Aufgabe stellen, die Arbeitsbedingungen innerhalb ihres Wirkungsbereiches zu regeln;
    2. in ihrer auf Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gerichteten Zielsetzung in einem größeren fachlichen und räumlichen Wirkungsbereich tätig werden;
    3. vermöge der Zahl der Mitglieder und des Umfanges der Tätigkeit eine maßgebende wirtschaftliche Bedeutung haben;
    4. in der Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gegenüber der anderen Seite unabhängig sind.

'employee' (in analogy) to SDW] for an association that represents SDW to conclude collective bargaining agreements. As regards the Austrian Economic Chambers' and the Chambers' of Labour competence to conclude collective bargaining agreements (note that the Chambers of Labour do not conclude agreements in practice),[37] no trend towards bargaining for persons being neither employers nor employees can be detected.

It can be assumed that the non-applicability of collective bargaining agreements to SDW relationships is one major driving factor for the existence of (still) around 14,000 SDW relationships. By not being obliged to apply a collective bargaining agreement, contractual partners of SDW are, for example, exempt from the obligation to pay a thirteenth and fourteenth salary – rights that in Austria every collective bargaining agreement provides for employees. Furthermore, works council representation at all levels (firm, company, etc.) is restricted to employees as well. Thus, collective labour law still follows the very strict binary divide between employees and businesspersons. Exceptions, though not within the context of the Labour Constitution Act, exist in the media sector.[38]

Individual labour law statutes applicable to SDW

The Civil Code does not regulate the contract underlying the working relationship between an SDW and her contractual partner ('freier Dienstvertrag'). Thus, the provisions regulating the employment contract (§§ 1151 et seq.) do not apply directly. However, those provisions that are not based on the assumption of personal dependence apply analogously. In other words, those employment rights provided for in the Civil Code apply to SDW that are not necessarily – or at least to a very low degree only – based on the person's status of personal dependence. These are § 1152 regarding wages (entitlement to reasonable, adequate wages, i.e. that wages should reflect collectively bargained wages for employees performing similar activities),[39] §§ 1159-1159b regarding termination periods and modalities of termination in case of termination by giving notice, and §§ 1162-1162d regarding general grounds for premature termination for substantive reasons.[40] The absolute prohibition to work eight weeks before and after giving birth, provided for by the Mutterschutzgesetz (Maternity Protection Act, MSchG; §§ 3, 5 paras 1 and 3)[41] applies to those SDW who fall under the definition of SDW in social security law. The latter definition follows – in the grand scheme of things – the criteria established in contract law (above all, reduced personal dependence).

Individual labour law statutes applicable to employee-like working persons

In addition to the aforementioned provisions of the MSchG and to those provisions of the Civil Code that apply analogously to SDW, further statutes apply to employee-like working persons because of their economic dependence. These are the Employees' Liability Act, the Equal

37. Cf. in more detail on the system of collective bargaining in Austria *Brameshuber, Elisabeth*, The Importance of Sectoral Collective Bargaining in Austria, in Laulom (ed.), Collective Bargaining Developments in Times of Crisis, Alphen aan den Rijn: Kluwer Law International, 89-104.
38. Cf. already under 'Legal presumptions for particular non-standard employment relationships' and infra under 'Individual labour law statutes applicable to employee-like working persons'.
39. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 130.
40. *Rebhahn* in *Neumayr/Reissner,* ZellKomm^3 § 1151 ABGB (1.1.2018, rdb.at) para 130.
41. § 1 para 5 MSchG: „Auf freie Dienstnehmerinnen im Sinne des § 4 Abs. 4 des Allgemeinen Sozialversicherungsgesetzes (ASVG), BGBl. Nr. 189/1955 sind § 3 sowie § 5 Abs. 1 und 3 anzuwenden."

Treatment Act, the Temporary Agency Work Act, the Act regarding Employment of Foreigners, and a few provisions of the Insolvency Act. Furthermore, the specialised Employment and Social Security Courts decide upon legal disputes between employee-like working persons and their contractual partners.[42] Yet, other typically employment related statutes, e.g. the Working Time Act or the Holidays Act, do not apply to employee-like persons, not even analogously.

Collectively agreed employment conditions for freelancers in the media sector

The situation at the Austrian Broadcasting Corporation (Österreichischer Rundfunk – ORF) is peculiar. First, the Law on the ORF (ORF-Gesetz) which regulates, amongst others, the independence of those persons working for the ORF as journalists or who are involved in creating the programmes, applies to employees and freelancers. There are only few rules governing the employment/freelance relationship, namely on compensation payments, specific rules on fixed-term contracts and on payments to be made according to the BMSVG. However, the rules on compensation payments in case of termination of long-term fixed-term working relationships or in case of unjustified dismissal apply to employees only. The current collective bargaining agreement applicable to the ORF applies to employees only, too. For freelance journalists, the ORF has internal guidelines that are applied when determining how the specific tasks delivered by journalists should be paid. Yet, these internal guidelines have no formal legal basis and can be adapted unilaterally by the ORF as 'employer' at any time.

For journalists working for a company that is member of the (free) association of Austrian papers and media (Österreichischer Zeitschriften- und Fachmedienverband, ÖZV),[43] there exists a real collective bargaining agreement, concluded according to the Labour Constitution Act, between the ÖZV and the Austrian Trade Union Federation. However, the collective bargaining agreement itself limits its personal scope of application regarding permanent free-lancers, i.e. that only some very specific rules regarding their wages apply. Any other norms (on working time, holidays, etc.) of the collective agreement apply to employees only. It can be concluded that this is due to the fact that the Labour Constitution Act allows for the regulation of employment rights and obligations in collective bargaining agreements for employees only.

New strategies for non-employees?

Recent developments such as the creation of a 'club'/association for an – admittedly – very heterogeneous group of working persons under the roof of the Austrian Trade Union Federation[44] led to some discussion as to whether it was lawful to establish such a 'club'/association for working persons. The main point of interest in that discussion is that for many services to be offered as an

42. Cf. § 51 para 3 sect. 2 Arbeits- und Sozialgerichtsgesetz (ASGG, Act on Courts for Labour and Social Security Law Matters).
43. Cf. in more detail on how the collective bargaining system works in Austria, especially on who the parties to the agreements are and on the scope of application of the agreements, *Brameshuber*, The Importance of Sectoral Collective Bargaining in Austria, in Laulom (ed.), Collective Bargaining Developments in Times of Crisis, Alphen aan den Rijn: Kluwer Law International, 89-104.
44. Vidaflex; an initative under the wings of vida, the traditional union, but who focuses on one-person-companies/solopreneurs, small enterprises with up to four employees, and freelancers. For a membership fee of EUR 25 per month, they offer, amongst others, legal support, support regarding taxes etc, but also want to represent that quite heterogeneous group of persons (https://www.vidaflex.at/, 19 June 2019).

'independent contractor' (driving a taxi, e.g.), Austrian law requires the registration of the business. The registration, though, leads ipso iure to automatic and mandatory membership of the Economic Chambers. The Act on Economic Chambers further provides for automatic membership of one of the seven industry sectors within the Federal Chamber, as well as for automatic membership of one of the trade groups, according to the respective business licence. Thus, these registered working persons are already members of one association, namely the one concluding the collective bargaining agreements on the employers' side in practice.[45]

Taxi drivers are also subject to specific Acts in the nine Austrian regions providing for standardised, fixed fees for services. To date, these acts have not applied to Uber drivers, since they fall under the legal regime for rental cars. However, Parliament is currently debating on whether to subject Uber to the taxi regulations, which would lead to the application of the taxi regime, including standardised, fixed fees for the services provided.[46]

(Critical) Assessment of the situation (of employee-like working persons especially)

It can be assumed that due to the existence of the intermediate category of SDW and more in particular of SDW who are also economically dependent and therefore considered employee-like, resulting in the application of at least some employment rights, hardly any discussion of 'flexibility' of the criteria defining the employment relationship has emerged so far. Another highly probable reason is that social security law, which is very closely linked to the status of a working person, provides for mandatory social security (health, accident and pension insurance; for employees and SDW unemployment insurance as well)[47] for *any* work-related activity, irrespective of whether the income created is gained by dependent/subordinate, semi-dependent or self-employed/independent work as businessperson. Furthermore, not only is the employer responsible for paying the social security contributions for employees, but also for SDW. Thus, at least from a social security law point of view, economically speaking it has become less attractive over the years for employers to employ a working person as SDW. This is reflected by recent data, according to which the numbers of SDW dropped from nearly 20,000 in 2012 to around 14,000 in 2018.[48]

From a teleological point of view, the analogous application of only some employment related statutes to employee-like working persons can (and should) be challenged, though. The most obvious example is the Holidays Act which applies neither to SDW in analogy nor to employee-like working persons (either in analogy or by broadening its personal scope of application). When considering why, for example, the Equal Treatment Act or the Employees' Liability Act apply to employee-like working persons too – namely particularly because of their economic dependence – it might as well be questioned why the Holidays Act does not apply. This is particularly true when taking into account that the provision of services to only one or only very few other persons is one main criterion to be taken into account when assessing whether a working

45. Cf. for an overview *Brameshuber*, The Importance of Sectoral Collective Bargaining in Austria, in Laulom (ed.), Collective Bargaining Developments in Times of Crisis, Alphen aan den Rijn: Kluwer Law International, 89-104.
46. https://bit.ly/2WTwIcM (19 June 2019).
47. Note that since 2009, even businesspersons can voluntarily opt-in into unemployment insurance. Cf. in detail *Pfalz, Thomas*, Selbständige in der Arbeitslosenversicherung (Verlag Österreich 2018).
48. http://wko.at/statistik/bundesland/FreieDienstn.pdf (12 June 2019).

person is employee-like or not. If this is the case, it is highly questionable why such a person should not be entitled to paid holidays. The German Holidays Act (Bundesurlaubsgesetz, BUrlG), e.g. applies to employee-like working persons who are economically dependent (and in need of social protection), too.[49] Thus, when taking labour law and one of its main goals, the social protection of the economically weaker party, seriously, it can and should be questioned which labour laws or which concrete provisions of some statutes should apply to employee-like working persons as well.[50] The same argument is valid as regards the narrow scope of application of the Labour Constitution Act. If one of the main purposes of collective bargaining agreements is to be taken seriously – mitigating the unequal bargaining powers between the contractual partners that exist due to the economic dependence of the employee(-like working person) – a possibility to conclude collective bargaining agreements also for employee-like working persons should exist. However, to date, the prevailing opinion has been quite clear on the Labour Constitution Act's narrow scope of application.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

49. Cf. *Gallner, Inken*, in ErfKommArbR[19] (2019) § 2 BUrlG para 2. N.b. that *Gallner* advocates for an application of the definition of economically dependent, employee-like working persons of § 12a TVG also regarding those employee-like persons the BUrlG refers to.
50. Cf. for a more general assessment on that point *Benecke, Martina*, Der Citoyen als Travailleur - Recht als Schutzzone, EuZA 2018, 3 (15 et seq.); *Rebhahn, Robert*, Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive, RdA 2009, 236 (242 et seq.).

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 198–218

DOI: 10.1177/2031952519864196
journals.sagepub.com/home/ell
SAGE

The classification of employment relationships in Belgium

Mathias Wouters
KU Leuven, Leuven, Belgium

Abstract
This chapter provides an overview of the characteristics of the Belgian employment contract and, in particular, of the concept of 'subordination'. After having painted a picture of what differentiates an employment contract from a contract for services, it, subsequently, assesses the classification of certain specific examples, such as self-employed persons with only one client. The role of economic dependency in the classification of working relationships is discussed by using these examples. The chapter furthermore emphasises the strong binary divide between employment and self-employment. It goes into more detail on the country's collective bargaining mechanisms for false and genuine self-employed workers. After having described the Belgian take on identifying the 'employing entity', the chapter finishes off by outlining the contemporary debate on the reform of the Belgian classification mechanisms.

Keywords
Employment relationship, subordination, economic dependency, right to collective bargaining, employing entity

Introduction

The most recent OECD Employment Outlook is rich in policy guidelines. Some of these guidelines may well sound familiar to observers of Belgian labour relations. The report, for instance, calls upon states to clarify existing regulations with an aim to reduce the so-called 'grey zone' between self-employment and employment, and to, if necessary, consider strengthening the rights and benefits of those self-employed workers that despite these efforts remain in a 'grey zone'.[1]

1. OECD, *OECD Employment Outlook 2019: The Future of Work*, OECD Publishing, Paris, 2019, 27.

Corresponding author:
Mathias Wouters, KU Leuven, Blijde Inkomststraat 17, BE-3000 Leuven, Belgium.
E-mail: mathias.wouters@kuleuven.be

Guidelines like these resemble the policies implemented by various Belgian governments over the last decades.

The Government-Verhofstadt II promulgated in its Coalition Agreement of 2003 'to take legal measures, including the establishment of well-defined criteria to combat the phenomenon of ''false'' self-employed persons.'[2] This objective eventually led to the Employment Relationships Act of 2006. An act that would be amended in 2012 as a new government had committed itself to intensifying the struggle against social and fiscal fraud, inter alia, by using – additional – 'simple and effective' means to tackle 'sham' self-employment and employment.[3] The third instalment of this quest for a watertight binary divide between employment and self-employment might arrive sooner rather than later, considering the relatively unchanged situation since 2012, as well as the current national and international discourse on the topic.

The fact that Belgian governments do not refrain from intervening in the scope of labour law may be one reason for international scholars to show an interest in the Belgian law that governs the classification of employment contracts. After all, does legal certainty benefit from laying down detailed classification mechanisms by law? Does it lead to more equitable outcomes, and, if so, are these outcomes equitable according to everyone involved? Although these are some of the questions that will not be answered head on, they may prove valuable for the reader when reading this contribution. It aims to provide the reader with a picture of Belgian labour law that is detailed enough to form a personal opinion. Footnotes have been inserted that refer to more extensive publications in the national languages.

The contribution is structured in seven chapters. Once the first chapter has described the Belgian definition of an employee in the Employment Contracts Act of 3 July 1978 (hereinafter: ECA),[4] the second chapter will focus on the legal characteristics of subordination as provided for in the Programme Act (I) of 27 December 2006 (hereinafter: ERA).[5] Chapter three discusses specific examples such as a nominally self-employed person offering personal work or services to one main client. Chapter four explores the binary divide in Belgian labour law, as well as the extended application of labour law to self-employed workers. Chapter five describes the recent advancements with regard to the collective representation of self-employed workers, after which chapter six covers the nature of the Belgian employee's 'employing entity'. Lastly, chapter seven will give an overview of the recent national discourse on employment relationships.

2. Belgische Kamer van Volksvertegenwoordigers, Ontwerp van Programmawet (I), Doc 51 2773/001, 202 / Chambre des Représentants de Belgique, Projet de Loi-Programme (I), Doc 51 2773/001, 202.
3. Belgische Kamer van Volksvertegenwoordigers, Wetsontwerp tot wijziging van titel XIII van de programmawet (I) van 27 december 2006, wat de aard van de arbeidsrelaties betreft, Doc 53 2319/001 / Chambre des Représentants de Belgique, Projet de loi modifiant le titre XIII de la loi-programme (I) du 27 décembre 2006 en ce qui concerne la nature des relations de travail, Doc 53 2319/001.
4. Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten / Loi du 3 juillet 1978 relative aux contrats de travail.
5. Programmawet (I) 27 december 2006 / Loi-programme (I) 27 decembre 2006. The Act is usually called the Employment Relationships Act.

The employment contract

The element of 'subordination'[6] already served as the distinctive feature of the Belgian employment contract in the Employment Contracts Act of 1900.[7] The contemporary ECA likewise identifies 'subordination' as a precondition for an employment contract. While the legal concept was originally developed through jurisprudence and scholarship,[8] the legislature eventually decided to intervene and clarify what exactly is meant by 'subordination' in the ERA. The latter is, therefore, the primary piece of legislation that governs the differentiation between employment contracts and contracts for services.

The personal scope of labour law, nevertheless, depends predominantly on the definitions of an employee in the ECA. The relevant articles (two and three) of the Act define the employment contract as the contract by which an employee undertakes to perform (manual or non-manual) labour, under the authority of an employer in return for remuneration. These two articles are mandatory provisions.[9] The definitions lead scholars to identify four preconditions of an employment contract: an agreement, the provision of labour, in return for remuneration, all of which happens in a situation of subordination.[10] The Belgian *Cour de Cassation* (hereinafter: Court) has clarified what the implications of this statutory definition are.

With regard to the necessity of an existing 'agreement', the Court has pointed out that although an agreement has to exist, it has to cover solely the 'essential elements' of an employment contract. The determination of the remuneration that the employer owes the employee is, for example, such an element.[11] An employment contract can furthermore be orally concluded.[12] The ECA ensures that orally concluded employment contracts are full-time and open-ended.[13] This makes it easier for the labour inspectorates to argue that the worker is employed if the parties cannot provide proof of a written agreement.

6. The term 'subordination' will be used to refer to what the French text calls performing work *sous l'autorité d'un employeur*. The term thus refers to the need to work under the authority of an employer, which is a precondition to having an employment contract. The various elements that substantiate the concept of subordination will be discussed in chapter two.
7. P. HUMBLET, 'De Arbeidsovereenkomstenwet: de prequels' in B. DEBAENST (ed.), Van status tot contract: De arbeidsovereenkomst in België vanuit rechtshistorisch perspectief, Bruges, die Keure, 2013, 106.
8. See for instance, M. JAMOULLE, *Le contrat de travail*, Liège, Faculté de droit, d'economie et de sciences sociales de Liège, 1986, 545 p.; P. HUMBLET, *De gezagsuitoefening door de werkgever: een juridische analyse*, Antwerp, Kluwer, 1994, 420 p.; V. VANNES, *Le contrat de travail: aspects théoriques et pratiques*, Brussels, Bruylant, 1996, 826 p.; C. ENGELS, 'Subordinate employees or self-employed workers? An analysis of the employment situation of managers or management companies as an illustration. (Belgium) (Employed or Self-Employed? The Role and Content of the Legal Distinction)', *Comparative Labor Law & Policy Journal* 1999, Vol. 21, No. 1, 47-76.
9. Cass. 3 Mai 2004, AR S.03.0108.N.
10. F. HENDRICKX, *Inleiding tot het Belgische arbeidsrecht*, Bruges, die Keure, 2019, 15. Other authors only identify three preconditions, namely: labour, remuneration and authority. D. HEYLEN and I. VERREYT, *Arbeidsrecht toegepast (zesde editie)*, Antwerp, Intersentia, 2018, 17.
11. Cass. 17 December 2012, AR S.12.0072.F.
12. Belgian labour law features a hierarchy of norms. A written employment agreement ranks higher than an oral employment agreement pursuant to Article 51 of the Act on Collective Bargaining. Wet 5 december 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités / Loi du 5 decembre 1968 sur les conventions collectives de travail et les commissions paritaires.
13. *A contrario* artt. 9 and 11bis ECA.

The Court also clarified that the performed labour may be limited in time and scope.[14] The level of remuneration likewise does not affect the ascertainment of an employment relationship. This has been clarified by the Court in what is commonly called, the 'Icarus-case'. The work performed by a worker constitutes 'labour' within the meaning of the ECA regardless of whether the agreed remuneration is limited and regardless of whether that work is performed as a leisure activity, without the intention of obtaining an income.[15] Hence, the unremunerated nature of, for instance, voluntary work is quite absolute.

As is the case in many countries, subordination is the quintessential characteristic of employment. The exercise of authority by the employer, in relation to their employees, includes the authority to direct and supervise. The Court acknowledged early on that the employer might have only limited powers of direction and supervision in reality, despite the contractual entitlement thereto.[16] This probably had an influence on the subsequent development of the multi-factorial test that is used in Belgium to determine the existence of an employment relationship. It made it possible amongst others to conclude that a relationship of authority exists as soon as a person can in fact exercise authority over another person's actions.[17] The right to exercise authority in other words suffices; authority does not have to be put into practice.

The element of subordination

Primacy of facts

The mechanism used to determine the existence of subordination in working relationships developed through case law until the ERA eventually enshrined the mechanism in law. Doing so, the Act transposed the case law of the Court into statutory law. Article 331 of the Act holds that priority shall be given to the classification that arises based on the facts. However, that same article stresses that the facts only supersede the contractual agreement if the facts 'pre-empt' – are incompatible with – the legal classification, as chosen by the parties.

The Article, therefore, acknowledges the 'primacy of facts' as advanced in paragraph nine of the Employment Relationships Recommendation,[18] even though it makes this conditional upon the irreconcilability between the facts and the contractual designation. The facts only take precedence if those facts 'exclude' the contractual designation.[19] Consequently, it is for the courts to state how and to what extent the information obtained by the court, considered separately or as a whole, is incompatible with the performance of self-employed or employed work.[20] The courts may, for example, justifiably decide to reclassify on the basis of a single fact, if this fact is so serious as to preclude the contractual designation, or on the basis of an overall set of considerations.

What is more, pursuant to Article 332 of the ERA, 'sufficient information' must be provided to be able to conclude that there is indeed an incompatibility. Despite this considerable level of discretion for judges, their freedom to interpret facts has at the same time been curtailed. The

14. Cass. 19 Mai 2008, AR S.07.0004.N.
15. Cass. 10 March 2014, AR S.12.0103.N.
16. Cass. 19 December 1977.
17. Cass. 15 February 1982, *RW* 1982-83, 2210.
18. Employment Relationship Recommendation, 2006 (No. 198).
19. Cass. 5 February 2007, AR S.06.0024.N.
20. Cass. 29 October 2007, AR. S.05.0123.N.

Court has explicitly noted that the assessment of the information or facts has to be completed on the basis of the criteria currently laid down in the ERA.[21] Moreover, the Court has interpreted the issue of classifying employment relationships not solely as a matter of fact, and has considered itself competent to set aside an examining court's ruling in case of 'a violation of law'. This has proven consequential as we will see in the following subchapters.

General criteria and special criteria

Article 332 of the ERA states that the court shall reclassify the employment relationship if:

- the execution of the employment relationship provides sufficient elements which, assessed in accordance with the provisions of this Act and its implementing decrees, are incompatible with the classification given to the employment relationship by the parties;
- the presumed nature of the employment relationship does not correspond with the classification given to the employment relationship by the parties, and this presumption is not rebutted.

Article 332 results in two distinct but interrelated classification mechanisms that can be used to refute the contractual designation. The criteria that are used to assess the factual elements as noted in the first bullet point will be called the general criteria. The criteria used to implement the presumptions will be referred to as the special criteria. We will first discuss what could be called the 'special classification mechanisms', i.e. the second bullet point, which encompasses multiple industry-specific mechanisms that come in addition to the 'general classification mechanism', i.e. the first bullet point. We will subsequently discuss the latter.

The special mechanisms are applied in highly sensitive industries and lead to a rebuttable presumption in favour of either the designation of an employment contract or a contract for services. The presumption can always be overturned through the general mechanism, which is one single mechanism that repeatedly uses the same criteria indifferent to the industry to which the parties belong. If the working relationship belongs to an industry that is not characterised by a special mechanism, the courts will immediately apply the general mechanism. The special mechanisms, therefore, essentially serve to reverse the burden of proof.

If a self-employed worker claims to be misclassified, the worker would normally have to provide 'sufficient' information in order for the judge to conclude that the facts and contractual designation are incompatible, thereby excluding a contract for services in this example. If the worker works in an industry that is governed by a 'special mechanism', however, his contract for services would first be assessed to determine if it is presumed to be an employment contract. If so, as a result, the presumed employer – or third parties – will have to argue why the contractual designation was nevertheless justified.[22] Once subordination is presumed, presumed employers tend to have difficulties proving why subordination does not exist.[23]

21. Cass. 6 December 2010, AR S.10.0073.N.
22. This would not necessitate the employer to argue that the facts exclude the presumed classification. The presumption can be rebutted by all legal means.
23. J. GOYVAERTS, 'Aard van de arbeidsrelatie' in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, Bruges, die Keure, 2017, 258.

The special classification mechanisms

Sectoral presumptions concerning the nature of the employment relationship. The special classification mechanisms have been established in 2012 by amending the ERA. The special mechanisms are used in the construction, security, transport, cleaning, agriculture and horticulture sectors. If a court has to evaluate an employment relationship in one of these industries, the court will first resort to the 'special criteria' in order to see what the outcome of the presumption is.

The legislature has designated certain industries (Art. 337/1 ERA)[24] in which – if no royal decree has been adopted in relation to the occupational activities in the industries mentioned – the classification scheme in Article 337/2 is used to apply the presumption. Article 337/2 contains nine criteria. These criteria include amongst others: (i) a lack of responsibility and decision-making power regarding the financial resources of the enterprise on the part of the person carrying out the work, (ii) the absence of an obligation to achieve a result in respect of the agreed work, and (iii) a lack of decision-making power with regard to the pricing policy of the enterprise by the party who carries out the work, unless the prices in that industry have been set by law. If more than half of the nine criteria are fulfilled, the working relationship will be presumed to be an employment relationship. If fewer than half of them are fulfilled, the relationship is presumed to be of a commercial nature. These criteria are overall more orientated towards the assessment of economic dependency between the parties involved than the general criteria are (see chapter three).

The last paragraph of Article 337/2 authorises the government to alter or supplement these statutory criteria. The government drafted multiple royal decrees of which one, for instance, applies to buses and coaches, while another decree provides special criteria for taxis.[25] The special criteria that are issued by the government should include elements, which relate to socio-economic dependency or legal subordination. The procedure that is followed in order to adopt such a royal decree consults the necessary stakeholders such as the joint (sub)committee in the relevant industry.

The general classification mechanism

Four general criteria. Four general criteria have been formulated to determine the classification of the working relationship under the 'general mechanism'. These four criteria are the freedom (experienced by the worker) to organise the working time, the freedom to organise the work itself, the possibility (for the employer) to exercise hierarchical control and the intent of the parties as expressed in the agreement (Art. 333 ERA). These four criteria – notwithstanding the special mechanisms – define the concept of 'subordination' under Belgian law. It should be noted that these four criteria relate to legal subordination and not to socio-economic subordination. The latter

24. It concerns construction, the activity of carrying out on behalf of third parties all types of surveillance services, carriage of goods and persons on behalf of third parties and the activities that fall within the scope of the joint committee on cleaning services.
25. Arrêté royal de 29 octobre 2013 pris en exécution de l'article 337/2, § 3, de la loi-programme (I) du 27 décembre 2006 en ce qui concerne la nature des relations de travail qui se situent dans le cadre de l'exécution des activités qui ressortent du champ d'application de la sous-commission paritaire pour les autobus et autocars; Arrêté royal de 29 octobre 2013 pris en exécution de l'article 337/2, § 3, de la loi-programme (I) du 27 décembre 2006 en ce qui concerne la nature des relations de travail qui se situent dans le cadre de l'exécution des activités qui ressortent du champ d'application de la sous-commission paritaire pour les taxis et de la commission paritaire du transport et de la logistique, uniquement pour les activités de location de voitures avec chauffeur et de taxis collectifs.

of these criteria – the intent of the parties – is typically considered the starting point of the court's inquiry.

The courts take the information that illustrates the intent of the parties, as evidenced in the contract, into account. Every single provision can serve to illustrate the real intent of the parties. An overall assessment of the contract could, therefore, indicate that the official designation of the contract is misguided. Paragraph 3 of Article 333 of the ERA indicates, in any case, that the title of the contract, as well as a couple of other elements, are not suitable to adequately classify the employment relationship.[26]

The other three general criteria depend on the actual performance of the work, instead of the contractual language. Facts about the actual performance of the work have to relate to the freedom to organise working time, the freedom to organise the work or the employer's capacity[27] to exercise hierarchical control. The explanatory memorandum of the ERA mentions, for example, the obligation to comply with a precise and compulsory working time regulation, the fact that days of leave and holidays cannot be freely determined, the obligation to notify in the event of absences as indicative of subordination, based on this first general criterion.[28] A detailed specification of the tasks to be performed by the contractor and the existence of precise instructions by a hierarchical superior are other examples that can be taken into account under the two other general criteria. Information that does not relate to any of these general criteria can – in theory – not be taken into consideration by the court. Other important points to make are that the general criteria do not have to be cumulatively satisfied,[29] and are applied in light of the concrete reality of the relationship.[30] This entails that the criteria are not assessed in isolation but in conjunction, which implies that one or the other, depending on the concrete reality, may more prominently influence the classification.[31]

26. The other elements that are considered ill-suited by the legislature are: the registration with a social security institution, registration with the central business registration body, registration with the VAT authorities and the way in which the income is declared to the tax administration.
27. It suffices for the employer to be in a position to exercise control. It is not necessary for there to be actual management and control (Cass. 18 Mai 1981, *Arr.Cass.* 1980-81, 1080).
28. Ontwerp van Programmawet (I) 27 november 2006, Doc 51 2773/001 / Projet de Loi-Programme (I) 27 novembre 2006, Doc 51 2773/001.
29. H. BUYSSENS en L. DE MEYER, *Schijnzelfstandigheid: terug naar af?*, Antwerp, Intersentia, 2013, 19; J. GOYVAERTS, "Aard van de arbeidsrelatie" in F. HENDRICKX en C. ENGELS (eds.), *Arbeidsrecht*, I, Bruges, die Keure, 2015, 196; T. MESSIAEN en K. VAN DEN LANGENBERGH, 'Contractsvrijheid en de ontwijking van het werknemerschap' in M. RIGAUX en A. LATINNE (eds.), *Actuele problemen van het arbeidsrecht 9*, Antwerp, Intersentia, 2014, 139-140.
30. H. BUYSSENS en L. DE MEYER, *Schijnzelfstandigheid: terug naar af?*, Antwerp, Intersentia, 2013, 18; P. DE WULF, S. DIELS en M.-A. STAAR, 'De Arbeidsrelatiewet: 5 jaar rechtspraak', *Oriëntatie* 2012, afl. 7, 184; J. GOYVAERTS, "Aard van de arbeidsrelatie" in F. HENDRICKX en C. ENGELS (eds.), *Arbeidsrecht*, I, Bruges, die Keure, 2015, 201; C. LHOSTE, 'La loi relative à la nature des relations de travail; genèse et philosophie' in P. VERDONCK (ed.), *La nouvelle loi sur les relations de travail*, Louvain-la-Neuve, Anthemis, 2007, 23; K. VAN DEN LANGENBERH en A. VAN REGENMORTEL, 'Schijnzelfstandigheid na de arbeidsrelatiewet: een eerste evaluatie' in, *CBR Jaarboek 2008-2009*, Antwerp, Intersentia, 2009, 395; I. VAN DEN POEL, A. VAN EECKHOUTTE, S. HENDRICKX, G. DE MAESENEIRE en E. DE KEZEL, 'Overzicht van rechtspraak. Arbeidsovereenkomsten (2005-2012)', *Tijdschrift voor Privaatrecht* 2014, 134.
31. V. DOOMS en T. MESSIAEN, *Schijnzelfstandigheid*, Ghent, Larcier, 2008, 13; L. ELIAERTS, 'De Arbeidsrelatiewet, vennootschapsmandatarissen en vennoten', *Tijdschrift voor Rechtspersoon en Vennootschap* 2008, 86; K. NEVENS, *De arbeidsrelatie, de zelfstandige en de ondernemer*, Bruges, die Keure, 2011, 200.

The Court has, moreover, given valuable rulings on the lawful application of the 'general classification mechanism'.[32] It has to be stressed that its rulings do not have binding force of precedent, only persuasive force of precedent.[33] Some of its rulings have been rather cautious. The Court has, for example, held that a certain degree of freedom in the performance of the work does not preclude the existence of a contract of employment,[34] and that the imposition of a certain amount of supervision and control does not preclude a contract for services, either.[35]

That being said, the Court has also expressed some strong views over the years. The Court held in 2010 that the freedom to organise working time has to do with the freedom to do so experienced during the period in which the work is to be carried out – according to the contract concluded between the parties – or during the period in which the person carrying out the work is at the disposal of the principal/employer.[36] Consequently, the fact that the person carrying out the work is free to decline a job offer does not entail that this person is free to allocate working time once the job offer has been accepted.

The Court delivered a second interesting judgment in 2010. If the worker can only perform the job – because of a lack of professional knowledge – in case the contractual party gives precise instructions concerning the organisation of the work; the relationship between the worker and the principal/employer will go beyond the mere performance of control within the framework of a contract for services. A lack of professional knowledge, combined with no freedom to organise the work itself is incompatible with a contract for services.[37]

In another remarkable judgment of 2016, the Court considered the possibility to impose disciplinary sanctions as an element that excludes a contract for services, provided that such a right to discipline is not inherently linked to the exercise of the profession and, at the same time, justified in a statutory provision.[38] Cases like these are illustrative of the general classification mechanism's flexible design.

The unused possibility to formulate 'specific criteria'. The general criteria examine legal subordination and do not take socio-economic subordination into account. Notwithstanding the legislature's focus on legal subordination, Article 334 of the ERA did authorise the government to add specific criteria to the already-existing four general criteria for one or more industries, one or more professions, one or more categories of professions or one or more occupational activities. These specific criteria should, in principle, be of a legal nature, as the Act requires the criteria to indicate the existence of authority and not depart from the general criteria.

This would be the case unless the government chooses a socio-economic criterion listed in the third paragraph of Article 334 itself. The legislature compiled a list with the following criteria of a socio-economic or legal nature: (a) responsibility and possibility to decide on the financial resources with regard to the profitability of the enterprise; (b) fixed and/or guaranteed

32. The Court does this by assessing whether or not Employment Courts took the decision to classify in one way or the other in a lawful manner. Doing so, the Court sometimes indicates what it does and what it does not consider a lawful argument to reclassify.
33. A. DE VREESE, 'De taak van het 'of van Cassatie', *Tijdschrift voor Privaatrecht* 1967, 579.
34. Cass. 16 October 1972, *Arr.Cass.* 1973, 165.
35. Cass. 20 March 2006, *Journal des tribunaux du travail* 2006, 276.
36. Cass. 18 October 2010, AR S.10.0023.N.
37. Cass. 6 December 2010, AR S.10.0073.N/1.
38. Cass. 10 October 2016, AR S.14.0074.N.

remuneration; (c) personal and substantial investment in the enterprise with personal resources and personal and substantial participation in the profits and losses of the enterprise; (d) the possibility of employing staff or having them replaced; (e) to manifest oneself as a business towards co-contractors or third parties; (f) to work in rooms and/or with materials that are ones property.[39]

Other presumptions used in Belgian labour law

In addition to the special classification methods, which have a (sub)sectoral approach and supplement the general classification mechanism, Belgian law has also developed a number of other legal presumptions that concern a specific type of worker or profession. Some of these are rebuttable.

The most blatant example concerns pharmacists. Any pharmacist who carries out professional work in a pharmacy, that is open to the public, is presumed to be employed for white-collar work through an employment contract with the natural or legal person who owns or rents the pharmacy, unless there is evidence to the contrary (Art. 3quater ECA). A similar presumption exists for, for instance, trade representatives and students (Arts. 4 and 121 ECA).

Non-rebuttable presumptions are more rare, but not less important. Article 8 of the Act on Temporary Work, Temporary Agency Work and the Posting of Workers makes it clear that the agreement between the agency and worker is presumed to be an employment contract for temporary agency work.[40] A presumption that cannot be refuted. A slightly different technique is used for homeworkers who are employed using a 'contract for home work'. Although homeworkers are not subject to the direct supervision or control of the employer, they do work under the authority of an employer, in their place of residence or in any other place of their choice.[41] The homeworker is presumed to work under authority, notwithstanding the lack of direct supervision or control by the employer. '*Thus, an attenuated form of juridical subordination suffices*'[42] in the case of home work.

Labour law provides only the basis for the classification of employees in social security law

Lastly, it is important to stress that the procedures depicted in subsections 2.1 to 2.5 are used to differentiate between self-employed and employed workers for the purpose of labour law. The classification of a working relationship may be different in relation to social security law. A self-employed worker (under labour law) can, in other words, be considered an employee for social security purposes because social security acts contain definitions that assimilate certain self-

39. An example may clarify this procedure. One criterion that can be found in the 'special classification mechanisms' reads: '*not posing as an enterprise towards third parties or co-contractors, or predominantly or usually working for one client*'. This criterion is not entirely depicted in paragraph 3 of Article 334. Only 'not posing as an enterprise towards third parties or co-contractors' has been included in the list. The government could as a result introduce the latter as a specific criterion. Only the legislature, however, would be able to introduce 'predominantly or usually working for one client' as a new general criterion.
40. Wet 24 juli betreffende de tijdelijke arbeid, de uitzeindarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruiekrs / Loi du 24 juillet 1987 sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs.
41. Art. 119.1 ECA.
42. K. NEVENS, 'Home Work, Telework and the Regulation of Working Time: A Tale of (Partially) Similar Regulatory Needs, in Spite of Historically Rooted Conceptual Divergence', *International Journal of Comparative Labour Law* 2010, 199.

employed workers with employees. Article 332 of the ERA affirms that it does not affect such a legislative technique of assimilation.

One important example of this differentiation between labour law and social security law concerns artists. Persons who provide services or produce work of an artistic character in return for remuneration are commonly not considered an employee pursuant to the general classification mechanism. The Act on the social security of workers has been revised to nevertheless ensure that these cultural workers are considered employees for the purpose of social security.[43]

The assessment of specific examples under Belgian labour law

a) A nominally self-employed person offering personal work or services to one main client?

The ERA analyses the relationship of subordination from a legal perspective, thereby, in principle, not relying on economic dependency in order to establish subordination.[44] Facts that are relied on to prove subordination have to be classifiable under at least one of the four general criteria. Courts do show a tendency to sometimes incorporate elements of a socio-economic nature under the general criteria, which might be at odds with black letter law.[45]

The Employment Court in Brussels, for example, acknowledged that the kind of working relationship and full-time nature of the work could indeed lead to the self-employed worker ending up unable to de facto provide similar services to third parties, as a result of which the worker is economically dependent on the principal.[46] Although this element was considered insufficient to conclude that the facts were incompatible with the use of a contract for services, it did point towards the existence of subordination.

The Employment Court in Ghent ruled on a case in which it observed how the financial and economic organisation of the activities was directed by the principal, while the worker only served as a 'performer' thereby entitled to an agreed salary. These facts were indicative of an employment relationship.[47] The Employment Court in Mons identified the absence of risk on the part of the worker and the absence of property rights or individual consumers as elements that demonstrated the existence of economic dependency.[48] These elements would, however, not suffice to conclude that an employment contract exists when this contract has been designated by the parties as a contract for services.

