A R T I C L E S

When Antitrust Meets Labour: Exemption and Enforcement Under Article 101 TFEU

by

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Abstract

Labour rights protection has recently emerged as one of the key objectives of antitrust law, alongside sustainability and privacy. The application and enforcement of competition rules differ significantly between the workers' and employers' sides of the market, a distinction that is particularly visible in cases concerning remuneration. Wage-setting may fall within the scope of Article 101 TFEU where it results from coordination between undertakings; whether competition law applies therefore depends on how wages are fixed. While employer cartels that suppress pay are treated as restrictive agreements, collective bargaining arrangements are assessed under a markedly different analytical framework. This article examines the distinct strategies through which the CJEU and the European Commission are

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enhancing worker protection through antitrust law. It contributes to the broader discussion on the use of competition law beyond purely economic objectives, while highlighting the limitations inherent in the different approaches to wage-setting practices.

Résumé

La protection des droits du travail est récemment apparue comme l'un des principaux objectifs du droit de la concurrence, aux côtés de la durabilité et de la protection de la vie privée. L'application et le contrôle du respect des règles de concurrence diffèrent considérablement selon que l'on se situe du côté des travailleurs ou de celui des employeurs, une distinction particulièrement visible dans les affaires relatives à la rémunération. La fixation des salaires peut relever du champ d'application de l'article 101 du TFUE lorsqu'elle résulte d'une coordination entre entreprises ; l'applicabilité du droit de la concurrence dépend donc de la manière dont les salaires sont fixés. Alors que les ententes patronales visant à réduire les salaires sont considérées comme des accords restrictifs, les accords de négociation collective sont évalués selon un cadre analytique nettement différent. Cet article examine les stratégies distinctes par lesquelles la CJUE et la Commission européenne renforcent la protection des travailleurs par le biais du droit de la concurrence. Il contribue au débat plus large sur l'utilisation du droit de la concurrence au-delà des objectifs purement économiques, tout en soulignant les limites inhérentes aux différentes approches des pratiques de fixation des salaires.

Keywords: antitrust law; labour right protection; wage setting; collective agreements; employers' collusion; Articles 101 and 102 TFEU.

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I. Antitrust Law and Labour Relations

The relationship between competition law and the labour market has recently returned to the spotlight of European and international literature[1]. The Court of Justice's jurisprudence has been tackling the subject since the beginning of the

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[1] See Richard A. Epstein, 'The Application of Antitrust Law to Labor Markets – Then and Now' (2022) 4 New York University Journal of Law & Liberty 327–388; Ioannis Lianos, Nicola Countouris, Valerio De Stefano, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market', (2019) 10(3) European Labour Law Journal 291–333; Mariateresa Maggiolino, 'The application of competition law to labour markets: some unresolved issues' (2023) 11(1) Journal of Antitrust Enforcement June 2023 i127–i149; Kostantinos Stylianou, Marios C. Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42(4) Cambridge University Press 620–648.

new century, and the Commission has judged it timely to intervene, outlining new policies for applying antitrust law beyond its traditional areas of focus.

Competition law intervention may become relevant where the imbalance between employer and employee reflects broader market conditions affecting the competitive process in the labour market. It does not delve further into the specifics of the employment relationship, avoiding any additional interference in areas that fall within the purview of labour law[2]. However, the justification for antitrust scrutiny does not lie in correcting the internal imbalance inherent in a single employment contract. Labour law is specifically designed to regulate that vertical relationship, equipping the weaker party with rights, procedural guarantees, and collective mechanisms aimed at redistributing power within the firm. Its architecture is centred on subordination, working conditions, and organisational governance. By contrast, when distortions arise from coordination among undertakings or from structural concentration on the demand side of labour, the problem exceeds the bilateral employment nexus and acquires a market-wide dimension. In such circumstances, the relevant harm is not confined to an individual worker's vulnerability, but concerns the competitive process in the labour market itself: wage formation, mobility, and access to employment opportunities may be artificially constrained across an entire sector or territory[3]. Labour law is not primarily designed to address employer–employer coordination at market level, nor is it structured to dismantle systemic restraints that operate at the level of market structure rather than contractual imbalance. Competition law, conversely, is precisely concerned with preventing collusion, disciplining the exercise of market power, and preserving the conditions under which prices – including wages – are formed through genuine competition. Its intervention is therefore not a substitute for labour protection but a response to a distinct category of harm: distortions that affect the functioning of the labour market as such. In this sense, antitrust law enters the field not to govern the employment relationship internally, but to safeguard the competitive environment within which those relationships are negotiated.

The bargaining imbalance within the employment relationship underlies many labour law institutions designed to protect the weaker party. Yet when that imbalance is reinforced or amplified by structural concentration or coordination on the demand side of labour, the issue transcends the internal employment nexus and acquires a competitive dimension[4]. The control over the conditions affecting

2 Mariateresa Maggiolino, 'Even employees are undertakings in the labour market, but granting social rights is not antitrust's job (2022) 10(2) Journal of Antitrust Enforcement 365–402.

3 *Ibidem.*

4 The economic term that describes a situation comparable to monopoly and oligopoly on the demand side is monopsony or oligopsony. The first use of the term was attributed to Joan Robinson, in her 1933 *The Economics of Imperfect Competition*. On the topic of monopsony

workers' employment has been balanced by the right to unionize and engage in collective bargaining. The aggregation of workers increases their bargaining power, thus attempting to equalize the powers that distinguish the two sides of the market. In this case, competition law, while subsisting in scope, *recedes*, leaving room for agreements that are able to influence competition to protect a greater good: the welfare of workers and the pursuit of fair working conditions[5]. The scenario differs when the collusion involves employers. The creation of collusive arrangements reinforces the position of power – or creates it if not previously present – artificially affecting working conditions in a negative sense. The results of employer agreements, in fact, range from wage stagnation to a crippling of market mobility[6]. The intervention of antitrust law in this area is therefore active: faced with practices that violate not only the protection of competition, but also that of workers, all those agreements that harm, according to criteria identified by the Commission, the interests of workers – because of their nature as wage-fixing or market allocation agreements – are censured as restrictive agreements *by object*.

