

Information Technology and Innovation Foundation
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Comments of ITIF

Before the

European Commission
Directorate-General for Competition

In the Matter of

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Collective bargaining agreements)	
for self-employed—scope of application)	Ares(2021)102652
of EU competition rules)	
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January 25, 2021

Due Enforcement of Competition Law While Improving Platform Workers' Conditions

On behalf of the Information Technology and Innovation Foundation (ITIF), I am pleased to submit comments on the European Commission's public consultation on its "*Collective bargaining agreement for self-employed—the scope of application of E.U. competition Rules*"

I am Dr. Aurelien Portuese, Director of Antitrust and Innovation Policy at ITIF, the world's leading think tank for science and technology policy. ITIF has long been interested in the issue of competition policy in digitally innovative sectors of the economy. Effective enforcement of competition laws can spur innovation, while reduction of the reach of competition laws may allow for anticompetitive conducts to take place.

The European Commission's inception impact assessment envisages the possibility of no longer enforcing competition laws with respect to independent platform workers in order to improve their working conditions. The four options identified by the European Commission are misguided and detrimental to consumers, platform workers, and innovation.

We articulate recommendations which integrate the need to improve the working conditions of economically vulnerable platform workers while preserving the proper enforcement of EU competition laws in a fast-changing and highly innovative digital platform economy.

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I. INTRODUCTION: THE GIG ECONOMY BETWEEN INNOVATION AND POPULAR TENSIONS

The European Commission has launched an initiative to define E.U. competition law's scope concerning digital platforms' self-employed workers.¹ This roadmap consists of gathering feedback to regulate independent platform workers' working conditions in the "gig economy."² The proposed regulation is set for mid-2022.

¹ European Commission, "Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment," Ares (2021) 102652, (January 6, 2021).

² The expression of "gig economy," or "collaborative" or "sharing economy," has unclear origins. Digital platforms have ushered economic relationships where on-demand tasks have enabled millions of individuals to start providing services (i.e., driving, delivery, hosting, teaching, construction work, "taskers," etc..) either as extra income or as exclusive source of income. "Gig" may refer to jazz musicians who referred to "gig" as performances: the gig economy thus refers to freelance work performed thanks to multi-sided platforms. The European Commission attempted to define the "sharing economy" as "the collaborative economy, a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms, is developing at a fast pace. The collaborative economy leads to greater choice and lower prices for consumers and provides growth opportunities for innovative start-ups and existing European companies, both in their home country and across borders. It also increases employment and benefits employees by allowing for more flexible schedules, from non-professional micro jobs to part-time entrepreneurship. Resources can be used more efficiently thereby increasing productivity and sustainability," in European Commission, *Upgrading the Single Market: more opportunities for people and business*, COM/2015/0550 final, 3 (Brussels, October 2005). The Commission's highly positive definition (including for "employees") leaves aside the "non-commercial and commons-based approaches" inherent to the gig economy. The diversity of the gig economy is so vast that it can hardly be defined if the dynamic and disruptive innovation of these platforms are fully considered. We, too, avoid misconstruing some definitions and nevertheless point out the fact that absent definition of the gig economy, it is first and foremost tricky to define the independent platform worker, let alone ascribe to this undefined category specific rights and duties. See European Committee of the Regions considered. See Committee of Regions, "The Local and Regional Dimension of the Sharing Economy," Opinion 2016/C, (Brussels, October 2016) ("given its innovative and dynamic nature, the concept [of sharing economy] cannot be ultimately defined").

The topic of the legal status of independent platform workers has spurred widespread concerns in the press,³ the courts,⁴ and beyond.⁵ On-call contingent labor has historical roots much older than the rise of digital platforms; instead, the employee status has emerged and spread recently in labor history.⁶ Nevertheless, underused resources,⁷ bundled with disruptive innovation of online platforms, has created a whole new gig economy. In the European Union only, the European crowd employment platforms' size represented around €4.5 billion in gross revenue representing 12.8 million active workers in 2016.⁸ Digital technologies and

³Natasha Lomas, "UK outs plan to bolster gig economy workers' rights," *TechCrunch*, February 7, 2018; Coastas Pitas, "Uber defends business model in UK court battle over workers' rights", *Reuters*, July 21, 2020; Pymnts, "Uber Looks to Cut European Deal to Avoid Reclassification of Gig Workers", *Pymnts*, December 30, 2020.

⁴Aude Cefaliello, Nicola Countouris, "Gig workers' rights and their strategic litigation," *Social Europe*, December, 2020; German Federal Labor Court, Judgment AZR 102/20, December 1, 2020; Mathieu Rosemain, Dominique Vidalon, "Top French court deals blow to Uber by giving driver 'employee' status", *Reuters*, March 4, 2020; Soulier Avocats, "French Supreme Court Says Uber Drivers Are Employees!" *Soulier Avocats*, April 29, 2020 (noting that French Minister of Labor announced "her intention to set up a committee on the status of platform workers. The idea of a third status between salaried employees and self-employed workers [...] is resurfacing"); Attilio Pavone, "Treatment of Gig Economy workers in Italy", *Norton Rose Fulbright*, May 31, 2019; Manuel V. Gomez, "Spanish Supreme Court rules food-delivery riders are employees, not self-employed", *El Pais*, September 24, 2020; Marco Sideri, "Employed or self-employed? The Italian Supreme Court gives new clarity on delivery riders," *Lexology*, March 4, 2020.

⁵ Popular concerns have also been expressed in the U.S., most influentially, in the Silicon Valley-based State of California where a legislative attempt to classify app-based workers as employees has recently been rejected. See Nicole Russell, "California says 'no' to making app-based workers into employees", *The Post Millennial*, November 6, 2020 (stating that "people that choose to be independent contractors for companies like Uber often choose such work because it is flexible, the income acts as supplemental or bonus pay, and the freedom the company allows accommodates workers lifestyles"); Preetika Rana, "Uber, DoorDash Gig-Worker Victory in California Sets Tone for Other Fights", *The Wall Street Journal*, November 4, 2020 (where gig-economy companies are said to have won with Californian law "a major victory the companies hope will help them beat back challenges to their business models elsewhere in the U.S. and beyond"); Eric Morath, "Gig-Economy Companies Get Worker Flexibility From Trump Administration", *The Wall Street Journal*, January 6, 2021 (referring to a final rule clarifying independent contractor status under the Fair Labor Standards Act); See U.S. Department of Labor, U.S. Department of Labor Announces Final Rule to Clarify Independent Contractor Status under the Fair Labor Standards Act, Press Release, January 6, 2021, (where it is stated that "the final rule explains that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work.").

⁶ Jim Stanford, "The resurgence of gig work: Historical and theoretical perspective," *The Economic and Labour Relations Review*, (2017) 1-20 (stating that "labour contracting and subcontracting practices were the predominant form of paid work in early capitalism until later in the 19th century").

⁷ A spare room, a spare seat in a car, an idle talent have led to AirBnB, BlaBlaCar or Fiverr platforms respectively, so that such supply capacity could match a potential demand thanks to multi-sided platforms tantamount to transaction cost minimizing tools. On how the gig economy best exploit under-utilized resources, see Michael Spence, "The Inexorable Logic of the Sharing Economy," *Project Syndicate*, September 28, 2015.

⁸ Willem Pieter De Groen, Zachary Kilhoffer, Karolien Lenaerts, Nicolas Salez, "The Impact of the Platform Economy on Job Creation," 52 *Intereconomics*, 345-251 (2017). In the U.S., the job-creating effects outpace the destruction of

innovation of the app-based business models have allowed for “gig workers” to reap the benefits of extra income,⁹ with few of them exclusively relying on the digital platforms as a source of income.¹⁰ This latter category of gig-workers (namely those financially dependent on platforms) is the primary focus of social and popular concerns.¹¹ Nevertheless, disrupting traditional incumbents through a Schumpeterian process of creative destruction, the gig economy has created more jobs than it destroyed.¹² The preservation of the innovative business model and drive of the digital platforms remains essential for the flourishing, expansion, and strengthening of the innovation economy the Commission wants to see emerging.¹³

However, despite the complexities of the topic and the many (un)intended consequences stringent regulations can generate at the expense of the growth of the digital innovation, it appears that the present roadmap has a clear, predefined view of the precise outcome it wants to reach.¹⁴ Indeed, the inception impact assessment

jobs, see Robert Atkinson, John Wu, *False Alarmism: Technological Disruption and the U.S. Labor Market, 1850-2015*, (ITIF, May 2017), (noting that “technology clearly creates jobs when it enables the creation of whole new industries and occupations”).

⁹ Aditi Shrikant, “The gig economy isn’t going anywhere. 4 experts explain why.” *Vox*, October 1, 2018 (alleging that gig workers saw a 69 percent increase in income).

¹⁰ Arun Sundararajan, *The Sharing Economy. The End of Employment and the Rise of Crowd-Based Capitalism*, Cambridge, MA: MIT Press (2016) (who argues that the “peer-to-peer rental model is a central part of the sharing-economy narrative, the perfect confluence of two ideas: access without ownership, and network replace hierarchies”).

¹¹ Robert Maxim, Mark Muro, “Rethinking worker benefits for an economy in flux”, (The Brookings Institution, March 30, 2018) (advocating for a safety net applied to gig-workers); Faris Natour, “Respecting Human Rights in the On-Demand Economy: Closing the New Governance Gap”, *Business and Human Rights Journal* 1(2), 315-320 (2016); Mike Volkin, “Why the Gig Economy Will Drive the Future of Employment”, *Forbes*, March 27, 2020.

¹² Kermal Dervis, “Is Uber a Threat to Democracy?”, *Project Syndicate*, July 23, 2015; Organization for Economic Cooperation and Development (OECD), *Job Creation and Local Economic Development 2018 : Preparing for the Future of Work*, (Paris : OECD, 2018) (noting that jobs of the gig economy “can help better match workers to jobs, integrate those who are most marginalized in the labour market or offer new opportunities for work-life balance”).

¹³ European Commission, “Interim Evaluation of Horizon 2020” (Luxembourg: European Union, August, 16, 2016); European Commission, “Better regulations for innovation-driven investment at EU Level”, Commission Staff Working Document, (Luxembourg: European Union, 2016) (where the then Commissioner Moedas wrote “I am committed to getting the conditions right for innovation in Europe. Clearly one of the most important of these conditions is the regulatory framework.”); European Union, “Turning Europe into a true Innovation Union”, MEMO/10/473, (October 6, 2010) (describing Innovation Union as “a key to achieving the goals of the Europe 2020 Strategy for a smart, sustainable, and inclusive economy”); Sara Amoroso, Roberto Martino, “Regulations and technology diffusion in Europe : the role of Industry dynamics”, R&I Paper Series Working Paper 2020/09, (August 24, 2020) (noting that Member States have been “asked to implement structural reforms in order to promote growth in Europe, with a specific focus on innovation as the main lever to boost productivity gains”).

¹⁴ Aoife White, Giles Turner, “Gig workers have uberfriend in Margrethe Vestager”, *Business Day*, February 27, 2020 ; Pymnts, “EU Antitrust Chief Backs Gig Workers”, *Pymnts*, February 28, 2020 ; Rob Moss, “Gig workers should be able

identifies a “baseline scenario” (i.e., status quo) where independent platform workers are subject to E.U. competition and therefore cannot enter into collective bargaining with the digital platform. The Commission argues that “in the absence of E.U. intervention,” independent platform workers may be prevented from entering collective bargaining. Thus, the Commission concludes that “action at the E.U. Level may thus be needed.”¹⁵

It thus appears that the Commission has a well-defined objective even before starting the roadmap.¹⁶ The roadmap legitimizes an ardent desire for intervention for two main reasons. First, the Digital Single Market’s regulatory fragmentation is already underway; national initiatives, either through regulations or through court judgments, have started to unilaterally regulate independent platform workers’ ability to enter collective bargaining.¹⁷ The European Commission appraises these risks of regulatory fragmentations as exacerbated by

to form unions, says EU commissioner”, *Personnel Today*, October 25, 2019 ; Jean-Francois Gerard, Laura Llangozi, Sarah Gallagher, Tommaso Ciorra, “WorkLife2.0—collective bargaining for platform workers”, *Lexology*, July 13, 2020.

¹⁵ European Commission, “Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment,” Ares (2021) 102652, (January 6, 2021).

