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Artificial Intelligence as a Challenge for Human Rights, Labour Law and Antitrust Regulations

Abstract: This article examines challenges that artificial intelligence poses to the protection of human rights, including fundamental rights such as privacy, data protection, the right to work, and the prohibition of discrimination. Among the multiple regulatory dimensions affected by AI, three – the protection of fundamental rights, labour law and antitrust law – have been chosen for closer analysis as the areas in which the recently adopted EU regulatory framework (in particular the AI Act and the Platform Work Directive) produces the most immediate and tangible legal consequences. The study highlights the ethical and legal concerns associated with the rapid development and deployment of AI systems, particularly in contexts that affect individuals' lives and freedoms. Special attention is given to the application of AI in the workplace, where automation and algorithmic decision-making may lead to new forms of inequality, job displacement and biased recruitment or performance evaluation processes. The paper explores the intersection between AI and antitrust law, analysing whether AI can be used to facilitate anti-competitive practices. It considers to what extent algorithm-driven pricing mechanisms act autonomously, and to what degree they may be intentionally influenced or optimized to benefit corporate interests. The article concludes by emphasizing the need for a balanced regulatory approach that promotes innovation while ensuring ethical standards, transparency and accountability.

Keywords: artificial intelligence, human rights, labour law, antitrust law

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Introduction

Artificial intelligence (AI) represents one of the most significant determinants shaping contemporary socio-economic transformations. The rapid advancement of machine-learning techniques and the ability to process vast amounts of data have led to the increasing integration of AI-based systems across various sectors – from healthcare and transportation to recruitment, the assessment of creditworthiness and business pricing strategies. The benefits resulting from the implementation of AI-driven technologies are indisputable. However, their unreflective or uncontrolled application may give rise to numerous legal and ethical challenges, which should serve as a stimulus for in-depth doctrinal analysis and the development of comprehensive normative frameworks. In particular, AI has the potential to infringe upon fundamental human rights and freedoms, adversely affect employees' working conditions and shape market competition in ways that may raise concerns regarding compliance with legal principles.

The scope of this study has been deliberately narrowed to three areas in which the legal consequences of AI deployment have already crystallized in binding EU and national regulation and in which the risks materialize primarily at the level of individual rights and the competitive structure of the internal market: the protection of fundamental rights, labour law and antitrust law. This choice does not imply that other branches of law remain unaffected. AI also generates serious challenges for intellectual property law (notably as regards authorship of generative outputs and the scope of the text and data-mining exception under Directive (EU) 2019/790, as well as the fundamental right to intellectual property protected under Article 17(2) of the Charter of Fundamental Rights of the European Union (hereinafter: the CFREU)), for administrative law and the functioning of the administrative state (algorithmic decision-making by public authorities, automated risk-scoring in the administration of social benefits and taxes), for civil liability law and for criminal law (deep-fake offences, AI-assisted fraud). These domains, although equally important, require separate doctrinal treatment and have been the subject of growing, dedicated scholarship; their analysis is not feasible within the format of a single article without sacrificing analytical depth.

Given the potential risks associated with the continued uncontrolled development of artificial intelligence, a series of legislative initiatives have been undertaken at the international, European Union and national levels. These efforts culminated in the entry into force on 1 August 2024 of the AI Act (European Parliament & Council of the European Union, 2024c) and the Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law (Council of Europe, 2024). The AI Act, as a pioneering legislative measure on a global scale, has established a unified legal framework for the development and use of AI systems within the European Union, aiming to promote the creation of human-centred and trustworthy AI while ensuring a high level of protection for health, safety and fundamental rights as enshrined in the CFREU. At the same time – and, one may say, in parallel – the Council of Europe's Framework Convention introduced the first comprehensive international regulation on artificial intelligence, thereby setting a normative standard of global significance.

1. The issue of human rights protection in the age of AI

Within the catalogue of fundamental rights that are particularly sensitive to the influence of artificial intelligence systems, the right to privacy and the protection of personal data occupy a central position. The reason for this is that AI systems employ machine-learning algorithms and frequently operate on large datasets (Big Data), which often include personal data, for the purpose of making predictions or decisions (Gholipour, 2024, p. 94). Examples of such use include facial recognition algorithms designed to identify individuals in crowds or profiling systems that analyse online behaviour to predict preferences (Gültekin-Várkonyi, 2021, p. 5). Such activities may intrude upon an individual's privacy, especially when conducted without their knowledge or consent. Already in the early years of the 21st century, the European Court of Human Rights emphasized the inherent and high risk associated with the collection and storage of sensitive data by governmental entities, noting that individuals have legitimate legal concerns regarding the future use of previously gathered data (Judgments of the ECtHR, 2006 and 2008). Rapid technological advancement has only intensified these concerns.

Another significant threat concerns algorithmic discrimination, which runs counter to the principle of equal treatment. Algorithms trained on historical data may unwittingly perpetuate biases and stereotypes present in the data. The literature contains numerous examples of bias in AI systems, ranging from automated recruitment systems favouring men over women (based on data from male-dominated sectors, or training datasets influenced by patterns such as longer employment interruptions among women due to maternity leave) to credit-scoring algorithms discriminating against certain social classes (Packin & Lev Aretz, 2018, p. 4). Such practices may be deemed violations of the prohibition on discrimination protected by Article 21 of the CFREU, Article 32 of the Constitution of the Republic of Poland ('Equality before the law; Prohibition of discrimination') and Article 113 of the Polish Labour Code ('Prohibition of discrimination in employment'), among others. Importantly, the absence of a direct intent to discriminate is no exemption from liability: if the functioning of an algorithm results in indirect discrimination against certain groups (e.g. through disproportionately frequent rejection of their candidacies in recruitment), an employer or entity applying such an algorithm may face legal consequences under equal treatment provisions.

Freedom of speech and the right to access information constitute another potentially vulnerable area. An increasing amount of content is moderated or filtered through AI, particularly on online platforms and social media. Algorithms can automatically remove specific types of content (such as hate speech) or limit their reach. While this aims to protect users, it also creates the risk of excessive censorship or the misidentification of lawful content as prohibited – so-called false positives (Cobbe, 2021, pp. 741–755). A lack of transparency regarding the criteria used by such algorithms hampers verification of whether freedom of expression (protected under Article 54 of the Constitution of the Republic of Poland and Article 10 of the European Convention on Human Rights) is being infringed. Likewise, algorithms that personalize content for users (recommender systems) may create so-called information bubbles and contribute to opinion polarization, prompting questions about the safeguarding of information pluralism – a foundation of a democratic state.

In the face of the *sui generis* nature of threats arising from the use of AI-based technologies, the European Union possesses an adequate normative apparatus and is not without effective legal safeguards. Consequently, the EU has developed one of the strictest legislative frameworks worldwide in this field: Regulation (EU) 2016/679 of the European Parliament and of the Council (the General Data Protection Regulation, GDPR), applied since 2018, which also indirectly applies to AI systems processing personal data. The GDPR establishes principles such as data minimization, purpose limitation and transparency, along with data subjects' rights (access, rectification, objection, erasure, etc.), collectively forming important protections against abuses in profiling and monitoring individuals through AI (Jędrzejczak, 2024, p. 91).

The second key legal act, which comprehensively regulates uniform legal frameworks for the development and deployment of AI systems within the EU, is the aforementioned AI Act. Its primary objective is to ensure that AI systems placed on the EU market are safe, transparent, non-discriminatory, and subject to human oversight. The Regulation adopts a risk-based approach, establishing categories of AI systems with varying degrees of risk to users and society, along with corresponding restrictions. Thus systems posing an unacceptable risk to EU values have been qualified as prohibited AI practices, while high-risk AI systems are subject to stringent requirements before market entry. Prohibited AI practices under the AI Act include:

a) systems leading to cognitive manipulation of humans (e.g. interactive toys or applications inducing children to engage in dangerous behaviours) (Article 5(1)(a)),
b) systems exploiting vulnerabilities based on age, disability or social or economic status, causing changes in people's behaviour in a way likely to cause significant harm (Article 5(1)(b)),
c) social scoring, i.e. a comprehensive evaluation of citizens based on their behaviour or attributes when results lead to unfair treatment in unrelated

social contexts, or unjustified or disproportionate harm to individuals or groups (Article 5(1)(c)),

d) AI systems for assessing or predicting the risk of a person committing a rime based solely on profiling or evaluation of personality traits. This prohibition will not apply to AI systems that support human assessment of a person's involvement in criminal activity when that assessment is based on objective and verifiable facts directly related to criminal conduct (Article 5(1)(d)),
e) AI systems that create or expand facial recognition databases through untargeted scraping of facial images from the internet or CCTV footage (Article 5(1)(e)),
f) use of emotion recognition technology in workplaces and educational institutions (Article 5(1)(f)),
g) biometric categorization systems that categorize individual natural persons based on their biometric data to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation (Article 5(1)(g)),
h) real-time biometric identification of individuals in public spaces (Article 5(1)(h)).

These categories have been deemed so dangerous to fundamental human rights (particularly privacy, human dignity and individual freedom) that the EU legislature has established a general ban on their use within the European Union. Only in certain exceptional cases may they be authorized (e.g. real-time facial recognition by police strictly for locating perpetrators of the most serious crimes, subject to judicial authority or an independent administrative authority). As a rule, however, the EU establishes a clear boundary to protect democratic values.

High-risk AI systems are those which, despite potential threats to safety and human rights, also offer significant benefits to individuals. Accordingly, the AI Act permits them on the market solely upon their meeting additional conditions. Annex III enumerates critical sectors, including:

a) critical infrastructure (e.g. systems managing critical digital infrastructure, road traffic),
b) education and vocational training (e.g. AI systems used for admission decisions in educational institutions, for evaluating learning outcomes, assessing what level of education or training a person should receive or can access, monitoring or detecting prohibited behaviour by students during exams),
c) essential private and public services (e.g. credit-scoring systems, systems used by or for public authorities to assess eligibility for public ben-

efits or services, systems used for risk assessment and pricing for health insurance),

d) the judiciary (e.g. systems assisting courts in analysing facts and interpreting legal provisions, systems supporting criminal investigations),
e) border control (e.g. identification systems in migration and border procedures),
f) biometrics, insofar as their use is permitted under relevant Union or national law: remote biometric identification systems or emotion recognition, used for biometric categorization based on protected attributes,
g) employment, worker management and access to self-employment (for the requirement used to make decisions about employment conditions, promotion, termination, task allocation),
h) law enforcement (e.g. systems used to assess a person's risk of becoming a crime victim or of someone offending or reoffending, not based solely on profiling or personality traits, polygraphs or lie-detectors, as well as systems used to evaluate the reliability of evidence during criminal investigations or prosecutions).

Providers and users of high-risk AI systems must meet multiple obligations to ensure respect for rights and safety. These include implementing risk-management systems (Article 9 AI Act), ensuring high-quality training data to minimize errors and biases (Article 10), maintaining documentation and incident records for audit purposes (Article 12), informing users about AI features and limitations (Article 13), introducing appropriate mechanisms for human oversight (Article 14), and complying with cybersecurity and performance accuracy standards (Article 15). Of particular note is the requirement imposed on public-sector or private entities providing public services to conduct a Fundamental Rights Impact Assessment, identifying which specific rights or freedoms may be affected by the AI system and what measures should be taken to mitigate such risks. This obligation underscores the overarching goal of regulation: preventing human rights violations before they occur, through a systematic and preventive analysis of the impact of AI applications on fundamental rights, intended to secure accountability, transparency and the ethical development and use of AI systems (Bertaina et al., 2025, p. 2).

In addition to the EU measures, it is worth noting the Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law (CETS no. 225), adopted by the Committee of Ministers on 17 May 2024 and opened for signature in Vilnius on 5 September 2024. The two instruments – the AI Act and the Framework Convention – although complementary, differ fundamentally in their legal nature and operative effect. The AI Act is an EU regulation directly applicable in all Member States, harmonizing rules for the placing on the market and use of AI systems, prescribing concrete obligations addressed to providers, deployers, importers and distributors, and equipped with a centralized enforcement architecture (the AI Office, national competent authorities and administrative fines that for the most serious infringements reach EUR 35 million or 7% of global annual turnover). The Framework Convention, by contrast, is a public international law treaty of a framework character, addressed to state parties; it sets out general principles and obligations of result rather than detailed rules of conduct, leaves parties broad discretion as to the means of compliance (Article 3(1)(b) allows alternative measures vis-à-vis the private sector), excludes matters of national defence (Article 3(2)) and lacks an autonomous sanctioning mechanism, relying instead on a Conference of the Parties as a follow-up body. As of the date of writing, the Framework Convention has not yet entered into force: entry into force is conditional upon five ratifications, including by at least three Council of Europe Member States (Article 30(2)). The European Union signed the Convention on 5 September 2024 on the basis of Council Decision (EU) 2024/2218; for the EU the Convention is to be implemented, in the area of its exclusive competence, through the AI Act itself. The Framework Convention thus complements but does not replace the EU regime: it contributes to building a global baseline (the United Kingdom as a Council of Europe member, and the United States and Israel as non-member states involved in its elaboration, signed it on the same day; other non-Council-of-Europe states may accede under Article 31), while the substantive density of legal protection within the single market is determined by EU law (Presno Linera & Meuwese, 2024, p. 148).

At the national level, in Poland, protection against potential human rights abuses involving AI is largely based on implementing the aforementioned international and EU frameworks. The Constitution of the Republic of Poland guarantees fundamental rights (such as dignity, privacy, freedom of speech and equality) regardless of the nature of the threat, implying that actions involving algorithms must also comply with constitutional limits (Kaczmarek-Templin, 2024, p. 27). It is worth noting that the catalogue of fundamental rights affected by AI is broader than the analysis above suggests; it extends in particular to the right to intellectual property under Article 17(2) of the CFREU (and, correspondingly, Article 1 of Protocol no. 1 to the European Convention on Human Rights as interpreted by the Strasbourg Court). The intellectual-property dimension, however, situates itself primarily on the positive side of the protection – the entitlements of authors and right-holders vis-à-vis AI systems – whereas the analytical axis pursued in this article concerns the negative side, namely the protection of fundamental rights against infringements by AI systems. The two perspectives are complementary but methodologically distinct, and the former forms the subject of a separate strand of scholarship.

Given this comprehensive, multi-level set of legal instruments, from general constitutional and international norms to the GDPR and AI Act, the normative safeguard framework appears to provide adequate and high-quality legal protection. The remaining challenge lies in supervisory bodies (e.g. the president of the Personal

Data Protection Office in Poland in the area of data protection, or the future European AI Office established under the AI Act) effectively implementing these norms in practice and ensuring awareness among entities developing and deploying AI regarding their obligations.

2. AI, protection of employees' rights, and the future of employment: Automation, supervision and HR decisions

The labour market has also been significantly affected by the widespread implementation of AI systems, which are increasingly shaping not only the organization of work but also the nature of the employment relationship and the position of the employee in relation to the employer. Several key aspects of AI's impact on employment can be identified. The first is the automation of work through the replacement of people by intelligent machines or algorithms to perform certain tasks. Gradually, more and more factories are equipping their production lines with intelligent robots that use AI to take over repetitive tasks. Call centres employ artificial intelligence algorithms for customer service (chatbots, voicebots); intelligent avatars teach the basics of foreign languages; and software can rapidly analyse large sets of financial data and draw conclusions. On the one hand, technological progress significantly increases labour productivity that previously required the involvement of numerous assistants and analysts. On the other hand, it raises concerns about job security and the growth of so-called technological unemployment (Tyson & Zysman, 2022, p. 259). Economic studies indicate that algorithmic progress may particularly endanger medium-skilled occupations performing routine tasks, but increasingly also intellectual professions, as AI develops the ability to process natural language and make quasi-expert decisions (Drydakis, 2025).

Labour law provisions do not protect against job elimination for technological reasons – employers are entitled to reorganize their workplaces and introduce new technologies, even if this results in redundancies (with due respect for notice and collective dismissal regulations). Nevertheless, it is increasingly postulated that legislative policy should accompany the processes of AI-driven job replacement by introducing measures to mitigate social impacts. One such measure is strengthening employees' right to retraining and upskilling, so that those threatened by AI-induced job loss can be reskilled into roles complementary to new technologies (Tyson & Zysman, 2022, p. 266). The European Union has promoted the concept of a 'just transition' in the context of digitalization and automation, reflected in the European Pillar of Social Rights, which endorses lifelong learning and active employment support (Aragüez Valenzuela, 2024, pp. 158–159). In Poland, there are currently no specific legal regulations in this regard; providing suitable training to employees depends largely on employers' willingness or labour-market support programmes. However, in light of AI's progress, this issue may call for legislative intervention, such as incentives encouraging companies to retrain or upskill rather than dismiss employees.

The second aspect concerns employer supervision of employees using AI, known as 'algorithmic management'. An increasing number of employers use digital systems to monitor working time, productivity or even employee behaviour, and continuous electronic surveillance can infringe upon an employee's dignity and privacy. Polish legislation, under Articles 222 and 223 of the Labour Code, attempts to balance the employer's interests (in protecting property or production control) with employees' rights – requiring, among other things, that employees be informed about the purpose and scope of monitoring, and prohibiting surveillance of sanitary facilities or private correspondence. However, AI opens new possibilities for supervision that go beyond traditional cameras or email monitoring. Programs analysing mouse and keyboard movements (to measure actual working time) or monitoring visual activity are becoming increasingly sophisticated. Some companies have even experimented with cameras analysing employees' facial expressions to assess their concentration or emotional state. In response to such trends, labour laws across Europe are beginning to introduce additional employee protections. For instance, in France and Germany, works councils have statutory rights to co-decide on the introduction of new workplace monitoring technologies; employers cannot implement AI-based surveillance systems without employee representatives' consent. Italy amended its Employees' Statute a few years ago to extend union consent requirements to remote digital monitoring systems (Aloisi & Gramano, 2019, pp. 116–123).