Cases like these likely comply with the rulings of the Court, as the Court seems to not completely dismiss elements that point towards economic dependency, although they clearly do not

43. Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders / Loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs.
44. V. VANNES, 'Subordination et parasubordination – La place de la subordination juridique et de la dépendance économique dans la relation de travail' in S. GILSON (ed.), *Subordination et parasubordination - La place de la subordination juridique et de la dépendance économique dans la relation de travail*, Limal, Anthemis, 2017, 81.
45. T. MESSIAEN and K. VAN DEN LANGENBERGH, 'Hoofdstuk 4. Contractsvrijheid en de ontwijking van het werknemerschap: is de Arbeidsrelatiewet een afdoende remedie tegen de schijnzelfstandigheid?' in M. RIGAUX and A. LATINNE (eds.), *Actuele problemen van het arbeidsrecht 9*, Antwerp, Intersentia, 2014, 143-144 and 156-157.
46. Employment Court Brussels 10 June 2008, *Revue de Droit Commercial Belge - Tijdschrift voor Belgisch Handelsrecht* 2012, No. 2, 182.
47. Employment Court Ghent 7 December 2009, *Tijdschrift voor Gentse en West-Vlaamse Rechtspraak* 2010, No. 3, 211.
48. Employment Court Mons 9 March 2011, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2012, No. 31, 1496.

suffice to reclassify a contract for services into an employment contract.[49] If the facts are congruent with the general criteria and prove, in addition to legal subordination, that the worker is also economically dependent on the principal, the courts might have an easier time reclassifying a contract for services into an employment contract.[50]

Contrary to the nuanced position of socio-economic facts under the general classification mechanism, the fact that services are only provided to one client will be taken into account directly under 'special classification mechanisms'. One of the nine criteria mentioned in the ERA indicates that a worker is presumed to be an employee if the entity does not pose as an enterprise towards third parties or co-contractors, or predominantly or usually works for one client.[51] This, of course, only accounts for one criterion out of nine different criteria, of which five would have to point towards an employment contract. Some of the other criteria will nevertheless likely be indirectly affected, since this self-employed person is likewise unlikely to make significant investments in his/her own 'enterprise', to make decisions about the financial structure of the personal 'enterprise' or the price policy and purchasing policy of this 'enterprise', if the self-employed person only has one client.

If the legislature or government would want to take economic dependency into consideration, the criterion could be included in the 'general classification mechanism' as a 'specific criterion', as was noted earlier.[52]

a. a nominally self-employed person offering personal work or services to a multitude of clients or customers?
b. a nominally self-employed person offering personal work or services to one main client, while also owning some of the 'means of production' necessary to generate those services?

Considering what has been written with regard to a self-employed worker with one client, the chances of reclassification in these two examples would look slimmer. It has to be stressed, that those chances are, however, not fundamentally different from the likelihood of reclassification in the first example, at least when approached through the 'general criteria'.

Some cases of the Court may again prove illustrative. The Court ruled that the Court of Appeal's decision to reject the designation as a 'contract for services', and decide that it was an employment contract, instead, was unlawful.[53] The Court of Appeal had justified its reclassification based on socio-economic facts, namely that:

- the worker was not strictly prohibited from owning his own clientele, but did not have the time to meet the needs of personal clients because of the performance required of him by the principal, namely eight to nine hours of work per day;
- the principal determined the prices charged to the customers;

49. W. VAN EECKHOUTE, 'Bestanddelen van de arbeidsovereenkomst' in W. VAN EECKHOUTTE (ed.), *Sociaal Compendium Arbeidsrecht*, Mechelen, Kluwer, 2018-19, 684.
50. J. GOYVAERTS, 'Aard van de arbeidsrelatie' in F. HENDRICKX en C. ENGELS (eds.), Arbeidsrecht, Bruges, die Keure, 2017, 255-256.
51. Art. 337/2 ERA.
52. I. VANDEN POEL, A. VAN EECKHOUTTE, S. HEYNDRICKX, G. DE MAESENEIRE and E. DE KEZEL, 'Overzicht van rechtspraak. Arbeidsovereenkomsten (2005-2012)', *Tijdschrift voor Privaatrecht* 2014, No. 1, 143.
53. Cass. 23 December 2002, AR S.01.0169.F.

- the worker did not seem to be an independent manager or owner of a business, as the premises, tools and materials were provided by the principal, or, more generally, the worker did not seem to have assumed the economic or financial risk of managing the exploitation managed by him;
- the worker ceased his activities once the principal ceased to use his services.

It is also interesting to note in relation to the example of the worker who owns some of the 'means of production' that the Court considered the following facts not incompatible, either individually or considered altogether, with a contract for services:

- the 'business' operated by the worker was the sole property of the principal;
- the worker did not participate in any way in the negotiations which led to the conclusion of the cooperation agreement between the principal and the manufacturer of kitchens;
- the worker was similarly never involved in the negotiation of the termination of that cooperation;
- the worker was, nevertheless, forced to work pursuant to the conditions imposed by his principal and the instructions of the manufacturer, so that he could only sell the kitchen furniture purchased from this manufacturer;
- the worker had no right to exploit the stand at which the kitchens, which he was required to sell were 'exhibited'.[54]

As these cases made their way to the Court, it would seem that socio-economic considerations, indeed, seem to hold sway over the employment tribunals and courts, but are typically refuted by the Court. A lot depends on the arguments used by the tribunals and courts to justify the reclassification and whether or not those arguments fit in the 'legal subordination paradigm' provided for by the ERA.

As has been noted earlier, the use of socio-economic criteria is much more pronounced under the 'special classification mechanisms'. Many of these criteria essentially aim to find out whether or not the worker runs a personal business. Does the worker make a personal and substantial investment in the business? Does the worker share in the profits of the business? Can the worker decide about the financial resources of the enterprise and is he responsible for those decisions? Does the worker decide about the procurement policy of the enterprise?

d) a self-employed person that established a relationship with other workers (not necessarily through a subordinate work contract – it could be, for instance, a relationship of association) and/or coordinates the work and services they provide?

Self-employed workers can organise and form associations in various ways. The Federation of Liberal Professions, for example, distinguishes between various forms.[55] Independent entities can (i) collaborate in an unstructured manner through professional contacts, (ii) form partnerships with an aim to share costs, or (iii) establish partnerships that share both the costs and revenues. This last example will typically require the formation of a company. The fourth form of association is what the federation calls 'vertical partnerships'. The initiative to form such a partnership rests with an established practitioner who will recruit co-workers in the capacity of independent contractors.

54. Cass. 28 April 2003, AR S.01.0184.F.
55. Federatie vrije beroepen, 'Samenwerken in associatie', http://www.federatievrijeberoepen.be/viewobj.jsp?id=423294.

The federation indicates that these independent contractors are at risk of being considered false self-employed.

A ruling that dates back to 2000 provides us with a good example.[56] It concerned an attorney-associate who started working for an international law firm as an independent contractor. Once the associate took on a position as an assistant at a Belgian university, the managing partner noticed an increased absence on the part of the associate. The managing partner, consequently, gave the associate a choice between either resuming work full-time at the firm or agreeing to the part-time organisation of his work. The associate declined both options and the relationship ended, after which the associate claimed back wages due to the fact that, according to him, the relationship was an open-ended employment relationship, instead of a contract for services. The Employment Tribunal applied the classification test, which governed labour relations at that time, and concluded that the associate was indeed an employee. It was the first time that a Belgian court decided to reclassify the relationship between an attorney and a company as an employment contract. The Employment Court eventually overturned the tribunal's judgment in a ruling that has received some criticism from commentators.[57] The general meeting of the Association of Flemish Bars decided on the second of March 2005 that a lawyer should from this time forth always and exclusively practice his profession as a self-employed person. The association made this decision because of the need for the practising lawyers to be intellectually independent and at all times objective.[58]

The application of labour law on the liberal professions still raises questions. The Act of 7 December 2016 on the organisation of the profession and the public supervision of company auditors, for example, clearly states that the auditor may not accept or continue an audit assignment if there is a direct or indirect employment relationship between himself, the audit firm, the network to which he belongs, or any other natural person who is in a position to influence, directly or indirectly, the outcome of the audit assignment.[59]

The ruling of the Employment Tribunal in 2000 nevertheless suggests that a risk of reclassification exists for those individuals that instigate a 'vertical partnership' in case the profession is not covered by a clearly established exemption like the company auditors are.

A strong binary divide between employment and self-employment

A royal decree on the 'social status' of self-employed workers

Belgian law still maintains a clear dichotomy between employment and self-employment.[60] The dichotomy in labour relations can be deduced from Royal Decree no. 38 concerning the 'social

56. Employment Tribunal Brussels 8 December 2000.
57. Employment Court Brussels 16 March 2004; W. VAN EECKHOUTTE, 'Advocaat-medewerker is geen werknemer: een schot naast de roos', *De Juristenkrant* 2004, Vol. 6, No. 87, 1-2.
58. Reglement betreffende het statuut van de advocaat, https://www.advocaat.be/documenten/ordeexpress/2006/18/reglement%20statuut%20advocaat.pdf.
59. Art. 12 wet 7 december 2016 tot organisatie van het beroep van en het publiek toezicht op de bedrijfsrevisoren / loi de 7 decembre 2016 portant organisation de la profession et de la supervision publique des réviseurs d'entreprises.
60. V. DE STEFANO and F. HENDRICKX, 'Gig economy, platform work, and the binary worker categorization'. in M. SOMERS (ed.), *Vorm geven aan digitale tijden*, Minerva, 2018, 96-111.

status' of self-employed workers.[61] A self-employed person is defined as any natural person engaged in professional activities in Belgium by virtue of which he is not bound by an employment contract or by a statute. The Royal Decree provides for (i) family benefits, (ii) retirement benefits and survivors' pensions, (iii) benefits in case of sickness, invalidity or maternity and (iv) the so-called *droit passerelle*. This 'bridging right' provides self-employed workers who have to stop their activity due to circumstances, among which is bankruptcy, with certain social security benefits and exemptions from social security contributions if they fulfil the legal conditions.[62]

Despite the merits of this Royal Decree, self-employed workers do operate under commercial law. Article I.1. of the Commercial Code defines any natural person who independently pursues a professional activity, any legal person and, in principle, any other organisation without legal personality as an 'enterprise'.[63]

Even though the call for an intermediate category resurfaces from time to time, this line of thought has never led to any result. In 2017, the Flemish Network for Enterprises (Voka)[64] argued in favour of a third status. The Minister of Employment dismissed the proposal when asked about his opinion in a parliamentary question, instead, opting for a revaluation of the governing ERA.[65] The idea of a third status has likewise been bounced around in scholarship. This happened, for instance, in the wake of the attempt to draft an International Labour Standard on contract labour.[66] The idea lives on but does not receive a lot of support.[67]

The extension of labour law to self-employed workers

The abovementioned Royal Decree describes the rights of self-employed workers in relation to social security law. Self-employed workers can generally expect little protection or obligations to derive from labour law. Some labour law provisions, nevertheless, do apply.

The labour inspectorate, for instance, can take measures that are also to be complied with by self-employed workers who work in the same workplace as employees and, therefore, have obligations under the regulations on the well-being of workers when performing their work.[68] In addition, both Chapters IV and V of the Act on the wellbeing of workers may apply to workers of subcontractors and temporary agency workers.[69] Chapter IV contains provisions that apply to external workers and temporary agency workers. The business has certain duties in relation to the contractors and subcontractors that it uses to execute the work, such as the provision of all

61. Koninklijk besluit nr. 38 van 27 juli 1967 houdende inrichting van het sociaal statuut der zelfstandigen / Arrêté royal no. 38 de 27 juillet 1967 organisant le statut social des travailleurs indépendants. For more information on this, see: M. WESTRADE and S. GILSON (eds.), *Le statut social des travailleurs indépendants*, Limal, Anthemis, 2013, 734 p.
62. Wet 22 december 2016 houdende invoering van een overbruggingsrecht ten gunste van zelfstandigen / Loi du 22 décembre 2016 instaurant un droit passerelle en faveur des travailleurs indépendants.
63. Wetboek economisch recht van 28 februari 2013 / Code de droit économique de 28 fevrier 2013.
64. *Het Vlaams netwerk van ondernemingen*.
65. Belgische Kamer van volksvertegenwoordigers, schriftelijke vragen en antwoorden 17 mei 2018, vraag nr. 2177 / Chambre de représentants de Belgique, questions et réponses écrites 17 mai 2018, question n° 2177.
66. C. ENGELS, 'Contract labour, de afhankelijke zelfstandige of de zelfstandige afhankelijke' in *Liber Amicorum Prof. Dr. Roger Blanpain*, Bruges, die Keure, 1998, 261-276.
67. F. KÉFER, Q. CORDIER and A. FARCY, 'Quel statut juridique pour les travailleurs des plateformes numériques?', *Tijdschrift voor Sociaal Recht / Revue de Droit Social* 2019, No. 1, 47-48.
68. Art 49 Code pénal social.
69. Wet 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk / Loi du 4 aout 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail.

necessary information with regard to risks and safety procedures, as well as the duty to ensure that contractors comply with their obligations under OSH. The contractors likewise have a set of obligations. Contractors shall respect and, in turn, make sure that subcontractors respect, the duty, for example, to cooperate with the client and other contractors in order to safeguard the wellbeing of all employees in the establishment. The other chapters of the legislation on workers' well-being only apply to employees and assimilated categories of workers, which each time depends on the chapter at hand.

Another important part of labour law in which self-employed workers are explicitly included are the Acts on certain forms of discrimination, on discrimination between men and women and against racism and xenophobia.[70] The acts define 'labour relations' as the relationships which cover, inter alia, employment, conditions of access to employment, working conditions and dismissal arrangements, whether for employed or unpaid workers, trainees, apprentices, workers engaged on occupation and career development contracts, or self-employed workers. The Acts thus explicitly protect self-employed workers against discrimination if they engage in 'labour relations'. The Acts furthermore provide examples of 'labour relations'. Accession as a partner in companies or partnerships is, for instance, considered an example of a labour relationship, more, in particular, a condition for access to employment.

The regional Acts on private employment services are another example. Both jobseekers and self-employed persons are treated in the same way as employees.[71]

Collective bargaining for self-employed workers in Belgium

Small businessmen and self-employed workers are quite adequately represented by employers' organisations. Self-employed workers, however, cannot be expected to take part in any collective bargaining agreements in the strict legal sense as they cannot be considered employees.

One important feature of Belgian collective labour law is that only the 'most representative organisations'[72] can conclude collective agreements pursuant to the Act on collective bargaining agreements and joint committees.[73] Only the three large trade unions are as a result capable to conclude such collective agreements in practice. One of these has, indeed, recently reached out to provide services for self-employed workers without personnel. The Confederation of Christian Trade Unions now operates a service called 'United Freelancers', which promises to represent their interests by means of collective bargaining at company, sector and national level.

This being the case, it will be interesting to see how this promise will take shape considering that Article 5 of the Act on collective bargaining agreements and joint committees reads as follows: *'a collective agreement is an agreement concluded between one or more workers' organisations and one or more employers' organisations, or one or more employers, which establishes individual*

70. Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie. Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes. Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination.
71. See art. 3 of the Flemish decree. Decreet 10 december 2010 betreffende de private arbeidsbemiddeling / Décret du 10 decembre 2010 relatif au placement privé. Wallonia and Brussels-Capital Region likewise have regional decrees with a similar broad scope of application.
72. For the criteria that determine what constitutes a 'most representative organisation', see wet van 29 mei tot inrichting van de Nationale Arbeidsraad / Loi organique du 29 mai 1952 du Conseil national du Travail.
73. Wet van 5 december 1968 betreffende de collectieve arbeidsovereenkomsten en de paritaire comités / Loi du 5 decembre 1968 sur les conventions collectives de travail et les commissions paritaires.

and collective relations between employers and employees in enterprises or an industry [. . .]'. The same Act extends the notion of employees to: '*persons who are not bound by an employment contract but nevertheless work under the authority of another person.*' Sham self-employed workers could, therefore, be considered employees due to this extension. Collective bargaining by genuinely self-employed workers is much less evident as the definition of collective agreements explicitly notes that it establishes individual and collective relations between employers and employees.[74]

An agreement that details the individual and collective relations between self-employed workers and principals is not a collective agreement in the legal sense of the word.[75] A collective agreement may only contain rights and obligations for employees and employers in addition to the obligations of the contracting parties.[76] Provided that the agreement is not a collective agreement, it can, consequently, not bear the legal effects that a collective agreement does due to the so-called 'hierarchy of norms' that applies in labour law.[77] Another issue is the question of how self-employed workers should be represented in the collective bargaining process.[78] Some self-employed workers may turn their attention towards the trade unions, while others remain represented by employer's organisations.

The Christian Trade Union would predominantly aim to represent self-employed workers without personnel. Interest groups for self-employed persons, however, already existed. The Association for Self-employed Entrepreneurs (UNIZO) and the Neutral Syndicate for the Self-Employed are not exactly convinced by the merits of the union's initiative. Freelancers traditionally turn towards employers' associations for representation, while false self-employed workers could already rely on the trade unions to defend their interests.

Another aspect of the debate is the problematic nature of collective bargaining by self-employed workers under the governing provisions of antitrust law.[79] Antitrust law would complicate agreements between workers and principals if those workers classify as 'undertakings' pursuant to EU competition law. The agreement could be considered a decision or practice that prevents, restricts or distorts competition within the internal market.[80] Not every provision in a collective agreement among self-employed workers seems to necessarily have the object or effect of harming competition. Although fixing the level of remuneration among each other in relation to third parties would, of course, be off limits, an agreement that intends to improve working conditions may still be on the table.

74. Soon to be published: D. DUMONT, A. LAMINE and J.-B. MAISIN (eds.), *Le droit de négociation collective des travailleurs indépendants*, Brussels, Larcier, 2019 (forthcoming).
75. F. DORSSEMONT, 'Les travailleurs de plateforme face au droit des relations collectives du travail: les droits fondamentaux des travailleurs, une porte d'entrée?', *Tijdschrift voor Sociaal Recht / Revue de Droit Social* 2019, No. 1, 122.
76. Cass. 2 juni 2014 AR S.12.0113.N.
77. Art. 51 Act on Collective Bargaining.
78. Do they join trade unions or employers' organisations? Do they negotiate with the client or do they negotiate among one another about their mutual terms of engagement in relation to third parties? F. HENDRICKX, 'Vijftig jaar CAO-Wet in België en nieuwe vormen van arbeid: de cao als cadeau', *Arbeidsrecht Journaal* 2017-18, No. 2, 6-7.
79. See for example, V. DE STEFANO and A. ALOISI, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers' in J. R. BELLACE and B. TER HAAR (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Edward Elgar Publishing Ltd (forthcoming). Available as Bocconi Legal Studies Research Paper No. 3125866 at SSRN: https://ssrn.com/abstract=3125866.
80. Art. 101 TFEU.

While the extension of provisions to self-employed workers in collective agreements is not a feature of contemporary Belgian labour relations, other innovations with regard to the representation of self-employed workers have been introduced. One cooperative that is called SMart and which was founded in 1998 has generated a significant degree of interest. It concerns a cooperative structure for project guidance and management that aims to support freelancers, in particular, creative and cultural workers, and explicitly promotes solidarity among its members, partners and clients.[81] The non-profit organisation gained recognition when helping Deliveroo bikers operate pursuant to an intermediated employment contract, instead of a direct contract for services with the users of the platform.

The workers become salaried employees of SMart as a consequence of this intermediation. While the organisation engages the workers on very short-term employment contracts, the workers themselves retain the capacity to directly negotiate the assignment with the client.[82] This legal construction is problematic because of a number of reasons, one of which is the employer's obligation under Article 20 of the ECA to furnish the employee with work.[83] SMart does not furnish its associates with any work. Their goal is to extend the protection of social law to workers that effectively behave like independent contractors, by posing as their legal employer. The legislature and government have not yet taken any action to reconcile self-employed workers' demands for these types of constructions, which resemble *portage salarial*, with current labour law.

The employing entity

The legal employer in Belgium is usually understood to be the employee's co-contractor.[84] The identification of the employer is consequently based on the employment contract itself. While such an approach may be prone to artificial legal structuring, certain provisions limit this risk. Belgian labour law contends that the employer's authority may only be exercised by the natural or legal person associated with the employee by virtue of an employment contract.[85] This general rule derives from Article 31 of the Act on Temporary Work, Temporary Agency Work and the Posting of Workers.[86]

The legal structure surrounding SMart, for example, potentially violates this article as the parties involved may breach the absolute prohibition for employers to hire out employees to a third party, in case that third party makes use of the employees and exercises any kind of authority over them that would normally be exercised by the employer. Any kind of employer's authority suffices to violate the prohibition. The prohibition, however, does not apply if a self-employed worker is dispatched to a third party, or if the employee is dispatched without the third party exercising any kind of authority over the employee.

81. SMart, https://smartbe.be/en/; J. DRAHOKOUPIL and A. PIASNA, *Work in the platform economy: Deliveroo riders in Belgium and the SMart arrangement*, Brussels, Etui, 2019, 43 p.
82. SMart, https://smartbe.be/wp-content/uploads/2019/02/What_is_smart.pdf.
83. C. CANDITO, M. DEGUELDRE, S. GILSON and L. HAREL, 'Regards sur le portage salarial' in C.-E. CLESSE and S. GILSON (eds.), *Le travail temporaire, le travail intérimaire et la mise à disposition de travailleurs*, Limal, Anthemis, 2017, 279.
84. M. VAN PUTTEN, *Het arbeidsrecht en de onderneming*, Mortsel, Intersentia, 2009, 688.
85. Cass. 6 September 2005, *Rechtspraak Antwerpen Brussel Gent* 2006, 125.
86. L. ELIAERTS, *Terbeschikkingstelling van werknemers en uitzendarbeid*, Mechelen, Kluwer, 2014, 897 p.; C.-E. CLESSE and S. GILSON (eds.), *Le travail temporaire, le travail intérimaire et la mise à disposition de travailleurs: Les 30 ans de la loi du 24 juillet 1987*, Limal, Anthemis, 2017, 356 p.

As a consequence, in case SMart contends to be the legal employer, no single third party or client of the SMart associate may exercise any kind of employer's authority over the employee. It follows from Article 31, which is a rule of public policy, that the agreement by which the employer posts workers to third parties, in disregard of that prohibition, is entirely null and void.[87] Certain exemptions to this prohibition have been allowed, such as a general exemption for temporary agency work and an exemption for the exercise of authority by third parties in order for this third party to comply with his duties under OSH law. Exemptions have to be interpreted restrictively.

The third party that engages another entity's employee in violation of the prohibition will be assumed to have a direct open-ended employment contract with the employee in question from the moment the employee started to work with this third party. The new employer – former third party – and the former employer will be held jointly and severally liable for the payment of the social security contributions, wages, allowances and benefits resulting from the new employment contract. The Act thus institutionalised a three-step approach. The already-existent employment contract becomes null and void, a new employment contract is formed between the employee and third party, and the former employer is, nevertheless, held jointly and severally liable for the debts of the new employer.

Not every shared exercise of authority results in the severe consequences of this three-step approach. Regular employers, other than temporary work agencies, can also legally dispatch employees to third parties by complying with the legal requirements thereto. Since the unlawful use of a dispatched employee bears severe consequences and due to the arduous process required to lawfully dispatch employees, an alternative mechanism has developed in practice. This additional possibility entails that one employee is bound by a single employment contract with multiple employers. The employment contract is usually considered only to be *intuitu personae* on behalf of the employee and not on behalf of the employer(s). Scholarship furthermore seems to agree that there are no legal provisions that prohibit such a construction. Implementing the legal construction in practice without breaching any provisions of labour law can, however, prove daunting. The multiple employers involved might not belong to the same joint (sub)committees due to the various industries they belong to. Two sets of collective agreements could, as a consequence, apply to one single employment contract. This is difficult, if not nearly impossible, to successfully realise in certain cases.

Notwithstanding practical difficulties, an employee may have two different employers under a single employment contract, according to W. Van Eeckhoutte, if the employers share the exercise of the employer's prerogatives and are closely associated.[88] L. Vandeplas and V. Petry observed the development of a 'comprehensive employment contract'. They describe the contract as an employment contract concluded between an employee and two or more employers that share the employer's prerogatives. Every single employer, nevertheless, makes a commitment to respect all the duties of a regular employer and to be held liable up to the full amount for the employers' debt vis. the employee.[89] The authors dismiss the requirement of a 'close association' between the employers in question.[90]

An interesting point to highlight is that even though the latter contribution advances the 'comprehensive employment contract' as a flexible solution for businesses, a more recent analysis of the

87. Cass. 15 February 2016, C.14.0448.F.
88. W. VAN EECKHOUTTE, *Sociaal Compendium Arbeidsrecht 2018-19*, Mechelen, Kluwer, 2018, 667.
89. L. VANDENPLAS and V. PETRY, 'Co-sourcing: de globale arbeidsovereenkomst', *Oriëntatie* 2018, No. 4, 113.
90. *Ibid.* 114.

case law on this topic stresses the fact that courts generally decide to acknowledge a situation of multiple employers in order to grant specific protection to the employee.[91] This suggests that the legal arrangement may eventually gain broad support.

Belgian labour law has thus traditionally had a very constricted view on multi-partite arrangements, as expressed through the general prohibition of public policy on the dispatching of employees. Although exceptions to the prohibition have gradually increased,[92] they have to be interpreted restrictively. Paradoxically enough, one way to escape from the prohibition's grasp is to devise employment contracts with multiple employers. Such a multi-employer employment contract brings about a situation that resembles the end result of the three-step approach in Article 31 of the Act on Temporary Work, Temporary Agency Work and the Posting of Workers. Considering that the Federal Public Service for Employment, Labour and Social Dialogue agrees with the legality of these contracts, despite uncertainty about the preconditions for such legality, attention from the legislature or government for these developments seems warranted.

Contemporary debates about the reform of the classification mechanism

No discussions are currently taking place with an aim to fundamentally reform the scope of application of labour law. The Belgian social partners did draft a report in 2017 in which they diagnosed topics such as digitalisation and the platform economy.[93]

The report was adopted under the auspices of the *Conseil Central de l'Économie* and *Conseil National du Travail*. It plainly states that the social partners are of the opinion that a new status for 'independent employees' should not be created. It would, instead, be much more useful to reflect on how the already existing statuses can be adapted to the platform economy. The trade unions, moreover, warned in another recent advice about the abusive use of a new status that had been created for so-called 'student-entrepreneurs' in the platform economy.[94]

Based on these sources, it is safe to say that social partners consider platform work as an important issue, but an issue that does not warrant any preferential treatment. Notwithstanding the social partners' preference to tread lightly, the government did find it necessary to formalise platform work through a system that allows for 'untaxed additional income'. The Act on economic recovery and the strengthening of social cohesion has three pillars: working for an association, occasional services between citizens and the sharing economy. The Act allows platform workers to earn an untaxed income of up to EUR 6.250 a year if they are engaged through a so-called 'recognised platform'.[95]

91. A. BOSERET, K. MAGERMAN and I. VERDONCK, 'Meervoudig werkgeverschap: een *work-around* voor de verboden terbeschikkingstelling van personeel?', *Oriëntatie* 2019, No. 5, 140.
92. Another example is the establishment of a legal scheme for so-called 'groups of employers' (*groupements d'employeurs*). See Wet 12 augustus 2000 houdende sociale, budgettaire en andere bepalingen / Loi du 12 aout 2000 portant des dispositions sociales, budgétaires et diverses.
93. National Labour Council and Economic Council for Enterprises, http://www.cnt-nar.be/RAPPORT/rapport-107-FR.pdf.
94. National Labour Council, http://www.cnt-nar.be/AVIS/avis-2085.pdf.
95. For the list of recognised platforms, see: économie collaborative – liste des plateformes agréées, https://finances.belgium.be/sites/default/files/downloads/127-economie-collaborative-liste-plateformes-agreees-20190509.pdf.

The National Labour Council feared that this method would lead to a number of harmful consequences, such as unfair competition and a shift from professional activities and regular employment to these exempted forms of employment.[96] On top of that, the social partners deemed the system detrimental to what they had built up over the years in the field of social protection with multiple previous governments. Social law is, for instance, not applicable to platform work performed in this particular system.

The social partners are clearly not in favour of this development. An agricultural association ('Boerenbond'), the Association for Self-employed Entrepreneurs, the Neutral Syndicate for the Self-Employed, the General Christian Trade Union Confederation of Belgium, as well as others, have claimed the unconstitutionality of the Act in front of the Constitutional Court based on various grounds. The case is still pending.

Notwithstanding abundant literature on the nature of the employment contract/relationship,[97] the classification mechanisms have largely been left untouched since the amendment in 2012.[98] An immediate overhaul of the general classification mechanisms is not to be expected. The (last) Minister of Employment Kris Peeters emphasised that even though an intermediate worker category had been considered, an overall consensus seemed to emerge in favour of retaining the current dichotomy. It would, instead, be recommendable to evaluate the current employment status and provide opportunities to make employees more autonomous.[99]

Incremental improvements to the governing system remain imaginable. The annual reports of the Administrative Commission for the Regulation of the Employment Relationship can serve as a source of inspiration.[100] The administrative body's 2018 report interestingly enough notes that an inquiry in the joint (sub)committees, that was conducted by the National Labour Council, indicates that a choice should be made between the enforcement of the industry-specific special criteria, implying that also related legislative lacunae have to be addressed, or, instead, the 'generalised use' of the general criteria.[101]

96. National Labour Council, http://www.cnt-nar.be/AVIS/avis-2065.pdf.
97. K. NEVENS, *De Arbeidsrelatie, de zelfstandige en de ondernemer*, Bruges, die Keure, 2011, 730 p.; S. GILSON (ed.), *Discipline et surveillance dans la relation de travail*, Limal, Anthemis, 2013, 602 p.; B. DEBAENST (ed.), *Van status tot contract: De arbeidsovereenkomst in België vanuit rechtshistorisch perspectief*, Bruges, die Keure, 2013, 189 p.; S. GILSON (ed.), *Subordination et parasubordination: La place de la subordination juridique et de la dépendance économique dans la relation de travail*, Limal, Anthemis, 2017, 500 p.; L. DEAR and E. PLASSCHAERT (eds.), *Le contrat de travail revisité à la lumière du XXI^e siècle*, Brussels, Larcier, 2018, 679 p.; J. CLESSE and F. KÉFER, *Enjeux et défis juridiques de l'économie de plateforme*, Limal, Anthemis, 254 p.
98. Wet 25 augustus 2012 tot wijziging van Titel XIII van de programmawet (I) van 27 december 2006, wat de aard van de arbeidsrelaties betreft / Loi du 25 aout 2012 modifiant le Titre XIII de la loi-programme (I) du 27 décembre 2006, en ce qui concerne la nature des relations de travail.
99. T. VERMEIR, 'Kris Peeters: "Geen nieuw statuut creëren voor freelancers"', https://www.nextconomy.be/2018/05/kris-peeters-geen-nieuw-statuut-creeren-voor-freelancers/. Predominantly the Workable and Manoeuvrable Work Act has been adopted to that end. Wet 5 maart 2017 betreffende werkbaar en wendbaar werk / Loi du 5 mars 2017 concernant le travail faisable et maniable.
100. *De Administratieve Commissie ter regeling van de Arbeidsrelatie* or *Commission administrative de règlement de la relation de travail* is composed of representatives of the Federal Public Service for social security, and for employment, labour and social dialogue as well as representatives of the National Institute for the social insurance of employees and of self-employed workers. The commission, therefore, has an apolitical structure. See https://commissionrelationstravail.belgium.be/fr/index.htm.
101. The commission's reports can be found on the official website, see annual report 2018, 17.

Conclusion

The Employment Relationships Act had a big influence on the Belgian classification mechanism by consolidating the jurisprudence of the *Cour de Cassation*, and thereby giving the Court the opportunity to develop a jurisprudence that revolves around the lawful application of the general criteria. The incorporation of, inter alia, the special classification mechanisms in 2012 was also a significant turn of events.[102]

It seems suitable for this contribution to conclude by outlining some elements of Belgian labour law that are particularly worth having a tangible discussion about.

- The use of specific criteria in order to regularise the sometimes-concealed use of socio-economic facts when applying the general classification mechanism. Would an industry-based use of specific criteria be able to replace the special classification mechanisms, by allowing the courts to openly rely on socio-economic facts in case they have to assess the existence of an employment relationship in a sensitive industry?
- The collective rights of self-employed workers have lately received additional recognition on the international stage.[103] If self-employed workers enjoy the right to bargain collectively, positive measures should be taken by the State to encourage the conclusion of collective agreements by these right-holders. The State should, as a consequence, rethink the regulatory structures that govern labour relations in order for collective agreements with self-employed workers to actually be concluded. The realignment between antitrust law and collective rights can be part of this larger exercise.
- The use of multi-employer employment contracts could be formalised. Such an endeavour could fit into a broader evaluation of the Act on Temporary Work, Temporary Agency Work and the Posting of Workers and the pivotal role of the prohibition engrained in Article 31.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

102. The amendment made other changes as well. It established, for example, the Administrative Commission for the Regulation of the Employment Relationship.
103. European Committee of Social Rights 12 September 2018, *Irish Congress of Trade Unions (ICTU) v. Ireland*, No.123/2016 §93-95; ILO, *Compilation of decisions of the Committee on Freedom of Association*, 2018, 70-71 and 240.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 229–239

DOI: 10.1177/2031952519870018
journals.sagepub.com/home/ell
SAGE

Trade union representation for new forms of employment

Monika Schlachter
IAAEU, Trier University, Germany

Abstract
Defining the personal scope of application of the right to be represented by a trade union for collective bargaining purposes starts by defining the notion of employee/worker on whose behalf the conclusion of collective agreements is not disputed. In the German legal system, a sub-category of self-employed persons, known as 'employee-like' persons, is also included in the scope of the statute on collective agreements. For all other self-employed persons, however, no such statutory inclusion exists. They are, rather, prevented from collective price setting by (national und EU) competition law. Upon a closer look at the social purpose of exempting collective agreements from the restrictions of competition law, it is necessary to differentiate according to the existence of a structural power imbalance to the detriment of one contracting party much rather than according to the type of contract concluded. Some self-employed persons, specifically those categorised as workers under a new form of employment, do need collective bargaining as much as employees do, as they find themselves in a comparably weak individual bargaining position.

Keywords
Employees/self-employed and employee-like persons under German law, collective bargaining for self-employed persons, collective agreement, competition law

Introduction

While modern forms of work develop, more diverse, fractured and digitised than previous contracts for services, new obstacles to trade union representation also emerge. Current work relationships increasingly tend to be organised as self-employment, frequently for saving the direct and indirect costs associated with an employment relationship, sometimes also for offering more flexibility, even to labour providers. However, an increasing part of the work force working as self-employed persons means more difficulties for expanding union coverage in undertakings. Self-employed persons frequently work from home or from anywhere else instead of sharing

Corresponding author:
Monika Schlachter, IAAEU, Trier University, Universitätsring 15, 54296 Trier, Germany.
E-mail: schlacht@uni-trier.de

common workspace; consequentially they lack opportunities for building up a collective identity as colleagues, and even have to compete with regularly employed colleagues for specific work tasks. For unions, that means it becomes more complicated on a factual basis to reach out to and convince them to join a union for their professional advancement. Next to such practical challenges of how to organise freelancers, trade unions also face legal obstacles when attempting to bargain collectively on their behalf. National and EU competition law is predominantly seen as standing in the way of collective bargaining for union members who are self-employed or at least do not fit into the regular concept of employee/worker. For improving working conditions for working persons independent of the legal status assigned to their type of contract, trade unions ask for the legal competence to bargain and conclude collective agreements on their behalf.

The easiest way of securing the legality of trade union representation for working people engaged under new forms of contracts for labour provision would be expanding the notion of employee/worker to also cover such non-traditional contracts. This would imply the additional advantage of providing beneficiaries with the protection of statutory labour law as a whole, avoiding different levels of protection for different types of contracts. However, as this paper seeks to argue for the legality of union representation for the majority of persons working under new contracts for services, it will concentrate on the arguments for establishing the entitlement to bargain collectively and have collective agreements concluded on their behalf. Whether or not statutory labour law should also be applicable to their work relationship is not logically dependent on collective bargaining rights, as the German legal system quite vividly demonstrates. However, for identifying the legal challenges and opportunities, the technical differentiation between employee and self-employed persons including their sub-group of the employee-like self-employed deserves explanation first.

The personal scope of application of labour law in Germany

Who is a worker?

For decades, the notion of '*Arbeitnehmer*' (person working under a contract of employment/employee) was not defined by statutes[1] but exclusively developed by the courts in their case law.[2] With a law entering into force on 1 April 2017, a new provision was introduced into the Civil Code (Art. 611a BGB), which for the first time defined the contract of employment. This provision follows the regular principles of the law on obligations under the Civil Code, not defining the status of the contracting parties but instead the obligations created by concluding this type of contract. By regulating the contract of employment, an indirect definition emerges as an employee is to be understood as anyone promising services under a contract of employment. The context in which this new provision was established served a very distinct purpose: it was included in the draft Act changing the statute on temporary agency work.[3] It aimed at preventing the bypassing of labour protection by artificially avoiding the form of an employment contract.[4] In order to properly

1. Statutory provisions instead refer to the description that the notion of employee covers white-collar and blue-collar workers as well as apprentices, without defining any of those categories, e.g. Art. 5 § 1 (1) BetrVG; Art. 5 § 1 (1) ArbGG; Art. 2 § 2 ArbZG: Art. 622 § 1 BGB.
2. BAG (Federal Labour Court), 23.5.2009 – 5 AZR 31/08; 20.1.2010 – 5 AZR 106/09; 20.11.2016 – 9 AZB 41/16.
3. Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes of 21 February 2017, BGBl. I-2017 p. 258.
4. BR-Drucks. 294/ 16 of 2 June 2016, p. 1.

differentiate between contracts for independent provision of work and work as an employee, the latter type of contract had finally to be specified by law. Anyhow, it was the explicit goal of the legislature not to change the legal situation content wise.

According to the preparatory material to the draft Act, the legislator intended to mirror previous case law on a one-by-one basis.[5] As this case law described the preconditions for the classification as an employee, the purpose of regulating the employment contract is served merely indirectly.[6] Under the new provision, the key criteria characterising a contract of employment and differentiating it from other types of service-related contracts, is the following: an employment contract obliges one party to perform services under the direction and in the interest of the other party who is obliged to pay for those services (Art. 611a §1 (1) BGB). The working party does not owe a duty in relation to the success of their work; the payment is dependent on the provision of work as requested by the other party, not on the successful completion of a specific task. The obligation to follow directions may concern the concrete function fulfilled, the time and place of work, the way and means of how services are to be organised (Art. 611a § 1 (2) BGB). Compared to the notion of worker developed by the CJEU, the precondition of working 'under the direction' of another person is not construed completely in parallel. The CJEU seems to give priority to whether the other person would be able to remove the subordinate person from their position so that even Managing Directors of a company might qualify as employees.[7] In contrast, under German law, working under the direction of another person implies that this person directs the ways, means and time an employee actually works, be it by supervising the employee directly or by defining their concrete duties explicitly in the contract.

In following the earlier practice of the judiciary, the existence of an employment contract should be determined by taking into consideration all the specific circumstances of the concrete contract and how it is put into practice (Art. 611 a § 1 (5) BGB). The obligation to follow directions is understood to create a 'personally dependent' status of the party providing the service,[8] as opposed to being merely economically dependent on the wages paid in return.[9] By including personal dependency in the notion of employee, courts aimed at avoiding the characterisation of employees by their need to earn money for making a living. Persons inheriting a fortune or marrying a well-off spouse, or highly paid specialists or professional sports players should count as employees once their contractual relationship is one of 'personal dependency'.