This paper aims to illustrate how the Court of Justice and the Commission have elaborated the two trends in antitrust law as outlined above and analyse the possibility of transferring the same legal approach to the digital market[7]. The Luxembourg court has focused on the *exemption* trend, creating an exception to the discipline of Article 101 TFEU for collective bargaining. To this date it is at its greatest subjective expansion, thanks to the Commission's intervention. The Guardian of the Treaties also intervened on the *enforcement* aspect: it explicitly defined, in the latest antitrust policy brief on the topic, wage-fixing and non-employment agreements as restrictions by object. The Commission's communication on this issue guides national authorities and informs its own enforcement. The first case applying the principles set out in the document shows how strengthening worker protections can intersect with antitrust law[8]. It is worth considering that the potential to strengthen workers' rights through the application

in the labour market: José Azar, Ioana E. Marinescu, Marshall Steinbaum,'Labor Market Concentration' (2022) 57 The Journal of Human Resources, Special Issue: Monopsony in the Labour Market S167–S199.

[5] These objectives fall within the framework outlined by the Commission communication, Establishing a European Pillar of Social Rights, COM/2017/0250 final, specifically in points 6 and 8, validating the theory that competition law is compatible with social policies and goals.

[6] Vincent Delabastita, Michael Rubens, 'Colluding Against Workers' (2023) SSNR Electronic Journal; Ciara Denihan, 'Collective or Collusive Agreements? An examination of the Position of Solo Self-Employed Persons under Article 101 TFEU' (2023) 46(3) World Competition 317–352.

[7] "Digital market" refers to the online platforms and environments where individuals and businesses engage in work- related transactions, typically mediated through technology. These markets enable the exchange of services, freelance work, gig jobs, and remote employment via digital platforms. They are characterized by the use of online tools and apps to connect workers with employers or clients globally, allowing tasks to be completed digitally.

[8] Case AT.40795 – Food Delivery Services, 02/06/2025.

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of Article 102 TFEU remains an open possibility, despite being only minimally explored thus far: some insights on this topic will be provided. Ultimately, the interaction between competition law and labour law presents both opportunities and challenges, raising important questions about the extent to which antitrust law can be leveraged to address imbalances in the labour market, particularly in light of evolving economic dynamics and the rise of the digital economy.

The article follows a chronological approach to examining interventions on this topic. The first section, titled *Collective Bargaining and Article 101 TFEU*, focuses on the supply side of the market, specifically the workers' perspective. Here, the Court of Justice of the European Union (CJEU) shaped the antitrust approach to collective bargaining by determining that such agreements fall under the scope of Article 101 TFEU. This led to a delicate balancing of social and economic interests, resulting in an exception distinct from that provided in Article 101(3). The second section, *Collusion Between Employers and the Prohibition of Restrictive Agreements on Competition*, shifts to the demand side of the market, analysing employer agreements. Antitrust investigations and enforcement in the labour market represent a relatively new development. The European Commission published a policy brief dissecting this phenomenon, comparing it to similar practices in the goods market. In the concluding section, the potential application of Article 102 TFEU is evaluated, with a focus on its relevance to the labor market. While the article emphasizes the importance of antitrust law enforcement in this context, it also underscores its complementary role as a tool for worker protection.

II. Collective Bargaining and Article 101 TFEU

In most analyses, the intersection of competition law's restrictions on collusion and labour law centres on agreements between workers (or their representatives) and their employers or employer associations[9]. Collective bargaining has all the characteristics for it to be considered a censurable agreement under Article 101 TFEU: there is an understanding between entities that fall under the notion of an enterprise, insofar as they engage in an economic activity, and it may adversely affect competition in the internal market. However, collective bargaining historically meets the needs of the weaker bargaining party in the labour relationship[10]. Moreover, social dialogue is among the objectives referred to in Article 151 TFEU,

[9] Giorgio Monti, 'Collective Labour Agreements and EU Competition Law: Five Reconfigurations' (2021) 17 European Competition Journal 714–744.

[10] Isabelle Schömann, 'Collective bargaining and the limits of competition law. Protecting the fundamental labour rights of self-employed workers' (2022) ETUI Policy Brief: "Competition law and collective bargaining both fulfil a dual purpose of preventing abuses of power and ensuring fair competition. […] As complementary instruments, they can both help to create more socially inclusive and sustainable markets."

which opens Title X on EU Social Policy. Article 156 TFEU encourages cooperation among member states to achieve the objectives of Article 151 TFEU in a list of matters, among which collective bargaining is included.

The Court of Justice's (CJEU) first pronouncement on the intercurrent relationship between workers' collective bargaining and competition law is the well-known *Albany* judgment[11]. In it, using the language of antitrust law and bringing collective bargaining under the notion of an agreement in Article 101 TFEU, the Court creates an exception to the application of the same, with the aim of strengthening the protection of workers[12]. Indeed, the European courts and Advocate General Jacobs agree that the scope of competition law also covers collective bargaining, given its possible restrictive effects on the market. But such agreements are the means by which other values protected by the Treaties are protected: they are nothing more than the practical expression of the social policies of Articles 151–154 TFEU. It would not be logical for a policy expressly protected and promoted by one part of the Treaty to be censured by another article of the same instrument. To avoid internal short-circuits, and given the fundamental social value of collective bargaining, the *Albany* exception was thus born: competition law, and specifically Article 101 TFEU, does not apply to those collective agreements that improve workers' working and employment conditions, wages implicitly included. The following year, the Court clarified the limits of the exception: it applies only to employees[13]. Self-employed workers engage in economic activity by assuming the risk of enterprise and are for all purposes undertakings for EU law. A collective agreement among self-employed workers would be equivalent to an agreement among enterprises. And a union representing in collective bargaining self-employed workers would act as an association between enterprises: an agreement between a union of self-employed workers and employer or association representing employers is therefore excluded from the exception.

