PRECARIOUS WORKERS AND COMPETITION LAW

SELF-EMPLOYED PERSONS AND THE RIGHT TO COLLECTIVE BARGAINING IN A RISING PLATFORM ECONOMY

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Table of chapters

1. The problem with the Dutch cartel prohibition in relation to the protection of platform workers against exploitation in a rising platform economy **10**
2. A normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements **29**
3. The use of competition law to improve the economic position of platform workers **40**
4. Two competition law approaches enabling platform workers to enter into collective bargaining agreements **68**
5. The designated authority to develop a competition law solution **76**
6. Conclusion **83**

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Table of contents

List of abbreviations **5**

Introduction **6**

The problem with the Dutch cartel prohibition in relation to the protection of platform workers against exploitation in a rising platform economy

1. Introduction **10**
    - **1.1 Competition law** **10**
        - 1.1.1 Theory and objectives of competition law 10
        - 1.1.2 Competition law: legislation and enforcement 12
            - 1.1.2.1 Cartel prohibition 12
        - 1.1.3 The relationship between Dutch and European competition law 14
        - 1.1.4 The notion of 'undertaking' 14
    - **1.2 Labour law** **15**
        - 1.2.1 Foundations of labour law 15
        - 1.2.2 Collective labour agreements and European law 16
        - 1.2.3 Collective labour agreements in the Netherlands 16
    - **1.3 Self-employed persons without employees** **17**
        - 1.3.1 Self-employed persons without employees and the cartel prohibition 17
        - 1.3.2 Object and effect restrictions 18
    - **1.4 Precarious work** **19**
        - 1.4.1 Notion and history of precarious work 19
        - 1.4.2 Self-employed persons without employees and precarious work 20
        - 1.4.3 Self-employed persons without employees and poverty: numbers and facts 21
        - 1.4.4 New self-employed and competition law 22
    - **1.5 Platforms** **23**
        - 1.5.1 Two-sided markets and network effects 23
        - 1.5.2 Platforms and precarious work 24
        - 1.5.3 Platforms challenging the legal framework 25
    - **1.6 Conclusion** **26**

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A normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements

2. Introduction **29**

2.1 Recapitulation: the identified problem 29

2.2 Three elements of a normative framework to establish an adequate solution 30

2.2.1 Protecting platform workers against poverty 30

2.2.2 Protecting consumer welfare 32

2.2.3 Protecting economic freedom 33

2.3 Collective labour agreements to improve the economic position of platform workers 35

2.4 The choice of a competition law solution 37

2.5 Conclusion 38

The use of competition law to improve the economic position of platform workers

3. Introduction **40**

3.1 Case law: an overview 40

3.1.1 Becu and others: the difference between workers and undertakings 40

3.1.2 Albany: the 'social exception' 41

3.1.3 Pavel Pavlov: in continuation of *Albany* 42

3.1.4 Allonby: the concept of 'worker' 43

3.1.5 Jany and others: no *de minimis* for the self-employed 44

3.1.6 FNV KIEM versus the Netherlands: the false self-employed 45

3.1.6.1 Opinion of AG Wahl: the prevention of *social dumping* 46

3.1.6.2 Judgement of the ECJ: the false self-employed 46

3.1.6.3 The Hague Court of Appeal: musicians are falsely self-employed 47

3.1.7 Deliveroo: bikers are not employees 48

3.1.8 Uber in court 49

3.1.8.1 Transport service or information service? 49

3.1.8.2 Mr Aslam and Mr Farrar: Uber drivers are employees 50

3.2 Platform workers and case law 50

3.2.1 Precarious platform workers and employment relationships 51

3.2.2 Precarious platform workers and the false self-employed 53

3.3 The exception of Article 101(3) TFEU 54

3.3.1 The requirements of Article 101(3) TFEU 54

3.3.2 Qualification of collective bargaining under Article 101(1) TFEU 55

3.3.3 Collective bargaining agreements and Article 101(3) TFEU 56

3.3.3.1 Efficiency gains ... 56

3.3.3.2 Fair share for consumers ... 57

3.3.3.3 Indispensability ... 57

3.3.3.4 No elimination of competition in a substantial part of the market ... 58

3.4 The *Wouters* doctrine ... 58

3.4.1 Inherent restrictions ... 58

3.4.2 Clashing goals of competition law ... 59

3.4.3 *Wouters* and collective bargaining agreements for platform workers ... 61

3.5 'Bagatel' ... 62

3.5.1 Article 7 of the Competition Act ... 62

3.5.2 Article 7 and collective bargaining agreements for platform workers ... 64

3.6 Conclusion ... 64

Two competition law approaches enabling platform workers to enter into collective bargaining agreements

4. Introduction ... **68**

4.1 A proportionality-test ... 68

4.1.1 Description of the proportionality-test ... 68

4.1.2 Assessment in the light of the protection of platform workers, consumer welfare and economic freedom ... 70

4.2 The extended *Albany*-approach ... 70

4.2.1 Description of the extended *Albany*-approach ... 70

4.1.2 Assessment in the light of the protection of platform workers, consumer welfare and economic freedom ... 73

4.3 Conclusion ... 73

The designated authority to develop a competition law solution

5. Introduction ... **76**

5.1 The ACM as the designated authority ... 76

5.2 The Ministry as the designated authority ... 77

5.3 Useful effect doctrine ... 80

5.4 Conclusion ... 81

Conclusion ... 83

List of references ... 86

List of abbreviations

AAA	Autonomous Administrative Authority
AG	Advocate General
ACM	The Netherlands Authority for Consumers and Markets
Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission
Competition Act	Dutch Competition Act
ECJ	Court of Justice of the European Union
ECSR	European Committee of Social Rights
EU	European Union
ILO	International Labour Organization
IMF	International Monetary Fund
LCLA	Law on Collective Labour Agreements
NCA	National Competition Authority
NMa	Dutch Competition Authority
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Introduction

> *'Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore*.'[1]

The aforementioned quote is from Lukas Biewald, founder and CEO of CrowdFlower.[2] The company, now sold for 300 million dollars, is a platform connecting businesses to crowdworkers. The latter perform small tasks like photo moderation in exchange for money.[3] Online platforms, of which CrowdFlower is only an example, have become central pillars of business activity and key facilitators of online economic transactions in the European Union ('*EU*').[4] Platforms have enabled the EU to come closer to its ideal of creating a single market where cross-border trade is facilitated. Besides, consumers benefit from online platforms.[5] Concerns are however rising regarding the growing power of platforms.[6] One of those concerns relates to the erosion of labour standards as a result of the way in which platforms set their terms and conditions.[7]

Persons working for online platforms are often classified as 'independent contractors' or 'self-employed' by the platform they are performing services for.[8] Traditionally *workers* have been protected under the rules of labour law. Labour law enables workers to engage in collective bargaining agreements in order to set salaries and minimum contractual safeguards. *Self-employed persons* however are considered to be undertakings which means that competition law applies to them. The collective setting of prices and contract terms between undertakings is prohibited under European and Dutch competition law. The distinction between 'worker' and 'undertaking' is thus very important.[9]

A self-employed status can bring in certain advantages. There is no fixed amount of working hours and people have the possibility to perform services whenever they want. Competition between

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[1] This quote is derived from Moshe Marvit, 'How Crowdworkers Became the Ghosts in the Digital Machine' (*Nation* 5 February 2014) <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/> Accessed 14 May 2019.

[2] CrowdFlower is currently known as Figure Eight Inc. See: Figure Eight, 'Platform: learn how our high-quality data annotation platform helps make your machine learning projects work in the real world' (*Figure Eight*) <https://www.figure-eight.com/platform/> Accessed 29 May 2019.

[3] Anthony Ha, 'CrowdFlower raises 10M to combine artificial intelligence with crowdsourced labour' (*TechCrunch* 2016) <https://techcrunch.com/> Accessed 14 May 2019.

[4] Paul-Jasper Dittrich, 'Online platforms and how to regulate them: an EU overview' (2018) 227 Jacques Delors Institut Berlin 1, 3.

[5] *Dittrich* (4) 4.

[6] *Ibid.*

[7] *Ibid* 4 and 7.

[8] Valerio De Stefano, 'The Rise of the Just-in-time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' (2016) 37 Comparative Labour Law & Policy 471, 478.

[9] Victoria Daskalova, 'Regulating the new self-employed in the Uber economy: what role for EU competition law?' (2017) 38 Stockholm Faculty of Law Research Paper Series 1, 8-9.

platform service providers can however push down compensation, forcing people to work long hours to make sufficient earnings.[10] A striking expression in this regard is the recent Uber driver protest in Amsterdam. Drivers claim that they have to work sixty hours a week and still do not earn enough money to make ends meet.[11]

Although flexibility, the shifting of risks to workers and income instability are related to the platform-based economy, these phenomena are not *entirely* new to the labour market. Instead, they seem to be part of a broader trend towards 'casualization' of labour.[12] This casualization of labour also fits in a global trend where the capital share of income dominates to the detriment of the labour share.[13] Critics have however accepted the general conception that it is the *platform economy* that can lead to diminished protection of workers.[14] The role of platforms in the digital labour market is rising,[15] and the European Commission (*'Commission'*) notes that the platform-economy can be considered as a '*structural shift*'.[16]

This leads to the following research question:

> ***What is the problem with the Dutch cartel prohibition in relation to the protection of self-employed persons without employees against exploitation in a rising platform economy and what solution could Article 101 TFEU offer to ensure an adequate resolving of this problem?***

The research question is predominantly an evaluative question. The aim of this research is to *evaluate* what solution Article 101 TFEU could offer to ensure an adequate solution to the identified problem. Valuing a solution as being 'adequate' contains a normative analysis. This means that both the positive and the negative sides of different potential solutions will be assessed. The research question contains a *design*-element as well. The aim of the research is to improve an *undesired* situation, in order to realize a *desired* situation. The desired situation in this regard refers to the 'adequate solution'.

A solution to the lack of protection of self-employed persons can be sought in different areas. This research will focus on a competition law solution. More precisely, the aim of this research is to evaluate whether the cartel prohibition as laid down in Article 101 TFEU could offer a solution. The

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[10] *De Stefano* (8) 479.
[11] NOS, 'Taxichauffeurs lopen in protestmars door Amsterdam' (*NOS* 19 April 2019) <https://nos.nl/video/2281178-uberchauffeurs-demonstreren-bij-hoofdkantoor-in-amsterdam.html> Accessed 20 April 2019.
[12] *De Stefano* (8) 481.
[13] Marcel Canoy and Kees Hellingman, 'De Mededingingswet en de onderkant van de arbeidsmarkt' (2018) 5 Markt en Mededinging 184, 190.
[14] Daisy Chan, Freek Voortman and Sarah Rogers, 'The rise of the platform economy' (*Deloitte* January 2019) 2 <https://www2.deloitte.com/nl/nl/pages/human-capital/articles/the-rise-of-the-platform-economy.html> Accessed 25 April 2019.
[15] *Chan, Voortman and Rogers* (14) 3.
[16] European Commission, 'A European Agenda for the Collaborative Economy' (*Commission* 2016) 11.

choice for the search of a competition law solution is not self-evident.[17] Competition law is a problem for the protection of self-employed persons as the cartel prohibition limits their possibilities to enter into collective labour agreements. It may thus seem odd to search for a solution to this problem *within* competition law. Yet, competition law also prevents distortions of the market.[18] As concerns are expressed regarding the extreme amount of power platforms exercise,[19] it makes sense to explore the option of using competition law as a tool to tackle this problem.[20]

This research will be library-based. Both case law of the Court of Justice of the European Union (*'ECJ')*, decisions of the Commission and the Authority for Consumers and Markets ('*ACM*') and legal literature will be used as sources. Statistic research performed by several entities will be used as well. To a smaller extent, social and political science literature will be relied on. As this research is performed in the Netherlands and the economic position of self-employed persons has been a topical issue in this country, this research will focus on the legal situation in the Netherlands. Therefore, references to Dutch policy documents will be made. As Dutch competition law is highly influenced by European competition law, references will be made to European policy documents as well.

The structure of this research is as follows. The aim of the first chapter is to describe what the problem is with the Dutch cartel prohibition in relation to the protection of self-employed people without employees. In order to do so, some core concepts and the current legal situation need to be clarified. The aims of competition law, the cartel prohibition and the notion of 'undertaking' will be discussed. Subsequently, the foundations of labour law and the role of collective labour agreements will be explored. Next, it will be examined how competition law affects self-employed persons and how the work performed by self-employed persons relates to precarious work. The platform economy will be shown to play an increasing role in the lack of protection self-employed persons experience. The failure of the current legal system to protect self-employed people against exploitation will be emphasized by looking at the clashing goals of competition law and labour law and the result following from this.

Equipped with an answer to the question what the current problem entails, the second chapter will establish a normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements. This normative framework should determine what an adequate solution to the problem as described in the first chapter would look like. It will be argued that an adequate solution should balance three conflicting interests of competition law and labour law: the need to protect precarious workers, consumer welfare and economic freedom. Enabling platform workers to enter into collective bargaining agreements could function as an adequate solution in this regard.

The third chapter will identify what possible solutions competition law currently offers to allow self-employed persons to enter into collective bargaining agreements. An overview of case law of

[17] *Daskalova* (9) 27.
[18] *Ibid.*
[19] *Dittrich* (4) 9.
[20] *Daskalova* (9) 27.

the ECJ, clarifying different concepts, will be drawn. Subsequently, it will be analysed what this case law means for platform workers. It will be argued that currently existing case law, the exception of Article 101(3) TFEU, the *Wouters*-doctrine and the exception of Article 7 of the Dutch Competition Act (‘*Competition Act*’) are all incapable of offering platform workers a solution to enter into collective bargaining agreements. Therefore, the current legal system must be interpreted differently in order to create a solution.

In the fourth chapter, two of those different interpretations will be discussed. The three elements that need to be balanced, as discussed in the second chapter, will be applied to the two different interpretations to determine whether the interpretations could function as an adequate solution to improve the economic position of platform workers. In the fifth and final chapter, it will be explored what authority should be assigned to apply and develop one of the two solutions: the ACM or a Ministry. Finally, a conclusion answering the research question will be drawn.

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The problem with the Dutch cartel prohibition in relation to the protection of platform workers against exploitation in a rising platform economy

1. Introduction

The goal of this chapter is to explain what the problem is with the Dutch cartel prohibition in relation to the protection of self-employed persons. In order to do so, some core concepts need to be clarified. The first section will describe the core provisions and goals of competition law and the relationship between Dutch and European competition law. In the second section, the foundations of labour law and the role of collective labour agreements will be discussed. The third section will explain the notion of self-employed persons and their relationship with competition law. Next, the fourth section will discuss the meaning of precarious work and its relationship with self-employed persons. The fifth and final section will explain what the role of platforms is regarding self-employed persons and precarious work. Finally, a conclusion will be drawn on the five sections altogether.

1.1. Competition law

In this section, the goals of competition law and the core provisions of both Dutch and European competition law will be discussed. Next, the relationship between Dutch and European competition law and the notion of undertaking will be discussed.

1.1.1. Theory and objectives of competition law

Competition is described as '*a process of rivalry between firms … seeking to win customers' business over time*'.[21] There is a growing consensus that in general, markets deliver better results than state planning does. The process of competition is central to the idea of a market.[22] Benefits of competition are lower prices, better products, more choice for consumers and greater efficiency gains compared to efficiency gains under monopoly conditions.[23]

It has been argued that consumer welfare has been the ultimate goal of competition law over the past years.[24] Consumer welfare is at the moment the standard that the Commission applies when it assesses competition law infringements and mergers.[25] The ACM focuses on improving consumer

[21] Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 4.
[22] *Whish and Bailey* (21) 4-5.
[23] *Ibid* 5.
[24] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 The Competition Law Review 131, 131.
[25] Neelie Kroes, 'European Competition Policy – Delivering Better Markets and Better Choices' (*European Consumer and Competition Day* 15 September 2015) 2 <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm> Accessed 25 April 2019. See also *Whish and Bailey* (21) 19.

welfare as well.[26] The Organisation for Economic Co-operation and Development ('*OECD*') defines consumer welfare as follows:

> *'Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences.'*[27]

The reason of choosing a consumer welfare standard is that this standard is based on economic science. Such a standard should be objective and ensure a consistent enforcement of competition law throughout the EU.[28] Using consumer welfare as a standard does not mean that competition law applies only when consumer prices are shown to be higher than competitive prices.[29] The ECJ has ruled that consumers can also be *indirectly* harmed by actions that affect the competitive process.[30] It can be questioned though whether the ECJ *completely* accepted this focus on consumer welfare.[31] Although the consumer welfare standard is important, there are multiple policy objectives that have been pursued in the name of competition law.[32] From a historical perspective, there has not been one single policy objective forming the foundation of competition law.[33] For many years, competition law has played an important role in facilitating the *single market*. The single market aims at dismantling barriers to trade within the EU.[34] The focus on establishing a single market shows that politics influence competition law. As political views change over time, competition law is pervaded with tension.[35]

An example of an objective of competition law other than consumer welfare is the redistribution of wealth. In this sense, economic *equity* is promoted rather than economic *efficiency*.[36] Linked to this objective is the view that competition law should protect small undertakings against larger, more powerful competitors. This goal is contested by the Chicago School as a focus on the protection of competitors could harm consumers.[37] Yet, EU competition law has in some cases been applied with

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[26] Chris Fonteijn, 'ACM's strategy regarding enforcement of vertical restraints' (*Meeting Competition Law Association* 24 November 2014) <https://www.acm.nl/nl/publicaties/publicatie/13592/Speech-Chris-Fonteijn-bij-Vereniging-voor-Mededingingsrecht-over-verticale-overeenkomsten> Accessed 11 June 2019.
[27] Organisation for Economic Co-operation and Development, 'Glossary of Statistical Terms: Consumer Welfare' (*OECD* 1993) <https://stats.oecd.org/glossary/detail.asp?ID=3177> Accessed 11 June 2019.
[28] *Daskalova* (24) 131.
[29] *Whish and Bailey* (21) 19.
[30] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343 para 43.
[31] Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 Journal of Common Market Studies 127, 131.
[32] *Whish and Bailey* (21) 19.
[33] *Ibid* 19.
[34] *Ibid* 23.
[35] *Ibid* 19.
[36] *Ibid* 20.
[37] *Ibid* 21. See also Eleanor Fox, 'What's Harm to Competition? Exclusionary Practices and Anticompetitive Effect (2002) 70 Antitrust Law Journal 371.

the aim of protecting competitors.[38] Another possible objective of competition law could be the striving for *fair competition*.[39] Finally, it has been argued that the market mechanism can lead to individual freedom.[40] This *ordo-liberal* point of view formed an important part of the foundations of competition law.[41] In this view, competition law has been perceived as a tool to obtain *economic freedom*.[42] According to ordo-liberals, the state needs to structure the market to ensure market outcomes that are acceptable to society.[43] This view will be further discussed in chapter 2.

1.1.2. Competition law: legislation and enforcement

The Competition Act has been enacted in 1997.[44] The aim of the Competition Act was to intensify competition policy and to match European competition law as much as possible.[45] The ACM is responsible for the enforcement of the Competition Act. Judicial review of competition matters is at first instance performed by the District court Rotterdam. Appeals are being reviewed by the Trade & Industry Appeals Tribunal.[46]

Competition law of the EU is laid down in the Treaty on the Functioning of the European Union (‘*TFEU*’).[47] The Commission enforces European competition law.[48] Within the Commission, DG COMP is the Directorate that is responsible for competition policy.[49] Regarding judicial review, the General Court is responsible for the hearing of appeals against Commission decisions in competition matters. The General Court decides upon the legality of appealed decisions according to the provisions of the TFEU. The ECJ reviews appeals from the General Court on points of law.[50]

1.1.2.1. Cartel prohibition

The Dutch prohibition of cartels is embedded in Article 6(1) of the Competition Act. Article 6(1) reads as follows:

> *‘Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.’*[51]

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[38] *Whish and Bailey* (21) 21-22.
[39] *Ibid* 22-23.
[40] *Gerbrandy* (31) 129.
[41] *Ibid.*
[42] *Ibid* 130.
[43] *Ibid* 129-130.
[44] Competition Act 1997.
[45] Explanatory Notes to the Competition Act, Document 24707 No. 3 [1995-1996] para 1.
[46] Johan van de Gronden, *Mededingingsrecht in de EU en Nederland* (Paris 2017) 20.
[47] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ 326/47.
[48] *Whish and Bailey* (21) 54.
[49] *Ibid* 55.
[50] *Ibid* 56.
[51] This translation is found at Dutch Civil Law, ‘Dutch Competition Act’ (*DCL)* <http://www.dutchcivillaw.com/legislation/competitionact.htm.> Accessed 17 April 2019.

Article 6 applies when the following conditions are met. First, an agreement between undertakings, decision by an association of undertakings or a concerted practices of undertakings is required. Second, the conduct concerned needs to have the intention to or will result in a distortion of competition. Third, this distortion must have an influence on the Dutch market or on a part of the Dutch market.[52]

The Competition Act provides for a specific provision for agreements having a limited influence on competition.[53] This so-called '*bagatel' provision* is laid down in Article 7 and specifies two exceptions to the prohibition of cartels. First, Article 6(1) does not apply according to Article 7(1) when no more than eight undertakings are involved in the agreement in question and when the combined turnover of the concerned undertakings does not meet the stipulated thresholds. Second, Article 6 does not apply according to Article 7(2) when the combined market share of the relevant undertakings does not exceed 10% on the relevant markets influenced by the agreement and the agreement does not appreciably affect trade between Member States.[54] Article 7 of the Competition Act will be further discussed in chapter 3.

The exceptions to the application of Article 6(1) as laid down in Article 6(3) of the Competition Act and in European block exemptions will be discussed in chapter 3 as well. Next to these exceptions, the Dutch legislator has specified in Article 16 of the Competition Act that Article 6(1) does not apply to collective labour agreements and collective agreements on pensions.[55] This exception will be discussed in paragraph 1.2.3.

Moving to European competition law, the European cartel prohibition is laid down in Article 101(1) TFEU and reads as follows:

> *'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
> *(b) limit or control production, markets, technical development, or investment;*
> *(c) share markets or sources of supply;*
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

[52] *Van de Gronden* (46) 115.
[53] This applies to concerted practices and decisions of associations of undertakings as well. This research will focus on agreements.
[54] *Van de Gronden* (46) 118-119.
[55] *Ibid* 122-123.