The third area concerns AI-assisted HR decision-making, including recruitment, employee evaluation, promotion and dismlissal. In recruitment, AI most often takes the form of applicant tracking systems, which automatically analyse submitted CVs and reject those that do not meet pre-defined criteria, selecting a handful of candidates from hundreds for interviews with HR staff. Algorithmic CV filtering, however, may lead to the use of opaque selection criteria, leaving candidates unaware of the reasons for their rejection. Such operations can result in indirect discrimination risks if, for example, a system trained on the profiles of existing employees favours a certain group (e.g. graduates from specific universities) over others (Rigotti & Fosch-Villaronga, 2024, p. 5).

From a labour law perspective, recruitment decisions, although subject to employers' discretion, are constrained by anti-discrimination provisions. A job applicant subjected to unequal treatment based on a protected attribute (sex, age, origin, disability, etc.) may claim compensation under Article 183(d) of the Labour Code. If discriminatory grounds for refusal are proven, the employer bears liability, irrespective of whether the selection was carried out by a human or an algorithm. Therefore employers implementing AI in recruitment should examine their algorithms for bias and ensure the possibility of human verification in atypical cases to avoid such claims (Rigotti & Fosch-Villaronga, 2024, p. 6). In fact, employers using AI systems to select candidates for employment should also verify whether their AI software supplier meets all the requirements of a high-risk system category (Articles 8–21 AI Act). If the AI system is categorized as high-risk, deployers who are employers must inform employees' representatives about use of the system before using it in the workplace (Article 26(7) AI Act). Data protection must not be overlooked either: since candidates' personal data are processed during recruitment, under the GDPR they have the right to be informed if a decision rejecting their application was made automatically and to object or request human review (Article 22 GDPR).

Analysis of the above issues demonstrates that the integration of AI systems can infringe or weaken employee rights such as the right to dignity and privacy, the right to equal treatment or the right to be informed of evaluation criteria. Nonetheless, protecting these rights requires the proper interpretation of existing provisions and, where necessary, the introduction of new regulations adapted to the algorithmic era. Recognizing this, the European Union has identified the need to regulate the influence of digital platforms and algorithms on working conditions. This initiative was reflected in the adoption of the Platform Work Directive on 23 October 2024 (European Parliament & Council of the European Union, 2024a), which aims to regulate and improve working conditions for persons providing services through online platforms. Moreover, it introduces the concept of algorithmic management into European law, along with associated employee rights, which may also extend beyond the platform sector. EU Member States have until 2 December 2026 to align their national legislation with these new EU requirements.

Crucially, with respect to algorithmic management, the Directive obliges employers using automated monitoring and decision-making to ensure algorithmic transparency and human oversight over systems making significant HR decisions (which is also consistent with the AI Act provisions regulating high-risk systems). Practically, this entails obligations such as informing employees about the use of automatic monitoring and performance-evaluation systems, clearly explaining in understandable terms the criteria and parameters applied, and providing employees with the possibility to contact competent personnel for reviews of algorithm decisions (Articles 7–15 Platform Work Directive). Similar obligations are also imposed under the AI Act (Article 26(7)).

Taking into account both EU law (the Platform Work Directive and the AI Act provisions on high-risk systems linked to HR processes) and national-level developments (Labour Code amendments in some countries and future implementation of the Directive in Poland), these efforts aim to close regulatory gaps and ensure that employees' fundamental rights – from privacy to fair treatment – are equally respected in modern and automated work environments.

3. AI as a challenge for antitrust regulations

Advanced AI systems are gradually playing an increasingly significant role in the functioning of markets and in shaping companies' business strategies. This inevitably affects the field of competition policy. The primary objective of antitrust law (referred to as competition law in Europe) is to ensure fair market rivalry, notably through the prohibition of anti-competitive agreements such as price-fixing, market sharing or production-limiting cartels (Article 102 TFEU; Articles 6 and 9 of the Act on Competition and Consumer Protection) (Rab, 2019, p. 141).

The emergence of AI and advanced algorithms raises the question of whether traditional anti-competitive practices may evolve into newer, more effective forms through technological means, and whether the existing legal framework can detect and penalize such phenomena. Traditionally, in order for a competition authority to find the existence of a price-fixing cartel between specific entities, it must demonstrate that an agreement or a concerted practice exists between independent undertakings, typically in the form of secret meetings or communication. AI technology, however, may expand the range of circumstances considered prohibited practices under competition and consumer protection law. One of the most frequently discussed risks is the rise of algorithmic price-fixing (Rab, 2019, pp. 141–143). In the digital economy, companies selling goods and services to consumers, as well as online platforms, increasingly rely on dynamic-pricing algorithms that continuously monitor competitors' prices and adjust their own accordingly. Problems may arise when several firms use algorithms developed by the same software provider, thereby unintentionally facilitating price harmonization on the market without any formal interaction among company executives.

An illustrative scenario of such tacit algorithmic collusion would involve several petrol station owners delegating pricing decisions to algorithms. These algorithms then analyse each other's pricing behaviours and may 'reach a shared understanding' whereby all maintain fuel prices above the cost-optimal level, effectively forming a cartel without human decision-makers' involvement. This phenomenon could enable corporations to circumvent antitrust laws. Consequently, there is concern that companies may use algorithms as a form of 'hidden collusion': legally, they do not engage in any agreement, yet their algorithms stabilize prices at an elevated level (Mleczko, 2018, p. 70).

Since Article 6 of the Act on Competition and Consumer Protection of 16 February 2007 prohibits agreements that have as their object or effect the restriction of competition (including price coordination), it might initially seem that in the absence of direct human contact, there can be no 'agreement' to speak of. Yet competition law doctrine recognizes the concept of a 'concerted practice': conscious coordination between undertakings, even without a formal contract, may suffice to render their conduct potentially anti-competitive (Jurkowska-Gomułka & Piszcz, 2025, pp. 225–226).

Therefore if it can be demonstrated that companies intentionally used algorithms in a manner that enabled them to anticipate and adjust prices more effectively, an antitrust authority may attempt to attribute a violation of competition law to them and consequently impose a financial penalty. Establishing awareness and intent will be crucial – for instance, proving that firms knew of concurrent use of the same algorithm or adjusted its parameters to avoid price wars. In such cases, the algorithm remains merely a tool, and responsibility lies with the undertakings themselves.

Legal literature underscores that sanctions cannot be avoided simply because a decision was made by an algorithm if that algorithm acted under human-defined instructions aimed at restricting competition. Importantly, the liability of the undertaking for AI actions in the field of competition and consumer protection law should be the rule, since allowing an exemption based on the algorithm's autonomy would pose too great a risk of abuse. In other words, a company cannot justify itself by claiming 'it wasn't us who fixed the prices; our algorithms decided that'; once a firm deploys pricing algorithms, it must supervise their functioning and bear responsibility for their actions, under the principle of strict liability (Stucke & Ezrachi, 2018, pp. 643–644).

This debate is by no means confined to European scholarship. Crane (2024, pp. 1187–1192) argues in the context of US antitrust law that the 'coming wave' of general-purpose AI technologies will erode the foundational assumptions on which competition law has rested: AI-driven systems will detect (and even program) consumer preferences without the benefit of price signals, will invert the salient characteristics of human managerial intent (whose objectives become discernible while operative steps remain opaque) and will enable extreme market concentration that may eventually require sector-specific regulation rather than *ex post* antitrust enforcement. From a European perspective, this diagnosis reinforces rather than displaces the traditional doctrinal toolbox of Article 101 and 102 TFEU and their national counterparts (Article 6 and 9 of the Polish Act on Competition and Consumer Protection), but it counsels integrating the AI Act's transparency, logging and human-oversight obligations (Articles 12, 14 and 26) into the evidentiary architecture of competition proceedings, and complementing them with the *ex ante* asymmetric duties imposed on gatekeepers under Regulation (EU) 2022/1925 (the Digital Markets Act (DMA)). The convergence of these three regulatory layers – traditional antitrust, the AI Act and the DMA – is in our view, the genuinely novel feature of the European response, and it is on the interaction between them that future scholarship and enforcement practice will have to focus.

Conclusions

One of the main concerns associated with artificial intelligence is the ethical dimension of its use and the need to ensure that its development respects fundamental human rights. The law often struggles to keep pace with the rapid advancement of technology; however, the AI Act and the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law provide a solid foundation for safeguarding fundamental rights and ensuring the safe and responsible deployment of AI technologies. The rapid evolution of such systems may nevertheless lead to violations of the right to privacy and data protection. The extraordinary capacity of AI to process information, correlate facts and analyse materials from the internet or surveillance systems raises legitimate fears of an Orwellian vision of a permanently monitored society being realized.

Equally important are the risks associated with algorithmic discrimination, which may result from biased data, prejudice or flaws in the machine-learning process. Poorly designed AI systems can cause tangible harm, restricting access to education, employment or public benefits, or even endangering life and health when used in medical contexts. The key challenge therefore lies in ensuring that AI systems are fair, transparent and pluralistic. The AI Act rightly classifies systems related to recruitment, employment and access to education as high-risk, which should be positively assessed given their significant impact on individuals' livelihoods, career prospects, economic well-being and labour rights. Nonetheless, there is a legitimate concern that the automation of decision-making processes may lead to new forms of inequality, social exclusion and even rising unemployment.

The development of advanced AI systems also raises challenges in the field of competition law, particularly regarding the detection and prevention of collusive behaviour. Algorithms used for dynamic pricing may result in unintended price harmonization among enterprises, even in the absence of formal agreements. In such cases, competition authorities may qualify the conduct of undertakings as a form of concerted practice, especially where there is evidence of awareness or the intentional use of algorithms to limit competition.

The decisive question is how the balance postulated above is to be achieved in practice and how the policy goals of the EU regulatory framework are to be translated from the level of legislative declaration to the level of operational reality. In our view, three interlocking elements are indispensable. First, the institutional architecture: Article 70 of the AI Act requires Member States to designate a national market surveillance authority for AI Act enforcement. The Polish draft Act on Artificial Intelligence Systems (parliamentary print no. 2443) opts for a dedicated regulator: Article 5(1) of the draft establishes the Commission for the Development and Safety of Artificial Intelligence (Komisja Rozwoju i Bezpieczeństwa Sztucznej Inteligencji) as the market surveillance authority within the meaning of Article 70(1) of the AI Act, and Article 5(2) designates the Commission as the single point of contact within the meaning of Article 70(2). The choice of a dedicated regulator concentrates technical expertise but also creates a risk of jurisdictional fragmentation in cases that simultaneously implicate data protection, competition or labour law dimensions; its effectiveness will depend on the quality of cooperation arrangements with sectoral regulators and on the genuine resourcing of the Commission with technical, and not only legal, expertise.

Second, the architecture of judicial review: under the new Article 479(88)(a) of the Code of Civil Procedure, introduced by the draft Act, appeals against decisions of the Commission fall to the Court of Competition and Consumer Protection (Sąd Ochrony Konkurencji i Konsumentów). This choice consciously assimilates judicial control of AI Act enforcement to the established model of cases in the regulated sector (competition, energy, electronic communications, rail transport), ensuring consistency of procedural standards.

Third, private law remedies: following the withdrawal of the proposed AI Liability Directive in February 2025, the civil liability framework for AI-related harm rests on the EU side on the revised Product Liability Directive (Directive (EU) 2024/2853) and on the Polish side on the general regimes of tort and contractual liability under the Civil Code, applied by analogy to AI systems. Article 415 of the Civil Code, which establishes the general clause of fault-based tort liability, allows the injured party to seek redress against the operator or deployer of an AI system whose unlawful and culpable conduct – including failure to exercise due supervision over an autonomously acting system – has caused damage. Where the harm arises in the performance of a contractual obligation, Article 471 of the Civil Code grounds the liability of the debtor for non-performance or improper performance of an obligation, regardless of whether the breach was the immediate result of a human decision or of the operation of an AI system used by the debtor in the discharge of the obligation. The Product Liability Directive reform complements these regimes by extending the notion of 'product' to software, including AI systems, and by introducing presumptions of defect and causation in technically complex cases – changes which, properly implemented in Polish law, may compensate for the absence of a dedicated AI-liability instrument.

A methodological caveat is in order. The ultimate test of the AI Act will not be the consistency of its wording but the capacity of national authorities and courts to enforce its norms under conditions of informational and technological asymmetry between regulator and regulated. This observation corresponds, *mutatis mutandis*, to Crane's account, formulated for the United States antitrust order, of an emerging 'AI arms race between firms and enforcers' in which, on present trajectories, 'the firms have the decided advantage' (2024, p. 1224; see also pp. 1225–1226 on the difficulty of cartel detection in algorithmic environments). The European answer to this asymmetry differs from the solution envisaged by Crane: it does not consist in a retreat from antitrust toward purely sector-specific regulation but in the layering of three regimes – *ex post* competition enforcement, *ex ante* regulation of gatekeepers under the DMA, and horizontal AI regulation under the AI Act. The Polish model – a specialized Commission, a distinct procedural regime, a dedicated complaint mechanism and the assimilation of judicial review to the established model of regulated-sector cases

– is a coherent national translation of that European regulatory wager. The thesis defended in this article is, accordingly, that the convergence of the three mechanisms outlined above – institutional, judicial review, and private law – is what may transform the European regulatory model from a normative aspiration into a functioning system of protection. None of these mechanisms considered in isolation will be sufficient; only their coordinated application can keep technological innovation within the bounds of fundamental rights, fair competition and democratic accountability.

REFERENCES

Aloisi, A., & Gramano, E. (2019). Artificial intelligence is watching you at work: Digital surveillance, employee monitoring, and regulatory issues in the EU context. *Comparative Labor Law & Policy Journal*, *41*(1), 101–138.

Aragüez Valenzuela, L. (2024). Hacia la transición justa y sostenible del empleo digitalizado. Algunas reflexiones sobre la formación profesional y el Plan Europeo de Acción de Educación Digital. (2021–2027). *E-Revista Internacional de la Protección Social*, *9*(2), 157–179.

Bertaina, S., Biganzoli, I., Desiante, R., Fontanella, D., Inverardi, N., Penco, I. G., & Cosentini, A. C. (2025). Fundamental rights and artificial intelligence impact assessment: A new quantitative methodology in the upcoming era of AI Act. *Computer Law & Security Review, 56*, Article 106101. https://doi.org/10.1016/j.clsr.2024.106101

Cobbe, J. (2021). Algorithmic censorship by social platforms: Power and resistance. *Philosophy & Technology*, *34*, 739–766.

Council of Europe. (1950). European Convention on Human Rights, signed in Rome on 4 November 1950 (Dz.U. 1993 no. 61, pos. 284).

Council of Europe. (2024). Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, Vilnius, 5 September 2024 (CETS no. 225).

Council of the European Union. (2024). Council Decision (EU) 2024/2218 of 28 August 2024 on the Signing, on Behalf of the European Union, of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (O. J. L, 06.09.2024).

Crane, D. A. (2024). Antitrust after the coming wave. *New York University Law Review*, *99*(4), 1187–1243.

Drydakis, N. (2025). Artificial intelligence and labor market outcomes. *IZA World of Labor, Article 514. https://doi.org/10.15185/izawol.514*

European Parliament & Council of the European Union. (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation).

European Parliament & Council of the European Union. (2019). Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (DSM Directive) (O. J. L 130, 17.05.2019, 92–125).

European Parliament & Council of the European Union. (2022). Regulation (EU) 2022/1925 of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (O. J. L 265, 12.10.2022, 1–66).

European Parliament & Council of the European Union. (2024a). Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on Improving Working Conditions in Platform Work (O. J. L 2024/2831, 11.11.2024).

European Parliament & Council of the European Union. (2024b). Directive (EU) 2024/2853 of 23 October 2024 on Liability for Defective Products and Repealing Council Directive 85/374/EEC (O. J. L 2024/2853, 18.11.2024).

European Parliament & Council of the European Union. (2024c). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No. 300/2008 (EU) No. 167/2013 (EU) No. 168/2013 (EU) No. 2018/858 (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (O. J. L 2024/1689, 12.07.2024).

European Union. (1957). Treaty on the Functioning of the European Union, signed in Rome on 25 March 1957. (Dz.U. 2004 no. 90, pos. 864).

European Union. (2012). Charter of Fundamental Rights of the European Union (consolidated version: O. J. C 326, 26.10.2012).

Gholipour, M. (2024). The impact of machine learning algorithms and big data on privacy in data collection and analysis. *Australian Journal of Engineering and Innovative Technology*, *6*(5), 93–103.

Gültekin-Várkonyi, G. (2021). Facial recognition technologies and human rights: A European law perspective. *Hungarian Journal of Legal Studies*, *62*(4), 392–408.

Jędrzejczak, M. (2024). Ochrona danych osobowych przetwarzanych przez systemy sztucznej inteligencji. *Gdańskie Studia Prawnicze*, *3*(64), 86–98.

Judgment of the European Court of Human Rights of 7 December 2006 on the case of *Van der Velden v. the Netherlands*, application no. 29514/05.

Judgment of the European Court of Human Rights of 4 December 2008 on the case of *S. and Marper v. the United Kingdom*, application nos. 30562/04 and 30566/04.

Jurkowska-Gomułka, A., & Piszcz, A. (2025). Komentarz do artykułu 6. In A. Jurkowska-Gomułka & A. Piszcz (Eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* (pp. 225–226). C. H. Beck.

Kaczmarek-Templin, B. (2024). Justice in the machine age: Legal landscapes and challenges in the disputes in the era of artificial intelligence – remarks in the light of Polish regulations. In *Artificial intelligence and legal responsibility* (pp. 19–28). Iberojur Science Press. https://doi.org/10.62140/BKT192024

Mleczko, M. (2018). Technologiczne wyzwania dla antropocentrycznego prawa konkurencji na przykładzie algorytmicznego ustalania cen w sektorze e-commerce. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, *8*(7), 63–72.

Packin, N. G., & Lev-Aretz, Y. (2018). Learning algorithms and discrimination. In W. Barfield & U. Pagallo (Eds.), *Research handbook on the law of artificial intelligence* (pp. 88–113). Edward Elgar. https://doi.org/10.4337/9781786439055.00014

Presno Linera, M. Á., & Meuwese, A. (2024). La regulación de la inteligencia artificial en Europa. *Teoría y Realidad Constitucional*, *54*, 131–161.