In subsequent years, the Court has a way to refine the *Albany* exception. Supplementary clauses to collective bargaining are also to be considered included in the exception, since they presuppose the same negotiation between social partners for their draft and inclusion in a collective agreement[14]. Moreover, the involvement of third parties in the management of funds established by collective

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[11] Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430. See also Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* EU:C:1999:434; Case C-219/97 *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer en Havenbedrijven* EU:C:1999:437.

[12] Pietro Manzini, *Il diritto antitrust dell'Unione Europea* (Giappichelli Editore, 2022) pp. 66–72.

[13] Cases C-180/98 to C-184/98 *Pavel Pavlov and others v. Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428.

[14] Case C-437/09 *AG2R Prévoyance v. Beaudout* Père et Fils SARL EU:C:2011:112.

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bargaining – in this case, a sickness fund – is not sanctioned as anti-competitive. Indeed, restricting the social partners' action by preventing them from turning to third parties in the implementation of clauses would be detrimental and contrary to collective bargaining itself and the values it protects[15]. These are interventions that do not upset the original structure and arguments, as they adapt the antitrust exception to concrete situations presented before the Court of Justice.

It was with *FNV Kunsten*[16] that the court substantially broadened the scope of the *Albany* exception. The *a quo* judge questioned whether, in the face of a union representing employees and self-employed workers, collective bargaining in favour of the latter was covered by the *Albany* exception or whether it was covered by the prohibition in Article 101 TFEU.

The Court's decision continues in the wake of previous case law: self-employed workers are undertakings, and as such do not benefit from the exception from the application of Article 101 TFEU. However, the case of so-called "*false self-employed*" workers is different: they are considered to be all those individuals who, for tax, administrative or bureaucratic reasons indiscriminately, are working under a contract of services but are essentially equated with employees[17]. They can be distinguished from self-employed workers in that the false self-employed are integrated into the enterprise, presenting themselves as a single economic entity, they do not manage and organize their own performance – timetables and mode of performance are just a few examples – and they do not assume the economic risk of the entrepreneurial activity, which is totally in the hands of the employer to whom they are offering their services. Thus the Luxembourg judges list the criteria that the national court will have to use to assess whether to requalify an employment relationship when faced with a *false self-employed person*[18]. The criteria are derived from the Court's consistent case law on workers and the employment relationship.

The *Albany* exception therefore also applies to false self-employed individuals: for this to happen, a pronouncement by the national court qualifying the contractual relationship as an employment relationship is required. This choice on the part of the CJEU has avoided application uncertainties in all those situations in which the worker is not actually self-employed, but the contractual requalification pronouncement by the national court has not yet taken place. With *FNV Kunsten*

[15] Case C-222/98 Hendrik *van der Woude v. Stichting Beatrixoord* EU:C:2000:475.

[16] Case C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* EU:C:2014:2411.

[17] *Ibidem*, para 36. While the term "false-self-employed" cannot be ascribed to any single legal or political actor, it has nonetheless permeated the European socio-legal lexicon – gaining traction in both legislative instruments and political debate – since the early 2010s. The definition employed hereinafter is that which was articulated by the Court of Justice of the European Union (CJEU) within that specific jurisprudential climate, and it serves as the conceptual benchmark for the ensuing analysis.

[18] *Ibidem*, paras 33–37.

the exclusion of collective bargaining from the application of the prohibition of restrictive agreements on competition knows its maximum subjective extension through caselaw[19].

A further intervention on the issue of collective bargaining and Article 101 TFEU was made by the Commission in late September 2022. However, it is too early to analyse its enforcement, as no relevant cases have yet arisen. With the publication of the Guidelines "On the Application of Union Competition Law to Collective Agreements Concerning the Working Conditions of Individual Self-Employed Persons"[20], the phenomenon of *soft law* instruments being used as an interpretive act of legislation, or as in this case, case law, is being repeated[21]. The communication extends the jurisprudential interpretation that has so far evolved in a straightforward manner, overcoming one of the limits always stressed by the Court of Justice: that of the notion of undertaking. In fact, the Commission declares that it will not act against collective agreements that have been formulated to represent and protect self-employed individuals[22]. This is a category that meets the needs of vulnerable workers in the labour market that did not find protection in the definition of the *FNV Kunsten* judgment[23].

The guidelines are a document that binds, in a self-imposed motion, the Commission in its role as *enforcer*. The idea behind it is to signal its commitment to the subject matter, with the possibility of influencing and promoting the same course of action by national competition authorities[24]. The rationale behind the communication can be found in the first part of the document, the introductory and defining part of the scope in general: the labour market has been profoundly changed by the succession of economic and health crises, and the process of digitization accelerated by the pandemic highlighted how European and national

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[19] Henrik Nordling, 'State of the unions: the applicability of art 101(1) TFEU to collective bargaining agreements after FNV Kunsten media' (2015) 14(1) Competition Law Journal 37–48.

[20] Commission communication, Guidelines on the Application of Union Competition Law to Collective Agreements concerning the Working Conditions of Individual Self-Employed Persons, 2022/C 374/02 (*Guidelines 2022*).

[21] See Mariolina Eliantonio, Oana Stefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 European Journal of Risk Regulation 159–175.

