



Platform Work and the Danish Model  
– Legal Perspectives

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## ABSTRACT

Labour law and services provided via online platforms or digital apps, platform work, appear to be an ill-matched couple as the business model of the platforms often relies on the worker not being an employee, whereas labour law categorises persons performing work as either self-employed or employees, depending on the circumstances of the relationship. Recent European and national case law concerning Uber illustrate that the classification of platform work is complicated. This article examines platform work in the light of the Danish model of providing a legal basis for decent pay and working conditions by way of collective bargaining. Collective agreements are a prerequisite for the Danish model to be extended to persons providing services via digital platforms. Platform businesses operate in an uncertain realm where the use of collective agreements could be questionable from a labour law as well as from a competition law perspective. The article takes a closer look at such legal perspectives by drawing out principles from national case law as well as case law of the European Court of Justice. The article further discusses a trial-agreement concluded between a trade union and a platform business in Denmark. The article concludes that collective agreements would be in line with the Danish model as well as with competition law, as long as the circumstances of each contract of service are characteristic of employment and as long as the service providers are not genuinely self-employed. The article contributes to the discourse on collective agreements as a means to ensure decent pay and working conditions as well as societal values and protections for persons providing services in the form of labour via online websites and digital apps.

## 1. INTRODUCTION

Technological developments allow for new business models and new forms of work. This has always been the case. Recent developments in digital technology likewise enable new models for providing services. The use of online websites or digital apps to assist the exchange of services between private persons are often referred to as ‘platform economy’, and it is often promoted as a manner of executing the economic principle of sharing assets or services, referred to as the ‘sharing economy’.<sup>1</sup>

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<sup>1</sup> E.g. <<https://deleoeconomien.dk/>> - The article in essence distinguishes between digital platforms as regards to the object of exchange. The term ‘sharing’ is appropriate, where assets are shared, such as a car or an apartment. As recognized for more than a century, labour is however not a commodity. Evidently, labor hours, as they are provided by a human being, cannot simply be shared as an ‘asset’, and thus is not appropriately categorised as ‘sharing economy’. This perspective is easily neglected - also in Denmark, e.g. in 2017, a trade association for platform businesses emerged with the objective of ensuring that ‘Danes in companionship and with respect for each other

Business models vary, also businesses using digital platforms. There is no one-size-fits-all model for using online websites or apps to connect service providers and users. Certain elements can nonetheless be examined as typical. The term ‘platform work’ in this article thus refers to the phenomenon where a private person offers a service in the form of working hours to another private person or corporate entity, where the connection is made via an intermediary online website or a digital app. The person offering work is referred to as ‘service provider’, the website or app is referred to as ‘the platform’, the legal entity offering and constructing the model of the intermediary app or website is referred to as ‘the platform provider’, the recipient of the service is referred to as ‘the user’.<sup>2</sup>

The dichotomy in labour and employment law provides that the relationship between the parties can be categorised as either one of employment or one of contracts for services by self-employed persons. This division is often referred to as ‘the binary divide’.<sup>3</sup> As an employee a person is entitled to certain rights and protections, and as self-employed, any rights or protections are the responsibility of the service provider. In

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can earn and save money in sharing the available resources through collaborative platforms’, *Foreningen for platformøkonomi i Danmark* <<http://danskeplatforme.dk/>>. Instead, in the view of the authors, digital platforms enable new and welcome avenues for providing services in the form of labour, e.g. cleaning services, transportation, etc., and could more accurately be termed new business models.

<sup>2</sup> See a.o. these sources for more on the legal aspects of platform work: Jeremias Prassl, ‘Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who Is a Worker?’ (Social Science Research Network 2017) SSRN Scholarly Paper ID 2948712 <<https://papers.ssrn.com/abstract=2948712>> accessed 20 August 2018; Jeremias Prassl and Martin Risak, ‘Uber, Taskrabbit, and Co.: Platforms as Employers - Rethinking the Legal Analysis of Crowdwork’ (2015) 37 *CLLPJ* 619; Valerio De Stefano, ‘The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork and Labour Protection in the “Gig-Economy”’ (2016) Working paper <[http://www.ilo.org/travail/whatwedo/publications/WCMS\\_443267/lang--en/index.htm](http://www.ilo.org/travail/whatwedo/publications/WCMS_443267/lang--en/index.htm)> accessed 20 August 2018; Jon Erik Dølvik and Kristin Jesnes, *Nordic Labour Markets and the Sharing Economy: – Report from a Pilot Project* (Nordisk Ministerråd 2017) <<http://urn.kb.se/resolve?urn=urn:nbn:se:norden:org:diva-4754>> accessed 20 August 2018; Marianne Jenum Hotvedt, ‘Arbejdsgiveransvar i formidlingsøkonomien? Tilfallet Uber’ (2016) 55 *Lov og Rett* 484; Ane Kristiansen and Søren Kaj Andersen, ‘Digitale platforme og arbejdsmarkedet’ (2017) 38 *Forskningscenter for Arbejdsmarkeds- og Organisationsstudier* <<http://faos.ku.dk/publikationer>> accessed 20 August 2018; Miriam A Cherry and Antonio Aloisi, ‘“Dependent Contractors” in the Gig Economy: A Comparative Approach’ [2016] *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=2847869>> accessed 20 August 2018; Jennifer Pinsof, ‘A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy’ (2016) *MITLR* 22, 341.

<sup>3</sup> Alan Bogg and Mark Freedland, *The Contract of Employment* (Oxford University Press 2016) 238 where the evolution of the binary divide is explored.

non-standard contracts of work the distinction can be blurred. This is apparent with work performed via platforms, where the platform provider often utilises a contractual term, by which the service provider is not an employee, but where at the same time the actual relationship between the platform and the service provider is atypical for self-employed persons.

The categorisation as employees or self-employed is of influence not only for the rights and protections of the individual service provider. Correct classification allows for fundamental societal considerations to be enforced. A number of employee rights and protections are a result of broader societal considerations and choices, e.g. ensuring a sustainable and healthy work force by providing safety at work, maximum working hours and paid annual leaves; a decent level of social security, e.g. pension payments, sick leave pay and maternity leave pay; and protecting societal values such as equality and protection against discrimination. Indeed, the classification as either employee or self-employed is vital to ensure that a given society's basic rights and protection for persons performing work in employment also applies when such work is performed via an intermediary digital app or a website.<sup>4</sup>

At the collective level where social partners aim to conclude collective agreements, the binary divide is likewise of essence. Collective agreements is the primary tool of choice to ensure a proper balance in the employment relationship as well as in society at large as a key feature of the Danish welfare system. However, if a service provider on digital platforms is categorised as self-employed, a collective agreement providing binding payment structures would violate competition law, collective action aimed at concluding agreements for genuinely self-employed persons would be unlawful under Danish law, and the Labour Court would not have jurisdiction to assess complaints of breach of contract. And vice-versa. In April 2018, 3F, the largest trade union in Denmark (United Federation of Danish Workers) concluded a collective agreement with a digital platform, Hilfr, which acts as intermediary between private cleaners and customers.<sup>5</sup> This article draws into focus existing labour law principles used to assess the status of persons in less than typical employment situations, case law from the Danish competition authorities and the CJEU regarding collective agreements for non-typical employment situations.<sup>6</sup> As the agreement with Hilfr is ground-breaking in Denmark, perhaps worldwide,<sup>7</sup> the article also takes a closer look at the innovative elements of the agreement.

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<sup>4</sup> Prassl and Risak (n 2) 622.

<sup>5</sup> <<https://www.3f.dk/english>> accessed 20 August 2018.

<sup>6</sup> The agreement is available at <[https://www.3f.dk/fagforening/fag/rengoeringsassistent-\(privatansat\)/overenskomsten-hilfr](https://www.3f.dk/fagforening/fag/rengoeringsassistent-(privatansat)/overenskomsten-hilfr)> accessed 20 August 2018.