Rab, S. (2019). Artificial intelligence, algorithms and antitrust. *Competition Law Journal*, *18*(4), 141–150.

Rigotti, C., & Fosch-Villaronga, E. (2024). *Fairness, AI & recruitment*. *Computer Law & Security Review, 53*, Article 105966. https://doi.org/10.1016/j.clsr.2024.105966

Sejm of the Republic of Poland. (1964). Act of 23 April 1964 – Civil Code (consolidated text: Dz.U. 2024, item 1061, as amended).

Sejm of the Republic of Poland. (1974). Act of 26 June 1974 –Labour Code (consolidated text: Dz.U. 2025, item 277).

Sejm of the Republic of Poland. (2007). Act of 16 February 2007 on Competition and Consumer Protection (consolidated text: Dz.U. 2024, item 1616).

Stucke, M. E., & Ezrachi, A. (2018). Antitrust, algorithmic pricing and tacit collusion. In W. Barfield & U. Pagallo (Eds.), *Research handbook on the law of artificial intelligence* (pp. 624–640). Edward Elgar.

Tyson, L. D., & Zysman, J. (2022). Automation, AI & work. *Daedalus*, *151*(2), 256–271.

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Competition and Wage Regulation in the EU

Abstract: The following article analyses the complex relationship between competition and wage regulation within the European framework, examining how the CJEU, the European Council and the European Parliament have intervened in the field of pay. Taking into consideration the lack of EU competence on wage matters, as established by Article 153, para. 5, TFEU, it is possible to identify significant changes, especially with the 2022 Directive on Adequate Minimum Wages. The article examines both how the European Commission has addressed issues related to pay during economic crises and CJEU judgments such as *RegioPost* and *Bundesdruckerei*, illustrating how wages are seen as a competitive element in public procurement or, as in the *Werhof* and *Alemo-Herron* cases, how competition rules often prevail over wage protection. For these reasons, the Directive on minimum wages aims to solve the problematic balance between competition and social security. To achieve this goal, it is necessary to ensure the concrete, practical implementation of the Directive or a reform of the Treaty or the Charter of Fundamental Rights to recognise the right to a fair wage.

Keywords: minimum wage, competition, European Union, labour law

Introduction

This paper examines interactions between competition and pay, a key issue in European Union labour law. The focus is on how the different European institutions, particularly the Court of Justice of the European Union (CJEU) and also the legislature, intervene in the field of pay. The EU has never had formal competencies in this area since the Treaty of Rome entered into force in 1958. Moreover, this issue provides insight into changes since the origins of the European Economic Community,

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highlighting whether and how wages remain at the intersection of workers' protection and the functioning of the single market.

The fact that the EU cannot regulate wage profiles, at least not directly, has been clear for years, considering that Article 153(5) TFEU seems expressly to exclude that area from EU competences, which is linked to the discourse of competition. As the CJEU's Advocate General Kokott stated in her Opinion in the *Impact* case delivered in 2008 (Judgment of the CJEU, 15 April 2008, point 173), by preventing the harmonisation of wage levels applicable in each of the Member States, the exclusion of pay contributes to maintaining competition between undertakings operating in the internal market. As many in Europe are aware, significant changes occurred in 2022 with the passage of the EU's Directive on Adequate Minimum Wages (2022/2041), which will be analysed further below.

This does not mean that, for political and economic reasons, the EU before the 2022 Directive sidestepped the (apparent) lack of competence in some cases and intervened decisively on pay in others. Furthermore, as evidenced by the CJEU's case law, the issue of pay, particularly minimum wages, is connected to freedoms and fundamental rights with an EU dimension. Regarding this sidestepping of EU competences on pay, the requirements outlined in the instructions issued by the Bank of Italy on 30 March 2011 for implementing Directive 2010/76 (European Council, 2010) are particularly noteworthy. This regulatory intervention primarily concerns the relationship between fixed and variable components of pay and the criteria for the structure of variable wages (Nogler, 2013, p. 36). This Directive, confirmed with some amendments by Directive 2013/36 (European Council, 2013, pp. 338–436)[1] along with the instructions of the Bank of Italy, while it covered only some banking sector workers, lends itself to interesting considerations regarding the allocation profile of EU competences. Reading the 2013 Directive, one realises that most of its requirements concern variable pay.[2] It is possible to find general provisions on remuneration policy, as well as other, more meaningful provisions concerning the principles to be applied to variable pay components.[3]

1 This Directive amended Directive 2002/87/EC and repealed Directives 2006/48/EC and 2006/49/EC.

2 To be exact, 'categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile' (Directive 2013/36, Article 92(2)).

3 Among those principles are that: 1) 'variable remuneration is strictly limited as a percentage of net revenue where it is inconsistent with the maintenance of a sound capital base and timely exit from government support'; 2) 'the relevant competent authorities require institutions to restructure remuneration in a manner aligned with sound risk management and long-term growth, including, where appropriate, establishing limits to the remuneration of the members of the management body of the institution'; and 3) there are provisions limiting variable remuneration. See Directive 2013/36, Article 94(2)(g), according to which 'institutions shall set the appropriate ratios between the fixed and the variable component of the total remuneration, whereby the following principles shall apply:

It has been challenging to reconcile the more detailed provisions, which are limited to specific categories of workers in a particular sector, with the exclusion of EU competences in the field of pay. Indeed, the accompanying documents to the 2010 and 2013 directives (European Commission, 2009) declared that wage policies in the financial services sector have played a crucial role in exacerbating the global economic crisis. It is undeniable that the situation may change the EU's priorities. Nevertheless, this would not be sufficient to increase EU competences.[4] Article 153(5) TFEU states that 'the provisions of this article shall not apply to pay', so according to this, and more generally within Title X of the Treaty, where this article is located, no provision could be passed by the EU in that area until at least 2022 (Santagata, 2011, pp. 1015–1017). On the contrary, EU intervention in the field of pay would be possible based on different provisions and/or within other Titles of the same Treaty. However, such an interpretation would make the distribution of competences between the EU and Member States useless, since the EU could regulate a single subject matter (such as pay), Member States or both, under the principles of proportionality and subsidiarity, depending on whether the legislation in question is enacted as part of a particular EU policy. In this way, there would have been a differentiated distribution of competences, which would have created legal disorder and prevented the operation of the EU system. Each subject matter would be 'chopped up' under the Part or Title of the Treaty based on which action is taken, rather than based on the relevant provision, thus making the boundaries of the matter itself fluid and uncertain. In short, such an interpretation would lead to the paradoxical result of allowing wage regulation in the financial services sector, which was affected by the crisis, while excluding it in the social policy field. Moreover, the same aspect is often linked to both the economic crisis and social policy, as is the case with variable pay.

Speaking of the primary sources of EU law, the Charter of Fundamental Rights (CFREU) does not expressly address wages, unlike other subjects where the EU

(i) the variable component shall not exceed 100% of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage; (ii) Members States may allow shareholders or owners or members of the institution to approve a higher maximum level of the ratio between the fixed and variable components of remuneration provided the overall level of the variable component shall not exceed 200% of the fixed component of the total remuneration for each individual. Member States may set a lower maximum percentage.'

4 Moreover, on the participation of employees in profits and enterprise results, as well as on shareholding, EU bodies and institutions have always refrained from interfering with binding acts, instead preferring soft law instruments which essentially contain guidelines and non-coercive provisions addressed to single states. This has been because the EU has consistently recognised both the diversity of national experiences and the legislative sovereignty of states in some fields, such as pay and tax policies. An example of such an approach is the EU Recommendation of 27 July 1992 (European Council, 1992) and other soft law provisions enacted to date, such as the European Parliament Resolution of June 2003.

has no competence, as the right of association is included in its Article 12.[5] In contrast, the right to strike and the right to impose lockouts are enshrined in Article 28 CFREU. As far as pay is concerned, however, the only provision that can be considered is Article 31(1) CFREU, which provides that 'every worker has the right to working conditions which respect his or her health, safety and dignity' (Ricci, 2012, p. 10). It is certainly possible that this provision could be interpreted to include pay. Nevertheless, the wording of Article 31(1) refers to working conditions thoroughly considered, rather than to the right to fair and equitable pay (Bogg, 2014, p. 856; Hunt, 2003, p. 44), and the heading of the Article ('Fair and just working conditions') puts the two adjectives in connection with working conditions without any qualification. As I have mentioned, this was true until the approval of the Directive on minimum wages in 2022, which enabled the EU to address its lack of competence in pay.

1. Indexation mechanisms, reductions of wage bills and the role of the European Commission

Some years ago, the European Commission also played a role in addressing the issue of pay to combat the economic crisis by enacting recommendations within the integrated coordination of employment policies and memoranda of understanding, addressed to some Member States (Dorssemont, 2014, pp. 153–170). Moreover, these sources operated in a field such as pay, which is traditionally an elective area of regulation for social partners across Europe.

As far as the recommendations are concerned, in many cases they were rather vague, asking for moderation in wage increases in general (Bulgaria, Finland and Italy) or in minimum wages in particular (France and Slovenia) (Leonardi, 2014, pp. 85 – 195.; Schulten & Müller, 2013, p. 7). More precise recommendations were addressed to other countries (Belgium, Italy and Spain) regarding reforms to their wage-setting systems. Intense criticism was directed at countries that employed automatic indexation mechanisms (Belgium, Luxembourg, Malta and Cyprus), which had to be repealed or at least severely amended. With specific reference to minimum wages, the European institutions intervened against Ireland, which, under pressure from the Troika, reduced minimum wages in 2011 and then brought them back to their previous value, only because 'the Irish Government, as an exchange, decided to reduce the social security contributions of employers' (Schulten & Müller, 2013, p. 8). In contrast, Lithuania, Portugal and, albeit in a more informal way, Spain were in-

5 According to Article 12 CFREU, 'everyone has the right to […] freedom of association at all levels […], which implies the right of everyone to form and to join trade unions for the protection of his or her interests'. Article 28 establishes that 'workers and employers, or their respective organisations, have […] the right […], in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

duced to freeze minimum wages. At the same time, in 2012 the Troika imposed a 22% cut on Greece's minimum wage.

Similar considerations apply to the Memorandum of Understanding, as provided for in Article 3(bis) of Regulation 2002/332 (European Council, 2002), which was concluded for Romania in 2009 under Article 143 TFEU (applicable to non-Euro states) following the Council's adoption of two decisions: Decision 2009/458, granting mutual assistance to that country, and Decision 2009/459, making a medium-term loan available to it (Judgment of the CJEU, 13 June 2017). These decisions authorised the conclusion of the Memorandum, which was regarded as mandatory by the CJEU in its June 2017 judgment. The problem is that the Memorandum provided for a reduction of the public sector wage bill (European Commission & Romania, 2009), thus directly impinging on the field of pay. Since the Memorandum is a mandatory source of EU law, Romania was required to reduce its wage bill in the public sector, according to the conditions attached to the financial assistance given by the EU set out in the Memorandum (Judgment of the CJEU, 13 June 2017).

Moreover, the EU intervention in Greece was quite intrusive, and not only in terms of the required percentage cut to the minimum wage (Ricci, 2015, pp. 205–217.).[6] As highlighted in the Recommendations of the Expert Group for the Review of Greek Labour Market Institutions of 27 September 2016 (European Parliament Committees, 2016), the need to comply with the requirements to reduce real and nominal wages to bring about an internal devaluation of the Eurozone led to a change in the procedures for determining minimum wages in Greece. In fact, before the crisis, the minimum wage in that country was determined through intersectoral collective bargaining via the National General Collective Labour Agreement; the Greek state did not intervene in minimum wages, except to ensure the universal application of collective agreements and the minimum wages set therein.

2. The CJEU and the issue of minimum wages in public contracts: *RegioPost and Bundesdruckerei*

The CJEU has issued various judgments that directly or indirectly address pay; however, it is helpful to focus on those that are most relevant to the relationship between wages on the one hand and the market economy or competition on the other. It is better to start by examining decisions that demonstrate that wages and minimum wages are integral to the competitive landscape and can be considered a competitive

6 Deakin (2013, pp. 549–559.) believes that the EU was interested in remuneration during the crisis because 'while monetary policy was unified, economic policy was not, and the absence of a common approach to wage determination magnified the resulting divergences'. For this reason, 'the issue of wage determination has acquired a new, EU-level dimension' (Deakin, 2013, p. 559). On those profiles, see Guarriello, 2017, pp. 107–118.

variable within the market. The issue of minimum wages in that respect has become prominent at the EU level in the field of public procurement, especially as a result of two CJEU judgments delivered just a few years after the famous *Rüffert* case (Judgment of the CJEU, 3 April 2008): *RegioPost* (Judgment of the CJEU, November 2015) and *Bundesdruckerei* (Judgment of the CJEU, 2014).

> In *RegioPost* (Brino, 2016, pp. 35–45.), the CJEU ruled that:
> 'Article 26 of Directive 2004/18 (European Council, 2014, pp. 114–120) must be interpreted as not precluding legislation of a regional entity of a Member State […] which requires tenderers and their subcontractors to undertake […] to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation'. (Judgment of the CJEU, November 2015, para. 77)[7]

Consequently, neither tenderers nor their subcontractors 'who refuse to undertake […] to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation' can be excluded 'from participation in a procedure for the award' (Judgment of the CJEU, November 2015, para. 77). This provided that the workers assigned to the execution of a public contract (or subcontract) must perform their duties in the Member State that introduced the legislation concerned, regardless of the country of the contracting authority.

Conversely, in *Bundesdruckerei* (Judgment of the CJEU, 2014; Guadagno, 2015, pp. 33–44.), a contractor based in Germany applied to obtain the award of a public contract but declared that it would carry out that contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belonged. The CJEU ruled that:

> the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue […] is capable of constituting a restriction within the meaning of Article 56 TFEU. (Judgment of the CJEU, 2014, para. 30)[8]

7 The text of Article 26 reads: '[C]ontracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

8 This case recalls the Judgment of the CJEU, 2008, para. 37. On the latter, see, *ex multis*, Ales, 2008. This paper not only deals with the *Rüffert* case but also with the *ITWF* and *Laval* cases, since in

Therefore,

> by imposing, in such a situation, a fixed minimum wage corresponding to that required to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained. (Judgment of the CJEU, 2014, para. 34)

In other words, the provision of a minimum wage may not be out of context, and in the CJEU's view, legislation on minimum wages is only applicable to employees of a contractor established in an EU country who carry out their activity in the same Member State as that of the contracting authority. Only in this event should the minimum wage be identical to that of the workers working for the contracting authority, as the wage bill must be adapted to the cost of living existing in that state. If such a minimum wage were also to apply to workers employed by contractors or subcontractors who carry out their work in another Member State where the cost of living is lower, the freedom to provide services under Article 56 TFEU would be breached, because competition is achieved precisely by exploiting the differences in minimum wages in the various national contexts (Guarriello, 2017, p. 108). Therefore the sovereignty of a Member State cannot extend to requiring contractors or subcontractors established in other states to comply with the minimum wage fixed by the legislation of the first country.

This finding must be analysed from a twofold perspective. On the one hand, a state with a high minimum wage is unable to impose such a minimum in tendering if the performance is carried out by contractors or subcontractors established in another Member State with lower wage levels, thereby undermining the protection

all these judgments, 'at stake was the request of (maintaining) working conditions which differ from those ones afforded by the employer to the workers' (Ales, 2008, p. 8). The other element that is common to all the three cases is avoiding 'that the exercise of a fundamental freedom by the relevant employer will have as a direct or indirect effect the worsening of wage standards and, consequently, of living conditions' (Ales, 2008, p. 9). On the *Laval* and *Rüffert* cases, see also Lo Faro, according to whom 'in both cases, the legality of the practices of wage dumping carried out by foreign "low-cost" companies has been based on an arbitrarily reductive interpretation of the Posted Workers Directive 96/71/EC, pp. 1–6 and of Article 49 of the EC Treaty on freedom to provide services. According to this highly contestable interpretation, Directive 96/71 does not allow the host Member State to oblige a foreign service provider to observe terms and conditions of employment settled in its own national system, to the extent that those terms and conditions go beyond the mandatory rule for minimum protection' (2008, p. 14).

of workers in that country. On the other hand, it can also happen that a Member State with a lower minimum wage cannot impose it on contractors or subcontractors established in a Member State with higher wage levels, so the issue of higher or lower worker protection turns out to be more complex than expected. Moreover, the CJEU's findings suggest again that the EU regards wage trends as a factor that influences the free market rather than as a fundamental aspect of workers' protection (Kenner, 2017).[9]

The two judgments above reflected the CJEU's case law on the posting of workers. In particular, the *Portugaia Construções* ruling of 2002 concerned the pay treatment of employees of a Portuguese company who had been posted to Germany (Judgment of the CJEU, 2002). That judgment concerned the application of minimum wages to posted workers, and according to the CJEU, 'Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State' (Judgment of the CJEU, 2002, para. 21). The CJEU added that 'the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees' (Judgment of the CJEU, 2002, para. 23). Of course, it is for national courts to determine whether the wage legislation in question is suitable to ensure the protection of posted workers; still, the EU judges were leaning in that direction. The evaluation of national authorities in this case is then a given, as minimum wages in Germany in the relevant sector were higher than the corresponding wages in Portugal. Otherwise, the CJEU's opinion would probably have been different.

For these reasons, the *Portugaia Construções* ruling is particularly welcome, as the CJEU underlined that the protection of workers is a general objective to be pursued in the context of the posting of workers. In sum, the judgment in question, albeit reaching conclusions substantially similar to the case law on public contracts, has the merit of focusing on the protection of workers rather than on the functioning of the internal market (Bavaro, 2012, p. 88).[10]

9 Kenner agrees with this opinion, although he makes a distinction between the two decisions mentioned. As a matter of fact, he believes that '*Bundesdruckerei* is a case of posting in reverse with consequences that are in many respects even more negative for labour law than *Rüffert*' (2017, p. 237). On the contrary, *RegioPost* 'is an antidote to *Rüffert* and *Bundesdruckerei*, and represents a significant shift in the Court's jurisprudence' (Kenner, 2017, p. 238).