[22] See Marco Inglese, 'Antitrust e rapporti di lavoro: un'economia sociale di mercato fortemente competitiva' in Pietro Manzini (ed.), *I confini dell'antitrust. Diseguaglianze sociali, diritti individuali, concorrenza* (Giappichelli Editore, 2022), pp. 97–121.

[23] See Schömann (n. 11); Antonio García-Muñoz Alhambra, 'Collective Bargaining of Self-Employed Workers and Competition Law in the EU' (2023) 3 Lavoro Diritti Europa.

[24] See Marco Casiello, 'Note a caldo sugli Orientamenti della Commissione UE sull'applicazione del diritto della concorrenza dell'Unione agli accordi collettivi dei lavoratori autonomi individuali' (2022) 3 Diritti Europa; Massimo Pallini, 'L'approccio "rimediale" della Commissione UE alla tutela del diritto di contrattazione collettiva dei lavoratori autonomi' (2023) 3 Diritti Europa.

regulations were not ready to support the transition to fully digitized work, different from the forms of teleworking used up to that time.

It describes three categories of dependent self-employed workers whose collective agreements will not be subject to the application of Article 101 TFEU, in view of an anomalous extension of CJEU jurisprudence. These are economically dependent self-employed workers[25], dependent self-employed workers who work "side by side" with employees, and finally individual self-employed workers who work through digital work platforms.

The Commission's recognition of economic dependence aligns it more closely to national legislations[26] and European policies aimed at protecting vulnerable workers[27]. However, this approach does not go as far as to redefine the concept of undertaking, under which economically dependent self-employed individuals are still categorized. The second category exactly describes the "false self-employed" in the *FNV Kunsten* ruling – the identifying criteria are expressly recalled – overcoming the need for the national court's pronouncement of contractual requalification: according to the Commission, the *Albany* exception can be applied regardless of the national court's ruling. What looks like an intervention to broaden worker protection, however, could create application doubts that the Court evaluated and avoided with the original decision dispositions. The third category to which the *Albany* exception is extended is that of self-employed workers who "*are in a situation comparable to that of employees vis-à-vis the digital work platforms through which, or to which, they offer their work*"[28]. These workers often have no way of influencing the choice of clientele, selected by an algorithm, and the performance mode is imposed by the platform, along with the conditions of the relationship and the performances' rates. The latter category is to be seen as complementary to the protection of platform workers prepared by the Directive on Improving Working Conditions in Digital Platform Work[29]. In fact,

[25] Guidelines 2022, (n. 21) p. 23 "[…] In general, such solo self-employed persons do not determine their conduct independently on the market and are largely dependent on their counterparty, forming an integral part of its business and thus an economic unit with that counterparty. In addition, such solo self-employed persons are more likely to receive instructions on how their work should be carried out.[…]".

[26] As an example, in Italy, Art. 9, Law No. 192 of June 18, 1998 refers to business-to-business abuse, although the text of the law has recently been updated to include brokerage services provided by a digital platform, an addition of Art. 33 of Law 118/2022.

[27] In the European context, the *Working Yet Poor* project (https://workingyetpoor.eu/) has created taxonomies of vulnerable *and underrepresented* (VUP) subjects. In the second, devoted to the self-employed, specific reference is made to the false self-employed and those economically dependent on the counterpart. The conclusion of the project saw the publication of the book, edited by Luca Ratti and Paul Schoukens, *Working Yet Poor: Challenges to EU Social Citizenship* (Hart Publishing Ltd, 2023).

[28] Guidelines 2022, (n. 21) p. 28.

[29] European Parliament and Council, Proposal for a Directive on the improvement of working conditions in work through digital platforms, COM/2021/762 final.

if Article 5 of the directive and the legal presumption contained therein were not to apply, the worker would still receive partial protection, at least as far as collective bargaining is concerned, through the Guidelines being analysed. This is a concrete step towards the application of antitrust law to the digital labour market, by extending antitrust exemptions.

The communication was not limited to the subjective extension of the *Albany* exception. The concluding section outlines those types of agreements against which, while the exception may not apply, the Commission does not intend to act against. These are agreements between self-employed workers and a counterparty with a certain level of economic strength. There are two alternative criteria for identifying economic strength: the first is that the counterparty represents the entire sector or the entire industry[30]; the second is that the total annual turnover and/or total annual budget exceeds two million or whose headcount is 10 or more. The methodology common to the definition of *gatekeeper* in the DMA[31] is evident: Article 3(2) of the regulation identifies thresholds that must be met for each of the three possible designations in paragraph 1. With the enactment of the Digital Markets and Services Regulations, DMA and DSA[32], the symptomatic indices of dominance and characterization of "strong" market players are changing. It should come as no surprise then that they are also applied to the assessment of bargaining power between independent self-employed workers and counterparties.

The second type of agreement against which the Commission does not intend to act is that provided for in national or European legislation. This is a closing provision that refines the system in the face of national legislation that already protects intermediate work figures between subordination and self-employment that cannot be brought under the first part of the guidelines and considering the possible future evolution of member states' law on the subject. Even with the limitations of a *soft law* provision, the Commission's commitment as an *enforcer* of antitrust law in the European Union is symptomatic of a clear policy[33].

[30] It has strong reminiscences of the analyses necessary to highlight the dominant position, and its potential abuse by the company, which forms the basis for the application of Article 102 TFEU.

[31] EU Regulation 2022/1925 of September 14, 2022, on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation).

[32] EU Regulation 2022/2065 of October 19, 2022, on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation).

[33] This policy stemming from the concrete implementation of the European Pillar of Social Rights (n. 6), which focuses on promoting fair working conditions, social protection, and equal opportunities across the EU. Antitrust enforcement is a tool for the practical realization of these objectives. By ensuring fair competition and preventing market distortions, it supports the creation of a level playing field, which is essential for promoting fair working conditions and safeguarding workers' rights.