<sup>7</sup> Collective agreements for quasi self-employed are not uncommon. According to Eva Grosheide and Beryl Haar, 'Employee-like Worker: Competitive Entrepreneur or

## 2. THE DANISH MODEL

Denmark is a small Scandinavian country of 5.7 million inhabitants. The Danish Constitution, dating back to 1849, establishes a constitutional monarchy and the framework for a democratic rule. The legislative power lies with the parliament and government in unison, and the rule of law is prevalent in Denmark.<sup>8</sup>

In the late Nineteenth century, labour was in abundant supply, working conditions were very poor, and the only way to improve working conditions was by acting collectively to gain bargaining leverage. A system of collective bargaining and conflicts emerged. In 1899, a lengthy nationwide conflict was brought to an end with the historic September Agreement. The September Agreement carved out the fundamental principles for the industrial relations system in Denmark, and recognised *inter alia* the right to bargain collectively, the right to strike, the duty of peace and the employer's managerial power. The social partners acknowledged the opposite party's right to exist and the right for employees and employers to freely join trade unions and employer's confederations.<sup>9</sup> These principles continue to be the foundation of the Danish collective bargaining system.<sup>10</sup> In 1910, parliament provided a dispute resolution system, based on a distinction between conflicts of interest and conflicts of rights, whereas conflicts of rights should be settled by way of dispute resolution rather than by way of conflict. Statutory legislation provided a specialised and effective dispute resolution system for the social partners, i.e. the Act on the Labour Court, *Arbejdsretsloven*<sup>11</sup> and the Act on a Public Conciliator, *Forligmandsloven*.<sup>12</sup> The social partners are otherwise self-regulatory as there is no statutory regulation of trade unions, collective agreements

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Submissive Employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie', in Maciej Laga and others (eds.), *Labour Law and Social Rights in Europe. The Jurisprudence of International Courts* (Gdansk University Press 2017), one social partner has adopted minimum fees for self-employed persons in a.o. architectural firms in the Netherlands.

<sup>8</sup> E.g. Denmark tops the World Justice Project, Rule of Law Index, 2017-18, <<https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2017-2018-report>>

<sup>9</sup> Ole Hasselbalch, *Labour Law in Denmark* (Fourth edition, Kluwer Law International B V 2016) 32; Jens Kristiansen, *The Growing Conflict between European Uniformity and National Flexibility: The Case of Danish Flexicurity and European Harmonisation of Working Condition* (DJØF 2015) 25.

<sup>10</sup> E.g. recognized in the current version of the General Agreement concluded by the Danish Employers' Confederation, DA, and the Danish Confederation of Trade Unions, LO, <[http://www.da.dk/bilag/General%20Agreement\\_net.pdf](http://www.da.dk/bilag/General%20Agreement_net.pdf)>

<sup>11</sup> Statutory Act no. 1003 of 24/08/2017 on the Labour Court and industrial arbitrations. Available in English at <<http://arbejdsretten.dk/generelt/labour-court/labour-court-act.aspx>> accessed 19 April 2018.

<sup>12</sup> Statutory Act no. 709 of 20/08/2002 on Conciliation in Collective Disputes.

and the lawfulness of industrial conflicts.<sup>13</sup> The right to collective bargaining is not explicitly protected in the constitution.<sup>14</sup>

The State interferes as little as possible in matters regarding pay and working conditions. Such matters are considered to be more suitably settled by way of collective bargaining.<sup>15</sup> This understanding is supported by a very high unionisation rate,<sup>16</sup> in 2017 approx. 67%, and a high coverage of collective agreements, in 2015 approx. 74% of private sector and 100% of public sector employees.<sup>17</sup> Within the boundaries of the labour market, the social partners act as the primary legislative power.<sup>18</sup> As a result, there is no general statutory legislation on what constitutes an employment relationship, on working conditions, minimum wages,<sup>19</sup> normal daily or weekly working hours<sup>20</sup>, overtime payment, sick leave pay, maternity leave pay, pensions, continuing education or lawful termination of employment.<sup>21</sup> Statutory regulation is traditionally passed only when avenues of negotiation have been exhausted in areas of social security, or for groups of workers in need of special protection or traditionally not unionised. Working conditions in Denmark are primarily regulated by way of collective agreements.<sup>22</sup> This system of bargaining is referred to as the Danish model. Denmark's membership of the European Union and the duty to implement directives by statutory law has forced the legislators to play a more active role.<sup>23</sup> At the political level, Denmark is reluctant towards EU legislation on topics

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<sup>13</sup> Hasselbalch (n 9) 51.

<sup>14</sup> Jens Kristiansen, *Den Kollektive Arbejdsret* (3rd ed, Jurist- og Økonomforbundet 2014) 112.

<sup>15</sup> Hasselbalch (n 9) 44; Kristiansen (n 9) 13.

<sup>16</sup> In 2008 the average unionization rate in Europe was less than 25 percent. Kristiansen (n 9) 45.

<sup>17</sup> Dagpengekommissionen, *Det Danske Arbejdsmarked*, Oktober 2015, 22 .

<sup>18</sup> Hasselbalch (n 9) 44.

<sup>19</sup> There are only three minor exceptions: vocational trainees are by statutory legislation ensured a minimum wage equal to the wage in the normal collective agreement in the trade in question and the pay of 'crown servants' is ultimately fixed by the Parliament, if the organizations do not come to an understanding during the negotiations. And finally, if the job is created as a initiative under the public unemployment scheme, a statutory act requires the pay to be settled according to the collective agreement within the trade. Hasselbalch (n 9) 135.

<sup>20</sup> *ibid* 120.

<sup>21</sup> Kristiansen (n 9) 31. The provisions with formal and substantive criteria for lawful dismissals exist, but are fragmented. E.g. Statutory Acts applicable to all employees prohibit dismissal on specific grounds, and Statutory Acts for certain groups of employees provide notice-periods and a standard of reasonableness in cases of dismissal.

<sup>22</sup> 'COLLECTIVE AGREEMENT WITH ERGA OMNES APPLICABILITY | Eurofound' <<https://www.eurofound.europa.eu/efemiredictionary/collective-agreement-with-erga-omnes-applicability>> accessed 19 April 2018.

<sup>23</sup> Kristiansen (n 9) 17.

traditionally reserved for collective bargaining.<sup>24</sup> At the legal level, the social partners aim to implement EU Directives by collective agreements, supplemented by minimum legislation applicable to those who are not covered by an implementing agreement.<sup>25</sup>

Collective agreements are automatically binding for signatories and their members, but not applicable *erga omnes*.<sup>26</sup> Employers can be bound either via membership of an employers' association, party to an agreement, or through an individual agreement with a trade union.<sup>27</sup> Agreements define their own scope of application. Typically, the agreement provides that when an agreement is in force, the employer must extend the provisions to all employees performing the type of work covered by the agreement, regardless of their membership status. Sectoral agreements typically run for a period of 2-3 years and regulate material working conditions such as wages, working hours, overtime pay, rules of termination and work place union representatives.<sup>28</sup>

For persons performing work via digital platforms in Denmark who would be categorised as employees, the customary avenue of ensuring reasonable pay and working conditions is by way of concluding collective agreements.<sup>29</sup>

### 3. NOTION OF EMPLOYEE – AN OVERVIEW

At the collective level the question of employee-status has surfaced in Danish law not only with regards to who is eligible to receive the rights provided for in the agreement, but also in regards to the

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<sup>24</sup> E.g. a unified 'no' to the European Commission's 2014 proposal to legislate on minimum wages in all EU Member States, 'Denmark: Heated Debate about Introducing Minimum Wage | Eurofound' <<https://www.eurofound.europa.eu/publications/article/2015/denmark-heated-debate-about-introducing-minimum-wage>> accessed 20 August 2018.

<sup>25</sup> This has been the model of implementation since 2001, where Denmark passed supplementing statutory legislation to implement Directive 97/81 concerning the Framework Agreement on part-time work.

<sup>26</sup> Kristiansen (n 9) 40; The members of the signing organizations can be seen as 'partakers' rather than 'parties' given the very limited right to supplement or deviate from the agreement they are bound by through their membership of the organisation. Hasselbalch (n 9) 58.

<sup>27</sup> If the employer is not a member of an employer organization, the employer can accede to the industry wide agreement by concluding an *adoption agreement* with a national trade union party to such an industry wide agreement.

<sup>28</sup> Hasselbalch (n 9) 60.

<sup>29</sup> For some groups of employees, the legislators have provided, that pay and working conditions must abide by the standards in the agreements concluded by the 'most representative' associations in Denmark. This is the case for e.g. posted workers, taxi-drivers, and apprentices.



jurisdiction of the Labour Court and the lawfulness of collective action.<sup>30</sup> This section gives an overview of the general principles for assessing employee status as the basic foundation for the assessment at the individual level.