Case law is rather generous in taking into consideration all the circumstances of the written contract and the practice of how to perform the mutual obligations for establishing the existence of a status of personally dependent service. Should the practice differ from what is written in the contract, it is the factual situation that determines the legally relevant type of the contract (Art. 611a § 1 (6) BGB).[10] In principle, however, the mutual will of the contracting parties remains relevant for defining the type of contract concluded. If they both explicitly agree an employment contract, this characterisation is definite.[11] Once the contract specifies providing the services under

5. BR-Drucks. 294/ 16 of 2 June 2016, p. 14.
6. *Schneider*, in: Münchner Handbuch zum Arbeitsrecht, vol. I (4th ed. 2018), § 18 no. 10.
7. CJEU 11.11.2010 – C-232/09, Danosa v. LKB Lizings SIA, no. 44-49.
8. Following the established case-law: BAG 28.2.1962 – 4 AZR 141/61; 27.3.1991 – 5 AZR 194/90; 20.7.1994 – 5 AZR 627/93; 4.12.2002 – 5 AZR 667/01.
9. BAG 20.7.1994 – 5 AZR 627/93; 20.9.2000 – 5 AZR 61/99;20.1.2010 – 5 AZR 99/09.
10. BAG 11.8.2015 – 9 AZR 98/14; 29.8.2013 – 10 AZR 499/11.
11. BAG 12.9.1996 – 5 AZR 1066/94.

a contract of self-employment, this amounts to excluding the service provider from the protection of labour law. Given that contracts of services typically are standard contracts pre-fabricated by one of the parties, courts may determine whether they illegally deviate to the detriment of the other party from statutory preconditions.[12]

Case law created a (principally non-exhaustive) number of factors that might indicate, under appropriate circumstances, the existence of personally dependent work. The most important indicators include: being integrated into the work organisation of the other party;[13] necessary working tools being provided and paid for by the other party;[14] wages being determined by hours of service provided, as opposed to a predefined result of the work undertaken; and the existence of contractual entitlements to paid holidays, sick leave or maternity benefits. The possibility of bringing in substitutes to fulfil the obligations undertaken is usually a strong indicator against the existence of a contract of employment.[15] An alternative approach propagated by legal doctrine took the allocation of economic risks and opportunities as the main element for establishing a person as an independent businessperson,[16] i.e. operating outside labour law. This approach has not been included in the new provision, as it was also never part of the legal reasoning of the judiciary. Some of the aspects used for establishing the existence of independent decision-making of a businessperson may, however, be part of proving the existence of personally dependent work under the current provision.

However, the established notion was flexible enough to include all the 'classical' forms of non-standard employment relationships. As this notion was unrelated to the length of working time, all forms of part-time workers are included,[17] no matter how few hours they work.[18] Fixed-term contracts are also undisputedly included in the notion of employment contract. The same applies to temporary agency work contracts, at least as far as the contracts between the agencies and their employees are concerned. Legal doctrine does not acknowledge the existence of a contractual relationship between the agency worker and the user undertaking, as long as the employment contract with the agency is legal. For new forms of employment such as crowd workers, however, the evaluation is different. Few of them would qualify as employees under the above-described definition as they primarily do not work under the direction of the other party nor are they included in their work organisation.[19]

For specific cases, a legal fiction is used to determine the existence of an employment contract, e.g. the transfer of undertakings to the new owner establishing an employment relationship (Art. 613 a § 1 (1) BGB), or the illegal hiring-out of temporary agency workers, establishing a contract of employment with the user undertaking (Art. 9, 10 AÜG).

12. BAG 15.2.2012 – 10 AZR 111/11.
13. BAG 13.8.1980 – 4 AZR 592/78.
14. BAG 13.8.1980 – 4 AZR 592/78.
15. BAG 11.8.2015 – 9AZR 98/14.
16. *Wank*, „Arbeitnehmer und Selbständige" (1988), p. 32 ff.
17. BAG 9.9.1981 – 5 AZR 477/79; 16.4.2003 – 7 AZR 187/02.
18. However, 'zero-hour' contracts, if construed as employment contracts, would be invalid for violating the good-faith standard. Instead, parties could agree on a framework agreement establishing the conditions of future contracts between them. This agreement would be legally valid once both sides remain free to accept or not accept subsequent work offers based on such agreement. Only the individual offer, however, would then turn into an employment contract, whereas the framework agreement as such does not create any obligation to work or pay, BAG 15.2.2012 – 10 AZR 111/11.
19. *Hanau*, „Schöne digitale Arbeitswelt?", Neue Juristische Wochenschrift 2016, 2613.

The question remains whether the newly introduced statutory provision will change the situation for better or worse: will it become easier or more complicated to adapt the employment contract to the developments in the world of work?[20] Could the new provision initiate the evolution of adequate protection also for persons providing work lacking the classical elements of the work in industries? In answering this question, it is topical that the legislator did not even intend to change the legal situation through this reform. It seems fair to say that, consequentially, the courts will continue deciding cases the same way as they have previously.[21] Only under the auspices of legal doctrine does one aspect seem noteworthy: Without the statutory definition of an employment contract, the federal labour court based their decision on the understanding that an employee is a sociological description much rather than a legal term.[22] Therefore, all elements of this notion were mere indicators of the existence or otherwise of an employment relationship; even the lack of one or two of the most prominent indicators could be overcome by the existence of several other indicators. The new statutory provision operates on a slightly different dogmatic approach. It takes on board the 'indicators' most regularly applied in case law but establishes them as legal conditions for the existence of an employment contract; lacking one of these features consequentially prevents the contract from being regarded as an employment contract.[23] The judiciary, however, does not seem to have changed its line of reasoning at all after the entering into force of the new provision.[24]

Self-employed persons

As the concept of employee is characterised by the notion of 'personally dependent' work undertaken under the direction and control of the other party, all work relationships lacking such characterisation in principle fall outside the protective standards of labour law. However, some exceptions to this rule traditionally are accepted for some forms of work relationship that are deemed to deserve at least some social protection as well. For this purpose, the German legal system provides the category of '*arbeitnehmerähnliche Person*' ('employee-like person') between working persons included in, and those totally excluded from, labour law, which, from a dogmatic standpoint, qualify as a sub-group of the self-employed. To them, if specifically provided for in the relevant legal sources, some labour law statutes apply. However, only contracts qualifying as employment contracts open the access to labour law in general.

Those in this category are considered self-employed as there is lacking the main feature of an employment relationship - the personally dependent work status. Instead, the person is considered merely economically dependent on the other party, once the person is dependent on the income from primarily one contract for securing their capacity to make a living. Economic dependency is strong enough to put a person into this category, as opposed to being independently self-employed, when the person needs social protection as much as the typical employee.[25] This status is indicated

20. *Deinert*, „Neuregelung des Fremdpersonaleinsatzes im Betrieb", Recht der Arbeit 2017, 83, 85; *Preis*, in: Erfurter Kommentar zum Arbeitsrecht (19th ed. 2019), art. 611a BGB no. 23 ff.
21. *Reinecke*, „Neues zum Arbeitnehmerbegriff", Arbeit und Recht 2019, 56, 57.
22. BAG 21.7. 2015 – 9 AZR 484/14; BVerfG 20.5.1996 – 1 BvR 21/96.
23. *Preis*, „§ 611a BGB – Potenziale des Arbeitnehmerbegriffs", Neue Zeitschrift für Arbeitsrecht 2018, 817.
24. *Vogelsang*, in: Schaub (ed.), Arbeitsrechtshandbuch, § 8 „Arbeitnehmer" no. 22; *Thüsing*, in: Henssler/Willemsen/Kalb (eds.), Arbeitsrecht Kommentar (8th ed. 2017), § 611a BGB no. 26, 46.
25. BAG 21.6.2011 – 9 AZR 820/09.

by either the dependency on just one contract as a source of income,[26] or by the fact that one contract represents in absolute terms the main portion of the total income for services received under several contracts.[27] The statute on collective agreements, entitling employee-like persons to bargain collectively and be covered by collective agreements (Art. 12a TVG), requests that such persons meet several criteria. They must: qualify as economically dependent persons providing their services on the basis of any kind of civil law or commercial law contract for services; be obliged to provide their services in person primarily without the help of employees; provide their services to just one contracting party or generate more than 50% of their income from providing this type of service to just one contracting party. Even though this provision regulates specifically the possibility of having one's contract conditions regulated by collective agreements, the pre-conditions mentioned are indicators for establishing the status as a member of the 'employee-like' category in general. In contrast, an independent business person is characterised[28] by providing their services under the conditions of competition on the general market, operating on the basis of risks and opportunities, organising their own business, potentially engaging personnel, receiving their payment not as an hourly pay rate but upon successfully completing the service, and fixing their prices autonomously.[29]

The 'employee-like' category of service providers is covered by labour law standards only insofar as the respective statutes are explicitly extended to it. The most important labour law statues including this category in their personal scope of application are the following:

- -The code of procedure for the (specialised branch of) labour courts (Art. 5 ArbGG); as a consequence, the labour courts are exclusively competent for all contractual issues between such persons and the users of their services.
- -The code on paid holidays (Art. 2 s. 2 BUrlG); as a consequence, the persons are entitled to 24 paid days of leave per year.
- -The code on health and safety at work (Art. 2 § 2 no. 3 ArbSchG); all regulations concerning health and safety will apply to such persons.
- -The anti-discrimination legislation (Art. 6 § 1 no. 3 AGG); the EU-law based prohibitions against discrimination will apply to such persons.
- -The maternity protection Act (Art. 1 § 1 no.7 MuSchG); as a consequence, maternity protection with the exception of financial entitlements will apply.
- -The code on collective bargaining (Art. 12a TVG); such persons will be entitled to have their contract conditions regulated by collective agreements (which would include a right to participate in collective action).

26. LAG Berlin-Brandenburg 31.8.2010 – 6 Ta 1011/10.
27. BAG 11.4.1997 – 5 AZB 33/96.
28. There is no statutory provision providing a legal definition, either. Instead, the judiciary developed such characterisation according to a statute regulating the contract of independent sales representatives, Art. 84 § 1 (2) HGB („Selbständig ist, wer im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann"). According to this clause, a person acts as an independent contractor if they are entitled to determine their ways and means of work, including working time, autonomously.
29. BAG 12.12.2001 – 5 AZR 624/96.

- Additionally, under the code of social security, employee-like persons are obligatorily insured in the statutory old-age pension system (Art. 2 no. 9 SGB VI), if they do not employ another person and if they are permanently and primarily working for just one contracting partner.

Comparing those entitlements provided to employee-like service providers to entitlements given to employees only, it seems difficult to identify one overarching principle for deciding which kind of rights were included and why. Those protective instruments based on EU Directives demanding their applicability also to self-employed persons are an obvious choice, as they do not offer the legislator a viable alternative. Rules such as including the self-employed in (some) social security schemes could be the consequence of primarily economic considerations: where self-employed persons demonstrably do not organise protection against social risks on a private basis or are economically unable to do so, state social aid systems funded by tax money will provide their last available fall-back option. Including such persons in public social security schemes will be a means to save tax money. As for the remaining, purely labour related provisions, no obvious reason for extending them to self-employed workers is immediately detectable. Specifically concerning their inclusion in collective bargaining rights and collective agreement coverage is dealt with in more detail below.

The question, however, remains, why so much effort must be devoted to differentiating between employees and self-employed service providers if, at least for several categories of persons, it is agreed that the latter may deserve protection in a manner comparable to an employee? In terms of legal doctrine, self-employed persons in general enjoy the fundamental freedom to enter into any type of contract, thereby securing their own professional interests. Following this line of reasoning, freely agreed upon contractual terms are the best way of balancing the interests of contracting parties, and no state interference should hinder such balancing process unless it is established that one party is strong enough to simply dictate the bargaining results.[30] The existence of such a power imbalance, however, was commonly accepted for employment relationships;[31] for every other type of contract, it is disputed. Prescribing the application of labour law to all types of contracts providing services might, in this view, interfere with self-determination and freedom of contract that would be constitutionally adequate only in case of objective justification. Consequentially, the application of specific protective rules for an employment relationship also to other contracts is justifiable only upon establishing functional equivalence between these contracts.

The personal scope of application of the freedom to bargain collectively

Labour law provisions

The freedom of association is a fundamental right protected by the Constitution in a clause formulated with the broadest possible personal scope of application. The relevant provision (Art. 9 § 3 GG) principally guarantees freedom of association to all persons and all professions. Becoming member of a professional organisation for furthering one's own working and economic conditions therefore is open to everyone, including the self-employed, independent business persons,

30. BVerfG (Federal Constitutional Court) 7.2.1990 – 1 BvR 26/84; 19.10.1993 – 1 BvR567/89; 5.8.1994 – 1 BvR 1402/89.

31. *Vogelsang* in: Schaub, Arbeitsrechtshandbuch, § 8 „Arbeitnehmer“ no. 3.

employers or civil servants executing authority in the name of the state. However, this provision does not guarantee, according to the predominant established legal opinion, unions the right to conclude collective agreements. Collective agreements differ from civil law contracts in that they gain a specific normative effect; this effect does not follow from the constitutionally protected process of collective bargaining as such but is based on the legislative decision to structure industrial relations by such normative means. The unions' fundamental right to bargain collectively does not result in an obligation on the legislator to provide normative effects to all kind of contracts a union concludes. While it is accepted that the constitution protects adequate union activities for improving the economic conditions of their constituency, outside the personal scope of the relevant statute (law on collective agreements, TVG), contracts concluded by unions create obligations only between the parties to such contracts themselves, not for their organisational members.

The legal capacity to conclude collective agreements having a normative effect, i.e. becoming immediately binding not only on the parties themselves but also on all their members, is reserved for unions and employers/employers' organisations (Art. 2 § 1 TVG). Professional organisations representing employees only are classified as a 'union' for the collective bargaining process. However, as described earlier, Art. 12a § 1 TVG extends the personal scope of this statute to the category of employee-like persons economically dependent on income received, more than 50% of which is from one client. Art. 12a § 3 TVG lowers this 50% income threshold to at least one third of the income received from one client if the service providers concerned are working in the arts, as journalists or writers. Legislation thereby shows the willingness to extend the right to bargain collectively and conclude agreements with normative effects to professional organisations representing employees and/or employee-like persons. A comparable provision exists also for persons working under a specific type of contract on home production (Art. 17 HAG).

In practical terms, some collective agreements exist governing terms and conditions of work for employee-like persons, but effectively this option is primarily relevant for concluding agreements for persons working in the (public) broadcasting sector. Theoretically however, Art. 12a § 3 TVG offers a much broader personal scope of application by lowering the threshold for being included in collective agreements. Persons providing artistic or journalistic or writer's services and persons responsible for technically implementing such tasks are considered to be 'employee-like' and therefore entitled to collective agreement coverage already once they receive at least 30% of their income from one contracting partner (as opposed to the 50% threshold applicable to all other professions). It seems that this provision is not applied to other services than the broadcasting branch. The reason for this is presumably that there are practical difficulties for unions to reach out to this target group. For self-employed persons contracting with public broadcasting companies, the situation is different as there is a tradition of collective organisation and collective bargaining on their behalf. In broadcasting, everyone's work is dependent on the technical and organisational structures of the company, no matter on which contractual basis they perform, and everyone has to cooperate closely; from these real life conditions, the willingness to organise may have grown also for the self-employed.

On the part of the unions, they have no reason to object to employee-like persons as members, as no statutory prohibition forbids accepting membership of employee-like or even self-employed persons in by-laws. The by-laws of the union of construction workers (IG BAU), the services union (ver.di) and the metalworkers' union (IG Metall) may serve as an example for this. Whether membership of self-employed persons leads to coverage by collective agreements, however, is disputed by legal doctrine according to which the regulating power of collective agreements is

confined to employees and those employee-like persons added by Art. 12a TVG. Beyond such limits, one may think about unions concluding civil law contracts with an undertaking on behalf of self-employed persons providing services to the company. Such contracts, however, lack the specifically binding normative effect of collective agreements, as well as the fact that they are not better insulated against a perceived dominance of competition law than collective agreements.

Non-labour law provisions

Restricting collective agreements to the regulation of working conditions for employees and employee-like persons is primarily a labour law concept. Additionally, competition regulations are also relevant from this perspective. All kind of work that can be organised through an employment relationship or self-employed work could represent the service of an undertaking. Undertakings are prohibited from collectively setting prices for their services in order to protect consumers against distortion of competition. Bringing undertakings together with the aim of collectively demanding higher prices for their services is therefore regularly illegal, at EU level as well as under national law. The mere existence of a rule such as Art. 12a § 1 TVG, permitting collective price setting also for unions representing employee-like persons, defined as sub-category of the self-employed, needs objective justification against the principles of competition law.

The concept for furthering collective bargaining as a means for creating conditions for employment contracts is widely accepted at national level as well as in international and European human rights law. If it would fall under the scope of application of competition regulation, the specific social aim of collective bargaining, allowing workers to bargain on an equal footing with employers, could never be reached. Therefore, it is widely acknowledged that collective agreements for the advancement of working conditions must have priority over competition rules while such agreements concern the working conditions of employees.[32] If agreements containing conditions for self-employed persons should likewise acquire priority, the two categories of service providers must demonstrably be in an essentially comparable situation.

The balancing process leading to the finding of sufficient comparability of the two groups could in principle follow two different lines: As the CJEU demonstrated in its *Kunsten* decision,[33] it is possible to broaden the concept of 'employee' for this purpose by labelling some categories of service providers as 'false self-employed' persons. Organisations representing such 'false self-employed' are acting as trade unions when representing them as those members are not just comparable to, but really are, (misclassified) employees. An alternative approach accepts the existence of service providers who do need the tool of collective bargaining as much as employees for the same purpose justifying the exemption of employees' organisations from competition rules.[34] The purpose of giving collective bargaining priority lies in strengthening the structurally weaker bargaining position of an individual employee vis-à-vis their employer. A structurally, not merely incidentally, weaker bargaining position could be overcome only by concerted actions of the individually weaker parties.

32. CJEU 21.9.1999 – C-67/96, Albany International BV v. Stichting Bedrijfspensionsfonds Textielindustrie.
33. CJEU 4.12.2014 – C-413/13, FNV Kunsten, Informatie en Media v. The Netherlands.
34. European Committee of Social Rights 12.9.2018, Collective Complaint 123/2016, Irish Congress of Trade Unions v. Ireland, no. 38, 99.

Under such preconditions, there is not even a need to invoke competition law against collective bargaining: the purpose of competition rules is prohibiting the stronger party from collectively fixing high prices that the individually weaker party, the consumer, would otherwise have to accept. Collective bargaining represents a mirror image of this tool by hindering the individually stronger party from fixing low prices the individually weaker party, the service provider, would otherwise have to accept. The purpose of eliminating wage competition through collective condition setting is comparable to the purpose of securing price competition between undertakings through forbidding cartels. In both cases, the rules protect the respective weaker party from contract conditions unilaterally determined by the other party. Service providers who are structurally in the same weak bargaining position as employees would therefore need to bargain collectively as much as employees do. Indicators for the existence of a comparably weak bargaining position might be that the user is unilaterally pre-fabricating the contractual terms and conditions of the service which the provider can only accept or abstain from concluding the contract altogether. Furthermore, a weaker bargaining position is indicated by payments received for services not higher or even lower than those of employees doing the same work even though self-employed persons must bear all costs for social security themselves. Invoking competition law to protect consumers would only then be necessary once the service providers are likely to gain as much bargaining power so as to unilaterally dictate prices for their services.

Conclusion

Trade union representation for new forms of employment is disputed, but necessary for improving working conditions through bargaining instead of statutory regulation. The most comprehensive way of including new forms of labour in the collective bargaining system aims at broadening the concept of employee/worker. The ILO supervisory bodies follow this approach when interpreting collective labour rights as covering all self-employed persons.[35] Once everyone who is providing work for another person is a worker, no matter on which contractual basis the work is undertaken, then unions can represent everyone, collective agreements cover everyone and everyone may participate in collective action. However, there are counterarguments to such a broad concept, as well. Most non-industrial forms of work can principally be undertaken based on an independent contract, and some service providers take a genuine interest in working in an independent capacity.[36] It is difficult to argue that they should not have the option of working independently once they genuinely wish to do so and have had the choice under which type of contract they prefer to work.

For furthering collective bargaining and the self-regulation of working life through collective agreements, it seems unnecessary to include all self-employed persons in the notion of employee. Following this argument, trade union representation might be isolated from the status of members. Whether or not trade unions are competent to bargain on behalf of members, creating collective agreements that regulate reliable and binding improvements for their terms and conditions need not be dependent on the existence of an employment contract. Trade unions could represent such self-employed persons, who are individually in a comparably weak bargaining position as employees.

35. ILO (ed.), Committee on Freedom of Association, Compilation of the decisions of the CFA (6th ed. 2018), para. 387.
36. E.g. medical doctors opting for a status as independent contractors in hospitals while turning down an offer for an employment contract; the same happens with high paid IT-specialists, or much sought-after midwives who wish to avoid extended time-schedules when working in hospitals.

To satisfy the legitimate goal of protecting consumers against distortion of competition, collective agreements may not cover contractors in a strong, self-reliant bargaining position, as collective price fixing on their behalf is questionable. The difference between those categories of self-employed and others, on behalf of whom collective agreements are legitimate, can follow the established interpretation of international law. Whereas the ILO's interpretation of labour rights is far-reaching enough to allow for including any form of self-employed persons in collective agreement coverage,[37] the interpretation of Art. 6 § 2 of the European Social Charter weighs the purpose for exempting collective agreements from the competition clauses. However, securing representation rights to trade unions may not solve all the practical problems. The pertinent challenge remains how to convince self-employed persons to join a union.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

37. ILO (ed.), Committee on Freedom of Association, Compilation of the decisions of the CFA (6th ed. 2018), para. 387.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 240–253

DOI: 10.1177/2031952519870028
journals.sagepub.com/home/ell
SAGE

'New trade union strategies for new forms of employment': Focus on Italy

Elena Gramano
J. W. Goethe Universität, Germany

Giovanni Gaudio
Ca' Foscari University, Venice, Italy

Abstract
The article aims at providing an exhaustive description of the current scope of application of labour law, with the goal to assess who is entitled to exercise fundamental labour and social rights within the Italian legal system. More specifically, this assessment is used to test the main hypothesis of the Authors of the ETUC report 'New trade union strategies for new forms of employment', according to which the idea of the 'personal work relation' may be used to redefine the personal scope of application of labour law as applicable to any person that is '*engaged by another to provide labour*, unless that person is *genuinely operating a business on her or his own account*'. The article concludes that, although the Italian legal system cannot be currently reframed around the idea of the 'personal work relation', there are few signs under Italian law of a trend of enlarging the scope of application of labour laws in order to apply certain traditional labour rights not only to employees but also to certain types of independent contractors.

Keywords
Labour law, scope of application, employee, quasi-subordinate workers, self-employed workers, independent contractors, collective rights, employer, personal work relation

Introduction

The contribution aims at providing an exhaustive description of the current scope of application of labour law, with the goal to assess who is entitled to exercise fundamental labour and social rights within the Italian legal system. More specifically, this assessment will be used to test the main hypothesis of the Authors of the report 'New trade union strategies for new forms of employment',

Corresponding author:
Elena Gramano, J. W. Goethe Universität, 60323 Frankfurt, Germany.
E-mail: gramano@jur.uni-frankfurt.de

according to which the idea of the 'personal work relation' may be used to redefine the personal scope of application of labour law as applicable to any person that is '*engaged by another to provide labour*, unless that person is *genuinely operating a business on her or his own account*.'[1]

To this end, Section 2 first analyses the notion of employee as prescribed by the law and as developed by case law, offering an assessment of the traditional state of the law in terms of the personal scope of application of standard employment protection legislation in Italy. Section 3 moves the scope of analysis beyond standard employment. In particular, Section 3.1. elaborates on the category of 'hetero-organised work' recently introduced by Article 2 of the Legislative Decree No. 81 of 2015, according to which labour law is now applicable also to those workers who continuatively collaborate by providing exclusively personal work in favour of a principal who organises the methods of execution of the activity also with reference to the time and place of work. Moreover, Section 3.2 analyses the regulation of non-entrepreneurial self-employment, as recently regulated by Law No. 81 of 2017. Section 4 explores both past and present collective regulations and practices seeking to regulate the terms and condition of employment of a wide range of personal work providers, trying to understand whether and how their scope of application has been extended to autonomous workers. Lastly, Section 5 addresses the issues arising from the fragmentation processes affecting enterprises, in order to evaluate whether and how the Italian legal framework has developed legal strategies to better face the above-mentioned challenges. Conclusions will follow.

Who is a worker? An analysis of the traditional personal scope of application of labour law in Italy

According to Article 2094 of the Italian Civil Code, a subordinate employee is a 'a person who agrees to collaborate with an entrepreneur in exchange for a remuneration, performing intellectual or manual work under the direction and at the dependence of the entrepreneur.' On the other hand, according to Article 2222 of the Italian Civil Code, an independent contractor is a person 'who performs work or services in exchange for remuneration, mainly by means of her labour and in the absence of a relationship of subordination *vis-à-vis* the principal.'

The distinction between employees and independent contractors was, and still is, of great relevance because while employees are granted a whole set of protections, independent contractors have not been covered by any labour regulation. Only recently, with the entrance into force of the Law No. 81 of 2017, the policymakers introduced a specific regulation meant to cover solo-independent contractor, who do not rely on any form of entrepreneurial organisation, in order for them to also enjoy some basic labour rights (for further details see Section 3.2 below).

The normative content of the definition of employee relies entirely on Article 2094, as Article 2222 only provides for an *a contrario* definition, stating that it is independent the worker who lacks a relationship of subordination with the principal. Turning the attention to Article 2094, it is clear that what distinguishes an employee, and therefore the essential criteria to assess the legal definition of employee, is the fact that she works *under the direction and at the dependence of the entrepreneur*. Case law has played an essential role in assessing the meaning of this provision.

1. Countouris, N. and De Stefano, V. (2019) *New trade union strategies for new forms of employment*, Report for ETUC, pp. 7-8 available at https://www.etuc.org/sites/default/files/publication/file/2019-04/2019_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment_0.pdf (accessed on 21 July 2019).

First, courts consistently exclude that the type of the working activity carried out by the worker shall be granted any relevance in assessing the legal nature of the working relationship. Whether manual, or intellectual, whether basic and repetitive or complex and requiring a deep knowledge, the nature of the work shall be utterly irrelevant in the process of legal classification of the working relationship.

Indeed, the essential factor shall be linked to the conditions under which the worker is contractually obliged to perform her duties. On this aspect, the traditional interpretation of the legal provision identifies the distinguishing feature of the subordinate employment relationship in the 'hetero-direction' ('*eterodirezione*') concept that constitutes the dogmatic foundation of the employment relationship. It requires that the employee – to be classified as such – shall be under the obligation to follow the orders and instructions received by the employer. Those orders might be specific or just programmatic, might be repeated daily, or on a random basis: all this depends on the kind of activity performed. What is important is that the employee is not free to organise her work autonomously and is legally bound to respect the instructions received to the point that she might be disciplined or might face a dismissal if she fails to do so.

The concept of hetero-direction and its suitability to function as *the* criterion to distinguish employees from independent contractors might work in theory, but struggles when facing complex relationships, where the worker is granted a certain degree of autonomy, but is part of an organisation that belongs to someone else or still exclusively relies on one employer to make a living. Eventually, case law progressively developed a number of factors that, despite not being part of the legal definition of employee, were considered as being *normal* features of an employment relationship and, therefore, suitable to be used as indicators of the existence of an employment relationship. Factors as the length of relationship, the obligation to respect set working hours, the use of working tools owned by the employer, the performance of working activity inside the premises of the company, etc. have been used by judges in order to classify as subordinate a contractual relationship where the parameter of 'hetero-direction' was blurred or hard to prove.[2]

Beyond employment: Quasi-autonomy and the self-employed in Italy

Protections afforded to quasi-subordinate workers: The tale of intermediate categories in Italy

It is not easy to assess whether or not the Italian legal system identifies any intermediate category between employees and independent contractors, or whether it has identified such a category in the past.[3] For the time being, we might affirm with a certain degree of certainty that in Italy there is not an intermediate category or there is no more.

In 2015, the Legislative Decree No. 81 abolished entirely the project work regulation, previously introduced by Legislative Decree No. 276 of 2003 (the so-called '*Biagi Decree*'), that was seen by part of the doctrine as a category of 'quasi-subordinate' employment. Today, Article 2 of the Legislative Decree No. 81 of 2015, states that the full set of employment

2. Del Conte, M. and Gramano, E. (2018) Looking to the other side of the bench: The new legal status of independent contractors under the Italian legal system. *Comparative Labor Law & Policy Journal* 39(3): 579-605.
3. For an articulated analysis of the normative evolution of the so called third category in the Italian legal system, see Del Conte, M. and Gramano, E. (2018) Looking to the other side of the bench: The new legal status of independent contractors under the Italian legal system. *Comparative Labor Law & Policy Journal* 39(3): 579-605.

protections are applicable also to those workers who continuatively collaborate by providing exclusively personal work in favour of a principal who organises the methods of execution of the activity also with reference to the time and place of work (collaborations knowns as 'hetero-organised').

This provision does not shine with clarity. Proof of this lies in the variety of doctrinal elaborations, which – united by the effort to interpret a norm which has caused a small earthquake in the fundamental categories of labour law –[4] arrived at diametrically opposed hermeneutical solutions, yet based on rigorous and logically valid argumentations.[5]

On the one hand, there are those authors according to whom the new law has substantially expanded the notion of employee to include also those workers whose performance is exclusively personal, continuous and organised (even though not strictly directed) by a client.[6] It has been argued that Article 2 is 'a provision of ''normalization'' aimed at extending labour law to neighbouring areas frequently framed as coordinated and continuous collaborations even if in fact similar to employment'.[7]

On the other hand, some other scholars argue that hetero-organised work is a separate case, which is distinct and does not overlap with that of subordination, even though the legal system brings the same legal effects (the application of labour law).[8] The new law would thus have as its object a subtype of self-employment,[9] as such excluded from the scope of application of Article 2094 of the Civil Code,[10] characterised by the fact that the client is the

4. Perulli, A. (2016) Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro. In Zilio Grandi, G. and Biasi, M. (eds.) *Commentario breve allo Statuto de lavoro autonomo e del lavoro agile*. Padova: Wolter Kluwer-Cedam, p. 45; Ciucciovino, S. (2016) Le 'collaborazioni organizzate dal committente' nel confine tra autonomia e subordinazione. *Rivista Italiana di Diritto del Lavoro* 3: 321.
5. Vallebona A (2015) Il lavoro parasubordinato organizzato dal committente. Colloqui giuridici sul lavoro. *Massimario Giurisprudenza del Lavoro, Supplemento* 12.
6. Razzolini, O. (2016) *La nuova disciplina delle collaborazioni organizzate dal committente. Prime considerazioni*. In Zilio Grandi, G. and Biasi, M. (eds,) *Commentario breve alla riforma 'Jobs Act;*. Padova: Wolter Kluwer-Cedam, p. 565; Treu, T. (2015) In tema di Jobs Act. Il riordino dei tipi contrattuali. *Giornale di Diritto del Lavoro e delle Relazioni Industriali* 2: 162; Pallini, M. (2015) Dalla eterodirezione alla eterorganizzazione: una nuova nozione di subordinazione?. *Rivista giuridica del Lavoro* 1: 66. Tiraboschi, M. (2015) Il lavoro etero-organizzato. *Diritto delle Relazioni Industriali* 4: 979; Nogler, L. (2016) La subordinazione nel d. lgs. n. 81 del 2015: alla ricerca dell''autorità del punto di vista giuridico'. *Argomenti di Diritto del Lavoro* 1: 55; Persiani M (2015) Note sulla disciplina di alcune collaborazioni coordinate. *Argomenti di Diritto del Lavoro* 6: 1259.
7. Ferraro, G. (2016) Collaborazioni organizzate dal committente. *Rivista Italiana di Diritto del Lavoro* 1: 53. See also, Nuzzo, V. (2015) Il lavoro personale coordinato e continuativo tra riforme e prospettive di tutela. *Working Papers C.S.D.L.E. 'Massimo D'Antona'*.IT – 280: 6.
8. Perulli, A. (2015) Le collaborazioni organizzate dal committente. In Fiorillo, L. and Perulli, A. (eds.) *Tipolgie contrattuali e disciplina delle mansioni. Decreto legislativo 15 giugno 2015, n. 81.* Turin: Giappichelli, p. 279; Perulli, A. (2016) Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro. In Zilio Grandi, G. and Biasi, M. (eds.) *Commentario breve allo Statuto de lavoro autonomo e del lavoro agile*. Padova: Wolter Kluwer-Cedam, p. 52; Pessi, R. (2015) Il tipo contrattuale: autonomia e subordinazione dopo il Jobs Act. *Working Papers C.S.D.L.E. 'Massimo D'Antona'*.IT – 282: 11; Filì, V. (2015) Le collaborazioni organizzate dal committente nel d. lgs. n. 81/2015. *Il lavoro nella Giurisprudenza* 12: 1091.
9. Ciucciovino, S. (2016) Le 'collaborazioni organizzate dal committente' nel confine tra autonomia e subordinazione. *Rivista Italiana di Diritto del Lavoro* 3: 323; Voza, R. (2017) La modifica dell'art. 409, n. 3, c.p.c., nel disegno di legge sul lavoro autonomo. *Working Papers C.S.D.L.E. 'Massimo D'Antona'*.IT – 318: 3; Zilio Grandi, G. and Sferrazza, M. (2016) Le collaborazioni organizzate dal committente. *Argomenti di Diritto del Lavoro* 4-5: 759.
10. Perulli, A. (2015) Le collaborazioni organizzate dal committente. In Fiorillo, L. and Perulli, A. (eds.) *Tipolgie contrattuali e disciplina delle mansioni. Decreto legislativo 15 giugno 2015, n. 81.* Turin: Giappichelli, p. 285; Pessi, R.

holder of a legal power[11] which is suitable to be exercised to organise, precisely, the performance of the collaborator even in its spatial and temporal dimensions.[12]

From an even different perspective, another part of the doctrine greatly reduced the innovative scope of the norm, even to the point of excluding any preceptive effect of it, by saying that the new provision is empty and not suitable either to extend or to reduce the scope of application of labour law, or to create any new legal category.[13]

Surprisingly, not much case law has been developed on the interpretation of the new provision. However, it is interesting to note that the new law has been referred to by the Tribunal of Turin (11 April 2018, No. 778) to address the delicate issue of the classification of the employment relationship of those who work for/with digital platforms.[14] The dispute arose from a claim filed by a group of workers in order to ascertain the existence of an employment relationship of indefinite duration with the company Digital Services XXXVI Italy s.r.l. (Foodora). The defendant concluded with each of the applicants a contract of 'coordinated and continuous cooperation for a fixed period', which expired and was not renewed and specified that the riders would carry out their activities 'independently, without being subject to any constraint of subordination'.

However, doubts could be raised as to the genuine autonomy of the claimants: it was the defendant that established the riders' working shifts; determined the time and place of deliveries; determined their pace, reserving the right to make reminder calls in the event of delays; monitored the position of the riders by GPS; reacted to delays or non-deliveries by temporarily excluding workers from the group chats through which the shifts were shared out, and/or by not allocating the shifts on them. On the other hand, the messengers were entirely free to decide whether and when they would be available to carry out the work and the defendant itself was free to allocate the shifts to the workers, without any obligation to ensure that everyone could carry out the deliveries. The case, therefore, presented several elements of complexity.

In proceeding with the ascertainment of the existence of the requirements of subordination, the judge adhered to the jurisprudence according to which a fundamental requirement of the employment relationship is the bond of subjection of the worker to the managerial, organisational and disciplinary power of the employer, which derives from the issuing of specific orders, as well as

(2015) Il tipo contrattuale: autonomia e subordinazione dopo il Jobs Act. *Working Papers C.S.D.L.E. 'Massimo D'Antona'*.IT – 282: 11; *contra* Ferraro, G. (2016) Collaborazioni organizzate dal committente. *Rivista Italiana di Diritto del Lavoro* 1: 57.

11. Perulli, A. (2016) Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro. In Zilio Grandi, G. and Biasi, M. (eds.) *Commentario breve allo Statuto de lavoro autonomo e del lavoro agile*. Padova: Wolter Kluwer-Cedam, p. 60; Ciucciovino, S. (2016) Le 'collaborazioni organizzate dal committente' nel confine tra autonomia e subordinazione. *Rivista Italiana di Diritto del Lavoro* 3: 325.
12. Ciucciovino, S. (2016) Le 'collaborazioni organizzate dal committente' nel confine tra autonomia e subordinazione. *Rivista Italiana di Diritto del Lavoro* 3: 325; Zoppoli, A. (2016) La collaborazione eterorganizzata: fattispecie e disciplina. *Diritti, Lavori, Mercati* 1: 33.
13. Santoro Passarelli, G. (2015) I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative e coordinate ex art. 409, n. 3, cod. proc. civ. *Argomenti di Diritto del Lavoro* 6: 1133; Pessi, R. (2015) Il tipo contrattuale: autonomia e subordinazione dopo il Jobs Act. *Working Papers C.S.D.L.E. 'Massimo D'Antona'*.IT – 282: 11; Tosi, P. (2015) L'art. 2, comma 1, d. lgs. n. 81/2015: una norma apparente? *Argomenti di Diritto del Lavoro* 6: 1120; Id., Tosi, P. (2016) Il diritto del lavoro all'epoca delle nuove flessibilità – Le collaborazioni eterorganizzate. Giurisprudenza Italiana 3: 737; Mazzotta, O. (2016) Lo strano caso delle 'collaborazioni organizzate dal committente'. *Labor* 1-2: 9.
14. See also Aloisi, A. (2018) Dispatch No. 13 – Italy – 'With great power comes virtual freedom': A Review of the First Italian Case Holding that (Food-delivery) Platform Workers are not Employees. *Comparative Labor Law & Policy Journal* (Dispatches section available online at https://cllpj.law.illinois.edu/dispatches).

from the exercise of assiduous supervision and control of the execution of the work services. In proceeding with the analysis of the working performance in order to verify whether it was punctually directed by the platform and closely monitored, the judge started from a datum that he considered to be certainly testifying to the sense of the autonomy of the claimants: the circumstance that the riders were free to put themselves at the disposal of the defendant to be assigned the shifts and that the company itself was free in the allocation of shifts; that there was, therefore, no obligation of the parties, respectively, to offer and receive the service.[15]

The judge also excluded the application of Article 2 of the Legislative Decree No. 81 of 2015, as he adhered to the last interpretation described above, excluding that Article 2 may be applied because, despite the intention of the lawmaker, it does not have – in his view – a content capable of producing new legal effects and, therefore, to expand the scope of application of labour law.

It is worth mentioning that the judgement was completely repealed by the Court of Appeal of Turin which, instead, made reference precisely to Article 2 in order to extend the labour protection claimed by the workers, even though they could not be technically classified as employees under Article 2094 of the Italian Civil Code.

Protections afforded to self-employed persons in Italy[16]

On June 6, 2017, Law No. 81, named 'Measures for the safeguard of non-entrepreneurial self-employment and measures aimed at facilitating flexible articulation of subordinate employment' was approved by the Parliament with the purpose of providing for the very first time some sort of protection to independent contractors who do not have an entrepreneurial organisation.

It is important to underline that the law applies to those workers who are 'genuinely' independent, by providing for rules that reflect the autonomous nature of the work carried out by such workers.

In particular, the Law articulates the protection granted to independent contractors in three main sets of rules. The first one aims at protecting the worker when she is called to negotiate the contractual conditions of her work. The second grants social protections during the working relationship with the principal, similar to some of the protections so far only granted to employees. The third recognises specific forms of protection on the labour market.