With regard to collective bargaining for platform workers, a few examples have emerged within EU member states[34]. However, this is a relatively recent phenomenon that has struggled to gain sufficient traction at the national level. Moreover, the focus often tends to be on specific apps or platforms rather than on the broader category or job roles of the workers involved. This limited scope has hindered the development of comprehensive protections and policies that would benefit platform workers as a whole, making it more difficult to address the systemic challenges faced by this segment of the labour market. As a result, the legal and regulatory landscape remains fragmented, with significant gaps in worker coverage across different platforms and sectors.

The limitations of using Article 101 TFEU to protect workers in the context of collective bargaining are closely tied to its scope. Neither the *Albany* exception nor the relevant guidelines apply in the absence of a collective agreement, and even when such an agreement exists, it must have adequate subjective coverage. Moreover, antitrust law's intervention is primarily confined to the quantitative aspect of the employment relationship, namely wages, and it cannot protect the qualitative aspects of the employment relationship. While this form of protection is marginal, its application can nonetheless reinforce workers' rights[35]. Article 101 TFEU and its judicial interpretation can serve as a valuable tool for advancing worker protections without undermining the core principles of the discipline. When applied to safeguard workers, it should be seen as complementary to, rather than a substitute for, labour law. This approach ultimately enhances and strengthens the position of workers[36].

III. Collusion Between Employers and the Prohibition of Restrictive Agreements on Competition

Strengthening the protection of workers' rights through the application of antitrust law is not necessarily achieved by an exception from the discipline, as per the *Albany* jurisprudence. This is the case with antitrust authorities' investigations of agreements between employers that harm competition in the labour market, and by extension, also negatively influence the production of the goods market. The first investigations were carried out by the U.S. antitrust authorities[37], and

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[34] Mariagrazia Lamannis, 'Collective bargaining in the platform economy: a mapping exercise of existing initiatives' (2023) 2 ETUI report.

[35] Mattew Dimick, 'Conflict of Laws? Tensions between Antitrust and Labor Law', (2023) 90(2) The University of Chicago Law Review 379–436.

[36] *Ibidem*.

[37] Eric A. Posner, Sarah Roberts, 'No-Poach Antitrust Litigation in the United States' (2023) 993 University of Chicago Coase-Sandor Institute for Law & Economics Research Paper, November 2023.

recently, in Europe this phenomenon has been brought to the attention of the European Commission[38].

The types of agreements being investigated have been distinguished in doctrine depending on the subject matter of the provisions contained therein, and the complexity of the network created by the arrangement[39]. Initially, a distinction is made between wage-fixing agreements and no-poach, i.e., no- hire agreements. The latter in turn are distinguished into a commitment to refrain from actively seeking contact with other people's employees (*non-solicit,* or also *no-cold calling*), from a commitment not to hire even if the worker shows up at a firm different from that of current employment (*no-hire*). Both wage-fixing and no-hire agreements affect workers, going on to negatively affect wages, job mobility, and the allocation of the best resources[40].

The Commission, in early May 2024, published a policy brief on antitrust enforcement in the labour market. Specifically, it addresses the issue of agreements between employers to the detriment of their workers[41]. Referring to previous notices[42], including the aforementioned Guidelines, the agreements under analysis are traced back to types of restrictive agreements prohibited by Article 101 TFEU, as they are considered restrictive of competition because of their object[43]. Recognizing that usually the labour market is structured on a national, regional or local basis, and therefore this type of cartel naturally falls into the "territory" of national antitrust authorities, with this dossier the Commission takes a strong stance in future antitrust *enforcement* policy, directing the network of European authorities to uniformly counter the phenomenon covered by the document.

From the introduction of the paper, the Commission's position is firm: *wage-fixing* and *no-poach agreements* are considered restrictions by object – not by effect

[38] See press release of November 21, 2023, Antitrust: Commission carries out unannounced inspections in the online food delivery sector, IP/23/5944. It must be noted that member states national competition authorities have been investigating the subject matter since 2013, the effort spreading faster after the Covid-19 pandemic. As for today, official communication on the matter have been made from the national authorities of Germany; Greece; Lithuania; Poland; Hungary; Spain and Catalonia; Portugal; Croatia; Sweden, Norway, Finland, Denmark and Iceland in a Joined Report. Also, the UK CMA published a report on the subject at the beginning of 2024, and lately, on the 18th of September 2024, the Turkish authority published a draft of Guidelines on Competition Violation in Labour Markets that partially overlap with the Commission policy brief on the same matter.

[39] In particular, a distinction is made between simple non-hiring agreements, thus between different firms in the industry, and complex ones, which usually characterize arrangements between entrepreneurs belonging to a *franchise*. For further discussion see also Posner, Robert (n. 38).

[40] See Delabastita, Rubens (n. 7).

[41] Antitrust in Labor Markets, Competition Policy Brief No. 2/2024, May 2024.

[42] Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements (*Horizontal Guidelines*), 2023/C 259/01, and Guidelines on the Application of European Union Competition Law to Collective Agreements Concerning Working Conditions of Self-Employed Employees, 2022/C 374/02.

[43] Manzini, *Il diritto antitrust dell'Unione Europea*, (n. 13) pp. 54–60.

– and can hardly be shown to be ancillaries to other agreements or to benefit from the exemption in Article 101(3) TFEU. The reasons, economic in nature, behind such a stark decision follow in the document. The harms from wage-fixing agreements affect workers by depressing wages and other benefits, with the side effect of reducing *output* and increasing production costs to the detriment of consumers as well. Analysing the phenomenon in concentrated markets, it would also seem to reconnect to sluggish growth in national GDP. The effects of the mutual non-recruitment agreement have similar outcomes: reduced labour market dynamism, with negative effects on wages[44], business productivity and innovation.