There is no uniform statutory definition of what constitutes an ‘employee’.<sup>31</sup> The question of whether a person is entitled to certain rights as an employee is assessed according to the specific scope and definition provided in the relevant legal basis compared to the particularities of the relationship *in casu*.<sup>32</sup> The sui generis definition of the term ‘employee’ would be ‘a person receiving remuneration for personal work in a service relationship’.<sup>33</sup> General principles of what is characteristic for an employment relationship has been derived from case law. Most notably, the status agreed to by the parties themselves is indicative but not decisive. The Danish approach is functional, based on the social realities of the relationship between the parties.<sup>34</sup>

*First*, and often most prevalent, is the degree of the right of the employer to make decisions in the contractual relationship and the duty of the employee to follow such directives. In platform work, this would concern instructions on how the work is to be performed, a right to control the work, and a duty of the service provider to report to the platform. *Second* important feature is the economic arrangement between the parties, in particular how the remuneration is calculated and paid. It is characteristic of an employment relationship that the employee receives set remunerations calculated on the basis of time or results. The employee typically does not bear the risk of the success of the work, and likewise does not benefit from surplus. An employee typically does not bear the costs related to the work, such as materials. It is characteristic of self-employment to pay for an office/workshop, materials, tools, and to pay sales tax, etc. *Third*, a duty to perform the work personally is typical of an employment relationship. *Fourth*, the degree of connectedness between the parties, such as the length of the work, the intensity of the contractual relationship, and whether the contract supplies the main or supplementing income for the worker. *Fifth*, the social perception of the relationship, i.e. whether the worker in relation to the social perception and to his occupational position is similar to an ordinary employee.<sup>35</sup> None of these elements are decisive in themselves, and the Court will

<sup>30</sup> Ole Hasselbalch, ‘Arbejdsretten’, III, 1.2.2., <<http://arbejdsretu.lovportaler.dk/>> Accessed 20 August 2018.

<sup>31</sup> Jens Kristiansen, ‘The concept of employee: the position in Denmark’, in Bernd Waas and Guus Heerma von Voss (eds.), *Restatement of Labour Law in Europe, Volume I, The Concept of Employee*, Hart 2017.

<sup>32</sup> Hasselbalch (n 30) III, 1.

<sup>33</sup> Kristiansen (n 31), 135, Statutory Act no 240 of 17/03/2010 on a Written Statement, s 1(2).

<sup>34</sup> Hasselbalch (n 30) III, 1.

<sup>35</sup> Hasselbalch (n 30) III, 1.

carry out the assessment based on all the circumstances of each specific case.

The notion of employee is not constant, and legislation as well as case law take into consideration aspects outside the relationship between the employer and the employee. This is the case for legislation with an underlying health or social security purpose,<sup>36</sup> statutory acts based on EU-directives which must be applied in conformity with the underlying EU directive and CJEU case law,<sup>37</sup> and legislation counteracting risks of abuse.<sup>38</sup>

So far, no case law has emerged in Danish labour law specifically assessing the employment status of service providers under digital platforms. However, it is very likely that, depending on the specific setup of the individual platform business, the degree of influence on setting the prices, the degree of instructions as to how to carry out the work or on personal conduct when providing services, the degree of managerial powers delegated to the platform provider or its algorithm, the degree of elements of the algorithm influencing the economic foundation for the earnings, would render that the relationship could be assessed more characteristic of employment than of self-employed.

Even if the classification of a person under Danish law would be as self-employed, this cannot exclude a person from being classified as a worker under EU law, and as such being eligible to enjoy rights provided in EU directives.<sup>39</sup>

In *Lawrie-Blum* the Court adopted a definition, whereby:

*‘The essential feature of an employment relationship [ ] is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’*<sup>40</sup>

A key feature of being classified as employee in EU law is the element of subordination to the employer’s directions and the element of performing work for an external entity. A self-employed person under EU-law can choose the type and amount of work and tasks to be

<sup>36</sup> E.g. the Holiday Act, *Ferie-loven*, the Act on Occupational Injury Insurance, *Arbejdsskadesikringsloven*, the Act on Sick Leave Benefits, *Sygedagpengeloven*, the Act on Unemployment Insurance Benefits, *Arbejdsløshedsforsikringsloven*, and the Act on Supplementing Pensions Payments, *ATP-loven*, Hasselbalch (n 30) III, 1.2.1., 1), and the Act on Occupational Health and Safety, *Arbejds miljøloven*, Hasselbalch (n 30) III, 1.2.1., 2).

<sup>37</sup> E.g. the Act on a Written Statement, *Ansættelsesbevisloven*, the Act on Equal Treatment of Men and Women in regards to Access to Employment, *Ligebehandlingsloven*, and the Act on Non-Discrimination in Employment, *Forskelsbehandlingsloven*, Hasselbalch (n 30) III, 1.2.1., 2); Ole Hasselbalch, ‘Lønmodtagerbegrebet i EU-retlig kontekst’, (2018) EU-ret og menneskeret, 25, 3.

<sup>38</sup> E.g. the Act on Bankruptcy, *Konkursloven*, and the Act on an Employees’ Remuneration Guarantee Fund, *Lov om lønmodtagernes garantifond*.

<sup>39</sup> On the concept of employee in EU law and Danish law, see Hasselbalch (n 37).

<sup>40</sup> Case C-66/85 *Lawrie-Blum* [1985], para 17.

executed and performs work via the organisational entity of his own business. The case law of the CJEU additionally suggests that self-employed persons can lose their qualification as independent undertakings if the independence of a self-employed person is merely notional, thereby disguising an employment relationship, the CJEU in *Allonby*.<sup>41</sup> Likewise, if undertakings operate as auxiliary organs forming an integral part of the principal's undertaking, as promoted in *Confederación Española*.<sup>42</sup> In *FNV*<sup>43</sup> the Court provided that self-employed persons could be 'fake self-employed' in that they did not enjoy the freedom typical of self-employed status under each specific contract, see further section 5.1.2.

In *Uber Systems Spain* the Court considered Uber to primarily be a transport service because of the decisive influence over the conditions for transportation and the conduct of the drivers.<sup>44</sup> The Court did not take a specific stance on the employment status of the Uber-drivers, but the decisive influences strongly indicate a status as employees.<sup>45</sup> The Court reiterated its view on Uber as primarily being a transport service and, accordingly, not an 'information society service' in the later *Uber France SAS* case.<sup>46</sup>

#### 4. EMPLOYEE - COLLECTIVE BARGAINING ASPECTS

Collective agreements are concluded between a collective entity representing employees and an employers' association or a single employer. The status of service providers via platforms as employees or self-employed with regard to collective agreements presents additional legal thresholds, namely the lawfulness of collective action, the

<sup>41</sup> Case C-256/01 *Allonby* [2004], para 71.

<sup>42</sup> Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006], para 43 vis-à-vis agents and their principal.

<sup>43</sup> Case C-413/13 *FNV KIEM* [2014].

<sup>44</sup> Case C-434/15 *Uber Systems Spain SL* [2017], para 39.

<sup>45</sup> Other jurisdictions have assessed the status of Uber-drivers. In the UK, *Aslam and others v Uber B.V. and others*, the Employment Tribunal found an Uber driver to be a 'worker' for the purpose of the Employment Rights Act 1996, Employment Tribunals 28.10.2016, 2202551/2015 upheld by Employment Appeal Tribunal 10.11.2017, Appeal No. UKEAT/0056/17/DA. Conversely, the Australian Fair Work Commission on 21 December 2017 concluded that an Uber driver was not an employee and not protected against unfair dismissal.

<sup>46</sup> Case C-320/16 *Uber France SAS* [2018], para 22. Similarly, the status of Deliveroo drivers/food deliveries in other jurisdictions. The UK Central Arbitration Committee did not consider Deliveroo-drivers to be employees, cf TUR 1/985(2016), *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, and similarly in Italy regarding a similar food delivery service, *Foodora*, cf Tribunale Ordinario di Torino, Sentenza n. 778/2018 pubbl. il. 07/05/2018 RG n. 4764/2017; The Spanish Juzgado de lo Social in Valencia found Deliveroo-drivers to be workers, cf SENTENCIA del juzgado nº 6 de Valencia nº 244/2018 de 1 de junio.

jurisdiction of the Labour Court, and the lawfulness of agreements concerning remuneration under competition law.

#### 4.1. COMPETITION LAW AND PLATFORM WORK

The purpose of bargaining pay and working conditions collectively is, *inter alia*, to restrict the internal competition for jobs between employees, which historically has led to the ‘race to the bottom’.

Collective agreements in reality restrict competition. In a narrow sense by essentially fixating the labour costs of the employer, as well as indirectly by appointing a specific financial institution as the sole provider of e.g. compulsory occupational pensions.<sup>47</sup>

In Denmark, section 3 of the Statutory Act on Competition, *Konkurrenceloven*<sup>48</sup> explicitly provides that the act does not apply to salaries and working conditions. This exemption has been in force since the first Act on Price Agreements in 1936<sup>49</sup> was continued in the Act on Monopolies in 1955 amendments<sup>50</sup> and is now an essential feature of the Competition Act. According to the preparatory works, collective agreements are not acts of unilateral price fixing, but are the result of negotiations between two opposing parties pursuing specific interests, where the element of negotiation ensures that the provisions are well-balanced.<sup>51</sup> The social partners pursue social rather than competitive interests.<sup>52</sup> The mechanism of collective bargaining ensures societal considerations as well as counteracts abuse of power by the social partners.<sup>53</sup> Although collective action is invoked with the purpose of applying pressure on the opposite party,<sup>54</sup> the mitigating function of the Public Conciliator and the legal principles developed in case law ensure that such actions remain proportional to the aim of the conflict.<sup>55</sup>

The legal test for exemption under section 3 is qualitative. If a collective agreement does not regulate salaries and working conditions, the agreement is not exempt from competition law.<sup>56</sup>

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<sup>47</sup> Ruth Nielsen, 'Samspillet mellem konkurrenceretten og arbejdsretten', in Jens Hartig Danielsen and others (eds.), *Festskrift Til Jens Fejo* (DJØF 2012) 324.