10 In Bavaro's opinion an undertaking that derives competitive advantage from the application of economic and regulatory measures to the lowest level would be socially harmful, simply because such an undertaking would be established in a Member State with lower levels of social protection.

3. Pay, collective bargaining and the freedom to conduct business: *Werhof and Alemo-Herron*

It is now necessary to address CJEU judgments that involve an indirect and unbalanced interaction between wages and competition, as the rules governing competition are considered as prevailing over those protecting wages. A couple of rulings regarding the transfer of undertakings must be examined: *Werhof* and *Alemo-Herron* (Judgments of the CJEU, 2006 and 2013). In both cases, reference was made to wages recognised by collective agreements based on Article 3(3) of Directive 2001/23 (European Council, 2001, pp. 16–20), according to which, 'following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'. The collective agreement is not immediately applicable, but it is valid because it is referenced in the contracts of employment signed by the transferor and the workers. Therefore, on closer inspection, it is Article 3(1) of the Directive that applies, under which 'the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of a transfer shall, because of such transfer, be transferred to the transferee'. After the transfer, collective bargaining establishes a wage increase that the transferee refuses to extend to the workers. In short, it is necessary to clarify whether the reference to the collective agreement is static or dynamic.

In both cases, the CJEU classified it as a static reference, as a different interpretation would have prevented the transferee from making the necessary adjustments and changes to carry on its business (Judgment of the CJEU, 2006, para. 31; Judgment of the CJEU, 2013, para. 27). The similarities between the two judgments end here, so they need to be examined *seriatim*. In *Werhof*, the CJEU's ruling centred on the negative freedom of association. The EU judges ruled that 'if the "dynamic" interpretation of the contractual reference clause were applied, that would mean that future collective agreements would apply to a transferee who is not a party to a collective agreement and that their fundamental right not to join an association could be affected' (Judgment of the CJEU, 2006, para. 34). In *Alemo-Herron* on the contrary, the CJEU's reasoning centred on the freedom to conduct a business under Article 16 CFREU. Such a freedom covers 'inter alia, freedom of contract' (Judgment of the CJEU, 2013, para. 32), so that 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity' (Judgment of the CJEU, 2013, para. 33). In such a situation, 'the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business' (Judgment of the CJEU, 2013, para. 35). In short, the freedom of contract was conceived as a function of the undertaking's activity. In contrast, the negative freedom of association was set aside because in this case, the employee's wage was determined periodically by a third party, namely, the National Joint Council for Local Government Services, of which neither the transferor nor the transferee was a member or represented.

Here, it is worth noting again that EU primary sources fail to recognise the fundamental right to an equal, fair, or decent wage, at least to the same extent as they recognise the right of association and the freedom to conduct a business. You can agree with the failure to grant wage adjustments to transferred workers after the transfer of an undertaking, because the guarantees in the case of a transfer may not be applicable for an indefinite period. However, wage increases must be implemented in other ways, namely through a collective agreement applicable to the transferee or through different instruments, including statutory regulation. Any freeze on wage increases (for example, because there is no relevant collective agreement applicable to the transferee) would be disadvantageous for workers, who may not be protected by EU law and whose dignity would be at risk if such a freeze were to last for a considerable time.

Moreover, by emphasising the freedom of contract as functional to the freedom to conduct a business while at the same time downplaying the negative freedom of association, the CJEU seems to suggest that employers may disregard collective agreements concluded by third parties. On the one hand, this contention may enable an individual employer to refuse to comply with collective agreements concluded by bodies to which the employer is not affiliated, as in the case before the CJEU. On the other hand, it can give rise to the claim that the organisation to which an employer belongs must also be regarded as a third party relative to that employer, bound only to collective agreements to which it is a party, thus paving the way for firm-level collective bargaining. If the CJEU consolidates this interpretation, it could be argued that a transferee, who may already have decided not to apply the collective agreement after the transfer as it concerns only the transferor, could freeze the treatment of transferred workers for a specific period. The transferee may use the working conditions agreed in any collective agreement applicable to the transferor until the date of termination or expiry of that agreement or the entry into force or application of another collective agreement. Then it may be that, as regards wages, the transferee renewed the economic part of the collective agreement shortly before the transfer of the undertaking. In such a case, the risk is that the treatment of the transferred employees is blocked, since the renewal of the agreement signed by the transferor does not apply while the collective agreement of the transferee has not been renewed. In addition, if the freedom to conduct a business has to be protected in the way understood by the CJEU, pay treatment, even a minimum wage, that fully ensures the freedom of contract, might be the only treatment provided by a firm-level collective agreement, which could be concluded much later than a national sectoral agreement.

Fortunately, another CJEU ruling seems to point in a different direction. The *Asklepios* judgment of 27 April 2017 concerns the transfer of undertakings and the application of the same article of the Directive as that in *Alemo-Herron*, as well as in Article 16 CFREU. In such a case, 'the national legislation […] provides for the possibility, after the transfer, for the transferee to adjust the working conditions existing at the date of the transfer, either consensually or unilaterally' (Judgment of the CJEU, April 2017, para. 24). Thanks to that legislation, the continued observance of the rights and obligations of the transferor arising from a contract of employment extended to a 'dynamic' clause according to which their employment relationship was governed not only by the collective agreement in force on the date of the transfer, but also by amending agreements after the transfer. Therefore this decision appears to mitigate the problem highlighted above, namely the freezing of the wage increase for the transferred worker; however, this was mainly due to the domestic law applicable in the present case rather than EU law. Nevertheless, it is essential, in the CJEU's view, that domestic legislation does not infringe on EU law.

More generally, the judgments mentioned above raise questions about the relationship between contractual and statutory sources on the one hand and the freedom of contract protected by EU law on the other. In fact, except for the *Asklepios* case, it appears that the CJEU's attitude has changed in this regard. A decision of 30 years ago is very eloquent, although it does not concern the transfer of an undertaking. The *Meyers* case of 1995 is about the equal treatment of men and women in matters of employment and concerns the application of 'an income-related benefit (s.c. *family credit*) which is awarded to supplement the income of low-paid workers who are responsible for a child' (Judgment of the CJEU, 1995, para. 3), under a British statutory provision. According to the CJEU,

> compliance with the fundamental principle of equal treatment presupposes that a benefit such as family credit, which is necessarily linked to an employment relationship, constitutes a working condition within the meaning of Article 5 of the directive (European Council, 1976, pp. 40–42). To confine the latter concept solely to those working conditions which are set out in the contract of employment or applied by the employer in respect of a worker's employment would remove situations directly covered by an employment relationship from the scope of the directive. (Judgment of the CJEU, 1995, para. 24)

Therefore, based on this decision, it is legitimate, at least within the scope of the Directive in question, for national legislation to incorporate the contents of the employment contract, providing for benefits that have not been negotiated between the parties involved. In short, for the CJEU, not all working conditions can be agreed upon in the contract of employment, but they can also be established by law and by collective agreements.

The difference between this judgment and the more recent decisions concerning the transfer of an undertaking is that in the 1995 case, the law incorporates the contents of the contract of employment when providing for the family credit (Judgment of the CJEU, March 2015). In contrast, in the later cases there is a succession of collective agreements or an adjustment of pay provided for in some of these agreements. However, upon closer inspection, even in the assumptions concerning the transfer of undertakings, it is the statutory source that prevents the application of wage adjustments to the transferred employees. Therefore in both cases, it is essential to understand how the law can intervene on (and possibly compress) freedom of contract, a problem, as has been underlined, of fundamental importance in the wage issue. In addition, regarding the relationship between competition and wages, these judgments demonstrate that the freedom to conduct business is thoroughly regulated at the EU level and includes the freedom of contract. In contrast, the right to a decent wage is ancillary to such freedom. In other words, the latter right does not seem to keep pace with the right to conduct a business, the functioning of the market, and, ultimately, competition.

4. Wages and the notion of subordination in CJEU case law: *Fenoll and Balkaya*

As will become evident, pay is a necessary though not sufficient requirement for classifying an employee, according to EU law. This once again demonstrates that wages are helpful for the functioning of the market, albeit in a different sense in the context of public procurement, for instance. It is necessary to highlight this profile, however briefly, by recalling other case law of the CJEU. According to the *Fenoll* judgment of 6 May 2015, to define an employee under Directive 2003/88/EC on working time (European Council, 2003, pp. 9–19), it is necessary to pass a test based on four elements. First, it is crucial to consider 'both the nature of the activities concerned and the relationship of the parties involved', independently of the classification provided by national legislation (Judgment of the CJEU, March 2015, para. 29). Second, the activities entrusted to the interested person must be 'of some economic benefit to the body concerned', i.e. the employer (Judgment of the CJEU, March 2015, para. 32). Third, the activities entrusted by the person must be carried out 'in return for remuneration', regardless of the amount, as it may be lower than the minimum wage, and irrespective of the origin of the funds for remuneration (Judgment of the CJEU, March 2015, paras. 33–34). Finally, regarding the fourth element, the activities undertaken by the interested persons must be considered 'real and genuine'; they cannot be 'purely marginal and ancillary' (Judgment of the CJEU, March 2015, para. 35).

The case law concerning the scope of Directive 98/59 on collective redundancies (European Council, 1998, pp. 16–21) is also interesting. In particular, the *Balkaya* judgment of 9 July 2015 (Judgment of the CJEU, July 2015, para. 29) focuses once again on the concept of an employee, saying that 'the essential feature of an employment relationship is that, for a certain time, a person performs services for and under the direction of another person, in return for which he receives remuneration' (Judgment of the CJEU, July 2015, para. 34). Moreover, 'the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for EU law', it being necessary 'to consider the circumstances in which [… the person] was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed' (Judgment of the CJEU, July 2015, paras. 35, 39). All that considered, the interested person in the *Balkaya* judgment, who was a member of the board of directors of a capital company, can be classified as an employee for EU law, since he, 'in return for remuneration, provides services to the company which has appointed him and of which he is an integral part', 'carries out his activities under the direction or supervision of another body of that company and […] can, at any time, be removed from his duties without such removal being subject to any restriction' (Judgment of the CJEU, July 2015, para. 39).

According to the same judgment, the notion of a 'worker' in EU law is even wider (Pallini, 2016, p. 77),[11] since it can also cover 'a person who serves a traineeship or periods of apprenticeship in an occupation […], provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer' (Judgment of the CJEU, July 2015, para. 50). Such a person is an employee under legislation on collective redundancies, and 'while not receiving remuneration from his employer, performs real work within the undertaking […] with financial support from, and the recognition of, the public authority responsible for the promotion of employment' (Judgment of the CJEU, July 2015, para. 52).

Both the *Fenoll* and the *Balkaya* cases demonstrate that, according to EU law, the notion of an employed worker is not based on the existence of a contract of employment or an employment relationship characterised by the job or by wage exchange, since, as we have seen, in both decisions the origin of the resources used to pay the remuneration was irrelevant; it is possible to use public funds for this purpose, also outside the area of public employment. In other words, in the CJEU's view, remuneration shall be considered as one of the leading (although not necessary) indicators of the presence of an employee, defined as an economic operator within the single market. For these purposes, the amount is unrelated; it is only vital that it is not so low that the subordinate worker loses the characteristic of being an economic operator.

11 The CJEU has long extensively interpreted the concept of a subordinate worker by using, in a non-technical sense, the criterion of their being directed by another person and by valuing other criteria, such as the fact of being organised by another person or being in the weak position of the employee in the market. See also section 5 below.

Therefore, in this case, the purpose of EU law is not to recognise pay as a fundamental right of workers, but rather to identify employees as economic operators, thereby protecting their freedom of movement, which is necessary for the functioning of the market and competition.

5. The new era: The Directive on Adequate Minimum Wages

The EU Directive on Adequate Minimum Wages represents a significant intervention in the panorama of European social policies, aimed at promoting adequate minimum wages to combat the phenomenon of the working poor and to ensure sufficient pay for all workers, establishing general principles and leaving it to the Member States – through a 'variable geometry' structure – to adapt the implementation methods to their own regulatory and economic characteristics while respecting national traditions. Although the Directive does not impose the adoption of a uniform minimum wage, it identifies two main pillars to ensure wage adequacy: strengthening collective bargaining and, where necessary, introducing minimum statutory salaries based on objective and transparent criteria.

Among the most relevant requirements, the Directive provides for Member States taking measures to achieve a contractual bargaining coverage of at least 80% of workers; if this threshold is not reached, Member States are invited to set up action plans to promote the development and strengthening of social partners' capacity to participate in collective bargaining on wage determination at the sectoral or inter-sectoral level or to introduce a statutory minimum wage that guarantees a proportionate and sufficient wage following local socio-economic conditions. Furthermore, the Directive provides objective criteria for assessing the adequacy of minimum wages, including the cost of living, the general wage level and economic productivity. It suggests quantitative thresholds (60% of the median salary or 50% of the average wage) to ensure minimum protection standards. Regarding transparency and monitoring, the Directive requires Member States to collect and provide periodic reports on wage levels, contractual coverage and the effectiveness of the measures taken.

A comparison between the experiences of some EU Member States highlights differentiated but effective approaches to ensure wage adequacy: for example, in Germany, the introduction of a statutory minimum wage in 2015 helped to reduce poorly paid work and strengthen collective bargaining, acting as a safety net for workers not covered by trade union agreements; in France, on the other hand, the minimum wage is flanked by a system of automatic adjustments based on inflation and economic growth, which ensures greater wage stability over time.

As is well known, in 2023 Denmark, supported by Sweden, claimed an action before the Court of Justice (Case C-19/23; Judgment of the CJEU, 2025) regarding the alleged lack of competence of the Union to issue a directive on adequate minimum wages and the need to annul the Directive itself. According to the Danish government, the adoption of the Directive exceeded the competence of the European Union, as it infringed Article 153(5) TFEU. Indeed, the Parliament and the Council are competent to adopt directives laying down minimum requirements only in respect of 'working conditions' (under Article 153(2)(b) TFEU, read in conjunction with Article 153(1)(b) TFEU). In contrast, they may not legislate in areas such as pay or the right to association (Article 153(5) TFEU). Moreover, even if the Directive did not fall within the scope of the exclusions regarding pay and the right of association in Article 153(5) TFEU, Denmark argued that the Parliament and the Council did not follow a valid procedure for adopting the Directive.

The appeal, while motivated by highly technical aspects, appeared to be partly justified by political reasons. It is no coincidence that it was introduced by Denmark, a country where the collective and participatory dimensions have always been significant. From a reading of the appeal, the challenge was motivated by the fear that the Directive could threaten the role of social partners in determining minimum wages and that the Union could engage in excessive interference in matters such as pay, which are at the heart of domestic collective bargaining.

On 14 January 2025, Advocate General Nicholas Emiliou delivered his Opinion, in which he invited the Court to uphold the Danish appeal and declare the Directive in question null and void. It is not possible to review the Advocate General's arguments in detail here; suffice to say that they shared the Danish government's concerns about the risk of excessive interference by the European legislature in fields entrusted to collective bargaining. This is even more striking when reading that part of the Opinion which emphasises that the purpose of the exclusion of competence in matters of pay would be to protect the contractual freedom of the social partners.

On 11 November 2025, the Court of Justice delivered its decision (Brameshuber, 2026; Lo Faro, 2026; Menegatti, 2025; Müller, 2025; Ratti, 2025). The Court reiterated that the exception relating to pay provided for in Article 153(5) TFEU is based on the principle that the determination of wages falls within the contractual autonomy of social partners at the national level and within the competence of the Member States. For this reason, it was considered appropriate, under current EU law, to exclude the determination of wage levels from any harmonisation under Article 151–157TFEU (Judgment of the CJEU, 2025, para. 67).[12]

This exclusion of competence must be interpreted as covering all measures that would involve direct interference by EU law in the determination of remuneration, such as the total or partial standardisation of wage components and/or their levels across Member States or the establishment of a minimum wage at the European level.

12 This referred to the judgments in *Del Cerro Alonso* of 13 September 2007, C-307/05, paras. 40 and 46, and *Coca-Cola European Partners Deutschland* of 7 July 2022, C-257/21 and C-258/21, para. 47.

However, according to the Court of Justice, that exclusion cannot be extended to any matter with even the slightest connection to pay; otherwise, many of the issues covered by Article 153(1) TFEU would be rendered meaningless (Judgment of the CJEU, 2025, para. 68).[13] In short, since 'pay is an integral part of working conditions', the legal basis for the Directive is Article 153(1)(b) (Judgment of the CJEU, 2025, para. 72). The legal basis for an act must be determined by its specific purpose and content, not by the legal basis used for other EU acts with similar characteristics.

Having established these premises, the Court examined whether the contested provisions of the Directive (Articles 4 and 5) involve direct interference by Union law in the determination of remuneration (Judgment of the CJEU, 2025, para. 75). Article 4 of the Directive is compatible with the exclusion of competence provided for in Article 153(5) TFEU, because although it introduces state intervention in the methods of collective bargaining on wages, it does not give rise to direct interference by Union law in the determination of wages (Judgment of the CJEU, 2025, para. 77). On the one hand, Article 4 does not affect Member States' choice of model for determining wages: legislative, collective bargaining or mixed. On the other hand, the provision neither defines the content nor prescribes the outcome of collective bargaining. The measures provided for constitute obligations of means, not of result. Article 4(2) does not require that the collective bargaining coverage threshold provided therein be met; rather, it requires Member States to establish a favourable framework and to define a promotional action plan if that threshold is not met.

On the other hand, the Court of Justice's November 2025 ruling partially annulled Article 5. This provision regulates the procedure for determining and updating statutory minimum wages, requiring Member States to establish procedures based on criteria developed at the national level to ensure their adequacy and periodic updating, while leaving them free to determine their relative weight (Judgment of the CJEU, 2025, para. 91). According to the Court, there has been no direct interference so far. However, the same provision listed, in points (a) to (d), four binding elements that national criteria had to include: the purchasing power of statutory minimum wages in relation to the cost of living, the general level of wages and their distribution, the rate of wage growth, and the levels and long-term trends of national productivity (Judgment of the CJEU, 2025, para. 94). Article 5(2) therefore obliges Member States with statutory minimum wages to ensure that their criteria include at least these four elements. By imposing these parameters on the determination and updating procedures, the European legislation has established requirements that directly affect the constituent elements of wages (Judgment of the CJEU, 2025, para. 95). In the Court's view, Article 5(2) achieves partial harmonisation of the constituent elements of wages and thus is a direct interference by EU law in wage determination, which is incom-

13 With reference to the *Impact* ruling of 15 April 2008.

patible with the exclusion of competence provided for in the Treaty (Judgment of the CJEU, 2025, para. 96).