The policy brief recalls a legal analysis of European law and jurisprudence, which act as the basis of the definition of employer agreements as restrictive by object of competition. Citing the criteria of the Court of Justice's restrictive interpretation in *Groupement des cartes bancaires*[45], it points out that in order to be deemed restrictive by object, the objective of the agreement must be clear from the content of the agreement, without being confused with the subjective intentions or legitimate objectives pursued by the companies in question; the pursuit of a legitimate objective does not preclude the measure from being considered restrictive of competition[46] and it is not sufficient to show that the agreement *also* has positive effects on competition[47].

The jurisprudential criteria recalled in the policy brief must be applied to the facts under analysis, i.e., the two types of agreements that the Commission has decided to regulate through its intervention. Referring to the recent guidelines on horizontal agreements[48], it describes the four steps necessary for the investigation, establishing *know-how* for national authorities and the Commission's own future investigations.

The first step is to analyse the "content" of the agreement. The two types of agreements in the labour market fall under letters a) and c) of Article 101 TFEU: respectively, the wage fixing corresponds to a form of fixing the sales price, while

44 Undertakings participating in the agreement do not offer higher wages to attract workers, and thus the mature counter-offer process that gives rise to competition for human resources is not initiated. In this regard, the allocation of the best (human) resources to the most competitive and cutting-edge enterprises is also restricted.

45 Case C-67/13 P *Groupement des cartes bancaires (CB) v. European Commission* EU:C:2014:2204, and case law cited therein.

46 Case C-228/18 *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others* EU:C:2020:265, and *CB* (*ibidem*).

47 The balancing of pro and anti-competitive effects recalled on page 4 of the Commission's policy brief can be traced back to Joined Cases 56 and 58–64 Établissements *Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. E.C.E. Commission* EU:C:1966:41. More recently, and referred to in the Commission's paper, can be cited Case C-307/18 *Generics (UK) Ltd and others v. Competition and Markets Authority* EU:C:2020:52; Case C-331/21 *Autoridade da Concorrência and others v. Ministério* Público EU:C:2023:812; and finally the opinion of Advocate General N. Emiliou in Case C-883/19 P *HSBC Holdings plc and others v. European Commission* EU:C:2022:384.

48 Horizontal Guidelines (n. 43).

the non-employment agreement is a form of allocation of resources among cartel members[49]. Such agreements are consistently treated as restrictions by object in both the practice of antitrust authorities and the case law of the Court of Justice, consolidating what the Commission enunciated in the document introduction.

The second step is an analysis of the objective. The parties to the agreements under analysis might argue that the agreement has a legitimate objective. The reasonings behind this argument are usually two: the agreement is intended to protect investments made by the employer in the training of its employees; or the agreement protects trade secrets of which the employee has become aware. This line of argument is not sufficient to rule out restriction by object to the harm of competition. The objective should be clear from the measures in question, not from subjective intentions or legitimate goals allegedly pursued. In addition, there are instrument that do not conflict with the discipline of Article 101 TFEU and are aimed at protecting the mentioned interests, such as: confidentiality agreements or NDAs clauses, obligations to remain employed with the same employer a minimum amount of time proportionate, of course, to the training investments and/or tasks performed, or even reimbursement of training costs. Non-compete agreements are mentioned as a possible solution: these do not fall under the application of Article 101 TFEU, as they are not agreements between companies. From an antitrust law perspective, "*non-compete clauses would be considered less restrictive ways of protecting the employers' investments in training or non-patent IP as, unlike no poach agreements, they are transparent vis-a-vis employees, who can, at least, ask for an equitable compensation.*" It is necessary to point out in this regard that U.S. antitrust authorities have already taken a – negative – position regarding *non-compete clauses* included in employment contracts[50]. It cannot be ruled out that in the future the Commission will also align with this policy.

The third step is the analysis of the economic and legal context: if relevant pro-competitive effects could be proven, sufficiently related to the restriction of competition, and significant enough to create reasonable doubt that the restriction of competition was justified, the agreements might not be censured by antitrust law. Neither type of agreement would appear to pass this test[51].

[49] Policy Brief, (n. 42) p. 4.

[50] The official notification of the FTC was published April 23rd, 2024, where non-compete clauses imposed by employers on their employees that exceed the normal *rationale of* the institution are officially censured under Section 5 of the FTC Act. https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[51] Following the Court's case law on buyer's cartels, including the cited C-883/19 *HSBC Holdings*, it should be sufficient to dwell on the test of the "sufficient degree of impairment" of the competitive process in the labour market. Moreover, as in the recent case C-680/21, *UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL* EU:C:2023:1010 it is suggested in para 107 "[…] that limitation is likely to have an impact on the competition in which the clubs may engage, not only in the 'upstream or supply market', which, from an economic point of view, is constituted by the recruitment of players, but also in the 'downstream market', which, from the same point of view, is constituted by interclub football competitions."

Recalling the Guidelines on the Application of Article 81(3) of the Treaty[52], the Commission is lapidary about the possibility of considering agreements between employers as ancillary restraints: there are institutions that have no impact on competition that can achieve the same objective, and furthermore, the clauses are not addressed to specific individuals among workers but cover the entire workforce[53]. The possibility of an exception based on Article 101 TFEU(3) is then ruled out, as there can be no positive effects on competition resulting from these agreements that can justify the restrictions and negative effects on the labour market resulting from the agreements under analysis.