<sup>48</sup> Statutory Act no 155 of 1/3/2018 on Competition,

<sup>49</sup> Statutory Act on Price Agreements, *Prisafstaleloven*, Rigsdagstidende 1936-37, 4948.

<sup>50</sup> Statutory Act on Supervision regarding Monopoly and Obstacles to Competition, section 2(2), *Lov om tilsyn med monopol og konkurrencebegrænsninger*, no 102 of 31/3/1955, and report of the Ministry of Industry, 'Fra monopollov til konkurrencelov', Betænkning 1075/1986, 35 and 52.

<sup>51</sup> Rigsdagstidende 1936-37, 4948

<sup>52</sup> Hasselbalch (n 30) XXI, 2.2.

<sup>53</sup> Hasselbalch (n 30) XXI, 2.2

<sup>54</sup> Collective action can in Denmark lawfully be invoked by the workers' (strikes and blockades) as well as by the employers' (lockout and boycott) representatives.

<sup>55</sup> Hasselbalch (n 30) XXI, 2.2

<sup>56</sup> Hasselbalch (n 30) XXI, 2.2

At the EU level, collective agreements are not expressly exempt from the scope of Article 101(1) of the Treaty of the Functioning of the EU (TFEU). The social aim of collective agreements can however outweigh the aim of unrestricted competition, as will be elaborated further below in 4.1.2.

#### 4.1.1. DANISH COMPETITION AUTHORITIES – CASE LAW ON ATYPICAL EMPLOYEES AND COLLECTIVE AGREEMENTS

The case law of the Danish competition authorities illustrates that it is possible for collective agreements to fulfil the conditions in section 3 even for self-employed persons, when entering into contracts of business on similar working conditions as regular employees. The term used is indicative but not decisive, and the specifics of the circumstances must be compared to the characteristics of those performing services in permanent employment and to those genuinely self-employed. Determining factors are that self-employed workers perform services under the same terms as employees, at the same entity and under the instruction of the employer whilst performing the tasks. Likewise, it is taken into consideration whether the agreement provides pay and working conditions typical for the industry, and whether mandatory social security payments were made.

This was the case in a ruling in 1993<sup>57</sup> where the Competition Appeals Tribunal took into account that the use of the term ‘freelance’ indicated that the agreement did not concern ‘pay and working conditions’, the freelance photographers had registered businesses with a duty to pay sales taxes, and the relationship with the media houses with regard to power of instruction and loyalty obligations did not differ significantly from what is often the case in commercial relations. As such, some persons covered by the agreement would in fact be genuinely self-employed, and for these persons the price-list was a violation of the Competition Act.

Likewise, in a ruling concerning freelancers from 1999,<sup>58</sup> where a ‘Guideline’ for pay and working terms was assessed, the term ‘freelance’ was used for any employment contract of less than 6 months, including casual contracts. As the Guideline in reality regulated prices for self-employed, the Tribunal stated that the proper mechanism would be to conclude collective agreements. However, freelance journalists providing services on casual contracts cannot be classified as self-employed solely because the assignments are not permanent. As the services of casual freelance journalists had the same characteristics as the services of the permanent employees at the same media houses, the Guideline was similar to collective agreement provisions concerning casual work, and was exempt from the Competition Act.

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<sup>57</sup> Section 70-76 of Competition Appeals Tribunal Ruling of 10/9/2003 (n 60).

<sup>58</sup> Competition Appeals Tribunal, ruling of 7 April 1999, j. no. 97-218.349.

In 2003,<sup>59</sup> the Tribunal assessed the lawfulness of a notice of collective action. The collective action was in support of a claim for a collective agreement providing standard payments for freelance journalists. The dispute concerned whether the notice, using the term freelancers, would cover also self-employed persons and constitute a breach of the Competition Act. The union argued that the term 'freelancer' covered two groups of workers providing services on casual contracts but not genuinely self-employed freelancers. The Tribunal returned the case for renewed deliberation without assessing the substance of the case as the notice could unintentionally include genuinely self-employed persons. The case was later withdrawn.<sup>60</sup>

In 2005,<sup>61</sup> the Tribunal *inter alia*<sup>62</sup> ruled on fixed prices for veterinary services. A collective agreement provided set hourly rates for meat quality controls<sup>63</sup> for employed as well as for substitute veterinarians. The substitute veterinarians providing the services could be employed elsewhere and could also be self-employed. The distinction between salaries and working conditions on the one side, and terms for conducting trade between businesses on the other side, should be carried out comparing the circumstances of the situation to the characteristics of either employment status or self-employed services. The starting point is whether one person is under the instruction of the other party, including a right to dismiss. A duty to pay mandatory contributions to social security measures, such as social pensions, sick leave payments and occupational injury insurance, is also characteristic of employment status. The Tribunal stated that the veterinarians were under the instruction of the public authority while providing the services, that payments were paid out as ordinary remuneration, and that the veterinarians accrued holidays with pay and social security contributions. The Tribunal also noted that the substitutes performed the work as a supplement to their main occupation. It was significant that during the contracts, the substitute veterinarians provided services under the same working conditions as permanently employed veterinarians. The Tribunal regarded the veterinarians as employees during the substitute contracts,

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<sup>59</sup> Competition Appeals Tribunal Ruling of 10/9 2003, J.nr. 02-85.078, j.nr. 02-85.080 og j.nr. 02-85.081 <<https://www.kfst.dk/media/14175/20030910-kendelse-tv2-danmark-danske-dagblades-forenings-forhandlingsorganisation-og-dansk-magasinp.pdf>> accessed 20 August 2018.

<sup>60</sup> Press release 25/2/2004:

<<https://www.kfst.dk/afgoerelser-ruling/konkurrenceomraadet/styrelsesafgoerelser/2004/dansk-journalistforbunds-varsling-af-kollektive-kampskridt/>> accessed 20 August 2018.

<sup>61</sup> Ruling of 26 October 2005, j.nr. 3/1120-0301-0374/SEK/LOB, <<https://www.kfst.dk/media/13665/20051026-afgoerelse-praktiserende-dyrlaegers-arbejdsgiverforenings-vedtaegter.pdf>> accessed 20 August 2018.

<sup>62</sup> Other questions were assessed.

<sup>63</sup> Ruling of 2005 (n 62), para 29-34 and 65-77.

regardless of their main occupation as self-employed, and the agreements were exempt from the Competition Act.

In particular, the choice to compare the circumstances under each contract was innovative and relevant, and an approach that also the CJEU has taken, see 4.1.2.

#### 4.1.2. CASE LAW OF THE COURT OF THE JUSTICE OF THE EU

Article 101(1) in the Treaty of the Functioning of the EU (TFEU) prohibits all agreements which may prevent, restrict or distort competition within the internal market. Agreements determining minimum prices are mentioned as the first example of ‘blacklisted’ measures in Article 101(1) TFEU, as they ‘*directly or indirectly fix purchase or selling prices or any other trading conditions*’. Such agreements, fixing minimum prices for an industry, have, in the case law of the CJEU, consistently been considered to entail a significant restriction on competition.<sup>64</sup> CJEU case law has, however, exempted agreements regarding salaries and working conditions, which corresponds with the approach in Danish competition law.<sup>65</sup>

In the case of *Albany*, the Court assessed whether collective agreements establishing mandatory and exclusive pension funds constituted an unlawful restriction of competition. Advocate General Jacobs argued that collective agreements are, by their very nature, restrictive of competition, since generally employees cannot offer to work for wages below the agreed minimum.<sup>66</sup> In reality, collective agreements probably do not have a notable restrictive effect on the competition between employers.<sup>67</sup> The CJEU found it beyond question that certain restrictions of competition are inherent in collective agreements. However, as collective agreements pursue social policy objectives of improving living and working conditions and provide social protection,<sup>68</sup> they were not a violation of the provisions in the Treaty.

The CJEU has on this account accepted that mandatory pensions,<sup>69</sup> social security schemes with regard to occupational injuries,<sup>70</sup> and insurance with regards to sickness leave,<sup>71</sup> are outside the scope of

<sup>64</sup> *FNV KIEM* (n 44) Opinion AG Wahl, paras 35 -36 referring to case C-243/83 *Binion*, para 44.