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

Article 101(1) TFEU applies when the agreement concerned affects interstate trade.[56]

1.1.3. The relationship between Dutch and European competition law

Regulation 1/2003 on the implementation of the rules of competition law introduced an important rule.[57] According to Article 3(1) of this Regulation, European competition law *must* be applied to agreements that may affect trade between Member States. National Competition Authorities ('*NCA's*') are allowed to apply national competition law as well,[58] but Article 3(2) of the Regulation determines that national competition law cannot prohibit agreements that do not distort competition according to Article 101 TFEU.[59] The result is that national competition law moves closer to European competition law.[60]

As Article 6 of the Competition Act and Article 101 TFEU are applied at the same time when the agreement affects interstate trade, the interpretation of Dutch competition law is highly influenced by European competition law. Only in situations where an agreement does *not* affect interstate trade, national competition law *only* can be applied.[61] Besides, the application of European competition law is eventually reviewed by the ECJ. Also, preliminary questions from national courts regarding the interpretation of European competition law will be answered by the ECJ. Case law of the ECJ is thus very important for the interpretation of both European *and* national competition law.[62]

1.1.4. The notion of 'undertaking'

Competition law applies to undertakings.[63] Article 1(f) of the Competition Act refers to Article 101(1) TFEU for the interpretation of the term 'undertaking'. It is however not the TFEU but the ECJ that defined the term 'undertaking'.[64] In the case of *Höfner and Elser v Macrotron GmbH,* the ECJ ruled as follows:

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[56] *Ibid* 58.
[57] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[58] *Van de Gronden* (46) 33.
[59] Article 3(2) of Regulation 1/2003 does leave Member States the possibility to apply stricter national competition law to unilateral conduct of undertakings.
[60] *Van de Gronden* (46) 35.
[61] The Commission has explained in its Guidelines how the concept of interstate trade should be interpreted. See: European Commission Notice, 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' [2004] OJ C101/81.
[62] Anna Gerbrandy and Paul Kreijger, '*Mededingingsrecht in relatie tot samenwerking tussen zzp-ers'* (Utrecht University 2017) 12.
[63] *Whish and Bailey* (21) 83.
[64] *Ibid.*

'It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.'[65]

An undertaking is thus any entity engaged in economic activity, regardless of its legal status and the way in which it is financed. In the *Pavlov*-case, the ECJ added that:

'It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity'.[66]

In order to determine whether an entity is performing an economic activity, a 'functional approach' must be adopted. This means that it is possible that one and the same legal entity is considered an undertaking when it performs on *one activity* but not when it is performing *another*.[67] Case law of the ECJ will be further elaborated on in chapter 3.

1.2. Labour law

This section will start with a brief explanation of the foundations of labour law. Next, the relationship between competition law and collective labour agreements at both the European and national level will be discussed.

1.2.1. Foundations of labour law

While competition law aims at protecting *product markets,* labour law on the other hand aims at protecting *labour markets.* Competition law tries to maintain competition on product markets but the labour market is a specific market in which fierce competition is considered undesirable.[68] Labour law recognizes that workers are first and foremost *people* and not just *commodities* that can be bought and sold on the labour market. [69] Regulation of the labour market should thus aim at pervading the human subject of labour law with dignity.[70]

Next to this, it has been argued that employees are in need of protection because they do not have as much bargaining power towards their employers as their employers have towards them. In order to avoid labour market exploitation, the 'normal' rules of market ordering, based on freedom of

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[65] Case-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161 para 21.
[66] Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428 para 75.
[67] *Whish and Bailey* (21) 84-85.
[68] Arjan Van den Born, Eric van Damme and Arjen van Witteloostuijn, '*Mededingingsrecht en de zzp-er: een economische analyse'* (Tilburg University 2017) 4.
[69] Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing 2016) 4. See also Gerry Rodgers and others, '*The ILO and the Quest for Social Justice 1919/2009'* (*ILO* 2009) 7.
[70] *Rodgers* (69) 4. See also Gerry Rodgers and others, '*The ILO and the Quest for Social Justice 1919/2009'* (*ILO* 2009) 7.

contract, need to be restricted through law or collective bargaining process.[71] These two foundations originate from the work of Marx, which will be discussed in paragraph 1.4.1.[72]

1.2.2. Collective labour agreements and European law

Collective labour agreements form an essential part of labour law. They are written agreements focusing on labour or employment conditions.[73] The ECJ has developed a special approach for collective labour agreements. These agreements are exempted from the cartel prohibition if two conditions are met. First, the agreement concerned has to be the result of a collective consultation between a labour union and an employer or an association of employers. Second, these agreement has to focus on labour or employment conditions.[74] The *Albany*-case has been very important in this regard.[75] Case law will be elaborated on in more detail in chapter 3.

The importance of collective labour agreements is explicitly stated in the Articles 154 and 155 TFEU. Article 154(1) TFEU states the following:

> *'The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.'*

Article 155 TFEU targets collective labour agreements specifically and states the following:

> *'Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.'*

1.2.3. Collective labour agreements in the Netherlands

The Dutch '*Wet op de collectieve arbeidsovereenkomst*', translated as the 'Law on Collective Labour Agreements' ('*LCLA*'), dates from 1927.[76] The Act determines what a collective labour agreement is and who is able to arrange one. Article 1(1) specifies that collective labour agreements are drawn up between one or more employers (or one or more associations of employers) and one or more associations of employees. Collective labour agreements cover primarily, or exclusively, labour conditions that have to be taken into consideration when employment contracts are drawn. Article

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[71] *Rodgers* (69) 4.
[72] Karl Marx, *Das Kapital: a Critique of Political Economy* (Pacifica Publishing Studio 2010) 84.
[73] Government of the Netherlands, 'Wat is een cao?' (*Government of the Netherlands)* <https://www.rijksoverheid.nl/onderwerpen/arbeidsovereenkomst-en-cao/vraag-en-antwoord/wat-is-een-cao> Accessed 16 April 2019.
[74] *Van de Gronden* (46) 59.
[75] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430.
[76] Law on Collective Labour Agreements 1927.

1(2) of the LCLA determines that collective labour agreements can cover commission contracts and contracting for services.[77]

Article 16a of the Competition Act explicitly states that the cartel prohibition does *not* apply to collective labour agreements as defined in Article 1(1) of the LCLA. Next to this, Article 16 of the Competition act determines that collective agreements between associations of employers and labour unions regarding pension schemes are exempted from the cartel prohibition as well.[78] The Dutch Competition Authority ('*NMa'*, the predecessor of the ACM) has explicitly stated in its decisions that it assumes collective labour agreements to be exempted from the Dutch cartel prohibition.[79] It can be argued that Article 16 of the Competition Act introduces a block exemption for collective labour agreements and collective pension agreements.[80]

1.3. Self-employed persons without employees

Not everyone works under an employment contract. An increasing number of people in the Netherlands is 'self-employed without employees'.[81] The term 'self-employed without employees' refers to the situation in which someone works for oneself rather than for an employer without having an employee.[82]

In this section, the link between self-employed persons without employees and the cartel prohibition will be discussed. Specific attention will be paid to the distinction between object and effect restrictions.

1.3.1. Self-employed persons without employees and the cartel prohibition

The cartel prohibition as embedded in Article 6 of the Competition Act and in Article 101 TFEU applies to undertakings. As explained, Article 1(f) of the Competition Act refers to Article 101(1) TFEU for the definition of undertaking. The European notion of undertaking has been determined by the Höfner-case: an undertaking is any entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[83] This is a very broad definition. Natural persons are considered to be undertakings when they engage in an economic activity and offer services for

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[77] Leonard Verburg, *'Werken in netwerken'* (Radboud University 2017) 9.
[78] *Van de Gronden* (46) 123.
[79] See for example Dutch Competition Authority, Decision in Case No. 1012*, Van Eck* [2000] para 39.
[80] *Van de Gronden* (46) 123.
[81] The term 'self-employed without employees' is in Dutch translated as '*zelfstandige zonder personeel'*, or the often used abbreviation '*zzp-er'*.
[82] Statistics Netherlands, 'Is elders in de EU het aandeel zzp'ers zo hoog als in Nederland?' (*CBS* 27 December 2018) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp/hoofdcategorieen/is-elders-in-de-eu-het-aandeel-zzp-ers-zo-hoog-als-in-nederland-> Accessed 16 April 2019. See also:
Statistics Netherlands, 'Dossier ZZP' (*CBS*) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp> Accessed 16 April 2019.
[83] Case-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161 para 21.

remuneration. This means that self-employed persons without employees can fall under the scope of the cartel prohibition.[84]

The consequence of the fact that self-employed persons can fall under the scope of the cartel prohibition is that agreements between self-employed persons can be prohibited if these agreements distort competition in an essential part of the market. While Article 16 of the Competition Act allows *workers* to engage in collective bargaining agreements to negotiate labour conditions, the same cannot automatically be said for *self-employed persons*.[85] Agreements between self-employed persons leading to harmonization of competitive parameters like prices, tariffs and commercial conditions will most likely be considered to distort competition.[86]

The reason for this is that competition law aims at protecting the interests of the consumer. If undertakings like self-employed persons are allowed to enter into agreements which increase prices or impose conditions upon their buyers, market power is being created and this is not in the interest of the consumer.[87] The goals of competition law will be further elaborated on in chapter 3.

1.3.2. Object and effect restrictions

It is important to note that both Article 6 of the Competition Act and Article 101 TFEU distinguish between two types of agreements: agreements that have as their *object* to restrict competition and agreements that have as their *effect* to restrict competition.[88] If an agreement is considered to have as its object the restriction of competition, it is not necessary to assess what the concrete effects of the agreement concerned are on competition.[89]

Not *every* agreement falling within the scope of Article 101 TFEU and affecting competition will be considered prohibited. If the agreement does not have an appreciable effect on inter-state trade or competition, the agreement will not be prohibited. This is the so-called *de minimis* doctrine.[90] The doctrine was established by the ECJ in the case *Völk v Vervaecke.*[91] In the *Expedia*-case, the ECJ confirmed the *de minimis* doctrine and added that an agreement restricting competition by object and affecting inter-state trade, *automatically* violates Article 101(1) TFEU. It is thus not necessary to demonstrate the concrete effects on competition when an object restriction is established.[92]

[84] *Gebrandy and Kreijger* (62) 18.
[85] *Ibid* 22.
[86] *Ibid* 21-22.
[87] *Ibid* 22.
[88] *Whish and Bailey* (21) 119.
[89] *Van de Gronden* (46) 64.
[90] *Whish and Bailey* (21) 147.
[91] Case C-5/69 *Völk v Vervaecke* EU:C:1969:35.
[92] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* ECLI:EU:C:2012:795 para 37.

Agreements concerning prices are considered to have the object of distorting competition.[93] An agreement between self-employed persons covering prices or tariffs is thus most likely considered to restrict competition without prior assessment of the concrete effects of the agreement.[94]

1.4. Precarious work

As mentioned, not everyone works under an employment contract. As of 2017, more than one million people in the Netherlands are self-employed without employees which is around 12% of the population.[95] The increase in the number of self-employed people without employees in the Netherlands between 2007 and 2017 is the highest increase of all countries in the EU.[96] This means that the number of people who are not protected under labour law is rising as well.

The existence of self-employed people is not a new phenomenon though. Besides, the Commission has considered these people to be undertakings for years.[97] It is however argued that as a result of developments in the labour market a *new type* of self-employed persons is emerging to which competition law increasingly applies. This new type of self-employed persons seems to be more similar to *precarious workers* than to entrepreneurs.[98]

This section will start with describing what 'precarious work' means. Next, the link between self-employed persons without employees and precarious work will be discussed, supported by statistic reports. Afterwards, the tension between competition law and the *new self-employed* will be discussed.

1.4.1. Notion and history of precarious work

Precarious work is associated with work outside of the traditional 'standard employment relationship', which refers to full time work for a single employer.[99] Rodgers has established four criteria to identify precarious work. The first criterion is the degree of certainty that the employment will continue. The second criterion relates to organizational factors like working conditions and individual control over work. The third criterion relates to sufficient salary and the last criterion

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[93] *Van de Gronden* (46) 64.

[94] *Gebrandy and Kreijger* (62) 22.

[95] Statistics Netherlands, 'Is elders in de EU het aandeel zzp'ers zo hoog als in Nederland?' (*CBS* 27 December 2018) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp/hoofdcategorieen/is-elders-in-de-eu-het-aandeel-zzp-ers-zo-hoog-als-in-nederland-> Accessed 16 April 2019. See also: Statistics Netherlands, 'Dossier ZZP' (*CBS*) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp> Accessed 16 April 2019.

[96] Statistics Netherlands, 'Is elders in de EU het aandeel zzp'ers zo hoog als in Nederland?' (*CBS* 27 December 2018) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp/hoofdcategorieen/is-elders-in-de-eu-het-aandeel-zzp-ers-zo-hoog-als-in-nederland-> Accessed 16 April 2019. See also: Statistics Netherlands, 'Dossier ZZP' (*CBS*) <https://www.cbs.nl/nl-nl/dossier/dossier-zzp> Accessed 16 April 2019.

[97] European Commission Recommendation, concerning 'the Definition of Micro, Small and Medium-Sized Enterprises' [2003] OJ L124/36 Article 1.

[98] *Daskalova* (9) 1.

[99] *Rodgers* (69) 2.

relates to legal and social protection.[100] These four criteria have been used to create *'four dimensions of vulnerability'*.[101] The four dimensions are flexibility, insecurity, under-valuation and poor working conditions.[102]

The idea of workers having been made vulnerable by the operation of the capitalist system dates from the 19th century when Marx wrote '*das Kapital'*.[103] Marx argued that labour is made vulnerable by two processes resulting from a capitalist work mode. The first one is the process of *commodification* which reduces human beings to goods to be bought, sold and exploited for profit.[104] The second process revolves around the inequality of bargaining power between employers and employees resulting from the capitalist system. Marx argues that two classes in the capitalist system can be distinguished: the *bourgeoisie* and the *proletariat*. It is the bourgeoisie that owns the means of production and controls the value created by the work of the proletariat. The proletariat on the other hand is kept in a position of subordination, having no alternative to working in the capitalist system.[105] The two processes, although criticized, still form the foundations of labour law as described in paragraph 1.2.1.

1.4.2. Self-employed persons without employees and precarious work

Self-employed work is referred to as 'non-standard' or 'atypical' work. Literature on precarious work discusses several disadvantages of these atypical contracts for self-employed persons.[106] The lack of incentives for firms to invest in workers doing precarious work as a result of their minor importance to the firm is seen as a disadvantage, because it results in insecurity, low pay and low status.[107] It is also argued that jobs that are created on a flexible basis, including self-employed work, shift risks from the employer to the worker.[108] Another problem is that labour market institutions are still focused on the model of the standard employment relationship. As a result, non-standard workers like self-employed persons face difficulties when trying to obtain protections and benefits associated with labour law.[109]

As mentioned, the existence of self-employed persons without employees is not a new phenomenon. However, the population that constitutes the group of self-employed persons has both increased *and*

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[100] *Rodgers* (70) 3.
[101] Damian Grimshaw and Mick Marchington, 'United Kingdom: Persistent Inequality and Vulnerability Traps' in François Eyraud and Daniel Vaughan-Whitehead (eds) *The Evolving World of Work in the Enlarged EU: Progress and Vulnerability* (ILO 2009) 550.
[102] *Grimshaw and Marchington* (101) 550. See also *Rodgers* (69) 3.
[103] *Marx* (72). See also *Rodgers* (69) 20.
[104] *Marx* (72) 84. See also *Rodgers* (69) 20.
[105] R Bellotti, 'Marxist Jurisprudence: Historical Necessity and Radical Contingency*'* (1991) 4 Canadian Journal of Law and Jurisprudence 145, 146. See also *Rodgers* (69) 21.
[106] *Rodgers* (69) 7. There are more forms of non-standard work like temporary agency work or homeworking. These forms will not be discussed as this research focuses entirely on self-employed persons without employees.
[107] Sandra Fredman, 'Precarious Norms for Precarious Workers' in Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women and the New Economy* (Hart Publishing 2006) 177. See also *Rodgers* (69) 7.
[108] *Fredman* (107) 177. See also *Rodgers* (69) 7.
[109] *Rodgers* (69) 7.

evolved.[110] Self-employed persons without employees have traditionally been considered to be entrepreneurs and, to use Marx' classification, *bourgeois.*[111] Self-employment has been very common for the so-called 'liberal professions' like physicians, lawyers and accountants.[112]

However, the increase in the number of self-employed persons seems to be linked to the emergence of a '*new type of self-employed'*.[113] Social science literature describes how these new self-employed are often much less independent and financially stable than the traditional self-employed. According to Buschoff and Schmidt, these new self-employed often work solo in professions with low capital requirements. While their work can often be found at the boundary between self-employment and dependent employment, their work is *formally* defined as self-employment.[114] According to the International Labour Organization ('*ILO'*), the distinction between employment and self-employment is nowadays very artificial as a result of flexibilization of the labour market.[115]

1.4.3. Self-employed persons without employees and poverty: numbers and facts

A consultation between the Netherlands and the International Monetary Fund ('*IMF*') shows that nominal wage growth has declined in the Netherlands since 2000 and that the growth is low compared to other European countries. Econometric studies show that wage moderation in the Netherlands is related to the rising share of temporary workers who are willing to accept lower wages.[116] It is also suggested that the rise of the number of self-employed persons contributes to the low wage growth.[117]

Next to this, research of The Netherlands Institute for Social Research shows that the number of *working poor* is increasing. A single person household is considered to be poor when he or she earns less than 1063 euros per month. For a couple with two children, the limit is set at 2000 euros.[118] Self-employed persons without employees often belong to the group of working poor.[119] They are considered to be a group at risk of poverty as they form 36% of the working poor, whereas permanent

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[110] *Daskalova* (9) 3.
[111] Giedo Jansen, 'Self-employment as Atypical or Autonomous Work: Diverging Effects on Political Orientations' (2016) 0 Socio-Economic Review 1, 1. See also *Daskalova* (9) 4.
[112] *Daskalova* (9) 4. See also Aalt-Willem Heringa and Weyer VerLoren van Themaat, 'Vrijheid in gebondenheid: de vrije beroepen en het mededingingsrecht' (2005) 6645 Weekblad voor Privaatrecht, Notariaat en Registratie 931.
[113] Schulze Buschoff and Claudia Schmidt, 'Adapting Labour Law and Social Security to the Needs of the ''New Self-Employed'' - Comparing the UK, Germany and the Netherlands' (2009) 19 Journal of European Social Policy 147, 147-148. See also *Daskalova* (9) 4.
[114] *Buschoff and Schmidt* (113) 147-148. See also *Daskalova* (9) 4.
[115] International Labour Organization, *Non-Standard Employment Around the World: Understanding challenges, shaping prospects* (*ILO* 2016).
See also: *Van den Born, Van Damme and Van Witteloostuijn* (68) 5.
[116] International Monetary Fund, *Country Report No. 18/130: Kingdom of the Netherlands* (*IMF* 2018) 9-10.
[117] *International Monetary Fund* (116) 58.
[118] The Netherlands Institute for Social Research, *Als werk weinig opbrengt* (*SCP* 2018) 11.
[119] *The Netherlands Institute for Social Research* (118) 25-26.

workers who work more than 35 hours a week form 8% of this group and temporary workers who work more than 35 hours a week form only 3% of this group.[120] It is worthy to note that Uber drivers recently protested at Uber's headquarter in Amsterdam, claiming that they have to work sixty hours a week and still do not earn enough money to make ends meet.[121]

Finally, the Bureau for Economic Policy Analysis shows that more than 25% of independents is unable to independently provide for a minimum income until their pension when they become occupationally disabled.[122]

1.4.4. New self-employed and competition law

Dekker draws a distinction between *voluntary* self-employment and *involuntary* self-employment.[123] The first group *chooses* to work independently in order to take advantage of the possibilities it offers. Working as an independent could for example offer more flexibility or higher profits. The latter group however prefers employment but is *forced* into self-employment out of necessity.[124]

The distinction is important as economic theory about the functioning of the labour market starts from the view that individual freedom is the highest social aim. Freedom of contract between employers and employees is valued as it would result in the most efficient allocation of resources because individuals know what is best for them.[125] Besides, self-employed persons without employees form a very heterogeneous group.[126] Not *all* self-employed persons work under precarious conditions.[127] This research will focus on involuntary self-employed.

The clash between labour law and competition law is visible in the way in which collective bargaining agreements are approached.[128] Where the collective setting of prices and contract terms is seen as a cartel and a clear *infringement* on competition law, entering into collective labour agreements is considered to be the exercise of a *fundamental right* under labour law.[129] The problematic part of this is the fact that the new self-employed do not benefit from the protection of labour law, nor do they benefit from opportunity-creating competition law.[130] It is thus necessary to find a solution for the problem of self-employed persons without employees working under precarious conditions that

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[120] *Ibid* 29.
[121] NOS, 'Taxichauffeurs lopen in protestmars door Amsterdam' (*NOS* 19 April 2019) <https://nos.nl/video/2281178-uberchauffeurs-demonstreren-bij-hoofdkantoor-in-amsterdam.html> Accessed 20 April 2019.
[122] Ernest Berkhout and Rob Euwals, *Zelfstandigen en arbeidsongeschiktheid* (*CPB* 2016) 3.
[123] Fabian Dekker, 'Self-Employed without Employees: Managing Risks in Modern Capitalism' (2010) 38 Politics & Policy 765, 768.
[124] *Dekker* (123) 768. This view is shared by Fredman, see *Fredman* (107) 180. See also *Rodgers* (69) 7.
[125] *Rodgers* (69) 61.
[126] Annette Bernhardt, 'Labor Standards and the Reorganization of Work: Gaps in Data and Research' (2014) 100 University of California, Berkeley 1, 7.
[127] *Rodgers* (69) 8.
[128] *Daskalova* (9) 8.
[129] *Ibid* 9.
[130] Mies Westerveld, 'The Stepchild of Labour Law: The Complex Relationship Between Independent Labour and Social Insurance (2011) Inaugural lecture at the University of Amsterdam. See also *Daskalova* (9) 5.

combines both the protective function labour law has for *self-employed persons* and the protective function competition law has on *the market*. This will be discussed in Chapter 2.

1.5. Platforms

This section will start with an explanation of what platforms are and what distinguishes them from conventional markets. Next, the link between platforms and precarious work and the challenges platform-based work imposes on the current legal framework will be discussed.

1.5.1. Two-sided markets and network effects

Platforms are two-sided markets that connect two distinct groups of people.[131] The benefit of both groups flows from the interaction through the common platform.[132] Platforms can be characterized as *intermediaries* as they leverage their 'middleman position' to enable communication with other market participants which leads to transactions that create economic or social value.[133] An example of a platform is Uber. Uber connects drivers and persons seeking for a ride with its application, thereby facilitating transactions between the two of them.