The Commission has thus brought price-fixing and non-recruitment agreements between employers among the types of restrictive agreements to which Article 101 TFEU applies. From an initial analysis, it would also seem to be of remote possibility that such agreements could be exempted from discipline under paragraph 3 of the aforementioned article or under the parameters of ancillary restraints. Given the geographic significance of labour markets, investigations will certainly be carried out primarily by national authorities, but a policy brief with content such as that analysed was necessary to ensure that an *allegedly* widespread phenomenon[54] can be addressed in a harmonized manner in member states.

In this context, the Commission subsequently intervened with its first sanction concerning a labour market cartel in the Food Delivery Services case[55]. In the specific instance, the infringement consisted of a single and continuous violation lasting 48 months, from July 2018 to July 2022. The conduct was articulated through a combination of restrictive practices, namely: (i) a no-poach agreement between competing undertakings; (ii) the exchange of commercially and competitively sensitive information concerning employment conditions; and (iii) the allocation of geographic markets[56]. The no-poach arrangement operated as the core restrictive mechanism, insofar as it eliminated competitive hiring pressure between the undertakings concerned. By neutralising the possibility of reciprocal recruitment, the agreement altered the competitive structure of the labour market without the need for explicit wage coordination. The accompanying exchange of sensitive information and the geographic allocation further reinforced the stability of the collusive framework, reducing strategic uncertainty and limiting the scope for independent competitive conduct.

The decision is therefore noteworthy not only because it represents the first formal sanction in this area, but also because it clarifies that collusion affecting labour inputs

[52] Commission communication, Guidelines on the application of Article 81(3) of the Treaty, C 101.

[53] Manzini, *Il diritto antitrust dell'Unione Europea*, (n. 13) p. 65.

[54] Jonathan Masur, Eric A. Posner, 'Horizontal Collusion and Parallel Wage Setting in Labor Markets (2023) 90(2) University of Chicago Law Review 545–578.

[55] Case AT.40795 – Food Delivery Services, 02/06/2025 (n. 9).

[56] Case AT.40795, pp. 8–13.

– when structured as a single and continuous infringement – falls squarely within the orthodox analytical framework of Article 101(1) TFEU, irrespective of whether the restriction materialises through wage-fixing or through other mechanisms capable of constraining competitive interaction in labour markets[57].

Following these enforcement initiatives, the analytical focus may be broadened beyond traditional forms of express collusion to encompass structurally analogous restraints emerging in digitalised labour markets. In the digital sector, various forms of algorithmic collusion between undertakings are well-known[58]. However, how these practices are exploited on labour platforms has yet to be thoroughly examined. One potential direction for further investigation is the equivalence between no-hire agreements and app-tying or lock-in practices used for delivery workers[59]. The inability to transfer data between competing platforms and the incompatibility of running two different applications simultaneously are behaviours that could be scrutinized under antitrust law – either as instances of algorithmic collusion or as expressions of abuse of dominant position[60]. These practices merit closer analysis to determine their impact on competition and worker mobility in the platform economy.

Against this background, it is important to clarify the practical reach of competition law in this field. The impact of interventions on collusive agreements primarily influences the overall market rather than the individual worker. Once a cartel has been sanctioned, the Commission's role comes to an end, and the protective function of antitrust law for workers is effectively exhausted. The law's focus is on eliminating the anti-competitive practices that distort the market, such as price-fixing or wage suppression, which can have wide-reaching effects on wages, labour mobility, and demand flexibility. However, once these market distortions are addressed, antitrust law does not offer direct compensation or remedies to individual workers who have been harmed by the cartel's actions. For individual workers who have suffered damages, the only recourse is through private

[57] Following the Commission's intervention and as a concrete expression, at national level, of the principles outlined in the Policy Brief, the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, AGCM) announced the opening of formal proceedings against seven undertakings for an alleged reciprocal no-poach cartel. The investigation concerns a purported agreement aimed at preventing the mutual hiring of employees, thereby potentially restricting competition in the relevant labour market. The case signals the transposition of the Commission's enforcement approach into domestic practice and confirms the increasing readiness of national authorities to scrutinise horizontal arrangements affecting employee mobility under Article 101 TFEU and its national equivalents. https://www.agcm.it/dotcmsdoc/allegati-news/I881_provv.%20avvio.pdf.

[58] Marina Kozlova, et al., 'The influence of digital platforms and algorithms on legal regulation of competition' (2021) 109 SHS Web of Conferences, 01020.

[59] Antonio Aloisi, Nastazja Potocka-Sionek, 'De-Gigging the Labour Market? An Analysis of the 'algorithmic management' Provisions in the Proposed Platform Work Directive' (2022) 15(1) Italian Labour Law E-Journal.

[60] Cosmin Popan, 'The fragile 'art' of multi-apping: Resilience and snapping in the gig economy' (2024) 56(3) EPA: Economy and Space 802–815.

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enforcement, which comes with significant challenges[61]. Pursuing damages in this way often involves complex litigation and is hindered by well-known evidentiary difficulties, such as the burden of proving causation and quantifying the specific harm suffered[62]. As a result, while antitrust law can dismantle harmful cartels and remove systemic barriers, the process does not always provide adequate redress for individual workers who have been directly impacted.

In conclusion, antitrust law remains a limited tool for the protection of workers, even when the safeguarding of workers' rights is recognized as one of its potential objectives. While acknowledging this goal is a step forward, it is not enough to bring about substantial changes in legislation or enforcement practices. Antitrust interventions, though significant at the market level in addressing systemic issues such as wage suppression or reduced labour mobility, fall short in providing direct or comprehensive protection for individual workers. Once market distortions are corrected, the individual worker often remains in a vulnerable position, lacking adequate recourse for the specific harms they may have suffered.

Ultimately, while antitrust law can play a role in enhancing workers' rights, it cannot fully substitute for more robust labour law protections. The broader impact on market conditions is valuable, but without mechanisms to address individual grievances effectively, workers continue to face challenges in seeking compensation and redress. Thus, antitrust law, though complementary, cannot stand as a complete solution for worker protection.