<sup>65</sup> Ruth Nielsen, ‘Kollektive overenskomster og konkurrenceretten’, (2001) Ufr 2001B.27.

<sup>66</sup> Case C-67/96 *Albany* [1999] Opinion AG Jacobs, para 178.

<sup>67</sup> *ibid*, para 182 in which he points to the labour costs being only one of many production cost factors.

<sup>68</sup> Case C-67/96 *Albany* [1999], para 59.

<sup>69</sup> C-67/96 (n 69); joined Cases C-115/97 and C-117/97 *Brentjens’ Handelsovernemning BV* [1999]; Case C-2019/97 *Drijvende Bokken* [1999]; joined Cases C-180/98 and C-184/98 *Stichting Pensioenfonds Medische Specialisten* [2000].

<sup>70</sup> Case C-218/00 *Cisal* [2002].

<sup>71</sup> Case C-222/98 *Woude* [2000].

Article 101(1).<sup>72</sup> The Court takes the view that the social objectives would be seriously undermined if management and labour were subject to Article (85(1) (now Article 101(1)) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment,<sup>73</sup> and that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must be regarded as falling outside the scope of Article 85(1) of the Treaty.<sup>74</sup>

However, the exemption is not without limits. In 2004, the European Commission pursued the Belgian Architects' Association for breach of Article 101(1) TFEU by adopting a scale of set fees for architects.<sup>75</sup> According to the Commission, architects are undertakings because they provide services on a long-term basis and for remuneration.<sup>76</sup> As a result the fee scale was an independent act by the association of a prescriptive character<sup>77</sup> with the object of restricting competition, and the association was imposed a fine of 100.000 Euros.<sup>78</sup>

In a more recent CJEU ruling, *FNV* from 2014, the Court assessed the line between employed or self-employed with regard to self-employed Dutch musicians. A Dutch association for self-employed musicians, FNV, concluded a collective agreement with a Dutch orchestra's association, providing fixed minimum fees for self-employed musicians when providing services as substitutes in orchestras.<sup>79</sup> The CJEU reiterated the arguments of *Albany*, *Brentjens* and *Drijvende Bokken* that self-employed service providers are – in principle – undertakings subject to Article 101(1). Self-employed persons offer their services for remuneration on the market and in relation to the principal perform their activities as independent economic operators.<sup>80</sup>

If an association acts in the name of and on behalf of self-employed service providers, the association does not act as a social partner, but as an association of undertakings.<sup>81</sup> Such agreements would therefore not be the result of collective bargaining between employers and employees and would not be exempt from the scope of Article 101. The Treaty encourages dialogue between management and labour in

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<sup>72</sup> The Danish Labour Court in ruling of 17 November 2000, AR 1996.225, aligned its case law with the rulings of the ECJ in *Albany*, *Brentjens* and *Drijvende Bokken*, Nielsen (n 66) 31.

<sup>73</sup> C-115/97 (n 70) para 56.

<sup>74</sup> *ibid* para 57.

<sup>75</sup> *Orde van Architecten* (Commission Decision of 24 June 2004), para 1.

<sup>76</sup> *ibid* para 38.

<sup>77</sup> *ibid* para 78.

<sup>78</sup> *ibid* para 138.

<sup>79</sup> C-413/13 (n 44) para 6. See also Eva Grosheide and Mark Barenberg, 'Minimum Fees for the Self-Employed: A European Response to the Uber-ized Economy', (2016) 22(2) CJEL 194.

<sup>80</sup> C-413/13 (n 44) para 27.

<sup>81</sup> *ibid* para 28-30.



order to improve working conditions; the Treaty does not however encourage dialogue between self-employed service providers.<sup>82</sup> If an agreement is concluded on behalf of self-employed service providers, it is not a result of negotiations between employers and employees and is not exempt from the scope of Article 101 TFEU. If, on the other hand, the self-employed service providers were in fact ‘false self-employed’, that is, if they are service providers in a situation comparable to that of employees,<sup>83</sup> agreements concluded on their behalf would be regarded as a result of negotiations between employers and employees.

It is not always easy to establish the status of self-employed persons as ‘undertakings’.<sup>84</sup> A service provider can lose his status of ‘self-employed’ if he does not determine his own conduct on the market, is entirely dependent on his principal, does not bear any of the financial or commercial risks, and thus operates as an auxiliary within the principal’s undertaking.<sup>85</sup> On the other hand, an essential feature of being an ‘employee’ is that for a certain period of time one person performs services of and under the direction of another person in return for which he receives remuneration.<sup>86</sup> According to Advocate General Wahl, the provisions of the TFEU Treaty on ‘employment’ (Articles 145 to 150 TFEU) and ‘social policy’ (Articles 151 to 161 TFEU) all centre on the notion of the ‘worker’.<sup>87</sup> The decisive factor is whether the person acts under the direction of an employer, in particular with regard to his freedom to choose the time, place and content of his work, does not share the employer’s commercial risks, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, forming an economic unit.<sup>88</sup> The Court stated that in order for the substitute musicians to be classified, not as ‘workers’ but as genuine ‘undertakings’, the national courts must ascertain whether the circumstances are similar to characteristics of ‘workers’ under EU law. Particular emphasis should be put on whether the relationship with the orchestra would **not** be one of subordination under the duration of the contract, e.g. whether the substitutes enjoy **more** independence and flexibility than employees performing the same activity, when comparing

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<sup>82</sup> *ibid* para 29, with reference to joined cases C-180/98 and C-184/98, *Pavlov and others*, para 69.

<sup>83</sup> *ibid*, para 31.

<sup>84</sup> *ibid*, para 32.

<sup>85</sup> *ibid*, para 33.

<sup>86</sup> *ibid*, para 34, with reference to recent cases of C-46/12 N, para 40, and C-270/13 *Haralambidis*, para 28.

<sup>87</sup> C-413/13 (n 44) paras 36-40.

<sup>88</sup> *ibid*, para 36, referring to cases C-256/01, *Allonby*, para 72; C-3/87, *Aggate*, para 36; and C-22/98, *Becu and others*, para 26.

the determination of working hours, the place and manner of performing the tasks assigned, i.e. the rehearsals and concerts.<sup>89</sup>

Notably, the Court used the criteria established in case law for losing status as an ‘undertaking’, i.e. not having the independence and flexibility during the contract’s characteristic of self-employed. The Court found that during the performances of the contracts, the self-employed musicians were in fact in a comparable situation to the employees, as the self-employed musicians did not enjoy more freedom during the contracts compared to the employed musicians, but would be under instructions as to the time, place and manner of performing music alongside the employed musicians. The Court introduced the notion ‘false independent’ for self-employed persons providing services in a situation comparable to ‘workers’.

It could be questioned if the Court, by introducing the concept of ‘false self-employed’, meant to introduce a new category or a third category in between the status as employee or self-employed undertaking. Similarly, whether the Court intended to prevent abusive misclassifications by promoting a realist assessment of the binary divide as seen in previous cases.<sup>90</sup> The realist mode of interpretation prescribed puts much emphasis on determining whether the service provider is a subordinate of the employer. In the case of *FNV* this would be sufficiently fulfilled by comparing the independence or subordination of the substitutes whilst performing one single contract of service as a musician. Whether or not the substitutes were genuinely independent in other contracts or in between orchestra contracts was not assessed and could be viewed as having no relevance to the assessment of whether they had lost their full status as an ‘undertaking’ in relation to this one type of contract, and as such on the classification of the provisions in the collective agreement applying to the substitutes.

From the case law of Denmark and the CJEU, collective agreements could be accepted for persons providing services via digital platforms as not being in violation of competition law, as the relationship during the performance of the contracts would be viewed as most similar to employment, which is the approach of Danish law, or most dissimilar to genuine self-employment, which is the most recent approach of the CJEU.

The term used to denote the service provider or the contractual basis as casual is indicative but not decisive.

Even unilaterally issued guidelines and recommendations that are not the result of a collective bargaining process could be exempt from

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<sup>89</sup> C-413/13 (n 44), para 37. The national Court of Appeals of The Hague determined, that the self-employed substitutes were in fact ‘false self-employed’ and that the stipulation of minimum fees fell ‘by reason of its nature and purpose’ outside the scope of Article 101(1) TFEU, *Grosheide and Barenberg* (n 80), 223.

<sup>90</sup> *Grosheide and Barenberg* (n 80) 224.

the Danish Competition Act. Insofar as the content reflects negotiated provisions in agreements and insofar as the working conditions are exactly the same as those covered by the existing agreements, such unilateral recommendations would not constitute a risk of abuse or violations of Danish competition law. The status under EU law of unilateral recommendations is more uncertain.

EU competition law has room for allowing collective agreements to be negotiated for workers in atypical employment relationships as long as the collective agreement pursues a social purpose and has a collective entity representing employees on the employee side.