¹⁶ This intuition is confirmed by the previous 2020 consultation and by statements of Commissioner Vestager who has recently declared that “we need to make sure that there is nothing in the competition rules to stop those platform workers from forming a union, to negotiate proper wages as you would do in any other business [...] Platform workers should be able to team up, to defend their rights [...] The fact that their employers label those workers as “self-employed” doesn’t make those collective agreement into cartels, when that label is just a way to disguise that they are really employees.”, in *Financial Times*, Vestager says gig economy workers should ‘team up’ on wages, *Financial Times*, October 24, 2019. See also European Commission, Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed, *Press Release*, June 30, 2020 (where Commissioner Vestager said “[...] today we are launching a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules”).

¹⁷ The Single Market’s fragmentation with multiple national and regional regulations applicable to the gig economy prevents a “frictionless” Digital Single Market to come to the fore, according to the European Commission. See, for instance, European Commission, *Study to monitor the business and regulatory environment affecting the collaborative economy in the EU*, Final Report, (Luxembourg: European Union, 2018) where it is noted, pp.114-115, that “Regulatory alignment has been found to be an important factor of growth for the collaborative economy as understanding and complying with different requirements is costly, especially for small platforms. Reducing policy fragmentation is therefore beneficial for the development of the collaborative economy in the EU.,” See *ibid* at p.109, where an interviewee argued that “the European market is fragmented [...] The different regulations and languages can act as barriers for export activities.” See also European Commission, *Study on the Assessment of the Regulatory Aspects Affecting the Collaborative Economy in the Tourism Accommodation Sector in the 28 Member States*, 580/PP/GRO/IMA/15/15111J (Luxembourg: European Union, 2018) where at p.12 it is noted that “the current situation is one where each Member State chooses their own regulatory approach to most of these new issues, which might not always be in compliance with EU rules. Furthermore, Member States’ regulatory approach can be pursued at national, regional or local level. This diversity and multi-level nature of the current regulatory framework is leading to an increasingly fragmented legal reality across the EU, whilst this mosaic-like regulatory reality can be particularly challenging for the nature and design of collaborative platforms themselves.” Regulatory fragmentation leads to “regulatory heterogeneity” which accounts for

the absence of E.U. preemptive action. If the E.U. acts, Member States' regulatory frameworks may be superseded by an E.U. regulation enjoying both supremacy over national regulations and harmonization benefits. It will be argued that the preemption argument is unconvincing since the European Commission lacks both the legal basis and downplays the benefits accrued from regulatory race to efficient national regulations of collective bargaining rights. Second, commissioned studies have concluded that independent platform workers need to be entitled to enter collective bargaining with digital platforms. As acknowledged by the Commission itself in the inception impact assessment, only "one in four self-employed" platform workers "can be seen as facing more precarious situations, with lower levels of income and job security." Despite this relatively marginal proportion of independent platform workers susceptible to benefit from the foreseeable regulation, the European Commission unequivocally embraces the studies' conclusions to modify competition law in favor of independent platform workers. Despite having raised concerns as per the innovation costs of such regulation and the legal incongruities created thereof, these justificatory studies constitute a legitimate basis for actions according to the Commission.

Therefore, the inception impact assessment outlines the four different directions identified by the European Commission since the status quo (or so-called "baseline scenario") is excluded. The first regulatory Option would consist of granting "all solo self-employed providing their labor through digital labor platforms"¹⁸ would access collective bargaining. The second regulatory Option would give access to collective bargaining for "all solo self-employed providing their labor through digital labor platforms or to professional customers of a certain minimum size,"¹⁹ thereby encompassing also traditional professions in the offline economy. For example, this might include real estate agents. The third regulatory Option envisages granting collective bargaining rights to all solo self-employed providing their labor through digital platforms or to professional customers of any size except for regulated (and liberal) professions,"²⁰ thus broadening even further the category irrespectively of company size. The fourth and final Option entails that "all solo self-employed

slow productivity growth in the Single Market, see Centre for European Policy Studies, *Legal obstacles in Member States to Single Market rules*, (Brussels, November 2020) where at p.68 "regulatory heterogeneity" is the fact that "rules and obligations in different Member States serving similar or identical objectives are nevertheless distinct, that is 'heterogeneous', thereby raising costs of cross-border intra-EU business." On the legal aspects of regulatory fragmentation in Europe's digital market, see Michèle Finck, *Digital Regulation, Designing a Supranational Legal Framework for the Platform Economy*, *LSE Law, Society and Economy Working Papers* 15/2017, (2017); Valerio De Stefano, Antonio Aloisi, *European legal framework for 'digital labour platforms*, (Luxembourg: European Commission, 2018).

¹⁸ Option 1 of the European Commission, "Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment", Ares(2021) 102652, (January 6, 2021) 3.

¹⁹ *Ibid.* Option 2. Regulated and liberal professions include specifically-regulated professions where private regulatory bodies exist, such as doctors, architects, lawyers, accountants, etc.

²⁰ *Ibid.* Option 3.

providing their labor through digital labor platforms or to professional customers of any size”²¹ are entitled to collective bargaining rights, thereby including any company of any size and even regulated professions excluded in Option 3.

These four options are flawed as they engender incommensurable costs and risks to innovation and consumers without providing workers the necessary improvement of the working standards. Indeed, the baseline scenario, subject to improvements outside the realm of competition law, is the most desirable scenario irrespective of the Commission’s outright and baseless exclusion from policy options.

Indeed, the gig economy’s fragile digital ecosystem commands the Commission to cautiously warrant against the hasty regulatory burden imposed in Europe and the expense of the continent’s competitiveness and innovativeness. Nevertheless, the popular tensions that have arisen can hardly be unaddressed: social concerns are better addressed through social protection regulations instead of ill-suited competition laws. After exposing the numerous advantages and merits of preserving the competition law’s status quo (II), we shall outline the countless disadvantages and risks associated with the policy options envisaged. Competition law principles appear to be twisted in a socially detrimental manner (III). The social tensions above-mentioned can be addressed while preserving the competition and innovation objectives of the Digital Single Market. We thus lay down the socially optimal path forward (IV). We finally conclude by summarizing our policy recommendations and calling for greater policy coordination across jurisdictions on these cross-jurisdictional issues (V).

II. ANTITRUST ENFORCEMENT AGAINST A CARTELIZED LABOR MARKET

Competition law traditionally prohibits agreements such as cartels and collusive practices because they are harmful to society. This general prohibition equally applies to the suppliers (monopoly power) and the demanders (monopsony power). It is argued that this principled prohibition must be preserved and enforced to the competitive process to be both dynamic and innovative (a).

As a derogation to the principled prohibition, employees have traditionally been able to enter into collective agreements to counterbalance the use of monopsony power. However, this exemption of the principled ban is narrowly delineated for good reasons. It is inapplicable to the context of independent platform workers who are not employees from a legal and economic perspective (b). Consequently, competition enforcers must warrant against the inappropriate reduction of antitrust laws’ reach as hinted by the platform labor market’s envisaged harmful cartelization.

²¹ *Ibid.* Option 4.

II.1. A Principled Prohibition

The existential underpinning of competition laws resides in the prohibition of cartels. The bans of the market's cartelization and other collusive practices constitute one of the founding principles of competition laws in general, including E.U. competition law. Never has the strength and reach of Article 101 TFEU been convincingly questioned.²² Although there is no per se prohibition of cartels and collusive agreements under Article 101(1) TFEU,²³ the principled ban laid down in Article 101(1) can only be derogated under narrowly accepted exceptions provided by Article 101(3).²⁴ This article requires four cumulative conditions for cartels and collusive agreements to be accepted under E.U. competition law: i) efficiency benefits must be generated from the agreement; ii) a fair share of these benefits must pass-on to consumers; iii) restrictions must be strictly indispensable; iv) the agreement must not eliminate competition.²⁵ These four conditions are narrowly accepted exceptions to the well-accepted principle of prohibition of a cartelized marketplace. Another possibility for collusive agreements to be legal under E.U. competition is to resort to block exemption for specific aspects of the marketplace. It will be demonstrated that both venues are inadequate for the envisaged cartelization of the gig economy.

II.1.1. Article 101(3) Cannot Be Applicable to Independent Platform Workers

The European Commission intends to cartelize the market for independent platform workers by granting collective bargaining rights to independent entrepreneurs and firms. Indeed, according to Option 1 (the least market competition distorting Option), independent self-employed individuals “would cover all people

²² Collusive agreements between sellers on prices, quotas, market division are all prohibited as a matter of principle. See COMP/38698, CISA Agreements, July 16, 2008 (collusive agreements can be informal); Case T-540/08, *Esso v Commission*, EU:T:2014:630 (2014), 5 CMLR 507 (agreements can be incomplete); Case C-70/12P, *Quinn Barlo v Commission* (*Methacrylates*), EU:C:2013:351 (agreements can be terminated); C-455/11P, *Solvay v Commission*, EU:C:2013:796 (agreements can be concerted practices); Case T-588/08, *Dole Food Company v Commission*, EU:T:2013:130 (agreements can be assumed when a meeting takes place); Case T-519/09, *Toshiba v Commission* (*Power Transformers*), EU:T:2014:263 (agreements are evidenced with documents); Case C-382/12P *MasterCard v Commission*, EU:C:2014:2201 (agreements can be decisions by associations of undertakings).

²³ C-226/11, *Expedia Inc.*, EU:C :2012 :795 (agreements that may not affect trade between Member States are outside the reach of Article 101 TFEU). See also COM 2014/C, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union*, 291/01, August 30, 2014.

²⁴ See, in general, European Commission, *Guidelines on the application of Article 81(3) of the Treaty*, COM 101/97,101/08, (Brussels, 2004) (where it is stated, at para.32, that “the assessment of restrictions by object and effect under Article 81(1) is only one side of the analysis. The other side, which is reflected in Article 81(3), is the assessment of the positive economic effects of restrictive agreements.”

²⁵ Case T-491/07, *CB v Commission*, EU:T :2012 :633 (emphasizing at para.377 that the four conditions are cumulative). See also Case T-185/00 etc, *Métropole Télévision SA (M6)*, ECR II-3805 (2002).

working through platforms, doing online and/or on-location work through platforms” and entitle them to collective bargaining power.²⁶ According to the European Commission, these collective agreements would lead to collusive discussions on “earnings, social protection, and other working conditions, which would improve the working and living situation of individuals currently in need of protection.” Expectedly, “increased earnings and access to social benefits” would unfold from these collective negotiations. The European Commission may assert that “this initiative would cover neither collective negotiations/agreements concerning trading conditions (such as prices charged) to private consumers nor unilateral price-fixing.”

The price-fixing nature of the collective agreements is obvious since any discussions involving “earnings” and other aspects would inevitably raise end-users’ prices. Indeed, for instance, how could Airbnb hosts improve their earnings via collective bargaining with the Airbnb platform without the final price of room rates being subject to the price increase? Also, how could Fiverr freelancers access heightened working conditions without the Fiverr platform passing-on to end-users the cost increase? How could BlaBlaCar service providers negotiate higher earnings without the platform’s associated costs on other BlaBlaCar’s platform users? The alleged non-cartelization effects of the envisaged collective bargaining power, as hinted in the Inception Impact Assessment, is both deceptive and illusory. The cartelization of the gig economy may be the undesirable effect of the proposed reform.

Not only is such cartelization economically detrimental, but it also is legally improper. Indeed, to qualify for Article 101(3) and render such cartelization compatible with E.U. competition rules, the four cumulative conditions need to be fulfilled.²⁷ However, none of them are so.

First, the agreement needs to “improv[e] the production or distribution of goods or to promot[e] technical or economic progress [...]”—this is the efficiency condition, be it productive, allocative, or dynamic efficiency.²⁸ How could the independent platform workers’ cartelization contribute to productive, allocative, or dynamic efficiencies? Production costs would expectedly increase since the collective agreements’ very objective is to increase “earnings.” Due to these increased transaction costs, the matchmaking nature of the multi-sided platforms where independent platform workers would deplete, thereby damaging the allocative efficiency due to the introduction of frictions (i.e., transaction costs) where supply and demand were once matching in a transaction cost minimization device. Finally, as the innovative business model of multi-sided platforms

²⁶ European Commission, “Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment,” Ares (2021) 102652, (January 6, 2021) 3.

²⁷ Cumulative satisfaction is deemed “both necessary and sufficient”, see Case T-17/93, *Matra Hachette SA v Commission*, IECR II-595 (1994); Joined Cases C-501, 513, 515 & 519/06P, *GlaxoSmithKline Services Unlimited v Commission*, ECR I-9291 (2009).