The same conclusion applies to Article 5(3). Although it merely allowed Member States to use automatic mechanisms for indexing minimum wages and refers to national law and practice for the applicable criteria, the provision subjects that option to the condition that the mechanism does not reduce the statutory minimum wage (Judgment of the CJEU, 2025, para. 97). Consequently, by imposing a non-regression clause on Member States that adopt automatic indexation, this provision constitutes, in the Court's view, a direct interference by EU law in the determination of wages (Judgment of the CJEU, 2025, para. 98).

Conclusions

On the one hand, most of the aforementioned judgments of the Court of Justice show, albeit in different ways, that the EU considers wage trends a factor that influences the internal market rather than a crucial aspect of workers' protection and ultimately a fundamental human right. On the other hand, such an attitude reveals the limitations of EU social policies and the prevalence of a market-oriented vision.[14] This approach reflects the lack of thorough EU competence in the field of pay and therefore also the lack of a uniform minimum wage applicable to Member States. All this demonstrates once again that the competition game is played at the level of wage differences among the various Member States, rather than between the EU as a whole and extra-EU countries. Therefore, regarding the prospects, the best approach should be twofold.

The first option is to amend the Treaty, or more specifically the Charter of Fundamental Rights, by recognising the right to an equal, fair and decent wage as a fundamental right of the EU. The second way is to implement the Directive on Adequate Minimum Wages in the Member States after it has been considered substantially valid by the Court of Justice. The Directive appears to be a beacon in the darkness of the EU's (apparent) lack of competence in pay matters. The existence of the Direc-

14 According to Blanpain, 'socially speaking, the EU is still an empty box. The EU is like a giant tanker with a very small social engine. There is not yet a European Social Model. We tried very hard to provide the EU with more social competences, but failed hopelessly. The EU is absent from one of the most important fields: social policy. As a result of the failure of appropriate social and employment policies, the Member States are competing with each other. Wage costs and taxes continue to be national competences. The EU has no jurisdiction over core issues like wages and social security. For remuneration, job security, collective bargaining, workers' participation or freedom of association and the right to strike, every Member State goes its own way. The EU has 27 Member States and 500 million inhabitants, including 215 million workers. But there is no European minimum wage, and no European social security. We should be able to say to foreign investors: we give you access to a market of 500 million consumers and these are our social conditions. But we cannot. […] So we compete with each other forever' (2009, pp. 167–168).

tive represents a change in the EU's attitude, as is well demonstrated by the seventh 'whereas' clause of the Directive itself: 'addressing large differences in the coverage and adequacy of minimum wage protection contributes to improving the fairness of the Union's labour market, to preventing and reducing wage and social inequalities, and to promoting economic and social progress and upward convergence'. This approach seems to be linked to a different notion of competition in the single market that, according to the same clause, 'should be based on high social standards, including a high level of worker protection and the creation of quality jobs, as well as on innovation and improvements in productivity, while ensuring a level playing field'. The Directive is not the perfect solution to the interaction between wages and competition, since it also has some defects. Nevertheless, it could be an opportunity for the EU to shift its direction towards a better balance between social protection and competition.

Ultimately, the Court of Justice's declaration that the EU has some competencies in the field of pay has consequences for the various issues I have addressed above. This results in a 'snowball effect' that would be positive in some cases (such as the 2022 Directive) but negative in others, particularly in areas like wage cut-offs and public contracts, as it would be entirely legitimate for the EU to intervene in such fields with numerous normative tools.

REFERENCES

Ales, E. (2008). *Transnational wage-setting as a key feature of a socially oriented European integration: Role of and (questionable) limits on collective action* [Working paper 63]. Centro studi di Diritto del Lavoro Europeo 'Massimo D'Antona'.

Bavaro, V. (2012). *Azienda, contratto e sindacato*. Cacucci.

Blanpain, R. (2009). *Memoirs of Roger Blanpain: 'What can I do for you?'*. Brugge.

Bogg, A (2014). Article 31 – Fair and just conditions. In S. Peers, T. Hervey, J. Kenner, & A. Ward (Eds.), *The EU Charter of Fundamental Rights: A commentary* (p. 833–868). Hart Publishing.

Brameshuber, E. (2026). EuGH bestätigt Kompetenzkonformität der 'Mindestlohn-RL' weitgehend – oder sollte sie doch 'RL über unionsrechtliche Rahmenbedingungen für nationale Tarifverhandlungen' heißen? *Zeitschrift für Arbeits – und Sozialrecht*, *1*p. 1–10

Brino, V. (2016). Salario minimo legale e appalti pubblici: il caso RegioPost. *Rivista giuridica del lavoro*, *2*, 135–147.

Deakin, S. (2013). Labour standards, social rights and the market: 'Inderogability' reconsidered. *Giornale di diritto del lavoro e di relazioni industriali*, II, p. 549–564.

Dorssemont, F. (2014). Collective action against the austerity measures. In N. Bruun, K. Loercher, & I. Schoemann (Eds.), *The economic and financial crisis and labour law in Europe* (pp. 153–170). Hart Publishing.

European Commission. (2009). Accompanying Document to the Proposal for a Directive of the European Parliament and of the Council Amending Capital Requirements Directive on Trading

Book, Securitisation Issues and Remuneration Policies (COM(2009) 362 final, SEC(2009) 975 final, p. 3).

European Commission and Romania. (2009, 23 June). *Memorandum concluded in Bucharest and Brussels*, p. 1–20. https://commission.europa.eu/system/files/2016–09/ecfin_publication15409_en.pdf .

European Council. (1976, 9 February). Directive 76/207/EEC (O. J. L 39, 14.02.1976, pp. 40–42).

European Council. (1992, 27 July). Recommendation on Participation of Employees in Profits and Enterprise Results (92/443/EEC).

European Council. (1998, 20 July). Directive 98/59/EC (O. J. L 225, 12.08.1998, pp. 16–21).

European Council. (2001, 12 March). Directive 2001/23/EC (O. J. L 82, 22.03.2001, pp. 16–20).

European Council. (2002, 18 February). Regulation on Providing Medium-Term Financial Assistance for Member States' Balances of Payments ((EC) no. 332/2002).

European Council. (2003, 4 November). Directive 2003/88/EC Concerning Certain Aspects of the Organisation of Working Time (O. J. L 299, 18.11.2003, pp. 9–19).

European Council. (2004, 31 March). Directive 2004/18/EC on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (O. J. L 134, 30.04.2004, pp. 114–240).

European Council. (2010, 24 November). Directive 2010/76/EU Regarding Capital Requirements for the Trading Book and for Re-Securitisations, and the Supervisory Review of Remuneration Policies (O. J. L 329, 14.12.2010, pp. 3–35).

European Council. (2013, 26 June). Directive 2013/36/EU on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms (O. J. L 176, 27.06.2013, pp. 338–436).

European Council and European Parliament. (2022, 19 October) Directive 2022/2041 on adequate minimum wages in the European Union)

European Parliament. (2003). Resolution on Employee Financial Participation (P5-TA (2003) 0253).

European Parliament Committees. (2016). *05–12-2016 17:15: Hearing on Greek labour market reform*. http://www.europarl.europa.eu/committees/en/events-hearings.html?id=20161202CHE00561

Guadagno, S. (2015). (Sub)appalto transnazionale e ambito di applicazione delle norme sul salario minimo. *Rivista giuridica del lavoro e della previdenza sociale*, *2*, 33–45.

Guarriello, F. (2017). Legge e contrattazione collettiva in Europa: verso nuovi equilibri? *Giornale di diritto del lavoro e di relazioni industriali,* I,, pp. 107–127..

Hunt, J. (2003). Fair and just working conditions. In T. Hervey, & J. Kenner (Eds.), *Economic and social rights under the EUCFR: A legal perspective* (pp. 44–64. Hart Publishing.

Judgment of the CJEU of 13 July 1995 on the case of *Jennifer Meyers v. Adjudication Office*, C-116/94.

Judgment of the CJEU of 24 January 2002 on the case of *Portugaia Construções Ldª*, C-164/99.

Judgment of the CJEU of 9 March 2006 on the case of *Hans Werhof v. Freeway Traffic Systems GmbH c Co. KG*, C-499/04.

Judgment of the CJEU of 3 April 2008 on the case of *Dirk Rüffert v. Land Niedersachsen*, C-346/06.

Judgment of the CJEU of 15 April 2008 on the case of *Impact v. Minister for Agriculture and Food and Others*, C-268/06.

Judgment of the CJEU of 18 July 2013 on the case of *Mark Alemo-Herron et alii v. Parkwood Leisure Ltd*, C-426/11.

Judgment of the CJEU of 18 September 2014 on the case of *Bundesdruckerei GmbH v. Stadt Dortmund*, C-549/13.

Judgment of the CJEU of 26 March 2015 on the case of *Gérard Fenoll v. Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI)*, C-316/13.

Judgment of the CJEU of 9 July 2015 on the case of *Ender Balkaya v. Kiesel Abbruch und Recycling Technik GmbH*, C-229/14.

Judgment of the CJEU, of 11 November 2015, on the case of *RegioPost GmbH & Co. KG* v. *Stadt Landau in der Pfalz*, C-115/14.

Judgment of the CJEU of 27 April 2017 on the case of *Asklepios Kliniken Langen-Seligenstadt GmbH v. Ivan Felja* and *Asklepios Dienstleistungsgesellschaft mbH v. Vittoria Graf*, C-680/15 and C-681/15.

Judgment of the CJEU of 13 June 2017 on the case of *Eugenia Florescu, Ioan Poiană, Cosmina Diaconu, Anca Vidrighin, Eugenia Elena Bădilă v. Casa Judeţeană de Pensii Sibiu, Casa Naţională de Pensii* şi *alte Drepturi de Asigurări Sociale, Ministerul Muncii, Familiei* şi *Protecţiei Sociale, Statul roman, Ministerul Finanţelor Publice*, C-258/14.

Judgment of the CJEU of 11 November 2025 on the case of *Kingdom of Denmark v. European Parliament*, C-19/23.

Kenner, J. (2017). The enterprise, labour and the Court of Justice. In A. Perruli, & T. Treu (Eds.), *Enterprise and social right*s (pp. 199–247). Wolters Kluwer.

Leonardi, S. (2014). Salario minimo e ruolo del sindacato: il quadro europeo fra legge e contrattazione. *Lavoro e diritto*, I, 185–200..

Lo Faro, A. (2008). *Is a decent wage part of a decent job? Answers from an enlarged Europe* [Working paper 64]. Centro studi di Diritto del Lavoro Europeo 'Massimo D'Antona'.

Lo Faro, A. (2026). I salari minimi, la Corte e la Direttiva salvata: tra continuità giurisprudenziale e sensibilità politica. *Lavoro e diritto*, I, pp. 57–77.

Menegatti, E. (2025). All's well that ends well? The Court's 'saving' of the Adequate Minimum Wage Directive. *Italian Labour Law e-Journal*, *2*, 6–17.

Müller, T. (2025). I'm still standing: Transposition and political impact of the Directive on Adequate Minimum Wages in the EU. *Italian Labour Law e-Journal*, *2*. p. 21–36.

Nogler, L. (2013). Sub article 36, co. 1, Cost. In R. De Luca Tamajo & O. Mazzotta (Eds.), *Commentario breve alle leggi sul lavoro* (pp. 36–48). Cedam.

Pallini, M. (2016). Dalla eterodirezione alla eteroorganizzazione: una nuova nozione di subordinazione? *Rivista giuridica del lavoro e della previdenza sociale*, *1*, pp. 77–90

Ratti, L. (2025, 24–28 November). Out of the shadows: The Court of Justice and the limits of EU law competence on determining minimum wages. *EU Live: The Week*, *93*.

Ricci, G. (2012). *Il diritto alla retribuzione adeguata. Tutele costituzionali e crisi economica*. Giappichelli.

Ricci, G. (2015). La retribuzione in tempi di crisi: diritto sociale fondamentale o variabile dipendente? In B. Caruso & G. Fontana (Eds.), *Lavoro e diritti sociali nella crisi europea. Un confronto fra costituzionalisti e giuslavoristi* (pp. 205–XXX). Il Mulino.

Santagata, R. (2011). Partecipazione azionaria dei lavoratori. In *Enciclopedia del Diritto* (pp. 1015–1017). Annali, Giuffrè.

Schulten, V. T., & Müller, T. (2013). *A new European interventionism? The impact of the new European economic governance on wages and collective bargaining*. European Public Service Union. www.epsu.org/IMG/pdf/EU_intervention_on_CB_Schulten_Mueller_final_version.pdf

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Competition and Self-Employed Workers in Europe: Some Critical Reflections

Abstract: This article examines the complex relationship between European competition law and the collective rights of self-employed workers. It focuses on the implications of the *FNV Kunsten* case (C-413/13), which established the limits of applying Article 101 TFEU to collective agreements involving self-employed workers, distinguishing between genuine and bogus self-employment. The author critically analyses the European Commission's 2022 Guidelines on collective bargaining for self-employed persons, assessing their effectiveness in extending protection to economically dependent or vulnerable self-employed individuals. The paper argues that, despite progress, significant gaps remain for certain categories of self-employed workers, who still risk exclusion from collective bargaining rights under EU competition law.

Keywords: self-employment, collective bargaining, EU competition law

Introduction

The definition of employment protections for self-employed workers remains a classic and unresolved issue in labour law. Generally, each Member State of the European Union draws a sharp distinction between employed and self-employed work, affording employees broader and more intensive protection. This asymmetry reflects the structural characteristics of the employment relationship: employees are typically subordinate to their employer's authority, financially dependent on a single source of income and prevented from engaging in competing activities. Self-employed workers, by contrast, retain autonomy over how they perform their work – including

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choice of hours and location – and are therefore presumed, often without empirical verification, to have a lesser need for workplace protection (Countouris, 2007; Davidov, 2017, p. 365; Supiot, 2001).

This presumption, however, is not always warranted. In the labour markets of recent decades, many self-employed persons, while formally autonomous in the exercise of their professions, remain economically vulnerable (Colin & Lapeyre, 2017; ILO, 2016; Perulli, 1996; Treu, 2016). Whether collective agreements should extend to them is therefore a question of growing practical and theoretical importance. The relationship between self-employment and collective bargaining protections is deeply controversial and raises at least three fundamental legal questions. First, it is necessary to determine, within the broad and heterogeneous category of self-employment, which workers fall within the scope of collective agreement protections; second, the question arises of who holds the right to negotiate such agreements on their behalf; and third – and perhaps most pressing – it is essential to clarify the relationship between national labour law and European competition law, which has become one of the most intensely debated issues in this field.

This paper devotes particular attention to the third question, on the grounds that recent action by the EU institutions has proved insufficient to extend collective protection to all categories of self-employed workers who genuinely need it. The analysis begins with the *FNV Kunsten* judgment (Judgment of the CJEU, 2014; see Countouris, 2018, p. 192; Daskalova, 2017; Delfino, 2017; Grosheide & ter Haar, 2017; Lamannis, 2023; Risak & Dullinger, 2018), which directly addressed the conflict between Article 101 TFEU and collective agreements concluded on behalf of self-employed workers. It then turns to the Commission's Guidelines on the application of competition law in this area (European Commission, 2022; see Daskalova, 2018, p. 461; Giampà, 2024; Giovannone, 2023; Gramano, 2025, p. 135; Jurkowska-Gomułka et al., 2024; Rainone & Countouris, 2021). The aim is to identify which categories of self-employed workers, not covered by these instruments, may nonetheless engage in collective bargaining without incurring a conflict with competition law.

1. The FNV Kunsten case and its relevance in European law

As noted above, the *FNV Kunsten* case concerned the boundary between competition law and labour law, and more specifically the scope of application of Article 101(1) TFEU. At issue was the compatibility with EU competition law of Dutch rules permitting independent service providers to join a trade union that had concluded a collective agreement on their behalf (Judgment of the CJEU, 2014, points 6–11). The judgment reaffirmed the need to comply with the so-called '*Albany* exemption', a doctrine established in prior European case law (Judgment of the CJEU, 1999), while also seeking to clarify the specific conditions under which that exemption applies (Barnard, 2003; Broulík, 2024; Cengiz, 2021; Countouris, 2007; Šmejkal, 2015).

The *Albany* exemption, as is well known, rests on the principle that the social policy objectives pursued by collective labour agreements may justify restrictions on competition that would otherwise fall within the prohibition laid down in Article 101(1) TFEU. In *Albany* itself, the Court of Justice held that the obligation imposed on private companies to contribute to a sectoral public pension fund did not infringe competition law, notwithstanding that it precluded those companies from opting out in favour of private insurance arrangements offering more advantageous terms. The compulsory nature of affiliation to the public fund was justified by the pursuit of a social objective of overriding importance: preventing undertakings engaged in low-risk activities and employing younger, healthier workforces from exiting the fund in search of more favourable private coverage. Had such selective exit been permitted, the fund would have been left to insure a disproportionately high-risk pool – namely, employees of small and medium-sized enterprises performing hazardous work, with older staff profiles and elevated actuarial risk – thereby undermining its financial viability and its capacity to provide adequate coverage to those most in need (Judgment of the CJEU, 1999, point 108).

It was thus established that the social objectives pursued by collective agreements, insofar as they impose minimum standards of protection, constitute restrictions on competition that are nonetheless justified under Article 101 TFEU (Judgment of the CJEU, 1999, point 123). Building on this foundation, the subsequent *FNV Kunsten* case examined whether collective agreements could lawfully extend their scope of application to self-employed workers (Judgment of the CJEU, 2014, points 10 and 13).