IV. Conclusive Remarks

Antitrust law is emerging as a versatile tool, adaptable to various fields while maintaining its core objectives. Beyond its traditional role in regulating labour markets and safeguarding workers' rights, antitrust has been increasingly applied to areas such as sports, environmental protection, and privacy. European institutions and legal scholars alike are turning to antitrust law as a key mechanism

[61] Helene Andersson, 'The Quest for Evidence – Still an Uphill Battle for Cartel Victims? in Magnus Strand, Vladimir Bastidas Venegas, Marios C. Iacovides (ed.), *EU Competition Litigation. Transposition and First Experiences of the New Regime* (Hart Publishing 2019) 134–136.

[62] The same argument holds true in the context of abuse of a dominant position. Article 102 TFEU is frequently invoked in private disputes, primarily by competitors of the undertaking abusing its dominant position rather than by consumer, due to the challenging burden of proof. Workers remain largely excluded from the subjective scope of those considered affected by this regulatory framework. For a more comprehensive analysis on Article 102 and private enforcement see Assimakis P. Komninos, 'Damages Actions in Article 102 TFEU Cases: The New Frontier for Private Enforcement', in Strand, Bastidas Venegas, Iacovides (*ibidem*) 134–136.

for advancing social values aligned with European policy goals, making it a crucial instrument in the broader pursuit of public interest across multiple sectors[63].

Regarding worker protection, the first part of the article examined how the Court of Justice's case law initiated a policy to safeguard collective bargaining by carving out an exception from the application of Article 101 TFEU. This culminated in the development of Guidelines which, in the specific language of competition law, aim to protect workers' interests. Remarkably – something that would have been inconceivable a decade ago – self-employed workers now have both the right and a practical opportunity to engage in collective bargaining, a process from which they were previously excluded – thanks, in part, to antitrust law.

The second part of the article explored how competition law serves as a protective tool for workers not just through exemptions but also in its enforcement. By recognizing that competition-restrictive agreements between employers fall within the scope of Article 101 TFEU, antitrust law provides an additional avenue for safeguarding workers' rights. However, both of these approaches have limitations, as noted earlier.

It's essential to emphasize that some of the solutions proposed in the policy brief, particularly by the European Commission, are being scrutinized by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) as potentially conflicting with market competition principles. For instance, non-compete clauses could fall under the scope of Article 102 TFEU, as a form of abuse of dominant position, if the CJEU and the Commission will follow a similar path to that of U.S. authorities. The concept of abuse of a dominant position is being invoked to describe the typical power imbalance in working relationships[64]. The risk here is that practices deemed legitimate under labour law may be viewed as unlawful in the context of competition law: a more precise definition of abuse in the employment sphere is essential. Additionally, a revision of the criteria for defining relevant markets is urgently needed. The labour market is highly fragmented, sometimes artificially so, and under the current metrics, jobs that essentially belong to the same market could be classified as different markets[65].

The challenge of redefining antitrust law as it applies to worker protection remains unresolved, particularly given the ongoing transformation of work,

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63 Manzini, *I confini dell'antitrust. Diseguaglianze sociali, diritti individuali, concorrenza*, (n. 23).

64 It is important to highlight that dominance in the goods market does not necessarily translate into dominance in the labour market, and the focus of the analysis is solely on the latter, despite the mutual impact that these two markets can have on each other. While a company may hold significant market power in terms of goods or services, this does not automatically imply the same level of control over labour conditions or employment dynamics. Nonetheless, the interactions between these markets are crucial, as practices in one can influence outcomes in the other.

65 On the issue of labour market fragmentation, Suresh Naidu, Eric A. Posner, 'Labor Monopsony and the Limits of the Law, Special Issue: Monopsony in the Labor Market' (2022) 57 The Journal of Human Resources S284–S323.

especially in the digital sector post-COVID-19. The complexities in defining labour relations, as well as the tension between employees and self- employed workers, now intersect with the challenges of applying antitrust principles to digital markets and enterprises that do not necessarily fit within the definition of gatekeepers[66].

The protection of workers, along with other areas where antitrust law is now applied, remains a secondary objective within the discipline. However, this expanded focus does not conflict with the primary goal of preserving competition in the internal market. Instead, competition law is being utilized in a complementary fashion alongside other legal frameworks, creating a more integrated system of social and economic policy that promotes broader European harmonization. Whether this approach proves sustainable at the European level remains to be seen. Time will ultimately determine whether these expanding boundaries of antitrust law will hold or whether certain limits will emerge, defining the extent of its applicability in areas beyond traditional competition concerns.

In conclusion, the evolving role of antitrust law, particularly in the context of worker protection, reflects a significant shift in how legal frameworks are adapting to modern social and economic challenges. As the European Union continues to experiment with integrating competition law into broader policy goals, the balance between its original purpose and its growing social applications will shape the future trajectory of European legal and economic governance. Whether antitrust law can preserve its adaptive capacity in the face of evolving forms of market power – particularly in digital and labour-intensive contexts – or whether its structural orientation toward market-wide correction will expose inherent limitations remains a central question for the future of competition policy.

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[66] For an analysis of all competition risks related to digital platforms and the cross-cutting problems that emerge: Marina Echebarrìa Sàenz, 'Restricciones de acceso al mercado y plataformas digitales: el caso amazòn como ejemplo' (2021) 78 Revista de Estudios Europeos 154–182. For a proposal of criteria to define platform power (and the possible abuse of it), Michael G. Jacobides, 'What Drives and Defines Digital Platform Power? A framework, with an illustration of App dynamics in the Apple Ecosystem' (2021) Evolution LTD White Papers, par. 2 'A Simple Framework to Define Platform Power' 11–14.