²⁸ Joined Cases 56 & 58/64 *Consten SARL & Grunding Verkaufs-GmbH v Commission*, ECR 299 (1966); Cases 43 & 63/82, *VBVB and VBBB v Commission*, ECR 19 (1984); Case T-168/01, *Glaxo-SmithKline Service Unlimited v Commission*, ECR II-2629 (2006).

becomes fundamentally questioned, as the level of disruptive innovation against traditional incumbents decreases, dynamic efficiency shall suffer altogether. Consequently, the outcome of collective bargaining powers granted to independent platform workers may generate efficiency costs rather than efficiency benefits. Thus, Article 101(3) 's first condition cannot be met since the agreement will be welfare-decreasing rather than welfare-increasing.

Second, the agreement needs to generate efficiencies that allow for “consumers a fair share of the resulting benefit.”²⁹ Because these agreements expectedly create more costs than benefits, the inefficiencies will eventually be passed on to end-users. Price competition will decrease as independent platform workers will increasingly find it harder to differentiate one another and be prone to inevitable homogenization of their fares and services. Consequently, end-users will face overall prices charged for slipping upward, thereby suffering from consumer harm created by reducing their purchasing power.

Third, these restrictions need to be “indispensable for the attainment of these objectives” pursued by the agreement.³⁰ Pursuing detrimental economic objectives, these agreements may nevertheless be indispensable. Indeed, only cartel-like agreements can increase customers' earnings, increasing consumers' final prices without an objective justification derived from product quality or innovation goals. In other words, these highly detrimental consequences of the gig economy's dynamics, and the innovativeness of the market economy more generally, can be enforced through cartelization of the (independent platform workers') market. Absent such agreements, prices would continue to fall, innovation would continue to spring, and competition (both at the level of gig workers and platform competition) will continue to be exerted aggressively. These cartel-like agreements would appease the agreements so that the soon-to-be “monopoly” power of platform workers will enjoy a quieter life. It used to be the case with the costly license system where entry barriers were kept artificially high.³¹

²⁹ See Case T-86/95, *Compagnie Générale Maritime v Commission*, ECR II-1011 (2002) ; Case C-238/05, *Asnef-Equifax, Servicios de Informacio sobre Solvencia y Credit SL v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*, ECR I-11125 (2006).

³⁰ Case T-2018/13, *Portugal Telecom v Commission*, ECLI:EU:T:2016:368COMP/39839, para.104 (stating that the indispensability needs to be scrutinized in practical terms); Telefonica / Portugal Telecom, January 23, 2013.

³¹ To refer to one telling example, the historical price-fixing arrangements of taxi cartels have traditionally kept prices high. This lessening of competition through collective agreements may revert back to a situation of entrenched rent-seeking market positions. See Youngme Moon, “Uber: Changing the Way the World Moves,” *Harvard Business School*, 9-316-101, (November 2015); Henrique Schneider, *Creative Destruction, and the Sharing Economy. Uber as Disruptive Innovation*, (Cheltenham UK: Edward Elgar Publishing, 2017); Georgis Petropoulous, *Uber and the economic impact of sharing economy platforms*, (Bruegel, February, 2016); Kathleen Thelen, “Regulating Uber: The Politics of Platform Economy in Europe and the United States”, in *Perspectives on Politics*, 16(4), (Cambridge: Cambridge University Press, 2018) 938-953; Mark J. Perry, “Schumpeterian creative destruction—the rise of Uber and the great taxicab collapse”,

Fourth and finally, to be compatible with competition rules, the agreement ought not to eliminate competition “in respect of a substantial part of the products in question.”³² Whether competition is considered to have been eliminated by the said agreement is a matter of the extent to which competition existed before the agreement’s adoption and the impact of such agreement on reducing actual and potential competition.³³ There will foreseeably eliminate most of the competition present in the gig economy’s thriving and dynamic sector concerning platform workers. Indeed, the Commission may well argue that “the initiative will be limited to removing E.U. competition law obstacles to collective bargaining.”³⁴ In practice, it will exempt the horizontal relationship amongst platform workers from E.U. competition law, enabling them to coalesce on the features of providing services.

Furthermore, despite the Commission’s guarantee that these agreements will not fix prices, the coordination of “earnings” and “wages” may inevitably have consequences concerning eliminating price competition for final consumers.³⁵ The Commission’s envisaged plan is tantamount to creating a trade association of platform workers where horizontal competition between them will ultimately be eliminated, although trade associations carry considerable risks of cartelizing the economy and “there is a wide consensus on the fact that trade associations should be subject to competition rules [...]”³⁶ Ignoring these well-known warnings, the Commission may provide a regulatory incentive for platform workers not only to coalesce in potentially harmful agreements but may also exempt these trade associations from “competition law obstacles.” The risks of antitrust infringement at the expense of both consumers and dynamic innovation are all the more heightened.³⁷

AEIdeas, September 2, 2015; Jim Edwards, “Uber is Destroying The Value of Taxi Monopolies in a Bunch of American Cities”, *Business Insider*, (November 28, 2014).

³² See, for instance, Case T-451/08 *Föreningen Svenska Tonsättares Internationella Musikbyrå v Commission*, EU:T:2013:189; Joined Cases C-239/11P etc, *Siemens v Commission (Gas Insulated Switchgear)*, EU:C:2013:866.

³³ European Commission, Guidelines on the application of Article 81(3) of the Treaty, COM 101/97, 101/08, (April 27, 2004), para.108.

³⁴ European Commission, “Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment,” Ares (2021) 102652, (January 6, 2021).

³⁵ *Ibid.*

³⁶ Organization for Economic Cooperation and Development (OECD), *Trade Associations* (Paris: OECD, 2007), p.8 (where it is argued that trade associations provide for meetings and discussions, and “such meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination.”).

³⁷ *Ibid* at p.8 where it is stated that “traditional areas of concern about trade associations are price fixing, allocation of customers or territories and bid-rigging.” In the case of platform workers, earnings and wages discussions pertain to price fixing discussions, whereas geographic market division pertain to allocation of customers or territories.

Consequently, none of the four cumulative conditions of Article 101(3) TFEU necessary for an agreement to be considered compatible with Article 101(1) TFEU are met: exempting antitrust laws to apply for platform workers' agreements would generate no efficiencies (but costs instead), will harm consumers with higher prices and slower innovation, are nevertheless indispensable for cartelizing the platform labor market and will be tantamount to elimination of (price and dynamic) competition.

In fact, not only are these agreements not liable to be eligible for the four conditions of Article 101(3) TFEU, but they may very well be suitable for being classified as “hardcore restrictions.”³⁸ Cartels are almost systematically prohibited, without further scrutiny on their alleged procompetitive effects.³⁹ Anticompetitive practices can sometimes be so harmful to the competitive process that they are considered to be restrictions of competition “by object”—meaning hardcore restriction are so serious that they cannot “benefit from a block exemption based on the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market.”⁴⁰ Collusive practices intended to enforce horizontal price-fixing,⁴¹ market sharing,⁴² bid-rigging,⁴³ and certain kinds of information exchange⁴⁴ are presumed to be illegal under Article

³⁸ Organization for Economic Cooperation and Development (OECD), *Recommendation of the OECD Council concerning effective action against hard core cartels*, (Paris: OECD, 1998) where hard core cartels are said to be “the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.”

³⁹ See Ioannis Lianos, Valentine Korah, Paolo Sciliani, *Competition Law. Analysis, Cases, & Materials*, (Oxford: Oxford University Press, 2019) who state at 701-702 that “it is widely accepted that cartels almost always produce negative effects on welfare, if one takes a welfare perspective, and always produce negative effects if one focuses on the competitive process. Hence, many competition law systems prohibit cartels, without the need to estimate their anti-competitive effects or to examine their effects on welfare.”

⁴⁰ European Commission, *Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreement may benefit from the De Minimis Notice*, SWD(2014) 198 final, (Brussels: European Union, June, 2014) p.4 where it is further specified that “hardcore restrictions cannot benefit from the safe harbor of the De Minimis Notice.” Therefore, hardcore restrictions, such a price-fixing cartels, are illegal under EU competition irrespectively of the breadth of their impact and without further examination. Therefore, irrespectively of their impact, independent platform workers' agreements as suggested by the Commission may be illegal under current competition rules.

⁴¹ Joined Cases T-217 & 245/03, *French Beef*, ECR II-04987 (2006).

⁴² C-41/69, *ACF Chemie farma NV v Commission*, ECR-661 (1970).

⁴³ C-40/73 etc, *Suiker Unie v Commission*, ECR 1663 (1975).

⁴⁴ C-8:08, *T-Mobile Netherlands BV, KPN Mobil NV, Orange Nederland NB, Vodafone Libertel NV, v Raad van bestuur van de Nederlandse*, ECR I-4529 (2009). See also, European Commission, *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements*, C 11/1 (2011) para.74 stating that “information exchanges between competitors of individualized data regarding intended future prices or quantities should therefore be considered a restriction of competition by object.” Discussions between platform workers cannot avoid discussing prices, qualities and quantities of the services provided, and thus create the conditions for hardcore cartels to cement.

101 TFEU no matter the importance of these agreements. Lamenting that “solo self-employed” platform workers are “price-takers and have little say over their working conditions,”⁴⁵ the European Commission implicitly suggests that they should become price-makers, overlooking the fact that they are independent entrepreneurs engaging in hardcore cartels should they coalesce over prices (be they earnings, wages, or fares). Contrary to what the European Commission attempts, there can be no distinction between the differences across “prices” for platform workers because it eventually pares down the final prices paid by the end-users.⁴⁶

11.1.2. Block Exemption Regulations Inapplicable to Independent Platform Workers

The Inception Impact Assessment aims to find novel ways to help platform workers be “involved in the determination of the price of their services” and gain “individual bargaining power to negotiate their terms and conditions.”⁴⁷ As referred earlier, foreseeable price-fixing discussions may usher from these collective bargaining rights granted as an exemption to the application of E.U. competition rules. These price-fixing discussions (on wages, earnings, fares, etc...) are hardcore restrictions. Hardcore restriction, or “restriction by object,” are restrictions “between non-competitors can be distinguished as to whether they relate to market partitioning by territory and/or customer group or to limitations on the buyer’s ability to determine its resale price.”⁴⁸

However, hardcore restrictions are not susceptible to benefit from the block exemption regulations. Indeed, the Commission made clear in its 2014 Staff Working Document that:

Types of practices that generally constitute competition restrictions “by object” can be found in the Commission’s guidelines, notices, and block exemption regulations. These refer to restrictions by object or contain lists of so-called “hardcore” restrictions that describe certain types of restrictions that do not benefit from a block exemption on the basis of the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market. Those so-called

⁴⁵ European Commission, “Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment,” Ares (2021) 102652, (January 6, 2021).

⁴⁶ This is illustrated by one of the studies commissioned by the European Commission itself, see European Commission, *Study to gather evidence on the working conditions of platform workers*, 98 “earnings” are said to include “wages, fees, price setting”. Also, the report wrongly claims at 84 that “in some countries, there are legal barriers such as anti-cartel laws targeting anti-competitive behavior (e.g. organizing to agree prices or negotiate conditions [...])”. It is not “in some countries” of the European Union but precisely in all countries since it is a prohibition led down by EU competition rules are directly applicable within Member States. Price-fixing cartels cannot be procompetitive.

⁴⁷ European Commission, “Collective bargaining agreements for self-employed—scope of application of EU competition rules, Inception Impact Assessment,” Ares (2021) 102652, (January 6, 2021).

⁴⁸ European Commission, *Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreement may benefit from the De Minimis Notice*, SWD(2014) 198 final, (Brussels: European Union, June, 2014) 12.

“hardcore” restrictions are generally restrictions “by object” when assessed in an individual case. Agreements containing one or more “by object” or hardcore restrictions cannot benefit from the De Minimis Notice’s safe harbor.⁴⁹

Thus, the European Commission considers that the “three classical ‘by object’ restrictions in agreements between competitors are price-fixing, output limitation, and market sharing (sharing of geographical or product markets or customers).”⁵⁰ In the case of independent platform workers, the collective bargaining arrangements envisaged by the European Commission would ultimately incentivize gig workers to cartelize their labor market with hardcore restrictions, albeit the Commission assures the opposite.⁵¹

Consequently, not only are the four conditions of Article 101(3) TFEU inapplicable to gig workers, but they cannot benefit from the block exemption regulations to prevent consumer harm and a fully-fledged cartelization of the independent platform labor market. This legal situation of E.U. competition rules is to be praised for protecting competition and innovation, rather than lamented and attempted to be dubiously circumvented as the Inception Impact Assessment of the Commission inaccurately suggests. Therefore, it settled that E.U. competition rules cannot allow for independent entrepreneurs to cartelize their market. Is it nevertheless that the allegedly weak bargaining power platform workers are left unchecked against the platform’s monopsony power? Antitrust rules already address such weak bargaining power by appropriate prohibitions pertaining to the abuse of monopsony power, thereby undermining the claim that platform workers’ weak bargaining power is left unchecked.