The Court of Justice answered this question in the negative, for reasons that have since been examined extensively by scholars and national courts across numerous European jurisdictions. In the Court's analysis, the self-employed workers to whom the collective agreement in question referred were, in principle, to be regarded as undertakings within the meaning of Article 101 TFEU on two cumulative grounds: first, they offered their services for remuneration on a specific market; and second, they carried out their activities as independent economic operators in relation to their clients.

On the first point, the Court drew a sharp distinction between self-employed workers and employees. Unlike the latter, who work under conditions determined unilaterally by their employer, self-employed workers participate in the market by establishing the value of their own work – that is, by setting the price at which they choose to sell the product or service they provide. This pricing autonomy was regarded as incompatible with the logic underlying the *Albany* exemption, which was designed to protect parties whose working conditions are not the product of individual market negotiation (Judgment of the CJEU, 2014, point 30). The second point concerned a further structural characteristic of self-employment: the fact that self-employed workers typically provide services to multiple clients simultaneously.

This multi-party engagement was taken to preclude the kind of economic dependence that characterises subordinate employment relationships and that constitutes one of the principal justifications for affording collective bargaining protection (Judgment of the CJEU, 2014, point 33).

The consequence of this reasoning was significant. Where a trade union – in the case at hand, the FNV – negotiates a collective agreement on behalf of self-employed workers, it must be treated as an association of undertakings. Any agreement concluded in that capacity therefore falls within the prohibition laid down in Article 101 TFEU and is, as such, incompatible with European competition law (Judgment of the CJEU, 2014, points 28–30). To this general conclusion, however, the Court appended an important qualification that substantially limits its reach. Incompatibility with Article 101 TFEU may be avoided where the workers concerned are 'falsely' self-employed – that is, they are individuals who, despite formally performing work on a self-employed basis, find themselves in a situation comparable to that of employees. This may be the case, for instance, where a worker derives most of their income from services rendered to a single undertaking, thereby exhibiting a degree of economic dependence functionally equivalent to that of an employed person (Judgment of the CJEU, 2014, points 31 ff.).

The reasoning advanced by the Court of Justice in *FNV Kunsten* raises several significant questions and, not coincidentally, continues to divide scholarly opinion. In the space available, I wish to highlight the two issues I consider most fundamental.

2. The concept of bogus self-employment and its impact on today's labour market

The first issue concerns the new category of workers that the Court's decision effectively brought into being: bogus self-employed workers. Initially, some scholars took the view that this category was confined to individuals who had obtained a judicial ruling declaring their self-employment contract unlawful and formally establishing the existence of an employment relationship (Countouris, 2018, p. 192–225). This interpretation, however, did not accurately reflect the Court's intentions. In referring to bogus self-employed workers, the Court sought to extend the *Albany* exemption so as to permit collective agreements to be concluded in favour of genuinely self-employed workers who find themselves in conditions materially comparable to those of employees (Daskalova, 2018, p. 461–508; Giampà, 2024, p. 243–265; Giovannone, 2023, p. 61–77; Gramano, 2025, p. 135–156; Jurkowska-Gomułka et al., 2024, p. 65–82; Monda, 2022).

This interpretation has had a significant impact on the regulatory frameworks of several Member States, including Italy. Its most important implication is that extending to self-employed workers protections typically associated with subordinate employment – including collective bargaining rights – demonstrates that the link between employment status and legal protection is not a rigid one. As the Italian experience illustrates, most notably through the regime of 'hetero-organised' collaborations established by Article 2 of Legislative Decree no. 81/2015, the protective rules governing subordinate employment can be transposed to self-employed workers where the functional conditions so warrant (Zoppoli, 2024).

The practical significance of this development has become especially apparent in the context of the gig economy, driven by the expansion of digital platforms and new forms of work organisation more broadly. Courts and legislatures across several European countries have been called upon to determine the employment status of platform workers, and the prevailing tendency has been to extend to them the protections accorded to subordinate employees (Kajander & Kerikmäe, 2022; Leckey, 2020; Prassl, 2018). This trend has been further reinforced by the transposition at national level of the legal presumption of subordination introduced by the EU Directive on Platform Work.

3. Collective safeguards and incompatibility with EU competition law

The second issue concerns the nature of the protection under examination. The Court's reasoning focused primarily on the status of self-employed workers who, where they are genuinely self-employed, are treated under competition law as undertakings and therefore fall outside the *Albany* exemption. However, comparatively little attention was devoted to the fact that collective agreements do not invariably produce effects *erga omnes* and that in many European legal systems – Italy being a prominent example – collective agreements operate under civil law, binding only those workers who are members of the signatory trade unions (Cordella, 2021).

The reason why the Court did not examine this dimension is not difficult to identify. Dutch law provides for a specific mechanism enabling collective agreements to be extended so as to apply universally, independently of the individual worker's freedom to affiliate with a particular trade union. Under this system, a collective agreement may acquire a general binding effect, thereby preventing individual parties from negotiating terms less favourable than those it establishes. Independent service providers are consequently required to set their labour costs at no less than the minimum standard prescribed by the agreement. In practical terms, this mechanism forecloses the possibility of using lower labour costs as a competitive instrument to reduce the price of services on the market. It is precisely this market-distorting effect that led the Court of Justice to hold that collective agreements binding on independent service providers are incompatible with Article 101 TFEU.

The converse situation, however, points towards a different legal outcome. In legal systems that do not provide for the extension of collective agreements to non-members, independent service providers are under no obligation to comply with the minimum standards established therein. By choosing not to join the signatory trade union, they remain entirely free to negotiate their working conditions and labour costs on an individual basis. In such systems, therefore, collective agreements covering self-employed workers produce no distortion of competition: service providers retain the autonomous choice of whether to accept the collectively agreed standards or to opt out and negotiate individually.

This freedom to determine working conditions – a structural feature of collective agreements in systems lacking general extension mechanisms – renders collective bargaining compatible with the principle of undistorted competition enshrined in Article 101 TFEU. It is important to note, however, that this line of argument is valid exclusively in relation to self-employed workers. The absence of general extension mechanisms constitutes a relevant consideration only for the purpose of assessing the compatibility of collective agreements covering the self-employed with Article 101 TFEU. It does not extend to employees: even where collective agreements applicable to them lack general binding effect, the *Albany* exemption applies to them without qualification, and the compatibility of such agreements with competition law is therefore not in doubt.

4. Limits of the Commission Guidelines on collective bargaining for self-employed workers

As anticipated, the uncertainties generated by the *FNV Kunsten* ruling – and by its treatment of collective bargaining for self-employed workers as incompatible with European competition law and its characterisation of such workers as undertakings – prompted a regulatory response from the European Commission. In September 2022, the Commission published its Guidelines on the application of EU competition law to collective agreements on the working conditions of individual self-employed workers (European Commission, 2022).[1] The Guidelines constitute a detailed, though non-binding, instrument of soft law. Their central contribution is to clarify that a specific category of self-employed workers, referred to as 'solo self-employed workers', may negotiate or be included in collective agreements without thereby infringing EU competition law. This position rests on the premise that such workers possess limited market power and that their structural weakness vis-à-vis their clients may more readily deprive them of the ability to determine their own market behaviour freely. The Commission reasonably concludes that competition law should not apply to collective agreements entered into by, or on behalf of, these workers,

1 These Guidelines have received the express support of the European Parliament (2024, point 10), as well as explicit mention, with a view to improving the conditions of self-employed workers, in the 'recitals' (no. 30) of the EU Directive on Platform Work.

on the grounds that collective bargaining in this context does not restrict individual market autonomy but rather compensates for an existing imbalance, thereby protecting their working conditions (European Commission, 2022, points 5 and 36).

The Guidelines nonetheless identify two distinct categories of self-employed workers within which collective agreements may be concluded in a way that is compatible with European competition law. The first encompasses workers in a situation like that of employees; the second covers workers who, while not comparable to employees in the way they perform their work, are nonetheless entitled to collective protection on account of their socio-economic vulnerability.

Regarding the first category, the Guidelines provide that collective agreements concluded by or on behalf of self-employed workers fall outside the scope of Article 101 TFEU where those workers are in a situation comparable to employment. This is deemed to be the case where the workers concerned (a) are economically dependent on a single client, receiving at least 50% of their total annual working income from that client (point 24); (b) work 'side by side' with employees within the same organisational context (points 26–27); or (c) provide their services through digital labour platforms – a provision that anticipated the employment presumption subsequently introduced by the EU Directive on Platform Work (points 28–31).

With regard to the second category – workers who, though not comparable to employees, require collective protection for socio-economic reasons – the Commission specifies that competition law does not apply to self-employed workers who (1) find themselves in a situation of clear power imbalance relative to the counterparty with whom they contract, as in the case of negotiations conducted with undertakings of significant size, such as those with high turnover or more than ten employees; or (2) conclude agreements in application of national rules aimed at pursuing recognised social policy objectives.

Conclusions

The Guidelines represent a significant step forward in clarifying the *FNV Kunsten* case law and in creating the conditions under which collective agreements compatible with competition law may extend to broader categories of self-employed workers. Certain issues, however, remain unresolved with respect to those genuinely self-employed workers who, on the analysis developed above, should be entitled to engage in collective bargaining. While the Guidelines permit recourse to collective agreements as a mechanism for rebalancing the structural contractual asymmetry that characterises the position of self-employed workers vis-à-vis their clients, this option appears to be confined to 'individual self-employed workers' – that is, those who, according to paragraph 2 of point 1 of the Guidelines, perform their activity primarily through their own personal work. The Guidelines do not address the position of self-employed workers who, although in need of protection, perform their services in collaboration with other workers.

The interpretive difficulty turns on the scope of the adverb 'primarily' as used in paragraph 2 of point 1. Read carefully, this qualification appears to exclude workers who perform their activity 'mainly' through personal work but with the involvement of collaborators – an arrangement expressly contemplated, for instance, by Article 409 of the Italian Code of Civil Procedure. When applied to personal work, 'primarily' seems instead to permit the self-employed worker to avail themselves of material means and equipment, while stopping short of authorising recourse to human collaborators. This reading is supported by the subsequent reference in paragraph 18, point 2.2, where assets used in the performance of the service are described as 'an ancillary means to provide the final service', and their use is expressly stated not to preclude classification as a solo self-employed person where the activity is carried out personally.

From this perspective, the Guidelines fail to dispel the uncertainty surrounding this category of workers. The risk therefore persists that certain self-employed service providers – those who work predominantly alone but with occasional recourse to collaborators – may be excluded from collective protection, even where the way they organise their activity does not diminish, and may indeed reinforce, their position of socio-economic vulnerability on the market.

REFERENCES

Barnard, C. (2003). Social dumping and the race to the bottom: Some lessons for the European Union from Delaware? *European Law Journal*, 1, 563–584.

Broulík, J. (2024). *Harm to workers in EU competition law: A sufficient condition for intervention* [Working paper no. 12]. Amsterdam Center for Law & Economics.

Cengiz, F. (2021). The conflict between market competition and worker solidarity. *Legal Studies*, *1*, 73–90.

Colin, C., & Lapeyre, W. F. (2017). *Dependent self-employment: Trends, challenges and policy responses in the EU* [Employment working paper no. 228]. International Labour Office.

Cordella C. (2021). Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sindacali. *Biblioteca '20 Maggio*', *2*. https://csdle.lex.unict.it/sites/default/files/Documenti/Articoli/2021–2_Cordella.pdf

Countouris, N. (2007). *The changing law of the employment relationship: Comparative analyses in the European context*. Ashgate.

Countouris, N. (2018). The concept of 'worker' in European labour law: Fragmentation, autonomy and scope. *Industrial Law Journal*, *2*, 192–225.

Daskalova, V. (2017). *Regulating the new self-employed in the Uber economy: What role for EU competition law?* Tilburg Law & Economics Center (TILEC) Law & Economics Research Paper Series. Available at SSRN: https://ssrn.com/abstract=3009120 or http://dx.doi.org/10.2139/ssrn.3009120.

Daskalova, V. (2018). Regulating the new self-employed in the Uber economy: What role for EU competition law? *German Law Journal*, 3, 461–508.

Davidov, G. (2017). 'Subordination v. domination: Exploring the differences'. *International Journal of Comparative Labour Law and Industrial Relations*, *3*, 365–389.

Delfino, M. (2017). Statutory minimum wage and subordination: FNV Kunsten Informatie judgment and beyond (CJEU, C-413/13). In M. Łaga, S. Bellomo, N. Gundt, & M. Boto (Eds.), *Labour law and social rights in Europe. The jurisprudence of the international courts: Selected judgments* (pp. 41–48). Gdansk University Press.

European Commission. (2022). *Communication from the Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons*, C-374/02.

European Parliament. (2024, 16 January). Resolution of 16 January 2024 on Competition Policy – Annual Report 2023 (2023/2077(INI) OJ C, C/2024/5705, 17.10.2024.

Giampà, G. (2024). Collective bargaining for solo self-employed persons in the European Union: Assessing the efficacy of the European Commission's guidelines. *Diritti lavori mercati international*, *1*, 243–265.

Giovannone, M. (2023). Guidelines on collective agreements regarding the solo self-employed persons: Another (controversial) immunity to EU competition rules. *Diritti lavori mercati international*, *2*, 61–77.

Gramano, E. (2025). Collective rights, competition, and self-employed workers in the EU. *International Journal of Comparative Labour Law and Industrial Relations*, *2*, 135–156.

Grosheide, E., & ter Haar, B. (2017). Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13 (FNV Kunsten Informatie). In M. Łaga, S. Bellomo, N. Gundt, & M. Boto (Eds.), *Labour law and social rights in Europe. The jurisprudence of the international courts: Selected judgments* (pp. 21–41). Gdansk University Press.

ILO. (2016). *Non-standard employment around the world: Understanding challenges, shaping prospects*. International Labour Office.

Jurkowska-Gomułka, A., Piszcz, A., & Oliveira Pais, S. (2024). Collective agreements on working conditions of solo self-employed persons: Perspective of EU competition law. *Białostockie Studia Prawnicze*, *2*, 65–82.

Judgment of the Court of Justice of the European Union of 21 September 1999 on the case of *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96.

Judgment of the Court of Justice of the European Union (First Chamber) of 4 December 2014 on the case of *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, C-413/13.

Kajander, A., & Kerikmäe, T. (2022). Gig economy workers in the European Union: Towards change in their legal classification. *Revista CIDOB d'Afers Internacionals*, *131*, 117–136.

Lamannis, M. (2023). *Collective bargaining in the platform economy: A mapping exercise of existing initiatives*. Etui.

Leckey, C. (2020). ECJ clarifies 'worker' status under EU law in gig economy ruling (UK). *European Employment Law Cases*, *3*, 210–213.

Monda, P. (2022). The notion of the worker in EU Labour Law: 'Expansive tendencies' and harmonisation techniques. *Diritti lavori mercati international*, *2*, 93–123.

Perulli, A. (1996). Il lavoro autonomo. Contratto d'opera e professioni intellettuali. In A. Cicu, F. Messineo (Eds.), *Trattato di Diritto Civile e Commerciale* (pp. XII – 786). Giuffrè.

Prassl, J. (2018). *Humans as a service: The promise and perils of work in the gig economy*. Oxford University Press.

Rainone, S., & Countouris, N. (2021). *Collective bargaining and self-employed workers: The need for a paradigm shift* [Policy brief no. 11]. European Trade Union Institute.

Risak, M., & Dullinger, T. (2018). *The concept of 'worker' in EU law*. Etui.

Šmejkal, V. (2015). Competition law and the social market economy goal of the EU. *International Comparative Jurisprudence*, *1*, 33–43.

Supiot, A. (2001). *Beyond employment: Changes in work and the future of labour law in Europe*. Oxford University Press.

Treu, T. (2016). *Tipologie contrattuali nell'area del lavoro autonomo*. Libro dell'anno del Diritto Treccani.

Zoppoli, A. (2024). Collaborazioni coordinate, dipendenza economica e contrattazione collettiva tra ordinamento italiano e diritto eurounitario. *Lavoro diritti europa*, *3*, 1–13.

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No-Poach Agreements and Wage-Fixing Practices: When Labour Market Collusion Becomes an Antitrust Issue

Abstract: This article analyses the growing role of labour markets in competition policy, arguing that collusion between employers – particularly no-poach agreements and wage-fixing practices – should be assessed with the same severity as classic cartels. Using a doctrinal and comparative approach, it presents the legal frameworks and enforcement trends in the United States, the European Union, and Poland. The text conceptualizes hiring as a market transaction in which employers act as buyers of labour and employees as its suppliers, and shows how no-poach and wage-fixing agreements distort mobility, reduce wages, and weaken workers' bargaining power. It then discusses the convergences and divergences across jurisdictions: US authorities increasingly pursue criminal proceedings against 'naked' restraints; EU policy and case law tend to classify wage-fixing and many no-poach agreements as restrictions 'by object' (Article 101 TFEU); Polish practice adopts an effects-based approach. The article also addresses the issue of so-called ancillary restraints in the context of collaborations (e.g. franchising, joint ventures) and indicates when – if at all – recruitment bans may be considered objectively necessary and proportionate.

Keywords: antitrust law, labour rights, no-poach agreements, wage-fixing, economic law

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Introduction

In recent years, the role and significance of the labour market in competition policy has become increasingly visible in both academic literature and case law. This is particularly noteworthy given that until now, issues concerning the employer–employee relationship had largely remained outside the mainstream focus of antitrust law, which concentrated primarily on consumer protection as well as business activity (Marinescu & Posner, 2020, p. 1347). However, the dynamic development of the digital economy, technological progress, and the globalization of labour markets have revealed that restrictions on competition can affect not only customers, but also the employees themselves. The digitalization of labour markets, including the expansion of remote and platform-based work (Nyka & Zapolska, 2024, p. 177–178), has on the one hand increased worker mobility, while on the other hand it has facilitated coordination between employers of practices that restrict competition for labour. As a result, digital tools that reduce geographic barriers and broaden employment opportunities may simultaneously foster the formation of no-poach or wage-fixing agreements, particularly in sectors related to new technologies and those requiring highly specialized labour. Consequently, the labour market is increasingly viewed as an object of interest and analysis within competition law.