An important distinction between platforms and 'conventional markets' is that competition between platforms is characterized by direct and indirect network effects.[134] *Direct network effects* are related to the size of the platform. The benefit that a user receives from using the platform increases when the number of participants on the other side of the platform increases as well.[135] *Indirect network effects* on the other hand arise as an increase of users on *side one* of the platform increases the number of users on *side two*, which *on its turn* increases the number of users on *side one* of the platform.[136] The presence of network effects makes competition between platforms not efficient per se; a monopoly platform can actually be efficient if all market participants coordinate transactions through the platform.[137] Besides the existence of network effects, competition between platforms is characterized by switching costs and economies of scale.[138]

The use of one, large marketplace functioning as a medium of exchange is not new. It is efficient as it reduces searching costs. An example can be found in the fact that car dealers are often located in the same neighborhood.[139] However, over the past years *online platforms* have become central pillars of the facilitation of online transactions in the EU. This is especially the case in the market for business-

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[131] Julian Wright, 'One-sided Logic in Two-sided Markets' (2004) 3 Review of Network Economics 44, 44.
[132] Jean-Charles Rochet and Jean Tirole, 'Competition in Two-sided Markets' (2003) 1 Journal of the European Economic Association 990, 990.
[133] Karine Perset, 'The Economic and Social Role of Internet Intermediaries' (2010) 171 OECD Digital Economy Papers 1, 6.
[134] Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11, Springer 49, 60.
[135] *Haucap and Heimeshoff* (134) 51.
[136] *Ibid.*
[137] *Ibid* 52.
[138] *Ibid* 60.
[139] *Ibid* 51.

to-consumer services.[140] It is estimated that platform companies, including Uber and Spotify, intermediated around 60% of privately consumed goods and services within the European digital economy.[141] Online platforms are often linked to the *sharing economy,* supporting the exchange of physical assets or services.[142]

1.5.2. Platforms and precarious work

Platforms seem to be exemplary of economic processes that have eroded standard employment relationships.[143] Three processes are distinguished in the literature: technological innovation, increased competition as a result of globalization and the dominance of the service sector over the manufacturing sector.[144] Platforms seem to be linked to all three processes. First, platforms form an essential part of the digital transformation that has taken place in the last decade.[145] Second, many platforms operate on a global scale.[146] Third, platforms do not manufacture products themselves, they '*create the means of connection'*.[147]

Platforms benefit both consumers and businesses in the EU as platforms provide for easier access to products and services and enable transactions between market participants.[148] At the same time, concerns are rising about the growing power of platforms.[149] One of the main characteristics of platforms is the three-sided contractual relationship between the platform, the supplier and the consumer.[150] By setting the general terms and conditions, the platform has large power over both sides of the market. It is the platform that determines what rights the two user groups have vis-à-vis each other *and* vis-à-vis the platform itself.[151] It is thus the platform that determines the employment relationship of its users. Using Uber again as an example, paragraph 2 of its terms and conditions read as follows:

> *'You acknowledge that Uber does not provide transportation or logistics services or function as a transportation carrier and that all such transportation or logistics services are provided by*

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[140] *Dittrich* (4) 3.
[141] Copenhagen Economics, *Online Intermediaries: Impact on the EU Economy* (*Copenhagen Economics* 2015). See also *Dittrich* (4) 3.
[142] Tawanna Dillahaunt and Amelia Malone, 'The Promise of the Sharing Economy among Disadvantaged Communities' (2015) CHI 2285, 2285.
[143] *Rodgers* (69) 6.
[144] Alain Supiot, 'The Transformation of Work and the Future of Labour Law in Europe: A Multi-disciplinary Perspective' (1999) 138 International Labour Review 31, 33. See also *Rodgers* (69) 6.
[145] *Dittrich* (4) 1.
[146] Fheng Zhu and Marco Iansiti, 'Why some platforms thrive and others don't (*Harvard Business Review* 2019) <https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont> Accessed 18 April 2019.
[147] Alex Moazed, 'Platform Business Model - Definition, What is it, Explanation' (*Applico* 1 May 2016) <https://www.applicoinc.com/blog/what-is-a-platform-business-model/> Accessed 18 April 2019.
[148] *Dittrich* (4) 1.
[149] *Ibid* 4.
[150] *Ibid* 9.
[151] *Ibid* 9.

> ***independent third party contractors who are not employed by Uber*** *or any of its affiliates.'*[152]

The new forms of work based on online platforms, also referred to as the *gig-economy*, is raising concerns. Many self-employed people without employees working for platforms experience insecurity about their income. They have to work a relatively high number of hours to receive a minimum income.[153] Several times platform workers have reported unfavorable working conditions and underpayment.[154]

It is important to note that the increase in self-employed persons without employees is not *fully* linked to the rise of the platform economy.[155] After all, there are professions in the regular labour market that are considered to be vulnerable as well.[156] Questions have however arisen as to what will happen if the platform economy grows and people do not perform tasks to earn *additional income* anymore but to earn their *main source* of income.[157] It is argued that although a lack of bargaining power and security is not considered to be a large problem by many persons working for platforms *now,* a lack of bargaining power and security can become problematic *in the future* if the platform economy grows.[158] It looks like the role of digital labour market matching by means of platforms is rising,[159] and critics have accepted the general conception that the platform economy can lead to diminished protection of workers.[160]

1.5.3. Platforms challenging the legal framework

As discussed, the new self-employed are not protected under labour law as they are undertakings and not workers.[161] The existence of labour law is rooted in the aim to prevent the commodification of labour and to balance the inequality of bargaining power between employers and employees.[162] Exactly those two foundations form a challenge to platform work. First, there is the risk of the commodification of platform work.[163] Next to this, concerns are expressed regarding the extreme

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[152] Uber, '*Terms and Conditions*' (*Uber* 2017) <https://www.uber.com/legal/terms/nl/> Accessed 18 April 2019.
[153] *Canoy and Hellingman* (13) 184. See also NOS, 'Taxichauffeurs lopen in protestmars door Amsterdam' (*NOS* 19 April 2019) <https://nos.nl/video/2281178-uberchauffeurs-demonstreren-bij-hoofdkantoor-in-amsterdam.html> Accessed 20 April 2019.
[154] *Dillahaunt and Malone* (142) 2286. See also Homa Khaleeli, 'The truth about working for Deliveroo, Uber and the on-demand economy' (*The Guardian* 15 June 2016) <https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy> Accessed 18 April 2019.
[155] *Daskalova* (9) 5.
[156] *Canoy and Hellingman* (13) 184.
[157] *Ibid.*
[158] Bas ter Weel and others, *The rise and growth of the gig economy in the Netherlands* (*SEO Amsterdam Economics* 2018) 8.
[159] *Chan, Voortman and Rogers* (14) 2.
[160] *Ibid* 3.
[161] *Daskalova* (9) 1.
[162] *Rodgers* (69) 4.
[163] *De Stefano* (8) 472.

amount of power platforms exercise over both sides of the market when setting their terms and conditions.[164]

Platforms are thus challenging the current legal framework.[165] An increase of people working under precarious conditions is not only problematic for the workers themselves. Self-employed persons without employees taking health and safety risks to make themselves cheaper for their buyers can erode the bargaining position of workers towards their employers during collective labour negotiations. This is called '*social dumping.*'[166] Next to this, it can be argued from a democratic point of view that the setting of rules by platforms suffers from a lack of transparency and accountability as civil society stakeholders or regulators are not involved.[167]

1.6. Conclusion

In this section, a conclusion will be drawn on the first chapter.

The process of competition is central to the idea of a market.[168] Benefits of competition as compared to a monopoly are lower prices, better products, more choice for consumers and greater efficiency gains.[169] Although there is not one single objective of competition law, consumer welfare is at the moment the standard that the Commission and ACM apply when they assess competition law infringements and mergers.[170]

Competition law applies to undertakings: entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.[171] The cartel prohibition forms the core provision of both Dutch and European competition law. As Dutch and European competition law are applied at the same time when the agreement concerned affects interstate trade, the interpretation of Dutch competition law is highly influenced by the interpretation of European competition law.[172]

While competition law aims at protecting *product markets,* labour law on the other hand aims at protecting *labour markets.* Competition law tries to maintain competition on product markets but the labour market is a specific market in which fierce competition is considered undesirable.[173] Labour law recognizes that workers are first and foremost *people* and not just *commodities* that can

[164] *Dittrich* (4) 9.
[165] *Ibid* 1.
[166] *Canoy and Hellingman* (13) 184.
[167] *Dittrich* (4) 7.
[168] *Whish and Bailey* (21) 4-5.
[169] *Ibid* 5.
[170] Neelie Kroes, 'European Competition Policy – Delivering Better Markets and Better Choices' (*European Consumer and Competition Day* 15 September 2015) 2 <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm> Accessed 25 April 2019. See also *Whish and Bailey* (21) 19.
[171] Case-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161 para 21.
[172] The Commission has explained in its Guidelines how the concept of interstate trade should be interpreted. See: European Commission Notice, 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' [2004] OJ C101/81.
[173] *Van den Born, Van Damme and Van Witteloostuijn* (68) 4.

be bought and sold on the labour market. Regulation of the labour market should thus aim at pervading the human subject of labour law with dignity.[174] Collective labour agreements are essential in this regard. The ECJ has exempted them from the cartel prohibition. The Competition Act determines this specifically.

While Article 16 of the Competition Act allows *workers* to engage in collective bargaining agreements to negotiate labour conditions, the same cannot automatically be said for *self-employed* persons.[175] They are considered to be undertakings and fall under the scope of competition law. Where the collective setting of prices and contract terms is seen as a cartel and a clear *infringement* of competition law, it is considered to be the exercise of a *fundamental right* under labour law.[176] Agreements between self-employed persons covering prices or tariffs are most likely considered to restrict competition without prior assessment of the concrete effects of the agreement. The distinction between workers and self-employed persons is thus an important one.[177]

Precarious work is associated with work outside of the traditional 'standard employment relationship'.[178] Dimensions of precarious work are flexibility, insecurity, under-valuation and poor working conditions.[179] Self-employed work is referred to as 'non-standard' work. Literature on precarious work discusses several disadvantages of these non-standard contracts for self-employed persons.[180]

The increase in self-employed persons seems to be linked to the emergence of a '*new type of self-employed'*.[181] Social science literature describes how these new self-employed are often much less independent and financially stable than the traditional self-employed. Statistics show that self-employed persons without employees in the Netherlands often belong to the *working poor*. They are considered to be a group at risk of poverty.[182] The new self-employed do not benefit from the protection of labour law, nor do they benefit from opportunity-creating competition law.[183] It is important to note that self-employed persons without employees form a very heterogeneous group.[184] Not *all* self-employed persons work under precarious conditions.[185] This research will focus on involuntary self-employed.

Platforms are related to precarious work as critics have accepted the general conception that the platform economy can lead to diminished protection of workers.[186] The role of platforms in the digital

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[174] *Rodgers* (69) 4. See also *Rodgers* (70) 7.
[175] *Gebrandy and Kreijger* (62) 22.
[176] *Daskalova* (9) 9.
[177] *Ibid* 8.
[178] *Rodgers* (69) 2.
[179] *Grimshaw and Marchington* (101) 550. See also *Rodgers* (69) 3.
[180] *Rodgers* (69) 7.
[181] *Daskalova* (9) 4. See also *Buschoff and Schmidt* (113) 147-148.
[182] *The Netherlands Institute for Social Research* (118) 25-26.
[183] *Westerveld* (130).
[184] *Bernhardt* (126) 7.
[185] *Rodgers* (69) 8.
[186] *Chan, Voortman and Rogers* (14) 2.

labour market is rising.[187] Two concerns can be distinguished in this regard. First, there is the risk of the commodification of platform work.[188] Next to this, concerns are expressed regarding the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions.[189]

Concluding, competition law and labour law rely on different concepts. Competition law on the one hand aims at enhancing *consumer welfare*.[190] Labour law on the other hand aims at *protecting* workers.[191] These different concepts result in problems for self-employed persons: self-employed persons suffer from a lack of protection as competition law stands in their way to enter into collective agreements. More concrete, this results in self-employed persons being at risk of poverty.[192]

In the next chapter, a normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements will be established.

[187] *Ibid* 3.
[188] *De Stefano* (8) 472.
[189] *Dittrich* (4) 9.
[190] *Whish and Bailey* (21) 18-19.
[191] *Rodgers* (69) 4.
[192] *The Netherlands Institute for Social Research* (118) 29.

A normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements

2. Introduction

The goal of this chapter is to determine what an *adequate solution* to improve the economic position of self-employed persons would look like. In order to do so, a *normative framework* to assess the desirability of tackling the problem as described in the previous chapter will be established. The outcome will be used in the fourth chapter to further develop an adequate solution that enables platform workers to enter into collective bargaining agreements.

In order to establish a normative framework, this chapter will start with a brief recapitulation of the problem as identified in the previous chapter. Next, *three elements* establishing a normative framework to find an adequate solution for the problem of self-employed persons being at a risk of poverty will be discussed. Subsequently, it will be argued why allowing self-employed persons to enter into *collective bargaining agreements* could potentially be used as a tool to tackle this problem, as long as the three elements are balanced against one another. In the fourth section, it will be discussed why this research focuses on finding a *competition law solution*. Finally, a conclusion will be drawn on the four sections altogether.

2.1. Recapitulation: the identified problem

Competition law and labour law rely on different concepts. For many years, competition law has played an important role in facilitating the *single market*.[193] Nowadays, enhancing *consumer welfare* seems to be the most important goal of competition law.[194] Although it can be questioned whether the ECJ *completely* accepted this focus on consumer welfare,[195] it has been argued that consumer welfare has been the ultimate goal of competition law over the past years.[196] Labour law on the other hand aims at *protecting workers*.[197] While Article 16 of the Competition Act allows *workers* to engage in collective bargaining agreements to negotiate labour conditions, the same cannot automatically be said for *self-employed* persons.[198] They are considered to be undertakings and fall under the scope of competition law.

This results in self-employed persons suffering from a lack of protection as competition law stands in their way to enter into collective agreements. More concrete, this results in self-employed persons being at risk of poverty.[199] The increase in self-employed persons in the Netherlands seems to be

[193] *Whish and Bailey* (21) 23.
[194] *Ibid* 19.
[195] *Gerbrandy* (31) 131.
[196] *Daskalova* (24) 131.
[197] *Rodgers* (69) 4.
[198] *Gebrandy and Kreijger* (62) 22.
[199] *The Netherlands Institute for Social Research* (118) 29.

linked to the emergence of a '*new type of self-employed'*.[200] Statistics show that self-employed persons without employees in the Netherlands often belong to the working poor.[201]

2.2. Three elements of a normative framework to establish an adequate solution

The previous chapter has shown that there is a tension between competition law and labour law. While labour law aims at preventing the commodification of human beings and limiting the inequality of bargaining power between employers and employees,[202] competition law is used as a tool to enhance consumer welfare.[203] A solution to the problem of self-employed persons being at a risk of poverty would thus need to balance several conflicting interests. In this section, it will be argued that there are *three interest* that need to be balanced against one another. It will be argued that an adequate solution to resolve the problem must balance these three elements. The three elements will now be discussed one by one.

2.2.1. Protecting platform workers against poverty

The first element of the normative framework is the need to *protect self-employed persons* against poverty. The earliest justification of collective bargaining was found in the structural imbalance of power in the labour market. The economic dependence of platform workers underlines this justification.[204] In a perfectly competitive labour market, workers can quit their jobs at no cost and they will obtain comparable work for a comparable salary at another employer.[205] Labour markets are not highly competitive though.[206] In fact, research in the USA shows that *employer monopsony* prevails in a large number of labour markets.[207] Employers with monopsony power are able to repress wages and to degrade working conditions in order to save costs.[208] As it has been argued that self-employed persons without employees are similar to precarious workers and self-employed persons without employees in the Netherlands often belong to the working poor,[209] it can be argued that it is necessary to find a way to improve their economic position.

The goal of protecting persons against working under precarious conditions fits Article 3(3) of the Treaty on European Union ('*TEU')* which aims at establishing a *social market economy.* The article states:

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[200] *Daskalova* (9) 4. See also *Buschoff and Schmidt* (113) 147-148.
[201] *The Netherlands Institute for Social Research* (118) 25-26.
[202] *Rodgers* (69) 7.
[203] *Whish and Bailey* (21) 19.
[204] Dagmar Schiek and Andrea Gideon, 'Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier to smart cities?' (2018) 32 International Review of Law, Computers And Technology 275, 284.
[205] Iona Elena Marinescu and Eric Posner, 'Why has Antitrust Law Failed Workers?' (2019) SSRN 1, 4-5.
[206] *Marinescu and Posner* (205) 2.
[207] *Ibid* 7.
[208] *Ibid* 6.
[209] *The Netherlands Institute for Social Research* (118) 25-26.

> *'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive **social market economy**, aiming at full employment and **social progress**…'*[210]

From a human and social rights perspective, the goal of protecting persons against working under precarious conditions fits Article 12 of the Charter of Fundamental Rights for the European Union (the '*Charter*'). Article 12 states:

> *'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for **the protection of his or her interests**.'*[211]

Another important provision in this regard is Article 28 of the Charter that states:

> *'**Workers and employers**, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action **to defend their interests**, including strike action.'*[212]

Support for protecting self-employed persons against poverty can also be found in case law of the European Committee of Social Rights ('*ECSR'*). The ECSR recently ruled that '*self-employed workers should enjoy the right to bargain collectively through organisations that represent them, including in respect of remuneration for services provided, subject only to restrictions provided by law, pursuing a legitimate aim and being necessary in a democratic society*.'[213]

These human and social rights guarantees go *beyond* demanding higher wages or better working hours. They aim at the establishment of a working environment that generally supports fundamental rights in the workplace.[214] Schiek and Gideon formulate this as: '*The right to combine and engage in relation to working conditions also empowers citizens to take political engagement from the narrow realm of the traditional public sphere to the wider realm of the market place.'*[215]

An example of issues other than tariffs or working hours that could improve the position of self-employed persons, is customer rating.[216] The rating process taking place in a platform like Uber requires drivers to provide personal information while at the same time allowing customers to write

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[210] Consolidated Version of the Treaty on European Union [2012] OJ 326/13, Article 3(3).
[211] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 12.
[212] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 28.
[213] European Committee of Social Rights, Decision in Case No. 123/2016, *Irish Congress of Trade Unions v Ireland* [2018] para 95.
[214] *Schiek and Gideon* (204) 284.
[215] *Ibid.*
[216] *Ibid.*

ratings on drivers that can be offensive and can cause emotional stress.[217] Determining the boundaries of personal life may be a task that can be best performed by platforms and platform-workers collectively.[218]

Protecting platform workers will harm competition. It must however be noted that this harm to competition is *inherent* to collective labour agreements. The system of collective labour agreements under labour law is based on a balancing act between preserving the interests of employees *and* employers.[219] Higher salaries for *workers* harm competition and the consumer interest just like minimum-tariffs for self-employed persons without employees do. The ECJ recognizes this in the *Albany*-case, stating that *'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers.'*[220] If it is argued that the new self-employed are more similar to precarious workers than to entrepreneurs,[221] at least the costs and benefits of allowing self-employed persons to negotiate working conditions should be balanced against one another.

2.2.2. Protecting consumer welfare

Although harm to competition might be inherent to collective labour agreements, that does not mean that the need to protect consumer welfare can be ignored. There are serious drawbacks resulting from protecting self-employed persons against working under precarious conditions that need to be taken into consideration. As mentioned, enhancing consumer welfare seems to be the most important goal of competition law nowadays.[222] Therefore, the second element of the normative framework is the need to protect *consumer welfare*.

First of all, there is the risk that groups of self-employed persons will be offered protection who do not need it.[223] The group of self-employed persons without employees is a heterogeneous one.[224] As mentioned, the increase in the number of self-employed persons seems to be linked to the emergence of a '*new type of self-employed*'.[225] Social science literature describes how these new self-employed are often much less independent and financially stable than the traditional self-employed.[226] There are however still professions like physicians, lawyers and accountants for which self-employment is

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[217] *Schiek and Gideon* (204) 284. See also Uber, 'Een chauffeur beoordelen' (*Uber* 2019*)* <https://help.uber.com/riders/article/een-chauffeur-beoordelen?nodeId=478d7463-99cb-48ff-a81f-0ab227a1e267> Accessed 26 April 2019. See also Ridesharing Driver, 'Fired from Uber: Why drivers get deactivated, and how to get reactivated' (*Ridesharing Driver* 7 February 2018) <https://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/> Accessed 26 April 2019.
[218] *Schiek and Gideon* (204) 285.
[219] *Canoy and Hellingman* (13) 191.
[220] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430 para 59.
[221] *Daskalova* (9) 1.
[222] *Whish and Bailey* (21) 19.
[223] *Canoy and Hellingman* (13) 191.
[224] *Bernhardt* (126) 7.
[225] *Buschoff and Schmidt* (113) 147-148. See also *Daskalova* (9) 4.
[226] *Buschoff and Schmidt* (104) 147-148. See also *Daskalova* (9) 4.

not uncommon.[227] Persons working in these professions will most likely not need to be protected against working under precarious conditions. It is important to ensure that a solution to improve the economic position self-employed person tackles *the right persons*.

Tackling the right self-employed persons relates to the second and most important drawback of protection self-employed persons: the risk of collusion or tariffs being set too high. This would run contrary to the interest of the consumer.[228] Competition law is very critical of collective conduct resulting in higher prices or conditions that would not have been reached under normal competition.[229] Although the Commission has said that consumer welfare does not include prices *only* but also quality, choice and innovation, the Commission has put an emphasize on 'price' as a parameter of consumer welfare.[230] Protecting self-employed persons by way of enabling them to set minimum-tariffs will most likely result in higher prices for consumers.[231] This effect can be increased if protective measures will be offered to those self-employed persons who do not even need to be protected.

Finally, an undesired side-effect of protecting self-employed persons without employees against poverty is the risk that professions are being supported that would otherwise have faded. These superannuated professions would 'artificially' sustain.[232] If a protected group of self-employed persons would face competition from a new and better service, protective measures could result in consumers paying a higher price for the service than they would have paid under normal competition. This is not in the interest of the consumer.

2.2.3. Protecting economic freedom

The third element of the normative framework is the need to protect *economic freedom*. As mentioned in paragraph 1.1.1, it has been argued that the market mechanism can lead to individual freedom.[233] This *ordo-liberal* point of view formed an important part of the foundations of competition law.[234] In this view, competition law has been perceived as a tool to obtain *economic freedom*.[235] According to ordo-liberals, the state needs to structure the market to ensure market outcomes that are acceptable to society. Individual freedom can be guaranteed through the market mechanism, but that does not mean that the state can leave the market unregulated. That is, firms will strive for market power and this will limit the *economic freedom* of others which will result in market outcomes that are perceived

[227] *Daskalova* (9) 4. See also *Heringa and VerLoren van Themaat* (112).
[228] *Ibid.*
[229] *Gebrandy and Kreijger* (62) 22.
[230] *Daskalova* (24) 145-146.
[231] *Canoy and Hellingman* (13) 191.
[232] *Ibid.*
[233] *Gerbrandy* (31) 129.
[234] *Ibid.*
[235] *Ibid* 130.

as unfair by society.[236] According to the ordo-liberal view, competition law must not only aim at ensuring the right *market outcomes* but must take *societal concerns* into account as well.[237]

In this paragraph, it will be argued that protecting economic freedom should be the third element of the normative framework, even though this goal is considered to be part of '*old competition law'*.[238] It has already been explained that consumer welfare has been the ultimate goal of competition law over the past years.[239] Yet, while it was expected that this standard would bring clarity, the consumer welfare standard has resulted in much uncertainty.[240] It is not self-evident to determine *who* qualifies as a consumer and *what* consumer welfare exactly means.[241]

Besides, while the focus on consumer welfare is considered to be an 'economic approach',[242] this does not mean that taking societal concerns into account *automatically* clashes with economic science.[243] Interests other than consumer interests are often called 'non-economic interests' by competition lawyers.[244] It is however argued that from an economic perspective, there is no such thing as an '*economic end*'.[245] In economic science, only *individuals* have interests; economic science has no interests or goals *in itself*.[246] Also, consumer welfare is often mistaken to be the same as 'efficiency'.[247] However, efficiency means that one tries to reach the goals as set by individuals, without spilling resources.[248] Thus, if the legislator or society as a whole determines that improving the social-economic position of platform workers is an important goal, an economist would not *necessarily* want to prevent this.