II.1.3. Ancillary Prohibitions to Tackle Monopsony Power

After having demonstrated that the principled prohibition against cartelization of markets is enshrined in E.U. competition rules, for good reasons both legally and economically, it will be argued that this prohibition is further expanded beyond monopoly power: competition rules address the abuse of monopsony power (or

⁴⁹ Ibid, p.4.

⁵⁰ Ibid. p.5.

⁵¹ Ibid. p.2 asserting paradoxically that “Neither collective negotiations/agreements concerning trading conditions (such as prices charged) to private consumers nor unilateral price fixing would be covered by this initiative.”

one firm buying products or services) to counterbalance weak bargaining power.⁵² Monopsony power can be an antitrust issue.⁵³

Two broad answers have been provided with a sound basis to tackle the potential issue of monopsony power. Monopsony power in itself did not go unchecked: firms' agreements over employees' ability to switch companies (the so-called "no-poaching agreements") are antitrust violations.⁵⁴ Indeed, sometimes companies may coalesce against employees' ability to exit and switch employers; companies' part of the agreement commit themselves not to recruit one another's employees. Similarly, cartel agreements enable monopoly power to be exercised so that prices can increase without consumers' retaliation. No-poaching agreements allow monopsony power to suppress wages. Also, non-compete clauses imposed on employees are deemed illegal whenever they are unreasonably designed. Thus, the firms' monopsony power is already mostly limited on the supply-side (i.e., employees can form unions). On the demand-side (i.e., companies cannot cartelize the labor market with no-poaching agreements and unreasonable non-compete clauses). Concerning gig-

⁵² The term "monopsony" was coined by Joan Robinson in 1933 in Joan Robinson, *The Economics of Imperfect Competition* (London: St Martin's Press, 1933) 215. Robinson divided his book between "monopoly, the principles of selling" and "monopsony, the principles of buying". In the preface of his second edition published in 1969, Robinson considered at p.xii, with some salience for today's ad-funded platform business models, that "to make industry genuinely serve the needs of the public, as it supposed to do in the text-books, would require a monopsony of consumers, equipped with their own experts. Some slight efforts are being made nowadays to protect the consumer interest, but they cannot make much head against the power of advertisement." See more recently, Alan Manning, *Monopsony in Motion*, Princeton: Princeton University Press (2003) (devising a dynamic monopsony model).

⁵³ Monopsony power in a market is defined as the ability for a producer to depress the amount paid for an input. In the case of labor, this refers to a dominant firm expressing the ability to reduce the price paid to the supply of labor. This suppression of wages has two effects in the marketplace. First, it reduces worker welfare. Worker welfare is the idea that workers receive a market wage greater than their value of leisure. The worker is incentivized to work because they are compensated above the point where they would drop out of the market. Depressing the price paid to these workers in the labor market can cause all but the most desperate workers to drop out of the market, in most cases because the wage paid is not sufficient to sustain their household. The second way that this monopsony power influences the market is by cementing the reduced competition in the market that allowed for the firm dominance in the first place. Monopsony power comes about out of a lack of competition in the labor market. Workers have relatively few opportunities for work, so they either take a low wage or fall out of the labor market. This low wage, while bad for workers, also has the effect of benefiting the producer. The producer has a low cost of labor, meaning that they are able to make profits above and beyond what they would be able to if there was competition in the labor market. This allows the firm to increase in size through the exploitation of workers and maintain their dominant position in the market. See, more generally, Andrew I. Gavil, et al., *Antitrust law in perspective: cases, concepts and problems in competition policy*, (New York: West Academic Publishing, 2018) 773; Josh Bivens, Lawrence Mishel, John Schmitt, "It's not just monopoly and monopsony: How market power has affected American wages", Economic Policy Institute, (April 2018); Alan Manning, "The real thin theory: monopsony in modern labour market", 10 *Labour Economics*, (2003)105-131.

⁵⁴ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010) i(where the U.S. Department of Justice settled a case for no-poaching agreements involving tech companies).

workers, it can thus be contemplated that proper enforcement of antitrust laws may assist able employees in forming unions and prohibiting these platforms from entering into unreasonable contractual clauses.⁵⁵

Judge Easterbrook has seminally argued that “dependence” is “frequently a euphemism for monopsony”⁵⁶ since workers’ limited mobility faces local company towns. The monopsony power of some companies can indeed be an issue only if the problem is well-defined. And it is rarely so. There never is a monopsony: instead, oligopsonies may exist. Indeed, if ever, a company rarely holds an exclusive market position as a buyer of human capital and labor. Even if one petrol station is in town, it does not mean that monopsony actively suppresses petrol station workers or potential workers. Whenever low-skilled jobs are involved, there is great supply-side substitutability (here, workers’ ability to be interchangeable) with other low-skilled jobs. Thus, the petrol station workers or potential workers may turn to more favorable job positions in other boutiques and shops in the same town, thereby lowering the petrol station owner’s ability to suppress them. To be sure, some situations exhibit few demanders of labor—the so-called oligopsonies—but to conflate the notion of monopsony with the notion of oligopsony undermines the accuracy of the overall analysis and their conclusions, akin to confusing the study of monopoly with oligopoly. Even law & economics experts continuously overlook the fundamental difference between monopsonies and oligopsonies for competition and labor purposes. For instance, Eric Posner has written that these two concepts, however different, will be used “interchangeably” in his research.⁵⁷ Therefore, absent monopsonies, the potential oligopsonies possibly faced by gig-workers need to be contemplated in an objective manner (i.e., with evidence of actual or potential anticompetitive behavior). The ancillary prohibitions of monopsony power are two-pronged: a *per se* prohibition of no-poaching agreements (1) and a prohibition of unreasonable non-compete clauses (2).

11.1.3.1. Per Se Prohibition of No-Poaching Agreements

The prohibition of no-poaching agreements provides further evidence to the fact that antitrust laws not only positively tackle any attempt to cartelize the market—thereby making even less legitimate the present plan of the Commission to cartelize the platform labor market—but also effectively address the potential issues of monopsony power—thereby contradicting the premise according to which monopsony power of platforms is unconstrained.⁵⁸

⁵⁵ Florian A. Schmidt, *Digital labour markets in the platform economy: mapping the political challenges of crowd work and gig work* (Bonn: Friedrich Ebert Stiftung, 2017) 2.

⁵⁶ *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (Easterbrook, J., concurring).

⁵⁷ Suresh Naidu, Eric A. Posner, Glen Weyl, “Antitrust Remedies for Labor Market Power,” 132 *Harvard Law Review*, (2018) 536-601, 556 et seq.

⁵⁸ This assumes that monopsony power is *per se* detrimental. Although debatable, this issue lays outside the remit of this study. For a discussion of the social cost of monopsony, see Suresh Naidu, Eric A. Posner, Glen Weyl, Antitrust Remedies for Labor Market Power, 132 *Harvard Law Review*, (2018) 536-601, p.556 et seq.

No-poaching agreements are considered to be naked restraints of trade (or “hardcore cartels”⁵⁹) in violation of antitrust laws.⁶⁰ They thwart the free competition between employers in the labor market and prevent employees from bargaining over their working conditions in an unrestricted labor market.⁶¹ No-poaching (and no-hiring, no-switching) agreements first facilitate wage-stagnation and ultimately lead to wage-suppression. No-poaching agreements are evidence of potential “considerable market power enjoyed by employers, who use their market power to suppress wages.”⁶²

Naidu and Posner consider that monopsony power is exerted on the labor market akin to monopoly power are wielded in the product market: “labor market concentration creates monopsony [...] conditions where the buyer exercises labor market power rather than the seller.”⁶³ The company that purchases (or rents) labor services enjoy a stronger bargaining position (a monopsony power) than laborers who are multiple, dispersed, and dependent on being hired. No-poaching agreements have recently spurred media attention in the U.S.,⁶⁴ while Europe has experienced a surprisingly softer approach. U.S. antitrust enforcement addresses no-poaching agreements by considering them as per se illegal. In contrast, European antitrust enforcers have traditionally been more reserved in enforcing antitrust laws to no-poaching agreements.⁶⁵ Recently, the U.S. Department of Justice has announced on January 7, 2021, that a federal grand jury returned a two-count indictment charging a health care company for labor market collusion: the indicted company agreed with competitors not to solicit senior-level employees.⁶⁶ Depenne notes that “unlike their American counterpart, the European public enforcer, the European Commission, does not focus its enforcement policy on

⁵⁹ Although not treated as such, see Valentin Depenne, “One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements,” 2 *Sorbonne Student Law Review* 1, 239-270 (2019), 254.

⁶⁰ See *Union Circulation Co. v. Fed. Trade Comm’n*, 241 F.2d 652, 658 (2d Cir. 1957), FN2. More recently, see *ProTherapy Associates, LLC v. AFS of Bastian, Inc.*, 2012 WL 2511175 4th Cir. Va. (2012); DOJ Final J. against *Adobe, et al.*, March 17, 2011 (“DOJ Adobe J.”); In *re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012); *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868 (N.D. Cal. 2015).

⁶¹ Organization for Economic Cooperation and Development (OECD), *Competition concerns in Labour Market—Background Note*, DAF/COMP(2019)2, (May 13, 2019), 17.

⁶² Suresh Naidu, Eric A. Posner, Glen Weyl, “Antitrust Remedies for Labor Market Power,” 132 *Harvard Law Review*, (2018) 536-601, p.537.

⁶³ *Ibid.*

⁶⁴ See News Release of the Office of the Attorney General, Washington State, “AG Ferguson secures end to no-poach provisions at eight more restaurant chains nationwide,” (September 13, 2018); Nick Lichtenberg, “Four Fast Food Firms Settle No-Poach Claims With 14 States”, *Bloomberg Law*, (March 12, 2019).

⁶⁵ Valentin Depenne, “One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements,” 2 *Sorbonne Student Law Review* 1, 239-270 (2019) (noting that no-poaching agreements are addressed via antitrust laws in the U.S. whereas they are addressed via labor or commercial laws in Europe).

⁶⁶ *United States v. Surgical Care Affiliates, LLC and SCAI Holdings, LLC*, 15 U.S.C. 1, January 5, 2021; Department of Justice, Health Care Company Indicted for Labor Market Collusion, Press Release 21-14, January 7, 2021.

anticompetitive practices in the labor market [...] [T]he no-poaching agreements seem to receive more diversified treatment, of which competition law is an important component, but where other legal grounds are also solicited.”⁶⁷ These other legal grounds are labor regulations and commercial law principles and under the free movement of workers enshrined in Article 45 TFEU.⁶⁸ Improvements are possible in terms of the E.U. investigating no-poaching agreements, which may fall within the ambit of E.U. competition law. The monopsony (or more accurately oligopsony) power of some employers may be better addressed should these employers engage in illegal no-poaching agreements. For the time being, E.U. competition law enforcement remains insufficiently well-equipped and motivated to identify such no-poaching agreements. This state of affairs further sheds doubts about the appropriateness of the routes suggested in the Inception Impact Assessment to address digital platforms’ monopsony power. Indeed, should the most effective route to address such monopsony power be preferred, the prosecution of no-poaching agreements represents a more effective and consistent way than an antitrust exemption for the cartelization of independent platform workers.

11.1.3.2. Prohibition of Unreasonable Non-Compete Clauses

Covenants not to compete, or non-compete clauses, are included in employment contracts for employers to ensure that out-going employees are prevented from working with a direct competitor.⁶⁹ The non-compete clause can either identify the employer’s industrial sector or a geographic area where the future former employee will be barred from seeking employment. Sometimes, it is a combination of both an industry and a geographic area concerned with non-compete clauses. Always, non-compete clauses have a time horizon after which they are no longer invocable by the former employer against the former employee. In many cases, the non-compete clauses must be reasonable for the clauses to be enforced in courts; non-compete clauses are not per se illegal. They are assessed in a balancing exercise where the employer’s interests are weighed against the employee’s claims. Non-compete clauses have procompetitive effects because they incentivize employers to invest in the employee’s professional skills. Also, they can be justified for reasons related to the protection of

⁶⁷ Valentin Depenne, “One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements,” 2 *Sorbonne Student Law Review* 1, 239-270 (2019) 259.