Article 2 states that the Legislative Decree No. 231 of 2002 on 'Implementation of Directive 2000/35/EC on combating late payment in commercial transactions' also fully applies to commercial transactions undertaken by independent contractors. By means of application of the Decree, an independent contractor is entitled to interest for late payment to the extent that she has fulfilled her contractual and legal obligations, and she has not received the due amount on time, unless the debtor proves that the delay in the payment was caused by an circumstance resulting from a cause not attributable to her. Interest commences from the period established in the contract or, failing that, from the legal term. The parties may, in the exercise of their contractual freedom, set a more extended period than the statutory period provided that such clause is stipulated in writing under penalty of nullity. Article 3, Law No. 81 of 2017 specifies, however, that the terms under which the client is entitled to pay the worker more than 60 days after the invoice has been

15. The same reasoning was adopted by Tribunal Milan, 10 September 2018, No. 1853.
16. This section draws from Sections VI and VII of Del Conte, M. and Gramano, E. (2018) Looking to the other side of the bench: The new legal status of independent contractors under the Italian legal system. *Comparative Labor Law & Policy Journal* 39(3): 579-605.

sent are considered unfair *ex lege*. The worker is also entitled to compensation for the costs incurred for the recovery of sums not paid in good time, subject to proof of more significant damage if the debtor does not prove that the delay is not attributable to her. Finally, the agreement on the date of payment, or on the consequences of late payment, shall be null and void if, having regard to prevailing good commercial practice, the nature of the services covered by the contract, the condition of the parties and the business relations between them, as well as any other relevant circumstance, it is grossly unfair to the detriment of the creditor (*i.e.* the worker).

Article 3 states that they are considered as abusive, and therefore null and void, those clauses according to which: the principal can unilaterally change the content of the contract; the principal can unilaterally withdraw from the contract without any notice period (in the case in which the contract establishes a continuative working activity); the principal is entitled to pay the worker more than 60 days after the invoice was sent to her by the worker. The principal's refusal to conclude the contract in writing is also considered *ex lege* abusive.

In the event of unfair terms and therefore - as previously stated – void clauses, the worker is entitled to compensation for damages. It is not clear whether the list of abusive clauses listed by Article 3 should be considered exhaustive or whether it can be extended due to interpretation.

According to the final paragraph of Article 3 of the Statute, Article 9 of Law No. 192 of 1998 on the abuse of economic dependence is also applicable. By reference to this provision, the new Law specifies that when a situation of economic dependence occurs, the abuse by one or more undertakings of such position is prohibited. More in particular, a state of economic dependency occurs when an undertaking is capable of causing an excessive imbalance of power in its commercial relations with another company (or individual). Economic dependence shall also be assessed taking into account the real possibility for the dependent party to find satisfactory alternatives on the market.

The abuse may also consist of a refusal to sell or a refusal to buy, the imposition of unjustifiably burdensome or discriminatory contractual conditions, or the arbitrary termination of existing business relationships.

The agreement that results in the economic dependency is invalid.

The Law contains a delegation to the Government to adopt one or more legislative decrees that strengthen the security and social protection benefits of self-employed workers registered in orders or colleges, through the empowerment of private law pension funds, also in an associated form, authorised by supervisory bodies, to activate, in addition to supplementary social security and social-health benefits, other social benefits, financed by a special contribution.

Self-employed women are also entitled to maternity allowance for the two months preceding the expected date of birth and for the following three months, irrespective of their actual abstention from work (Article 13). Therefore, while employed women have to suspend their activity during this period, self-employed women are given the freedom to choose whether to work or to suspend their activity, as the allowance is paid in both cases. In the event of maternity, it is possible for self-employed women, with the prior consent of the principal, to be replaced by other workers who meet the necessary professional requirements, also through forms of co-presence of the replaced worker and her substitute (Article 14, par. 2).

Moreover, the pregnancy, illness or injury of self-employed workers who work continuously for the same principal does not lead to the termination of the contract, the performance of which, at the worker's request, is suspended, without entitlement to compensation, for a period not exceeding 150 days per year (Article 14). However, the principal is entitled to withdraw from the contract if she loses her interest in its continuation.

Finally, self-employed workers are entitled to parental leave of up to six months for both parents during the child's first three years of age. The indemnity is equal to 30 per cent of the income from work relative to the contribution paid and is due only if the worker matures at least three months of contribution.

Collective labour rights beyond employment in Italy

The traditional binary approach between employment and self-employment becomes even more blurred in Italy when the discussion moves from individual to basic collective labour rights. In this respect, the Italian legal system has been traditionally oriented towards enlarging the scope of certain collective labour rights in order to entitle quasi-subordinate workers and, to certain extent, self-employed ones, to the freedom of association and the right to collective bargaining as well as the right to strike.

With regard to the right to freedom of association and, more specifically, the right to join a trade union enshrined under Article 39 of the Italian Constitution, it is undisputed that their scope is broader than the one strictly referred to employees. In this regard, not only employees but also quasi-autonomy and self-employed workers enjoy the same protections generally afforded to employees, so that they are free to join a trade union and, potentially, bargain collectively. Conversely, the very same protection is traditionally deemed to include employers, who are free to join employers' associations. As a result, the scope of this basic collective right may be considered as theoretically applicable to all the individuals and legal entities that, in various forms and through diverse relationships, may play a role in the collective bargaining process.[17]

In addition, it should be noted that, although the collective bargaining process normally only involves, from the workers' side, employees, there is an increasing number of circumstances where certain working relationships of quasi-autonomous and self-employed workers, for different legal reasons, fall within the scope of a collective bargaining agreement.

Firstly, Italian statutory law, in certain cases, has expressly referred to collective bargaining agreements in setting some terms and conditions of the legal regime applicable to certain kinds of quasi-subordinate workers. For example, Article 63 of the Legislative Decree No. 276 of 2003, as amended by Law No. 92 of 2012, used to provide that certain kinds of quasi-autonomous workers, *i.e.* project-based workers (the so-called '*co.co.pro.*'),[18] were entitled to a minimum wage that could not be lower than the one set by collective bargaining agreements applicable to employees which performed tasks comparable to the ones performed by the relevant project-based worker.

In other cases, certain terms and conditions of the legal regime applicable to certain kinds of quasi-autonomous or self-employed workers are set by collective bargaining agreements specifically applicable to them. For example, the collective bargaining agreement for call centre workers

17. Carinci, F., De Luca Tamajo, R., Tosi, P. and Treu, T. (2018) *Diritto del Lavoro. 1. Il Diritto Sindacale*, Milano: Utet, pp.106-108.
18. Project-based workers were a special kind of independent contractors entitled to certain rights traditionally recognised to employees only. Please note that Article 52 of the Legislative Decree No. 81 of 2015 repealed the provisions regarding project-based workers, which are now applicable to the project-based contracts entered into before 25 June 2015 and that are still in force.

entered into force on 1 March 2018 guarantees these workers certain rights that are normally granted to employees only, such as a minimum wage.[19]

In yet other cases, Italian law has expressly recognised the existence of collective bargaining agreements applicable to certain kinds of autonomous workers, *i.e.* commercial agents. For example, Article 1751-*bis* of the Italian Civil Code expressly provides that the indemnity to be paid to a commercial agent by their principal shall be determined according to the criteria set by the relevant collective bargaining agreements applicable to them. In addition, these collective bargaining agreements extensively set the terms and conditions applicable to the relationship of these autonomous workers, ranging from the rights and duties of the parties, to the criteria to calculate the commissions and the termination indemnity to be paid to commercial agents, as well as the notice to be given in case of termination of the relationship.[20]

A very similar trend in expanding the personal scope of labour law may be observed with regard to the right to strike provided by Article 40 of the Italian Constitution. Italian case law has clarified that certain types of self-employed workers are entitled to the right to strike provided that they are in a weaker position *vis-à-vis* their counterparty. In this respect, Italian Constitutional Court held that a small-scale entrepreneurs, as independent contractors, were entitled to the right to strike,[21] but only provided that they carried out their activity on their own account and they did not employ any employee.[22] In addition, Italian *Corte di Cassazione* held that quasi-autonomous workers who collaborated with a principal under a continuous, coordinated and mainly personal relationship and fell within the scope of Article 409 of the Italian Code of Civil Procedure (the so-called '*co.co.co.*') were entitled to the right to strike under Article 40 of the Italian Constitution, although they were not employees but quasi-autonomous workers.[23]

Notwithstanding the above, it shall be taken into account that quasi-autonomous and self-employed workers are deemed to be outside the scope of other collective protections normally afforded to employees. Besides the above-mentioned basic rights enshrined in the Italian Constitution, there are several additional collective rights whose scope has traditionally been limited to employees only, as the ones provided by Law No. 300/1970 (the so-called '*Statuto dei Lavoratori*').[24] By way of example, the Italian Constitutional Court held that only employees fall within

19. This collective bargaining agreement is available at https://www.eclavoro.it/wp-content/uploads/2018/03/rinnovo_Ccnl_call_center_010318.pdf (accessed on 21 July 2019).
20. The most important collective bargaining agreements applicable to self-employed commercial agents are the ones for the trade and manufacturing industries.

    The relevant collective bargaining agreement for the trade industry entered into force on 16 February 2009, and amended on 29 March 2017, available at http://www.confcommerciomilano.it/export/sites/unione/doc/contratti_lavoro/contrattazione_collettiva/agenti_rappresentanti/AEC-definitivo.pdf (accessed on 21 July 2019) and http://www.confcommerciomilano.it/export/sites/unione/doc/contratti_lavoro/lavoro_news/2017/lavoronews_n_26/AEC-allegato-con-firme.pdf (accessed on 21 July 2019).

    The relevant collective bargaining agreement for the manufacturing industry entered into force on 30 July 2014 available at http://www.uiltucs.it/wp-content/uploads/2015/09/AEC-Industria-30.07.2014-con-firme-2.pdf (accessed on 21 July 2019).
21. Italian Constitutional Court 17 July 1975, No. 222, according to which small-scale entrepreneurs that do not employ any employees fall within the scope of Article 40 of the Italian Constitution.
22. Italian Constitutional Court 24 March 1986, No. 53, according to which small-scale entrepreneurs that employ one or more employees do not fall within the scope of Article 40 of the Italian Constitution.
23. Italian *Corte di Cassazione* 29 June 1978, No. 3278.
24. For the general remark according to which trade union rights provided by this Law are strictly referring to employees, see Italian Constitutional Court 17 December 1975, No. 241.

the scope of Article 28 of Law No. 300/1970, which entitles certain trade unions with the right to benefit from a special legal proceeding aimed at effectively combating anti-union behaviour.[25]

In conclusion, the personal scope of collective labour rights in Italy is certainly broader than the one based on the concept of subordination, which has traditionally been the central gateway to employment rights under Italian law. However, this trend cannot be regarded as generally applicable to the whole legal framework of Italian collective labour law, but it is limited to those rights, as freedom of association and the right to collective bargaining as well as the right to strike, which constitute the more basic (and, in any case, most important) protections under Italian labour law.

Shaping the personal scope of application of labour law in fragmented enterprises

As already underlined under Section 2, the notion of employment under Italian law has been traditionally anchored on contractual principles. More specifically, the *Sezioni Unite* of the *Corte di Cassazione* held that the structure of the contract of employment is necessarily bilateral[26] and, accordingly, the concept of the employer has been mainly perceived as a unitary one.[27]

This rule constitutes a corollary of a more general principle, namely the prohibition of indirect employment, according to which labour supply is forbidden except when it takes place through agencies duly authorised by the State. Otherwise, if the legal entity entitled to exercise the power of direction and control over an employee is different from the one that formally entered the contract of employment, it is the former and not the latter that is to be considered the actual counterparty to the bilateral employment relationship at stake.[28]

More recently, the legislator introduced an explicit exception to this general rule, admitting the opportunity to enter into a contract of employment which can be framed by the parties as a multilateral one from the employer's side.[29] However, this is an option (and not a duty) for entrepreneurs, which has been expressly limited by the legislator only to certain specific kinds of contractual networks. In light of the above, it has been underlined that this constitutes a further argument for claiming that this is an optional and exceptional rule that cannot be extended without an explicit legislative intervention, thus confirming the general principle according to which the contract of employment is necessarily bilateral.[30]

25. Italian Constitutional Court 17 December 1975, No. 241. As a result, trade unions representing self-employed workers cannot benefit from this special proceeding as held by Italian *Corte di Cassazione* 24 September 2015, No. 18975: in the case at hand, the Court excluded that the trade unions representing a certain kind of quasi-autonomous workers (the so-called '*co.co.co.*') were entitled with the right to activate the special proceeding provided by Article 28 of Law No. 300 of 1970.
26. Italian *Corte di Cassazione*, *Sezioni Unite*, 22 October 2002, No. 14897.
27. Italian *Corte di Cassazione*, *Sezioni Unite*, 26 October 2006, No. 22910.
28. For a recent diachronic analysis of the evolution of the Italian legal system with reference to the prohibition of indirect employment, please refer to Alvino, I. (2014) *Il lavoro nelle reti di imprese: profile giuridici*, Milano: Giuffrè, pp. 55-158 and, in English, to Menegatti, E. (2015) Mending the Fissured Workplace: the Solutions Provided by Italian Law'. *Comparative Labor Law & Policy Journal* 37(1): 91-119.
29. Biasi, M. (2014) Dal divieto di interposizione alla codatorialità: le trasformazioni dell'impresa e le risposte dell'ordinamento. *WP CSDLE 'Massimo D'Antona'.IT* 218. available at http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20140613-100442_biasi_n218-2014itpdf.pdf (accessed on 21 July 2019).
30. Romei, R. (2016) Il diritto del lavoro e l'organizzazione dell'impresa. In: Perulli, A. (eds.) *L'idea di diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, Venezia: Cedam, p.519.

Given this scenario at statutory law level, it shall be pointed out that case law holds the view that the scope of certain employment law rights may be partially reassessed, taking into account legal entities other than the employer, in case of employees working for a legal entity part of a corporate group. However, this partial reassessment of employment law coverage has been admitted only in those cases where, behind the corporate veil, it is possible to recognise a so-called 'single undertaking', according to the following factors: a) the existence of a common organisational structure among discrete legal entities that are part of a group of companies; b) the integration between the activities carried out by these discrete legal entities; c) the technical, financial and administrative coordination between these discrete legal entities towards a common productive goal; and d) the fact that the employee has performed his/her working activity in favour of more than one of these discrete legal entities that are part of a corporate group. If this test is satisfied, case law deems that the scope of individual and collective dismissals law shall be reassessed in order to take into account legal entities other than the employer. In certain decisions, case law has also recognised a joint and several liability between the different legal entities constituting a 'single undertaking' according to the abovementioned factors.[31] However, it has to be pointed out that Italian case law, aside from very few anomalous cases, has never held that this may amount to the recognition of a multilateral contract from the employer's side, because such a conclusion would have violated the prohibition of indirect employment. Rather, case law has merely recognised, through what can be regarded as a *fictio iuris*, that the scope of certain protective norms, with specific reference to specific domains of employment law, can be reassessed in order to take into account legal entities other than the employer.[32]

Having said that, it has been pointed out how the existing legal scenario, anchored to the abovementioned unitary concept of the employer, is becoming increasingly unsatisfactory in adapting to the complex organisational arrangements characterising the modern economy, where more than one legal entity may often interfere with the work done by each employee.[33] As a possible solution, certain Italian scholars have argued that the contract of employment shall be reframed as a multilateral one from the employer's side. According to them, each employee may be able to identify not only one but rather multiple counterparties to bear employment law obligations, both in case of contractual networks[34] and in case of corporate groups[35] composed of several legal entities interconnected from an organisational standpoint.

However, these doctrinal proposals have been not exempt from criticism. This is why these theories do not seem to offer a well-grounded explanation on how the rules according to which the structure of the contract of employment has to be read as necessarily bilateral can be sidestepped in a system where the general prohibition of indirect employment is still in force. Therefore, without a

31. Greco, M.G. (2017) *Il rapporto di lavoro nell'impresa multidatoriale*. Torino: Giappichelli, pp. 64-82 and 137-147, where it is possible to find an extensive reference to the relevant case law.
32. Gaudio, G. (2019) *Organizzazioni complesse e rapporti di lavoro. Per un diritto del lavoro a geometria variabile*. Ph.D. Thesis, Bocconi University, Italy, XXI Cycle, pp.67-72.
33. Garofalo, D. (2017), Lavoro, impresa e trasformazioni organizzative. In: *A.I.D.La.S.S. Conference*, Cassino, 18-19 May 2017, p.7.
34. Speziale, V. (2010) Il datore di lavoro nell'impresa integrata. *Giornale di Diritto del Lavoro e di Relazioni Industriali* 125(1): 1-86.
35. Razzolini, O. (2009) Contitolarità del rapporto di lavoro nel gruppo caratterizzato da 'unicità di impresa'. *Giornale di Diritto del Lavoro e di Relazioni Industriali* 122(2): 263-304; De Simone, G. (2012) I gruppi di imprese. In Brollo, M. (ed.) *Trattato di diritto del lavoro. Vol. IV. Il mercato del lavoro*, Padova: Cedam, pp.1509-1554; Raimondi, E. (2016) *Rapporto di lavoro e gruppi imprenditoriali. La figura del datore di lavoro e le tecniche di tutela*, Torino: Giappichelli.

legal provision that openly admits these multiple employer patterns, these theories seem to merely offer to the legislator a possible policy option to reform the existing legal framework.[36]

In any case, it should be noted that, aside from the debate regarding a possible re-conceptualisation of the notion of the employer, some statutory interventions and judicial decisions in certain domains of our subject have openly admitted that it is possible to reframe the personal scope of employment laws in order to take into account entities other than the employer as the immediate contractual counterparty to the relevant employee. Examples of this novel pattern can be mainly found in certain domains of Italian labour law deriving from the transposition of EU Directives, such as anti-discrimination, equal pay, health and safety, whistleblowing and transfer of undertakings laws.[37] Furthermore, the same pattern may be observed with reference to those Italian laws providing for a joint and several liability of the principal with the contractors or subcontractors with reference to wage and social security rights.[38] These provisions have recently been regarded by the Italian Constitutional Court as applicable to all kinds of external contracting arrangements, irrespective of the type of legal tool used by entrepreneurs to establish the contractual network at stake, so that the principal is regarded to be jointly and severally liable with contractors or subcontractors for the wage and social security rights of the workers employed by the contractors or subcontractors down the supply chain.[39] In light of the above, although this novel trend is limited to certain specific domains of the Italian legal system, the Italian legislator seems to have started developing criteria to frame the personal scope of employment laws in a way that they are more versatile to adapt to the flexibility of entrepreneurs in setting up the boundaries of the fragmented enterprise through multiple entities. In other words, these novel legal strategies, different from the traditional contractual ones, leave entrepreneurs with fewer chances to gain an immunity to certain employment protective norms.[40]

In conclusion, aside from a specific statutory law exception and from certain anomalous case law decisions regarding group of companies, the Italian legal system is still firmly anchored to a unitary notion of the employer, which is based on the traditional view according to which the contract of employment is necessarily bilateral. This conclusion may be difficult to sidestep in a system where the general prohibition of indirect employment is still in place. This is why it seems unlikely that, given the abovementioned legal scenario, the Italian system may easily switch towards a broader concept of the employing entity as the one proposed by the authors of the report, namely the one according to which the burden of employment law protections may be placed on whichever party in practice substantially determines the terms of engagement or employment of a worker.[41] However, the Italian legal system has already developed legal strategies, different from

36. Mazzotta, O. (2013), Gruppi di imprese, codatorialità e subordinazione. *Rivista Giuridica del Lavoro* 1: 21-27 and Pinto, V. (2013) Profili critici della teoria della codatorialità nei rapporti di lavoro. *Rivista Giuridica del Lavoro* 1: pp. 55-80.
37. Gaudio, G. (2019) *Organizzazioni complesse e rapporti di lavoro. Per un diritto del lavoro a geometria variabile*. Ph.D. Thesis, Bocconi University, Italy, XXI Cycle, pp. 246-287.
38. Gaudio, G. (2019) *Organizzazioni complesse e rapporti di lavoro. Per un diritto del lavoro a geometria variabile*. Ph.D. Thesis, Bocconi University, Italy, XXI Cycle, pp. 287-296.
39. Italian Constitutional Court 6 December 2017, No. 254.
40. Gaudio, G. (2019) *Organizzazioni complesse e rapporti di lavoro. Per un diritto del lavoro a geometria variabile*. Ph.D. Thesis, Bocconi University, Italy, XXI Cycle, pp. 301-322.
41. Countouris, N. and De Stefano, V. (2019) *New trade union strategies for new forms of employment*, Report for ETUC, pp. 62-63, available at https://www.etuc.org/sites/default/files/publication/file/2019-04/2019_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment_0.pdf (accessed on 21 July 2019).

the traditional contractual ones, that seem to better deal with the issues arising from the fragmentation of the enterprise. Although this pattern is not related to a possible re-conceptualisation of the notion of the employer as the party of the contract of employment, it seems to offer some novel theoretical hints in respect of the debate regarding the problems of the personal scope of employment laws in adapting to the complexities of modern enterprises.

Conclusions

Under Section 2, we showed that the traditional scope of application of labour law within the Italian legal system is based on a fundamental distinction between employees and autonomous workers. Therefore, the central gateway to employment rights is the existence of an employment relationship entered into by an employee and an employer.

Notwithstanding the above, Section 3.1 has demonstrated how, on the one hand, the Italian legislator has partially reassessed the boundaries of the above-mentioned distinction through the introduction of Article 2 of the Legislative Decree No. 81 of 2015, by which the legislator aimed at including within the scope of full labour and employment protection certain kinds of quasi-subordinate workers, *i.e.* the so-called 'hetero-organised' ones. In any case, the practical impact of this reform has not been overwhelming as long as not much case law has been developed concerning the interpretation of this novel provision, except for very few cases regarding platform-delivery workers. On the other hand, as described under Section 3.2, the Italian legislator introduced in Law No. 81 of 2017 a regulation aimed at better protecting those independent contractors, who are now entitled to a specific set of rules specifically dedicated to them.

Moving from the individual to the collective dimension of labour law, Section 4 has shown how the Italian law system has been traditionally oriented towards enlarging the scope of application of the certain collective rights. However, this trend cannot be regarded as generally applicable to the whole legal framework of collective labour law, but it is limited to those rights which constitute the more basic protections for workers under Italian law.

In addressing the issues related to the fragmentation of modern enterprises, Section 5 has pointed out how the Italian legal system seems to be anchored to the traditional view according to which the contract of employment is necessarily bilateral and the notion of the employer is perceived as a unitary one. However, although this trend may be recognised only with specific reference to certain domains of employment law, the Italian legal system seems to have developed certain legal strategies, different from the traditional contractual ones, that seem to better deal with the challenges posed by the complexities of modern enterprises.

In conclusion, it is surely not possible to conclude that *de iure condito* the Italian legal system can be reframed around the idea of 'personal work relation' proposed by the authors of the report. However, this paper means to show how there are few signs under Italian law of a trend of enlarging the scope of application of labour laws in order to apply certain traditional labour rights also to independent contractors.

Author note

The article is the result of the joint research of the two authors. However, §§ 2 and 3 must be attributed to Dr. Elena Gramano and §§ 4 and 5 must be attributed to Dr. Giovanni Gaudio. Introduction and Conclusion must be attributed to both authors.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 254–270

DOI: 10.1177/2031952519867544
journals.sagepub.com/home/ell
SAGE

Workers, the self-employed and TRADEs: Conceptualisation and collective rights in Spain[1]

Adrián Todolí-Signes
Labour and Social Security Law Department, University of Valencia, Valencia, Spain

Abstract

The subjective scope of application of Labour Law is set by the Statute of Labour. Nevertheless, the interpretation of the Courts is crucial to understand who is a worker in Spain. In this study, the criteria set by the Spanish courts and their evolution are analysed. Recently, the Spanish Supreme Court seems to have abandoned the 'control test' criteria for classifying workers and has moved towards a personal conceptualisation of work. This paper shows rulings that prove this evolution. Moreover, Spain has its own Self-employed Workers' Statute applicable to common self-employed workers and economically dependent self-employees (TRADEs). In this paper I analyse the concept of both types and the individual and collective rights granted to them by the Self-employed Workers' Statute. Two main conclusions can be drawn: first, the TRADEs are not an intermediate category between employees and self-employees but instead a sub-category of self-employees. Second, the protection granted by the Self-employed Workers' Statute is clearly insufficient.

Keywords

Concept of worker, concept of employee, scope of application of Labour Law, personal work, economically dependent workers, TRADE, self-employee, self-employed worker, freelancer

1. This paper has been funded by the Spanish Government (Ministry of Economy and Competitiveness Research Plan, 2016-2019: by the Research project DER2015-67613-R 'The regulation of sharing economy'.

Corresponding author:
Adrián Todolí-Signes, Assistant Professor, Labour and Social Security Law Department, University of Valencia, València, 46020, Spain.
E-mail: Adrian.todoli@uv.es

Workers and self-employees

Concept of employee

Article 1.1 of the Statute of Labour establishes a definition of a worker/employee in Spain (in this article I will use the words 'worker' and 'employee' as synonyms, since there is no legal category called 'worker' that is different from an employee). This definition states as follows: employees are those who voluntarily provide their paid services for others and within the scope of an organisation and under the direction of another person, either physical or legal, called an employer.

The five requirements for an employment contract

This is the main legal rule used by the courts to distinguish between an employee and a self-employed worker. The generic definition made an interpretation by the courts necessary. The judgments focus on five characteristics in order to distinguish a true employment contract from any other civil, commercial or administrative contract: i) voluntary work, ii) personal work; iii) dependency; iv) working on another's behalf (*ajenidad*); v) compensation. In theory, the five elements have to be present in the relationship in order to classify a services contract as an employment contract. However, some of them are more important than others and can be nuanced by jurisprudence in some cases.

Voluntary work. This element is used by the literature to exclude only some legally mandatory work from the employment contract. For example, when the law makes it compulsory to go to (work at) the polling station during general elections. This kind of work is excluded from the employment contract as it is not voluntary but instead compulsory by law. However, the economic necessity of the worker has never been a criterion used to understand that work is not done on a voluntary basis only if it is compulsory by law.

Personal work. This element is used to exclude from the employment contract cases in which the services provided are carried out by a substitute or a subcontractor or even if the service provider hired someone else to perform the work. However, the mere contractual possibility of outsourcing is not enough to exclude the employment contract. The Spanish Supreme Court, in this sense, ruled that the inclusion of contractual clauses that allow for the possibility of substituting the worker or outsourcing the work has no relevance unless this possibility was actually used by the service provider (Supreme Court Judgment (STS) of 15 June 1998 rec. 220/1997, 17 January 2000 rec. 1093/1999, 22 January 2001 rec. 1860/2000). In fact, even the occasional substitution of a worker by another worker is not relevant in excluding the employment contract (STS of 25 January 2000 rec. 582/1999). On the contrary, the inclusion of clauses forbidding outsourcing would be considered relevant to affirm that there is an employment relationship.

Dependency. Traditionally, the courts have considered that there is dependency when: the worker has regular working hours, there is exclusivity in the contract, there are instructions and orders from the principal, and monitoring carried out by the latter (SSTS of 10 July 2000 rec. 4121/1999, 15 October 2001 rec. 2238/2000, 7 October 2009 rec. 4169/2008). In particular, any instruction from the employer in order to obtain a better execution of the services by a self-employee is an illegitimate interference in the freedom of a truly independent contractor, thereby making her an employee (STS of 24 June 2015 rec. 1433/2014).

In the same sense, the fact that the services were provided using the brand of the principal has been considered a sign of an employment contract (STS of 19 December 2005 rec. Ud. 5381/2004). Moreover, cases in which the principal gave training to the alleged self-employed worker or even simply paid for such training (STS 19 of June of 2007 rec. 4883/2005), and even when the supposed self-employed worker paid for her own training because the contract with the principal makes that training compulsory, have been interpreted as an indicator of a false self-employed worker (STSJ of Madrid of 28 December 2008 rec. 4883/2005 and of 23 February 2009 rec. 220/2009).

Ajenidad. This characteristic aspect of the employment contract can be interpreted from different perspectives. First, *ajenidad* can be viewed as the fruits of labour[2] or the patrimonial utility of the work[3]. This means that in an employment contract, the worker gives away the fruits of her labour to the employer who owns them in exchange for some compensation. Second, there is *ajenidad* in respect of business risks. In this sense the worker is not the one who assumes the company's losses. That said, this does not mean that an employee cannot have a variable compensation connected with the results of the company[4]. Third, is *ajenidad* regarding the means of production; in this case, the worker does not own the relevant elements required to produce goods or services[5]. Last, *ajenidad* in respect of the market means that the worker is not offering services to the market but only through her company. All these faces of *ajenidad* are different perspectives of the same reality, according to the Supreme Court (STS of 31 March 1997 rec. 3555/1996) and so they have to be analysed together.

The Supreme Court has understood that there is *ajenidad* even though the workers are compensated with a percentage of the business income (STS of 20 June 1999 rec. 4040/1998). In the same sense, there is an employment contract despite the fact that the worker has agreed not to receive a commission in cases in which the buyer is not paying for the product sold in order to get a commission (STS of 7 October 2009 rec. ud. 4169/2008 and STSJ of Cantabria of 29 December 1994 rec. 929/1994). In conclusion, the employment contract still exists when the worker takes on certain business risks.

In addition, the employee can be the owner of some work tools or means of production as long as these means of production are not economically important or relevant (STS of 19 July 2002 rec. 2869/2001). The courts endorse the idea that there will be a civil contract only when the service provider makes a meaningful investment to provide the services.[6]

Compensation. The last characteristic of the employment contract is crucial, as it refers to the fact that the main obligation of the employee is pay the prices of the services (STSJ of Catalonia of 20 November 2003 rec. 148/2002). This means that the worker is neither a volunteer nor does he do the work exclusively in order to accomplish a greater good or a public good. On the contrary, employees work mainly to earn a salary. However, the lack of compensation will not always mean that there is a civil or some other kind of contract. Indeed, sometimes the lack of compensation is

2. Alonso Olea., *Introducción al Derecho del Trabajo, ed. Revista de Derecho Privado*, Madrid, 1968.
3. Montoya Melgar 'El poder de dirección del empresario', *IEP*, Madrid 1965.
4. De La Villa Gil, L.E., *El trabajo a domicilio*, Aranzadi, Madrid, 1966; Bayón Chacón and Pérez Botija, *Manual de Derecho del Trabajo*, Marcial Pons, Madrid, 1976.
5. Albiol Montesinos I., 'Entorno a la polémica ajenidad-dependencia', *CCDT*, n°1, 1971.
6. González Biedma E., 'Aspectos jurídico-laborales de las franquicias', *Civitas*, 97, 1999, pp. 667.

simply a breach of the employment contract (SSTSJ of Andalucía of 8 July 2015 rec. 1178/2015). So, the relevant thing will be whether the worker's intention is to work in exchange for compensation or for altruistic reasons.

Legal presumption of employment contract

It is not clear whether we have a legal presumption of employment contract in Spain. Historically, the courts interpreted that we do have it in Article 8.1 of the Statute of Labour[7]. However, in recent times this presumption has been used less and less by the courts. The literature argues that the aforementioned Article 8.1 only describes what an employment contract is again – as in Article 1.1 of the same Law.[8] That is why this part of the doctrine supports the non-existence of a legal presumption of the employment contract. Nevertheless, today some courts still use the legal presumption when the judge wishes to make his motivation for the ruling stronger.

In conclusion, the burden of proof of the existence of the employment contract is not clear in Spain.

Irrelevance of the nomen iuris

Something that has been argued for a long time – and still is – is the irrelevance of the *nomen iuris*. Indeed, the Spanish Supreme Court argues that the real legal nature of a contract does not depend on the name given to it by the parties involved but on the real content of the obligation and what really happens in the relationship.[9] Because of this, in order to determine the real legal nature of the contract, the Court has to look into the acts performed by the parties during the relationship and not the words of the contract, or the name of the contract agreed by them or even the original will of the parties.[10] This means that the parties cannot ever change the real legal nature of the contract only by its formal designation on the written contract.

The concept of a self-employee

As already established at the beginning of this paper, an employee has to meet the five requirements cited earlier. However, not everyone who provides services without an employment contract is a self-employed worker. The concept of a self-employed worker is also determined by the law. In its first article, the Spanish Law 20/2007, of 11 July, on the Self-employed Workers' Statute (*Ley del Estatuto del Trabajador Autónomo*) defines a self-employed worker as follows: 'natural persons who habitually, personally, directly, on their own account and outside the scope of the direction and organisation of another person carry out an economic or professional activity for a lucrative purpose'.

This is not the time or the place to analyse this concept, but the important thing in this moment is that the law describes a self-employed worker as a worker who does personal work as in the case of

7. Garcia Ninet J.I., 'Régimen jurídico del personal voluntario', RSS, n° 18, 1983, 136.
8. Ramírez Martínez J.M., 'El trabajador', in AAVV, Derecho del Trabajo, Valencia, Tirant lo Blanch, 2013, p 105.
9. STS of 21 June 1990.
10. Lujan Alcaraz J., 'Las relaciones de trabajo . . . ' op cit., p 208. SSTS of 13 December 1985, of 18 April 1988, of 21 July 1988, of 5 June 1990.

having an employment contract. The difference between an employee and a self-employed worker lies in the concepts of dependency and *ajenidad*.

As will be explained below, self-employed workers have certain rights and certain obligations, such as compulsory payment of Social Security contributions. In order to have these obligations and rights, the worker has to fit in this classification.

A subcategory of self-employed workers: TRADEs

Within the Self-employed Workers' Statute, Spanish law regulates another kind of worker, called the economically dependent self-employed worker ('*Trabajador autónomo economicamente dependiente*' – TRADE). This institution is regulated in Article 11 of the Self-employed Workers' Statute in the following terms: 'those who carry out an economic or professional activity on a lucrative basis and in a habitual, personal, direct and predominant manner for a natural or legal person, called a client, on whom they depend economically to receive at least 75 per cent of their income through income from work and from economic or professional activities'.

It is therefore clear from the regulations that TRADE is not a third category of workers or an intermediate category between employees and self-employees. On the contrary, first TRADEs have to be completely self-employed workers, and then if they fulfil another additional requirement – 75% of their income comes from one client – they will be TRADEs. This is why, in my opinion, TRADEs are a subcategory of self-employed workers.

In reality, however, those two requisites are difficult to find. Indeed, it is difficult to find a real self-employed worker if she is economically dependent on one client. In this sense, usually if a service provider depends on just one client, this service provider is adapted to the client's main business, something that would mean that she is not really self-employed. Apart from that, the economically dependent service provider knows that she has to comply with the wishes – instructions – of the client as her whole survival depends on that.

To sum up, even though the category exists in the norm, this kind of worker is scarce in reality, as the definition contradicts its own terms. Currently, the official data say that there are only 10,000 TRADEs registered in the whole of Spain. This accounts for less than 0.33% of all self-employed workers and less than 0.05% of the total number of workers in Spain. Nevertheless, the Self-employed Workers' Statute grants some particular rights to self-employed workers, including collective rights. These rights are in addition to the right that they have because they are self-employed workers.

Individual and collective rights of self-employed workers

Fundamental rights

Protection against discrimination. The Constitutional right to not be discriminated (Article 14 Spanish Constitution) is directly applicable to private citizens, which means that it is applicable to all relationships or contracts (civil, commercial, administrative and labour). However, apart from that prescription, in its Article 4.3 a) the Statute of Labour establishes that self-employed workers have the right to not be discriminated in the exercise of their professional activities.

Moreover, this provision, in its Article 6.3, establishes that any contractual clause that breaches this anti-discriminatory right shall be void.

Right to privacy. The fundamental right to privacy is equally applicable in the case of the self-employed worker. Article 4.3 c) of the Self-employed Workers' Statute establishes that the self-employee has the right to privacy and dignity and adequate protection against sexual and gender harassment or harassment of any other kind. This means that the client has to respect these limits and autonomy if the parties are limited by these rights. Again, these limits stem directly from the Constitution (Article 18.1) and so the Self-employed Workers' Statute only repeats something that has already been established in a superior regulation (Pérez Agulla 2016).

Individual rights: working conditions of the self-employee

Working hours. The nature of independent contractors seems incompatible with any regulation or limitation of working hours. In fact, there is no specific regulation about time or working hours for self-employed workers; that is, there is no regulation about a minimum number of rest hours or about paid holidays or any other kind of leave (Mercader 2017).

There are, however, specific regulations regarding working hours in some sectors (e.g. transportation) (Trujillo 2014).

Compensation. The remuneration will be that which is agreed upon. There is no minimum wage for self-employed workers. However, the Self-employed Workers' Statute establishes (Article 4.3.f)) limits to the term of payment for work done by self-employed workers. In particular, the payment has to be made within 30 days as of the time when the service was provided by the independent contractor. This period can be extended to 60 days if the parties agree to do so.

The same regulation also establishes that, in case of infringement of this period, the client will have to pay interest. The interest rate shall be that agreed to by the parties or the European Central Bank interest rate from last semester plus 8 points.

Collective rights

Freedom of association. The Self-employed Workers' Statute includes a series of collective rights for individual practice. Specifically, it establishes that self-employed workers are entitled to:

a) Join the trade union or business association of their choice, in the terms established in the corresponding legislation.
b) Join and found professional associations specific to self-employed workers without any prior authorization.
c) Exercise the collective activity of defending their professional interests.

In this way, self-employed workers, firstly, are entitled to join union organisations and business associations that have already been constituted. Therefore, Article 19.1 a) of the Self-employed Workers' Statute grants self-employed workers the right to join organisations that are not their own but have already been constituted.

Regarding the possibility of affiliation of the self-employed worker, it is important to remember that Article 3.1 of the Organic Law on Freedom of Association grants the possibility of affiliation to the self-employed who do not have workers at their service. Thus, it seems that the right to join a union will be conditional on the self-employed worker not having other workers in his charge. Therefore, if he has workers at his service, he can only exercise his right of association, on the one hand, through business associations and, on the other hand, by becoming part of the specific

associations of self-employed workers referred to in Article 19 of the Self-Employed Workers' Statute.

In this way, self-employed workers, first of all, will be entitled to join union organisations and business associations that are already constituted. Therefore, Article 19.1 a) of the Self-employed Workers' Statute grants self-employed workers the right to join organisations that are not their own, but which have already been constituted.

Self-employed workers will thus have the individual right to join unions, business associations or professional associations of self-employed workers in the terms previously established. However, what truly self-employed workers do not seem to have is the right to create their own unions referring to a specific company/client or even a sector of activity. Conversely, what does exist is the possibility of creating associations (but not unions) specific to self-employed workers, either as a platform or as a business sector.

Indeed, section b) of this same article allows the right to affiliation and foundation of specific associations of self-employed workers. Therefore, the right to affiliation to union and business organisations and the right to affiliation and the foundation of specific self-employed workers' associations can be distinguished, since the law draws a distinction between them.

Hence, together with the right to join organisations that already exist, the Self-employed Workers' Statute recognises the right of self-employed workers to found their own associations which have as their objective the protection and defence of their rights and interests as such.