Concerns are expressed regarding the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions,[249] limiting the economic freedom of both consumers and platform workers. It can be argued from a *democratic point of view* that the setting of rules by platforms suffers from a lack of transparency and accountability as civil society stakeholders or regulators are not involved.[250] It has been noted that self-employed persons working for platforms are harmed by the way in which platforms exercise their power. Yet, the lack

[236] *Gerbrandy* (31) 129-130.
[237] *Ibid* 130.
[238] *Gerbrandy* (31) 130. See also Heike Schweitzer and Kiran Klaus Patel, 'EU Competition Law in Historical Context Continuity and Change' in Heike Schweitzer and Kiran Klaus Patel (eds) *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 207-230.
[239] *Daskalova* (24) 131.
[240] *Ibid* 142.
[241] *Ibid* 132.
[242] *Ibid* 158.
[243] Eric van Damme, 'Goede marktwerking en overige publieke belangen' (2017) 1 Markt & Mededinging 5, 5-6.
[244] *Gerbrandy* (31) 131.
[245] Lionel Robbins, *An essay on the nature and significance of economic science* (MacMillan 1932) 126. See also *Van Damme* (243) 5.
[246] *Van Damme* (243) 5.
[247] *Daskalova* (24) 141.
[248] *Van Damme* (243) 6.
[249] *Dittrich* (4) 9.
[250] *Dittrich* (4) 7.

of transparency and accountability as a result of the setting of rules by platforms seems to be able to harm *society as a whole* and not just platform workers. Besides, the societal impact of self-employed persons not being able to enter into collective bargaining agreements will most likely increase as the role of platforms in the digital labour market is rising.[251] The European Commission notes that the platform-economy can be considered as a '*structural shift*'.[252] Therefore, it is necessary that the state structures the market in such a way that market outcomes are accepted by society.

2.3. Collective labour agreements to improve the economic position of platform workers

Finding an adequate solution that balances the three elements as described above is not an easy task. The shortcomings of a reliance on free market processes often lead to far-reaching suggestions in the public debate to disengage the Competition Act. Slightly less radical is the suggestions to oblige self-employed persons to insure themselves against disability. This results however in forcing persons to insure themselves who do not need this.[253] Again, the group of self-employed persons without employees is a heterogeneous one.[254] Another 'solution' that has been opted is for the government to impose quota on undertakings of workers who have an employment contract. Quota however reduce flexibility and the exact percentage of workers to be imposed is quite arbitrary.[255]

Another option to improve the economic position of platform workers is to allow them to enter into collective bargaining agreements in order to set minimum-tariffs and improve working conditions. As the group of self-employed persons without employees is a heterogeneous one,[256] self-employed persons should be enabled to enter into collective bargaining agreements *only* when the three elements are properly balanced against one another.

Labour unions have advocated for the possibility for self-employed persons to enter into collective labour agreements in order to set minimum-tariffs. The unions argue that many self-employed persons are not truly independent.[257] Given the fact that labour unions stand up for the rights of workers, their point of view is not surprising. The issue is however discussed in politics as well. The Dutch government is exploring its options for the enactment of new legislation concerning self-employed persons. The government is looking into the ways in which self-employed persons without employees set their tariffs and is discussing the protection of those who work for low

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[251] *Chan, Voortman and Rogers* (14) 3.
[252] European Commission, 'A European Agenda for the Collaborative Economy' (*Commission* 2016) 11.
[253] *Canoy and Hellingman* (13) 190.
[254] *Bernhardt* (126) 7.
[255] *Canoy and Hellingman* (13) 190.
[256] *Bernhardt* (126) 7.
[257] NOS, 'Vakbonden: tariefafspraak voor zzp'ers moet kunnen' (*NOS* 27 February 2017) <https://nos.nl/artikel/2160454-vakbonden-tariefafspraak-voor-zzp-er-moet-kunnen.html> Accessed 24 April 2019.

tariffs with the Commission.[258] In the coalition agreement it is stated that new legislation should ensure that for self-employed persons without employees an employment contract is presumed, if the self-employed is working under a low tariff in combination with a long duration of the agreement.[259]

Next to this, the ACM is investigating how to prevent social dumping of self-employed persons without employees. The chairman of the ACM has stated that the ACM tries to find an exception within the legal framework that would enable vulnerable self-employed persons to enter into collective tariff agreements with their buyers.[260]

Moreover, Advocate General (‘*AG’)* Wahl argued in his opinion in the *FNV KIEM*-case that *‘...preventing social dumping is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation’*.[261] The *FNV KIEM*-case will be discussed in more detail in chapter 3. Wahl’s opinion was not followed by the ECJ.[262] Besides, his suggestion of a collective agreement for self-employed was aimed at preventing *social dumping*, which erodes the bargaining position of workers, rather than at protecting self-employed persons.[263] Allowing self-employed persons to enter into collective agreements with their buyers is still an interesting option to investigate. Collective labour agreements are used as a tool for *workers* to strengthen their bargaining position and to prevent commodification of labour. If it is argued that the new self-employed are more similar to precarious workers than to entrepreneurs,[264] it makes sense to search for a solution that stays close to the solution that has been used to protect workers.

Several advantages of platform workers being able to enter into collective bargaining agreements can be distinguished. First of all, this solution preserves flexibility. It allows self-employed people and their buyers to negotiate working conditions that fit the needs of the specific sector.[265] This is important as the group of self-employed persons without employees is a heterogeneous one.[266] It

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[258] Government of the Netherlands, ‘Kabinet stap verder met wetgeving zzp’ (*Government of the Netherlands* 22 June 2018) <https://www.rijksoverheid.nl/actueel/nieuws/2018/06/22/kabinet-stap-verder-met-wetgeving-zzp> Accessed 23 April 2019).
[259] Government of the Netherlands, Regeerakkoord ‘Vertrouwen in de Toekomst’ (*Government of the Netherlands* 10 October 2017) <https://www.kabinetsformatie2017.nl/documenten/publicaties/2017/10/10/regeerakkoord-vertrouwen-in-de-toekomst> Accessed 5 May 2019, 25.
Alt assumes that a tariff will be considered low if it is set between 15 and 18 euros per hour. See: Jan Wouter Alt, ‘De gedwongen vrijheid van de maaltijdbezorger en de plannen van het kabinet Rutte III’ (2018) 5 Tijdschrift Recht en Arbeid 35, 38.
[260] Job Woudt, ‘Toezichthouder ACM zoekt uitweg om ‘sociale dumping’ zzp’er tegen te gaan’ (*Het Financieele Dagblad* 15 February 2019) <https://fd.nl/economie-politiek/1288983/toezichthouder-acm-zoekt-uitweg-om-sociale-dumping-zzp-er-tegen-te-gaan> Accessed 20 April 2019.
[261] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2215, Opinion of AG Wahl, para 79.
[262] *Canoy and Hellingman* (13) 189.
[263] *Ibid* 184.
[264] *Daskalova* (9) 1.
[265] *Schiek and Gideon* (204) 285.
[266] *Bernhardt* (126) 7.

seems that state regulation is less capable to preserve this flexibility.[267] Collective bargaining agreements are also flexible in the sense that the need for self-employed persons to be characterized as workers would disappear. Some self-employed *do* enjoy their independent status after all.[268]

Specific features of the platform economy may be challenging to organize *collective* organization. The work performed by platform workers relies on technology that allows working on an individual basis without personal contact. Although this reduction of face to face communication appears in other forms of precarious work as well, it is enhanced by technology based work.[269] But while many platform workers may embrace individuality, they could still benefit from collectively organized services like trainings for being successful in platform-work or general time-management.[270]

2.4. The choice of a competition law solution

An adequate solution to improve the economic position of self-employed persons can be sought in different areas. A regulatory approach focusing on a specific sector could be an option.[271] A private regulatory approach, like codes of conduct, has been opted as well.[272] This research however will focus on a *competition law solution*. The choice for the search of a competition law solution is not self-evident.[273] It has been argued that if self-employed persons without employees suffer from a lack of protection, labour law is the most logical tool to use, not competition law. Van den Born and others state: *'One does not give a sling to someone having an injured knee*'.[274]

The use of *labour law* to tackle the inequality of bargaining power between self-employed persons and platforms and the resulting low income of self-employed persons is not unproblematic though. Labour law applies to workers. In order to cover the most precarious workers in the platform economy, the definition of 'worker' would need to be stretched to the point where it loses its core.[275] The definition of 'worker' will be further elaborated on in chapter 3. In chapter 3, it will be explained why the new self-employed will have difficulties fitting the status of worker.[276]

Competition law is considered to form a problem for the protection of self-employed persons; the cartel prohibition limits their possibilities to enter into collective labour agreements. It may thus seem odd to search for a solution to this problem *within* competition law. Yet, competition law also prevents distortion of the market.[277] It is competition law that aims at preventing the abuse of economic power. As mentioned in paragraph 1.1.1, the redistribution of wealth can be seen as an

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[267] *Schiek and Gideon* (204) 285.
[268] Matthew Taylor and others, *Good Work: the Taylor Review of Modern Working Practices* (*Government of the United Kingdom* 11 July 2017). See also *Schiek and Gideon* (204) 284.
[269] *Schiek and Gideon* (204) 285.
[270] *Ibid.*
[271] *Daskalova* (9) 26. See also *Canoy and Hellingman* (13).
[272] *Daskalova* (9) 26-27.
[273] *Ibid* 27.
[274] *Van den Born, Van Damme and Van Witteloostuijn* (68) 29.
[275] *Daskalova* (9) 10.
[276] *Ibid* 20.
[277] *Ibid* 27.

objective of competition law as well. In this sense, economic *equity* is promoted rather than economic *efficiency*.[278] As concerns are expressed regarding the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions,[279] it makes sense to explore the option of using competition law as a tool to tackle this problem.[280]

2.5. Conclusion

In this section, a conclusion on the second chapter will be drawn.

Competition law and labour law rely on different concepts. Nowadays, enhancing *consumer welfare* seems to be the most important goal of competition law.[281] Labour law on the other hand aims at *protecting workers*.[282] Self-employed persons without employees suffer from a lack of protection as competition law stands in their way to enter into collective labour agreements. More concrete, this results in self-employed persons being at risk of poverty.[283]

An adequate solution to this problem must balance three conflicting interests against one another. First, there is the need to *protect self-employed persons* against poverty. The earliest justification of collective bargaining was found in the structural imbalance of power in the labour market. The economic dependence of platform workers underlines this justification.[284] The goal of protecting persons against working under precarious conditions fits Article 3(3) of the Treaty on European Union (‘*TEU’)* which aims at establishing a *social market economy.* From a human and social rights perspective, the goal of protecting persons against working under precarious conditions fits Article 12 and 28 of the Charter.

Second, there is the need to protect *consumer welfare.* The most important drawback of protecting self-employed persons is the risk of collusion or tariffs being set too high. This would run contrary to the interest of the consumer.[285] Competition law is very critical of collective conduct resulting in higher prices or conditions that would not have been reached under normal competition.[286] Protecting self-employed persons by way of enabling them to set minimum-tariffs will most likely result in higher prices for consumers.[287] This effect can be increased if protective measures will be offered to those self-employed persons who do not even need to be protected. Finally, an undesired side-effect of protecting self-employed persons without employees against poverty is the risk that professions are being supported that would otherwise have faded. These superannuated professions would ‘artificially’ sustain.[288] This is not in the interest of the consumer.

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[278] *Whish and Bailey* (21) 20.
[279] *Dittrich* (4) 9.
[280] *Daskalova* (9) 27.
[281] *Whish and Bailey* (21) 19.
[282] *Rodgers* (69) 4.
[283] *The Netherlands Institute for Social Research* (118) 29.
[284] *Schiek and Gideon* (204) 284.
[285] *Ibid.*
[286] *Gebrandy and Kreijger* (62) 22.
[287] *Canoy and Hellingman* (13) 191.
[288] *Ibid.*

Third, there is the need to protect *economic freedom.* According to the ordo-liberal view, competition law must not only aim at ensuring the right *market outcomes* but must take *societal concerns* into account as well.[289] Even though this goal is considered to be part of '*old competition law*',[290] concerns are expressed regarding the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions,[291] limiting the economic freedom of both consumers and platform workers. It can be argued from a *democratic point of view* that the setting of rules by platforms suffers from a lack of transparency and accountability as civil society stakeholders or regulators are not involved.[292] This is not only harmful to platform workers but to *society as a whole*. Besides, the societal impact of self-employed persons not being able to enter into collective bargaining agreements will most likely increase as the role of platforms in the digital labour market is rising.[293] Therefore, it is necessary that the state structures the market in such a way that market outcomes are accepted by society.

An option to improve the economic position of platform workers is to allow them to enter into collective bargaining agreements in order to set minimum-tariffs and improve working conditions. As the group of self-employed persons without employees is a heterogeneous one,[294] self-employed persons should be enabled to enter into collective bargaining agreements *only* when the three elements are balanced against one another. This solution preserves flexibility. It allows self-employed people and their buyers to negotiate working conditions that fit the needs of the specific sector.[295] Collective bargaining agreements are also flexible in the sense that the need for self-employed persons to be characterized as workers would disappear. Some self-employed *do* enjoy their independent status after all.[296]

A solution to the problem as described above can be sought in different areas. This research focuses on a *competition law solution.* Although it may seem odd to search for a solution to this problem *within* competition law, the redistribution of wealth can be seen as an objective of competition law. In this sense, economic *equity* is promoted rather than economic *efficiency*.[297] As concerns are expressed regarding the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions,[298] it makes sense to explore the option of using competition law as a tool to tackle this problem.[299]

In the next chapter, the different ways in which competition law can be used to improve the economic position of platform workers will be discussed.

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[289] *Gerbrandy* (31) 130.
[290] *Gerbrandy* (31) 130. See also *Schweitzer and Patel* (238) 207–230.
[291] *Dittrich* (4) 9.
[292] *Ibid* 7.
[293] *Chan, Voortman and Rogers* (14) 3.
[294] *Bernhardt* (126) 7.
[295] *Schiek and Gideon* (204) 285.
[296] *Taylor and others* (268). See also *Schiek and Gideon* (204) 284.
[297] *Whish and Bailey* (21) 20.
[298] *Dittrich* (4) 9.
[299] *Daskalova* (9) 27.

3. Introduction

The goal of this chapter is to explore the different options Article 101 TFEU currently offers to allow platform workers to enter into collective bargaining agreements to set minimum-tariffs and improve working conditions. First, an overview of case law will be drawn. In the second section, the case law as described in the first section will be applied to platform workers. The third section will explore whether Article 101(3) TFEU could be used to allow collective bargaining agreements between self-employed persons. Next, the *Wouters* doctrine and its relevance to collective labour agreements will be discussed. The fifth section will describe the possibilities of Article 7 of the Competition Act for self-employed persons. Finally, a conclusion will be drawn on the five sections altogether.

3.1. Case law: an overview

Case law of the ECJ is very important for competition law. It is thus necessary to identify and discuss the most important cases relating to the inability of self-employed persons without employees to enter into collective bargaining agreements.

In this section, case law of the ECJ regarding the distinction between workers and undertakings will be discussed. Next to this, the ECJ has developed a specific approach for collective labour agreements which will be discussed as well.[300] Cases will be discussed in chronological order.

3.1.1. Becu and others: the difference between workers and undertakings

In the case of *Becu and others,* the ECJ distinguished workers from undertakings for the purpose of competition law.[301] Jean Claude Becu is the director of 'Smeg', a company that operates a grain warehousing business in the port of Ghent.[302] For the loading and unloading of grain boats, Smeg uses recognized dockers. For other work, which takes place when the grain is in the silos, Smeg uses workers who are employed by Smeg or temporary workers made available by an agency.[303] The Public Prosecutor's Department brought proceedings against Smeg and Mr Becu because work was carried out by non-recognized dockers, in breach of Belgian legislation.[304] Belgian legislation requires the loading and unloading of grain boats to be performed by recognized dockers, thereby granting those persons special or exclusive rights within the meaning of Article 90(1), the current Article

[300] *Van de Gronden* (46) 59.
[301] Case C-22/98 *Jean Claude Becu and others* ECLI:EU:C:1999:419. See also *Daskalova* (9) 18.
[302] Case C-22/98 *Jean Claude Becu and others* ECLI:EU:C:1999:419 para 14.
[303] *Ibid* 15.
[304] *Ibid* 16.

106(1) TFEU.[305] As this provision applies to undertakings, the question arises whether the dockers are *workers* or *undertakings.*[306]

The ECJ reasons that conditions relating to the work and pay of dockers are governed by collective labour agreements.[307] Next to this, the recognized dockers are used by undertakings to perform work under fixed-term contracts of employment for the purpose of clearly defined tasks.[308] The ECJ holds that the work performed by the dockers is *'characterized by the fact that they perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as 'workers'*.[309] They are for the duration of their employment relationship '*incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law*.'[310]

It is thus commercial dependence and the fact that workers are being incorporated into the undertaking concerned that distinguishes workers from undertakings.[311]

3.1.2. Albany: the 'social exception'

In 1999, the ECJ gave its ruling in the *Albany*-case.[312] The case was brought up by a Dutch textile company. Textile unions and employers in the Netherlands had entered into an agreement establishing a pension fund scheme for workers in the industry. The Dutch Minister of Social Affairs made the scheme compulsory for all companies in the textile industry. Textile company 'Albany' did not want to take part in this deal and tried to exempt itself,[313] relying on Article 81(1) of the EC Treaty (currently Article 101(1)TFEU).[314] Albany claimed that mandatory enrolment in the pension scheme undermined its competitiveness.[315]

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[305] *Ibid* 23.
[306] *Ibid* 24.
[307] *Ibid* 25.
[308] *Ibid.*
[309] *Ibid* 26.
[310] *Ibid.*
[311] Martin Risak and Thomas Dullinger, 'The concept of 'worker' in EU law - Status quo and potential for change' (*European Trade Union Institute* 2018) <https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change> Accessed 29 April 2019, 43. See also *Daskalova* (9) 18.
[312] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430. The ECJ applied the same reasoning in Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* ECLI:EU:C:1999:437 and in Case C-114/97 *Brentjens' Handelsonderneming BV and Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* ECLI:EU:C:1999:434.
[313] Eurofound, 'Competition law and collective agreements' (*Eurofound* 12 January 2011) <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/competition-law-and-collective-agreements> Accessed 29 April 2019.
[314] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33, Article 81(1).
[315] *Eurofound* (313).

The ECJ ruled as follows. The Court emphasized that the EU does not only prevent competition in the internal market from being distorted, but also establishes a policy in the social sphere. It is a task of the EU to promote a '*high level of employment and of social protection*'.[316] The ECJ focused on the current Articles 151, 154, 155 and 156 of the TFEU.[317] These provisions emphasize the objective of social dialogue and collective bargaining between employers and employees at both the national and the EU level.[318] The ECJ reached the following conclusion:

> *'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*
>
> *It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.'*[319]

Concluding, collective labour agreements are immune from the cartel prohibition if two conditions are met. First, the agreement concerned must be the result of a collective negotiation between employers and labour unions. Second, the agreement concerned must focus on labour or employment conditions.[320]

3.1.3. Pavel Pavlov: in continuation of Albany

In the case of *Pavel Pavlov and others*, Mr Pavlov and four other medical specialists objected to their compulsory membership to a pension scheme for medical specialists.[321] The medical specialists argued that they belong to a different fund. Therefore, they have not paid contributions for a few years.[322] The Medical Specialist Fund orders them to pay their premiums.[323]

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[316] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430 para 54. The ECJ refers to the current Article 3(3) TEU.
[317] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430 para 55-58.
[318] *Eurofound* (313).
[319] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:430 para 59-60.
[320] *Van de Gronden* (46) 59.
[321] Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428. See also *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECJ Press release 57/00 <https://curia.europa.eu/en/actu/communiques/cp00/aff/cp0057en.htm> Accessed 30 April 2019.
[322] Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428 para 43.
[323] *Ibid* 44.

The ECJ recalls that decisions taken by organizations representing employers and workers, in the context of a collective agreement, to set up a compulsory pension scheme do *not* fall under the scope of the cartel prohibition.[324] However, this exclusion does not automatically apply to funds which have *not* been set up in the context of collective agreements.[325]

The medical specialists are undertakings and their professional body, the '*Stichting Pensioenfonds Medische Specialisten',* is an association of undertakings.[326] A decision taken by the members of that liberal profession to create a supplementary pension fund restricts competition, but *not to an appreciable extent*.[327] The costs of the supplementary pension scheme only have a marginal and indirect influence on the final costs of the services offered by medical specialists.[328] The mandatory membership of the pension fund is thus not in breach with competition law.[329] Concluding, the *Albany*-exception does not automatically apply to funds which have *not* been set up in the context of collective agreements.[330]

3.1.4. Allonby: the concept of 'worker'

Debra Allonby was a part-time lecturer at a College. Her employment-contract was terminated.[331] Next, she was re-employed at the same College as a self-employed lecturer through an agency.[332] Debra Allonby's income decreased after she became self-employed.[333] As many of the self-employed lecturers were women, Allonby filed a complaint against the College and the United Kingdom for sex-discrimination.[334] This paragraph will not discuss the claim regarding sex-discrimination. The case is an interesting one though as the ECJ discusses the concept of 'worker'.

AG Geelhoed states that re-employing former workers as independent contractors can be used as a tool '*to evade the consequences of employment-protection legislation*' or '*legislation which seeks to give effect to fundamental legal principles in regard to the employment market.*'[335] The ECJ rules that there

[324] Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428 para 67.
[325] *Ibid* 68.
[326] *Ibid* 77 and 89.
[327] *Ibid* 97.
[328] *Ibid* 95.
[329] *Ibid* 99.
[330] *Ibid* 68.
[331] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 17-18.
[332] *Ibid* 18-19.
[333] *Ibid* 19.
[334] *Ibid* 23.
[335] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2003:190, Opinion of AG Geelhoed, para 45.

is not one single definition of 'worker' under EU law.[336] The definition '*varies according to the area in which the definition is to be applied*'.[337] The term 'worker' cannot be interpreted restrictively.[338]

The fact that someone is classified as self-employed under *national law* does not exclude the possibility that someone is classified as a worker under Article 141(1) EC '*if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.*'[339] The ECJ rules that '*it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.*'[340] Concluding, even if someone is classified as a self-employed person under national law, this person could still be considered as a worker if his independent status is '*merely notional'.*[341]

3.1.5. Jany and others: no *de minimis* for the self-employed

In the case of *Jany and others,* the Dutch government wanted to know whether sex workers from Poland and Czech Republic are considered to be self-employed. This would mean that they could take up economic activities under the Association Agreements.[342] The Dutch government argued that there are some 'minimum requirements' in order to be considered as self-employed, like performing skilled work, having a business plan, investment and long-term commitment.[343] The ECJ did not follow this argument and stated:

> *'There is nothing in the context or purpose of the Association Agreements between the Communities, on the one hand, and Poland and the Czech Republic, on the other, to suggest that they intended to give the expression 'economic activities as self-employed persons' any meaning other than its* ***ordinary meaning of economic activities*** *carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility.'*[344]

There is thus no *de minimis* rule that exempts self-employed persons without employees that do not fit 'entrepreneurial criteria' from the cartel prohibition.[345]

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[336] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 63.
[337] *Ibid.*
[338] *Ibid* 66.
[339] *Ibid* 71. Article 141(1) EC is the provision that guarantees equal pay for men and women for equal work.
[340] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 72.
[341] *Ibid* 71.
[342] *Daskalova* (9) 15. See also Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616 para 24.
[343] *Daskalova* (9) 15. See also Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616 para 24.
[344] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616 para 37.
[345] *Daskalova* (9) 15.