⁶⁸ The only EU case involving no-poaching implications of a cartel agreement is Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C213/02 P *Dansk Rorindustry and others v Commission of the European Communities*, ECLI:EU:C:2005:408. See Valentin Depenne, “One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements,” 2 *Sorbonne Student Law Review* 1, 239-270 (2019) 264-265.

⁶⁹ Non-compete clauses hack back to 15th century English Common Law with the seminal Dyer’s case of 1414 where a London court considered unreasonable the restrictive covenant according to which an apprentice was prohibited to pursue his trade in the same city for six months following his apprenticeship. See *The Dyer’s case*, Y.B. Mich. 2 Hen. 5, fol. 5, pl 26 (1414). The English rule of reasonableness in order to assess non-compete clauses was most significantly elaborated in the *Mitchel v Reynolds*, 24 English Report 347 (Queen’s Bench 1711).

know-how and other trade secrets.⁷⁰ Nevertheless, non-compete clauses run the risks of allowing anticompetitive effects to materialize whenever the ambit of such clauses is unduly broad.

Indeed, non-compete clauses have the potential of being anticompetitive: they may negatively impact labor market competition and reinforce monopsony power at the expense of the free movement of human capital and the best allocation of these human resources.⁷¹ In contrast to employers' no-poaching agreements without involving employees, non-compete clauses are part of a contract of employment jointly signed by the employer and the employee.⁷² Of course, the employee's proper consent can be questionable, given the imbalance of bargaining power. Nevertheless, the contractual aspect of the non-compete clauses cannot be overlooked and fundamentally differentiates them from no-poaching agreements.

Consequently, the lawfulness (or, in other words, the net competitive effects) of the non-compete clauses is a matter of ponderance, casuistic assessment, depending on both the jurisdictions and the facts at stake. Therefore, courts have widely accepted reasonable non-compete clauses while declaring illegal, unreasonable non-compete clauses. Consequently, all pares down to the reasonableness (or balancing) assessment of the non-compete clauses.⁷³ Although the study of such reasonableness is beyond the scope of this contribution, it can be said that whenever the procompetitive effects (say, protection of intellectual property and incentives to invest in human resources) are more significant than the anticompetitive effects (say, foreclosure effects on the labor market and undue creation of exit barriers), then the non-compete clauses are invalidated in courts. The current jurisprudence is mostly praised. Nothing justifies either alter or undermine the judicial approaches to non-compete clauses. Precisely, questioning the currently reasonable approach to the (in)validation of non-compete clauses may detrimentally increase monopsony power or may detrimentally decrease incentives to invest in human resources.

In conclusion, the prohibition of unreasonable non-compete clauses provides sufficient and appropriate safeguards against undue cartelization of the labor markets and abuse of monopsony powers. Furthermore, it has been demonstrated that the already weak European antitrust enforcement against no-poaching agreements that cartelize labor markets would be further weakened with the European Commission's inception impact assessment propositions: cartelization of the labor markets would no longer be inattentively overlooked, it would ultimately be detrimentally incentivized. As justified, this wrong-headed policy objective would further

⁷⁰ OECD, *Competition concerns in Labour Market—Background Note*, DAF/COMP(2019)2, May 13, 2019, 22-23.

⁷¹ *Ibid.*

⁷² Such clauses are widely used in most economies. For instance, as much as 18 percent of U.S. workers are said to be subject to non-compete clauses. See U.S. Department of the Treasury, Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications*, March 2016, p. 3.

⁷³ Organization for Economic Cooperation and Development (OECD), *Competition concerns in Labour Market—Background Note*, DAF/COMP(2019)2, (Paris: OECD, 2019), 23.

stifle digital innovation and increase market inefficiencies when applied, as envisaged, to digital platforms. Because of these numerous unintended consequences of further cartelization of the labor markets in Europe, the European Commission is well advised to retain the limited exemption's current boundaries to the labor markets' cartelization. Moreover, these legal boundaries wisely preclude expanding the narrow exemption to the independent platform workers, as it is now demonstrated.

II.2. A Limited Exemption

Traditionally, the above-discussed prohibition of markets' cartelization experienced a critical limitation: labor organizations representing employees can coalesce to better tackle the employers' oligopsony powers. Therefore, these collective bargaining agreements are exempted from the reach of antitrust laws. However, such exemption is of limited extent for legal and economic reasons. From a legal perspective, too broad an exemption would run the risk of treating dissimilarly similar situations, thereby ushering legal unfairness together with legal uncertainties. From an economic perspective, too general, an exemption would run the risks of generating the massive costs associated with markets' cartelization that precisely aim to preclude antitrust laws. It is indeed clear that "in all systems examined collective agreements between management and labour are to some extent sheltered from the prohibition of anticompetitive cartels. However, that immunity is not unlimited."⁷⁴ For these reasons, the exemption has remained limited.⁷⁵ However, benevolent to the European Commission's intentions concerning the platform workers, the limited exemption may not be extended to include platform workers. Such detrimental regulatory reform is warranted, beyond the risks of further cartelization of the markets, by the simple fact that platform workers are "undertakings" (and therefore cannot collude) (1) and are correspondingly not "employees" and consequently deprived of the benefits of collective bargaining) (2).

II.2.1. Platform Entrepreneurs as "Undertakings"

Digital platforms of the gig economy radically change the nature of work. Most platform workers do not derive the main source of their income from platforms. Most of them resort to the platform as an extra income source, bringing additional revenues instead of previous situations where full-time employment cannot generate extra revenues.⁷⁶

⁷⁴ Opinion of Advocate General Jacobs delivered on January 28, 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, ECLI:EU:C:1999:28, para. 109.

⁷⁵ Tamas Guylavari, "Collective rights of platform workers: The rule of EU law," 27 *Maastricht Journal of European and Comparative Law* 4, 406-424 (2020).

⁷⁶ European Commission, *Study to gather evidence on the working conditions of platform workers*, (Luxembourg: European Union, 2019) 73.

The ability of platform workers to perform tasks for which they are talented or for which they have the time to, with everybody “outsourcing” oneself, is “The Task Rabbit Economy,” as Robert Kuttner calls it—named after the “TaskRabbit” platform where individuals are paid to become “Taskers”.⁷⁷ Casual piecework with an endless variety of tasks performed by irregular jobbers proves to be the most radical change in economic relationships over the last few decades. This platform economy enables people to sell their skills and time on the marketplace at great ease while numerous tasks can be “outsourced” by other individuals rather than themselves.⁷⁸ Without a doubt, individuals become entrepreneurs who can, sometimes for the first time, sell their skills on the marketplace without an employment relationship. They have become, in a matter of speaking, entrepreneurs. They are entrepreneurs, and the law recognizes them accordingly.

Indeed, E.U. law has traditionally treated self-employed individuals as entrepreneurs—or more specifically, in European legal jargon, “undertakings.” Indeed, E.U. competition law considers “undertakings” as entities “engaged in economic activity.”⁷⁹ In the case of *Hydrotherm*⁸⁰, the Court of Justice has had the opportunity to state out the three fundamental elements of an “undertaking” under E.U. law:

- I. An undertaking is an economic unit “for the subject-matter,” meaning that an undertaking is considered in light of specific conduct or context.
- II. An undertaking may be made of different persons, be they “natural” or “legal” persons. Irrespective of the national classifications under corporate law, an economic unit made of persons is eligible to be undertaking under E.U. law, even if the undertaking is made of only one physical person unincorporated in according to national corporate laws;
- III. An undertaking competes with other undertakings, meaning that if two undertakings have identical economic interests (mostly because one person controls them), these two entities form only one undertaking for E.U. law.

Consequently, independent platform workers, most of the time solo-entrepreneurs with or without incorporation, qualify as “undertakings” under E.U. law since they are physical persons carrying out economic

⁷⁷ Robert Kuttner, “The Task Rabbit Economy,” *American Prospect*, October 10, 2013.

⁷⁸ Patricia Mark, “Outsource Yourself: The Online Way to Delegate Your Chores,” *New Yorker*, January 14, 2013.

⁷⁹ Case C-41/90, *Höfner and Elser* [1991] ECR I-1979. See also Christopher Townley, “The Concept of ‘Undertaking’: The Boundaries of the Corporation—A Discussion of Agency, Employees and Subsidiaries,” in G. Amato, C-D Ehlermann (Eds.) *EC Competition Law: A Critical Assessment*, (London: Hart Publishing, 2007), 3.

⁸⁰ Case 170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas*, ECR 2999, para.11. See also C-41/90 *Klaus Höfner and Fritz Elser v Macrotron*, ECR I-1979, para.21; C-440/11P, *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, ECLI:E:C:2013:514, para.36.

activities under one entity.⁸¹ But, a coalition of independent platform workers would be tantamount to an association of undertakings. An association of undertakings, such as envisaged by the Commission's Inception Impact Assessment, falls within the 101(1) TFEU and does not enjoy antitrust immunity.⁸² Indeed, the Court of Justice has clearly and legitimately considered that an association acting on behalf of self-employed persons is regarded as an association of undertakings under Article 101(1) TFEU and cannot escape the application of E.U. competition rules.⁸³

As would become a coalition of independent platform workers, the coalition of undertakings is tantamount to an association of undertakings under Article 101 TFEU. Consequently, the European Commission may want to rethink to the extent to which the subsequently created association of undertakings made of independent platform workers would entail: it would result in the cartelization of the platform labor market, which would lead to an increase in consumer prices for the sake of a marginal improvement of a small portion of the economically dependent platform workers. Where some see a potential “mismatch,”⁸⁴ we assess the interaction between labor law and competition law as one of consistency and clarity: only employees are able, given their economic dependence, able to enter into collective bargaining agreements. Otherwise, harmful collusion may stifle competition and innovation.

As a matter of principle, undertakings are not allowed to coalesce. Otherwise, violations of competition laws would be permitted. Indeed, the employees can enter into collective bargaining to address monopsony power—not undertakings. Contrary to what soft international law instruments may suggest,⁸⁵ the coalition of undertakings to enter collective bargaining is both prohibited and detrimental.

Because self-employed platform workers are (from an economic perspective) entrepreneurs and (from a legal perspective) undertakings, they cannot be permitted to cartelize the market they operate. Accordingly, the principled prohibition discussed above in Part II fully applies: any attempt, on their part, to coalesce to determine their prices (be they wages, fares, etc....) would be treated as hardcore horizontal restrictions

⁸¹ Paul Nihoul, “Do Workers Constitute Undertakings for the Purpose of the Competition Rules?” 25 *European Law Review* 4, (2000), 408. See also Case 40:8/73 etc, *Coöperatieve Vereniging ‘Suiker Unie’ UA and others v Commission*, ECR 1663, para.539.

⁸² 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*, ECR I-1577; Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI: EU: C:2014:2411, para. 28.

⁸³ 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*, ECR I-1577.

⁸⁴ Ioannis Lianos, Nicola Countouris, Valerio De Stefano, Re-thinking the competition law/labour law interaction: promoting a fairer labour market, 10 *European Labour Law Journal* 3, 291-333, 302.

⁸⁵ See, for a discussion, Ioannis Lianos, Nicola Countouris, Valerio De Stefano, Re-thinking the competition law/labour law interaction: promoting a fairer labour market, 10 *European Labour Law Journal* 3, 291-333 (2019), 297-298.

tantamount to cartels.⁸⁶ Consequently, the European Commission is well-advised not to overlook the fundamental importance of preserving self-employed individuals' legal classification as "undertakings." Otherwise, the law may no longer reflect economic realities and may unfairly create superfluous legal subtleties amongst competitors. For instance, should self-employed individuals become no longer considered as undertakings and are given the right to cartelize the market, entrepreneurs with at least one employee may be excluded from such horizontal agreements, thereby drawing an unfair line between the solo entrepreneurs and the entrepreneurs with one (or more) employee(s). This incentivization not to grow (otherwise subject to less favorable legal treatment) not only is legally inconsistent but would economically be damaging to the competition on the merits and the promotion of innovation.

In conclusion, self-employed individuals (platform entrepreneurs as any other entrepreneurs) must remain considered entrepreneurs without the law being bent until legal refinements create inequalities, hinder individual growth, stifle digital innovation, and spur resentment amongst mistreated competitors. As clearly as the law treats self-employed individuals as "undertakings," the law in no respect treats self-employed individuals as "employees."