Lastly, Article 19 of the Self-employed Workers' Statute recognises the possibility for self-employed workers to exercise collective activity in defence of their professional interests. This refers, as is to be expected, to the possibility of collective disputes and collective bargaining. However, it must be said that this collective activity to defend their interests does not come from the fundamental right to freedom of association, but from the private or common *associationism* of Article 22 of the Spanish Constitution, which will limit the possible actions in this collective dispute. In fact, the Law of the Self-employed Workers' Statute does not develop the possibility of exercising this collective activity in a specific or differentiated way as a private association (e.g. consumer associations).

Collective bargaining. In principle, collective bargaining between entrepreneurs is not allowed under competition law. However, in a judgment of 4 December 2014, the Court of Justice of the European Union declared that a collective labour agreement (CLA) that establishes minimum rates for self-employed service providers is acceptable and is not included within the scope of Article 101 (1) of the TFEU (inter-company practices designed to adversely affect competition in the EU market) but only insofar as these suppliers are 'false self-employed' workers.

Conversely, it must be understood that it is not possible, in accordance with current jurisprudence, to accept minimum fee agreements if the providers are truly self-employed.

Despite this interpretation, international doctrine understands that collective bargaining should be considered a Human Right of all people (Valerio 2018). Specifically, this doctrine has criticised the interpretation made of competition law, and applied by the Court of Justice of the European Union, which excludes certain groups, such as small entrepreneurs or freelancers, from the possibility of collective bargaining. It is understood that this interpretation of competition law seriously harms the interests of (normally unprotected) collectives that have common interests and which should be able to associate and negotiate their working conditions together, as regards both remuneration and working hours, among other aspects.

This interpretation undoubtedly has its complications when it comes to applying it, since it is not clear who would be the counterpart in the hypothetical collective bargaining, although it could be a more or less simple task to group the self-employed by professions or sectors of activity. However, the clients or any other opposing party in the negotiation will not share those necessary homogeneous characteristics. Without a counterpart, in collective bargaining, there could be no real negotiation, but instead we could find a series of remuneration scales agreed upon by the self-employed workers' association itself. This would be detrimental to competition. Collective bargaining needs a homogenous counterpart or association to bargain with. This is something that is not easy to find in every economic sector.

Right to strike. In Sentence 11/1981 of 8 April, the Spanish Constitutional Court analysed the scope of application of the right to strike established in Article 28.2 of the Spanish Constitution. In this judgment, the highest court concluded that, when the Constitution speaks of the workers' right to strike, it does so in the sense of labour workers included within the scope of application of the Statute of Workers. In this regard, the Constitutional Court did not hesitate to exclude other types of subjects, such as small entrepreneurs, self-employed workers and assimilated assumptions, from the constitutional protection of the right to strike.

In the same sense, the Law of the Self-employed Workers' Statute maintains this interpretation by not making any reference to self-employed workers' hypothetical right to strike. In fact, no reference is made to the existence of a right to collective dispute or a specific regulation.

However, I think that this interpretation made by the Constitutional Court was a restrictive interpretation of the right to strike in view of the current extension of self-employment. It could be understood that, since the Constitution does not make a distinction (when it speaks simply of workers), the courts should not do so with their interpretation either. Specifically, in my view, self-employed workers should have the right to collective dispute and to strike, especially when it can be determined that there is a set of general interests that affect a generic collective susceptible to individual determination. I will argue that, at the very least, the self-employed should be afforded the right to stop work, in order to use it as a measure of pressure, without this being considered a breach of contract.

In any case, this interpretation that I defend is not currently supported by Spanish jurisprudence and, therefore, it would require either a change of criteria by the Constitutional Court that modifies the principle maintained in Sentence 11/1981 of 8 April or an extension of the right to strike for self-employed workers via legislation.

Individual and collective rights of TRADEs

Individual rights: Working conditions

Working time. According to Article 14 of the Law of the Self-employed Workers' Statute, the working hours of TRADEs are set out in the contract or Agreement of Professional Interest (collective agreements of TRADEs). This document establishes the regime of schedules and working hours, as well as the weekly rest-time, the holidays and the maximum amount of activity per day or even of its weekly distribution in cases where days are computed over months or years. In addition, the regulations provide for the possibility of adapting the working hours to suit workers who are victims of gender violence in order to ensure their effective protection or their right to comprehensive social assistance.

Therefore, the working hours of economically dependent workers will be agreed upon by the parties. Article 14.3 of the Law of the Self-employed Workers' Statute allows for an activity to be voluntarily established for a longer time than that agreed to in the contract, but with limits. The limit will be established in the Agreement of Professional Interest or, if this does not exist, a subsidiary document with a maximum limit of 30% with respect to the initial time individually agreed upon in the contract.

It can therefore be seen that, unlike the self-employed worker, in the case of the economically dependent worker there seems be the possibility of setting a maximum number of working hours. However, the parties can decide on this contractual maximum without a maximum legal annual reference, as in the case of employees.

Now, once this limit to the number of working hours has been set, it must be respected by the parties, but even if they agree upon a maximum number of working hours, the client platform could legally demand up to 30% more than the initially agreed number of hours.

It seems that, in the case of the economically dependent worker, it can be thought that, since the majority of the work comes from the same client, that client can calculate approximately what days the economically dependent worker is needed and, therefore, include it in the contract. In contrast, in the self-employed without a main client, it does not seem possible to calculate a working day with each of their clients.

Compensation. The Self-employed Workers' Statute does not establish any specific regulation regarding remuneration for TRADEs. It will thus have to be subject to the general regulation for all self-employed workers regarding the matter already analysed in the section on self-employed workers.

Interruption, suspension of the contract and leave of absence. In accordance with Article 16 of the Self-employed Workers' Statute, duly justified causes of interruption of the activity by an economically dependent worker will be considered as those based on:

a) Mutual agreement of the parties.
b) The need to attend to urgent, unexpected and unpredictable family responsibilities.
c) A serious and imminent risk to the life or health of the self-employed worker, as provided for in section 7 of Article 8 of this Law.
d) Temporary disability, maternity, paternity, adoption or fostering.
e) Risk during pregnancy and risk during breastfeeding of a child under 9 months of age.
f) A situation of gender violence, so that the economically dependent self-employed worker draws on their right to protection or to comprehensive social assistance.
g) Force majeure.

2. Other causes of justified interruption of the professional activity may be established by means of a contract or agreement of professional interest.
3. The causes of interruption of the activity foreseen in the previous sections cannot constitute the basis for the termination of the contract by the client's intention foreseen in 1 f) of the previous Article, all without prejudice to other effects that for such cases may be agreed upon by the parties. If the client considers the contract terminated, this circumstance would be considered as a lack of justification for the purposes of unfair dismissal.

This same Article also says that despite these rights, when in the cases contemplated in s1 d), e) and g) the interruption causes significant damage to the client that paralyses or disturbs the normal performance of his activity, the termination of the contract may be considered justified.

The assumptions of maternity, paternity, adoption or foster care, and risk during pregnancy and breastfeeding of a child under 9 months of age, referred to in 1 d) and e) of this Article, will be exempt from the provisions of the paragraph above, when the economically dependent self-employed worker maintains the activity.

Holidays. Regarding holidays, in Article 14.1, the Statute establishes that 'the economically dependent self-employed worker shall have the right to an interruption of his/her annual activity of 18 working days, without prejudice to the fact that said regime may be improved through a contract between the parties or through agreements of professional interest'.

Contract termination. In order for any right to be effective, it is essential that there is a strong regime regarding unfair contract termination, since otherwise the request or requirement of any other right (e.g. the minimum wage) could end in the termination of the contractual relationship, thereby giving rise to the very non-existence of the requested right. Likewise, such an absence could result in the non-application of these rights by the rest of the workers due to a fear of this type of reprisal.

Thus, the regulation establishes a regime for the termination of the contract in Article 15, specifically by establishing that the contractual relationship between the parties will be extinguished by any of the following circumstances:

a) Mutual agreement of the parties.
b) Causes validly consigned in the contract, unless they constitute abuse of the law.
c) Death and retirement or disability incompatible with the professional activity, in accordance with the corresponding Social Security legislation.
d) Withdrawal of the economically dependent self-employed worker, in which case the stipulated notice must be mediated or in accordance with custom and usage.
e) Will of the economically dependent worker, based on a serious contractual breach by the counterparty.
f) Will of the client for a just cause, the stipulated notice being mediated or according to the uses and customs.
g) By decision of the economically dependent independent worker who is forced to terminate the contractual relationship as a result of being a victim of gender violence.
h) Any other legally established cause.

In turn, it is established that when the contractual resolution is produced by the will of one of the parties based on a breach of contract by the other, whoever resolves the contract will be entitled to receive the corresponding compensation for the damages and losses caused.

When the termination of the contract occurs by the will of the client without just cause, the economically dependent self-employed worker shall be entitled to receive the compensation provided for above.

If the decision is made by withdrawal of the economically dependent worker, and without prejudice to the notice provided in 1 d) of this Article, the client may be compensated when said withdrawal causes significant damage that paralyses or disturbs the normal performance of his activity.

When the party entitled to compensation is the economically dependent worker, the amount of compensation shall be that set out in the individual contract or in the agreement of professional interest that results from its application. In cases in which they are not regulated, for the purpose of determining their amount, the remaining time of duration of the contract, the seriousness of the client's default, the investments and expenses anticipated by the self-employed worker shall be taken into consideration, among other factors. Such factors include the investment made by the economically dependent worker linked to the execution of the contracted professional activity and the period of notice given by the client prior to the date of termination of the contract.

TRADEs' Collective Rights

Freedom of association. The freedom of association of TRADEs is quite indistinct, in accordance with the regulation emanating from the Self-employed Workers' Statute, from the right to freedom of association of common self-employed workers. Indeed, there is no specific regulation that establishes differences in the content of the right to freedom of association applicable to the particular case of TRADEs.

In this way, TRADEs will have the individual right to join unions, business associations or professional associations of self-employed workers. In turn, the TRADE will have the right to found specific associations for TRADEs, since the freedom granted by Article 19 of the Self-employed Workers' Statute to create professional organisations must include the right to set up professional associations exclusively for TRADEs. This is justified by the differences in the applicable legal regime (where those differences do exist as in collective bargaining) between the common self-employed and TRADEs. These differences include the possibility of the latter to negotiate Agreements of Professional Interest that the common self-employed do not have.

Finally, these exclusive associations of TRADEs can be organised through the creation of an association of TRADEs of a specific company or a specific activity sector or even the creation of TRADEs associations whose field of defence of interests is the entire economy (intersectorial). However, and as mentioned earlier, what does not seem possible is that TRADEs have the right to create their own unions referring to a company or even to a sector of activity.

In addition, TRADEs may also join already existing trade unions, business associations or professional associations of common self-employed workers (not specific to TRADEs).

However, the rights of these associations are very limited by their regulation. Indeed, there is no legal provision on the possibility of TRADEs holding an assembly or meeting at the client company itself, as in Article 77 of the Statute of Labour for unions of employees. Nor is any reference made to the use of bulletin boards or of the premises of the client company to the benefit of the associations of TRADEs, as in Article 81 of the Statute of Labour for employment trade unions.

In the case of common self-employed workers, it would be difficult, if not impossible, to grant self-employed workers' associations the right to use the bulletin boards of the premises or even the right to hold assemblies of the self-employed association in respect of any client. The reason for this is that it would impose a very large burden on a client, who probably had no relationship with the majority of the self-employed represented.

However, in the case of TRADEs, in my opinion, it does not seem so difficult to think that sections of that association of TRADEs could be created in the company itself. And they are sections, similar to the union sections, that could have the right to use the corporate intranet or

bulletin boards for their communications or they could even hold an assembly on the company premises.

In my view, the most representative associations of TRADEs should be able to create said associative sections in different companies where they are established.

Finally, once again, this right could only exist, either through an extensive interpretation, by the Constitutional Court, of the content of freedom of association contained in the Spanish Constitution that included the TRADEs or by an extension of these rights thought a change in legislation.

Collective bargaining. The major differences between the regulations of the self-employed and TRADEs are to be found in the legal regime of collective bargaining. In this sense, while the Self-employed Workers' Statute does not expressly recognise the right to collective bargaining of associations of self-employed workers, it does for TRADEs, through the figure of Agreements of Professional Interest.

In this sense, associations of self-employed workers can negotiate Agreements of Professional Interest for economically dependent self-employed workers who are affiliated or associated with them. This figure is regulated in Article 13 of the Law of the Self-employed Workers' Statute, which states that:

'The Agreements of Professional Interest set forth in section 2 of Article 3 of this Law, concluded between the associations or unions representing the economically dependent self-employed workers and the companies for which they carry out their activity may establish the conditions of manner, time, and place of execution of said activity, as well as other general contracting conditions. In any case, the agreements of professional interest will observe the limits and conditions established in the antitrust legislation.

2. Agreements of Professional Interest must be concluded in writing.
3. The clauses of the Agreements of Professional Interest contrary to legal provisions of necessary right will be considered null and void.
4. The agreements of professional interest will be agreed under the provisions of the Civil Code. The personal effectiveness of these agreements will be limited to the signatory parties and, where appropriate, to the affiliates of self-employed associations or signatory unions that have expressly given their consent to do so.'

Therefore, the first thing that can be affirmed is that any association can enter into this type of interprofessional agreement. Indeed, the law does not limit the possibility of negotiating this type of agreement to the most representative associations, but any type of professional association that represents TRADEs may negotiate and agree to such an agreement.

The second issue of relevance is that these agreements will not be applicable in general and *erga omnes* nor will they have a normative nature as do the collective agreements on employment. On the contrary, the law establishes the contractual nature and the subjective scope of the effectiveness of these agreements. Therefore, the agreements of professional interest will only be applied to those TRADEs that are affiliated to the trade unions or professional associations that have agreed upon that particular agreement of professional interest with the client company. In short, agreements of professional interest will only bind the signatories of the agreement.

The content of these agreements can be quite broad given that they can be regulated collectively in any type of labour conditions, including the conditions of contracting and extinction of TRADEs. This allows the negotiators a wide range of possibilities.

Third, the Article makes clear references to the antitrust legislation as a limit for this kind of collective bargaining of TRADEs. In Spain there is no judgment or administrative decision made by the Spanish competition authority in order to establish these limits. However, it is important that, given the right to collective bargaining of TRADEs, the law should make specific reference to these antitrust limits. That probably means that this law is not giving a right to collective bargaining above the competition law or it is making an exception to the applicability of the antitrust law in favour of TRADEs.

In the end, this collective bargaining for TRADEs would depend on how narrowly or extensively we apply competition law.

TRADEs: not such a useful regulation

It should not be forgotten that the Spanish National Institute of Statistics currently sets the number of workers who receive the majority or all of their income from a single client at more than 1,200,000 workers, while in the Official Register of Economically Dependent Workers the figures hover around 10,000. This means that there are more than 1 million workers in Spain who, despite being economically dependent, are not applying the TRADE legal regime. Undoubtedly, the causes of this divergence between the actual number of economically dependent workers and the number of economically dependent workers registered are due to many variations.

In my view, the lack of protection is the first reason. This includes the lack of a legal maximum number of hours for TRADEs, the absence of a minimum wage, no special health and safety protection, and so on. As a result, the self-employed workers have no real reason to identify themselves as TRADEs. Apart from that, there is no tradition of association in TRADEs, which means that there is no collective bargaining even when the law allows for this possibility.

In short, this is not the time to conduct a complex study of the causes or the failure of the TRADE regulation, but what is less doubtful is the conclusion: the need to rework the entire regulation of TRADEs if the legislator wants it to be of some use in the economic world.

Personal work relationship and the concept of workers: The recent Spanish Supreme Court interpretation

In recent times, the Spanish Supreme Court has been carrying out a deep reinterpretation of the concept of workers. Indeed, the High Court seems to have abandoned – or at least reduced to the minimum expression – the 'control test' as a way to identify an employee.

In this sense, in a multitude of judgments, the Supreme Court has claimed that there exists an employment contract even though the employee has freedom to choose his or her own schedule or working hours.[11] In the same sense, it has been understood that there can be an employment

11. STS of 20 of January 2015 (rec. 587/2014) – stair cleaners; STS of 20 of July 2010 (rec. 3344/2009) – office cleaners; STS of 22 January 2008 (rec. 626/2007) – Transporter who owned his own van; STS of 30 April 2009 (1701/2008) – garbage collector; STS of 16 July 2010 (rec. 3391/2009 and 2830/2009) and STS of 19 July 2010 (rec. 1623/2009 and 2233/2009) – artists; STS of 3 May 2005 (rec. 2606/2004) – lawyers; STS of 21 June 2011 (rec. 2355/2010) – insurance collectors; STS of 14 July 2016 (rec. 539/2015) – insurance agents; STS of 16 November 2017 (rec. 2806/2015) – Translators; STS of 8 February 2018 (rec. 3205/2015) – lift engineer.

contract even if there are no instructions from the employer.[12] The highest interpreter of the law also agrees that the worker's ability to reject assignments from the employer do not automatically exclude the possibility of being an employee.[13]

However, it is true that, on other occasions, the control test has been used to confirm an employment relationship.[14] Here, the Court said that any instruction from the employer in order to achieve a better execution of the services by a freelancer is an illegitimate interference with the freedom of a true self-employed worker, thereby making her an employee (STS of 24 June 2015 rec. 1433/2014).

Thus, the classic 'control test' – schedule, working hours, control, instructions and so on – seems to be a way to confirm the employee status but not the other way around when there are other circumstances. Indeed, for a long time now, the literature in Spain has defended a broad interpretation of subordination in the following terms: you are a subordinate if you are inside an organisation that is not yours (Rodríguez-Piñero 1966).

At the same time, the Spanish Supreme Court has said that the ownership of some working tools or means of production – the value of which is not high – does not exclude the existence of an employment contract.[15] Not even the fact that the workers assume some of the business risks is a reason not to consider them as employees,[16] or the fact that it has been proven that the workers provided services for more than one company – a non-exclusivity agreement.[17]

So, the Spanish Supreme Court is progressively abandoning, in my view, a rigid interpretation of subordination in which only the ones who 'pass' the control test are employees. In contrast, it seems that this Court is supporting a broad interpretation in which workers are all those who do personal work.

In this sense, the Court defines the concept of personal work as opposed to that of one who provides services within an enterprise. Of course, there will still be some interpretative doubts as it is not always easy to define what an enterprise is. However, the Spanish Supreme Court, in a recent judgment, made an approximation to the concept with enough relevant elements to identify it.

The Supreme Court Judgment of 16 November 2018 (rec. 2806/2015) – *Ofilingua* – concerned translators. In this judgment, the workers – formally freelancers – had freedom as regards their schedule and working hours, and they could reject an assignment to do interpreting work following the offer from the company without any negative consequences for them. There was no training provided by the company, no authorised or paid holidays – indeed, the company never asked to be informed when the workers wanted to take a holiday. There were no instructions about how they had to do the job, there was no exclusivity and it was proven that the translator did work for other clients apart from the company in question. The enterprise did not provide any tools to do the job

12. STS of 20 July 2010 (rec. 3344/2009) – office cleaners; STS of 22 January 2008 (rec. 626/2007) –transporter who owned his own van; STS of 30 April 2009 (1701/2008) – garbage collector; STS of 16 November 2017 (rec. 2806/2015) – Translators; STS of 8 February 2018 (Rec. 3205/2015) – lift engineer.
13. STS of 16 November 2017 (rec. 2806/2015) – translators; STS of 16 July 2010 (rec. 3391/2009 and 2830/2009) and STS of 19 July 2010 (rec. 1623/2009 and 2233/2009) – artists.
14. SSTS of 10 July 2000 (rec. 4121/1999); 15 October 2001 (rec. 2238/2000) and 7 October 2009 (rec. 4169/2008).
15. STS of 20 January 2015 (rec. 587/2014); STS of 20 July 2010 (rec. 3344/2009); STS of 8 February 2018 (Rec. 3205/2015), STS of 22 January 2008 (rec. 626/2007); of 7 October 2009 (rec. 4169/2008).
16. STS of 9 March 2010 (rec. 1443/2009).
17. STS of 22 January 2008 (rec. 626/2007); STS of 30 April 2009 (1701/2008); STS of 3 May 2005 (rec. 2606/2004).

and if they needed them, the workers had to use their own, including paper, pens, computer, dictionaries, and so on.

Hence, despite all of these facts that prove a lack of dependence, the Supreme Court rules that they were employees. In order to reach this conclusion, the Court used the following six criteria (although later on we will see that they can be summarised in just two):

1. First, it is understood that there was an employment contract because the employer (false client) was the one who made the decisions concerning the market and the relationship with the public.
2. Second, the company was the one that decided the prices of the services. So, the salary was not negotiated with the freelancer – on the contrary, the supposed self-employed worker could only accept it or would no longer be able to work there.
3. Third, the company selected the final clients or the services to be provided.
4. Fourth, the Supreme Court said that there was an employment contract because the salary was calculated on a criterion closely related to the work provided. This meant that the salary was connected with the number of hours worked and not with other business criteria.
5. Fifth, regarding the compensation there was a lack of 'special profit of the entrepreneur'.
6. Last, the Supreme Court concluded that there was a false self-employed worker because the workers provided services without a relevant business structure.

These six arguments are clearly not in line with the classic 'control test'. These arguments have the aim of proving that these workers who provide services are not a genuine enterprise.

In this sense, the Spanish Supreme Court relied on the interpretation in which the scope of labour law must not be limited by the dependent employment contract, but to all personal services while they are not a genuine company. In line with Freedland and Kountouris (2011),[18] it is necessary to distinguish between services provided by companies and services provided by personal work. Thus, in the world of services, they are divided into subordinate work, self-employed work and companies. With this purposive interpretation of the concept of workers (Davidov 2016)[19] the first two fall within the scope of the Statute of Labour, excluding only the companies.[20]

In fact, in my opinion, even though the Supreme Court established six arguments in order to defend the existence of an employment contact, these arguments had only one aim: to prove that these service providers were not a real company. In this sense, the fact that the workers did not make any decisions concerning the market or the public, the fact that they did not select the final clients, the fact that they did not fix the prices or even the fact that the compensation depended on the number of hours that they worked, are not arguments about whether they were subordinated or not, but instead arguments in favour of the notion that they were not a genuine company. Specifically, this is so because: i) they could not negotiate the labour conditions; and ii) they were not a genuine company because they did not manage one of the most important parts of any business – marketing, getting and retaining clients, choosing prices, and so on.

18. Freedland M and Kountouris N., L., (2011), *The legal construction of personal work relations*, Oxford.
19. Davidov, *A Purposive Approach to Labour Law* 35–45 (Oxford 2016).
20. Argument that I defended in the past, see Todoli-Signes A., The end of the subordinate worker? The On Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers, *International Journal of Comparative Labour Law and Industrial Relations*, 33, no. 2 (2017): 241–268.

The inexistence of a business structure owned by the service providers was highlighted at the end of the judgment in order to conclude that there was an employment contract. The lack of elements with which to determine that they were a genuine company – non-existence of important business areas, lack of relevant assets (material or immaterial) – seems to have been decisive. In fact, in this case, the need to have a computer to do the job, and the fact that the computer was owned by the freelancer, was not relevant because the computer was not very expensive and this activity could not be described as a 'capital intensive activity'.

To sum up, only if the services provided require an economically relevant amount of capital and these elements belong to the provider and it also manages the areas of the business needed to operate the business can it be considered a genuine enterprise.

The lack of the 'special profit of the entrepreneur' as a criterion may mean two things. First, it could mean that the compensation received is low and so that would be a criterion used in order to conclude that they are employees. However, it does not seem that a high compensation excludes the existence of an employment contract – not even in complex cases. In particular, the Spanish Supreme Court Judgment of 19 February 2014 (rec. 3205/2012) is a well-known case about a radio reporter whose compensation was far higher than the average Spanish compensation and the Court ruled that he was an employee.

Second, the other possibility is that the Supreme Court was referring to the surplus value, in other words, the concept that economics defines as the gains made by the employer though the work of others. In this sense, the Supreme Court could mean that these translators generated profits through their own work and not because they managed a company in which other people who were hired by them were doing the job.

In my opinion, the second one is more logical due to the fact that, if there are no workers hired by the service provider, this means that she does all the work herself. This situation is hardly a genuine enterprise. Moreover, this last interpretation is in line with other judgments (from courts in other countries) that support the idea that, in order to be considered a real freelancer, she has to have a compensation from something apart from her own work (e.g. special knowledge investment in capital) and she has to have real perspectives of business growth other than making more money if she works more hours.[21]

In conclusion, the Spanish Supreme Court seems to adopt a purposive interpretation of the employment contract in order to apply the concept to all personal providers of services regardless of whether they are subordinate or self-employed. If only the provider of services does the work, she can be a genuine enterprise and, thus, all the labour protections are applicable. However, there are still doubts about who a genuine entrepreneur really is.

In order to clarify the matter, the Supreme Court seems to see two main characteristics as being the most relevant: on the one hand, the fact that a real company has to have a business structure, meaning that it owns – or manages – relevant material (buildings, machines, etc.) or immaterial (brand, data, clients, specific software) elements.[22] On the other hand, a real business has to have sufficient organisation, which means having elements to provide the services but also elements to

21. Employment Tribunal UK case *Mr Y Aslam, Mr J Farrar and Others V Uber* Case Numbers: 2202551/2015. Commented at https://adriantodoli.com/2016/11/02/comentario-a-la-sentencia-que-declara-la-laboralidad-de-los-conductores-de-uber-en-uk/.

22. Basically, all this has similarity to what was previously argued with respect to 'the new criteria to classifying workers' since in the end these new factors have no other objective than to point out the importance of different productive elements of the 21st century -mainly immaterial – as opposed to those that were important in the 20th century

manage the business (such as a marketing policy, business administration, making the significant decisions, and so on). Second, a real enterprise will be one that hires workers and they are the ones doing the work from which the entrepreneur gains her profits/compensation.

In my view, this purposive interpretation has to be applauded, because with it the labour law accomplishes its main goal, that is, the protection of all those who make a living from their work.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This research is part of the Regulation Research Group at the University of Valencia, and have been funded by the Spanish Government (Ministry of Economy and Competitiveness Research Plan, 2016-2019: by the Research project DER2015-67613-R «The regulation of sharing economy».

(machinery, factory), see Todoli-Signes A., (2017), The 'gig economy': employee, Self-employed or the need for a special employment regulation?, *Transfer*, Vol. 23(2) 193–205.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 271–280

DOI: 10.1177/2031952519866536
journals.sagepub.com/home/ell
SAGE

Answers to the New trade union strategies for new forms of employment questionnaire

Samuel Engblom
Legal advisor, TCO – The Swedish Confederation for Professional Employees, Sweden

Magnus Lundberg
Legal advisor, TCO – The Swedish Confederation for Professional Employees, Sweden

Abstract
The personal scope of Swedish labour law is almost exclusively defined by the concept of the employee. Few workers other than employees are covered. From a comparative perspective, the Swedish concept of employee is rather wide, and the exemptions from the personal scope are few. There are no intermediary categories between employees and self-employed workers, but the scope of e.g. some occupational safety and health regulations is extended to cover some self-employed workers. Swedish trade unions are allowed to organise self-employed workers and many unions do so. There are some examples of collective bargaining agreements covering or regulating the conditions of self-employed workers.

Keywords
Sweden, labour law, employee, employer, self-employed, non-standard work, atypical work, gig-economy, platform work, trade unions, collective bargaining

Question 1. What is the main concept of working person defining the personal scope of application of your national labour law system? Is the concept defined by statutes/codes, by judges or both? What are the key criteria? Are the defining elements sufficiently flexible to include at least some non-SER?

Corresponding author:
Samuel Engblom, Legal advisor, TCO Linnegatan, Linnégatan 14, 114 47 Stockholm, Sweden.
E-mail: samuel.engblom@tco.se

The personal scope of Swedish labour law

The personal scope of Swedish labour law is almost exclusively defined by the concept of employee. Few workers other than employees are covered, but on the other hand, the concept of employee is broad and the exemptions from the personal scope are few.

In statutes, the personal scope is most often defined as 'employees' or 'employees in private or public employment'. An example of an Act with such plain scope is the *Annual Leave Act*, which grants rights to paid leave or holiday pay to all 'employees'.[1] The jurisdiction of the Labour Court is limited to disputes concerning collective agreements and other disputes concerning 'the relationship between employers and employees'.[2] The anti-discrimination act is applicable to all employees without any exceptions, but with the addition of e.g. jobseekers and employees of temporary work agencies *vis-à-vis* the client employer.[3]

More commonly, the personal scope is modified through a short list of employees exempted from the personal scope. The *Employment Protection Act* excludes managers, relatives of the employer, employees working in the household of the employer, and workers in special labour market programmes from dismissal protection.[4] These workers are, nevertheless, protected against certain kinds of discriminatory dismissal by the anti-discrimination acts. More rarely, other categories, including self-employed workers, are added to the personal scope (see Question 3).

The concept of employee

Swedish labour law statutes do not contain any definition of the concept of employee. Instead, the concept has developed through a combination of judicial interpretations – in particular by the Supreme Court (*Högsta domstolen*) and the Labour Court (*Arbetsdomstolen*) – and indications by the legislators in preparatory works.

For an employment relationship to exist, two essential criteria have to be fulfilled. The first criterion is the *existence of a contract* between the employer and the employee. In Swedish law there are no formal requirements for employment contracts. An orally concluded contract or a contract concluded through the actions of the parties is as valid as a written contract.[5] The second necessary criterion is that the party to the contract that is to perform work, i.e. the worker, is a *natural person*. This requirement does not mean, however, that the existence of a juridical person on the work-performing side of the contract rules out that it can be a contract of employment.

The existence of a contract and that the party that is to perform work is a natural person is not enough, however, to distinguish employees from the self-employed. For that, a multi-factor test taking into account all relevant circumstances is applied. The criteria used in the multi-factor test have been developed in case law and in the preparatory works of new legislation[6] and can be summarised as follows:

---

1. *Semesterlagen (1977:480), §1.*
2. *Lag (1974:371) om rättegången i arbetstvister, 1 kap. 1*§. C.f. also SOU 1974:8 p. 153. In the case AD 1978 nr 148, however, the Labour Court held that a dispute between two corporations could not be considered a dispute concerning a collective agreement when the party performing the work was a limited company.
3. Diskrimineringslagen (2008:567) Chapter 2, §1,
4. *Lag (1982:80) om anställningsskydd 1§.*
5. Government White Paper SOU 1993:32 pp 219 ff.
6. In the preparatory works of the 1976 *Employment (Co-determination in the Workplace) Act* the circumstances that in legal practice and jurisprudence have been said to draw the line between employees and independent contractors were

Performing work personally

The party performing the work is obliged to perform the work personally, whether this is stated in the contract or presumed by the parties to the contract, or has in fact, completely or almost completely, performed the work personally.

Subordination

He is, in the performance of the work, subject to specific orders or control as to how the work is performed, the working time or the place of work. The contract includes putting his/her labour at the disposal of the other party for arising tasks.

Economic dependence

The relationship between the two parties has a more lasting character. He/she is prevented from performing similar work of any significance for someone else, whether this is due to a restriction in the contract or a practical consequence of the actual conditions of the work, such as a lack of time or energy for other work.

There are also other factors, such as the ownership of machinery, tools and raw materials, remuneration paid at least in part as a guaranteed salary, compensation for expenses that may play a minor role. The preparatory works also mention as a factor that the party performing the work 'has economically and socially the same status as an employee'.

From a comparative perspective, the Swedish concept of employee is probably rather wide. In a comparative study published in 2003 one of the present authors found it to be wider than the concepts of employee used in French, US and British labour law, including UK 'workers'.[7] The width of the Swedish concept can be attributed to the technique of integrated consideration of all circumstances with no single factor being necessary. As subordination is not a necessary criterion, it has been possible to bring workers previously include the dependent contractor category under the concept of employee. At the same time, workers showing a sufficient degree of subordination do not have to be economically dependent to qualify for employee status.

The rather flexible concept of employee is probably one of the reasons that there have so far not been any more important cases where non-standard employment relationships, such as casual workers, have been excluded from labour law protection by case law. The concept of employee has also proven its flexibility over time, with new groups of persons performing work being included as the labour market has developed.

> Q.2: Is your labour law system essentially premised on the binary divide? Or does it encompass one or more intermediate categories of quasi-subordinate or economically dependent workers? If so, how are these intermediate categories defined by the law and by case law? How does you labour law system define the concept of self-employed person/worker? How does it define the concept of 'business person' or 'entrepreneur' (or equivalent category of

listed. SOU 1975:1 p 721 f. The list has been repeated in later Government White Papers, i.e. SOU 1993:32 pp. 227 ff., and is often quoted in the literature.

7. Engblom, S (2003) Self-employment and the Personal Scope of Labour Law – Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States. Florence: European University Institute.

person whose economic activities are likely to be regulated predominantly or exclusively by contract or commercial law, and not by labour law: e.g. employing staff)?

Q.3: In your labour law system what are the labour rights that: a) self-employed persons are entitled to? b) quasi-subordinate/economically dependent workers are entitled to?

Question 2.

Yes, the Swedish labour law system is premised on a binary divide. There are no intermediary categories, neither in labour law nor in e.g. taxation or social security. (But note the section below on dependent contractors).

In labour law, there is no definition of self-employed, entrepreneur or businessperson. It is simply the residual category left when employees have been distinguished. In the preparatory works of the 1976 *Employment (Co-determination in the Workplace) Act*, a list of circumstances indicating that a worker is an independent contractor is nonetheless provided.[8] These have to do with the worker not being obliged to perform the work personally, the work under the contract being limited to specified tasks, the relationship being of a temporary nature, he is not by contract or de facto prevented from performing similar work for someone else, he decides for himself how the work is performed, the working time and the place of work, he has to use his own machinery, tools or raw materials and has to cover his own expenses. The remuneration should be solely dependent on the economic performance of the business. Permits and official authorisation can also be a sign of status as an employee. This is very far from a legal definition however, and many genuinely self-employed do not fulfil all these criteria.

Dependent contractors – presumed dead

According to section 1 of the *Employment (Co-determination in the Workplace) Act*, which is the central piece of legislation on collective labour law, the term employee 'shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer.'[9] The background is the following:

From the 1940s Swedish labour law contained provisions concerning dependent contractors (*beroende uppdragtagare*) which in later doctrine were sometimes referred to as *jämställda uppdragtagare*, signifying contractors who have been put on an 'equal footing' with employees. Originally, the idea was that there were three types of workers: employees, dependent contractors and independent contractors.[10] The boundary for the personal scope of labour law thus came to lie between dependent and independent contractors. According to the preparatory works, the point of departure for distinguishing between the two was to be taken in the nature and degree of dependence. In particular, the existence of instructions for, and monitoring of, the work (i.e. limiting the worker's freedom) was considered to indicate dependence. Limits to the worker's freedom as to the pricing or terms of payment for goods and services provided to consumers and other third parties were, however, not considered enough to make an independent contractor dependent as they were normal practice between independent

8. Government White Paper, SOU 1975:1 p. 721 f.
9. *Lag (1976:580) om medbestämmande i arbetslivet, § 1 2st.*
10. Sometimes, the dependent contractors are described in terms that indicate that they should be considered as employees under the regulations with extended scope. Here, however, they will be considered as a separate category, inside of the personal scope alongside employees.

enterprises. For the worker to be a dependent contractor, the employer had to have some control of the running of her businesses. In addition, the worker's social and economic status was to be considered, including the worker's self-perception expressed, for example, through membership in an organisation built 'according to the principles of a trade union'.[11]

The current legal status of these third-type workers is not entirely clear. The most commonly held view is that the widening of the concept of employee has led to the inclusion of categories of workers previously classified as dependent contractors, and many argue that the dependent contractor category is more or less obsolete. Already in the preparatory works of the 1976 *Co-determination Act*, the necessity to include dependent contractors as a separate category was questioned. The committee drafting the legislation described their inclusion as a security measure to make sure that the personal scope of the new legislation would not be less wide than the scope of the legislation it was to replace.[12] In the government bill, the inclusion of dependent contractors was said to make the personal scope 'slightly wider than otherwise had been the case'.[13]

Less than three years later, in the government bill concerning the first equal opportunities act, the responsible cabinet minister concluded that the category of dependent contractors found in the *Co-determination Act* most likely was included in the concept of employee, without the need for any special provisions.[14] Adlercreutz holds that the workers who in 1945 were considered dependent contractors today to a large extent will be considered employees.[15] In a case from 1985, the Labour Court questioned whether there still is, due to the extension of the concept of employee, any room left for the dependent contractor category.[16] The decision, and the idea that the dependent contractor category has been subsumed by the concept of employee, has however been criticised. In the preparatory works of the *1979 Equal Opportunities Act* it was assumed that dependent contractors fell inside the concept of employee which is why no special provisions concerning that category were needed.[17] According to Sigeman, there are nevertheless indications in the preparatory works that the dependent contractor still is a distinct category. In addition, Sigeman introduces the idea that the dependent contractor concept, like the concept of employee, is dynamic and has developed to include some workers earlier considered as independent contractors, for example franchisees.[18]

Question 3.

The key legislation in the area of occupational safety and health, the *Work Environment Act*, assigns employers some responsibilities regarding the physical work environment that go beyond the circle of her employees and that can include self-employed workers.[19]

The personal scope of the Swedish *Work Environment Act* (*Arbetsmiljölagen*) varies between the different provisions. From the principal field of application – 'every activity in which

11. Prop. 1945:88 p 21, C.f. also AD 1980 nr 24 (salesmen of sewing machines) AD 1969 nr 31 (collective rights of gas station managers).
12. SOU 1975:1 p 725 ff.
13. 'Genom andra meningen utvidgas lagen tillämpningsområde något.' Prop. 1975/76:105 Bilaga 1 p. 323.
14. Prop. 1978/79:175 p. 110.
15. Adlercreutz (2000) p. 25.
16. AD 1985 nr 57. The case concerned four persons who were under a contract with the local authority to take care of mentally disabled children in their own homes.
17. Prop. 1978/79:175 p. 110.
18. Sigeman (1987) p. 613 f. Sigeman's view has been supported e.g. by Källström (1994) p. 70. For a summary on this debate, c.f. SOU 1994:141 pp. 80 ff.
19. C.f. below, 4.5.2.

employees are used for work on an employer's account'[20] – a number of exemptions and extensions are made. In the discussion of the personal scope found in the preparatory works of the original 1976 legislation, the purpose of the legislation took main stage.[21] The protective character of the legislation, aimed at guaranteeing worker health and safety, was said to require a wide scope for many of its provisions, which is why an extension of the personal scope to all professional activities had to be considered. At the same time, it was nonetheless considered natural that the legislation focused primarily on situations where the worker's work environment is dependent on the actions of someone else, as is the case with employees. The possibility to actually influence the working environment of the worker has been one of the more important factors in allocating responsibility under the *Work Environment Act*.

Before the 1978 *Work Environment Act*, Swedish occupational health and safety regulations exempted so-called 'uncontrollable work' (*okontrollerbart arbete*) - work performed in circumstances where the employer cannot be expected to monitor the work - from the personal scope. The exception was mainly applicable to homeworkers, but also to service mechanics and engine fitters working away from their employer's premises, and domestic helpers. Even though this kind of work is difficult to supervise, a fact that will in practice affect the employer's responsibility, it was not considered reason enough to leave it outside the personal scope of the act.[22]

Apart from responsibility for the employer's own employees, (and those held responsible under product safety rules), some responsibility is also given in the following cases: i) two or more persons (legal or natural) simultaneously engaged in activities at a common worksite; ii) persons controlling a worksite common to several enterprises; iii) landlords and other property owners who provide premises for work or as personnel facilities; and iv) user enterprises of temporary agency workers.