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3.1.6. FNV KIEM versus the Netherlands: the false self-employed

The Jany-case made clear that competition law applies to undertakings of all sizes. Small undertakings are not exempted from the cartel prohibition.[346] The main question is whether an entity is engaged in an 'economic activity'.[347] An exception is however created by the ECJ in the *FNV KIEM*-case. In this case, the ECJ distinguishes 'false self-employed' from genuine self-employed persons.[348]

FNV Kunsten Informatie en Media (KIEM) was a trade union that represented both regularly employed orchestra musicians and substitute orchestra musicians.[349] The substitute musicians had a freelance status.[350] The collective labour agreement as concluded by the employees association FNV KIEM and employers association 'Association of Foundations for Substitutes in Dutch Orchestras' laid down a provision concerning minimum tariffs for the substitute musicians. These minimum fees applied to both substitute musicians hired under an employment contract *and* to substitutes being self-employed.[351]

The NMa issued a document in which it stated that fixing minimum tariffs on behalf of self-employed musicians breaches competition law.[352] The NMa emphasized that the *Albany-exception* cannot be used to exempt the employment or working conditions of undertakings, which is what self-employed persons are.[353] FNV KIEM brought the case to court and argued that it is allowed for self-employed persons to enter into a collective bargaining agreement with employers to set minimum tariffs.[354]

The Hague Court of Appeal referred two preliminary questions to the ECJ. First, the court asked if a collective labour agreement providing for minimum fees for self-employed persons, who perform the same work for an employer as regular employees do, falls outside the scope of Article 101 TFEU.[355] Second, the court wanted to know if the first question is answered in the negative, whether the provision would fall outside the scope of Article 101 TFEU because the provision intends to directly or indirectly improve working conditions of *employees.*[356]

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[346] *Daskalova* (9) 17. See also Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616.
[347] Case-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161.
[348] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 31. See also *Daskalova* (9) 18.
[349] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 7. See also *Daskalova* (9) 18.
[350] *Daskalova* (9) 19.
[351] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 8.
[352] Dutch Competition Authority, *Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet: Visiedocument* (*NMa* 2007) 5.
[353] *Ibid.* See also *Gebrandy and Kreijger* (62) 20.
[354] *Daskalova* (9) 19.
[355] *Daskalova* (9) 19. See also Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 16.
[356] *Daskalova* (9) 19. See also Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 16.

3.1.6.1. Opinion of AG Wahl: the prevention of *social dumping*

AG Wahl did not discuss the similarity between the work performed by the orchestra substitutes having an employment contract and the self-employed substitutes and their similar weaker bargaining position.[357] Wahl suggests that collective bargaining agreements for self-employed persons can be allowed if the *purpose* of these agreements is to prevent '*social dumping'*.[358] A two-step test needs to be performed in this regard. First, the national court must determine that '*there exists a real and serious risk of social dumping'*.[359] Second, the court must determine '*whether the provisions in question are necessary to prevent such dumping. There must be an actual possibility that, without the provisions in question, a not insignificant number of workers might be replaced with self-employed persons at lower costs. This phenomenon might occur through the immediate dismissal of workers or through gradual economisation by not replacing workers whose contract has come to an end*.'[360]

Concluding, Wahl argues that in general, self-employed persons *do* fall under the scope of the cartel prohibition. The ECJ has always referred to employment and working conditions of *employees* and has never extended this to self-employed persons.[361]

3.1.6.2. Judgement of the ECJ: the false self-employed

The ECJ did not entirely follow the approach of Wahl. To some extent the ECJ agreed to Wahl though:

> *'... it follows that a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and* ***cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.'***[362]

Self-employed persons, being undertakings, are thus not excluded from the cartel prohibition. The ECJ continues however by introducing the concept of the *'false self-employed'*:

> *'That finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated,* ***are in fact 'false self-***

[357] *Daskalova* (9) 19.
[358] *Ibid.*
[359] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2215, Opinion of AG Wahl, para 89.
[360] *Ibid.*
[361] *Ibid* 27. See also *Daskalova* (9) 19.
[362] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 30.

> ***employed', that is to say, service providers in a situation comparable to that of employees.'***[363]

Concluding, self-employed persons are *in general* considered to be undertakings which means that they fall under the scope of the cartel prohibition. If they however are in *a situation comparable to that of employees,* a collective bargaining agreement that covers them would *not* fall under the scope competition law.[364]

The ECJ continues by stating that it is not always easy to determine which self-employed persons are undertakings and which are not.[365] The ECJ does give some indications, repeating previous case law:

> *'It follows that the status of 'worker' within the meaning of EU law is* ***not affected*** *by the fact that a person has been hired as a* ***self-employed person under national law, for tax, administrative or organisational reasons****, as long as that persons acts under the direction of his employer as regards, in particular,* ***his freedom to choose the time, place and content of his work*** *(see judgment in Allonby, EU:C:2004:18, paragraph 72), does* ***not share in the employer's commercial risks*** *(judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an* ***integral part of that employer's undertaking****, so forming an economic unit with that undertaking (see judgment in Becu and Others, C-22/98, EU:C:1999:419, paragraph 26).'*[366]

The national court must determine if the self-employed musicians are considered to be false self-employed or not, taking into account the above mentioned criteria.[367]

3.1.6.3. The Hague Court of Appeal: musicians are falsely self-employed

The ECJ refers the case back to The Hague Court of Appeal. The court rules that the self-employed musicians are indeed falsely self-employed.[368] The court reasons that the self-employed musicians are in a subordinated position during the entire contractual relationship they have with the orchestra. They have to obey the schedule for rehearsals and concerts and have no flexibility regarding their time schedule or the way they have to perform their tasks.[369] It is not relevant that the independent musician can work for multiple principals or can determine the duration of this contract as musicians having an employment contract can do exactly the same if they work part-time.[370] Thus, the *Albany-exception* applies to the self-employed musicians as well.[371]

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[363] *Ibid* 31.
[364] *Daskalova* (9) 19.
[365] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 32.
[366] *Ibid* 36.
[367] *Ibid* 37.
[368] *Gerbrandy and Kreijger* (62) 20.
[369] The Hague Court of Appeal, Case 200.082.997/01, *FNV Kunsten Informatie en Media tegen Staat der Nederlanden* [2015] ECLI:NL:GHDHA:2015:2305 para 2.6.
[370] *Ibid* 2.7. See also *Gerbrandy and Kreijger* (62) 21.
[371] *Gerbrandy and Kreijger* (62) 21.

3.1.7. Deliveroo: bikers are not employees

The Hague Court of Appeal emphasized that it only examined whether the self-employed musicians were 'genuine' or 'falsely' self-employed. It did *not* examine whether the musicians were *workers* in the sense of Article 7:610(1) of the Dutch Civil Code.[372]

In the *Deliveroo*-case, the District Court Amsterdam *did* rule on this question. Deliveroo is a digital platform that connects restaurants to customers. The meals are delivered by bike-riders. Deliveroo announced to its 'riders' that it would not offer them a new employment-contract after the termination of their current contract. Riders would be hired as independent contractors. Sytze Ferwerda, a rider, brought the case up to court and asked the District Court Amsterdam to declare his new relationship with Deliveroo, stating that Ferwerda works as a self-employed person for Deliveroo, as an *employment-relationship* in the sense of Article 7:610 of the Dutch Civil Code.[373]

The court dismisses Ferwerda's request.[374] The court examines the *intention* Ferwerda and Deliveroo had when they entered into their agreement and how they *executed* this agreement.[375] According to the court, both Ferwerda and Deliveroo had the intention that Ferwerda was going to work for Deliveroo as a self-employed person. Besides, the terms of the new agreement were clearly different compared to terms of the old employment-contract.[376] As regards the question how the new agreement was executed, the court reasons that Ferwerda can decide on his own what route he wants to take and what clothes he wants to wear.[377] Ferwerda was able to refuse orders and had the freedom to work for Deliveroo's competitors.[378]

The court concludes by stating that the current system of labour law may not have taken into account the new employment relationships resulting from the platform-economy. Nevertheless, the case concerned does not ask for judicial intervention. The court reasons that if it is considered undesirable that platforms like Deliveroo hire their workers as self-employed persons, the *legislator* should act upon it.[379]

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[372] Dutch Civil Code, Article 7:610. See also The Hague Court of Appeal, Case 200.082.997/01, *FNV Kunsten Informatie en Media tegen Staat der Nederlanden* [2015] ECLI:NL:GHDHA:2015:2305 para 2.3.
[373] *Canoy and Hellingman* (13) 187.
[374] District Court Amsterdam, Case 6622665 CV EXPL 18-2673, *Plaintiff v Deliveroo* [2018] ECLI:NL:RBAMS:2018:5183.
[375] District Court Amsterdam, Case 6622665 CV EXPL 18-2673, *Plaintiff v Deliveroo* [2018] ECLI:NL:RBAMS:2018:5183 para 9.
[376] *Ibid* 10.
[377] *Ibid* 18-19.
[378] *Ibid* 28.
[379] *Ibid* 28. See also *Canoy and Hellingman* (13) 188.

3.1.8. Uber in court

Another platform that has been involved in court cases over the last few years is Uber. Cases were brought up to court both within and outside the EU. Two of these cases will be discussed in this paragraph.

3.1.8.1. Transport service or information service?

In its first ruling on Uber, the ECJ had to determine whether Uber is a transport service under Article 2(2) Directive 2006/123[380] *or* a service in the information society falling under Directive 2000/31.[381] The outcome was important for the Spanish government; if the ECJ would rule that Uber offers a transport service, Spain could oblige Uber to register before being able to operate.[382] Although this case does not concern competition law, the case is interesting as it explores the relationship between Uber and its drivers.

According to AG Szpunar, the decisive question in this case concerned the question whether Uber *controlled* its drivers. He argued that this is indeed the case.[383] Szpunar argues that:

> *'Thus, **Uber exerts control over all the relevant aspects of an urban transport service**: over the **price**, obviously, but also over the **minimum safety conditions** by means of prior requirements concerning drivers and vehicles, **over the accessibility of the transport supply** by encouraging drivers to work when and where demand is high, **over the conduct of drivers** by means of the ratings system and, lastly, over **possible exclusion from the platform**. The other aspects are, in my opinion, of secondary importance from the perspective of an average user of urban transport services and do not influence his economic choices. **Uber therefore controls the economically significant aspects of the transport service offered through its platform.***
>
> ***While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances.** Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, (18) makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.'*[384]

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[380] Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market [2006] OJ L 376/36.

[381] Case C-434/15 *Asociación Profesional Elite Taxi tegen Uber Systems Spain SL* ECLI:EU:C:2017:981.
See also Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.

[382] *Schiek and Gideon* (204) 286.

[383] Case C-434/15 *Asociación Profesional Elite Taxi tegen Uber Systems Spain SL* ECLI:EU:C:2017:364, Opinion of AG Szpunar, para 51.

[384] *Ibid* 51-52.

The ECJ follows this approach and states the following:

> *'In addition,* ***Uber exercises decisive influence over the conditions under which that service is provided by those drivers****. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.'*[385]

It looks like Uber drivers receive remuneration and are under the direction of someone for a certain duration, which are features of an employment-relationship.[386]

3.1.8.2. Mr Aslam and Mr Farrar: Uber drivers are employees

In 2016, a London Employment Tribunal ruled on a case brought up by two Uber Drivers, Mr Aslam and Mr Farrar, on behalf of 19 other drivers.[387] The drivers argued that they are workers and entitled to minimum wage and paid holiday.[388] Uber argued that the drivers were self-employed and that Uber is a technology company simply connecting drivers to passengers.[389] The court ruled in favour of the drivers and stated: *'The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous.'*[390]

Uber's appeal against this decision has been dismissed. Uber has announced that it will challenge the decision at the Supreme Court.[391]

3.2. Platform workers and case law

The question is what the case law as discussed in the previous section means for precarious self-employed persons without employees in a platform-economy.

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[385] Case C-434/15 *Asociación Profesional Elite Taxi tegen Uber Systems Spain SL* ECLI:EU:C:2017:981 para 39.
[386] *Schiek and Gideon* (204) 287.
[387] UK Employment Tribunal, Case 2202551/2015, *Mr Y Aslam, Mr J Farrar and Others v Uber* [2016].
[388] UK Employment Tribunal, Case 2202551/2015, *Mr Y Aslam, Mr J Farrar and Others v Uber* [2016] para 7.
[389] Wilson Browne Solicitors, 'Workers or Self-Employed - Uber Drivers Seek Clarification' (*Wilson Browne Solicitors)* <https://www.wilsonbrowne.co.uk/news/business/workers-self-employed-uber-drivers-seek-clarification/> Accessed 1 May 2019.
[390] UK Employment Tribunal, Case 2202551/2015, *Mr Y Aslam, Mr J Farrar and Others v Uber* [2016] para 90.
[391] Sarah Butler, 'Uber loses appeal over driver employment rights' (*The Guardian* 20 December 2018) <https://www.theguardian.com/technology/2018/dec/19/uber-loses-appeal-over-driver-employment-rights> Accessed 1 May 2019.

There is not one single definition of 'worker'; the definition varies per area of EU law.[392] The ECJ has however been consistent in its definition of an *employment relationship*.[393] In *FNV KIEM*, the ECJ repeated that:

> *'It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that* ***persons acts under the direction of his employer*** *as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in Allonby, EU:C:2004:18, paragraph 72),* ***does not share in the employer's commercial risks*** *(judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an* ***integral part of that employer's undertaking, so forming an economic unit*** *with that undertaking (see judgment in Becu and Others, C-22/98, EU:C:1999:419, paragraph 26).'*[394]

A few characteristics of what an employment relationship looks like can be distinguished in this paragraph: subordination, independence and commercial risk and forming and organizational dependence.[395]

3.2.1. Precarious platform workers and employment relationships

The requirement of subordination is well known by labour law lawyers.[396] The criterion is however vague and there does not seem to be a very precise definition of the concept.[397] In FNV KIEM, the ECJ reasoned as follows:

> *'...in particular, that their relationship with the orchestra concerned is* ***not one of subordination*** *during the contractual relationship, so that they enjoy* ***more independence and flexibility*** *than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned, in other words, the rehearsals and concerts.'*[398]

The same kind of reasoning can be found in the *Allonby*-case, where the ECJ stated that:

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[392] *Daskalova* (9) 11. See also Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 34.
[393] *Daskalova* (9) 11.
[394] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 36.
[395] *Schiek and Gideon* (204) 283. See also *Daskalova* (9) 11.
[396] *Daskalova* (9) 11.
[397] *Daskalova* (9) 12.
[398] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 37.

> *' ...it is necessary in particular to consider the extent of any* ***limitation on their freedom to choose their timetable, and the place and content of their work****. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.'*[399]

It seems like the criterion of subordination is linked to a lack of flexibility.[400] The Commission notes in its Communication on the collaborative economy that:

> *'For the criterion of subordination to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions.'*[401]

The Commission has however stated that most self-employed persons without employees working via platforms will *not* meet this criterion.[402]

In the literature it is argued that this 'flexibility' of platform-based work is restricted in practice, as many self-employed persons regard the work as their full time job instead of performing services on an occasional basis.[403] Besides, independents working for the platform Handy have been fired for cancelling shifts.[404] Uber drivers state that they fear that if they do not accept a ride, this would affect their rating.[405] Even though platforms do not *force* their independent contractors to work a certain amount of hours, their flexibility seems to be restricted in more subtle ways.[406] And while the subordination criterion is aimed at identifying what an employment relationship entails, it can easily be manipulated by platforms to *avoid* labour law.[407] AG Szpunar seems to hint in this direction while he states that:

> ***'Uber therefore controls the economically significant aspects of the transport service offered through its platform.*** *While this control is not exercised in the context of a traditional employer-employee relationship,* ***one should not be fooled by appearances.*** *Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, (18) makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.'*[408]

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[399] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 72.
[400] *Daskalova* (9) 12.
[401] European Commission, 'A European Agenda for the Collaborative Economy' *(Commission* 2016) 12. See also Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616.
[402] European Commission, 'A European Agenda for the Collaborative Economy' (*Commission* 2016) 12. See also *Daskalova* (9) 13.
[403] *Daskalova* (9) 12.
[404] *Khaleeli* (154). See also *Daskalova* (9) 13.
[405] *Daskalova* (9) 13.
[406] *Ibid* 13.
[407] *Ibid* 14.
[408] Case C-434/15 *Asociación Profesional Elite Taxi tegen Uber Systems Spain SL* ECLI:EU:C:2017:364, Opinion of AG Szpunar, para 51-52.

Another criterion of an employment relationship is that someone '*performs services for and under the direction of another person.'*[409] This refers to the requirement of *independence and commercial risk*.[410] The ECJ clarifies this by stating that the employee is '*entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.'*[411]

Many self-employed persons without employees working for platforms will not meet this criterion.[412] Problematic is that platform workers complain precisely *because* they are not covered by any form of insurance policy from the platform.[413] The distinction as drawn by Dekker between *voluntary* self-employment and *involuntary* self-employment is important in this regard.[414]. Wahl stated in his opinion in the *FNV KIEM*-case that '*the higher risks and responsibilities borne by the self-employed are, on the other hand, meant to be compensated by the possibility of retaining all profit generated by the business.*'[415] This makes sense if people *choose* to become self-employed but it seems rather problematic if people are forced into independence out of necessity.[416]

It has been argued that many platform workers are not organizationally independent from the platform they work for either.[417] If the criteria as stated in the *FNV KIEM*-case are however cumulative, and it seems like this is the case, most platform workers will not be considered to be in an employment relationship with the platform they work for.[418]

3.2.2. Precarious platform workers and the false self-employed

In the *FNV KIEM*-case, the ECJ created the category of the 'false self-employed' to whom competition law does not apply.[419] The decision was welcomed as a step towards a solidarity enhancing approach of the ECJ.[420] It is however argued that the criteria of being 'falsely' or 'genuinely' self-employed are too open and vague. According to the ECJ, it is up to national courts to determine if the self-employed is performing the same function as an employee.[421]

The approach of the ECJ is not helpful for the new self-employed working in a platform-based economy. The ECJ affirms the test that should identify whether someone is a *worker* or not. Decisive

[409] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 34.
[410] *Daskalova* (9) 14.
[411] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 33.
[412] *Daskalova* (9) 14.
[413] *Khaleeli* (154). See also *Daskalova* (9) 14.
[414] *Dekker* (123) 768.
[415] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2215, Opinion of AG Wahl, para 45.
[416] *Daskalova* (9) 14.
[417] *Schiek and Gideon* (204) 283.
[418] *Ibid.*
[419] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 31.
[420] *Daskalova* (9) 20.
[421] *Ibid*.

criteria in this regard are subordination and commercial independence.[422] As explained in paragraph 3.2.1, many of the new self-employed will never meet these requirements; they cannot claim that their work is comparable to the work performed by regular employees.[423] As a result, platform workers will fall under the scope of competition law.[424]

3.3. The exception of Article 101(3) TFEU

Between 1990 and 2017, the Commission has imposed fines with a total value of 27,6 billion euros on 835 undertakings for a violation of Article 101(1) TFEU.[425] Agreements falling within the scope of Article 101(1) are not unlawful *per se* though. Article 101(3) TFEU offers a legal exception to Article 101(1).[426]

In this section, it will be discussed whether Article 101(3) could be used as a tool to enable platform workers to enter into collective bargaining agreements. First, the requirements of Article 101(3) TFEU will be discussed. Next, it will be explored how a collective bargaining agreement for self-employed persons without employees would be qualified. Finally, the requirements of Article 101(3) TFEU will be applied to this agreement after which a conclusion will be drawn.

3.3.1. The requirements of Article 101(3) TFEU

Article 101(3) TFEU reads as follows:

> *'The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
> *any agreement or category of agreements between undertakings,*
> *any decision or category of decisions by associations of undertakings,*
> *any concerted practice or category of concerted practices,*
>
> *which contributes to* ***improving the production or distribution of goods or to promoting technical or economic progress****, while allowing* ***consumers a fair share*** *of the resulting benefit, and which does not:*
> *(a) impose on the undertakings concerned restrictions which are not* ***indispensable*** *to the attainment of these objectives;*
> *(b) afford such undertakings the possibility of* ***eliminating competition in respect of a substantial part of the products in question****.'*[427]

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[422] *Ibid*.
[423] *Ibid*.
[424] *Ibid*.
[425] European Commission, 'Cartel Statistics' (*Commission* 31 December 2018) <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> Accessed 4 May 2019. See also *Whish and Bailey* (21) 525.
[426] *Whish and Bailey* (21) 157.
[427] Consolidated Version of the Treaty on European Union [2012] OJ 326/13, Article 101(3).

Four conditions must be satisfied in order to benefit from the exception of Article 101(3) TFEU. These conditions are cumulative.[428] First, the agreement must improve the production or distribution of goods or promote technical or economic progress. Second, consumers must receive a fair share of the benefits resulting from the agreement. Third, the restrictions following from the agreement must be indispensable to achieve the efficiencies. Fourth, the agreement must not eliminate competition in a substantial part of the market.[429] The conditions will be discussed in more detail in paragraph 3.3.3.

It is important to note that the burden of proof of showing that the requirements of Article 101(3) TFEU are met is on the person making the claim.[430] This flows from Article 2 of Regulation 1/2003.[431] Since Regulation 1/2003 entered into force, there has not been any decision in which the Commission found that an agreement satisfied Article 101(3) TFEU.[432]

3.3.2. Qualification of collective bargaining agreements under Article 101(1) TFEU

In order to determine whether a collective bargaining agreement could satisfy the requirements of Article 101(3) TFEU, attention must be paid to describe *how* this agreement would be qualified under Article 101(1) TFEU.