II.2.2. Platform Entrepreneurs, Not "Employees"

Collective agreements between employers and employees fall outside the scope of Article 101 TFEU.⁸⁷ Platform entrepreneurs are not "employees" and cannot, as self-employed individuals, benefit from collective agreements to reduce competition law's reach. The Court recently made this clear and unequivocal statement in 2014 in *FNV Kunsten*.⁸⁸ This is a judgment the European Commission wishes to override as suggested by the Inception Impact Assessment. We will first assess the merits of the *FNV Kunsten* case and then discuss the reasons for retaining a clear distinction between employees' right to collective agreements not subject to competition law and self-employed inclusion within competition law remits.⁸⁹

The *FNV Kunsten* case involved Dutch musicians who, via the Dutch musician's union (FNV), entered into a collective agreement with a Dutch association of orchestras (employers' association) to fix fees employee musicians but also self-employed musicians. The Dutch Competition Authority considered such an agreement equivalent to a price-fixing cartel, an analysis confirmed by the E.U. Court of Justice. Indeed, the Court clarified that self-employed workers who act as "undertakings" (because there is no subordination and

⁸⁶ Tamas Guylavari, "Collective rights of platform workers: The rule of EU law," 27 *Maastricht Journal of European and Comparative Law* 4, (2020) 406-424.

⁸⁷ Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, EU:C:2000:428.

⁸⁸ C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2215.

⁸⁹ Tamas Guylavari, "Collective rights of platform workers: The rule of EU law," 27 *Maastricht Journal of European and Comparative Law* 4, (2020) 406-424.

bear more risks than employees) are not exempted from the reach of E.U. competition law.⁹⁰ However, “false self-employed” workers—meaning that self-employed are treated as employees—can be part of collective bargaining agreements.⁹¹ Consequently, self-employed platform workers who evidence distinctive characteristics from employees cannot enjoy the above-discussed antitrust exemption. In that regard, the car-hailing company Uber once declared that it:

[D]oes not employ drivers, own vehicles, or otherwise control the means and methods by which a driver chooses to connect with riders ... it merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets.⁹²

Considered “partners” to the platform, the Uber drivers (inasmuch as any other car-hailing apps) have primarily been satisfied with their solo-entrepreneur status. Indeed, independent platform workers may prefer their solo-entrepreneur status instead of reclassifying an “employee” status.⁹³ Unless one embraces “Marxist and neo-Marxist approaches,”⁹⁴ the collective bargaining agreements can only be a right of strictly defined “employees” as excluding solo-entrepreneurs and independent contractors.

Following the *FNV Kunsten* case, some exceptions exist where solo entrepreneurs can demonstrate to have been treated as employees—namely when solo entrepreneurs are actually “false self-employed” workers.⁹⁵ These cases are decided in courts.⁹⁶ These cases nevertheless represent a minimal portion of the number of independent platform workers. The judicial review requalifies self-employed workers as employees because the economic reality led these workers to be treated as employees.⁹⁷ Any contractual clause that may prevent

⁹⁰ C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2215, para.37.

⁹¹ *Ibid.*, paras 38-41 (stating that “a provision of a collective labour agreement, in so far as it sets minimum fees for service providers who are ‘false self-employed’, cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU”).

⁹² Salovitz, 2014 WL 5318031, at 1. See also Demid Potemkin, “Platform, Not Employer: Why the Uber ruling is bad for American entrepreneurship and innovation,” *Medium* (July 7, 2015).

⁹³ Zachary Kilhoffer et al., *Study to gather evidence on the working conditions of platform workers* (Brussels: European Commission, 2020), 56.

⁹⁴ Ioannis Lianos, Nicola Countouris, Valerio De Stefano, “Re-thinking the competition law/labour law interaction: promoting a fairer labour market,” 10 *European Labour Law Journal* 3, (2019) 291-333, 324.

⁹⁵ C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2215, para.37.

⁹⁶ In the U.S., see recently *Dynamex Operations West v. Superior Court of Los Angeles County*, 4 Cal.5th 903 (2018) where the California Supreme Court considered workers to be employees depending on the control of the work performed and on the economic reality illustrated by an economic dependence from the worker toward the employer.

⁹⁷ Reclassifications of self-employed workers into employees occurred under EU caselaw most notably with the case of *FNV* where the Court made clear that economic dependence and hierarchical authority were essential components for

platform workers from seeking a Tribunal a reclassification of their contract as an employment contract should be considered abusive.⁹⁸

Because employees are not “undertakings” in EU law, they enjoy the benefits of collective agreements.⁹⁹ The Albany exception derives this benefit seminally acknowledged by the Court of Justice.¹⁰⁰ But, outside situations of full economic dependence and hierarchical control, self-employed workers cannot be presumed to be employees unless judged accordingly by the courts. Indeed, the law can hardly consider independent platform workers to be classified, as a matter of general principle, as “employees.” Indeed, under E.U. law, employees are those under an employment relationship which “resides in the fact that for a certain period of time a person performs for an under the direction of another person services in return for which he receives remuneration.”

Furthermore, E.U. law frequently relies on national definitions in the field of employment law. Indeed, Article 3 of the 2008 Directive on Temporary Agency Work states that “worker” means “any person who, in the Member State concerned, is protected as a worker under national employment law.”¹⁰¹ Furthermore, the E.U. concept of “worker” must be defined “according to objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned.”¹⁰² In comparison, the free movement of workers enshrined in Article 45 TFEU does not preclude subordination and control conditions as necessary conditions for workers to be considered employees.

Indeed, in the case of *Jean Claude Becu*, the Court of Justice considered that whenever workers perform work for and under the direction of an undertaking, these workers are considered “workers” under Article 45

concluding that a self-employed worker was, in reality, an employee. See Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI: EU: C:2014:2411.

⁹⁸ European Parliament, *The Social Protection of Workers in the Platform Economy*, Study for the EMPL Committee, (Luxembourg: European Union, 2017), 75.

⁹⁹ Ioanis Lianos Valentine Korah, Paolo Siciliani, *Competition Law. Analysis, Cases, & Materials*, (Oxford: Oxford University Press, 2019), 306 (arguing that “an employee cannot be an undertaking”, thereby cannot be subject to competition law).

¹⁰⁰ Case C-67/86, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECR I-5731. In this case, the Court made clear that collective agreements fall outside the scope of competition law when they involve employers/employees, and when they contribute to the improvement of the working conditions of workers.

¹⁰¹ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, (December 12, 2008).

¹⁰² C-428/09 *Union Syndicale Solidaires Isère v Premier Ministre et al*, EU :C :2010 :612, para.28.

TFEU's meaning are not undertakings.¹⁰³ While employees can enter into collective agreements,¹⁰⁴ self-employed workers can and should not be able to coalesce unless self-employed workers accept problematic and detrimental distinctions without employees and self-employed workers with employees.¹⁰⁵ Therefore, as a matter of principle, all self-employed workers are prevented from entering into collective bargaining. This was made clear in the Opinion of the Advocate-General Jacobs on January 28, 1999, when he argued that:

[T]wo arguments are put forward to support the view that collective agreements between management and labour should be given a special status. The first is based on an alleged fundamental right to bargain collectively, and the second is that Community law itself encourages the conclusion of such collective agreements.

A contrario, workers not considered “laborers” (or employees) cannot enter into collective bargaining agreements. Indeed, “workers”, under E.U. law, are considered to be “employees” (or laborers), as evidenced by the case *Jean Claude Becu*.¹⁰⁶ “Workers” and “employees” are used interchangeably—in opposition to self-employed individuals.¹⁰⁷ The workers understood as employees can enter into collective bargaining agreements.¹⁰⁸ Also, in the 2012 case of *O’Brien*¹⁰⁹ involving daily fee-paid basis judges, the Court of Justice

¹⁰³ Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, ECR I-5665.

¹⁰⁴ Under EU law, Under U.S. law, this statutory labor exemption is provided by Section 6 of the Clayton Antitrust Act, 15 USC 12-27 which states that “the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” See also *Connell Construction v Plumbers and Steamfitters Local Union No 100*, 2 June 1975, 421 US 616.

¹⁰⁵ Tamas Guylavari, “Collective rights of platform workers: The rule of EU law,” 27 *Maastricht Journal of European and Comparative Law* 4, (2020) 406-424.

¹⁰⁶ Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, ECR I-5665. See also Ioannis Lianos, Nicola Countouris, Valerio De Stefano, “Re-thinking the competition law/labour interaction: Promoting a fairer labour market,” 10 *European Labour Law Journal* 3, (2019) 291-333, 300.

¹⁰⁷ See AG N Wahl Opinion in Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI: EU: C:2014:2215, 4.

¹⁰⁸ Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECR I-5751.

¹⁰⁹ Case-393/10, *Dermod Patrick O'Brien v Ministry of Justice*, ECLI :EU :C :2012 :110 (where the Court judged that “European Union law must be interpreted as meaning that it is for the Member States to define the concept of ‘workers who have an employment contract or an employment relationship’” (para.51) and that “[...] it is for the referring court to examine whether the inequality of the treatment between full-time judges and part-time judges remunerated on a daily fee-paid basis may be justified” (para.65).

has considered that it is a matter of national law, not of European law, to decide on whether or not fee-paid basis workers are eligible to some workers' rights (here, pension scheme).

Furthermore, employees' monopsony power due to the hierarchical relationship with their employers is substantially different from the natural limitations of monopsony power associated with independent platform workers. Indeed, elasticity is of paramount importance to assess monopsony power because it dictates the price when both sides of the market exit. When a company has a relatively more elastic demand for labor, it will more rapidly exit the market if labor price gets too high. On the other hand, workers may have a relatively lower elasticity, meaning that they will en masse stay in the labor market when the wage rate decreases. However, commuters increase workers' elasticity and correspondingly reduces monopsony power.

Furthermore, platform workers in the majority do not use platform work as their primary source of income. According to studies conducted in the U.K. and E.U., less than 10 percent of those entering the platform economy use their primary income source.¹¹⁰ More specifically, only 1.4 percent of adults (aged between 16 and 74 years old) in the E.U. rely on platform work for their main income source.¹¹¹ Only 11 percent of the E.U. population is considered to have performed some platform work, meaning that approximately 8.6 percent of E.U. adults have occasionally performed platform work. Therefore, platform work constitutes a source of additional income for almost all adult platform workers. This stands in opposition to traditional self-employed workers, nearly 90 percent of whom use their self-employment occupation for their primary income.¹¹² Indeed, to understand the extent to which platform workers should be classified as employees instead of self-employed, one needs to have information on the regularity of the task performed and the proportion of platform income as part of the overall income. In other words, "only platform workers who provide services as the main job should be classified as employees."

But, such proportion, as argued, is only 1.4 percent of E.U. citizens of adult age. It is widely accepted that "most platform workers combine platform work with another job or care tasks and may find it difficult to work during regular hours or at fixed times."¹¹³ Thus, platform work additional occupational activity is also additional to the main employment contract, thereby leading platform workers to consider themselves mostly as "employees" by referencing their main job and not using their platform work. Most importantly, for the Commission's Inception Impact Assessment, it is evident that "most platform workers have the main activity

¹¹⁰ *The characteristics of those in the gig economy* (DBEIS, 2018); Zachary Kilhoffer et al., *Study to gather evidence on the working conditions of platform workers* (European Commission, 2020).

¹¹¹ Zachary Kilhoffer et al., *Study to gather evidence on the working conditions of platform workers* (Brussels: European Commission, 2020), 45.

¹¹² Greet Vermeylen, et al. *Exploring self-employment in the European Union*, (Luxembourg: European Union, 2017).

¹¹³ *Ibid*, 75.

besides platform work, through which they have access to social protection.”¹¹⁴ Therefore, implied that platform work is an additional occupational activity generating extra income, platform workers are protected under their main employment status. It follows that platform workers, in the majority, do not want to be classified as employees because platform work provides them with an additional income source while they remain employees in their primary job position. Additionally, platform workers massively use multiple platforms simultaneously to perform platform work—thereby differentiating themselves from an exclusive, hierarchical-based employment relationship.¹¹⁵

This indicates that these platform economies are being used as supplementary income and that the workers do not solely rely on the revenue generated through these platforms. This finding leads to the inference that the platform economy workers have a higher elasticity than speculated. This fact leads to the theory that workers in the gig economy realistically possess a large amount of leverage when determining the wage rate. While the method of wage negotiation is non-traditional, the result is the same. In the absence of collective bargaining agreements, workers can still capitalize on their elastic supply of labor and “vote with their feet” when the wage rate drops below their wiliness to accept. Platform workers, therefore, enjoy much greater elasticity and lower switching costs than employees. These characteristics differentiate further platform workers from employees, thereby impeding regulators from arbitrarily reclassify all platform workers as “employees.”