As Luisetto rightly observes, '[i]n a dynamic labour market, workers change jobs for better working conditions and benefits, opportunities for training and advancement, and higher wages' (2025, p. 1). In this context, two categories of practice have gained particular significance: no-poach agreements and wage-fixing practices. The former consists of reciprocal commitments by employers not to engage in recruitment activities targeting a competitor's employees, while the latter involve agreements on wage levels (Aresu et al., 2024, p. 2). Both result in artificially limiting worker mobility and weakening their bargaining power. This directly translates into a reduction in the level of protection of workers' rights, including their ability to effectively shape the conditions of their employment and remuneration, thereby contributing to rising income inequality (Lee, 2020, p. 199). The origins of the issue show that for many years such practices were considered neutral tools of workforce management, until groundbreaking proceedings were initiated in the United States, including against companies in Silicon Valley (Marinescu & Posner, 2020, p. 1344).

Against this background, the main thesis of this paper is the assumption that the practices under discussion constitute not only classic violations of competition law, but also significantly interfere with workers' rights – including the right to freely choose employment, the right to choose an employer, and the right to influence one's position in the labour market. The primary objective of the article is therefore to present and compare the approach to such practices in the United States, the European Union, and Poland, as well as to reflect on future regulatory directions. The analysis will cover both legal regulations and case law, with particular emphasis on the impact of these practices on workers' rights. In this sense, the issue of no-poach agreements and wage-fixing practices serves as a starting point for a broader discussion of the relationship between labour law and competition law, especially in the digital economy. We seek to examine the role of antitrust law in the protection of workers and the preservation of employment stability. Accordingly, the primary objective of the article is to analyse no-poach agreements and wage-fixing practices occurring in labour markets, using doctrinal legal analysis and comparative methods.

1. The legal nature of labour market collusion

The starting point for the analysis of no-poach agreements and wage-fixing practices is the question: Is the labour market a 'market' within the meaning of competition law? In the traditional approach, a significant portion of competition law cases concerns markets in which undertakings compete with each other by offering their products or services to consumers (Déchamps et al., 2019, p. 190). It is undeniable, however, that antitrust law applies to all areas of economic activity, and thus it may also be extended to the labour market, where undertakings, acting as employers, compete for workers (Prager, 2025, p. 4). From this perspective, the labour market should be treated as a market within the meaning of antitrust law, and agreements restricting competition in this area should be viewed as analogous to classic cartels (Urząd Ochrony Konkurencji i Konsumentów, 2023, p. 4). Luisetto underscores that a 'well-functioning labor market is a critical component of a market economy […] In a dynamic labor market, workers change jobs for better working conditions and benefits, opportunities for training and advancement, and higher wages' (2025, p. 1).

The theoretical justification for such an approach lies in the concept of the two-sided market: employers act as buyers of labour, while employees are its suppliers. When wage-fixing practices or no-poach agreements occur, this market becomes distorted in a manner similar to that observed in cases of price-fixing collusion (Aresu et al., 2024, p. 3). The effects of such practices are, of course, multidimensional. First and foremost, worker mobility in the market is restricted. In addition, wages are artificially depressed, and in a broader perspective, these practices may lead to reduced innovation and a slowdown in overall economic dynamics (Aresu et al., 2024, p. 2; Lee, 2020, p. 200). Economic arguments therefore clearly support treating the labour market as an area requiring competition protection. This is also confirmed by legal arguments, in particular the positions of US antitrust authorities, the European Commission, and national competition authorities (e.g. the president of Urząd Ochrony Konkurencji i Konsumentów (the Office of Competition and Consumer Protection) (UOKiK)), cited later. Importantly, recent enforcement practice increasingly reflects the view that labour market collusion constitutes a core concern of competition law rather than being a peripheral issue or one purely of labour law (European Commission, 2023a; FTC & DoJ, 2016). In their most recent guidelines, these bodies explicitly indicate that wage-fixing and no-poach agreements generally constitute restrictions of competition 'by object' under Article 101 TFEU.

Against this background, it is also worth pointing to two approaches to competition policy – neoliberalism and ordoliberalism. As Mączyńska and Pysz emphasize, '[t]he key to distinguishing between neoliberalism and ordoliberalism lies in their respective attitudes toward the freedom of the economic individual' (2014, p. 223). Neoliberalism assumes that the primary goal of competition policy is to maximize market efficiency and to ensure the lowest possible price for consumers (Carvalho, 2021, p. 151). Consequently, '[t]he constitutive slogans of the neoliberal doctrine are summed up most succinctly in the so-called sacred triad: privatization, deregulation, and stabilization' (Mączyńska & Pysz, 2014, p. 232). As pointed out by Boas and Gans-Morse,

> The most common use of neoliberalism refers to economic reform policies. Scholars typically characterize three sets of polices as being neoliberal: those that liberalize the economy, by eliminating price controls, deregulating capital markets, and lowering trade barriers; those that reduce the role of the state in the economy, most notably via privatization of state-owned enterprises; and those that contribute to fiscal austerity and macroeconomic stabilization, including tight control of the money supply, elimination of budget deficits, and curtailment of government subsidies. (Boas & Gans-Morse, 2009, p. 143)

In this respect, it seems that under neoliberalism, workers' rights and employment standards would be treated as separate issues belonging to labour law, rather than to competition law.

Ordoliberalism, by contrast, emphasizes not only competition itself, but also its quality and the framework conditions within which it operates. As Polański observes, "ordoliberalism assigns competition law the role of protecting freedom, thereby making it an 'economic constitution'" (2020, p. 60). Moreover, '[c]ompetition constituted the foundation of the principles of ordoliberalism. It was meant to drive economic efficiency' (Śliwa & Waląg, 2007, p. 79–80). Pawłowski observes that '[o]rdoliberals devoted a significant part of their considerations to moral, axiological, and social issues' (2018, p. 102). Ordoliberalism also stresses the necessity of 'a comprehensive approach to the study of the realities of economic life' (Mączyńska & Pysz, 2014, p. 231), emphasising that effective competition depends upon an appropriate legal, institutional and social framework (Bonefeld, 2012, p. 640). Against this background, it is possible to ask whether labour standards and working conditions should also be regarded as elements of that institutional framework. In this sense, the guiding notion is the word *ordo*, which in Latin means 'order, state of affairs' (Pawłowski, 2018, p. 102). As Mączyńska and Pysz point out, neoliberalism 'is characterized by market fundamentalism and the marginalization of the role of the state in shaping the socio-economic order, whereas in the latter [ordoliberalism] the issues of shaping order are of primary importance' (2014, p. 223). Neoliberalism therefore emphasizes freedom and efficiency (Mączyńska & Pysz, 2014, p. 223, 226, 241), while ordoliberalism emphasizes order, institutional structure, and quality standards, reflecting the conviction that a stable socio-economic order is essential to social and economic prosperity and stability (Pawłowski, 2018, p. 109).

In the literature, there is a view according to which ordoliberalism 'is not just about competition policy, it also views the competitive process as a pillar of a holistic political economy and societal order' (Anchustegui, 2015, p. 140). From this perspective, ordoliberalism may be understood not merely as a historical school of economic thought, but as a normative framework that has influenced the development of competition law. The ordoliberal approach to the economy and to competition, which emphasises that effective competition depends upon a robust legal, political and institutional framework (Bonefeld, 2012, p. 640), thus opens a space for discussion of whether labour standards – such as fair remuneration or decent working conditions – may be regarded as institutional preconditions for effective competition. Such an interpretation is consistent with ordoliberal premise that the market must be embedded in a constitutional framework designed to 'protect the process of competition from distortion by private power' (Vatiero, 2010, p. 374). Ordoliberalism conceives of a well-functioning market as depending on appropriate legal, social and institutional conditions (Bonefeld, 2012, p. 638). Accordingly, to what extent can labour standards themselves be regarded as institutional conditions that underpin the proper functioning of a market economy? Ordoliberalism may constitute a useful point of departure for interpreting selected workers' rights as institutional conditions underpinning a well-functioning competitive order. Consequently, anticompetitive agreements in the labour market may not only violate the norms derived from competition law, but also undermine the very foundations of a healthy market economy. This perspective helps explain why contemporary competition enforcement increasingly frames labour market collusion as a serious threat to market order rather than as a marginal concern.

2. Classification of anticompetitive practices in the labour market

2.1. No-poach agreements

No-poach agreements constitute a specific category of practices restricting competition in the labour market, the essence of which is the mutual commitment of employers not to compete for each other's employees. For the purposes of this analysis, the term 'no-poach agreements' is used in a broad sense to denote both no-hire and non-solicitation arrangements. No-poach agreements focus on the arrangement that often, competing employers will not recruit from one another's workforce (OECD, 2026, p. 248). In practice, this means that an employer refrains from 'poaching' or hiring such employees (Aresu et al., 2024, p. 2). Naturally, this usually concerns the best or most sought-after specialists on the market. At present, this can be observed particularly with respect to experts in new technologies, artificial intelligence, or cybersecurity (Davis, 2018, p. 279–280). Market observation shows that such agreements typically take the form of additional clauses included within another contract, most notably in franchise agreements or framework cooperation agreements between enterprises, rather than standalone arrangements. Moreover, the literature indicates that '[t]hese agreements may be express or implied, written or oral, and are most common among business competitors' (Davis, 2018, p. 281). Their essence lies in the fact that the parties to the agreement commit themselves to an arrangement whereby Undertaking A will not hire, engage, or offer cooperation to the employees of Undertaking B, and Undertaking B assumes an identical obligation toward Undertaking A.

Taladay and Mehta draw attention to the fact that such agreements 'can frequently be anticompetitive, resulting in lower wages or benefits for employees and harm to consumers in the form of reduced output or less innovation' (2017, p. 2; Lee, 2020, p. 200). It is worth noting that the understanding of the term 'employee' in this context is much broader than that traditionally derived from labour law. It usually covers not only individuals employed under an employment contract, but also those engaged on the basis of civil law contracts (e.g. a contract of mandate or a contract for specific work) and even sole proprietors operating under a B2B model (Aresu et al., 2024, p. 2). No-poach agreements themselves may take various forms and can also cover an entire sector or only selected entities.

When analysing no-poach agreements, two basic types can be distinguished: no-hire agreements and non-solicit agreements. The former involve employers agreeing among themselves not to hire each other's employees emphasize that a no-hire agreement may take an active form (a situation where an employer consciously refuses to enter into an employment contract with a candidate who has successfully completed the entire recruitment process, solely because that candidate is employed by a company with which the employer has entered into an agreement) or a passive form (a situation where an employer refuses to even consider a candidate's application solely because the person is employed by a company that is a party to the no-hire agreement) (Aresu et al., 2024, p. 2; OECD, 2026, p. 248).

Another type of no-poach agreement is the non-solicit agreement (also known as a no-cold-calling agreement), which focuses on prohibiting any active recruitment activities, such as sending job offers, encouraging participation in recruitment processes, or making individual offers of cooperation (Aresu et al., 2024, p. 2; OECD, 2026, p. 248; Lee, 2020, p. 200). Importantly, regardless of their scope or form, their very essence is the restriction of occupational mobility. They therefore directly affect the basic mechanism of competition in the labour market, and employees are deprived of the opportunity to improve their working conditions and remuneration through job changes (Lee, 2020, p. 199). Thus such agreements 'limit the outside employment opportunities of employees' (Luisetto, 2025, p. 1). Ultimately, this effectively reduces employees' bargaining power, not only in the labour market as a whole, but also vis-à-vis their current employer (Aresu et al., 2024, p. 2). It seems that no-poach agreements may be regarded as restrictions of competition 'by object' (Lehmann et al., 2025, p. 3). They would then be treated analogously to classic price-fixing cartels, though instead of goods or services, they concern labour resources.

The economic and legal significance of such agreements is well illustrated by the US example, which will be discussed in greater detail later. It is enough to mention here that between 2018 and 2020, the Attorney General of Washington State secured 237 so-called assurance of discontinuance agreements, under which the largest franchise chains committed to removing no-poach clauses from franchise agreements throughout the United States (Luisetto, 2025, p. 4). Moreover, existing analyses have shown that this initiative had effects beyond the directly targeted group: approximately 36% of franchisors who were not formally covered by the programme also decided to remove no-poach clauses from their contracts (Luisetto, 2025, p. 5). In addition, studies conducted by Lafontaine et al. (2024, p. 3) indicate that the elimination of these clauses translated into an estimated 4–5% increase in wages in the sectors affected by the practice. Similar concerns regarding no-poach agreements have also emerged in the EU. In this respect, the European Commission's Horizontal Guidelines emphasize that restrictions which are objectively necessary and proportionate to the implementation of an otherwise pro-competitive cooperation may constitute ancillary restraints. Although the Guidelines do not specifically refer to no-poach agreements, such clauses may fall within this category if these conditions are met (European Commission, 2023a).

2.2. Wage-fixing practices

The second category of practices restricting competition in the labour market are so-called wage-fixing practices, which consist in employers – usually competitors operating in the same market – jointly agreeing upon and controlling the level of their employees' remuneration (Aresu et al., 2024, p. 2; OECD, 2026, p. 248; Lee, 2020, p. 200). For the purposes of this analysis, wage-fixing practices are understood as agreements between employers that directly or indirectly eliminate wage competition on the labour market (Aresu et al., 2024, p. 2; US DoJ & FTC, 2025, p. 4–5). Such arrangements may concern both the direct setting of wages and the introduction of wage caps that employers undertake not to exceed. In practice, this leads to the elimination of wage competition between employers, which naturally results in limiting workers' freedom to negotiate better working conditions (Taladay & Mehta, 2017, p. 2). It may also involve artificially lowering the level of proposed remuneration. Importantly, the concept of remuneration covers not only the salary itself, but also all related components, such as bonuses, awards, and task-related or functional allowances, as well as social benefits (Aresu et al., 2024, p. 2). This means that agreements between employers relating to additional forms of benefits would also constitute a violation of competition law.

Among the negative effects of wage-fixing agreements, one may point to the direct lowering of employees' wages compared to the level that would prevail in a free and competitive labour market (Aresu et al., 2024, p. 2; Taladay, 2018, p. 2–3). Such practices may also eliminate competitive pressure between undertakings in the field of recruitment and retention of 'talents'. This undoubtedly affects the dynamics and attractiveness of the labour market for jobseekers (Aresu et al., 2024, p. 5). In the longer term, such practices may indirectly cause a decline in innovation and hamper economic growth, as well as resulting in 'harm to consumers in the form of reduced output' (Taladay, 2018, p. 2). In this sense, wage-fixing practices mirror the economic logic of classic price-fixing cartels, albeit with labour rather than goods or services as the relevant parameter of competition, given that '[l]abor market power is the mirror image of product market power' (Naidu et al., 2018, p. 538).

As the chair of the Federal Trade Commission (FTC), Lina M. Khan, has emphasized: 'Noncompete clauses keep wages low, suppress new ideas, and rob the […] economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned' (FTC, 2024b). This was also highlighted in the justification to the Non-Compete Clause Rule, which pointed out that 'non-competes tend to negatively affect competition in product and service markets, suppressing new business formation and innovation' (FTC, 2024a, p. 7).

The US and EU approaches will be discussed more broadly later, but as an example of a wage-fixing practice, one may point to the well-known case of *United States v. DaVita Inc.*, in which employers were accused of fixing wages and restricting competition among employees in the medical sector (Lehmann et al., 2025, p. 2). This case is particularly noteworthy as it serves as a reference point for further actions of the US antitrust authorities, which in recent years have increasingly taken initiatives targeting such practices. It illustrates an evolving enforcement approach in which wage-fixing agreements are increasingly presumed to be anticompetitive, without a systematic requirement to demonstrate their actual effects. It should, however, be emphasized that increased antitrust enforcement in labour markets should consider the autonomy of labour law and the protective instruments and mechanisms provided within its framework. Treating these bodies of law in isolation from one another 'leads to the risk of fundamental conflicts between the two disciplines and some uncertainty as to their respective scope, with the result that the level of labour protection may suffer' (Lianos et al., 2019, p. 5). Accordingly, the actions of antitrust authorities must remain consistent with the protective functions of labour law.

In the EU, the European Commission has indicated in its guidelines that 'both wage-fixing and no-poach agreements will in most cases qualify as restrictions by object under Article 101 TFEU and are unlikely to meet the requirements to qualify as ancillary restraints; moreover, they are unlikely to meet the requirements for an exemption under Article 101(3) TFEU' (Aresu et al., 2024, p. 1). It is important to note that '[t]he policy brief categorized wage-fixing agreements as "detrimental" to employees and outlined the EC's views on the potential effects of no-poach agreements, which included reduced compensation, inefficient allocation of workers, and stifled productivity' (Lehmann et al., 2025, p. 3). This approach reflects the increasing recognition of labour markets as fully fledged markets within EU competition law. A similar position can also be found in the statements of the Polish antitrust authority, i.e. by the president of UOKiK, who emphasizes that employers' agreements on employee remuneration are treated analogously to classic price-fixing cartels. As the president of UOKiK points out, 'employers compete in the labour market for employees mainly through the wages they offer (each employer wants to hire the best possible worker); anticompetitive wage-fixing refers to the fundamental parameter of competition, which is remuneration ("price")' (Urząd Ochrony Konkurencji i Konsumentów, 2023, p. 10).

3. The regulatory response and case law

3.1. The USA

A proper understanding of the US approach to no-poach and wage-fixing agreements first requires the presentation of the basic assumptions of American antitrust law and its evolution. One of the first federal antitrust statutes is the Sherman Antitrust Act of 1890. Pursuant to Section 1 of this Act,

> every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 2, on the other hand, provides that

> every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Act thus addresses two key issues from the perspective of competition law: namely, it establishes a prohibition on entering into contracts and agreements that negatively affect trade, and it prohibits conduct resulting in the creation of a monopoly (Frankiewicz & Grzebieniak, 2024, p. 26).