Self-employed persons without employees in the Netherlands are considered to be a group at risk of poverty.[433] Agreements containing minimum-tariffs could offer a solution to this problem. These agreements would however be classified as *horizontal price fixing;*[434] that is, an agreement fixing prices between actual or potential competitors.[435] Price fixing is regarded as the most undesirable of all restrictive practices.[436] In theory, all types of agreements can benefit from the exception of Article 101(3) TFEU. The Commission has however noted that horizontal price fixing agreements are unlikely to fulfil all four conditions of Article 101(3) TFEU.[437] Nevertheless, there have been a few cases in which the Commission permitted horizontal price fixing agreements under Article 101(3) TFEU.[438]

Collective bargaining agreements could also concern working conditions like working hours or rules concerning the rating process. These agreements can be seen as '*agreements relating to terms and*

[428] *Whish and Bailey* (21) 159.
[429] *Ibid* 157.
[430] *Ibid* 159.
[431] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 2.
[432] *Whish and Bailey* (21) 161.
[433] *The Netherlands Institute for Social Research* (118) 25-26.
[434] *Whish and Bailey* (21) 530.
[435] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C 11/1, para 1.
[436] *Whish and Bailey* (21) 530.
[437] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 46. See also *Whish and Bailey* (21) 539.
[438] *Whish and Bailey* (21) 539.

conditions.'[439] Standard-setting can be permitted under competition law if it is not used as a tool to restrict competition.[440] The Commission has permitted a non-binding agreement imposing terms and conditions under Article 101(3) TFEU.[441] There are however plenty examples of the Commission condemning such agreements.[442]

3.3.3. Collective bargaining agreements and Article 101(3) TFEU

The question that needs to be answered now is whether a collective bargaining agreement fixing minimum-tariffs and working conditions could benefit from the exception of Article 101(3) TFEU. The four conditions will be discussed one by one.

3.3.3.1. Efficiency gains

First, the agreement must improve the production or distribution of goods or promote technical or economic progress. A narrow view Article 101(3) only allows agreements that result in *economic efficiency*.[443] The Commission chooses a narrow approach based on economic efficiency; it does not consider other considerations to be relevant to the assessment.[444]

Allowing platform workers to enter into collective bargaining agreements could improve their economic position and limit the risk of commodification of labour.[445] It could also decrease the extreme amount of power platforms exercise over both sides of the market when setting their terms and conditions.[446] These benefits are however *qualitative* rather than *quantitative.* Benefits need to be quantified to enable the Commission to weigh them against the anti-competitive effects of the agreement. The quantification of the mentioned benefits is not an easy task.[447] The Commission explains that '*efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product.*'[448] It will be difficult to argue that Uber drivers being able to set minimum-tariffs would lower the costs of a ride, improve the quality of a ride or create a new type of service. Instead, the setting of minimum-tariffs will most likely result in higher consumer prices.[449] Benefits resulting from collective bargaining agreements will turn to the

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[439] *Ibid* 549.
[440] *Ibid* 550.
[441] European Commission, Decision in Case IV/32.265, *Concordate Incendio* [1989]. See also *Whish and Bailey* (21) 551.
[442] *Whish and Bailey* (21) 550. See for example European Commission, Decision in Case IV/30.175, *Vimpoltu* [1983].
[443] *Whish and Bailey* (21) 163.
[444] *Ibid* 167.
[445] *De Stefano* (8) 472.
[446] *Dittrich* (4) 9.
[447] *Gebrandy and Kreijger* (62) 25-26.
[448] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 33. See also *Whish and Bailey* (21) 167.
[449] *Gebrandy and Kreijger* (62) 26.

advantage of society at large and *not* to consumers suffering from a welfare loss. This complicates the assessment under Article 101(3) TFEU.[450]

It is also important to note that the Commission explicitly states that '*efficiencies are not assessed from the subjective point of view of the parties. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account*.'[451] The fact that platform workers *themselves* benefit from higher tariffs or better working conditions, is thus not enough to fulfil the first requirement of Article 101(3) TFEU.[452] Daskalova argues that a collective bargaining agreement for platform workers will certainly not meet this requirement.[453]

3.3.3.2. Fair share for consumers

Next, the self-employed persons need to show that they will pass a fair share of the benefits resulting from the collective bargaining agreement on to consumers.[454] The Commission notes that '*the concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers*.'[455]
If consumers pay a higher price for a product or service as a result of a restrictive agreement, they must be compensated through better quality or other benefits.[456] As mentioned in the previous paragraph, it will be difficult to argue that a higher income and better working conditions for self-employed persons will improve the quality of the service performed. Again, benefits need to be quantified to enable the Commission to weigh them against the anti-competitive effects of the agreement.[457] The Commission notes that if an agreement increases prices for consumers, it must be considered whether the efficiencies create *'real value*' for consumers.[458] If consumers face higher prices without receiving compensation in the form of a *concrete* benefit, it will be difficult to meet this condition.[459] Daskalova argues that a collective bargaining agreement for platform workers will certainly not meet this condition either.[460]

3.3.3.3. Indispensability

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[450] *Gerbrandy* (31) 132.
[451] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 49. See also *Gebrandy and Kreijger* (62) 25.
[452] *Gebrandy and Kreijger* (62) 25.
[453] *Daskalova* (9) 23.
[454] *Whish and Bailey* (21) 170.
[455] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 84.
[456] *Ibid* 86.
[457] *Gebrandy and Kreijger* (62) 25-26.
[458] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 104. See also *Whish and Bailey* (21) 172.
[459] *Gebrandy and Kreijger* (62) 27.
[460] *Daskalova* (9) 23.

The condition of indispensability requires a two-fold test.[461] Fist, the *agreement itself* must be reasonably necessary to achieve the efficiencies. Second, the *individual restrictions* resulting from the agreement must also be reasonably necessary to achieve the efficiencies.[462] The first condition requires that the efficiencies are *specific* to the agreement; there must be no less restrictive ways of achieving the efficiencies.[463] The second condition requires that the parties demonstrate that *all* restrictions of competition following from the agreement are indispensable and that their intensity is reasonably necessary to achieve the efficiencies.[464] The Commission notes that '*hardcore restrictions'* are unlikely to be indispensable.[465] Hardcore restrictions include horizontal price fixing.[466] It is thus unlikely that a collective bargaining fixing minimum-tariffs and working conditions for platform workers will meet this condition.

3.3.3.4. No elimination of competition in a substantial part of the market

The Commission makes it clear that '*ultimately, the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements.*'[467] If an agreement eliminates price competition, which is the case if a collective bargaining agreement includes minimum-tariffs, the condition holding that competition must not be eliminated in a substantial part of the market will not be met.[468] It is also difficult to argue that a collective bargaining agreement covering an *entire sector* would leave sufficient competition.[469] Concluding, this condition will most likely not be met either.

3.4. The *Wouters* doctrine

In this section, the *Wouters*-case and the doctrine derived from this case will be discussed. Attention will be paid to the different goals of competition law and to the discussion evolving around competition law and sustainability. Several arguments in favour and against applying the *Wouters* doctrine to collective bargaining agreements between self-employed persons will be discussed, after which a conclusion will be drawn.

3.4.1. Inherent restrictions

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[461] *Whish and Bailey* (21) 169. See also Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 73.
[462] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 73. See also *Whish and Bailey* (21) 169.
[463] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 75. See also *Whish and Bailey* (21) 169.
[464] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 78.
[465] *Ibid* 79.
[466] *Whish and Bailey* (21) 170.
[467] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 105.
[468] *Ibid* 110. See also *Gebrandy and Kreijger* (62) 27.
[469] *Gebrandy and Kreijger* (62) 27.

In the case of *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*, Mr Wouters wanted to practice as a lawyer in a firm of accountants. The Dutch Bar Association however prohibited Dutch lawyers from entering into partnerships with non-lawyers.[470] Wouters challenged the rule that prevented him from working in a firm of accountants, stating that the rule was not compatible with European competition law.[471] The ECJ holds that the rule issued by the Bar indeed limits production and technical development within the meaning of Article 101 TFEU.[472] The ECJ continues however by stating that:

> *'However, **not every agreement** between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them **necessarily falls within the prohibition laid down in Article 85(1) of the Treaty**. For the purposes of application of that provision to a particular case, account must first of all be taken of the **overall context in which the decision of the association of undertakings was taken or produces its effects.** More particularly, **account must be taken of its objectives,** which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR1-6511, paragraph 38). I**t has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives**.'*[473]

It is thus possible that non-competition interests outweigh restrictions of competition if the restriction is ancillary to a regulatory function. If this is the case, the cartel prohibition is not violated.[474] The ECJ took the proportionality of the measure into account as well.[475]

3.4.2. Clashing goals of competition law

The Wouters case touches upon the discussion concerning the *goals* of competition law. Consumer welfare forms the core rationale of European competition law.[476] This is expressed both in case law of the ECJ and in the Commission's guidelines.[477] Starting in the 1990's, a process of *economization*

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[470] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 25. See also *Whish and Bailey* (21) 138.
[471] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 30. See also *Whish and Bailey* (21) 138.
[472] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 90. See also *Whish and Bailey* (21) 138.
[473] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 97.
[474] *Whish and Bailey* (21) 138-139.
[475] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 108. See also *Daskalova* (9) 22.
[476] Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) 17 Oxford Legal Studies Research Paper 1, 5.
[477] See for example joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* ECLI:EU:T:2006:151 para 115. See also *Ezrachi* (476) 4.

has taken place within competition law.[478] Competition law is now used as a tool to protect consumer well-being and to create economic efficiencies.[479] There are however more goals of competition law like an effective competition structure, fairness, market integration and plurality and economic freedom.[480] This is recognized by the ECJ.[481]

These different goals of competition law often overlap, but cause friction as well.[482] As explained in paragraph 1.1.1, the redistribution of wealth can be seen as an objective of competition law. In this sense, economic *equity* is promoted rather than economic *efficiency*.[483] Allowing self-employed persons to enter into collective bargaining agreements to set minimum-tariffs and improve working conditions would fit into this goal, but it is not difficult to notice the friction it causes to *consumer welfare* as prices will increase.[484]

A discussion showing similarities with the protection of self-employed persons concerns the discussion on the compatibility of competition law and sustainability.[485] Agreements between undertakings that for example improve animal welfare can lead to higher consumer prices and will be covered by Article 101(1) TFEU.[486] The Dutch Minister of Economic Affairs has issued guidelines on sustainability initiatives and competition law.[487] The guidelines specify factors the ACM must take into account when it applies Article 6(3) of the Competition Act to agreements on sustainability.[488] According to the Minister, the ACM should take long-term benefits for society as a whole into account during its assessment of the benefits resulting from the agreement.[489]

It is not clear whether the social-economic position of self-employed persons without employees would fit into the aim of a sustainable society.[490] The guidelines are interesting though as they are in line with the view that competition law should balance *market interests* and *non-market interests*. It is argued that this balancing act is falling short at the moment.[491] In paragraph 2.2.3, it has been discussed why it is important to balance market and non-market interests.

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[478] *Gerbrandy* (31) 130.
[479] *Ibid.*
[480] *Ezrachi* (476) 4.
[481] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343.
See also *Gerbrandy* (31) 137.
[482] *Ezrachi* (476) 3.
[483] *Whish and Bailey* (21) 20.
[484] *Gerbrandy and Kreijger* (62) 27.
[485] *Ibid* 28.
[486] *Gerbrandy* (31) 131-132.
[487] Minister of Economic Affairs, 'Beleidsregel mededinging en duurzaamheid' 52945, 5 oktober 2016.
[488] Stibbe, 'Dutch Ministry issues Guidelines on Corporate Sustainability and Competition Law' (*Stibbe,* 2 November 2011) <https://www.stibbe.com/en/news/2016/november/dutch-ministry-issues-guidelines-on-corporate-sustainability-initiatives-and-competition-law> Accessed 6 May 2019.
[489] Minister of Economic Affairs, 'Beleidsregel mededinging en duurzaamheid' No. 52945 [2016] 7.
[490] *Gerbrandy and Kreijger* (62) 28.
[491] *Gerbrandy* (31) 138.

3.4.3. Wouters and collective bargaining agreements for platform workers

In this paragraph, the arguments pleading in favour of and against applying the *Wouters* doctrine to collective bargaining agreements for self-employed persons will be explored. Several judgements of the ECJ confirm that the *Wouters* doctrine can apply to regulatory regimes *other* than the regulation of legal professions, as was the case in the *Wouters*-case itself.[492] The ECJ has for example ruled in the case *Meca-Medina v Commission* that anti-doping rules can have the legitimate objective of combating drugs and ensuring equal chances for athletes.[493] Likewise, it could be argued that collective bargaining agreements are necessary for self-employed persons without employees to achieve acceptable working conditions.[494]

In most cases where the *Wouters*-doctrine was applied, it concerned markets suffering from market failures.[495] From an economic perspective, the existence of market failures can justify interventions into the market in order to increase efficiency.[496] Market power is a market failure. As stated in paragraph 2.3.1, in a perfectly competitive labour market, workers can quit their jobs at no cost and they will obtain comparable work for a comparable salary at another employer.[497] Labour markets are not highly competitive though.[498] In fact, research in the USA shows that employer monopsony prevails in a large number of labour markets.[499] Employers with monopsony power are able to repress wages and to degrade working conditions in order to save costs.[500] It can be argued that the strong position of platforms results in a market failure justifying an intervention.

It is however argued that the scope of exceptions following from the *Wouters* doctrine is rather limited. Besides, it is unclear whether a collective bargaining agreement would be accepted as a goal of public interest.[501] The group of self-employed persons without employees is a heterogeneous one.[502] This will make it difficult for platform workers to seek protection as a group. Even if *some* self-employed persons would benefit from an exception, the problem would remain for the rest.[503]

Next to this, the market failure that appeared to be the most relevant one for the Wouters doctrine to apply is *information asymmetry*. Asymmetric information often occurs in markets for liberal

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[492] *Whish and Bailey* (21) 140.
[493] Case C-519/04, *David Meca-Medina and Igor Majcen v Commission of the European Communities* ECLI:EU:C:2006:492. See also *Whish and Bailey* (21) 140.
[494] *Schiek and Gideon* (204) 290.
[495] Charlotte Janssen and Erik Kloosterhuis, 'The Wouters case law, special for a different reason?' (2016) 8 European Competition Law Review 335, 338.
[496] *Janssen and Kloosterhuis* (495) 338.
[497] *Marinescu and Posner* (205) 4-5.
[498] *Ibid* 2.
[499] *Ibid* 7.
[500] *Ibid* 6.
[501] *Daskalova* (9) 22.
[502] *Bernhardt* (126) 7.
[503] *Daskalova* (9) 22.

professions as a result of their complex nature.[504] This is shown by the *Wouters*-case, dealing with legal professionals, the *CNG*-case,[505] dealing with geologists and the *OTOC*-case,[506] dealing with accountants.[507] It can be difficult for consumers to assess the quality of the service performed by a lawyer, accountant or geologists which justifies an intervention in the market.[508] Platform work however often is often low-skilled work.[509] Information asymmetry does not seem to be the most problematic market failure.

Besides, the contested rule in the *Wouters*-case had a *public law character* as it concerned the regulation of the legal profession. Even though a private association was responsible for the rule-making function, the association was assigned to perform this task by the Dutch legislator.[510] In the *Meca Medina*-case, there was a legitimate objective of combating drugs for which the International Olympic Committee, a creature of public international law, was held responsible.[511] It can be doubted whether the *Wouters* doctrine can be extended to private regulatory systems, like a collective agreement between self-employed persons, without *any* public component.[512] Some form of public intervention seems to be required before a collective labour agreement could benefit from the exception of the *Wouters* doctrine.[513]

3.5. 'Bagatel'

In this section, Article 7 of the Competition Act will be discussed. The possibility of applying Article 7 to collective bargaining agreements from self-employed persons will be examined, after which a conclusion will be drawn.

3.5.1. Article 7 of the Competition Act

As mentioned in paragraph 1.2.1, the Competition Act provides for a specific provision for agreements having a limited influence on competition. This so-called '*bagatel' provision* is laid down in Article 7 and specifies two exceptions to the prohibition of cartels. The Article reads as follows:

> *'1. Article 6(1) shall not apply to agreements, decisions and concerted practices, as referred to in the said Article, if:*

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[504] *Janssen and Kloosterhuis* (495) 337.
[505] Case C-136/12 *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v Consiglio nazionale dei geologi* ECLI:EU:C:2013:489.
[506] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* ECLI:EU:C:2013:127.
[507] *Janssen and Kloosterhuis* (495) 337.
[508] *Ibid.*
[509] Miriam Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 Comparative Labor Law & Policy Journal 577, 583.
[510] *Whish and Bailey* (21) 140. See also Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98.
[511] Case C-519/04, *David Meca-Medina and Igor Majcen v Commission of the European Communities* ECLI:EU:C:2006:49. See also *Whish and Bailey* (21) 140.
[512] *Whish and Bailey* (21) 140.
[513] *Gerbrandy and Kreijger* (62) 36.

*a. **no more than eight undertakings** are involved in the agreement or concerted practice in question, or if no more than eight undertakings are involved in the respective association of undertakings; **and***
*b. the **combined turnover of the undertakings** party to the respective agreement or the concerted practices in the preceding calendar year, or the combined turnover of the undertakings which are members of the respective association of undertakings does not exceed:*
i. €5,500,000 if the agreement, concerted practice or association involves only undertakings whose core activity is the supply of goods
*ii. €**1,100,000 in all other cases**.*

*- 2. Without prejudice to the provisions set out in paragraph (1), Article (6)(1) shall furthermore **not apply to agreements,** decisions and concerted practices as referred to in the said Article insofar as they involve undertakings or associations of undertakings that are **actual or potential competitors** on one or more of the relevant markets, if:*

*a. the **combined market share of the undertakings** or associations of undertakings involved in the agreement, decision or concerted practice is no greater than **10 per cent** on any of the relevant markets affected by the agreement, decision or concerted practice; **and***
b. The agreement, decisions or concerted practice is not capable of appreciably affecting interstate trade.'[514]

First, Article 6(1) does not apply according to Article 7(1) when no more than eight undertakings are involved in the agreement concerned and when the combined turnover of the concerned undertakings does not meet the stipulated thresholds. Second, Article 6 does not apply according to Article 7(2) when the combined market share of the relevant undertakings does not exceed 10% on the relevant markets influenced by the agreement and the agreement does not appreciably affect trade between Member States.[515]

There is no European equivalent of this provision.[516] In the *Expedia*-case, the ECJ ruled that an agreement restricting competition by object and affecting interstate trade, *automatically* violates Article 101(1) TFEU. It is thus not necessary to demonstrate the concrete effects on competition when an object restriction is established.[517] This holds for both Article 101 TFEU and Article 6 of the Competition Act.[518] Article 7(2) however is applicable to both object and effect restrictions. Even a horizontal price fixing agreement could thus benefit from the exception of Article 7(2) of the Competition Act.[519]

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514 Article 7 of the Competition Act.
515 *Van de Gronden* (46) 118-119.
516 *Gerbrandy and Kreijger* (62) 31.
517 Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* ECLI:EU:C:2012:795 para 37.
518 *Gerbrandy and Kreijger* (62) 31.
519 *Ibid* 32.

3.5.2. Article 7 and collective bargaining agreements for platform workers

Article 7 of the Competition Act applies automatically. Parties need to determine *themselves* whether their agreement could benefit from the exception.[520] This self-assessment is not without risks: if the ACM rules that a collective bargaining agreement cannot benefit from the exception of Article 7, the self-employed persons can receive high fines. Defining the relevant market where the self-employed persons are active is not an easy task. If the ACM reaches a different conclusion, self-employed persons are at risk of receiving fines and third-party claims.[521]

Next to the high risk that comes along with relying on Article 7, it can be doubted how useful the provision is for self-employed persons entering into collective bargaining agreements. If the self-employed persons would rely on the first paragraph of Article 7, only eight persons could enter into the agreement. If they would rely on the second paragraph, their combined market share cannot exceed ten percent of the relevant market. In both situations, their buyers, including big platforms, can easily decide to buy services from the remaining 90% of service providers.[522]

3.6. Conclusion

In this paragraph, a conclusion on the third chapter will be drawn.

The *Albany*-case determined that collective labour agreements are immune from the cartel prohibition if two conditions are met. First, the agreement concerned must be the result of a collective negotiation between employers and labour unions. Second, the agreement concerned must focus on labour or employment conditions.[523] The *Pavlov*-case emphasized that this exclusion does not automatically apply to agreements which have *not* been set up in the context of collective agreements.[524]

In the case of *Becu and others,* the ECJ distinguished workers from undertakings for the purpose of competition law.[525] Commercial dependence and the fact that workers are being incorporated into the undertaking concerned separates workers from undertakings.[526]

In the *Allonby*-case, which was not a competition law case, the ECJ ruled that there is not one single definition of 'worker' under EU law.[527] The definition '*varies according to the area in which the*

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[520] *Ibid* 32.
[521] *Ibid* 33.
[522] *Ibid* 33.
[523] *Van de Gronden* (46) 59.
[524] Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2000:428 para 68.
[525] Case C-22/98 *Jean Claude Becu and others* ECLI:EU:C:1999:419. See also *Daskalova* (9) 18.
[526] *Risak and Dullinger* (311) 43. See also *Daskalova* (9) 18.
[527] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 63. The ECJ refers to Case C-85/96 *Martínez Sala* ECLI:EU:C:1998:217.

definition is to be applied'.[528] The term 'worker' cannot be interpreted restrictively.[529] The ECJ ruled that for the purpose of a provision guaranteeing equal pay between men and women, someone can be considered a worker when his independent status is '*merely notional*'.[530]

The *Jany*-case on the other hand made it clear that there is no *de minimis* rule that exempts self-employed persons without employees that do not fit 'entrepreneurial criteria' from the cartel prohibition.[531] This judgement is confirmed in the *FNV KIEM*-case; self-employed persons without employees are *not* exempted from competition law.[532] In this case, the ECJ introduced the concept of the 'false self-employed'. If self-employed persons are in *a situation comparable to that of employees,* a collective bargaining agreement that covers them would *not* fall under the scope competition law.[533] Several platforms like Deliveroo and Uber have been involved in court cases in which platform workers contest their employment status. The results are mixed.

As regards the notion of an employment relationship, a few characteristics can be distinguished in the *FNV KIEM*-case: subordination, independence and commercial risk and organizational dependence.[534] The Commission has stated that most self-employed persons without employees working via platforms will not meet the subordination criterion.[535] Many self-employed persons without employees working for platforms will not meet the criterion of dependence and commercial risk either.[536] They may be considered as organizationally depending on the platform they work for.[537] If the criteria as stated in the *FNV KIEM*-case are however cumulative, and it seems like this is the case, most platform workers will not be considered to be in an employment relationship with the platform they work for.[538]

The introduction of the false self-employed by the ECJ in the *FNV KIEM*-case is not helpful for the new self-employed working in a platform-based economy. The ECJ affirms the test that should identify whether someone is a worker or not. Many of the new self-employed will never meet these requirements: they cannot claim that their work is comparable to the work performed by regular employees.[539] As a result, platform workers will fall under the scope of competition law.[540] Concluding, currently existing case law does not help platform workers to enter into collective bargaining agreements.