Not only such reclassification may prove inappropriate legally and economically, but it may also prove contrary to platform workers’ desires. Indeed, surveys have consistently revealed the preference of platform workers to retain the freedom associated with solo-entrepreneur status instead of the regulatory restrictions related to employee status. In all platform work categories, gig workers never consider themselves as “employees” in the majority: only 31 percent of platform workers consider themselves employees for on-location platform work while only 42 percent of platform workers consider themselves employees for professional services. In any case, while evidencing that platform workers consistently believe themselves as self-employed in their platform work, these figures need to be further qualified.¹¹⁶

Instead, independent platform workers do not want, in a large majority, to be reclassified as employees because of the freedom, entrepreneurial spirit associated with their self-employed status. Indeed, they broadly

¹¹⁴ Ibid, 72. Also, it follows, quite inconclusively, that “some platform workers indicate that they are worried about social security (accident insurance in particular), while others are less worried because they can fall back on an outside activity [...]”, in *id.*

¹¹⁵ COLLEEM II Data. See Cesira Urzi Brancati, Annarosa Pesole, Enrique Fernandez-Macias, *Digital Labour Platforms in Europe: Number, Profiles, and Employment Status of Platform Workers*, JRC Technical Reports, (Luxembourg: Office of the European Union, 2019)

¹¹⁶ Greet Vermeylen, et al. *Exploring self-employment in the European Union*, Luxembourg: Publications Office of the European Union, (2017) 25.

enjoy discretion over tasks, work methods, speed or rate of work, and over important decisions.¹¹⁷ It cannot be ignored that in many cases, “self-employed workers eventually found their firm and hire employees (as with traditional craftsmanship); in these cases, self-employment is a path to becoming a business owner or to being rewarded as a recognized, sought-after professional.”¹¹⁸ Notably, “autonomy regarding the work organization, next to the flexibility to choose specific tasks and when to work, are among the main motivations for workers to engage in the platform economy.”¹¹⁹ Platform work must not be assimilated into an employment relationship as a general rule since platform work may oftentimes be the first enabling stage of an entrepreneurial career: indeed, “for workers who particularly want to start a business, some types of platform work may serve as a stepping stone” it is concluded from platform workers’ surveys.¹²⁰ Platform work is commonly considered conducive to “increase labor market access and lead to innovation and entrepreneurship [...]”¹²¹ The attempt to overlook these beneficial effects by regulating different platform workers’ very different situations that bear virtually no similarities may prove detrimental to both consumers and innovation.

In conclusion, the law precludes independent platform workers from being considered employees (absent a few reclassification exceptions in courts), but independent platform workers wish not to be regarded as employees. Therefore, contrary to the regulators’ beliefs that employee status represents both an improvement and an objective for gig workers, it thus appears that the law and workers’ freedom may warrant sudden changes in their entrepreneur status.

II.2.3. Unions Regulated by National Laws

In monopsony situations, the employer is exercising an outsized influence on labor price, pushing wages down, but it is also the labor consumer. If the consumer can make the price of goods down under normal circumstances, then the market is working the way it should. However, in this situation, the firm can seek a competitive advantage by reducing workers’ wages, thereby receiving monopoly rents without minimizing quantity or raising the price. While there are arguments to be made that this apparent market failure necessitates regulatory intervention by increased competition law,¹²² a labor laws approach might be more

¹¹⁷ Ibid.

¹¹⁸ Nolwenn Allaire, et al. *Covering Risks for Platform Workers in the Digital Age*, Sciences Po, May 1, 2019 (advocating for a “flexisecurity model” of improving social protection of platform workers while preserving the dynamics of the platform).

¹¹⁹ Zachary Kilhoffer et al., *Study to gather evidence on the working conditions of platform workers* (European Commission, 2020), 56.

¹²⁰ Ibid, at 78.

¹²¹ Ibid, at 15.

¹²² Randy M. Stutz. *The evolving antitrust treatment of labor-market restraints: From theory to practice* (Washington D.C.: AAI, 2018).

relevant. In labor markets, the monopsony power can come from weak, or weakly enforced, workers' rights. Under these situations, not only is a threat present from large corporations but so too do small buyers of labor can suppress wages.

This gap in workers' rights is the primary reason competition law is ill-equipped to remedy this situation. When there is a gap such as this, the size of the firm suppressing wages is immaterial. Even the smallest firm can reduce the wages paid to employees because nothing is legally stopping this treatment. Competition laws possess powerful tools to mitigate the harm that can arise when large companies commit anticompetitive action but extending these tools to small companies is not the answer. Consequently, other regulatory tools are better suited to improve workers' conditions than competition laws. Most notably, unions can be instrumental in addressing monopsony power in a limited number of situations and improving the workers' rights.

Social policy and labor regulations are the most appropriate tools. Yet, the E.U. has traditionally been focused on economic issues, leaving social matters for national governments to regulate according to a "separation thesis."¹²³ Although largely undermined, the separation thesis asserts that the E.U. is competent for economic issues while the national governments are competent for social problems. Accordingly, unions are regulated by national laws in the Member States. Indeed, the Community Charter of the Fundamental Social Rights of Workers states that employers and workers shall have the right to form and join professional organizations or trade unions "for the defense of their economic and social interests" (Article 11). Management and labor shall have "the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice" (Article 12). The right to collective bargaining is an obligation for the Member States to encourage, not a right granted unconditionally to all workers. Indeed, Advocate General Jacobs has eloquently pointed out in his Opinion in *Albany* that:

Article 4 of the carefully drafted 'Right to Organise and Collective Bargaining Convention' imposes on the Contracting States an obligation to 'encourage and promote' collective bargaining. No right is granted.

Therefore, Advocate General Jacobs advocated for a "limited antitrust immunity for collective agreements between management and labour" because:

It can be presumed that private economic actors usually act independently and not in the public interest when they conclude agreements between themselves. Thus, the consequences of their agreements are not necessarily in the public interest. Therefore, competition authorities should

¹²³ Ioanis Lianos Valentine Korah, Paolo Siciliani, *Competition Law. Analysis, Cases, & Materials*, (Oxford: Oxford University Press, 2019), 277-279.

scrutinize private actors' agreements even in particular areas of the economy such as banking, insurance, or even the social field.¹²⁴

Therefore, antitrust immunity is limited. It should not prevent competition law scrutiny to some private actors' agreements. Most importantly, these collective bargaining agreements between employees and employers are national law, not E.U. law. Also, labor regulations (and most specifically unions' regulations) are the competence of Member States and not of the European Union. This legal basis is justified for both economic reasons and social democracy reasons. First, localities' economic realities require these regulations to be the most local and adapted to the territories' economic situations. This is particularly true for platform regulations: virtually every platform work is performed locally, within municipalities, so much so undue generalizations may prove unsuitable. Indeed, freelance taskers, car drivers, hosting owners, and other platform workers perform their tasks within one locality. Therefore, many Member States leave unions regulations to subnational entities to best match different territories' economic realities. The European Union may very well creep on both the principle of subsidiarity and overlook the principle of conferred powers should it want to take precedence over national unions laws.

Second, the rationale for leaving the competence of regulating unions to the national level (let alone subnational levels) pares down to the need to best represent the workers' preferences in each of these regulations. With different social and economic stakes, the localities' specificities shape the workers' expectations regarding workers' rights and unions regulations. How could we reasonably design common rules pertaining to unions and workers' rights, encompassing a Parisian Airbnb host and a Budapest inhabitant performing casual tasks via a platform? How could we expect those different people to perform radically distinct functions for radically different expectations and occupational activities regulated by a rule designed in Brussels? Social democracy also means to regulate closer to economic realities to express their preferences and shape these regulations effectively. Should the imperatives of social democracy be overlooked, a looming social democratic deficit way arises with dramatic social consequences such as incensed populism. Consequently, unions are regulated at the national level and should so remain. With its Inception Impact Assessment, the European Union subreptically takes preeminence of unions regulations over unions' national regulations in a detrimental shift away from the workers' local realities.

In the *Yodel* case of 2019, the European Court of Justice has considered that many reasons would lead the national Court not to classify the plaintiff (here, a courier) as a worker under E.U. law, and more precisely under EU Working Time Directive. Nevertheless, the European Court of Justice was cautious enough to add that the final decision as per such classification lays within the national Court's jurisdiction, thereby rebuking the claims to impose EU-wide classification of the independent platform works as employees or contractors. Consequently, it appears that E.U. law is both neither reluctant to have independent platform workers be

¹²⁴ Opinion of Advocate General Jacobs delivered on January 28, 1999, *Albany International BV c Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, ECLI:EU:C:1999:28, para.184.

classified as contractors rather than workers, nor is unwilling to employ some judicial self-restraint to leave these socially controversial matters in the hands of national or regional courts.

The judicial stance of the European Court of Justice ought to be commended. Indeed, it altogether acknowledges the innovative business models of the platform economy, respects gig workers' need for flexibility and self-employability, and preserves the national (and regional) courts' necessary jurisdictions on economic issues which, most of the time, are very local. Indeed, the present Inception Impact Assessment seems to make inevitable E.U. regulation so that national regulations (and national courts henceforth) can be effectively superseded with an EU-wide regulation. Labor regulations are traditionally an area where the regulatory framework is characterized by directives allowing the Member States to further transpose them according to their economic realities and social concerns.

Interestingly, while the European Commission's Inception Impact Assessment primarily focuses on tilting bargaining power away from the platform in favor of the workers (due to its link with competition law where the Commission can intervene), it appears that the low bargaining power for platform workers is neither the prime source of concern for these workers nor is it the prime source of study of the work characteristics of the gig economy. In reviewing the studies that address these work characteristics, Melian-Gonzalez and Bulchand-Gidumal cannot cite any study based on workers' data in the platforms where workers' low bargaining power was a feature analyzed.¹²⁵

The exemption of the enforcement of antitrust laws to employee's coalitions is both justified and limited. They are justified because antitrust laws clash with labor protection laws where economic dependence and unequal bargaining power may incentivize firms to sub-optimally use human capital to the extent that labor is suppressed and under-invested. Limited because this exemption applies only because of the hierarchical subordination inherent to any employment relationship wherein labor forces give their time and skills exclusively to their employer. Independent contractors and firms operate on the marketplace as opposed to the employer-employee relationship, which is the result of a vertical integration preference over a market interaction preference. The employee embodies the firm's nature, whereas the independent companies

¹²⁵ Santiago Melian-Gonzalez, Jacques Bulchand-Gidumal, "What type of labor lies behind the on-demand economy? New research based on workers' data," *Journal of Management & Organization*, 1-17 (2018) where at 4 are quoted, based on platform analysis, the studies of Berg, J. (2016). Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers, International Labour Organization. Geneva. Retrieved February 18, 2017 and Adrian Todolí-Signes, "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(2), (2017) 241–268 who tersely discusses the topic of "unbalanced bargaining power" by solely referring to Brishen Rogers, "Employment Rights in the Platform Economy: Getting Back to Basics", 10 *Harvard Law & Policy Review*, (2016) 479-520 who argued that "employment status should turn on higher-order facts such as 'unequal bargaining power' (which may signal a democratic deficit and/or inequality) and/or 'economic dependence' (which may signal significant economic inequalities even in the absence of classic control over the performance of work)".

represent the nature of the marketplace. Outsourcing, contracting, and sub-contracting have a fundamentally different rationale, legally and economically, than recruiting an employee to expand its human capital. The tradeoff between recruitment and independent contractors can only result from the firm's fundamental features and analysis in time, considering its capabilities, needs, strengths, and weaknesses. Should the regulator force a firm to favor one way of resorting to human capital over another, the error costs, as well as the firm's internal disorganization, may inevitably unfold.

Therefore, the antitrust exemption to address oligopsony power is, and ought to, remain so. Should that narrowly defined exemption be broadened up for political reasons, not only would antitrust enforcement be weakened, and competition on the merits may wane, but legal uncertainties and incommensurable economic costs may be borne out. We now turn to these detrimental policy options suggested by the Inception Impact Assessment, where these negative consequences may foreseeably unfurl.

III. THE REASONABLE PATH FORWARD

We have demonstrated that platform companies represent an unusual way some individuals can perform work. Digital platforms are opportunities for additional income and opportunities to start a business and get a spirit of what an entrepreneurial life would be like. Digital platforms nevertheless represent some risks regarding "false self-employed" individuals who bear all the risks and have little social safety nets. The European Court of Justice and national courts' case-law provides for the adequate reclassification of false self-employed workers into employees so that these workers can benefit from the social protection they deserve. Furthermore, they can enter into collective bargaining agreements where antitrust laws are not applicable.