Danish competition law as well as recent EU case law on Article 101(1) TFEU allow the assessment of the classification of the relationship to be performed on one single contract of work, emphasising the degree of flexibility and independence during the contract compared to employed persons performing the same work.

In this sense, it would be likely to find examples of service providers via platforms who provide services on limited contracts, and where for the duration of the contract the service provider would be in a situation of subordination in particular regarding the time, place and manner of work, as soon as the contract terms have been accepted by the self-employed person. This could be the case when a platform worker has accepted an offer of e.g. cleaning, and the cleaning must be performed at the time, place and in a manner adhering to training or directions set out by the platform provider. Some platform workers could also very likely – as highlighted in the *FNV* case – be viewed as not taking a commercial risk, but instead becoming an auxiliary to the principal, an integral part of the platform's undertaking.

#### 4.2. LAWFULNESS OF STRIKE AND SECONDARY ACTION

The status of the service providers as employees or self-employed also influences the lawfulness of collective action under Danish collective labour law. In Denmark, a social partner can demand that an employer enters into a collective agreement, and this can be supported by way of collective action. One of the prerequisites for lawful collective action<sup>91</sup> is that the social partner has a reasonable interest in concluding an agreement with the specific employer for the specific type of work. This entails that the entity has employees who perform the type of work covered by the agreement or by the social partner demanding the agreement.<sup>92</sup>

In 2007,<sup>93</sup> the Labour Court assessed the lawfulness of collective action in support of a collective agreement for freelance journalists. The

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<sup>91</sup> Hasselbalch (n 30) XXI, 2.4., *Labour Law in Denmark* (n 9) 257-263 and *Lønmodtagerbegrebet i EU-retlig kontekst* (n 37).

<sup>92</sup> Hasselbalch (n 30), XXI, 2.4.

<sup>93</sup> Labour Court ruling of 24 august 2007, A2007.293.

dispute hinged on the employment status of freelance journalists providing services to the employer. The freelance journalists performed work of the same character, under the same working conditions and with the same remuneration as permanently employed journalists. The media houses receiving the services withheld taxes on behalf of the freelancers, some freelance assignments were partly permanent and editors could adjust the materials delivered by freelancers. The Labour Court, referring to the ruling of 1999 of the Competition Tribunal,<sup>94</sup> stated that freelancers are not considered self-employed persons solely based on the services being provided as individual assignments. When the service is provided on terms that are more characteristic of employees than of self-employed persons, this is a basis for negotiating pay and working conditions for the freelance journalists. The freelance journalists performing casual work thus constituted an interest of the trade union to conclude an agreement for journalists, including freelance journalists. Additionally, the Labour Court stated that secondary action in support of a main conflict for freelance workers could be lawful, and that members of the same trade union could refuse to perform work targeted by the main conflict, so-called 'strike work', also when the subjects of the conflict were freelance journalists. Finally, the Labour Court approved a right to engage in collective action for the freelancers performing work on employee-like working terms.

The approach of the Labour Court resembles the approach of the CJEU in the *FNV* case, and the Competition Appeals Tribunal in the case regarding substitute veterinarians.

It would be in line with labour law principles to view persons providing services via digital platforms as employees in the context of providing a basis for an interest to engage in conflict against the platform provider. Likewise, it would be in line with principles of labour law to allow for support of the main conflict with secondary actions, and to allow for employees organised in the same trade union to refuse to carry out work targeted by the action, as well as for (organised) service providers to engage in collective action themselves.

#### 4.3. LAWFULNESS OF BLOCKADE

Lawful collective action against an employer can also be invoked in the form of a blockade. If the blockade is lawful according to collective labour law principles, the members of the negotiating trade union are obliged to follow such actions. This is the case for strikes as well as for blockades, even when the lawfulness under the Competition Act is not yet determined.

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<sup>94</sup> Above 4.1.1.

In a Supreme Court ruling of 2001,<sup>95</sup> a freelance photographer was excluded from the Journalists Trade Union. The union produced new price lists for freelance press photographers. The media houses refused to pay the new prices. The union initiated a blockade, by which photographers were not allowed to deliver materials to media houses until the media houses consented to pay the new prices. One freelance photographer continued to deliver photos to a media house targeted by the blockade. As a consequence, the member was excluded. The Court found that the decision to impose a blockade on deliveries was a collective action in support of payments for services. It was of no effect on the validity and the lawfulness of the action under labour law that the action in support of the list could be rendered unlawful under the Competition Act. This did not give the member reason to believe that his deliveries were exempt from the blockade. The exclusion was upheld.

The mechanism of imposing a blockade against an employer also binds freelancers that are members of the same trade union. The duty not to supply services rests on members performing work as employees as well as member performing work as self-employed.

Collective agreements supported by collective action can only be concluded on behalf of employees. Service providers on digital platforms could, however, constitute a legal basis for collective action, as long as the service providers are not genuinely independent businesses but work on terms similar to those of employees.

Likewise, the mechanism of industrial conflict can be invoked against a platform company using the services of persons that perform work as freelancers but are not genuinely independent businesses. If the main conflict is lawful, secondary conflicts could be invoked, and members of the same unions involved in the conflicts could refuse to perform strike-work. Likewise, the freelancers themselves are expected to adhere to a blockade against a company, e.g. a platform company.

#### 4.4. SCOPE OF A NEGOTIATED AGREEMENT

When the social partners have negotiated an agreement applicable to employees at an entity, the question arises regarding who at the entity is covered by the agreement. The agreement typically covers only work performed by employees.<sup>96</sup> The Labour Court takes a functional rather than a formalistic approach when assessing whether persons performing work are employees or self-employed.

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<sup>95</sup> Supreme Court ruling of 17 October 2001, Ufr 2002.82H (first instance Eastern High Court ruling ØLD of 15 September 2000).

<sup>96</sup> Kristiansen (n 14) 237.

#### 4.4.1. JURISDICTION OF THE LABOUR COURT

The issue surfaced as early as 1922<sup>97</sup> before the Labour Court (then Permanent industrial Tribunal). The dispute concerned the uncertain employment status of milk-distributors, as their remunerations were calculated as payments per litre (milk, cream and butter) and not per hour. The Labour Court did not assume that the milk-distributors were self-employed persons, despite the remuneration scheme. The milk-distributors were covered by the agreement and the complaint could be assessed by the Court.

#### 4.4.2. WHO IS COVERED

In 2010 an Industrial Arbitration ruling<sup>98</sup> assessed which of the freelance journalists working at the entity were covered by the collective agreement for freelancers, and who were on the other hand genuinely self-employed and not covered by the agreement. In his assessment, the arbitrator set a high threshold for persons being assessed as a freelancer working on employment terms. The presumption was that collective agreements cover only employees in a traditional sense. As neither the title of the agreement, nor specific elements during the negotiation process indicated otherwise, the trade union could not establish evidence that the parties had agreed to extend the agreement to freelance journalists working as self-employed, nor to freelance journalists working as atypical self-employed.

The arbitrator assessed all the specific circumstances. The decisive element was whether the service providers had gained status as genuinely self-employed, i.e. registered businesses, paying sales taxes, performing and invoicing work under the auspices of the business, advertised their services as a business, used accountants, had several customers, used business contacts, worked from home or from a studio. The amount of work performed for the media company was not decisive.

For the applicability of an agreement it is not sufficient to assess the relationship between the employer and the service provider, including the similarities to employment. The assessment also takes into consideration the factual business setup of the self-employed person.

For platform work, this assessment would be similarly carried out. The amount of work performed by the individual service providers is not decisive, whereas the specifics of the relationship as well as the business setup of the service providers are. Some service providers perform work from an organised business setup, indicative of status as genuinely self-employed and would not be covered by the agreement. Other service providers at the same platform, on the same contracts and

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<sup>97</sup> Ruling of the Permanent Industrial Tribunal, AR 642, of 18/12 1922.

<sup>98</sup> Industrial Arbitration Ruling of 5 April 2010, Case FV 2009.0015.

performing the same work would have less organised business setups – if any, and would thus be covered by the agreement.

##### 5. FIRST COLLECTIVE AGREEMENT FOR PLATFORM WORK

In April 2018, 3F and the digital platform Hilfr concluded a collective agreement for cleaners performing cleaning services via the Hilfr app.

The agreement is valid for 1 year from August 2018 with a view to be renegotiated in 2019 as a 3-year agreement. The parties to the agreement state that this is a first attempt to connect digital platforms with the Danish model. The purpose is *inter alia* to gain experiences from the first agreement with a view to establish more permanent agreements in the future. The agreement is innovative.