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[528] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* ECLI:EU:C:2004:18 para 63.
[529] *Ibid* 66.
[530] *Ibid* 71.
[531] *Daskalova* (9) 15.
[532] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2411 para 30.
[533] *Daskalova* (9) 19.
[534] *Schiek and Gideon* (204) 283. See also *Daskalova* (9) 11.
[535] European Commission, 'A European Agenda for the Collaborative Economy' (*Commission* 2016) 12.
[536] *Daskalova* (9) 14.
[537] *Schiek and Gideon* (204) 283.
[538] *Ibid*..
[539] *Daskalova* (9) 20.
[540] *Ibid.*

Another possible solution that has been explored in this chapter is the use of Article 101(3) TFEU. It is however unlikely that Article 101(3) could be used as a tool to enable platform workers to enter into collective bargaining agreements. If these agreements contain minimum-tariffs, they would be classified as *horizontal price fixing.*[541] Collective bargaining agreements could also concern working conditions like working hours or rules concerning the rating process. These agreements can be seen as '*agreements relating to terms and conditions*.'[542]

In order to benefit from the exception of Article 101(3) TFEU, four cumulative conditions need to be met. The Commission chooses a narrow approach based on economic efficiency; it does not consider non-economic considerations to be relevant to the assessment.[543] Benefits following from collective bargaining agreements for self-employed persons are *qualitative* rather than *quantitative.* This is problematic as benefits need to be quantified to enable the Commission to weigh them against the anti-competitive effects of the agreement.[544] Besides, the fact that platform workers *themselves* benefit from higher tariffs or better working conditions is not enough to fulfil this requirement of Article 101(3) TFEU.[545] It will be difficult to argue that for example Uber drivers being able to set minimum-tariffs would lower the costs of a ride, improve the quality of a ride or create a new type of service. Instead, the setting of minimum-tariffs will most likely result in higher consumer prices.[546]

This makes it difficult to meet the second criterion: a fair share of the benefits must be passed on to consumers. If consumers face higher prices without receiving compensation in the form of a *concrete* benefit, it will be difficult to meet this condition.[547] As regards the condition of indispensability, the Commission notes that '*hardcore restrictions*' are unlikely to be indispensable.[548] Hardcore restrictions include horizontal price fixing.[549] Finally, if an agreement eliminates price competition, which is the case if a collective bargaining agreement includes minimum-tariffs, the condition that competition must not be eliminated in a substantial part of the market will most likely not be met.[550]

Thus, even if a collective bargaining agreement fixing minimum-tariffs and working conditions for self-employed persons will meet *some* of the conditions of Article 101(3) TFEU, it is unlikely that *all four* conditions will be met.

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[541] *Whish and Bailey* (21) 530.
[542] *Ibid* 547.
[543] *Ibid* 167.
[544] *Gebrandy and Kreijger* (62) 25-26.
[545] *Ibid* 25.
[546] *Ibid* 26.
[547] *Ibid* 27.
[548] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 79.
[549] *Whish and Bailey* (21) 170.
[550] European Commission, 'Guidelines on the application of Article 101(3)' [2004] OJ C 101/97, para 110. See also *Gebrandy and Kreijger* (62) 27.

The *Wouters*-case made clear that it is possible for non-competition interests to outweigh restrictions of competition if the restriction is ancillary to a regulatory function.[551] The Wouters case touches upon the discussion concerning the *goals* of competition law. Consumer welfare forms the core rationale of European competition law.[552] There are however more competition goals like an effective competition structure, fairness, market integration and plurality and economic freedom.[553]

The question arises whether the *Wouters* doctrine could apply to collective bargaining agreements for self-employed persons. Several judgements of the ECJ confirm that the *Wouters* doctrine can apply to regulatory regimes *other* than the regulation of legal professions, as was the case in the *Wouters*-case itself.[554] From an economic perspective, the existence of market failures can justify interventions into the market in order to increase efficiency.[555]

However, the cases where the ECJ applies the *Wouters* doctrine are difficult to predict.[556] Although the doctrine is interesting and relevant to collective bargaining agreements of self-employed persons, the doctrine has only been applied a few times and not in a fully consistent way.[557] It seems unlikely that the *Wouters* doctrine can form the foundation of allowing self-employed persons to enter into collective bargaining agreements.[558] Besides, some form of government intervention would be required in advance.[559]

Finally, it is unlikely that Article 7 of the Competition Act could be used as a tool to enable platform workers to enter into collective bargaining agreements. Next to the high risk that comes along with relying on Article 7, it can be doubted how useful the provision is for self-employed persons entering into collective bargaining agreements. If the self-employed persons would rely on the first paragraph of Article 7, only eight persons could enter into the agreement. If they would rely on the second paragraph, their combined market share cannot exceed ten percent of the relevant market. In both situations, their buyers, including big platforms, can easily decide to buy services from the remaining 90% of service providers.[560]

Concluding, existing case law, the exception of Article 101(3) TFEU, the *Wouters*-doctrine and the exception of Article 7 of the Competition Act are all incapable of offering platform workers a solution to enter into collective bargaining agreements. In the next chapter, a re-interpretation of the current legal framework will be discussed.

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[551] *Whish and Bailey* (21) 138-139.
[552] *Ezrachi* (476) 5.
[553] *Ibid* 4.
[554] *Whish and Bailey* (21) 140.
[555] *Janssen and Kloosterhuis* (495) 338.
[556] *Whish and Bailey* (21) 140.
[557] *Gerbrandy and Kreijger* (62) 36.
[558] This is what the Minister of Economic Affairs argues. See: Minister of Economic Affairs, 'Beleidsregel mededinging en duurzaamheid' No. 52945 [2016] 15.
[559] *Gerbrandy and Kreijger* (62) 36.
[560] *Ibid* 33.

Two competition law approaches enabling platform workers to enter into collective bargaining agreements

4. Introduction

In this chapter, two potential competition law solutions enabling platform workers to enter into collective bargaining agreements will be discussed. Both approaches require a different interpretation of the currently existing legal framework. The first section will describe what the proportionality-test entails. Subsequently, the test will be assessed in the light of the three elements of an adequate solution as discussed in the second chapter. In the second section, the extended *Albany*-approach as suggested by Schiek and Gideon will be discussed. Again, this approach will be assessed in the light of the three elements of an adequate solution. Finally, a conclusion will be drawn in which the differences between the two approaches will be explained. Also, a recommendation will be given as to what approach could be preferred.

4.1. A proportionality-test

In the second chapter, a normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements has been established. This framework aims at taking into account both the interests of competition law and labour law. It has been argued that, if self-employed persons without employees are similar to precarious workers, allowing self-employed persons to enter into collective agreements to negotiate minimum tariffs and working conditions *could* be an adequate solution to improve their economic position if three conflicting interests are balanced against one another. First, there is the need to protect *self-employed persons* against poverty. Second, there is the need to protect *consumer welfare*. Third, there is the need to protect *economic freedom.*

4.1.1. Description of the proportionality-test

The first approach to synthesize these three interests is to create a case-by-case analysis in the form of a proportionality-test. The aim of this proportionality-test is to determine whether the benefits of allowing a group of platform workers to enter into collective bargaining agreements outweigh the costs. This means that the test should be applied *ex ante.* The question that should be asked is *if* and *why* allowing certain self-employed persons to enter into collective bargaining agreements is *proportional.*[561]

Although it has been argued in the previous chapter that it is unlikely that the *Wouters* doctrine can form the foundation of allowing self-employed persons to enter into collective bargaining

[561] Support for a proportionality-test can be found in Robert Hoekstra, 'Het grondrecht op collectief onderhandelen van zelfstandigen versus het Europese mededingingsrecht' (2018) 3 Arbeidsrechtelijke Annotaties 43, 80.

agreements,[562] the test as described below shows some similarities with the *Wouters*-doctrine. The *Wouters*-case made clear that it is possible for non-competition interests to outweigh restrictions of competition if the restriction is ancillary to a regulatory function.[563] The ECJ took the *proportionality* of the contested measure into account as well.[564] The test as described below is however applied *ex ante*, unlike the cases where the *Wouters*-doctrine was applied. Besides, specific factors should be taken into account to determine whether the benefits of allowing platform workers to enter into collective bargaining agreements outweigh the costs.

First of all, allowing *all* self-employed persons to enter into collective bargaining agreements would cover those who do not need any protection all. As already noted, self-employed persons without employees form a very heterogeneous group.[565] Not *all* self-employed persons work under precarious conditions.[566] It is thus first necessary to determine whether the self-employed persons concerned are at risk of poverty. The criteria used by The Netherlands Institute for Social Research could be used as a guideline to determine whether someone is at the risk of poverty. [567]

If a platform worker is indeed considered to be at risk of poverty, attention must be paid to determine *what* tariffs and working conditions are suitable to decrease this risk of poverty while at the same time paying attention to the interest of the consumer. Competition law is very critical of collective conduct resulting in higher prices or conditions that would not have been reached under normal competition.[568] Price-fixing agreements, which collective bargaining agreements to set minimum-tariffs are after all, will most likely increase consumer prices.[569] It is thus important to determine proper tariffs and working conditions.

Finally, an undesired side-effect of allowing self-employed persons without employees to enter into collective bargaining agreements is the risk that professions that would otherwise have faded are being supported with minimum-tariffs. These superannuated professions would 'artificially' sustain.[570] It is thus important to consider whether there is actual *demand* for the service performed.

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[562] Minister of Economic Affairs, 'Beleidsregel mededinging en duurzaamheid' No. 52945 [2016] 15.
[563] *Whish and Bailey* (21) 138-139.
[564] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98 para 108. See also *Daskalova* (9) 22.
[565] *Bernhardt* (126) 7.
[566] *Rodgers* (69) 8.
[567] The Netherlands Institute for Social Research (118) 11.
[568] *Gebrandy and Kreijger* (62) 22.
[569] Merijn Schik and Marcel Canoy, 'Versoepeling van de Mededingingswet voor zelfstandigen is geen goed idee' (*Het Financieele Dagblad* 21 November 2016) <https://fd.nl/opinie/1176561/versoepeling-van-mededingingswet-voor-zelfstandigen-is-geen-goed-idee> Accessed 18 May 2019.
[570] *Canoy and Hellingman* (13) 191.

4.1.2. Assessment in the light of the protection of platform workers, consumer welfare and economic freedom

The proportionality-test takes all three elements of an adequate solution to improve the economic position of self-employed persons into account. First, the need to protect self-employed persons against poverty is taken into account by determining which groups of self-employed persons are at risk of poverty. If this part of the test is performed well, those persons struggling to provide a minimum income for themselves should be covered. Next, by determining what tariffs and working conditions are suitable, the risk of poverty of self-employed persons should decrease.

These two steps are not only useful to protect the interest of platform workers, but also to protect consumer welfare. By determining which groups of self-employed persons are in need of protection, it is also determined what groups are *not* in need of protection.[571] Those persons who are able to provide a minimum income for themselves should not be covered by protective measures. This will ensure that the damage to consumer welfare is minimized. Subsequently, by determining what tariffs and working conditions are suitable for the self-employed persons concerned, it must again be ensured that tariffs are not set higher than necessary to decrease the risk of poverty which will minimize the damage to consumer welfare.[572] Finally, by exploring whether there is actual demand for a service performed by self-employed persons, superannuated professions are not artificially sustained.[573] Although applying protective measures to superannuated services would benefit the platform workers concerned, this would disproportionally harm consumer welfare.

If the proportionality-test as described above is applied, the state tries to achieve a market outcome that is perceived as 'fair' by society.[574] That is, the state tries to ensure that self-employed persons are able to provide for a minimum income for themselves. By doing so, the state uses competition law as a tool to obtain *economic freedom*. As both consumer welfare and the interests of platform workers are protected, it is tried to find a balance between market and non-market interests.[575]

4.2. The extended *Albany*-approach

A second potentially adequate enabling platform workers to enter into collective bargaining agreements is suggested by Schiek and Gideon.[576]

4.2.1. Description of the extended *Albany*-approach

[571] *Bernhardt* (126) 7.
[572] *Canoy and Hellingman* (13) 191.
[573] *Ibid.*
[574] *Gerbrandy* (31) 129-130.
[575] *Ibid* 138.
[576] *Schiek and Gideon* (204) 286.

First, a definition of the concept of 'worker' for the purpose of competition law enabling platform workers to enter into collective bargaining agreements needs to be developed.[577] The criteria as confirmed by the ECJ in the *FNV-KIEM* case to define what an employment relationship entails were subordination, independence and commercial risk and organizational dependence.[578] These criteria would need to be expanded.[579]

In the platform-economy, employers seem to shift commercial risks to self-employed persons. This shift of risks allows platforms to circumvent compliance with labour law. More precisely, minimum wages, sick pay, holidays and contributions to social security are being avoided and platform workers will have to bear these costs themselves.[580] These risks are considered to be part of the trade-off that allows self-employed persons to work whenever they want, not being bound by a fixed amount of working hours.[581]

Competition between platform service providers can however push down compensation, forcing people to work long hours to make ends meet.[582] This is where the distinction made by Dekker between *voluntary* self-employment and *involuntary* self-employment becomes important.[583] The first group *chooses* to work independently in order to take advantage of the possibilities it offers. The latter group however prefers employment but is *forced* into self-employment out of necessity.[584] It is precisely the existence of the latter group that urges platform workers to enter into collective bargaining agreements. It is thus necessary to develop a '*functional notion of worker*', for the purpose of competition law.[585]

A '*truly economic approach*' would help to recognize that the shift of risks towards platform workers results in economic *dependency* of the platform worker concerned rather than *independence.*[586] As explained, the flexibility that should be the 'reward' of not being able to benefit from minimum wages is restricted in practice, as many self-employed persons regard the work they perform as their full time job instead of performing services on an occasional basis.[587] Besides, there are several examples of platform workers' flexibility being restricted in practice. Independents working for the platform Handy have been fired for cancelling shifts.[588] Uber drivers state that they fear that if they do not accept a ride, this would affect their rating.[589] Precisely those self-employed persons would benefit

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[577] *Ibid.*
[578] *Schiek and Gideon* (204) 283. See also *Daskalova* (9) 11.
[579] *Schiek and Gidon* (204) 287.
[580] *De Stefano* (8) 479.
[581] *Ibid.*
[582] *Ibid*.
[583] *Dekker* (123) 768.
[584] *Ibid*. This view is shared by Fredman, see *Fredman* (107) 180. See also *Rodgers* (69) 7.
[585] *Schiek and Gideon* (204) 286.
[586] *Ibid* 288.
[587] *Daskalova* (9) 12.
[588] *Khaleeli* (154). See also *Daskalova* (9) 13.
[589] *Daskalova* (9) 13.

from collective bargaining to create a fairer market place.[590] Westerveld expresses this very clearly: '*These workers fall through the cracks with regard to both protective labour laws and opportunity-creating business laws.'*[591]

Next, if an expanded notion of 'worker' has been established, the *Albany*-exception should be re-interpreted to exempt collective bargaining agreements from the cartel prohibition that have the purpose of overcoming economic dependency of service providers, regardless of the fact that these service providers have the legal status of being self-employed.[592] The first condition of the *Albany*-exception holds that the agreement concerned must be the result of a collective negotiation between employers and labour unions.[593] This requirement should be interpreted in such a way that it is acknowledged that some platform workers are, for the purpose of competition law, *workers* and not undertakings.

Although this research focuses on competition law and case law of the ECJ, it is interesting to note that support for this extended *Albany*-approach seems to be found in a recent ruling of the ECSR. As already briefly mentioned in paragraph 2.3.2, the ECSR ruled that self-employed workers should be able to enter into collective bargaining agreements, including agreements that fix minimum-tariffs.[594] The ECSR reasoned:

> *'The Committee further observes that the* ***world of work is changing rapidly*** *and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law,* ***of shifting risk from the labour engager to the labour provider.*** *This has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers.*
>
> *Moreover, the Committee emphasises that collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract. This contrasts with competition law where the grouping of interests of suppliers endanger fair prices for consumers. To overcome the lack of individual bargaining power the anti-cartel regulations are considered inapplicable to labour contracts and this has also been generally accepted by the CJEU (see Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, judgment of 21 September 1999). In establishing the type of collective bargaining that is protected by the Charter,* ***it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather***

[590] *Schiek and Gideon* (204) 288.
[591] *Westerveld* (130). See also *Daskalova* (9) 5.
[592] *Schiek and Gideon* (204) 288.
[593] *Van de Gronden* (46) 59.
[594] European Committee of Social Rights, Decision in Case No. 123/2016, *Irish Congress of Trade Unions v Ireland* [2018] para 95.

> ***whether there is an imbalance of power between the providers and engagers of labour.*** *Where providers of labour have no substantial* ***influence on the content of contractual conditions,*** *they must be given the possibility of improving the power imbalance through collective bargaining.'*[595]

The ECSR holds the opinion that self-employed persons cannot be refused to enter into collective bargaining agreements because of their *legal status.* The decisive criterion should be whether there is an *imbalance of power* between 'providers and engagers' of labour.[596]

4.2.2. Assessment in the light of the protection of platform workers, consumer welfare and economic freedom

The extended *Albany*-approach takes all three elements of an adequate solution to improve the economic position of self-employed persons into account. First, the need to protect self-employed persons against poverty is taken into account by expanding the definition of 'worker' in order to cover platform workers as well. As a result, platform workers will be able to enter into collective bargaining agreements to set minimum tariffs and improve their working conditions.

At the same time, consumer welfare is protected as Schiek and Gideon explain that a '*truly economic approach*' would help to recognize that the shift of risks towards platform workers results in economic *dependency* of the platform worker concerned rather than *independence.*[597] This means that those platform workers who are clearly depending on the platforms they provide services for will be enabled to enter into collective bargaining agreements, but this will not be the case for *all* self-employed persons. As a result, harm to consumer welfare will be minimized.

The third element of an adequate solution is the need to protect economic freedom. What has been said about the proportionality-test and the need to protect economic freedom applies in this situation as well: if the extended *Albany*-approach is applied, the state tries to achieve a market outcome that is perceived as 'fair' by society.[598] That is, the state tries to ensure that self-employed persons are able to provide for a minimum income for themselves. By doing so, the state uses competition law as a tool to obtain economic freedom.

4.3. Conclusion

In this section, a conclusion will be drawn on the fourth chapter.

Two potentially adequate solutions enabling platform workers to enter into collective bargaining agreements have been discussed. The first option concerns an *ex ante* applied proportionality-test to

[595] European Committee of Social Rights, Decision in Case No. 123/2016, *Irish Congress of Trade Unions v Ireland* [2018] para 37-38.
[596] *Ibid.*
[597] *Schiek and Gideon* (204) 288.
[598] *Gerbrandy* (31) 129-130.

determine whether the benefits of allowing platform workers to enter into collective bargaining agreements outweigh the costs. First, it is necessary to determine whether the self-employed persons concerned are at a risk of poverty. If this is the case, attention must be paid to determine *what* tariffs and working conditions are suitable to decrease this risk of poverty while at the same time paying attention to the interest of the consumer. Finally, it is important to consider whether there is actual *demand* for the service performed.

The proportionality-test takes all three elements of an adequate solution to improve the economic position of self-employed persons into account. First, the need to protect self-employed persons against poverty is taken into account by determining *which* groups of self-employed persons are at risk of poverty. If this part of the test is performed well, those persons struggling to provide a minimum income for themselves should be covered. Next, by determining what tariffs and working conditions are suitable, the risk of poverty of self-employed persons should decrease.

By determining what groups of self-employed persons are in need of protection, it is also determined what groups are *not* in need of protection. This will ensure that the damage to consumer welfare is minimized. Subsequently, by determining what tariffs and working conditions are suitable for the self-employed persons concerned, it must again be ensured that tariffs are not set higher than necessary to decrease the risk of poverty which will minimize the damage to consumer welfare. [599] Finally, by exploring whether there is actual demand for a service performed by self-employed persons, superannuated professions are not artificially sustained.[600] Although applying protective measures to superannuated services would benefit the platform workers concerned, this would disproportionally harm consumer welfare.

If the proportionality-test as described above is applied, the state tries to achieve a market outcome that is perceived as 'fair' by society. [601] That is, the state tries to ensure that self-employed persons are able to provide for a minimum income for themselves. By doing so, the state uses competition law as a tool to obtain *economic freedom*.

The second potentially adequate solution enabling platform workers to enter into collective bargaining agreement is suggested by Schiek and Gideon.[602] First, a definition of the concept of 'worker' for the purpose of competition law needs to be developed that enables platform workers to enter into collective bargaining agreements.[603] A '*truly economic approach*' would help to recognize that the shift of risks towards platform workers results in economic *dependency* of the platform worker concerned rather than *independence.*[604] Next, if an expanded notion of 'worker' has been established, the *Albany*-exception should be re-interpreted to exempt collective bargaining

[599] *Canoy and Hellingman* (13) 191.
[600] *Ibid.*
[601] *Gerbrandy* (31) 129-130.
[602] *Schiek and Gideon* (204) 286.
[603] *Ibid.*
[604] *Ibid* 288.

agreements that have the purpose of overcoming economic dependency of service providers, regardless of the fact that these service providers have the legal status of being self-employed.[605]

Like the proportionality-test, the extended *Albany*-approach takes all three elements of an adequate solution to improve the economic position of self-employed persons into account. First, the need to protect self-employed persons against poverty is taken into account by expanding the definition of 'worker' in order to cover platform workers as well. At the same time, harm to consumer welfare is minimized as only those platform workers who are clearly depending on the platforms they provide services for will be enabled to enter into collective bargaining agreements. Finally, as the state tries to ensure that self-employed persons are able to provide for a minimum income for themselves, the state uses competition law as a tool to obtain *economic freedom*.

The subtle difference between the two approaches lies in way in which the collective bargaining agreements are justified. The *Albany*-approach as suggested by Schiek and Gideon is based on the assumption that some self-employed persons are more similar to precarious workers than to entrepreneurs. As many platform workers are not *truly* independent, they should be considered as workers for the purpose of competition law.[606] The proportionality-test on the other hand does not aim at defining self-employed persons as 'worker'. The goal of the proportionality-test is to enable certain self-employed persons to enter into collective bargaining agreements because they are at a risk of poverty and the benefits flowing from the protective function of labour law outweigh the distortions in the market that competition law tries to prevent. The underlying justification of this approach can be found in the goal of the European legislator to establish a competitive *social* market economy, as noted in Article 3(3) TEU.

Both approaches aim at enabling platform workers to enter into collective bargaining agreements. As shown, both approaches are able to take the protection of platform workers, consumer welfare and economic freedom into account. Thus, both approaches could function as an adequate solution to improve the economic position of self-employed persons. The proportionality-test takes the three elements *explicitly* into account. It is asked *which* groups of self-employed persons should be enabled to enter into collective bargaining agreements and it is also explicitly asked *what* tariffs would be helpful for platform workers, yet not harming consumer welfare more than necessary. The extended *Albany*-approach takes the different elements somewhat more implicitly into account by asking which platform workers are economically depending on the platform they perform services for and which are not. As the proportionality-test is clearer in this regard, it could be preferred over the extended *Albany*-approach.

In the fifth and final chapter, it will be explored who should be the designated authority to apply the proportionality-test or the extended *Albany*-approach.