The first three concern rather specific situations and are more or less fashioned on construction sites or similar situations. Commonly, independent contractors are captured by these extensions. The fourth aims at a wider range of situations but applies to temporary agency workers only.

When two or more persons (legal or natural) are simultaneously engaged in activities at a common worksite, they are to consult each other and co-operate to achieve satisfactory safety conditions. In addition, each of them is responsible for not exposing any person working at the site to the risk of ill-health or accident, including self-employed workers.[23] A common worksite can be described as more than one undertaking at a time carrying on activities which are not physically segregated. If two undertakings share the same premises or devices, as happens at construction sites, certain department stores or when a cleaning company or transport company enters a factory or office to work there, a common worksite exists.

If a work site is permanent and common to several enterprises and the site is under the control of one of them, the person controlling the worksite will be responsible for co-ordinating safety measures. The same is true for someone who commissions construction or heavy engineering work. Co-ordination responsibility may by agreement be transferred to one of the other persons conducting work at the worksite. In other cases, for example when there is no permanent worksite or when none of the employers is in control of the worksite, the employers can agree that one of

20. *Arbetsmiljölagen 1 kap. 2§.*
21. SOU 1976:1 pp. 273 ff.
22. SOU 1976:1 pp. 277 f.
23. *Arbetsmiljölagen 3 kap 6§.*

them will assume the co-ordination responsibility. If no such agreement has been reached, the Work Environment Authority may ordain who is to have such responsibility, or if there are special grounds, ordain co-ordination responsibility on a person other than the one agreed by the parties.[24]

The responsibility to co-ordinate health and safety measures is defined by the *Work Environment Act* and concerns ensuring the co-ordination of the work to prevent risks of ill-health and accidents – including timetables, general and special safety devices and personnel facilities and sanitary devices.[25] Other employers and persons working at the common worksite shall comply with the directions issued by the person responsible for co-ordination. The co-ordination responsibility is not the same as the employer's responsibility and the co-ordination responsibility does not relieve the other employers present from their responsibilities under occupational health and safety legislation. The line between the two is, however, difficult to define. The point of departure is that the person who legally and factually has the best possibilities to take measures to protect workers and promote a good work environment is the one who should be responsible for them.[26]

In addition to the co-ordination responsibility, a person controlling a worksite 'shall ensure the existence on the worksite of permanent devices of such kind that a person working there without being an employee in relation to him is not exposed to the risk of ill-health or accident'.[27] The provision is aimed at protecting visiting personnel, involved with, for example, distribution, transportation and cleaning; and persons carrying out inspections. It was introduced on the grounds that someone who can influence the health and safety situation of a worker, will have the responsibility to do so, even if she is not under her supervision.[28] Naturally, this includes responsibility *vis-à-vis* self-employed workers.

In the early 1990s, when changes were made in the scope of the law to include user enterprises of temporary agency workers, the question was raised, in the government bill, whether user enterprises of self-employed contractors should be given the same kind of responsibility for the work environment of the self-employed workers.[29] The idea was rejected by the government on the grounds that the concept of employee had developed to include workers previously not covered and that the responsibilities already being assigned by the act would cover many self-employed workers.

Further, the government held that there typically were significant differences between self-employed contractors and temporary agency workers. Temporary agency workers were considered to be more 'physically integrated' into the user enterprises, being subject to the managerial prerogatives of the user enterprise and working under conditions resembling the user enterprise's own employees. Self-employed contractors, the argument went, were often hired to do work that was not part of the user enterprise's normal operations. In addition, an important reason for using self-employed contractors was to perform work for which the employer lacked the necessary skills or know-how, including how best to protect the worker from the hazards of the work. Finally, the government did not want private persons buying services from self-employed contractors to become responsible under occupational health and safety legislation.

24. *Arbetsmiljölagen 7 kap. 6§.*
25. *Arbetsmiljölagen 3 kap 7§.*
26. Prop. 1993/94: 186 pp. 28 f.
27. *Arbetsmiljölagen 3 kap 12 §.*
28. Prop 1993/94: 186 p. 31. C.f. also *Directive 89/391/EEC* and *92/57/EEC*.
29. Prop. 1993/94:186 pp. 35 f.

In 2017, a government committee of inquiry on new forms of work and the work environment proposed the undertaking of a review of the occupational safety and health legislation with the view of allocating responsibility for the work environment to the party best suited to take that responsibility also outside of a traditional employee-employer relationship.[30]

Q.4: How do your labour law system classify the following categories of working person: a) a nominally self-employed person offering personal work or services to one main client? b) a nominally self-employed person offering personal work or services to a multitude of clients or customers? c) a nominally self-employed person offering personal work or services to one main client, while also owning some of the 'means of production' necessary to generate those services? (would the answer be different if it had multiple clients?) d) a self-employed person that established a relationship with other workers (not necessarily through a subordinate work contract – it could be, for instance a relationship of association) and/or coordinates the work and services they provide? Would any part of your labour law system broadly understood (e.g. individual LL, collective LL, equality law, health and safety at work law) apply to any of these working persons? Please refer us to statutory provisions or legal precedents (if any).

The nature of the Swedish multi-factor test, with a joint consideration of all relevant factors, makes Question 4 very difficult to answer. In each case, there could be other circumstances that point in the direction of the person being either an employee or self-employed.

a) A nominally self-employed person with only one main client could be considered an employee and the high degree of economic dependence could e.g. mean that a low degree of subordination matters less. But if other circumstances point to it, the person could also be considered self-employed.
b) Having a multitude of clients does not disqualify one from employee status if other circumstances point strongly in that direction. But it would increase the chance of the person being considered self-employed.
c) The importance of the ownership of the means of production (if we, by this, mean tools or machinery) varies between different sectors or occupation.
d) The fact that there are several people working together would typically point to the person not being an employee of the client company. At the same, time, if other circumstances point to the person being an employee, the fact that a person has not performed all of the work personally does not exclude that person from status as an employee if he or she has performed the work 'almost completely'.

Q.5: Can you think of a particular collective agreement covering any term or condition of employment of particular categories or groups of self-employed persons or professionals? E.g. freelance journalists, or self-employed musicians? Do any of your national professional orders still set (unilaterally or otherwise) minimum fees for professional services? If you are an expert employed by, or directly involved in, a supranational or international institution, are there any aspect of your labour standards (including freedom of association and the right

30. Government White Paper SOU 2017:24 *Ett arbetsliv i förändring – hur påverkas ansvaret för arbetsmiljön*.

to collective bargaining) that also apply to members of the liberal professions or of professional orders?

Yes, there are. For example, freelance journalists are covered in the collective agreement for employed journalists regarding representative structures. There is also a specific 'freelance agreement' that is not, per se, a collective agreement but more serves the purpose of being a complementary agreement that covers certain issues such as incurred costs and intellectual property, if this has not been agreed separately. The Swedish Union of Journalists has also established a 'freelance calculator' that is used by freelance journalists to calculate what they should charge for their assignments as freelancers.

For actors, there are collective agreements conditions that deals with copyright that covers also the freelancers, but there is also one particular agreement on audiobooks that covers remuneration for self-employed actors.

Some of the TCO member unions are organising self-employed workers and have established guidelines for what to demand in terms of wages and other material conditions when accepting a temporary job as a self-employed contractor. These unions also provide support to self-employed contractors outside the scope of collective bargaining, such as legal advice, income insurances, professional development etc. Some of the unions have also themselves established billing or invoice services, to ensure that their members are treated fairly.

Q.6: Are there any obstacles (including statutory prohibitions) to self-employed persons setting their terms and conditions of employment/service (and in particular the level of remuneration) by means of collective agreements? Does the situation change if organisations also representing 'employees' are involved in the process of collectively negotiating terms and conditions of service of the self-employed?

There are, to a certain extent, obstacles; the Employment (Co-Determination in the Workplace) Act (1976:580) applies to the relationship between employer and employee. This Act defines collective agreements in the Swedish context, and non-employees, within the meaning of this Act, cannot form a trade union and conclude collective agreements. In principle, trade unions that represent 'employees' cannot conclude collective agreements that also cover freelancers etc. (although it has been done to some extent (see above) but not challenged).

The term 'employee' as used in this Act shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer.

Q.7: Are there any reform debates currently taking place in your legal systems and involving either the concepts of worker/work or the personal scope of application of (some areas of) labour law? Can you give us some examples?

Yes; for example, the unemployment benefit schemes are now being looked into by a governmental committee, and one of the objectives of the committee is to investigate how the legal framework for the unemployment benefit schemes can be made neutral when it comes to employment forms and similar (i.e. how to ensure that self-employed, freelancers etc. are covered by these schemes).

Another example is that TCO member union, *Unionen*, is currently working on a regulatory mechanism for the platform industry, involving 'buyers' (i.e. employers), 'sellers' (i.e. trade union members) and the 'intermediators' (i.e. the platforms), to ensure that labour standards on a par with collective agreements are adhered to.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 281–290

DOI: 10.1177/2031952519866537
journals.sagepub.com/home/ell
SAGE

UK response to new trade Union strategies for new forms of employment

Mark Freedland
Emeritus Research Fellow, St John's College, Oxford, UK

Hitesh Dhorajiwala
University College London, London, UK

Abstract
This paper records the responses to the questionnaire that was circulated to academics for the purposes of compiling the ETUC publication, 'New trade union strategies for new forms of employment'. In responding to the questions asked, this paper provides a broad description of how work relationships are organised in English law, including the various tests and criteria that are relevant to particular work relationship statuses which determine access to both individual and collective employment rights. This also involves discussing the relationship between newer intermediate work relationship statuses, and the traditional binary divide upon which English employment law is premised. The paper finally turns to assessing hypothetical scenarios against the tests for work relationship status in English law, as well as possible reform proposals that could help to increase coverage for workers.

Keywords
Employment law, personal work, UK employment law, English employment law, employee, worker, status

Q.1: What is the main concept of working person defining the personal scope of application of your national * labour law system? Is this concept defined by statutes/codes, by judges, or both? What are the key criteria that the law and case law use in order to identify this concept, and thus in order to define the personal scope of application of your labour law system? Are the defining elements of this concept sufficiently flexible as to adequately include at least

Corresponding author:
Mark Freedland, QC (Hon), FBA; Emeritus Research Fellow, St John's College, Oxford, OX13JP, UK.
E-mail: mark.freedland@law.ox.ac.uk

some non-SER in the ambit of Labour Law? Is it strengthened by 'legal presumptions' for particular forms of non-SER? Or/and by robust 'sham' or, favour', or 'fictio iuris' doctrines?

* or supranational or international if you are an expert employed by, or directly involved in, a supranational or international institution/body.

There are two key concepts for classifying work relationships in English law: (i) the employee; and (ii) the worker. While each of these concepts is defined by both statute and judicial case law, the employee concept is defined in more detail in the common law: s 230(3) of the Employment Rights Act (ERA) 1996 offers a circular definition of employment, stating that an employee is 'an individual who has entered into or works under . . . a contract of employment'.[1] However, more guidance is provided in the common law, which offers a set of criteria revolving around the idea that the putative employee is working under the control of the employer, or is dependent on the employer.[2]

Broadly speaking, for employee status, the three criteria are: 1) a relationship of employer and employee; 2) mutuality of obligation; and 3) no terms inconsistent with employee status.[3] Looking first to the 'relationship of employer and employee', the courts have developed a number of different tests to identify relationships that would be employment. This can include asking whether the employer has control over the employee,[4] whether the employee is integrated into the employer's workplace,[5] or whether the employee or employer is the party that assumes the economic risk of the work being done.[6] While these tests vary in their precise application, they all purport to be able to identify an essential element in the work relationship that explains its classification as employment, rather than some other kind of contractual relationship. However, what these concepts have in common is that, to differing degrees, they reinforce a certain paradigm of what the employment relationship looks like: a direct, bilateral relationship with a unitary employing entity,[7] which these tests tend to more readily fit, than those atypical work relationships that would have varying degrees of control or control, or which purposely shift economic risk onto workers within them.

The second criterion, mutuality of obligation, offers additional problems for work relationships seeking classification as employment. Mutuality of obligation, originally proposed as an analytical tool for assessing work relationships,[8] morphed into one of the criteria used by the courts to identify whether a work relationship is one of employment. In its widest form, mutuality of obligation places an obligation on the employer to offer work, and a concurrent obligation on the employee to accept that offer. These obligations exist between discrete wage-work bargains within the relationship, and this form of mutuality of obligation is often referred to as the 'global' or 'umbrella' form of the criterion. This version of mutuality of obligation assumes that an essential characteristic of an employment relationship is a continuity of obligations between the parties, and

1. Employment Rights Act 1996, s 230(3)(a).
2. ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) ch 5.
3. ibid.
4. *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497, 515 (QB).
5. *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, 111 (CA).
6. *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735 (CA).
7. Jeremias Prassl, *The Concept of the Employer* (OUP 2015).
8. Nicola Countouris 'Mutuality of Obligation' in Alan Bogg, Cathryn Costello, ACL Davies, and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 174.

relies upon that particular dynamic as a proxy for identifying employment. However, there is a less onerous conception of mutuality, which is an obligation to offer and accept work *within* a single wage-work bargain, akin to contractual consideration.[9]

Mutuality of obligation in the 'umbrella' sense has proven to be notoriously difficult to satisfy, with those work relationships that tend towards the paradigm discussed above being the most likely to contain the types of obligation within the work relationship that would satisfy the mutuality of obligation criterion in the wider conception. This becomes important, because while mutuality within a single wage-work bargain may be of use in establishing that a particular discrete job or task was done as an employee, an inability to demonstrate the existence of obligations between those tasks would deprive the putative employee of continuity of status, which would be a relevant condition for access to certain rights that have qualifying periods (notably, unfair dismissal).[10]

The third criterion is the requirement that there are no terms in the relationship that are inconsistent with employment status. Primarily, this criterion focuses on the presence and scope of any substitution clauses that would allow the employee not to perform work personally within the relationship. Generally, an unfettered substitution clause will be fatal to a finding of employee status,[11] whereas conditional or occasional substitution clauses may be compatible depending on the nature and degree of any fetters placed on that right of substitution.[12] Personal service is again a factor that is heavily relied upon as an important indicator that a work relationship exhibits the characteristics of employment, rather than independent contracting which is seen to be more closely aligned with a freer right to not provide personal work.

The worker concept, by comparison, is intended to be a more accessible, intermediate status between employment and independent contractors,[13] which should capture more non-standard work relationships that do not fit the paradigm work relationship that employment status is aligned to. Those who classify as workers are entitled to a narrower selection of rights (such as minimum wage) than those who would be employees. The status is defined in statute, and includes both employees, and those who work under:

> 'any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'[14]

This statutory test has been interpreted as having the same key elements as the employee definition,[15] albeit with the boundary for each of those tests pushed in the putative worker's favour.[16] What this means is that a worker must demonstrate that the relationship with the employer exhibits: mutuality of obligation; a personal service obligation; as well as the fact that they are not running their own business (assessed through broadly similar tests to those seen when considering whether there is a 'relationship of employer and employee' in employee status).

9. *McMeechan v Secretary of State for Employment* [1997] ICR 549, 563H-564B (Waite LJ).
10. Employment Rights Act 1996, s 108.
11. *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA).
12. *Ready Mixed Concrete* (n 4); *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [2017] ICR 657 [84].
13. Mark Freedland, *The Personal Employment Contract* (OUP 2003) 36.
14. Employment Rights Act, s 230(3)(b).
15. *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (CA) [17(5)].
16. ibid.

However, by using shared tests and criteria between employment, and the intermediate status, the two have collapsed into each other. Notably, mutuality of obligation in its 'umbrella' conception has operated to require similar kinds of obligations between employers and workers as would be required between employers and employees.[17] The result is that where the threshold for this shared criterion is essentially the same for worker status as it is employee status, the de facto threshold for the two becomes indistinguishable, causing the purportedly wider status to collapse into the narrower one. What results is a status that appears to be much more inclusive than employee status, but ends up being governed by the same heavily contractual elements that are found in employee status, and restricts access to even this intermediate status to those non-standard work relationships that still tend towards the paradigm relationship set out above.

In recent years, a troubling development related to worker status has been to elide other distinct intermediate statuses in English law with this 'worker' concept. This has notably occurred with s 83(2) of the Equality Act 2010, which defines the personal scope of anti-discrimination law. The Court of Appeal held that this status, which was in fact derived from EU equality Directives,[18] was materially the same status as s 230(3)(b) worker status,[19] notwithstanding the much wider drafting of the former. Moreover, in the recent *Deliveroo* decision in the CAC, the court approached s 296 of the Trade Union and Labour Relations (Consolidation) Act 1992, which defines the personal scope of legislation relating to collective rights at work, as essentially being the same as s 230(3)(b).[20] With these elisions come the inevitable consequence that criteria such as mutuality,[21] or the case law surrounding personal work obligations,[22] are imported into statuses that are neither drafted with such criteria in mind, and are likely intended to capture a much broader collection of work relationships than s 230(3)(b) worker status.

As for 'sham' doctrines, the most prominent in English employment law is found in the *Autoclenz*.[23] The Supreme Court held that in the context of work relationships, and taking into account the relative bargaining power of the parties, it may be necessary to ask whether the written terms of the agreement represent the 'true nature' of the agreement between the parties. This has provided a powerful tool to argue that while a work relationship may be represented in one way in the contract, divergent practice may allow a court or tribunal to look beyond that contract and apply the various tests to classify a work relationship to that practice. Although the specific contours of the *Autoclenz* approach remain to be determined,[24] it does introduce some flexibility in the assessment of work relationship status. However, it important to note that while the *Autoclenz* doctrine does offer a more flexible approach to assessing factual performance *vis-à-vis* written terms, it does not alter the tests, and their inherent rigidity.

There are, at present, no legal presumptions for employment status in English law.

17. Guy Davidov, 'Who is a Worker?' (2005) 34 ILJ 57.
18. Hitesh Dhorajiwala, '*Secretary of State for Justice v Windle*: the Expanding Frontiers of Mutuality of Obligation' (2017) 46 ILJ 268.
19. *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721.
20. *Independent Workers' Union of Great Britain v RooFoods T/A Deliveroo*, TUR1/985 (2016) (CAC).
21. *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] ICR 721.
22. *Deliveroo* (n 20).
23. *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820 [37].
24. Alan Bogg and Michael Ford QC, 'Between statute and contract: who is a worker?' (2019) 135 LQR 347.

Q.2: Is your labour law system essentially premised on the binary divide? Or does it encompass one or more intermediate categories of quasi-subordinate or economically dependent workers? If so, how are these intermediate categories defined by the law and by case law? How does you labour law system define the concept of self-employed person/worker? How does it define the concept of 'business person' or 'entrepreneur' (or equivalent category of person whose economic activities are likely to be regulated predominantly or exclusively by contract or commercial law, and not by labour law: e.g. employing staff)?

Q.3: In your labour law system what are the labour rights that: a) self-employed persons are entitled to? b) quasi-subordinate/economically dependent workers are entitled to?

The UK labour law system is currently premised upon a tripartite system, with two categories of inclusion: the employee and the worker; and one category of exclusion, which is the self-employed 'independent contractor'. Within worker status, a distinction is drawn between different types of self-employed people.[25] On the one hand, there are self-employed people who are *not* running their own businesses, and these people would fall within the statutory definition of 'worker'. On the other hand, those self-employed people who *are* in business for themselves would not be workers, and rather, would be classified as independent contractors.[26] The result is somewhat conceptually confusing, as the criteria for s 230(3)(b), as discussed above, are drawn from employee status, but the status is positioned as adjacent to independent contracting, and overlapping with self-employment.

This system operates such that inclusion in either employment status or worker status comes with an entitlement to the rights that those statuses guarantee; whereas exclusion from either of those statuses (i.e. being an independent contractor) results in an inability to access employee or worker rights. Moreover, this tripartite system for personal work relations has to co-exist alongside a system for taxation and social security which still primarily relies upon a bipartite system of employment and self-employment.[27] This produces a complex regulatory landscape where a 'self-employed' person may be so classified for the purposes of taxation and social security purposes, but at the same time, could be considered to be in the intermediate worker category and as such, entitled to a limited collection of basic employment rights.

Q.4: How do your labour law system classify the following categories of working person: a) a nominally self-employed person offering personal work or services to one main client? b) a nominally self-employed person offering personal work or services to a multitude of clients or customers? c) a nominally self-employed person offering personal work or services to one main client, while also owning some of the 'means of production' necessary to generate those services? (would the answer be different if it had multiple clients?) d) a self-employed person that established a relationship with other workers (not necessarily through a subordinate work contract – it could be, for instance a relationship of association) and/or coordinates the work and services they provide? Would any part of your labour law system broadly understood (e.g. individual LL, collective LL, equality law, health and safety

25. *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730.
26. ibid.
27. For a comprehensive discussion on the interrelation between tax law and employment law, see: Abi Adams, Judith Freedman and Jeremias Prassl, 'Rethinking legal taxonomies for the gig economy' (2018) 34 Oxford Review of Economic Policy 475.

at work law) apply to any of these working persons? Please refer us to statutory provisions or legal precedents (if any).

The first situation described would stand a significant chance of being classified as an employment relationship. This scenario bears a resemblance to the factual pattern in *Autoclenz*, where the workers were formally represented as independent contractors but found to actually be employees. Beyond the contractual classification in this scenario, if we apply the principles of *Autoclenz*, where a worker personally offers their work to an individual employer,[28] then the likelihood is that this would conform to the kind of paradigm relationship with a unitary employing entity that would result in the person doing work being classified as an employee (and by extension, a s 230(3)(b) worker as well). A court or tribunal would likely be able to identify mutuality of obligation in the 'umbrella' sense in the relationship, and whether the relationship satisfied the other criteria would depend on the specific facts surrounding the circumstances of how the work was done.

The second scenario has the potential to be classified as a s 230(3)(b) worker. The *Autoclenz* doctrine can again be applied here to defeat the nominal classification as self-employed, and the nature of the relationship beyond any contract will then be used to assess whether the relationship meets the criteria for worker status (crucially, whether or not the person is running a business, as we know they would be doing the work personally). In the absence of any further information, there is a strong likelihood that merely personally working for a number of different clients would not necessarily mean that the putative worker was running a business. However, one important caveat to this analysis is that worker status may only apply for the period during which the work is being done for each individual client.[29] If the worker is offering work to more than one client, there is the possibility that this could be interpreted as meaning that they may not necessarily have subsisting obligations with one particular client in between the jobs they do for them. Therefore, mutuality of obligation may exist for the duration of each individual job, and not bar the worker from being classified as such *during the job*,[30] but they may not necessarily retain that status in between each job either.

The third scenario would struggle to be classified as either an employee or a s 230(3)(b) worker. The discussion for the second scenario broadly applies in the same way, except that the ownership of the means of production (say as tools or materials) would likely be fatal to the argument that the person providing work was not running their own business. While it may not *necessarily* mean that the person would not be a s 230(3)(b) worker,[31] generally the ownership of tools or equipment used to do the work would suggest that the worker was running their own business, especially when that was combined with the fact they had multiple clients who did not provide these means of production.[32]

The final scenario is also unlikely to be classified as either a worker relationship or employment. As discussed, the tests and criteria used to classify a work relationship as either employment or s 230(3)(b) worker status exhibit a significant amount of overlap, and favour those relationships that tend towards the bilateral paradigm of subordinate work for a single employer. Where a

28. *Autoclenz* (n 23).
29. *Aslam, Farrar and Others v Uber BV* [2016] Case No: 2202550/2015 & Others (ET); *McMeechan* (n 9).
30. *McMeechan* (n 9).
31. *Uber* (n 29); *Lange and Others v Addison Lee* [2017] Case No: 2208029/2016 & Others (ET). The ownership of the means of production in the form of hire-purchase agreements with the employing entity was not a bar to worker status..
32. *Ready Mixed* (n 4); Simon Deakin & Gillian S Morris, *Labour Law* (6th edn, Hart Publishing 2012) 164.

self-employed person is acting to organise other workers, even through some form of association rather than a subordinate work relationship, the likelihood that the relationship that the worker would have with the employing entity would be classified as one of a client or professional relationship would be high. As a result, this would be fatal to the worker's classification as either a s 230(3)(b) worker or an employee. The relationship that the self-employed person has with other workers deviates sufficiently from the paradigm relationship, and would likely result in the self-employed person being analogised to either an agency that acts as an intermediary between workers and employers, or to a contractor who sub-contracts work to other workers (particularly if the other workers were subordinate to the self-employed person). This scenario also likely raises issues surrounding personal service, which is an essential obligation in an employment relationship and worker relationship.[33] Particularly if the self-employed person is able to organise work in a manner that allows them to apportion work they have agreed to do to other parties, this will also prove fatal to establishing worker or employee status for that person.[34] Their role in co-ordinating a larger amount of work would likely be viewed as incompatible with an obligation to do that work personally, especially if other parties do indeed complete that work.

As for the areas of labour law that would apply to each of these workers, it is tied to the status they hold. If the person has been classified as an employee, then subject to certain qualifying periods, they would be entitled to individual protections, be covered by the collective labour law regime, equality law, and health and safety protections. For the worker, as discussed, given the elision of s 230(3)(b) status with statutory statuses that define the scope of collective labour law and equality law,[35] if someone has been classified as a s 230(3)(b) worker, they will by extension also fall within the scope of s 83(2) of the Equality Act, and most likely s 296 of TULRCA as well. Notably, the statutory duty placed upon employers to ensure safe work environments extends to 'persons other than their employees'.[36] This runs parallel to a non-delegable common law duty that the employer has to provide a safe work environment for employees.[37]

> Q.5: Can you think of a particular collective agreement covering any term or condition of employment of particular categories or groups of self-employed persons or professionals? E.g. freelance journalists, or self-employed musicians? Do any of your national professional orders still set (unilaterally or otherwise) minimum fees for professional services? If you are an expert employed by, or directly involved in, a supranational or international institution, are there any aspects of your labour standards (including freedom of association and the right to collective bargaining) that also apply to members of the liberal professions or of professional orders?

There is a spectrum of arrangements for the representation of the interest of self-employed persons, ranging from, at one end of the spectrum, political representation of proprietors of small businesses to, at the other end, collective agreements which influence or determine the terms and conditions of engagement of self-employed workers in sectors such as journalism and entertainment. There is notable fragmentation in the manner in which gig-economy work has been regulated

33. *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1551.
34. ibid.
35. *Deliveroo* (n 20); *Windle* (n 19).
36. Health and Safety at Work Act 1974, ss 1 – 3.
37. *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203 [103].

by collective bargaining. Far from nationwide or multi-employer agreements, there is significant variation in the few agreements that do exist. For example, the GMB union arrived at an agreement with the Hermes courier company in February 2019, for an opt-in guaranteed earnings and holiday pay scheme called 'self-employed plus';[38] the specific details of which remain confidential, but seem to be premised upon nominally retaining the self-employment label for Hermes couriers, while extending some of the rights that a s 230(3)(b) worker would be entitled to.

> Q.6: Are there any obstacles (including statutory prohibitions) to self-employed persons setting their terms and conditions of employment/service (and in particular the level of remuneration) by means of collective agreements? Does the situation change if organisations also representing 'employees' are involved in the process of collectively negotiating terms and conditions of service of the self-employed?

There are concerns that domestic restraint of trade rules, and EU competition law could prevent collective bargaining for those workers classified as independent contractors. While in *FNV Kunsten* the CJEU did acknowledge EU competition law would not bar those who were 'false self-employed' from collectively bargaining,[39] in a manner not contingent upon national classification,[40] this approach is still tied to a binary distinction in EU labour law between work that is and is not subordinate.[41] Therefore, work relationships that fall on the wrong side of that binary divide in EU law would be barred from engaging in collective bargaining and action by EU competition law.

Another significant obstacle for those workers classified as independent contractors is that they are unable to access the statutory mechanism for trade union recognition. In the *Deliveroo* decision, the Central Arbitration Committee (CAC) confirmed that s 296 of TULRCA 1992, which sets the personal scope for who can access the statutory recognition procedure in Sch A1 of TULRCA 1992 was essentially an analogue of s 230(3)(b).[42] What this means is that workers classified as independent contractors would have no statutory right to compel an employer to recognise them for the purposes of collective bargaining. So while it is certainly the case that organisations can exist that advocate for the rights and interests of those considered to be independent contractors, unless they can demonstrate they qualify for worker or employee status, they would be unable to access any statutory rights to engage in collective bargaining or action.

Given the fact that these issues turn on the status of individual workers, it remains unclear whether the situation described above would change if an organisation that principally collectively bargains for employees also extended its scope of that bargaining to those who are classified as independent contractors. Similarly, the validity of any collective bargaining or action that would take place on behalf of that mixed constituency would also be unclear.

---

38. GMB Union, 'Hermes and GMB in groundbreaking gig economy deal' (*GMB Union*, 4 February 2019) <https://www.gmb.org.uk/news/hermes-gmb-groundbreaking-gig-economy-deal> accessed 13 June 2019.
39. Case C-413/13 *FNV Kunsten Informatie en Media v Netherlands* [2015] CMLR 1 [31].
40. Nicola Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 ILJ 192.
41. Case C-66/85 *Lawrie-Blum v Land Baden Wurttemburg* [1987] ICR 483; Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873.
42. *Deliveroo* (n 20); Joe Atkinson and Hitesh Dhorajiwala, '*IWGB v RooFoods*: Status, Rights and Substitution' (2019) 48 ILJ (forthcoming).

Q.7: Are there any reform debates currently taking place in your legal systems and involving either the concepts of worker/work or the personal scope of application of (some areas of) labour law? Can you give us some examples?

There are extensive reform debates involving the concept of the worker and the personal scope of application of many areas of labour law. These debates are to a considerable extent focused upon the practice of ultra-casual work relations and 'zero-hours contracts' in the so-called 'gig economy'. One recent proposal from Ewing, Hendy and Jones in *Rolling out the Manifesto for Labour Law* concentrates on the need to establish widespread sectoral collective bargaining as a method of regulating conditions at work,[43] achieved through a combination of legislative intervention and sustained government policy.[44] The authors also discuss proposals to reform work relationship statuses. This involves having a single work relationship status which covers any person engaged to provide labour who is genuinely not running their own business,[45] alongside an expanded definition of the employer which identifies that party that substantially determines the terms and conditions of employment as the relevant employing entity.[46] Additional proposals from these authors, as well as the TUC, include a presumption of employment status,[47] which would aim to offer the security of employment protections unless an employer were to demonstrate that the worker was in fact genuinely an independent contractor.

Another question which frequently arises in these debates is that of whether reforms to the categories of application of labour law need to be accompanied by corresponding reforms in the categories of income tax and social security law. The need to align these regimes was suggested in the recent Taylor Review,[48] to ensure 'that differences between the two systems are reduced to an absolute minimum'.[49] Our view is that although the latter reforms do not need to take place at immediately the same time as the former ones, these systems nevertheless will have to be harmonised with each other in due course, difficult though that harmonisation will no doubt prove to be.[50]

Q.8: Could you please share your views on a definition of employing entity (in effect operating as a 'presumption of employer status') that would apply to 'whichever party in practice substantially determines the terms of engagement or employment of a worker'. Any other suggestions?

This proposed status closely resembles a status currently in use in English law for very specific employment protections. The definition of employer for the purposes of whistleblowing extends the scope of the concept beyond a unitary employer, and to a person in circumstances in which 'the terms on which he is or was engaged to do the work are or were in practice substantially determined

43. K D Ewing, John Hendy QC & Carolyn Jones, *Rolling out the Manifesto for Labour Law* (IER 2018) 13.
44. ibid 15.
45. ibid 36.
46. ibid 38.
47. TUC, *The Gig is Up: Trade unions tackling insecure work* (TUC 2017) 6; *Rolling out the Manifesto for Labour Law* (n 43) 37.
48. Matthew Taylor, *Good work: the Taylor review* (BEIS 2017) 38; though these proposals should be read alongside the other proposals in the review, which suggest that a new intermediate 'dependent contractor' status should also be created..
49. ibid.
50. Adams, Freedman and Prassl (n 27).

not by him but by the person for whom he works or worked, by the third person *or by both of them*'.[51] This closely resembles the proposal in this question, and we are of the view that it would be a good idea to adopt this definition as a kind of presumption of employer status. However, we would add that it is important to combine that reform with the accompanying idea that there may be more than one employer of any one worker in any one nexus of personal work relations, and that accordingly we need to envisage the possibility of joint and several liability for observance of labour laws on the part of a multiplicity of employers in any one case. A similar purposive interpretation of s 43 K was made in *Day v HEE*, where the Court of Appeal held that a worker could identify one party as an employer for the purposes of the broader employer definition in s 43 K, while simultaneously being a worker or employee of another employer per the s 230 ERA 1996 definition.[52] It also accepted that joint employer status could exist in this specific regulatory context.[53]

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

51. Employment Rights Act 1996, s 43K(1)(a)(ii) (emphasis added).
52. *Day v Health Education England* [2017] EWCA Civ 329 [16] – [18].
53. ibid.

Article

ELLJ

European Labour Law Journal
2019, Vol. 10(3) 291–333

DOI: 10.1177/2031952519872322
journals.sagepub.com/home/ell
SAGE

Re-thinking the competition law/labour law interaction: Promoting a fairer labour market

Ioannis Lianos
Professor of Global Competition Law and Public Policy, University College London, London, UK

Nicola Countouris
Professor of Labour Law and European Law, University College London, London, UK

Valerio De Stefano
BOFZAP Professor of Labour Law, KU Leuven, Belgium

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-employed workers. This article aims to suggest a different, complementary rather than antagonistic, relationship between competition law and labour law. It initially explores the legal construction of the antagonistic relation between labour law and competition law, which is based on the conceptualisation of the two areas of law as separate and isolated legal fields. It explains that such conceptualisation is problematic as it leads to the risk of fundamental conflicts between the two disciplines and some uncertainty as to their respective scope, with the result that the level of labour protection may suffer. This calls for breaking the dichotomy and for ensuring a continuum of protection for various forms of labour, under both labour law and competition law. It thus puts forward concrete suggestions as to the strategies to be followed in order to achieve this goal.

Keywords
Labour law and competition law, collective bargaining, self-employed workers, concept of undertaking

Corresponding author:
Valerio De Stefano, BOFZAP Professor of Labour Law, KU Leuven, Belgium.
E-mail: valerio.destefano@kuleuven.be

Introduction

In the Age of 'secular stagnation'[1] and intense financialisation, when return to capital exceeds economic growth, and rentiers or senior executives, which form the bulk of the richest 1% of the population, see their share of total wealth increase, while that of the lower percentiles of the population, as well as those of the middle class stagnate or fall, questions of economic inequality become centre stage.[2] There is growing empirical evidence of increasing markups in the global economy, as a result of market power,[3] or because of higher concentration following intense merger activity.[4] This 'winner-takes-most' competition game, where 'superstar firms' command growing market shares and become highly profitable, has been linked to a larger decline in labour's share.[5]

At the same time we have witnessed important changes in the traditional model of the employment relationship that has accompanied the development of industrial capitalism, with the emergence of a 'New Economy Business Model', in particular in the high-tech industry, that does not rely on career employment within the same company, but offers less employment security, emphasising interfirm mobility of labour, with the aim to maximise shareholder value.[6] The dismantling of lifelong and secure employment built on mutual loyalty and commitment of employers and employees, which was the hallmark of industrial capitalism, in favour of short-term and insecure employment of a mobile workforce that is always on lookout for new opportunities, is a well-documented and well-understood story of labour in the latter part of the 20th century.[7] A study conducted in the US, for instance, surveyed temporary help agency workers, on-call workers, contract workers, independent contractors, and freelancers, and found that their share in the entire worker-force rose from 10.7% in 2005 to 15.8% in 2015 — a 50% increase in 10 years.[8] By comparison, there was hardly any change in this regard between 1995 and 2005. More telling, 95% of the net employment growth in the US economy (2005-2015) occurred in alternative work arrangements, while for standard employment arrangements the growth amounted to only 0.4%. There are predictions that the majority of US workers will be freelancing by 2027, thus leading to a very different structure of the labour market.[9] Although 44% of freelancers gained more than USD

1. L. Summers, 'The Age of Secular Stagnation: What It Is and What to Do About It', Foreign Affairs (17 February 2016) (noting the imbalance between excessive savings and investment, pulling down interest rates, savings tending to flow into existing assets, thus causing asset price inflation and rising economic inequality).
2. T. Piketty, *Capital in the Twenty-first Century* (Harvard University Press, 2014); A. B. Atkinson, *Inequality – What can be done?* (Harvard University Press, 2015).
3. See generally Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017), http://www.nber.org/papers/w23687 [https://perma.cc/ED9S-8HET]
4. See J. Kwoka, *Mergers, Merger Control, and Remedies* (MIT press, 2014); J. Kwoka, 'Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes', (2013) 78(3) Antitrust Law Journal 619.
5. D. Autor, D. Dorn, L. Lawrence, F. Katz, C. Patterson & J. Van Reenen, 'Concentrating on the Fall of the Labor Share', (2017) 107(5) American Economic Review 180.
6. W. Lazonick, The New Economy Business Model and the Crisis of U.S. Capitalism (2009) 4(2) Capitalism and Society: 1.
7. L. Boltanski, and E. Chiapello. *The new spirit of capitalism* (Verso. 2005); see also H. Ekbia, Digital Inclusion and Social Exclusion: The Political Economy of Value in a Networked World (2016) 32(2) *The Information Society*, 165-175.
8. Katz, L. F., and Krueger, A. B. 2016. 'The rise and nature of alternative work arrangements in the United States, 1995-2015'.
9. See E. Pofeldt, Are We Ready For A Workforce That is 50% Freelance?, Forbes (October 17, 2017), available at https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-for-a-workforce-that-is-50-freelance/#76afee263f82

50,000 gross income per year in 2018,[10] more than half of them work in more than two jobs, with 5% reporting having four jobs or projects simultaneously in order to be able to gain this income.[11]

The situation is also rapidly evolving in Europe. There were more than 1 million freelancers in the UK in 2017, the most popular occupation for those in the artistic, literary and media sectors.[12] The reported average earnings of these workers was approximately GBP 29,000, the medium annual earnings for full-time workers being GBP 28,760 during the same period.

Of particular interest is the development of alternative work arrangements which are facilitated by digital platforms, which create new digital marketplaces to supply labour for temporary use ('labour value platforms').[13] Schmidt provides a comprehensive taxonomy of these work arrangements, identifying two major categories each with three sub-categories, (i) Web-based Cloud work (which comprises freelance marketplaces, microtasking crowd work, and contest-based creative crowd work), and (ii) location based 'Gig' work (accommodation, transportation and delivery services, and household and personal services).[14] This work may sometimes be categorised under the wide umbrella of non-standard and contingent work (self-employed own account workers not hiring other individuals, temporary or fixed-term contracts, and part-time work), although the way the work is organised, and the lack of alternatives in view of the dominance of these platforms, may be compared to the relationship between employer and employee in traditional and long-term forms of employment.[15]

An increasing number of people provide services through online platforms such as Uber, Grubhub, Upwork, Handy, Deliveroo or TaskRabbit. The rise of these kinds of 'gig work' is becoming a global trend. It has been reported that of the 150,000 new jobs created in Denmark 2012-2017, 44% were part-time jobs with 20 working hours per week or less, despite its strong unions and social contract between employers and employees.[16] Other studies report similar trends. For instance, a study by JPMorgan-Chase (Farrell et al. 2016) found that 0.9% of adults in the USA participate in the online platform economy — 0.5% on labour platforms of the gig economy (e.g. Uber, Taskrabbit) and 0.4% on capital platforms, leasing or selling their assets (e.g. Airbnb, eBay). Importantly, these numbers are the result of remarkable growth, which reached the 400% mark in late 2013 and most of 2014 before it slowed down to 102% in mid-2016. However, such growth is counteracted by high turnover rates; around one in six participants is new in any given month, while ca. 50% of participants exit within 12 months.