The agreement applies to ‘employed cleaning assistants’, but not to ‘freelancers’ otherwise associated with the platform. The agreement assigns the cleaners a default status as freelancers for the first 100 hours of services. When a cleaner has performed 100 hours of service, the status automatically changes to one of ‘employee’. From this point on, the agreement starts to apply to the service provider (now employee). The agreement does not preclude the cleaner from choosing ‘employee’-status before having provided 100 hours of services, or to retain his/her ‘freelancer’-status after having provided 100 hours of services. This is a major novelty for collective agreements. The agreement provides the workers themselves with an unrestricted choice of being covered or not being covered by the agreement. Another novelty is that the agreement provides the worker with an unrestricted choice of status in the relationship with the platform provider, choosing his/her own status as either employee or freelancer. This is not in line with the principles for determining status as employee developed in Danish labour and employment law.

The platform can refuse a request for ‘employee’-status from cleaners who have worked less than 100 hours if providing a fair and objective reason for such refusal. The standard of fair and objective reasons is well-established in Danish labour law and refers to reasons concerned with the conduct of business.<sup>99</sup>

Employed cleaning assistants are entitled to an hourly minimum pay corresponding to the sectoral agreement. The employee is entitled to charge higher hourly rates - but not lower. The agreement grants the employee several novel rights: partial payment in case of late cancellation of accepted cleaning jobs, pension contributions paid by Hilfr, holidays

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<sup>99</sup> Persons covered by the General Agreement between the Confederation of Danish Trade Unions and the Confederation of Danish Employers are protected by a standard of reasonableness in dismissals – i.e. a fair and objective reason for dismissal, cf. section 4(2). Likewise, a choice not to employ an applicant can be viewed as restricted by the same standard, see e.g. Hasselbalch (n 9).

with pay, sick leave pay, protection against removal of profile (or otherwise making the profile inaccessible) without due cause and only after notice in writing, and an explicit right to daily breaks, and daily and weekly rest periods.

The parties agree not to be bound by the provisions in the agreement after the expiry or termination of the agreement. This is likewise novel in Danish collective labour law, as it is customary that the employer continues to be obliged to apply the provisions in the agreement until a new agreement has been concluded by the same parties, or until the parties have endured a collective dispute of a certain length and severity.<sup>100</sup>

## 6. DISCUSSION

### 6.1. FIRST ATTEMPT FOR AGREEMENT FOR PLATFORM WORKERS.

Choosing to negotiate an agreement specific to platform work builds on the understanding that the service providers would not already be covered by existing agreements. The less innovative and more traditional approach would have been to assess the status of the cleaners according to the normal concept of employee in Danish labour law and the case law of the Labour Court and industrial arbitration, and assess whether the cleaners could in fact be covered by existing collective agreements for cleaners. A strict and more traditional interpretation of the scope for freelance or non-typical employees would be in line with the arbitrator's assessment of the application of the journalists' agreement in 2010, above 4.4.2. However, special emphasis was made on the business setup of the self-employed freelancers. In this the cleaners at Hilfr would perhaps differ. The trade union adhered to the notion that a special agreement is required.

Second, the agreement aims at solving a number of issues by adapting certain provisions of working conditions to persons performing work via digital platforms. With regard to these substantial provisions, the agreement constitutes a significant step forward regarding job security, wage standards and social security measures for persons performing work via platforms. Classifying the persons as employees and providing the employees with typical workers' rights and remunerations constitutes a solid step forward and indeed a solution in part.

Third, giving the employees an unrestricted choice to opt-in or opt-out of the collective agreement is in conflict with the basic elements of collective labour law.

Allowing individual derogations of an entire agreement goes against a fundamental feature of collective agreements on the part of the workers' association – to be binding by nature thereby securing the rights of their members. Collective agreements in Denmark have mandatory

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<sup>100</sup> General Agreement s 7(2).



effect; that is, employers and employees bound by a collective agreement are not allowed to reach individual agreements in conflict with the collectively negotiated terms. This is also referred to as the inderogability of collective agreements.<sup>101</sup> Inderogability prevents individual derogations from, for instance, working time provisions in an agreement, which is in the strong interest of the employee association *inter alia* because of the imbalance in the bargaining power of the individual employee towards the employer – an imbalance brought back into balance by the collectivity in the collective bargaining.<sup>102</sup>

The general theoretical approach of asymmetry in bargaining power of the employer and the employee also presents questions as to the element of free choice. Putting the worker in a position to individually choose to opt-in or opt-out of the collectively bargained provisions could be viewed with some scepticism. Traditionally, such options are frowned upon, as they allow the employer to exercise coercion on the worker, to opt-out of the binding collective provisions and instead negotiate individually, in a setting of implied stronger bargaining power by the employer. This sincerely questions the element of ‘free choice’ of the worker agreeing to provisions negotiated individually and in the interest of the employer. This debate has surfaced in Denmark in recent times. In 2002, the Part-time Act, *Deltidsloven*,<sup>103</sup> was amended to provide a legal basis for the employer and employee to agree to a part-time working arrangement, allowing such individual agreement to overrule any limitations in collective agreements. The amendment was intensely debated in the parliament Labour Market Committee, *Arbejdsmarkedsudvalget*.<sup>104</sup> The notion of ‘voluntarily’ agreeing to part-time work was heavily criticised. The critics stated that the option to individually agree on terms counter to terms collectively negotiated ‘removes the protection of the worker from the collective agreement, and the employer becomes the stronger party’. The critics also

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<sup>101</sup> Jonas Malmberg, ‘The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions’, *DIVA* (Stockholm Institute for Scandinavian Law 2002) 199 <<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-124492>> accessed 20 August 2018; Lord Wedderburn, ‘Inderogability, Collective Agreements, and Community Law’, 1992 ILJ 21 4, 245.

<sup>102</sup> See Arbitration tribunal decision of 19 November 1998, where the chairperson ruled that the members of the employee organization could not derogate from the provisions on working time in the applicable collective agreement due to the protective incentive of the provisions. The collective interest of the employee organization could even limit the individual members’ freedom of action for the same reason.

<sup>103</sup> Statutory Act no 815 af 26/9/2002 on Part-time Work.

<sup>104</sup> 52 consultation reports were received by the committee, 79 deputations visited the committee, and the committee asked the Minister of Employment 210 questions during the deliberations of Reports of the parliament Labour Market Committee, ‘Betænkning af den 8/5/2002 over Forslag til lov om ændring af lov om gennemførelse af deltidsskemaet, Betænkning af 25/5/2002’ and ‘Betænkning af 29/5/2002’.

maintained that the proposal allowed the employer to force the individual employee into a part-time agreement, with a reduction of wages as a consequence.<sup>105</sup> The political compromise in 2002 was to establish two conditions for the admissibility of part-time agreements contrary to collective agreements: 1) Part-time work can only be agreed to during the employment relationship, not upon employment,<sup>106</sup> and 2) provisions in collective agreements requiring a minimum of 15 hours of work per week must be respected.<sup>107</sup>

The free choice of application is novel and surprising. The worker's association is bound by the collective agreement and cannot enforce the provisions of the agreement if their members have chosen to opt out of the agreement.

However, if a member, despite choosing to opt out of the employee status, would in fact be regarded as an employee under EU law<sup>108</sup> concerning, for instance, a right to protection against discrimination on grounds of race, or a right to equal pay, the collective agreement cannot preclude the employee her right to invoke *inter alia* a right to equal pay or a compensation for direct discrimination.

The agreement does not frame the 100 hours threshold into a stipulated period of, for instance, two months. A freelancer meeting the threshold after a long period of, for instance 10 months, has only had 12 hours a month work through the platform on average, and will from that point on be regarded as an employee with regards to the agreement.

Conversely, a freelancer opting in or automatically receiving status as employee with a right to minimum pay under the agreement can result in a breach of the Competition Act, if the freelancer is genuinely self-employed. Self-employed persons collectively establishing agreements regarding their fees have been deemed cartels by the CJEU as well as by national courts.<sup>109</sup>

Questions that arise are: what is considered fair and objective reasons for dismissing workers for putting forth a request to become employees? How will the duty of not undermining the agreement play out for the platform? How will the provision on allowing the agreement to be terminated without a new agreement and without a termination

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<sup>105</sup> Betænkning af 8/5/2002 (n 104), Statement by the minority.

<sup>106</sup> The Part-time Act s 4a(1).

<sup>107</sup> The Part-time Act s 4a(1).

<sup>108</sup> The definition of worker in Art. 45 TFEU is used in the case law of the ECJ to determine who is considered as a worker, when applying EU Directives in the social field, such as Directives on; working time, Case C-428/09 *Isère*; collective redundancies, Case C-229/14 *Balkaya*; equality/non-discrimination in employment, Case C-432/14 *O*. In other Directives it is left to the Member State to define in accordance with national law and practice, provided the definitions respect the purpose of the Directive and the effectiveness of EU law, such as the Framework Agreement on part-time work; Case C-393/10 *O'Brien*; Hasselbalch (n 37).