However, the limited scope of the antitrust exemption to employees' collective agreements should be preserved. Otherwise, undue harm to digital platforms' innovation dynamics would be created for truly self-employed individuals who, almost always, perform tasks on a casual basis for additional income aside from a full-time employee position. Therefore, the European Commission is recommended shunning the unprincipled propositions put forward in the Inception Impact Assessment (1). Nevertheless, should self-employed platform workers' conditions be left non-improved, while some digital platforms' monopsony power prevents them from benefiting from legitimate working conditions? We argue that a reasonable path forward, consisting of improving gig workers' working conditions while preserving the digital economy's equality and innovation, can be adopted (2).

III.1. The Unprincipled Propositions

The European Commission's propositions are detrimental to the proper enforcement of competition rules by unduly expanding the antitrust exemption, contrary to legal principles and recent legal cases, while ignoring the adequate tools to improve gig workers' conditions. Consequently, none of the four propositions identified by the European Commission are laudable.

Indeed, in the narrowest antitrust exemption envisaged (Option 1), the European Commission suggests that "all solo self-employed providing their labour through digital labour platforms" may enjoy the right to enter collective bargaining agreements digital platforms irrespectively of their economic dependence on the platform. Indeed, under this Option, a casual Airbnb host generating extra income at the top of a full-time employment contract suffering from no economic vulnerabilities and being in no economic dependence on the platform would be put on the same equal footing with, say, an Uber driver whose only income and occupational activities are derived from the Uber platform. This Option overlooks the notion of economic dependence (however crucial to grant platform workers additional rights similar to those of employees) and financial vulnerabilities (however essential to tackle those who genuinely suffer from the platform's precarious work). By overlooking these two fundamental elements, thereby enticing any solo self-employed gig worker to enjoy the benefits of collective bargaining agreements, it runs the risks of cartelizing the platform labor market without addressing the specific needs of those who need reforms the most: the dependent and vulnerable gig workers.

Option 1 constitutes a formidable deterrence for solo-entrepreneurs, if successful, to expand and recruit employees: because these rights are explicitly assigned and exclusively to solo self-employed workers, platforms entrepreneurs state with one employee onward shall be barred from the enjoyment of these benefits. Such prohibition would constitute a significant impediment to platform work expansion and constitute an unequal level playing field across remarkably similar economic situations. Indeed, one Airbnb host with multiple properties but no employee may be more profitable than one Airbnb host with one property and one employee. The essential notions for addressing the issues of platform work must remain the economic precariousness: economic dependence (full-time and/or exclusive income derived from the platform) and financial vulnerabilities (low-paid tasks, de-platforming risks, irregular on-demand work) are the most relevant elements to factor in—not a discretionary distinction exclusively based on the number of employees and not on the extent to which the economic duress is experienced.

Other Options proposed by the European Commission are more detrimental than Option 1: they expand the reach of the antitrust exemption, distorting free competition on the market for digital services, unduly harming consumers with higher fares, and potentially creating opportunistic behaviors from platform workers who enjoy further economic benefits without any need for them to receive so.

Indeed, Option 2 would broaden Option 1 to offline professionals. Therefore, any freelance professionals and independent contractors would be included in the antitrust exemptions, even though sectoral regulations

most appropriately address their rights and duties. For instance, a plumber providing services through a website would benefit from the antitrust exemption, eventually leading to price-fixing arrangements. However, collective bargaining agreements may already apply to his activities through dedicated national labor regulations. Furthermore, this Option includes a “minimum size threshold for the counterparty with whom the self-employed may bargain collectively.” The arbitrary minimum size may generate unfair situations where freelance workers in similar activities may not enjoy similar rights due to the slight difference in the size of the counterparty they are traditionally working with. Again, sectoral regulations addressing a specific profession’s rules are better suited than a general rule encompassing both gig workers and offline freelance workers without an appropriate match with the economic realities.

Option 3 includes “all solo self-employed providing their labour through digital platforms or to professional customers of any size except for regulated (and liberal) professions. Option 3 tries to overcome the pitfalls detrimentally created with Option 2. However, a further broadening of the antitrust exemption runs the risks of many cartelizing sectors of the economy so much so that the breadth of the antitrust enforceability left untouched remains questionable. Indeed, outside regulated, and liberal professions, all solo self-employed workers, be it through a digital platform or traditional means will be able to enter collective bargaining agreements. These suggestions rest upon two dubious assumptions: i) that collective bargaining agreements are inexistent for most professionals concerned; ii) that the counterparty is financially in a stronger position than the solo self-employed worker. Let assume that a fashion designer has no employee, is financially well-off, and regularly contracts with a textile company that fully depends on the fashion designer’s commands. Option 3 would assume that the fashion designer is the weaker party and would strengthen its bargaining power at the already economically dependent company’s expense. Option 3 assumes that all solo self-employed “professionals are often perceived as not being in a position of weakness.” Again, platform workers and solo self-employed workers are not always necessarily in a position of weakness. But, they are undertakings whose behaviors in terms of price-fixing agreements may stifle innovation and decrease competition. Therefore, Option 3 disproportionately expands the reach of antitrust exemption by overlooking the economic costs and the economic realities. Finally, Option 4 is the same as Option 3 but includes the regulated and liberal professions, which always have dedicated rules and often are the professionals who generate comfortable earnings. Therefore, treating gig workers like doctors, surgeons, and lawyers ignores the specificities of the rules governing each of these professions, ignores the economic differences across these realities, and overlooks the detrimental economic consequences of the labor markets’ general cartelization.

Consequently, none of the Options suggested by the European Commission are desirable. More reasonably, starting from the baseline scenario identified by the European Commission (which is the status quo where incremental reforms are nevertheless necessary), we can formulate a number of recommendations that both preserve the limits of the antitrust exemption while ensuring the proper and effective improvement of the working conditions of the vulnerable gig workers.

III.2. The Reasonable Solutions

Regulators and lawmakers need to embrace reasonable solutions where both, on the one hand, innovation and competition are incentivized in the platform economy. On the other hand, vulnerable platform workers experience improved working conditions. Three paths forward are possible: i) a third category status; ii) an amendment of every labor regulation; iii) ad focus on economically dependent platform workers who can improve their working conditions.¹²⁶ Because E.U. law is less relevant than national laws for adjusting labor regulations, we may reject the second path. What is necessary at the European level is a mix of solutions involving the first and third paths.

Independent platform workers are fully protected by the present minimal European regulatory framework concerning health and safety requirements, let alone additional protections granted by national laws. Indeed, the Framework Directive 89/391, together with “daughter” Directive 89/656 on minimum health and safety requirements, requires employers to ensure health and safety at the workplace. In *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another*,¹²⁷ the U.K. High Court has recently considered that the Framework Directive suggested a comprehensive definition of the term ‘worker,’ thereby entitling those falling within that category to benefit from the Directive’s provisions. Therefore, the precariousness identified by the European Commission in its inception impact assessment may, and should, be addressed as partial or deficient enforcement of the Directive’s rights available to gig workers. Consequently, the Framework Directive provisions can be made available to gig workers, whether through legal clarifications or future cases.¹²⁸

Beyond “false self-employed” workers,¹²⁹ platform workers can be in vulnerable situations whenever they have platform work as their main (or exclusive) source of income.¹³⁰ As reported by the International Labor

¹²⁶ Joe Kennedy, *Three Paths to Update Labor Law for the Gig Economy*, (ITIF, April 2016) (discussing reforms of the workers’ conditions in the U.S.).

¹²⁷ High Court, Queen’s Bench Division, *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another*, EWHC 3050, (November 13, 2020).

¹²⁸ Aude Cafaliello, Nicola Countouris, “Gig workers’ rights and their strategic litigation,” *Social Europe*, November 22, 2020; Lloyd Davey, Sarah Taylor, “Workers are entitled to the same protection as employees when taking steps to protect themselves from Covid-19”, *Lexology*, December 15, 2020.

¹²⁹ See above the II.2.2.

¹³⁰ It can be argued that platform workers who have platform work as additional source of income, aside a full-time employment, not only already have full social coverage, but also can be in a better bargaining situation. Indeed, they may “vote with their feet” in switch platforms more easily and more often than platform workers who have platform work as their main (or exclusive) source of income. Therefore, we focus our proposal on the vulnerabilities of these full-time platform workers. See European Parliament, Directorate General for Internal Policies, *The Social Protection of Workers in the Platform Economy*, (Brussels: European Parliament, 2017).

Organization, the lack of safety nets associated with lower bargaining power prevents full-time platform workers from enjoying minimal working standards.¹³¹

In the E.U., self-employed workers run a 55 percent risk of not being entitled to employment benefits, a 38 percent risk of not being entitled to sickness benefits. These increased risks concern those who have no other employment position aside from the platform work. These risks need to be addressed by the labor regulations. However, this may not be equivalent to reducing the reach of competition laws unduly as per price-fixing agreements amongst self-employed platform workers. Therefore, a subtle yet necessary path needs to be devised to improve the working conditions for those who need them the most while ensuring that competition and innovation are not unduly stifled in a dynamic sector that provides job creation and business opportunities for many individuals.

Therefore, the need to create a third category of workers, beyond the simplistic dichotomy of employee/self-employed, is regarded as a workable path forward. Inspired by current situations in Germany and Spain, an “independent worker” status is fully recognized, the law may realize such a third status while preserving Member States’ autonomy to regulate one of their core competences. The Member States’ competencies in that area are also justified by the on-location characteristic of most platform works. Consequently, E.U. may introduce a duty for the Member States, via a newly designed Directive, to provide for a third category dedicated to full-time platform workers who are most susceptible to experience vulnerabilities. Such a Directive may extend the personal scope of relevant directives and regulations to vulnerable platform workers.¹³²

Consequently, we express the following recommendations:

- 1) Abandon all of the European Commission’s four propositions included in the Inception Impact Assessment as they unduly expand the reach of competition laws without providing the necessary improvement of working conditions through more adequate means (i.e., labor regulations);
- 2) Preserve the limitation of the antitrust exemption to employees only, and retroactively to those reclassified as “false self-employed” platform workers;
- 3) Allow the Member States to create a third category (when not already existing) related to economically dependent (vulnerable) full-time platform workers: this category would target only those vulnerable platform workers and allow minimal working standards. This third

¹³¹ Paul Choudary Paul, *The architecture of digital labour platforms: Policy recommendations on platform design for worker well-being*. Report for the International Labor Organization (May 2018).

¹³² Tamas Guylavari, “Collective rights of platform workers: The rule of EU law,” 27 *Maastricht Journal of European and Comparative Law* 4, 406-424 (2020) 412-413.

category status of “flexicurity” would enable platforms to provide more benefits without the risk of having their workers classified as non-contingent workers entitled to full employment rights;

- 4) Enable at national levels collective representations (such as trade associations) of vulnerable platform workers, but ensure the prohibition of price-fixing arrangements;
- 5) Ease the access to justice for platform workers who may qualify for reclassification as employees;
- 6) Ensure full prohibition of no-poaching agreements and of unreasonable non-compete clauses to address monopsony power;
- 7) Declare void any contractual clause preventing platform workers from seeking before a Tribunal to reclassify their work relationship as an employment relationship;
- 8) Prohibit price-fixing agreement involving platform workers: improvement of working standards may take the form of applicable regulation of labor (i.e., health and security benefits, pensions, and sickness benefits), excluding the fixing of the wages and fees for platform workers as this would crystallize the final price by end-users, thereby cartelizing the platform economy;
- 9) Exclude liberal professions from the possible legislative reform: because specific labor and business regulations apply to liberal professions, these particular rules preempt any general rules on the platform economy;
- 10) Examine the state of the platform economy, precisely the economic reality of full-time platform workers, regularly update and best adapt the envisaged legislation.

We believe these solutions are reasonable: they maximize the path of digital innovation and competition in the platform economy while minimizing the risks of vulnerable platform workers being further disenfranchised from the social security benefits that are legitimate to them. To be sure, the path is fragile in providing the optimal incentives (i.e., digital innovation, starting and expanding a start-up, etc...) while ensuring that no platform worker is left behind. We strive for the reasonable path forward we have delineated and look forward to providing that the reasonable equilibrium suggested materializes inadequate legislative reforms at both E.U. and national levels whenever necessary.