These important evolutions raise interesting questions as to the respective scopes of labour law and competition law and their respective roles in engaging with, and regulating, these new

10. See https://www.statista.com/statistics/915926/gig-economy-workers-annual-income-before-taxes-us/
11. See https://www.statista.com/statistics/915809/gig-economy-number-jobs-currently-held-gig-economy-workers/
12. See https://www.statista.com/statistics/711419/united-kingdom-freelancing-professionals-type-of-work/
13. V. De Stefano & A. Aloisi, European legal framework for 'digital labour platforms', (European Commission, 2018), available at http://publications.jrc.ec.europa.eu/repository/bitstream/JRC112243/jrc112243_legal_framework_digital_labour_platforms_final.pdf
14. F. Schmidt, *Digital Labour Markets in the Platform Economy: Mapping the Political Challenges of Crowd Work and Gig Work,* (Friedrich Ebert Stiftung, 2017), available at https://library.fes.de/pdf-files/wiso/13164.pdf
15. C. Codagnone, F. Abadie & F. Biagi, The Future of Work in the 'Sharing Economy': Market Efficiency and Equitable Opportunities or Unfair Precarisation? (Office of the European Union Institute for Prospective Technological Studies JRC Science for Policy Report, 2016).
16. Damm, E. A. 2018. 'Stor stigning i stillinger på mindre end 20 timer om ugen', The Economic Council of the Labour Movement, Copenhagen, DK.2018; See Marton, A. Ekbia, H.R. and Gruss, L-D. New Division of Labour: Of Humans, Machines and Platforms. The 34th EGOS Colloquium. 2018.

emerging labour market dynamics. Traditionally, competition law focused on safeguarding competition on product markets, labour markets being, with a few exceptions, beyond its remit. This is partly due to the fact that competition law is traditionally perceived as regulating transactions taking place in the context of the market form of organisation, leaving hierarchies - that is, relations taking place inside the firm - outside of its scope.[17] In contrast, labour law has traditionally focused on the regulation of the standard employment relationship embedded in the typical contract of subordinate employment, although in recent decades its focus has partly expanded to include some emerging forms of so-called atypical work relations, such as part-time, fixed-term, and temporary work.[18] In the view of the present authors, this traditional allocation of tasks between employment law and competition law may not be fit for purpose in the era of the New Economy Business Model and the multiplication of alternative forms of labour.

This paper aims to suggest a different, complementary rather than antagonistic, relationship between competition law and labour law. We initially explore the legal construction of the antagonistic relationship between labour law and competition law, which is based on the conceptualisation of the two areas of law as separate and isolated legal fields. We explain that such conceptualisation is conceptually problematic as it leads to the risk of fundamental conflicts between the two disciplines and some uncertainty as to their respective scopes, with the result that the level of protection for labour may suffer. This calls, in our view, for breaking the dichotomy and for ensuring a continuum of protection for various forms of labour, under both labour law *and* competition law. This is examined in the third section of this study, where we put forward concrete suggestions as to the strategies to be followed in order to achieve this goal. The last section concludes.

The legal construction of an antagonistic relationship: The separate and isolated fields approach

Labour law and the distinction between employees and self-employed

Labour law typically draws a distinction between subordinate 'employees' and the autonomous 'self-employed'. Some Member States (e.g. Spain, the UK, Italy, Germany, Austria) contemplate intermediate categories of semi-dependent workers, that are usually understood as sub-categories of self-employment.[19] Other Member States (France, Belgium, Sweden) do not contemplate intermediate categories, but their notions of 'worker' are very broad and include several personal work providers that in other systems would be seen as 'self-employed' persons.

17. On the distinction between markets, hierarchies and the role of law, see O Williamson, *The Economic Institutions of Capitalism - Firms, Markets, Relational Contracting*. (New York: Free Press, 1985); O Williamson, *The Mechanisms of Governance* (OUP, 1996).
18. ILO, *Non-Standard Employment Around the World – Understanding Challenges, Shaping Prospects* (ILO, 2016); G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (OUP, 2011); G. Casale (ed.), *The Employment Relationship – A Comparative Overview* (Hart, ILO, 2011).
19. A. Perulli, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* (Brussels, 2003); Eurofound, Exploring self-employment in the European Union (Publications Office of the European Union, 2017); J. Fudge, 'A Canadian perspective on the scope of employment standards, labor rights, and social protection: The good, the bad, and the ugly' (2010) *Comparative Labour Law and Policy Journal*, Vol. 31, No. 2, pp. 253–266. See also the various chapters in the present Special Issue.

Self-employment is typically not defined in any great detail by domestic labour law systems, or by EU law for that matter. Usually the concept operates as a residual category: if a person does not meet the often very detailed criteria and indicators used to identify who is an 'employee' or 'worker', labour law will assume, almost by default, that that person is self-employed. Because of this approach, the concept of self-employment encompasses a very broad and heterogeneous range of service providers. It can include both self-employed persons that exclusively sell their personal labour (often to a single client or to a limited number of clients or customers), but also self-employed persons that offer highly capitalised services, including by recruiting staff in order to offer such services.[20]

The scope of application of EU labour law is defined by reference to the concepts of 'worker' and 'self-employed'. EU labour law does not contemplate any 'intermediate' class of workers. The EU labour law concept of 'worker' derives from the CJEU case law in the area of Free Movement of Workers (FMW).[21]

> '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 the 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] Emphasising the statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors, the California Supreme Court distinguished between three standards in determining the boundary between 'workers' and the 'self-employed' for the purposes of the 'wage orders' under the state law in California which provide minimum wage, maximum hour, and working condition, requirements for specific industries.

First, there is the common law standard of the hirer's right to control the details of the work, which as we described above also inspires the approach followed in EU law, which is often supplemented by a number of secondary factors that assist the decision-maker in the

20. Cf. N. Countouris and V. De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC, 2019).
21. See cases such as C-256/01, *Allonby* and C-313/16, *Fennol.* M. Risak and T. Dullinger, 'The concept of 'worker' in EU law: status quo and potential for change' (ETUI, 2018); N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) ILJ, 192-225.
22. Case C–518/15, *Matzak*, para. 28.
23. *Dynamex Operations West v. Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018).

implementation of the test.[24] Second, the US courts have developed the 'the ''economic reality'' (or ''economic realities'') standard', which treats as employees 'those workers who, as a matter of economic reality, are *economically dependent* upon the hiring business, rather than realistically being in business for themselves'.[25] Again, the courts make a multi-factor determination focusing, *inter alia*, on 'the workers' opportunity for profit or loss and their investment in the business', 'the degree of skill and independent initiative required to perform the work', 'the permanence or duration of the working relationship', and 'the extent to which the work is an integral part of the employer's business'.[26] As the second test requires a significant effort of analysis, some US courts adopted the simpler and clearer 'ABC standard'.[27] This standard places the burden on the hirer to establish that the worker is an independent contractor by assuming that the worker is an employee, unless the hiring entity cumulatively satisfies the following three factors: (A) 'that the worker is free from control and direction over performance of the work, both under the contract and in fact'; (B) 'that the work provided is outside the usual course of the business for which the work is performed'; *and* (C) 'that the worker is customarily engaged in an independently established trade, occupation or business'.[28] According to the California Supreme Court in *Dynamex*, the ABC test provides a less wide-ranging and flexible test than the 'economic realities' standard. The Court suggests starting by examining factors B and C first, before moving to the more evidentially demanding factor A, if need be. For instance, if a worker has not independently decided to engage in an independently established business but instead was simply designated an independent contractor by the unilateral action of the hiring entity, then there is a high risk of misclassification and factor C may not be satisfied. Furthermore, concerning factor B, the courts should examine if the role in question is comparable to that of employees in the specific course of business of the hiring entity. Factor A is similar to the common law standard previously examined. The judgment of the California Supreme Court has important implications as to the qualification of the activity of platform workers, and therefore the personal scope of labour law protection. It may also provide inspiration as to the possible use of similar factors under EU labour law. By referring to the existence of economic dependence as a relevant factor for the qualification of the distinction between 'employees' and 'self-employed', it hints to the possibility that common criteria, based on economic realities, may apply for both EU labour law and EU competition law.

However, there are exceptions to the general rule that the self-employed do not benefit from the labour law protection, thus hinting to the emergence of hybrid regimes. For instance, most EU Member states, and arguably EU Law, accept that even the self-employed ought to be protected against discrimination.[29] Several Member states also accept that freedom of association and collective bargaining are fundamental rights – often enshrined at a constitutional level – to be

24. These are, in addition to the control of the details of work the following five, thus constituting a 'six-factor test': '(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business'. The Court cites *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354-355.
25. *Dynamex Operations West v. Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018), fn 20 (emphasis added).
26. Ibid.
27. Ibid.
28. Ibid.
29. N. Countouris and M. Freedland, *The Personal Scope of EU Sex Equality Directives* (European Network of Legal Experts in the Field of Gender Equality, 2013).

enjoyed by all workers, including self-employed workers.[30] In other countries, such as France, express legal presumptions extend the bulk of labour rights to various types of self-employed persons, such as freelance journalists, performing artists, models, etc. When Member States contemplate the existence of intermediate categories of semi-dependent or economically dependent (self-employed) workers, their rights can vary 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 the '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, their inclusion 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 increasingly 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 but 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, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.'[32] According to the ILO Committee, the right to collective bargaining extends to

30. V. De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' 46 [2017] Industrial Law Journal 185.
31. A. Perulli, 'Subordinate, Autonomous an Economically Dependent Work: A Comparative Analysis of Selected European Countries', in G. Casale (Ed.), *The Employment Relationship. A Comparative Overview* (Hart, ILO, 2011), p. 159.
32. See ILO. 2018. *Freedom of Association Compilation of decisions of the Committee on Freedom of Association*. Sixth edition (2018), Geneva, ILO, para. 387.

self-employed workers, and ILO Member States are 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 parties involved with the aim of finding a mutually acceptable solution so as to 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'.[33] The Committee of Experts on the Applications of Conventions and Recommendations (CEACR) also repeatedly argued in the same direction.[34]

Instruments of the Council of Europe also recognise freedom of association and collective bargaining for the self-employed. The European Court of Human Rights, for instance, has extended the protection of freedom of association under Article 11 of the European Convention of Human Rights to self-employed persons.[35] Very recently, the European Committee of Social Rights also clearly stated that self-employed workers are protected under Article 6§2 of the European Social Charter, which grants the right to bargain collectively, and observed that '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'.[36]

Competition law and the distinction between undertakings and workers

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 that of EU law, the concept of 'undertaking' is widely interpreted as 'an entity engaged in economic activity'.[37] It includes individual persons offering goods or services on a market where they bear financial risk attached to performance of those services.[38] However, 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 in which undertakings may be engaging.[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

33. *Ibid*.
34. For instance, see ILO. 2012. *Giving globalization a human face General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*. ILO, Geneva, para. 53
35. *Voürdūr Ólafsson v. Iceland*, Application no. 20161/06.
36. European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland*, Complaint No.123/2016, adopted 12 September 2018, para. 40.
37. Case C-41/90, *Höfner and Elser* [1991] ECR I-1979.
38. Case C-35/96, *Commission v Italy* (customs agents) [1998] ECR I-3851.
39. See the Opinion of AG Jacobs in Case C-67/96, *Albany International BV* (ECLI: EU: C:1999:28), esp. paras. 80-112.

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 recognised 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.'[41]

40. 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; 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

41. 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 organise 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 immunise the collective bargaining process or collective bargaining agreements themselves from potential antitrust liability, but covered only labour's organisations 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

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 characterisation in a different factual context).[43]

It is fair to say that, 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*[44] 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 of pension for all workers in the sector 'contributed directly to

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.

42. 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).
43. 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), 5
44. Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

improving one of their working conditions, namely their remuneration',[45] consequently excluding this agreement from the scope of Article 101(1) TFEU.

Exercising a liberal professions has usually being found to constitute an economic activity falling under the scope of competition law if there is no relationship of employment.[46] 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?[47] The CJEU has examined the categorisation 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[48]. 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 association of 'undertakings' and as such subject to competition law.[49] 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'[50].

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

45. Ibid, paras. 62–63.
46. 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).
47. 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.
48. 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.
49. Case C-180/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, ECLI: EU: C:2000:428, para. 72.
50. Ibid., para 69.
51. Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI: EU: C:2014:2411, para. 28.

negotiated, are in fact ''false self-employed'', that is to say, service providers in a situation comparable to that of employees'.[52]

The problem: A conceptual and normative mismatch between the categories and goals of labour Law and EU competition law

In our view, the different approaches taken by labour law and competition law can lead to fundamental conflicts between the interests and rights protected by the two disciplines.

Labour law clearly increasingly sees it necessary to include some self-employed workers within collective bargaining processes or within its outcomes. This is particularly so because, in the last two decades, a constantly growing number of economic relations in the labour market is increasingly being configured as relations between self-employed persons and their clients/customers, rather than as work relations between workers and employers. As put by the European Committee of Social Rights in its Complaint No. 123/2016, *ICTU v Ireland* decision:

> '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 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. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers' (para. 37).

So, while labour law is increasingly accepting that many workers classified as self-employed are mainly or solely providing personal work to 'labour engagers', competition law is reluctant to accept the view that persons that labour law classifies as self-employed ought to be granted any exceptions from its scope of application. Competition law relies of a different binary classification and distinction, that between 'workers' and 'undertakings'. If one is not a dependent worker then it will necessarily be an undertaking. The only exception that competition law contemplates is, as noted above, in respect of employees that have been misclassified as (false) self-employed. Allowing undertakings to combine with each other and fix their prices is rightly seen as clashing with the fundamental tenets of competition law, distorting markets, harming business, and harming consumers.

EU competition law, in its current state, constitutes an important barrier for the extension of collective labour rights to platform workers and free lancers, as well as any other category of self-employed, to the extent that the self-employed are considered as 'undertakings'.

Article 101(1) TFEU prohibits collusive conduct between undertakings that are competitors in a definable market. Agreements between competitors regarding the price they will charge for a product or service are considered as serious infringements and restrictive of competition by their object, without the need to explore the existence of anticompetitive effects in a definable relevant market, but instead examining a number of factors, such as the content of the provisions of the agreement, concerted practice or decision of association of undertakings, its objectives and the economic and legal context of which it forms a part.[53] Article 101(3) creates exception to Article

52. Ibid., para. 31.

53. See, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C519/06 P *GlaxoSmithKline* [2009] ECR I-9291, para. 58, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* [1983] ECR

101(1) if the agreement or decision contributes to economic progress and competition is not eliminated, but as we will subsequently explain, this possibility of justification is quite limited and could not provide the required legal certainty for the development of collective bargaining for various categories of self-employed.

Article 102 TFEU prohibits an abuse of a dominant position by an undertaking(s), to the extent that a group of undertakings may be found to be in a collective dominant position. The constitution of an agreement or joint action between undertakings certainly satisfies the conditions of the case law for the existence of economic links or factors which give rise to a connection between the undertakings concerned that 'enable them to act together independently of their competitors, their customers and consumers'.[54] According to the jurisprudence of the EU courts, '[t]hree cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy'.[55] This opens the possibility for associations of self-employed which may be considered as undertakings to fall under the prohibition of Article 102 TFEU for a number of their activities, for instance, setting a minimum wage or a minimum fee for their work or services, if these may be found to constitute an abuse 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 artists 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

3369, para. 25, Case C-209/07 *Beef Industry Development Society (BIDS)* [2008] ECR I-8637, para. 16; Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, ECLI: EU: C:2013:160, para. 36; Case C 67/13 P, *Groupement des cartes bancaires (CB) v. Commission*, ECLI: EU: C:2014:2204, para. 52.

54. Case C-395/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, paras. 41-42.

55. Case T-193/02 *Laurent Piau v. Commission* [2005] ECR II-209 para. 111.

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%.

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 from which they benefitted.[58] The agreements concluded by collecting societies have since been assessed under Article 101 TFEU, in recent years, for several dimensions of their activities.[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 shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. However, the establishment of state granted monopolies has also been subject to intense competitive scrutiny.

Finally, Article 4(3) TEU with Articles 101 and/or 102 TFEU require States to abstain from any action or enact any rule conflicting with the EU competition law provisions where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or where that State divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. These provisions may limit the discretion of Member States to create statutory exemptions to the application of EU competition law rules by explicitly authorising, for instance, the self-employed or associations of the self-employed, to bargain collectively with other undertakings.

A recent example of this rather restrictive approach is the *CHEZ Elektro Bulgaria v. Yordan Kotsev* case, concerning the setting of minimum fee amounts by a lawyers' professional organisation (the Supreme Council of the Legal Profession (SCLP in Bulgaria)).[60] The Court considered that Articles 4(3) TEU and Article 101 TFEU could not apply 'where the tariffs are fixed with due regard for the public-interest criteria defined by law and the public authorities do not delegate their rights and powers to private economic operators', and this, 'even if representatives of the economic operators are not in the minority on the committee proposing those tariffs'.[61] The CJEU also noted that these experts should be 'independent of the economic operators' concerned and 'required,

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 However, the EU General Court annulled the Commission's decision, finding that the EU Commission had not proven that the European societies engaged in a concerted practice aimed at restricting competition when they implemented identical territorial restrictions in their reciprocals, as it had no evidence for coordination between societies of the territorial scope of their mandates (i.e. no emails, letters or minutes of meetings). The Commission had also not convincingly rebutted CISAC's argument that the existence of similar territorial restrictions (the 'parallel behavior') was not the result of coordination, but had other good reasons for it, such as the fact that protection and enforcement of rights require local presence and that it cannot be assumed that incentives to monitor and enforce rights continue to exist where there is competition between societies. See Case T–442/08 *CISAC v. European Commission*, ECLI: EU: T:2013:188.

60. Joined Cases C 427/16 and C 428/16, *CHEZ Elektro Bulgaria v. Yordan Kotsev,* ECLI: EU: C:2017:890.

61. Ibid., para. 43.

under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question'.[62] The SCLP was composed exclusively of lawyers elected by their peers, the legislation did not provide any specific criterion ensuring that the minimum amounts of lawyers' remuneration, as this was determined by the SCLP, was fair and justified in accordance with the general interest, and it was subject to a limited constitutionality review. The CJEU concluded that the SCLP was not an arm of the State working in the public interest subject to actual review, but an association of undertakings. By making mandatory a decision of an association of undertakings which has the object or effect of restricting competition or restricting the freedom of action of the parties or of one of them could be subject to the joint application of Article 101(1) TFEU with Article 4(3) TEU. However, the fact that there is a prima facie restriction of competition does not mean that the practice will necessarily fall under the prohibition of Article 101(1) TFEU.

As mentioned above, the *Albany* exclusion provides immunity from competition law (Article 101 TFEU) 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.[63]

The second criterion, relating to the purpose of the agreement, has been less problematic due to the fact that it has been interpreted broadly by the case law.[64] Limits of the second *Albany* condition were met in the *FNCBV* case, concerning an agreement between slaughterhouses and small farmers on prices for slaughtering animals and the suspension of imports after farmers' blockades of lorries in connection with mad cow disease, the Court finding that the agreement did not relate to measures for improving conditions of work and employment, 'but to the suspension of beef imports and the fixing of minimum prices for certain categories of cows', whose object was to restrict competition.[65]

With regard to the first criterion, the situation has been more complex. It is clear that the case law does not recognise collective bargaining rights for the self-employed, including micro-entrepreneurs. In *Pavlov*, the *Albany* 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'.[66] The Court refused to recognise an agreement setting up a pension fund for self-employed medical consultants as a collective agreement, because the consultants were not

62. Ibid., paras. 44-45.
63. Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 62-63.
64. See the analysis in D. Schiek & A. Gideon, Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities? (2018) 32 (2-3) International Review of Law, Computers and Technology 275,
65. See Joined Cases T-217/03 and T-245/03, *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) v. Commission*, ECLI: EU: T:2006:391, para. 100.
66. Case C-180/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, ECLI: EU: C:2000:428, para. 69.

employees. The agreement was nevertheless not considered as infringing Article 101 (1) TFEU because it did not appreciably prevent, restrict or distort competition (i.e. it was d*e minimis*). [67] The General Court also found that the first *Albany* condition was not met in the *FNCBV* case, although the French Labour Code considered the farmers as undertakings,[68] in particular, among other things, because they did not work under the direction of the slaughterhouses.[69]

Another justification under Article 101(1) is possible if the restriction of competition is necessary for a legitimate regulatory purpose. In *Wouters* the CJEU examined the compatibility with Article 101 TFEU of a regulation adopted by the Dutch Bar Association prohibiting lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with members of the professional category of accountants.[70] The CJEU found that the activities undertaken by the self-employed lawyers could be considered to be an economic activity with the consequence that the regulation of the Netherlands Bar Association could be qualified as an association of undertakings. However, the CJEU noted that the Dutch Legislation entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy. It took into account the public interest in assessing the existence of restrictions of competition under Article 101(1) TFEU, finding that the restrictions in question did not infringe Article [101(1) TFEU], since the effect restrictive of competition that is inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.[71] The Court, nevertheless, took note of the fact that the sound administration of justice is also to the benefit of the final consumer of judicial services.[72]

If this is not a *de minimis* restriction, Article 101(3) TFEU provides the last resort for a possible defence to a restriction of competition. However, that provision has rarely included public interest considerations of the kind taken into account in *Wouters* and *Albany*.[73] It very much depends on the

67. Ibid. paras. 94 & 97.
68. See Joined Cases T-217/03 and T-245/03, *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) v. Commission*, ECLI: EU: T:2006:391, para. 58.
69. Ibid., para. 100.
70. Case C-309/99 *Wouters, Savelbergh and Price Waterhouse v Algemene Raad Van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
71. For another example, see Joined Cases C-184/13 to 187/13, C-194, 195 and C-208/13, *API v. Ministero delle Infrastrutture e dei Transporti*, ECLI: EU: C:2014:2147, paras. 47-57 (exploring if the restriction of competition in question could be justified by the 'legitimate objective' of the improvement of road safety).
72. Ibid., para. 97.
73. In a number of cases dating before the adoption of Regulation 1/2003, the EU Courts recognised the discretion of the Commission in taking into account public interest objectives when implementing Article 101(3): Case C-26/76, *Metro v. Commission* (Metro I) [1977] ECR 1875, para. 21: 'The powers conferred upon the Commission under [Article 101(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of *objectives of different nature* and to this end *certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives* and they do not result in the elimination of competition for a substantial part of the common market'; Joined cases T-538/93, 542/93, 543/93 and 546/93, *Métropole Télévision v. Commission* [1996] ECR II-649, para. 118: 'in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3)]'. On the basis of this case law, the Commission has taken into account public interest considerations, such as employment policy and the protection of workers, cultural policy, environmental policy, the protection of public

existence of a block exemption regulation, otherwise parties need to argue for an individual exemption (the burden of proof is on the defendant who needs to prove quite strict conditions). The restriction should be indispensable to achieve the efficiency gain or public interest, an 'equal share' of these efficiency gains should go back to the user (of the relevant market), and the restriction should not lead to a substantial elimination of competition. Hence, in reality the possibility of justification in this context is particularly difficult.

This complex regime relies on a broad-brush categorisation of economic activities as 'labour', and thus subject to labour law, or entrepreneurship, subject to competition law, but 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, 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 to the occasional re-adjustment, frustrates the goals of both areas of law. This frustration may well have been managed 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 has 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 EU competition law with regard to the self-regulation by the social partners of labour relations may be less based on categorical distinctions between workers and the self-employed than on their conceptualisation as a *continuum* going from situations of complete dependence (in which case the relationship will be considered as akin to employment) to a situation of complete independence (in which case the entity in question will be considered as an independent undertaking). These points are further elaborated in the following section, but cases such as *FNV Kunsten*[74] raised the crucial question of the scope of competition law in view of the emergence of forms of work relationship, such as platform-based work, that put the traditional binary divide between employment and self-employment under strain.[75] It also raised important questions as to the optimal boundaries between competition law

health, among others, when implementing Article 101(3) TFEU. Since the adoption of Regulation 1/2003, and the end of the Commission's monopoly in enforcing Article 101(3) TFEU, the Commission seems to have moved towards a more restrictive position, as to the eligible 'improvements' to take into account.

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

75. For a useful discussion, from a labour law but also an economic perspective, see MR Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011); N Kountouris, 'The Concept of ''Worker'' in European Labour Law: Fragmentation, Autonomy and Scope' (2017) 47(2) *Industrial LJ* 192; A Stewart and J Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *Economic and Labour Relations Rev* 420

and labour law, and the possible extension of the workers' protection to the 'new jobs' - a politically sensitive issue.[76]

Breaking the dichotomy: Building a continuum of legal protection for labour

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 relationship 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 on 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 organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels'.

Secondly, the Charter itself has established a much firmer basis for interpreting its provisions in line with the relevant jurisprudence of the European Court of Human Rights (see Article 52(3) of the Charter) and has expressly 'reaffirmed' the European Social Charter.

Last, but not least, a new Article 9 TFEU was introduced, a provision with no direct predecessor in the earlier EC Treaties, this inclusion being particularly relevant in the context of the new model

76. See, most recently, European Parliament, The Social Protection of Workers in the Platform Economy: Study for the EMPL Committee (November 2017), 11, available at www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184_EN.pdf (finding that 'the greater the level of financial dependence [of the labourer] on platform work, the lower the access that workers have to social protections').
77. Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 55-59.
78. Ibid., para 55.
79. Case C-180/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, ECLI: EU: C:2000:428, para 69.
80. Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2411, para. 29.

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 relationship 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.

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, examining the 'economic realities' of the relationship between the hiring entity and the labourer, thus exploiting the potential offered by the *FNV Kunsten* case in order to design more realistically the boundaries between 'workers' and 'self-employed' (1). The second option is to exclude from the scope of competition law some categories of 'false self-employed' in order to preserve the effectiveness of provisions designed to prevent social dumping, which are negotiated and included in a collective agreement on behalf of and in the interests of workers, thus extending to this group labour law protection, with the aim to guarantee the internal consistency of EU law,[82] in particular in the context of the application of the proportionality principle (2). A third option is to take a categorical thinking, as opposed to case-by-case analysis, approach, by either expanding the existing category of 'workers', therefore excluding by the same the application of competition law

81. Case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, ECLI: EU: C:2016:972, paras. 76 & 78.
82. On legal consistency in EU law, see C Franklin, The Burgeoning Principle of Consistency in EU Law (2011) Yearbook of European Law 11; E. Herlin-Karnell & T. Konstadinides, The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration, (2013) 5 Cambridge Yearbook of European Legal Studies 139; J. Langer & W. Sauter, The Consistency Requirement in EU Law, 24 Colum. J. Eur. L. 39 (2017-2018).

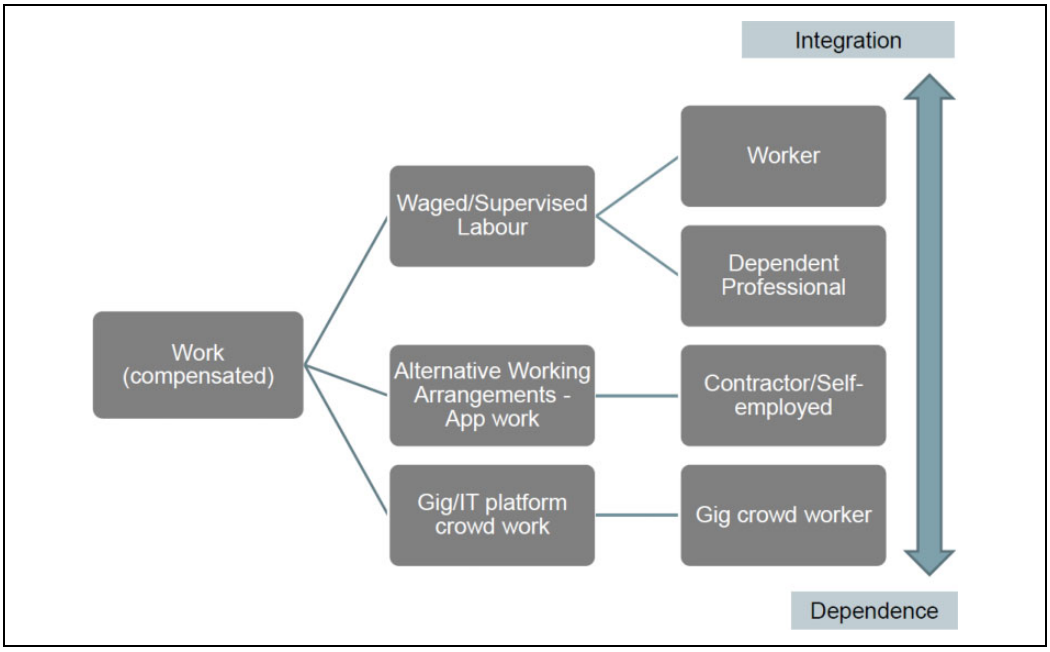


Figure 1. Dissecting the category of 'work' (compensated).

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 characterise as values-consistency (4).

1. Taking a functional approach: codifying the 'false self-employed' exception and/or employing the concept of 'economic dependence' for a case-by-case analysis

One may take an 'economic realities' perspective for both EU labour law and competition law building on the concept of economic (or technological) dependence. Looking to the category of 'work' (see Figure 1), we can identify two separate poles and then a number of situations that lie in the middle.

We are inspired here by the classic distinction between 'hierarchy', conceived as a centralised pole of economic organisation of production regulated by the employment contract and characterised 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

83. Depending, of course, on the theory of the firm one may adopt.

respond. The key concept characterising 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 relationship. 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] 'crowd work' and 'work on-demand via apps'. The first term usually refers 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 such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.[86] For instance, transport platform Uber uses technology to match customers with persons delivering work in the real world, such as offering a ride (cab services), delivering items (courier services), caring for children, the elderly or pets, gardening, or other craft services.[87] The second relies on the IT platform (through an app) to source work 'from an anonymous group of ''bidders'', who are referred to as the crowd, hence the name crowd sourcing', where frequently the provider and the worker will not have direct contact as the process is organised through the IT platform.[88] These archetypes 'represent points on continuum'.[89]

84. For a discussion, see V. De Stefano, The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy', Conditions of Work and Employment Series No. 71, (ILO, Geneva, 2016), available at https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_443267.pdf.
85. See, D. Schieck & A. Gideon, Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities? (2018) 32(2-3) International Review of Law, Computers and Technology 275227.
86. V. De Stefano, The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy', Conditions of Work and Employment Series No. 71, (ILO, Geneva, 2016), 1.
87. D. Schieck & A. Gideon, Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities? (2018) 32(2-3) International Review of Law, Computers and Technology 275.
88. D. Schieck & A. Gideon, Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities? (2018) 32(2-3) International Review of Law, Computers and Technology 275227.
89. Ibid.

App-work consists in a digital platform matching a user/consumer with a professional 'user' of the platform, pre-selected, by the platform, who is already exercising this type of activity, and although in theory independent and self-employed, in reality relies on the platform technology, often through an app, to reach consumers/users at the other side of the platform. This pre-selection process and the fact that inclusion in the platform to be 'matched' with a user from the other side requires some form of governance of the platform with specific rules to which the app workers may abide. Hence, this type of work may appear quite close to a traditional employment relationship, although there is no payment of wages on this occasion. Notwithstanding the non-integration of these workers in the hierarchy, for instance through the existence of a formal employment contract, the fact of the matter is that they also depend for their livelihoods on their technological inclusion in the digital platform ecosystem. Often their relationship with the platform takes the form of a commercial agency agreement, the genuine agency relations supposing that the agent acts as the long hand (*longus manus*) of the principal. However, courts have been quick to re-qualify these arrangements as functionally equivalent to employment, in view of certain characteristics accentuating this relationship of dependence.[90]

Crowd work may also lead to situations of dependence, if competition is limited because of the dominance of a platform on a specific (labour) market, or because of exclusionary strategies adopted by the platform. However, to the extent that the crowd worker is able to work for other platforms and collect an equal or significant part of his revenue from them, dependence becomes less of an issue. Dependence will of course increase the more the crowd worker depends on work for a specific platform, in which case his situation may be considered as functional equivalent to a full-dependent worker.

The introduction of computing into work environments has profound implications on the nature of the working relation and requires a more functional perspective in envisioning the concept of 'work'. This should integrate the change from EOBM to NEBM, as well as the reality of the technological dependence of labourers on 'matching' platforms. Those involved in alternative work arrangements often find themselves in the role of entrepreneurs, drawing on their own personal assets, with all the attendant risks and rewards to this kind of economic activity.[91] Gig workers find themselves in the grip of the so-called platform economy, controlled by machines and managed by algorithms, into the working of which they do not have any access or insight, and with

90. See, for instance, the approach of the UK Employment Tribunal (UKEAT)) regarding the employment status of Uber drivers: *Uber B.V. and Others v Mr Y Aslam and Others*: *UKEAT*/0056/17/DA. The UKEAT rejected the label of agency used in the written contract between Uber and the drivers and qualified them as employees, although the drivers incurred commercial risks as they were responsible for all costs incidental to owning and running the vehicle, and were also able to work for or through other organisations, including direct competitors with Uber operating through digital platforms. The UKEAT arrived at this conclusion by adopting a purposive interpretation, taking into account the relative bargaining power of the parties, the integration of Uber drivers into Uber's business, in particular as, among other things, they were prevented from building up a business relationship with the end user of the service, they were in practice obliged to accept all trip requests if they wanted to keep their account status, and Uber held a significant market share in London, which left them no other equally effective competitive alternative.

91. J. Berg, Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers. (International Labor Organization, 2016), available at https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_479693.pdf. U. Rani & J. Berg, Digital labour platforms and the future of work: Towards decent work in the online world. ILO, Research Department. 2018; Neff, G. Venture Labor: Work and the Burden of Risk in Innovative Industries. The MIT Press. 2012

no recourse to legal labour protections.[92] These changes also affect labour in different ways: low-skilled workers are facing stagnant or declining wages with an increasing prospect of intensified work through computer-coordinated mechanisms, while high-skilled professionals might be cognitively augmented in carrying out their work, and mid-level workers face the risk of job loss through technologies of automation. The net effect of these developments on waged labour is the 'hollowing out' of middle class, as observed in various societies.[93]

This functional approach allegedly inspired the CJEU in *FNV Kunsten*.[94] In 2006, a collective labour agreement laying down minimum fees for 'employed' and 'self-employed' musicians substituting for members of an orchestra was concluded in the Netherlands. However, it was terminated shortly afterwards, as the Dutch Competition Authority was of the opinion that it was anti-competitive under Article 101 (1) TFEU. The national proceedings initiated by the trade union led to a request for a preliminary ruling to the Court of Justice of the European Union, which surprisingly asserted its jurisdiction despite the lack of any cross-border element. The Court put in place an exception to the application of competition law rules for 'false self-employed'. The CJEU expressly suggested that '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', then Article 101(1) TFEU will not apply to these agreements.[95] The CJEU in *FNV* relied on the following two criteria for defining 'false self-employment':

- *Dependence*: 'the person does not determine independently his or her conduct on the market',[96] *or* 'the person is economically dependent on a main customer',[97] 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 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'.[98]
- *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.

We note 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 rationales

92. Hara, K. et al. A Data-Driven Analysis of Workers' Earnings on Amazon Mechanical Turk. In *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems* (CHI'18) 2018.; V. DeStefano, 'Negotiating the Algorithm': Automation, Artificial Intelligence, and Labor Protection. ILO Employment Policy Department. Working Paper No. 246, 2018; S.F. Deakin & C. Markou, The Law-Technology Cycle and the Future of Work (March 2018). University of Cambridge Faculty of Law Research Paper No. 32/2018.
93. R. Wike, & B. Stokes, B. (2018). In Advanced and Emerging Economies Alike, Worries About Job Automation. Pew Research Center. http://www.pewglobal.org/2018/09/13/in-advanced-and-emerging-economies-alike-worries-about-job-automation/
94. Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2411.
95. Ibid., paras. 30-31.
96. Ibid., para. 33.
97. Opinion of AG Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, para. 52
98. Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2411, para. 33.

of competition law and the approach followed in the context of genuine commercial agency agreements. This 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'.

The Court is open to this prospect on the basis that in *Allonby*, it had already held that the formal classification of a 'self-employed person' under national law 'does not exclude the possibility that a person must be classified as a worker . . . if his independence is merely notional, thereby disguising an employment relationship'.[99]

What are the implications of this case law for creatives? Writers, composers, and other providers of creative input are 'undertakings'. If they do not qualify as employees, their joint negotiation would be found to restrict Article 101(1) TFEU, by its object, if there is an agreement as to a minimum price across the industry, or by effect, in case the agreement in question may have price effects on the markets for the provision of various creative inputs. An industry-wide coordination would not satisfy the requirements of Article 101(3) TFEU to benefit from an exception to the prohibition rule. However, the definition of the category of 'false self-employed' in *FNV* would potentially exclude from the prohibition of Article 101(1) TFEU joint agreements between many workers in creative sector. To benefit from the exclusion, creatives should not have autonomy regarding the 'time, place, and content' of the task in question and 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 independent trader in respect of the same

99. Case C 256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, ECLI: EU: C:2004:18, para. 71 recalled in *FNV Kunsten*, above, at para. 35.

100. D. Schiek & A. Gideon, Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier? (2 ed.) 2018 CETLS Working Paper Series. DOI: http://www.qub.ac.uk/schools/SchoolofLaw/Research/European/FileStore/Filetoupload,815527,en.pdf, pp. 13-14.

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 principals.[102]

In applying Article 101(1) TFEU to agency agreements the Commission has previously noted that if the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services 'all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1)'.[103] In contrast, where the agent bears 'one or more of the relevant risks', 'the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1)' and in 'that situation the agent will be treated as an independent 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 emphasising 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 immunity under Article 101(1) TFEU and that of non-genuine commercial agency agreements that fall under Article 101(1) TFEU.

We also consider that the case law on 'genuine' commercial agency agreements, if taken by analogy as the legal basis of an exception for self-employed when these are in situations of economic dependence and their agreement has the same aims as those of the agreements benefitting from the *Albany* exception, offers clear limiting principles, and in any case only offers partial immunity for certain types of agreements only. In the context of a 'genuine' commercial agency, the immunity does not expand clauses often included in commercial agency agreements, concerning the relationship between the agent and the principal, such as a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (single branding provisions). With regard to these clauses, the agent is considered as a separate undertaking from the

101. Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission.*
102. See Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, para. 20.
103. Commission notice - Guidelines on Vertical Restraints (Text with EEA relevance.) OJ C 291, 13.10.2000, p. 1–44, para. 18.
104. Ibid., para. 21.
105. See, Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing GmBH* [1995] ECR I-3477. The first step of the analysis would be to determine if the agreement could be characterised as a 'typical' commercial agency, by looking to the criterion of financial risks. If this was the case, then the second step would be to ascertain if the particular clause of the contract is necessary on account of its legal/economic nature.
106. *Vertical Restraints Guidelines* [2000], paras. 12–20

principal, that is the commercial agency immunity does not apply, and they may therefore be found to infringe Article 101(1) TFEU.[107]

We consider that by analogy the approach followed for 'genuine' commercial agency agreements will preserve the theoretical foundations and consistency of Article 101 TFEU, while enabling the Commission and other competition authorities to abide by the broader EU law principles regarding social protection and the horizontal integration clauses included in the Treaty, and more specifically Article 9 TFEU, which should at least serve as broader interpretative guidance for the provisions of the Treaty.