<sup>109</sup> Grosheide and Haar (n 7) 1.

conflict be interpreted by the parties given its conflict with the procedure set out in section 9 of the Act on a Labour Court? How will the workers react when the initiative is placed with them for being freelance, not covered by the agreement, or being an employee, covered by the agreement, and what is the legal framework for coercion by the platform by way of other means than dismissal? And how will the fixed threshold of 100 hours be interpreted as this is not in accordance with the principles developed in labour law nor in competition law? How are the 100 hours calculated – can a service provider fall out of the scope of the agreement again, e.g. if having been on leave or travelling and starting over, and how will any remunerations, pensions and holiday payments in this case be calculated? Which hours count towards the 100 hours, how about jobs that have not been concluded satisfactorily, or where the user made last-minute-cancellations? Can the service provider change his/her mind, and opt-in/opt-out at will? Could the parties agree on a partial opt-in/opt-out and thus choose to apply some of the provisions, but not others?

The trial agreement is a remarkable attempt at resolving the difficult relationship between the binary divide and platform work and is novel as it introduces innovative features from a Danish collective labour law perspective. The effects remain to be seen, i.e. the purpose of concluding the agreement as a trial agreement.

## 6.2. PLATFORM WORK AND COMPETITION LAW.

Although the ruling of *FNV* was a novelty in EU competition law, platform work may not be entirely compatible with the facts in the *FNV* case. Most notably, service providers via platforms will most often not perform services alongside permanently employed persons performing the same job. On the other hand, the work performed and the conditions for performing the work to a large extent resembles normal cleaning assistant work elsewhere in the industry. The elements of having the liberty to arrange their own working hours and the liberty to accept or decline jobs offered, are not similar to employees in comparable employments as cleaners.

Some elements are worth looking further into. In the freelance journalists' cases of the Tribunal, the Tribunal looked to the cause for not being covered by a collective agreement. In the competition cases, the Tribunal stated that the element of the media house being covered by a collective agreement or not, was an element outside the control of the freelance journalist, and in itself could not render that the employment status changed according to features related to the recipient of the services, when all other aspects were the same, including the setup of the freelance journalists. The same applies in the case of platform work. The cause for the service provider to be self-employed in this context is primarily controlled by the employer. The contractual setup as self-employed is the choice of the employer, not of the service provider,

unless in the situations where the service provider has chosen a setup as genuinely self-employed. This element of the choice being outside the control of the service provider could likewise play a role in assessing whether collective agreements concluded for persons perhaps self-employed perhaps employees would be assessed as providing pay and working conditions in line with section 3 of the Competition Act.

One final argument to be explored is whether it could be said that an association of workers is still considered a social partner when negotiating a collective agreement and bargaining for minimum fees for genuinely self-employed persons, if the association is acting solely in the interest of its own members, the employees. The objective of the negotiations of the association for the genuinely self-employed would be to prevent ‘social dumping’ or in other terms prevent a ‘race to the bottom’.<sup>110</sup> In her Opinion to the *FNV* case, AG Wahl made a compelling argument for the exemption to Article 101(1) TFEU to also include such agreements by applying a perspective on the social policy objectives of collective bargaining.<sup>111</sup>

She argued that the elimination of wage competition between workers — the *raison d’être* for collective bargaining — implies that an employer under no circumstances can hire other workers for a salary below the one set out in the collective agreement. On that basis, and from the perspective of a worker, why should there be a difference if she is replaced by a less costly worker or by a less costly self-employed person. According to AG Wahl, 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. Further, she points out, that in the *Laval* case, the Court accepted that the right to take collective action for the protection of the workers of the Member State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.<sup>112</sup>

There still seems to be avenues of pursuit available for the trade unions to aim at concluding collective agreements with the digital platform providers on behalf of their service providers. The outer limits are set by competition law, EU labour law and Danish labour law that the worker must not be genuinely self-employed.

For collective bargaining to be lawful under Danish law, self-employed persons providing services on terms more similar to those characteristic of employees than of self-employed would form the basis for a recognised interest for trade unions to initiate demands for a

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<sup>110</sup> Grosheide and Barenberg (n 80) 224.

<sup>111</sup> C-413/13 (n 44) paras 74-79.

<sup>112</sup> Case C-341/05 *Laval un Partneri Ltd* [2007], para 103.

collective agreement to be concluded, including by way of collective action. Likewise, all collective action remedies could be put into play when supporting a demand for collective agreement, also for those in less than typical employment.

Finally, the element of combatting social dumping by concluding collective agreements for all persons performing work within the sector, including those working on less than typical employee terms, could be used as leverage in order to fulfil the criteria for not being in breach of competition law in the EU and in Denmark, as well as for abiding by the requirements of recognised interest established under Danish collective labour law.

Platform work and the Danish model are not inherently incompatible, regardless of the contractual terms of 'self-employed' or the setup of many small contracts of service. Labour law as well as competition law from the CJEU and national courts provide appropriate, clear and specific legal principles that can be put into practice when approaching the issues concerned with platform work in the context of the Danish model. This would perhaps give leverage to negotiating the next generation of collective agreements applicable to persons providing services via digital platforms, as existing principles would bring the agreements some way, and this could perhaps moderate the urgency for inventing brand new solutions on all accounts.

### 6.3. PLATFORM WORK AND FLEXICURITY.

Flexicurity and collective bargaining are key components of the Danish welfare model. Flexicurity consists of three elements: flexible labour laws allowing employers flexibility in terminating employment relationships, generous state-financed unemployment benefits securing a basic income for workers during periods of unemployment, and an active labour market policy *inter alia* promoting and financing acquiring skills and education to meet the changing needs of the market.<sup>113</sup>

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<sup>113</sup> For more on the Flexicurity model see: Christian Lyhne Ibsen and Mikkel Mailand, 'Striking a Balance? Flexibility and Security in Collective Bargaining' (2010) 32 *Economic and Industrial Democracy* 161; Henning Jørgensen and Per Kongshøj Madsen, *Flexicurity and Beyond: Finding a New Agenda for the European Social Model* (Djof 2007) <[http://vbn.aau.dk/en/publications/flexicurity-and-beyond\(ff3ac5f0-4fe1-11dc-a457-000ea68e967b\)/export.html](http://vbn.aau.dk/en/publications/flexicurity-and-beyond(ff3ac5f0-4fe1-11dc-a457-000ea68e967b)/export.html)> accessed 20 August 2018; Per Kongshøj Madsen, 'Flexicurity - Towards a Set of Common Principles?' (2007) 23 *IJCLLR* 525; Thomas Bredaard and Flemming Larsen, 'External and internal flexicurity: Comparing Denmark and Japan' (2010) 31 *CLLPJ* 745. On alleged detriments of the flexicurity system in light of crisis, see e.g. Henning Joergensen, 'Danish "flexicurity" in crisis - or just stress-tested by the crisis?' Report to the Friedrich Ebert Foundation, October 2010; Werner Eichhorst, Veronica Escudero, Paul Marx and Steven Tobin, 'The impact of the crisis on employment and the role of labour market institutions' (2010) *International Institute for Labour Studies*, 29.

The possibility of completing collective agreements for workers is the primary and preferred tool for ensuring proper working conditions for workers in all industries in Denmark. Moreover, the agreements provide a level of protection against arbitrary dismissals, thus moderating the 'flexible' part of the flexicurity model. The agreements also provide a certain minimum level salary which is necessary in order to be eligible for social security benefits, when out of employment.

The criteria for being eligible for social security payments in times of unemployment, sickness, retirement or other types of supported leaves from active employment should be a smooth fit, in order to ensure easy transition and an efficient 'security' part of flexicurity. In the current realities of an increased fragmentation in career paths and in employment, updating the legal criteria for eligibility for benefits to constitute a proper fit has been on the agenda of the social partners as well as the government lately. The first initiative was the amendment to the regulation on unemployment payments,<sup>114</sup> where several types of work now can count towards the working hours thresholds for becoming eligible for social security payments.

The blurred lines between what constitutes work as employee or work as self-employed could be set straight by collective agreements for platform workers, whereas with the current agreement, this is not entirely clear yet.

There is still some way to go for the social partners and the platform providers to meet and negotiate proper pay and working conditions for the persons who are not genuinely self-employed. The algorithms and digital apps are new tools enabling new, fast and extended ways of creating contact, exchanging services and creating a basis for business, whereas the service of personal labour remains more or less the same.

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<sup>114</sup> Statutory Act no 1670 of 26/12/2017 amending the Act on Unemployment Insurance; on the calculations, <<https://www.information.dk/debat/2018/01/nye-dagpengesystem-fyldt-faelder-folk-smaajobs>>.