[605] *Ibid* 288.
[606] *Ibid* 288.

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The designated authority to develop a competition law solution

5. Introduction

In this chapter, it will be discussed what authority should be responsible for the application of one of the two solutions as suggested in the previous chapter. If the proportionality-test is used, the proposed criteria would need to be elaborated and it must be decided whether the self-employed persons concerned should be able to enter into collective bargaining agreements or not. If the extended *Albany*-approach as suggested by Schiek and Gideon is used, it needs to be determined what the precise functional notion of 'worker' will be and which self-employed persons will be covered by that definition.

As long as the ECJ does not rule in a case concerning platform workers and their right to enter into collective bargaining agreements, decisions will need to be made by an authority. This chapter will explore two different options of authorities that could be held responsible for the application of the suggested competition law solutions: the ACM[607] and a Dutch Ministry.[608] It will be discussed whether the ACM or the Ministry is best suitable to balance the three elements of an adequate solution: the protection of platform workers, consumer welfare and economic freedom. Attention will also be paid to the 'useful effect doctrine', following from Article 4(3) TEU.

5.1. The ACM as the designated authority

The ACM is charged with both competition oversight, sector-specific regulation and enforcement of consumer protection laws. Its objective is to ensure that markets work well for both people and businesses.[609] This flows from Article 2(5) of the Establishment Act of the Authority for Consumers and Markets:

> *'The objective of the activities of the Authority of Consumers and Markets shall be to ensure that markets function well, that market processes are orderly and transparent, and that consumers are treated with due care. To that end, it shall keep guard over, promote, and protect effective competition and a level playing field, and remove any impediments to these goals.'*[610]

[607] If it is argued that a competition authority like the ACM should be the authority responsible for the application of the competition law solution, the next question that should be asked is what the role of the Commission should entail. This is a wide-ranging question that will not be answered in this research.
[608] This could for example be the Ministry of Economic Affairs and Climate Policy or the Ministry of Social Affairs and Employment. As this research will not discuss what Ministry is best suitable to perform the application of the competition law solution, the term 'Ministry' will be used.
[609] Authority for Consumers and Markets, 'Mission and Strategy: our duties' (*ACM*) <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-tasks> Accessed 20 May 2019.
[610] Article 2(5) of the Establishment Act of the Authority for Consumers and Markets 2013.

The ACM aims at improving consumer welfare.[611] This is explicitly stated in its mission: '*ACM ensures that markets work well for people and businesses*.'[612]

Every year, the ACM announces in its 'Agenda' what topics it will focus on in order to let consumers and businesses know what they can expect from the ACM.[613] In its Agenda of the years 2018 and 2019, the ACM has chosen 'the digital economy' as one of its focus topics.[614] The ACM has written a position paper for the Second Chamber in which it is explained what role the ACM sees for itself in ensuring a fair balance between the stimulation of innovation on the one hand and protecting the consumer interest on the other hand.[615] The ACM specifically touches on the conditions under which the contractors of platforms, the platform workers, operate.[616]

The suggested competition law solutions aim at solving a problem in the market: the inability of platform workers to enter into collective bargaining agreements as a result of their legal classification. As the ACM explicitly notes that it will focus on problems in the digital economy, it could be argued that the ACM is the designated authority to develop and apply the suggested solutions. To put it simply: if the problem concerned relates to competition and the ACM is the authority dealing with competition matters, it can be argued that the ACM is the most evident authority to be entrusted with this task.

5.2. The Ministry as the designated authority

It could also be argued that the Ministry should be the designated authority to develop and apply the suggested solutions. This approach is chosen in Ireland. The responsible Minister can, at the request of labour unions, appoint categories of self-employed persons meeting the relevant requirements. Labour unions can negotiate on behalf of these appointed self-employed persons, as long as the effect of the negotiated agreements on the market is insignificant, the costs for the government are acceptable and European competition law is not violated.[617]

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[611] Chris Fonteijn, 'ACM's strategy regarding enforcement of vertical restraints' (*Meeting Competition Law Association* 24 November 2014) <https://www.acm.nl/nl/publicaties/publicatie/13592/Speech-Chris-Fonteijn-bij-Vereniging-voor-Mededingingsrecht-over-verticale-overeenkomsten> Accessed 11 June 2019.
[612] Authority for Consumers and Markets, 'ACM's Strategy' (*ACM)* <https://www.acm.nl/sites/default/files/documents/acm-strategy-2019.pdf> Accessed 17 June 2019.
[613] Authority for Consumers and Markets , 'Mission and Strategy: our agendas' (*ACM*) <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-agendas> Accessed 20 May 2019.
[614] Authority for Consumers and Markets, 'Digitale economie' (*ACM*) <https://denkmee.acm.nl/thema/digitale-economie?status=inactief> Accessed 20 May 2019.
[615] Authority for Consumers and Markets, 'Position Paper Autoriteit Consument & Markt: Rondetafelgesprek over de marktdominantie van internet- en technologiebedrijven' (*ACM* 31 January 2018) <https://www.acm.nl/sites/default/files/documents/2018-02/positionpaper-acm-over-marktdominantie-grote-tech-bedrijven.pdf> Accessed 20 May 2019.
[616] *Ibid.*
[617] *Gebrandy and Kreijger* (62) 39. The aim of this paragraph is not to discuss the content of the Irish regulation.

In the discussion around competition law and sustainability, corporate initiatives like agreements improving animal welfare have shown to raise competition problems.[618] As noted, the Dutch Minister of Economic Affairs has issued Guidelines on Corporate Sustainability Initiatives and Competition Law.[619] However, the final decision regarding the compatibility of agreements with competition law is taken by the ACM. Wesseling argues that such an approach is not helpful at all as it does not offer the necessary space for undertakings to enter into agreements without facing the risk of violating competition law.[620] According to Wesseling, a better solution would be to let private parties negotiate agreements. Subsequently, the Minister can make those agreements compulsory.[621]

This approach could be justified under EU law. In the case of the *Gebrüder Reiff,* the ECJ ruled that a German system in which the tariffs of road transport were fixed by private parties was compatible with EU law.[622] The ECJ held that:

> *'It must therefore be stated in reply to the question submitted that Article 3(f), the second paragraph of Article 5 and Article 85 of the EEC Treaty do not preclude rules of a Member State which provide that tariffs for the long distance transport of goods by road are to be* ***fixed by tariff boards*** *and are* ***to be made compulsory for all economic agents, after approval by the public authorities****, if the members of those boards, although chosen by the public authorities on a proposal from the relevant trade sectors,* ***are not representatives of the latter*** *called on to negotiate and conclude an agreement on prices but are* ***independent experts called on to fix the tariffs on the basis of considerations of public interest*** *and if the* ***public authorities do not abandon their prerogatives*** *but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary, substitute their decision for that of the boards.'*[623]

Thus, as long as the private parties entering into the agreement concerned are not representatives of the government and the government has the final say, there is no incompatibility with competition law.[624] The ECJ gained importance to the fact that the system took the interests of multiple stakeholders into account:[625]

> *'Moreover, the GüKG does not allow the Tariff Boards to fix the tariffs solely by reference to the interests of undertakings or associations of undertakings engaged in transport but* ***requires them to take account of the interests of the agricultural sector and of medium-sized undertakings or regions which are economically weak or have inadequate transport facilities****.*

[618] Rein Wesseling, 'Polder-Plus'-model: oplossing 'Kip van Morgen' ligt niet bij ACM maar bij minister' (2015) 6 Markt en Mededinging 220, 220.
[619] Minister of Economic Affairs, 'Beleidsregel mededinging en duurzaamheid' No. 52945 [2016].
[620] *Wesseling* (618) 220.
[621] *Wesseling* (618) 220.
[622] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* ECLI:EU:C:1993:886. See also *Wesseling* (618) 220.
[623] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* ECLI:EU:C:1993:886 para 24.
[624] *Ibid.*
[625] *Wesseling* (618) 220.

> *Furthermore, the tariffs are fixed only after compulsory consultation of an advisory committee made up of representatives of the users of the services.'*[626]

And even if stakeholders are not explicitly involved in the setting of tariffs, an agreement can be made compulsory if the government *itself* performs an extensive test, paying attention to stakeholder's concerns.[627] A benefit of designating the Ministry as the responsible authority is thus that various societal concerns can be taken into account. The Minister can of course take the competition concerns of the ACM into account, but competition concerns do not have to be *decisive*.[628] At the same time, the ACM can focus on its mission of improving consumer welfare.[629] Besides, the Minister declaring agreements compulsory fits the Dutch tradition of decision making in which multiple public and private parties negotiate to reach consensus.[630] Collective bargaining between labour unions and employer unions to negotiate salaries and working conditions for employees is an important example of this decision making process.[631]

Arguments in favour of designating the Ministry as the responsible authority to develop and apply the suggested solutions can also be found in the *trias politica:* the separation of legislative, executive and judiciary power.[632] The ACM is an Autonomous Administrative Authority (*'AAA')*.[633] This means that the Minister has no direct influence on the ACM.[634] As the Minister has no direct influence on the ACM, he does not have to bear responsibility for the actions of the ACM. In other words, the Minister is not accountable to the Dutch Parliament.[635] Broekstra argues that this is problematic as AAA's do not simply *execute* policies, they have *regulatory* and *policy-making* powers.[636]

Of course it could be argued that the ACM being accountable to the Dutch Parliament could function as a *check and balance.*[637] Problematic however is that Dutch law requires AAA's to be *independent* from national governments.[638] This is explicitly laid down in Article 3(1)(a) of the Autonomous Administrative Authorities Framework Act:

> *'An autonomous administrative authority may be established only if:*

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[626] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* ECLI:EU:C:1993:886 para 18.
[627] Case C-35/99 *Manuele Arduino* ECLI:EU:C:2002:97. See also *Wesseling* (618) 220.
[628] *Wesseling* (618) 221.
[629] Authority for Consumers and Markets, 'ACM's Strategy' (*ACM)* <https://www.acm.nl/sites/default/files/documents/acm-strategy-2019.pdf> Accessed 17 June 2019.
[630] *Wesseling* (618) 221.This process of decision making is known as the '*poldermodel*'.
[631] NOS, 'Het poldermodel' (NOS 28 January 2013) <https://nos.nl/nieuwsuur/artikel/467254-het-poldermodel.html> Accessed 21 May 2019.
[632] Hansko Broeksteeg, 'De regelgevende bevoegdheid van zelfstandige bestuursorganen, mede in het licht van het EU-recht' (2015) 3 RegelMaat 170, 172.
[633] This flows from Article 2(6) of the Establishment Act of the Authority for Consumers and Markets 2013.
[634] *Broeksteeg* (632) 170.
[635] *Ibid* 170-171.
[636] *Ibid* 178.
[637] *Ibid* 178.
[638] *Ibid* 170.

a. there is a need for an ***independent*** *opinion based on* ***specific expertise;'***[639]

The advantage of an independent competition authority is that the influence of volatile political considerations on the application and enforcement of the rules is limited. The legislator has delegated powers to the ACM to ensure that the interpretation of the rules is mainly based upon legal and economic arguments instead of being influenced by political pressure.[640] However, the drawback of the aforementioned is that the national parliamentary control of the ACM is limited. From a point of view of legitimacy and accountability, this is not desirable.[641]

5.3. Useful effect doctrine

Whether the ACM or the Ministry is designated as the responsible authority, attention must be paid to Article 4(3) TEU. This provision reads as follows:

> *'Pursuant to the* ***principle of sincere cooperation****, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and* ***refrain from any measure which could jeopardise the attainment of the Union's objectives****.'*[642]

This provision is addressed to Member States. It aims at holding Member States liable for behaviour of undertakings that infringes competition law. The underlying goal of the provision is to ensure the full effectiveness of the Articles 101 and 102 TFEU.[643]

On the basis of Article 4(3) TEU, the ECJ has developed its '*useful effect doctrine*'. According to this doctrine, Member States are not allowed to create legislation or take decisions that deprive competition law from its useful effect.[644] In the case of *Van Eycke versus ASPA,* the ECJ held that a Member State would violate Article 4(3) TEU in combination with Article 101 TFEU:[645]

> *'… If a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.'*[646]

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[639] Article 3(1)(a) of the Autonomous Administrative Authorities Framework Act 2006.

[640] Johan van de Gronden and Sybe de Vries, 'Independent competition authorities in the EU' (2006) 1 Utrecht Law Review 32, 32.

[641] *Broeksteeg* (632) 179.

[642] Article 4(3) TEU.

[643] *Whish and Bailey* (21) 224.

[644] Kati Cseres, 'Questions of Legitimacy in the Europeanization of Competition Law Procedures of the EU Member States' (2013) 2 Amsterdam Centre for European Law and Governance Working Paper Series 1, 12.

[645] *Whish and Bailey* (21) 227.

[646] Case C-267/86 *Pascal Van Eycke v ASPA NV* ECLI:EU:C:1988:427 para 16.

It must be noted that Article 4(3) TEU can only be used if the state measure actually violates Article 101 (or 102) TFEU. This limits the scope of the provision.[647] If legislation is exempted from Article 101 TFEU as a result of the *Wouters*-doctrine for example, Article 4(3) TEU is not violated.[648] Besides, several challenges of national legislation under the Articles 4(3) TEU and 101 TFEU have failed because the final determination of prices remained the task of a Member State.[649]

5.4. Conclusion

In this paragraph, a conclusion on the fifth chapter will be drawn.

It has been discussed whether the ACM or the Ministry should be responsible for the application and development of one of the competition law solutions as suggested in the previous chapter. It could be argued that as the problem concerned relates to competition and the ACM is the authority dealing with competition matters, the ACM is the most evident authority to be entrusted with this task. Besides, in its Agenda of the years 2018 and 2019, the ACM has chosen 'the digital economy' as one of its focus topics.[650]

There are however serious drawbacks connected to the choice of the ACM as the designated authority. As the Minister has no direct influence on the ACM, he does not have to bear responsibility for the actions of the ACM. In other words, the Minister is not accountable to the Dutch Parliament if the ACM is in charge.[651] For this reason, it is preferable to assign the Ministry as the authority to develop and apply the chosen competition law solution.

A benefit of designating the *Ministry* as the responsible authority is that various societal concerns can be taken into account. The Minister can of course take the competition concerns of the ACM into account, but competition concerns do not have to be *decisive*.[652] At the same time, the ACM can focus on its mission of improving consumer welfare. [653]

According to Wesseling, a solution would be to let private parties negotiate agreements. Subsequently, the Minister can make those agreements compulsory.[654] This approach fits the Dutch tradition of decision making in which multiple public and private parties negotiate to reach consensus.[655] As long as the private parties entering into the agreement concerned are not

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647 *Whish and Bailey* (21) 228.
648 *Ibid* 227.
649 *Ibid* 228.
650 Authority for Consumers and Markets, 'Digitale economie' (*Authority for Consumers and Markets*) <https://denkmee.acm.nl/thema/digitale-economie?status=inactief> Accessed 20 May 2019.
651 *Broeksteeg* (632) 170-171.
652 *Wesseling* (618) 221.
653 Authority for Consumers and Markets, 'ACM's Strategy' (*ACM)* <https://www.acm.nl/sites/default/files/documents/acm-strategy-2019.pdf> Accessed 17 June 2019.
654 *Wesseling* (618) 220.
655 *Wesseling* (618) 221.

representatives of the government and the government has the final say, there is no incompatibility with competition law.[656]

The fact that the Minister can take multiple societal concerns into account is all the more important as the economic position of self-employed persons is not 'just' a competition issue. Of course it is competition law that stands in the way of self-employed persons to enter into collective bargaining agreements. This results however in problems of a *social nature*: self-employed persons are a group at risk of poverty[657] and concerns are rising regarding the commodification of platform work.[658] It is notably the ACM *itself* that points out that many societal concerns, including the economic position of platform workers, are not *fully* related to the exercise of market power. Instead, these problems are often due to other forms of market failures like negative externalities. In these situations, the ACM tries to collaborate with other authorities.[659]

For the reasons as stated above, the Ministry is more suitable to be designated as the authority that has to develop and apply one of the two solutions as suggested in the previous chapter. In order to prevent a breach of Article 4(3) TEU, the final determination of the policy should remain a task of the Ministry.[660]

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[656] Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* ECLI:EU:C:1993:886 para 24.
[657] *The Netherlands Institute for Social Research* (118) 29.
[658] *De Stefano* (8) 472.
[659] Authority for Consumers and Markets, 'Position Paper Autoriteit Consument & Markt: Rondetafelgesprek over de marktdominantie van internet- en technologiebedrijven' (*Authority for Consumers and Markets* 31 January 2018) <https://www.acm.nl/sites/default/files/documents/2018-02/positionpaper-acm-over-marktdominantie-grote-tech-bedrijven.pdf> Accessed 20 May 2019.
[660] *Whish and Bailey* (21) 228.

Conclusion

In this research, it has been tried to find an answer to the question what the problem is with the Dutch cartel prohibition in relation to the protection of self-employed people without employees against exploitation in a rising platform economy. Subsequently, it has been investigated what solution Article 101 TFEU could offer to ensure an adequate resolving of this problem.

The first chapter described the problem analysis relevant to this research. The objectives of both competition law and labour law have been analysed. While competition law aims at protecting consumer welfare and applies to undertakings, labour law aims at protecting workers and applies to workers. As self-employed persons are considered to be undertakings, it is competition law and not labour law that applies to them. It has been argued that the goals of competition law and labour law clash in the way in which collective bargaining agreements are approached: while labour law allows *workers* to enter into collective bargaining agreements, competition law prohibits *self-employed* persons to do the same.

This is not a new phenomenon. Yet, an increase of a new type of self-employed persons has been noticed. These 'new' self-employed persons perform activities which are more similar to precarious work than to entrepreneurial activities. Although the rise of this new type of self-employed persons is not fully related to the platform economy, critics have accepted the general conception that the platform economy can lead to diminished protection of workers. The answer to the first part of the research question is thus that the goals of labour law and competition law clash. This clash leads to self-employed persons being unable to enter into collective bargaining agreements to set minimum-tariffs and improve working conditions. As a result, self-employed persons are a group being at risk of poverty.

Subsequently, in the second chapter it has been tried to establish a normative framework to assess the desirability of allowing platform workers to enter into collective bargaining agreements. It is described what an adequate solution to improve the economic position of self-employed persons would look like. The framework consists of three elements: the protection of self-employed persons against poverty, consumer welfare and economic freedom. An adequate solution must balance these three conflicting interests.

It has been argued that it would be helpful for platform workers to be able to enter into collective bargaining agreements as platform workers seem to be similar to precarious workers. Allowing platform workers to enter into collective bargaining agreements is a flexible solution that fits human rights and the view of the ECSR. The Dutch government and the ACM are currently exploring this option. Enabling platform workers to enter into collective bargaining agreements could thus be an adequate solution to improve their economic position, *if* the protection of platform workers, consumer welfare and economic freedom are properly balanced against one another.

Next, the third chapter investigated what potential solutions Article 101 TFEU currently offers to allow self-employed persons to enter into collective bargaining agreements. An overview of case

law of the ECJ has been drawn to clarify the notion of worker, independent, undertaking and collective labour agreements. It has however been shown that this case law is rather difficult to understand and unable to protect persons working in a platform economy. The 'solution' suggested by the ECJ in the *FNV KIEM*-case is not helpful for platform workers as they will never be able to meet the definition of 'worker'. The currently existing case law is thus not offering any help to enable platform workers to enter into collective bargaining agreements. Article 101(3) TFEU, Article 7 of the Competition Act and the *Wouters*-doctrine are also unable to offer a solution. Therefore, the current legal system must be interpreted differently in order to create a solution.

Two potential solutions have been explored in this regard in the fourth chapter. First, a proportionality-test has been proposed. This is an *ex ante* applied test to determine whether the benefits of allowing platform workers to enter into collective bargaining agreements outweigh the costs. First, it is necessary to determine whether the self-employed persons concerned are at a risk of poverty. If this is the case, attention must be paid to determine *what* tariffs and working conditions are suitable to decrease this risk of poverty while at the same time paying attention to the interest of the consumer. Finally, it is important to consider whether there is actual *demand* for the service performed.

Subsequently, the solution as proposed by Schiek and Gideon has been discussed. First, a definition of the concept of 'worker' for the purpose of competition law needs to be developed that enables platform workers to enter into collective bargaining agreements. Next, if an expanded notion of 'worker' has been established, the *Albany*-exception should be re-interpreted to exempt collective bargaining agreements that have the purpose of overcoming economic dependency of service providers, regardless of the fact that these service providers have the legal status of being self-employed.

Both approaches are able to take the protection of both platform workers, consumer welfare *and* economic freedom into account, which means that the second part of the research question is answered in the affirmative. Both the proportionality-test and the extended *Albany*-approach could function as an adequate solution to improve the economic position of self-employed persons, *if* the protection of self-employed persons, consumer welfare and economic freedom are properly balanced against one another. The proportionality-test takes the three elements more *explicitly* into account. As this makes the proportionality-test somewhat clearer, it could be preferred over the extended *Albany*-approach.

Equipped with two potential solutions, the fifth chapter tried to determine *who* should be responsible for the application and development of the solutions: the ACM or a Ministry. It has been argued that a Ministry is more suitable to perform this task as this is more in line with the *trias politica.* Also, the Ministry declaring agreements compulsory fits the Dutch tradition of decision making. Moreover, the Minister can take various societal concerns into account when applying one of the solutions which is important as the economic position of self-employed persons is not 'just' a competition issue. At the same time, the ACM can focus on its mission of improving consumer

welfare. In order to prevent a breach of Article 4(3) TEU, the final determination of the policy should remain in the hands of the Ministry.

Concluding, the Minister should choose to follow one of the two suggested approaches, depending on the underlying reason *why* he wants to justify collective bargaining agreements for self-employed persons. The *Albany*-approach as suggested by Schiek and Gideon is based on the assumption that some self-employed persons are more similar to precarious workers than to entrepreneurs. Therefore, they should be considered as workers for the purpose of competition law. The goal of the proportionality-test on the other hand is to enable certain self-employed persons to enter into collective bargaining agreements because they are at a risk of poverty. The underlying justification of this approach can be found in the goal of the European legislator to establish a competitive *social* market economy, as noted in Article 3(3) TEU.

The proportionality-test is arguably clearer than the extended *Albany*-approach as it takes the three elements of an adequate solution explicitly into account. On the other hand, a reason to prefer the extended *Albany*-approach is that it has been argued that the new type of self-employed persons, including platform workers, are similar to precarious workers. As the *Albany*-approach is based on the assumption that these self-employed persons are similar to precarious workers, it could be preferred over the proportionality-test.

It has to be noted that applying and developing one of the two solutions will be difficult and contain a lot of work. This is not an easy task to perform for the Ministry. It is however a *necessary* task. The platform economy is rising. If in the future more and more people perform work for platforms while being classified as self-employed, their inability to enter into collective bargaining agreements will become unsustainable. It should not be fully up to *platforms* to decide on minimum incomes and working conditions. This is a task for which *the state* should take responsibility, in cooperation with the Commission.

Utrecht University

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