A broad functional approach that would apply case-by-case may nevertheless raise questions as to the limitations to the category of false self-employed, to the extent that situations of economic and technological dependence may occur in a variety of circumstances and could have a number of sources, depending on the idiosyncratic circumstances of each case, some of which might be quite difficult for competition law enforcers to evaluate. Hence, a different approach would be not to proceed with a case-by-case multi-factor analysis but with 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-employed. The latter approach was followed by the Irish legislator in the recent amendment of the Competition Act 2002, which provides that Section 4 of the Competition Act (which prohibits anti-competitive agreements, decisions and concerted practices, similarly to Article 101 TFEU) shall not apply to collective bargaining in respect of a 'relevant category of self-employed worker'.

More specifically, the Act provides a specific exemption for three named categories of self-employed workers: voiceover actors; session musicians; and freelance journalists. These workers have the right to bargain collectively with employers in relation to working conditions and terms of employment, including pay rates. The Irish Competition Act distinguishes between two relevant categories of self-employed workers that may be able to enter into collective bargaining agreements with employers:

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

107. Ibid., para. 19.

(ii) A *fully dependent self-employed* worker is defined as an individual

- who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and
- whose main income in respect of the performance of such services under contract is derived from not more than two persons

The Competition Act puts in place a procedure to apply for the benefit of the exception. Trade unions may apply to the Minister for Business, Enterprise and Innovation to permit groups of self-employed workers falling within these definitions to act collectively. As it is indicated in the amended Competition Act, the onus is on the Trade Union making the application to show that the self-employed workers they represent fall within the above definitions, and to also show that providing the exception (i) '(w)ill have no or minimal economic effect on the market in which the class of self-employed worker concerned operates, (ii) will not lead to or result in significant costs to the State, and (iii) will not otherwise contravene the requirements of this Act or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services'.

However, one should be mindful of the potentially limited effect in practice of such national exceptions to the application of competition law rules in the absence of an equivalent exception in EU competition law. Indeed, under Article 3(1) of Regulation 1/2003 Member States are obliged to apply Article 101 TFEU whenever they implement national competition provisions within the meaning of Article 101 (1) TFEU where those may affect trade on the internal market. It is also noted that the concept of 'effect on trade in the internal market' tends to be broadly construed by the Court.

2. A 'social dumping' rationale for excluding a broader range of 'false self-employed' from EU Competition Law

We believe that a third group of false self-employed workers should be excluded from Article 101(1) and that this exclusion can be premised on the anti 'social- dumping' rationale developed by AG Wahl in paragraphs 74-83 of his Opinion in *FNV Kunsten*.[108] In those paragraphs AG Wahl persuasively elaborated on whether the Dutch collective agreements met the Albany requirement that the provisions in the agreements are negotiated 'on behalf of and in the interests of workers'. AG Wahl concluded that 'that provisions designed to prevent social dumping, which are negotiated and included in a collective agreement on behalf of and in the interests of workers, are in principle to be regarded as improving directly their employment and working conditions, within the meaning of the Albany line of cases', but his analysis also has clear implication for the question of who should be covered by collective agreements (and which agreements could be exempted from EU competition law).

AG Wahl reached that conclusion on the basis of two main arguments pertaining to, in his words, the 'very *raison d'être* for collective bargaining', namely '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' (para. 76 of his Opinion); and

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

'that the possibility for employers to replace workers with other individuals in respect of whom they do not have to apply the working conditions laid down in the relevant collective agreement may significantly weaken the negotiating position of workers' (para. 77).

AG Wahl correctly notes that '(o)n that basis, and from the perspective of a worker, there is really no difference if he is replaced by a less costly worker or by a less costly self-employed person'[109] and that should that be possible, workers could not 'credibly ask for a salary increase if they knew that they could be easily and promptly replaced with self-employed 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-employed persons at lower costs') and 'whether they go beyond what would seem to be necessary to achieve the objective of preventing social dumping'.[115]

However, subject to these necessity and proportionality tests, there is an acceptance that self-employed person that genuinely compete with employees in a 'sector of the economy and the type of industry to which the collective agreement applies' could also be covered by collective bargaining (and benefit from an exception from competition law). This exclusion could be justified by taking into account the collective benefit of ensuring that the protective scope of labour legislation cannot be easily escaped. We note that, in the alternative, such social policy considerations should play a role in the context of Article 101(3) TFEU, as a form of collective benefits.[116]

So in addition to the 'false self-employed' and the 'economically dependent' categories illustrated above in the previous subsection, the Guidance should also grant a further exemption for 'genuinely self-employed persons 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 raisin a risk of social dumping or substitution'.

In 2016, ICTU lodged a collective complaint against Ireland with the European Committee on Social Rights (Council of Europe) regarding an alleged breach of Article 6.2 of the European Social Charter, due to the decision of the Competition Authority in the Actors' Equity Decision of

109. Ibid., para. 76.
110. Ibid., para. 77.
111. Ibid., para. 79
112. Ibid., paras. 80-83.
113. Ibid., paras. 99-94.
114. Ibid., para. 89.
115. Ibid., para. 92.
116. By analogy to the way these were considered by the Commission in *CECED* (for the protection of the environment)

2004.[117] The complaint was heard by the European Committee of Social Rights (a quasi-judicial body of legal experts appointed by the Council of Europe as the supervisory body for the Charter). Although the subsequent 2017 Act addressed some of ICTU's concerns, the trade union body pressed ahead with its complaint to the Committee on the grounds that (i) the 2017 Act only amended domestic Irish legislation and did not offer protection from EU law; and (ii) the scope of the Act was too limited. Following engagement with relevant parties, the complaint process concluded with a majority decision of the Committee being adopted in December 2018.

The Committee found 'that the ban on collective bargaining was not necessary in a democratic society and the situation that obtained before the entry into force of the 2017 Act was therefore in breach of Article 6§2 of the Charter'.[118] According to the Committee, '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'.[119] According to the Committee, '(t)his contrasts with competition law where the grouping of interests of suppliers endanger fair prices for consumers'.[120] The Committee made, in particular, reference to the trade union exception, noting that '(i)n establishing the type of collective bargaining that is protected by the Charter, 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'.[121] Indeed, '(w)here providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.[122] According to the Committee, 'the ban was excessive and therefore not necessary in a democratic society in that the categories of persons included in the notion of ''undertaking'' were overinclusive'.[123] As the Committee explained, '(t)he self-employed workers concerned here are obviously not in a position to influence their conditions of pay once they have been denied the right to bargain collectively'.[124] Importantly, the Committee considered that the Irish competition law prior to the 2017 amendment amounted to a 'ban on collective bargaining' and that as such it was 'excessive and therefore not necessary in a democratic society'.[125] In conclusion, according to this case law when a Member State sustains an over-inclusive scope of competition law, it can breach its obligations under Article 6(2) of the 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

117. European Committee of Social Rights, Complaint No. 123/2016, *Irish Congress of Trade Unions (ICTU) v. Ireland*.
118. European Committee of Social Rights, Decision on the Merits, *Irish Congress of Trade Unions (ICTU) v. Ireland,* Complaint No. 123/2016 (December 12th, 2018), para. 101.
119. Ibid., para. 38.
120. Ibid.
121. Ibid.
122. Ibid.
123. Ibid., para. 94.
124. Ibid., para. 95.
125. Ibid., para. 98.

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 replicates the definition developed in the area of the free movement of workers, which is also increasingly deployed to cast or recast the scope of application of EU employment law instruments. In essence it requires work to be performed under the direction of another (subordination criterion),[126] to be remunerated work (pay criterion), and to amount to a genuine economic activity (genuine economic activity criterion). The CJEU has interpreted very liberally the second (in cases like *Matzak*)[127] and third criteria (in cases like *Fenoll*),[128] but the first criterion remains a cardinal defining feature of the 'worker' definition.

But some judgments of the Court, and some AG Opinions, have begun to develop a more nuanced understanding of the concept of the subordination criterion, as also being evidenced from indirect and attenuated forms of control or cooperation. In *Danosa* the Court included within the scope of Directive 92/85 a pregnant member of the Board of Directors of a capital company.[129] In this case the Court expressly noted that even though, because of her managerial role, Ms Danosa 'enjoyed a margin of discretion in the performance of her duties',[130] she had to be treated as a 'worker' covered by the Directive because, *inter alia*, 'she had to report on her management to the supervisory board and to cooperate with that board'.[131] The Court adopted a generous and nuanced notion of subordination that does not require an employer to be constantly watching over the shoulders of a worker, and can effectively amount to a power of '*control'*,[132] 'direction or supervision',[133] or 'to *cooperate'*,[134] especially when such workers are 'an integral part of'[135] the company to which they provide services.

There is a growing recognition that, especially in the case of platform work, subordination cannot be expected to manifest itself in the traditional sense of a power to direct or to issue formal orders to workers. In *APET v Uber,* AG Szpunar carefully recognised that:

> '51. [. . .]Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. [. . .] Uber therefore controls the economically significant aspects of the transport service offered through its platform.
>
> 52. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, [. . .] makes it possible

126. See, Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2411, para. 37.
127. C–518/15, *Ville de Nivelles v Rudy Matzak*, ECLI: EU: C:2018:82.
128. C-316/13, *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, ECLI: EU: C:2015:200.
129. Case C-232/09, *Dita Danosa v LKB Līzings SIA*, ECLI: EU: C:2010:674, paras. 38-42.
130. Ibid., para. 49.
131. Ibid.
132. Ibid., para. 51.
133. Ibid., para. 56.
134. Ibid., para. 49.
135. Ibid., para. 56.

> to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.'[136]

Some of these considerations were replicated in the judgment by the CJEU (especially at para. 39). The Court recognised in particular that 'Uber exercises decisive influence over the conditions under which that service is provided by those drivers.'

The CJEU has repeatedly acknowledged 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, thereby disguising an employment relationship' (see para, 35 of the *FNV Kunsten* judgment, but also para. 71 of the *Allonby* judgment). Hence, the CJEU and the other EU institutions are entitled to provide their own definitions of 'worker' for the purposes of applying EU law, including, of course, EU competition law. Advocate General Wahl also accepted this view because 'in today's economy, the distinction between the traditional categories of worker and self-employed person is at times somewhat blurred'[137] and 'the self-employed are a notoriously vast and heterogeneous group'.[138] This approach will enable courts to re-characterise the self-employed as workers, taking into account that over-inclusiveness of the category of workers may produce fewer negative welfare effects than enabling the digital platforms to misclassify workers as independent contractors and may have positive distributional implications for workers. As Hagiu and Wright explain, employees enjoy greater bargaining power (e.g., through unions) than independent contractors, so their surplus exceeds what would have been their outside option in case they were considered employees. Hence, 'there can be higher gains to workers when true independent contractors are misclassified as employees, and also greater losses to workers when true employees are misclassified as independent'.[139]

We submit that a Guidance Document could offer a specific clarification of the term 'worker' for the purposes of the application of EU competition law as amounting to the following:

> 'A worker is a person that for a certain period of time is engaged by another to perform mainly personal work or services in return for which he receives remuneration.
>
> Such work or services may be performed under the direct control, indirect control, or decisive influence of the employer or involve a duty to cooperate with employer's direct or indirect instructions.'

We prefer this option to the proposals advanced by some authors to introduce a hybrid category of workers to whom to extend some labour protection,[140] including the immunity of the relevant collective bargaining from competition law. A number of authors, including Countouris

136. Opinion of AG Szpunar in Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain*, S, ECLI: EU: C:2017:364.
137. Opinion of AG N. Wahl in Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2215, para. 51.
138. Ibid., para. 55.
139. A. Hagiu & J. Wright, The status of workers and platforms in the sharing economy, (2019) 28 Journal of Economics Management & Strategy 97, 106.
140. A. Hagiu & J. Wright, The status of workers and platforms in the sharing economy, (2019) 28 Journal of Economics Management & Strategy 97, 106; Seth D. Harris and Alan B. Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"' (2015) The Hamilton Project, Discussion Paper 2015-10 < http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf>

and De Stefano and several contributions published in this Special Issue,[141] have already engaged multiple times with the shortcomings of these proposals. In particular, legal systems where something along the lines of hybrid categories were introduced experienced increased levels of litigation and uncertainty, caused by the fact that parties had to litigate over three rather than two employment statutes. At the same time, many workers who would have been classified as fully-fledged employees, with access to employment protection in its entirety, had a hybrid category not been introduced, were denied basic employment rights without them being substantially different from traditional employees. No positive effects in terms of innovation, productivity or consumer welfare have been proved to be associated with the past introduction of hybrid categories.

4. A purposive re-interpretation of collective bargaining as having a marginal and secondary effect in light of recent Treaty changes

The Court's exclusion of collective agreements concluded by workers from EU competition law in *Albany* was premised on various Treaty-based textual justifications,[142] 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'. By contrast, in *Pavlov*, such an exclusion was denied when the 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' (para. 69 of *Pavlov*) and this point was reiterated in paragraph 29 of *FNV Kunsten*.

However, as noted above in section 4 above, since 2009, the Charter of Fundamental Rights of the EU has come into force recognising, in Article 28, that: 'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels'. The Charter, in Article 52(3) also provides that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

Its Preamble also 'reaffirms [. . .] the rights as they result, in particular, from [. . .] the Social Charters adopted by the Union and by the Council of Europe', noting that '[i]n this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention'. The explanations prepared by the Praesidium confirm that 'Article 28 — Right of collective bargaining and action [. . .] is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers'.

141. See Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC, 2019).; Valerio De Stefano, The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy', Conditions of Work and Employment Series No. 71, (ILO, Geneva, 2016), 1; Miriam A. Cherry and Antonio Aloisi, 'Dependent Contractors' in the Gig Economy: A Comparative Approach 66 (2017) American Univ. L. Rev. 635. See also, in this Special Issue, the article by Hitesh Dhorajiwala and Mark Freedland, the article by Elena Gramano and Giovanni Gaudio and the article by Elisabeth Brameshuber.

142. See, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 55-59.

As noted above, in the recent decision on *Irish Congress of Trade Unions (ICTU) v. Ireland* (Complaint No. 123/2016) the Committee of Social Rights 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 that '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).

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 '[in] 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 persons in question are not genuine undertakings operating a business on their own account. This would be consistent with the growing recognition that the right to bargain collectively is a fundamental right protected both at a Treaty level, at an international level, and in the constitutional traditions common to the Member States of the European Union.

We note that in cases such as *Wouters*, the Court noted that while some agreements between undertakings may restrict competition, 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty [now Article 101(1) TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience [. . .]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.[143]

143. Case C-309/99, 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, para. 97.

It could be claimed that collective agreements setting minimum terms and conditions of employment applicable to self-employed workers, could now (i.e. in light of the entry into force of Article 28 CFREU and of the recent *ICTU v Ireland* decision) be seen as pursuing social objectives that are compatible with and protected by the Treaties, and – in the absence of other regulatory options - they could also be seen as a necessary and efficient means to achieve such objectives. While they may entail some restriction of competition, such restriction may only be a 'consequential effect' inherent in the pursuit of a protected objective, i.e. the protection of the terms and conditions of some self-employed workers, who by reason of being able to generate income predominantly or exclusively by the sale of mainly personal work or services to one main, or a limited number of, customer(s), are unable to act as free agents in the market. A similar point is also supported by academic work carried out by Schiek and Gideon.[144]

Designing competition law for labour market power regulation

The separate and antagonistic spheres approach followed so far with regard to the interaction between competition law and labour law, led to the conceptualisation of these two areas of law in isolation to each other, competition law applying merely to 'undertakings', while labour law protecting 'workers', with the interplay between the two being conceived negatively as merely ensuring that the aims followed by one will not be jeopardised by the application of the other. This approach may explain why issues of the respective scope of competition law and labour law became the central theme of this interaction, with an attempt to ensure that the application of competition law will not limit the ability of trade unions to bargain collectively with employers and protect the rights of workers. The exclusion of employees from the scope of competition law in *Becu,* the exception introduced by *Albany*, but also other possibilities of justification of such collective bargaining under EU competition law rules, such as the ancillary regulatory restrictions approach of *Wouters*, the 'false self-employed' exception recently introduced by *FNV*, and Article 101(3) TFEU, all consider the interplay between competition law and labour law from the rather defensive perspective of enabling collective bargaining and do little in putting forward a competition law agenda that would actively engage with restrictions of competition in labour markets with the aim to protect labour. It is submitted that this approach and the primary role recognised of collective bargaining follows from the emphasis put on exploitation in Marxist and neo-Marxist approaches, as well as the emphasis on the establishment of countervailing powers to tame the rising power of corporations, which is a feature of institutional economics and Keynesian economics.[145]

It is nevertheless possible to adopt a more proactive agenda in envisioning the relationship of competition law and labour, by putting forward the enforcement of competition law, rather than, or in conjunction with, the establishment of exceptions to the enforcement of competition law in order to preserve the possibilities of collective bargaining, in order to deal with the market failures affecting the optimal performance of labour markets and leading to the exploitation of workers, in particular to tackle labour market power.

144. D. Schiek & A. Gideon, Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier? (2 ed.) (2018) CETLS Working Paper Series. DOI: http://www.qub.ac.uk/schools/SchoolofLaw/Research/European/FileStore/Filetoupload,815527,en.pdf, 14-15.

145. On countervailing powers and their role in ensuring equilibrium in capitalist systems, see J.K. Galbraith, *American Capitalism- the Concept of Countervailing Power* (Houghton Mifflin, 1952).

Labour market power has been defined as 'the ability of employers to set wages below workers' marginal revenue product', which denotes the existence of labour exploitation, a concept that has nothing to do with the concept of exploitation employed by the labour theory of value inspiring Marxist approaches, as it only focuses on the exploitation of labour by virtue of the imperfection of the (labour) market.[146] A labour market has been defined as 'a group of jobs, between which workers can switch with relative ease (for example, computer programmers, lawyers, or unskilled workers) located within a geographic area usually defined by the commuting distance of workers'.[147] The concept assumes that there exists a 'spot market' for labour hours - firms employing a number of workers for a specific amount of hours. Under the profit maximisation principle, a firm would employ a number of workers whose net marginal product equals the marginal cost of labour, in terms of wages paid. One may conceive the employment relationship as a joint venture between owners of capital and workers to the extent that firms combine labour (L) and capital (K) to produce output (Q). The marginal product of a typical worker varies over time. Joan Robinson employed for her definition of exploitation the 'marginal physical productivity of labour', which she defined as 'the increment of output caused by employing an additional unit of labour with a fixed expenditure on other factors'.[148] The employment relationship results in a gap between the workers' marginal product at the firm and their alternative wage offers (in real terms). According to Robinson, exploitation may occur due to the workers' weaker bargaining power in relation to the employers', the 'fundamental cause' of exploitation being 'the lack of perfect elasticity in the supply of labour or in the demand for commodities'.[149] Exploitation may be monopolistic, if this results from imperfections in the commodities market (even if the labour market is competitive); or monopsonistic, if this is due to imperfect elasticity of the supply of labour (even if the product market is perfectly competitive).[150] In situations of monopsonistic exploitation, the wage would equal the supply price of the employee, which would be inferior, because of imperfect competition, to the value of the marginal physical product of labour. Although a minimum wage would remove this kind of exploitation as well as contribute other tangible economic benefits,[151] it would also have as an effect an increase in production costs, and may lead to a number of negative effects. First, it may increase prices for consumers, if these high costs were to be passed on to the consumers in the commodity market, hence workers may lose as consumers more than what can be offset by their gain as wage earners. Second, it may lead to labour factor substitution with a decrease in the level of employment.

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'.[152]

146. See, J. Robinson, *The Economics of Imperfect Competition* (MacMillan, 1933), 283, noting that 'a group of workers are being exploited when their wage is less than the marginal physical product that they are producing, valued at the price at which it is being sold'.
147. S. Naidu, E.A. Posner & G. Weyl, Antitrust Remedies for Labor Market Power, (2019) 132 Harvard Law Review 537, 539.
148. J. Robinson, *The Economics of Imperfect Competition* (MacMillan, 1933), 236.
149. Ibid., 281.
150. Ibid.
151. S. Deakin and F. Wilkinson, 'The Law and Economics of the Minimum Wage' (1992), *Journal of Law and Society*, 379.
152. I. Marinescu & H.J. Hovenkamp, Anticompetitive Mergers in Labor Markets, (2018). Faculty Scholarship at Penn Law. 1965. https://scholarship.law.upenn.edu/faculty_scholarship/196511.

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,[153] 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.[154] 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 employees, there are some studies quantifying the extent to which independent contractors, including platform workers, may be exposed to monopsony power'.[155]

Economic concentration in industries or product markets does not always lead to monopsony or oligopsony and labour market power. There are a number of market characteristics to take into account requiring some elaborate analysis of the interplay of supply (of labour) and demand in the specific market. One may use the hypothetical monopolist test (or Small Significant and Non transitory Increase in Price Test or SSNIP) which is adopted by the European Commission's Notice on Market Definition for product markets.[156] This typically aims to measure cross-price elasticity between two products through a speculative experiment postulating a hypothetical small but lasting change in relative prices [5-10%] and evaluating the likely reactions of customers to that increase. The important parameter that such a test enables us to observe is the price elasticity of demand facing the hypothetical monopolist: if the demand is elastic, then it would not make sense for this monopolist to implement profitably the SSNIP and therefore the relevant market needs to be broadened; if the demand elasticity is low, then it would be profitable for the monopolist to implement the SSNIP, and therefore the relevant market should be narrowed down. In our context,

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

154. 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 labour 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.

155. 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.

156. Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/5.

the test should be adjusted for gauging monopsony labour power. Hence, it will explore the hypothetical monopsonist's ability to impose a 'Small Significant Non-transitory Reduction in Wages' (SSNRW test) looking to the elasticity of labour supply in the hypothetical market.[157] The geographical dimension of these labour markets may be determined according to some evidence on work commuting. For instance, Marinescu and Hovenkamp suggest the use as a starting point in the analysis for geographic markets of 'Observed Commuting Zones (CZs)', which are 'geographic area definitions comprising clusters of counties that were developed by the United States Department of Agriculture (USDA) based on based on data from the 2000 Census on commuting patterns across counties to capture local economies and local labour markets.[158] With regard to product markets, they suggest the use as a starting point of the analysis of six digits Standard Occupational Classification (SOC) codes and a job title (e.g. senior as opposed to junior accountant), which may define markets by occupational category.[159] The purpose of this test and of the market definition exercise in general is to determine, indirectly, the existence of labour market power. The competition authority may compile market shares in these labour markets and determine if a specific undertaking or undertakings hold a dominant position or more generally market power.

However, in the context of labour markets, concentration is not always a necessary condition for the finding of labour market power. This is because there may be different sources of labour market power, such as product differentiation and search frictions.[160] These may be particularly strong in some cases, for instance because of the absence of other economic activities in the specific region and the dominant presence of one employer, so that even an individual firm may be considered as an antitrust labour market.[161] The difficulties of people to move in different places to search for work because of personal attachments (family, friends or local community), language and cultural factors, economic factors (such as a mortgaged home) also indicate that it is not possible to purely and simply transpose to labour markets the assumptions driving the assessment of market power in product markets (and in particular the baseline assumption of perfect competition). Hence, it is important to stay open to the idea that there may exist labour market power even in non-concentrated labour markets. The difficulty in this case would be for competition law to develop adequate metrics so as not for these instances of labour market power to escape the scrutiny of competition authorities.

A possible option is to rely on a multi-factor analysis that would take into account different sources of evidence of labour market power/monopsony. First, employers with labour market power are able to impose to workers adverse conditions on employment. These can take the form of non-compete clauses which go beyond what is necessary to protect the transfer of know-how to

157. For a detailed analysis, see M. Steinbaum, Antitrust, the Gig Economy, and Labor Market Power (June 12, 2019). Law and Contemporary Problems, 2019, available at SSRN: https://ssrn.com/abstract=3347949; E. A. Posner, G. Weyl & S. Naidu, Antitrust Remedies for Labor Market Power, (2018) 132 Harvard Law Review 536, 574-575.

158. I. Marinescu & H.J. Hovenkamp, Anticompetitive Mergers in Labor Markets, (2018). Faculty Scholarship at Penn Law. 1965. https://scholarship.law.upenn.edu/faculty_scholarship/196518.

159. Ibid., 18.

160. E. A. Posner, G. Weyl & S. Naidu, Antitrust Remedies for Labor Market Power, (2018) 132 Harvard Law Review 536, 541.

161. M. Steinbaum, Evidence and Analysis of Monopsony Power, Including but not Limited to, in Labour Markets, Roosevelt Institute (August 2018), available at file://ad.ucl.ac.uk/homea/uctlioa/Documents/ftc-2018-0054-d-0006-151013.pdf.

the worker, other disadvantageous terms (such as longer working hours, mandatory arbitration and class action waivers or broad non-disclosure agreements) without compensation, deferred compensation agreements or any other working conditions that depart from the norm in the specific industry or more broadly. Although the analysis may in some instances require to first look to 'abnormal' conduct or performance before addressing the issue of the market structure, thus inversing the traditional approach in determining the existence of market power, it is not unprecedented.[162] Second, Steinbaum puts forward as evidence of labour market power 'the prevalence of earnings inequality between similar workers who work at different firms in the same (labour) market' to the extent that in 'a competitive labor market, the existence of outside job offers at the market wage makes the (labour) supply curve infinitely elastic to individual firms' and '(a)ny worker paid less than they are worth would leave for a better offer'.[163] Another source of direct evidence of labour market power is when 'quits do not correspond very much to wage changes', this evidence being easier to comply in the context of digital labour platforms (such as Amazon Turk) where tasks and workers tend to be homogeneous and therefore easily comparable.[164]

Hence, it has been suggested that policymakers develop a broader list of criteria to take into account in defining the existence of labour market power. These recommendations include the following:

a (rebuttable) presumption that 'a market share of over 50% of employment (or alternatively, of posted job vacancies) in a well-defined antitrust (labour) market may constitute evidence of market power';

- '(t)he ability to lower wages below what would be charged in a competitive market';
- '(t)he ability to wage-discriminate, that is, to pay similar workers working in the same market significantly different wages';
- '(t)he ability to impose disadvantageous nonwage contractual terms on workers without compensation'.[165]

One may also argue for the analysis of the superior bargaining power of some employers, in view, for instance, of significant investments made by the workers in their education and training for the specific job, which make it quite difficult for them to switch if these costs are non-

162. It is indeed possible that economic methods may be used to assess market power directly by focusing on changes in market power, examining for instance a historical counterfactual without the challenged practices in order to decide if a conduct has increased market power (a retrospective analysis in the situation of an agreement or abusive conduct), or providing an analysis of the change in incentives (a prospective analysis for instance regarding mergers) in order to examine of the conduct is likely to increase market power. Profitability analysis or the fact that there has been permanent price discrimination or price stability can also be used as factors, among others, enabling competition authorities to infer the existence of market power. For a discussion, see JB Baker and T Bresnahan, 'Economic Evidence in Antitrust: Defining Markets and Measuring Market Power', in Paolo Buccirossi (ed.) *Handbook of Antitrust Economics* (MIT Press, 2008), 1.

163. M. Steinbaum, Evidence and Analysis of Monopsony Power, Including but not Limited to, in Labour Markets, Roosevelt Institute (August 2018), available at file://ad.ucl.ac.uk/homea/uctlioa/Documents/ftc-2018-0054-d-0006-151013.pdf. 2.

164. Ibid.

165. J. Azar, I. Marinescu & M. Steinbaum, Antitrust and Labor Market Power, Econfip Research Brief (May 2019), available at https://econfip.org/wp-content/uploads/2019/05/Antitrust-and-Labor-Market-Power.pdf. See also I. Marinescu & H. Hovenkamp, 'Anticompetitive Mergers in Labor Markets', Faculty Scholarship at Penn Law, February 20, 2018, https:// scholarship.law.upenn.edu/faculty_scholarship/1965;

recoverable in their new job or occupation. In some economic sectors (for instance, the fashion industry) working for a specific undertaking may also provide an important quality certification to the worker in terms of status and prestige in the profession, which it would be difficult to get elsewhere, thus further limiting the available options of employment to workers and their incentive to switch, and by the same, providing labour market power to the specific employer. Although situations of economic and technological dependence may not provide any interesting insights into the existence of labour market power for workers in employment contracts and thus integrated to the undertaking, they may be significant factors to take into account when considering conduct involving gig workers or the self-employed that may be qualified as separate undertakings under EU competition law.

Developing new concepts in order to gauge labour market power is not the only reform to undertake. It is also crucial to reflect on specific antitrust theories of harm and metrics that would fit the goal of protecting labour from the negative effects of monopsony. Such theories of harm would apply across the various areas of competition law, in the assessment of anticompetitive collusion, abuse of dominance or merger control. Reducing wages obviously constitutes a prevalent theory of harm in this context. This may result from various types of conduct: horizontal cartel-like conduct, such as non-poaching agreements,[166] or supplier wage 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 the exit of the competitor the incumbent would be able to reduce wages below the workers' marginal revenue product.[169]

166. See the US Department of Justice (DOJ) and Federal Trade Commission (FTC) Antitrust Guidance for Human Resource Professionals (October 2016), available at https://www.justice.gov/atr/file/903511/download3 (finding that agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal and also raising concerns regarding agreements to share information with competitors about terms and conditions of employment (although they also acknowledge that not all information exchanges are illegal); but also the active investigation by the DOJ, using its criminal enforcement authority, of non-poaching agreements in various sectors: see, *U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*, https://www.justice.gov/atr/case/us-v-knorr-bremse-and-westinghouse-air-brake-technologies; In Re: Railway Industry Employee No-poach Antitrust Litigation, No. 2:2018mc00798 - Document 192 (W.D. Pa. 2019); *Seaman, et al. v. Duke University and Duke University Health System*, https://www.justice.gov/atr/case/danielle-seaman-v-duke-university-et-al and various class actions brought by private plaintiffs, in particular In re: High-Tech Employee Antitrust Litigation (N.D. Cal. No. 11-CV-2509-LHK) regarding agreements between the executives of Adobe Systems, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar to eliminate competition among them for skilled labour which was settled in September 2015 for US 415 million (see, https://www.reuters.com/article/apple-google-ruling/u-s-judge-approves-415-mln-settlement-in-tech-worker-lawsuit-idUSL1N11908520150903). In Europe, the Italian competition authority (AGCM) fined eight modelling agencies a total of EUR 4.5 million for wage fixing agreements: see https://www.agcm.it/media/comunicati-stampa/2016/11/alias-8448. The UK CMA imposed fines totalling GBP 1,533,500 on five model agencies for colluding instead of competing on prices for modelling services: https://www.gov.uk/government/news/model-agencies-fined-15-million-for-price-collusion.
167. E. A. Posner, G. Weyl & S. Naidu, Antitrust Remedies for Labor Market Power, (2018) 132 Harvard Law Review 536, 597.
168. Ibid., 598.
169. Ibid., 598-599.

Merger control will certainly become an important area of competition law enforcement regarding the effect of mergers (horizontal or vertical) on labour markets. One may expect the application of unilateral non-coordinated theories of harm in the context of horizontal mergers (mergers between competitors). Simply put, a horizontal merger reduces competitive rivalry to the extent that the target company exerts a competitive constraint. Furthermore, other competitors benefit from the fact that the merged entity behaves less competitively than the two merging firms would have done absent the merger in question. The decision of the firms to increase prices following the merger, is motivated by the fact that part of the loss in sales is being captured by (diverted to) the other merging firm. Therefore, the closer the substitute products of the merging firms, the stronger the incentive of the merged entity to increase prices. Similar analysis may be performed as to the incentive of the merging firms to reduce wages, if the two merging firms were close competitors in labour markets. An interesting concept suggested in the context of merger control to estimate this unilateral effect is that of 'Downward Wage Pressure' (DWP), which aims to measure the effects of a merger on the wages of the workers in the labour markets affected. This concept/metric is analogous to the 'Upward Pricing Pressure' (UPP) that is used in merger control to determine the extent to which a merger and the consequent removal of a competitive constraint will alter the margins of the merging firms, the elimination of competition between the merging firms generating upward pricing pressure as the merging firm will be able to internalise the profits on sales diverted to what will be now a part of the same undertaking. UPP also takes into account the merger-specific efficiency improvements which may tend to offset the upward pricing pressure. DWP may be inspired by similar principles.[170] However, labour theories of harm may not only take the form of lower wages, but may also relate to the quality of the employment relationship, the ability of workers to benefit a fair share from increases in their productivity, because of innovation, thus affecting their incentives, and other anticompetitive strategies that may affect the share of the gains accruing to workers (as opposed to management and investors).

There is still little experience among competition authorities with assessing the effects of a restriction of competition on labour market. There is, however, some interesting experience from South Africa regarding the effects of mergers on employment, as part of the public interest test adopted under South African competition law.[171] There is case law under South African competition law on merger specific retrenchments,[172] which also proceeds to an analysis of alternative employment opportunities for the workers that were fired as a result of the merger in question. Including employment considerations in the analysis, in addition to concerns over wage reductions and restrictions on the conditions of employment, will require a broader standard that would be closer to a public interest one. In any case, the emphasis that this rapidly developing competition law literature puts on the anticompetitive effects on labour markets already breaks with the narrow vision of consumer welfare standards and the emphasis on product markets that has prevailed so far in competition law. This raises interesting questions as to a more optimal and complementary relationship between competition law and labour law.

170. For a discussion, see E. A. Posner, G. Weyl & S. Naidu, Antitrust Remedies for Labor Market Power, (2018) 132 Harvard Law Review 536, 578-583 (also suggesting merger simulation as a way forward to estimate anticompetitive effects in labour markets).

171. For an excellent discussion, see A. Raslan, Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa? (2016) 39(4) World Competition 625.

172. To be distinguished from operational employment loss, which is dealt under labour law, although the distinction is not always easy to make.

In conclusion, new competition law concepts and metrics and the way the protection of labour considerations can be integrated in the current competition law framework constitutes a fertile area for future research.

Conclusions

In drawing our conclusions, we would like to point out that the maintaining of the status quo of the tense relationship between labour law and competition law outlined in the opening sections of this paper, is not a sustainable option. The legal uncertainty produced by a variety of both domestic competition authorities and EU court rulings favour the denial of rights to a number of weakly positioned labour market participants and, in the context of a fissured, fragmented, and digitally mediated labour market, promotes a undesirable race to the bottom (or 'social dumping', to borrow the words used by AG Wahl in his Opinion in *FNV Kunsten*) between differently classified workers performing equivalent or identical personal work services for a variety of employing entities. The latter clearly benefit from the status quo, chiefly by accumulating the profits that they fail to redistribute to their increasingly diverse workforce and establishing themselves as dominant players in a variety of markets. But they do so by eating into labour's share of wealth generation, producing a range of negative externalities 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.

In this paper we have articulated the view that sustaining a prohibition on collective bargaining for the totality of the self-employed without possibilities for exemption for particular groups of weakly positioned self-employed workers, places Member States in the difficult position of choosing whether to breach their obligations under EU law or under the European Social Charter and a number of other European and international labour and human rights treaties. In this respect, it is important to note that Article 6 of the Treaty on the European Union establishes that the European Union shall accede to the European Convention of Human Rights, and that all EU Member States are also members of the International Labour Organisation, and thus bound, *inter alia*, by ILO Conventions 87 and 98.

Although it is possible for National Competition Authorities to set their own priorities in initiating competition law investigations, and that one may expect that a common approach developed under the ECN that would provide some flexibility to the adoption of collective bargaining by the self-employed, in particular when they are in the presence of significant power imbalances in bargaining between individual self-employed workers and employers, there is still the risk that collective agreements may be found to infringe Article 101 TFEU by national courts, thus leading to the possibility of damages awards for the benefit of the 'victims' of such practices. It is therefore essential that the Commission takes the initiative in this area and provides the required legal certainty and the uniform interpretation of EU competition law provisions.

On the basis of the analysis carried out in the previous sections we suggested that it would be desirable and possible for the Commission to adopt a Guidance Document to assist public

authorities, trade unions, employers and employers' organisations with the interpretation and application of competition law to collective agreements whose terms are applicable to self-employed workers. Drawing from the CJEU jurisprudence and the opinions of a number of Advocate Generals, we have suggested that, in our view, this Guidance Document should outline the following:

'Collective agreements covering workers, including self-employed workers providing personal work and services, should be exempt from the application of EU competition law if they pursue the objective of protecting minimum terms and conditions of employment and the effects restrictive of competition are merely consequential and inherent to the pursuit of those objectives.

In particular, collective agreements that contain minimum terms and conditions of employment or work that apply to workers, including self-employed workers providing mainly personal work and services, should be exempt from EU competition law rules if such agreements cover:

- Workers understood as persons that for a certain period of time are engaged by another to perform mainly personal work or services in return for which they receive remuneration. Such work or services may be performed under the direct control, indirect control, or decisive influence of the employer, or may involve a duty to cooperate with employer's direct or indirect instructions.
- False self-employed persons defined as persons who:
  - provide personal work or services in a situation comparable to that of employees, or
  - do not determine independently their conduct on the market, or
  - are economically dependent on a main customer, 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
  - are not operating a genuine undertaking and operating a business on their own account.
- Self-employed persons providing personal work and services 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 increasing the risk of social dumping or substitution'.

We consider that both competition law and labour law should get inspiration from the 'economic realities' approach and embrace economic and technological dependency as a criterion for distinguishing between 'workers' and the 'self-employed'. Both should also envisage some of the strategies discussed in III.B., with the aim to develop a consistent approach across both areas of law. This objective may be further facilitated by two strategies: first, competition law enforcement should increasingly focus on labour markets, rather than just on product markets in order to tackle labour market power; second, there should be sufficient flexibility in the context of Article 101(1) TFEU, for enabling dependent self-employed to bargain collectively with the digital platforms, thus improving their working conditions and their revenue share. For instance, the immunity regime for commercial agency agreements may offer the opportunity to the Commission and NCAs to take a more functional approach of the category of 'worker', thus implementing the broader EU law principles regarding social protection and the horizontal integration clauses included in the Treaty, and more specifically Article 9 TFEU, which should at least serve as broader interpretative guidance. As a last resort, the adoption of Article 10 Regulation 1/2003 decisions, providing a detailed analysis under Article 101(3) TFEU, or eventually a block

exemption regulation for 'platform labour', under Article 103 TFEU, that would exempt certain forms of collective bargaining, may also improve legal certainty.

As the various articles in this 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 herein 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'.

Author contribution

Valerio De Stefano's contribution to this publication was also carried out within the framework of the Odysseus grant 'Employment rights and labour protection in the on-demand economy; received from the *FWO Research Foundation – Flanders*.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.