Since the provisions of the Sherman Act were rather general, in order to specify its general principles the Clayton Antitrust Act and the Federal Trade Commission Act were adopted in 1914. The Clayton Act supplemented the provisions of the Sherman Act by prohibiting practices such as price discrimination, group boycotts, and anticompetitive mergers. The Federal Trade Commission Act, on the other hand, established the Federal Trade Commission, whose tasks include, above all, initiating proceedings against conduct that infringes antitrust laws. Both of these statutes, which clarify the Sherman Act, prohibit restraints on trade, monopolization, unfair agreements, mergers, and price discrimination (Cenzartowicz, 2002, p. 258–260).

In US case law, two approaches to analysing antitrust cases have been developed: illegality per se or according to the rule of reason. Cases involving unequivocal violations of antitrust law are illegal per se, whereas other restrictive practices are assessed on the basis of the rule of reason. Practices deemed illegal per se include agreements that have a negative impact on competition and for which no circumstances exist that could justify their application. Agreements not found to fall under the per se rule will instead be assessed under the rule of reason (Nealis, 2006, p. 348).

In *Addystone Pipe & Steel Co. v. United States* (Judgment of the US Supreme Court, 1899), an alternative method of assessing the compliance of business conduct with Section 1 of the Sherman Act was formulated: a distinction was made between direct restraints on trade and ancillary restraints, which later became the foundation of the per se prohibition. Direct restraints occurred when the purpose or subject matter of the agreement was focused solely on restricting competition, and therefore they were prohibited without the need to analyse their effects and without the possibility of justification. Ancillary restraints, on the other hand, accompanied another lawful agreement; their purpose was to increase efficiency, ensure the effectiveness of the transaction, facilitate the conclusion of a contract, or protect the lawful interests of the parties to the agreement against harm that would result if competition were not restricted (Jebelli, 2010, p. 2–4). At that time, the rule of reason was admitted only in relation to those restraints of competition that were ancillary in nature (Miąsik, 2004, p. 76–77).

The Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (both Antitrust Agencies) have significantly intensified their enforcement actions against no-poach agreements, under which undertakings (employers) commit not to recruit or hire each other's employees. The DoJ now regularly initiates criminal proceedings concerning such agreements. In January 2025, the antitrust agencies issued the Antitrust Guidelines for Business Activities Affecting Workers (US DoJ & FTC, 2025). According to Section 1 of these Guidelines, some types of agreement, including wage-fixing and no-poach agreements, may violate antitrust laws and can lead to criminal charges. Competing employers in the labour market may commit an antitrust offence if they enter into an agreement not to recruit, solicit, or hire one another's employees or to fix wages or terms of employment (US DoJ & FTC, 2025, p. 4).

Such agreements may also give rise to civil liability, even if criminal proceedings are not initiated, as emphasized in *United States v. Lucasfilm Ltd* (Final judgment of the US DoJ, 2011). The antitrust agencies focus on the essence of a wage-fixing or no-poach agreement; if the object of the employers' agreement is the alignment, stabilization, or other form of coordination of wage-setting, including through arrangements on ranges, caps, or benchmarks for calculating pay, it does not matter that a specific rate is not agreed upon (Plea agreement of the US DoJ, 2015). Moreover, if an undertaking agrees to limit their hiring of another undertaking's employees, it is irrelevant that the agreement does not completely prohibit such hiring. For example, based on the judgment in *United States v. Association of Family Practice Residency Directors* (Final judgment of the US DoJ, 1996), an agreement prohibiting 'cold-calling' employees must be considered a 'no-solicit' agreement, regardless of whether employers are still allowed to hire employees who apply on their own initiative without prior solicitation.

The agencies may also investigate and take action against other restrictive agreements that limit worker mobility or otherwise negatively affect competition. Agreements about non-solicitation of clients, which prohibit an employee from contacting former clients or business partners of the employer, may, depending on the circumstances, be anticompetitive, for instance if they are drafted so broadly that they effectively prevent the employee from taking up new employment or starting their own business (US DoJ & FTC, 2025, p. 9–10).

In recent years, the enforcement focus against no-poach agreements in the United States has shifted significantly toward state-level jurisdictions. State Attorneys General, particularly in states such as Washington, Illinois, and New York, have begun to identify no-poach clauses as a systemic barrier to labour mobility and a factor suppressing wage growth, an effect that is especially pronounced among lower-wage workers (Callaci et al., 2024, p. 4–5; Steinbaum, 2019, p. 51–52). This approach is grounded in the recognition that no–poach restrictions adversely affect workers' bargaining power by eliminating competition for labour.

In recent years, public debate has intensified regarding the need to reform US antitrust law (Jones & Kovacic, 2020, p. 228). Within this discussion, increasing emphasis has been placed on the role of actions undertaken at the state level, including heightened enforcement activity by state Attorneys General as well as legislative initiatives aimed at establishing distinct, state–specific standards of competition protection that differ from federal regulations. It should be noted, however, that states seeking to influence the national economy in matters of clearly nationwide significance should rely on the instruments of federal antitrust law to do so. Such actions may be carried out through the state Attorneys General, who are vested with broad authority to initiate proceedings under federal law (Stock, 2025, p. 14). This approach promotes more effective enforcement, supports more democratically grounded outcomes, and strengthens the legitimacy of state antitrust enforcement on the national stage, while at the same time preserving states' ability to pursue their policy objectives in local markets (Stock, 2025, p. 18).

The key legal instrument employed by the state of Washington was the so–called assurances of discontinuance (Gordon, 2021, p. 338), voluntary settlements under which corporations committed to cease the use of the disputed clauses. The initiative achieved remarkable success: from 2018, more than 200 nationwide franchise chains (including such major brands as McDonald's, Arby's, and Subway) entered into agreements to remove no–poach provisions from all of their contracts across the United States (Callaci et al., 2024, p. 1).

The most compelling example of the effectiveness of state enforcement authorities in the area of wage–related agreements is the campaign initiated in 2018 by the Attorney General of the state of Washington, Bob Ferguson. These actions focused on eliminating no–poach clauses from franchise agreements, which systematically prevented employees from moving between different outlets within the same network (e.g. fast–food restaurants), thereby de facto entrenching their bargaining position (Callaci et al., 2024, p. 2). This strategy was based on the premise that although the franchisor and the franchisee remain in a vertical relationship, individual franchisees compete directly with one another in the labour market (Posner, 2021, p. 57).

3.2. The European Union

When analysing the European approach to wage–fixing and no–poach agreements, it is worth noting that initially, the European Commission considered any agreement restricting competition to be contrary to competition law, even if economic analysis did not demonstrate a serious restriction of competition. Ultimately, however, the EU decided to adopt a more flexible approach, involving the assessment of business conduct in light of the economic conditions, considering the effects of the agreement under Article 101(1) TFEU, rather than verification under Article 101(3) TFEU. According to Article 101(1) TFEU, '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 shall be prohibited'. It must therefore be recognized that no–poach and wage–fixing agreements fall within this definition, since they restrict competition in the labour market.

In 2011, the European Commission issued guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (European Commission, 2023). The purpose of Article 101 TFEU is to ensure that undertakings do not use horizontal cooperation agreements to eliminate, restrict, or distort competition in the internal market, ultimately to the detriment of consumers. In light of this, wage–fixing and no–poach agreements must be regarded per se as restrictions of competition, similar to price cartels. This means that such agreements are treated as 'hardcore restrictions' that fundamentally violate EU competition law, regardless of their potential economic benefits. This assessment was further substantiated in the European Commission's decision in *Food Delivery Services*, where it emphasized that

> no–poach agreements typically cause economic harm. In particular, they can have negative effects on wages because the parties can no longer proactively offer higher wages to induce employees to switch, and/or provide counteroffers to induce their own employees to stay. By doing so, no–poach agreements are capable of preventing the efficient allocation of productive employees to productive firms. Declining job reallocation rates have been linked to declining productivity and hence slower GDP growth (European Commission, 2025, sec. 5.2.2.2.1).

In *Allianz Hungária Biztosító v. Magyar Biztosítók* (Judgment of the CJEU, 2013), the CJEU emphasized that agreements restricting competition are prohibited per se, without the need to demonstrate a direct effect on the consumer. In *Groupement des Cartes Bancaires v. Commission* (Judgment of the CJEU, 2014), the Court held that certain agreements may be so inherently harmful to competition that they are considered restrictive by object, without any need to analyse their effects. Similarly, in *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Judgment of the CJEU, 1999), the CJEU held that certain agreements may be inherently harmful to competition and are therefore deemed restrictive by object under Article 101(1) TFEU.

The mutual interaction of labour law and competition law is gaining importance as regulators seek to protect labour markets from anticompetitive practices. The primary function of labour law is to protect workers' rights, while competition law ensures the functioning of a competitive market environment (Lianos et al., 2019, p. 6–10). Worth noting in this respect are the European Commission's 2022 guidelines on the application of EU competition law to collective agreements of the self–employed, which recognize that certain labour market practices, such as wage–fixing agreements, may be subject to antitrust assessment even with respect to persons traditionally outside the scope of labour law. In addition, the Directive on Transparent and Predictable Working Conditions (2019/1152) has strengthened worker protection in the EU, interacting with competition law through rules concerning non–compete clauses and their potential impact on limiting worker mobility. These legal acts highlight the need for a coordinated approach to regulating labour market practices through the combined application of labour law and competition law.

In the context of no–poach agreements, if the object of the agreement is to eliminate competition for employees between undertakings, it may be considered anticompetitive, thereby restricting employees' freedom to change employers and preventing wage adjustments (Aresu et al., 2024, p. 5). In assessing whether no–poach agreements qualify as restrictions 'by object', the CJEU's judgment in *Becu and Others v. Gedi* (1998) emphasized that agreements intended to restrict competition may infringe Article 101 TFEU regardless of whether their direct effect is noticeable (Vejseli, 2024, p. 366).

According to EU competition law, and in particular Article 101 TFEU, an agreement may be considered anticompetitive if its object is to restrict, prevent, or distort competition, regardless of whether the parties are direct competitors in the same product market. This means that no–poach agreements may be anticompetitive even if they are concluded between undertakings that do not compete in the same product or service markets. The key question will therefore be whether the agreement restricts competition in the labour market. If the agreement limits employees' ability to freely change jobs or reduces employment opportunities, it may be deemed anticompetitive, regardless of whether the undertakings participating in the agreement are competitors in their respective markets (Vejseli, 2024, p. 367). The case of *T–Mobile Netherlands BV and Others* (Judgment of the CJEU, 2009) demonstrates that the anticompetitive nature of an agreement depends on its impact on competition, rather than solely on the competitive relationship between undertakings. In practice, many cases involving no–poach agreements also include additional anticompetitive conduct, such as market sharing or wage–fixing, which reinforces the grounds for finding a violation of Article 101 TFEU.

An interesting position was expressed by the Advocate General in the case of *Tondela and Others*, in which he emphasized that 'Article 101(1) TFEU must be interpreted as meaning that a no–poach agreement […] shall not be classified as restrictive by object, if its genuine rationale was to preserve the fairness and integrity of the sports competition affected by the pandemic' (Emiliou, 2025). As of now, it remains uncertain to what extent the Advocate General's opinion will shape the approach of European antitrust authorities to such agreements.

3.3. Poland

Article 6(1) of the Act on Competition and Consumer Protection (Sejm Rzeczypospolitej Polskiej, 2007) prohibits agreements whose object or effect is the elimination, restriction, or other distortion of competition in the relevant market, while it also lists exemplary agreements – although wage–fixing and no–poach agreements are not explicitly mentioned. Polish competition law has adopted an effects–based approach to anticompetitive agreements, which consists in examining the economic consequences of business conduct. This means that the assessment of conduct is based not only on the content of the agreement, but also – if not primarily – on the market conditions in which such conduct takes place (Jurkowska–Gomułka, 2012, p. 34–35).

In its 2024 guide 'Cartels and Abuses in the Labour Market: Competition Law and Labour Law', the Office of Competition and Consumer Protection (UOKiK) emphasizes that competition law applies not only to markets where products are sold, but also to the labour market, where employers compete for workers. UOKiK identifies wage–fixing and no–poach agreements as being 'highly likely to infringe competition law'. Consequently, the president of UOKiK may find that a violation of competition law has occurred in a given case and, in turn, may take enforcement action and impose fines. In recent years, UOKiK has increasingly signalled that 'anticompetitive HR agreements' will be treated in the same way as price cartels. The president of UOKiK has repeatedly spoken about plans to scrutinize such practices, and proceedings have been initiated in relation to no–poach and wage–fixing agreements, although no final decisions have yet been issued.

4. Challenges and perspectives concerning the legality of no–poach and wage–fixing agreements

One of the most serious challenges in relation to wage–fixing and no–poach agreements is establishing the boundary between permissible business cooperation and prohibited restrictions of competition. In practice, a recruitment ban is often an element of a cooperation agreement, such as a joint venture or outsourcing arrangement. In each case, it will therefore be necessary to determine whether such a clause is genuinely indispensable to achieving the business objective or whether it constitutes a restriction of competition per se (Nealis, 2006, p. 348). Both EU and US law have developed the doctrine of ancillary restraints, under which certain restrictions of competition may be legally permissible if they are ancillary to another lawful business arrangement (Miąsik, 2004, p. 76–77). One of the major challenges will be answering the question of whether, for example, a no–recruitment clause in a franchise agreement should be considered a justified restriction or a prohibited anticompetitive agreement.

Another challenge is the proper definition of the relevant market in the context of competition law. Traditionally, antitrust regulation focused on product and service markets, while the labour market was for a long time not regarded as an area requiring intervention by competition authorities (Déchamps et al., 2019, p. 190). Defining the relevant market for workers is crucial to assessing the impact of a given agreement on competition. There are also significant differences in regard to sanctions. While in the United States individuals may be held criminally liable, including with the possibility of imprisonment (Kobayashi, 2001, p. 715–717), in the European Union and Poland the sanctioning system is limited to administrative liability (with fines imposed on undertakings) (Błachucki, 2013, p. 58). This raises the question of the effectiveness of the European system and whether it provides a sufficient deterrent effect.

Taking into account both the regulations and the enforcement activity of antitrust authorities in the United States, as well as the principles adopted at the level of the European Union, in the coming years one can expect further strengthening of competition authorities' involvement in the labour market. In the context of dynamic economic changes, advancing digitalization, and growing awareness of workers' rights, any restrictions on occupational mobility or artificial wage suppression should be regarded as contrary to the principles of the labour market – including freedom of employment – as well as to the fundamental freedoms of the EU internal market (Majewska & Samol, 2016, p. 15–19). Furthermore, given the global nature of many companies' activities, one may expect further intensification of cross–border cooperation between competition authorities, both within the EU and in relations with US authorities.

Conclusions

Analysis of no–poach and wage–fixing agreements leads to the conclusion that the labour market should be treated as a fully fledged market within the meaning of competition law, in which employers compete with one another for employees and where the parameters of competition include, inter alia, labour mobility and wage levels (Aresu et al., 2024, p. 1–2). The considerations presented also indicate that the ordoliberal concept of competition policy opens the space to view labour standards, such as fair remuneration or minimum employment conditions, as an element of market quality, the maintenance of which is essential for the proper functioning of the economy. From this perspective, anticompetitive agreements in the labour market infringe not only the norms of competition law, but also the foundations of a fair economic order.

No–poach and wage–fixing agreements generally constitute 'by object' restrictions, analogous to price cartels, since they artificially depress wages and limit worker mobility (Aresu et al., 2024, p. 1). Exceptions may be permissible only under the doctrine of ancillary restraints, where the restriction is genuinely necessary for lawful cooperation. Against the backdrop of international practice, clear differences emerge between the United States and the European Union and Poland. In the US, a repressive approach prevails, including the possibility of criminal liability for individuals and the classification of such agreements as per se violations. In the EU and Poland, administrative liability dominates, but the European Commission and national competition authorities clearly indicate that no–poach and wage–fixing agreements are, as a rule, restrictions of competition 'by object'. In this context, particular attention should be paid to the opinion of the Advocate General in *Tondela* (Emiliou, 2025), suggesting that in exceptional circumstances a no–poach agreement need not automatically be classified as a restriction 'by object'; in this case its true aim was to preserve the integrity of sporting competitions during the pandemic. At this stage, however, it is difficult to assess whether this reasoning will influence the CJEU's case law and the Commission's practice.

Looking ahead, one of the key challenges will be drawing the boundary between permissible business cooperation and prohibited restrictions of competition, as well as properly defining the relevant market in labour market cases. The effectiveness of the European system of sanctions also gains particular importance, raising the question of whether the absence of criminal liability may weaken its deterrent effect. Given the growing enforcement activity of competition authorities in the US, the EU, and Poland, as well as the global nature of labour markets and business operations, further intensification of competition law enforcement in this area can be expected. In the context of dynamic economic change, digitalization, and increasing awareness of workers' rights, any practices that restrict labour mobility or artificially suppress wages should be regarded as contrary not only to the principles of the labour market, but also to the fundamental freedoms of the EU internal market.

REFERENCES

Anchustegui, I. H. (2015). Competition law through an ordoliberal lens. *Oslo Law Review*, *2*, 139–174. https://www.scup.com/doi/epdf/10.5617/oslaw2568

Aresu, A., Erharter, D., & Renner–Loquenz, B. (2024, May). Antitrust in labour markets. *European Commission Competition Policy Brief*, *2*. https://competition–policy.ec.europa.eu/document/download/adb27d8b–3dd8–4202–958d–198cf0740ce3_en

Błachucki, M. (2013). Polish competition law – commentary, case law and texts. Office of Competition and Consumer Protection.

Boas, T. C., & Gans–Morse, J. (2009). Neoliberalism: From new liberal philosophy to anti–liberal slogan. *Studies in Comparative International Development*, *44*(2), 137–161. https://doi.org/10.1007/s12116–009–9040–5

Bonefeld, W. (2012). Freedom and the strong state: On German ordoliberalism. New Political Economy, 17(5), 633–656. https://doi.org/10.1080/13563467.2012.656082

Callaci, B., Gibson, M., Pinto, S., Steinbaum, M., & Walsh, M. (2024). The effect of franchise no–poaching restrictions on worker earnings. *Upjohn Institute Working Paper 24–405. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research.* 1–51. https://doi.org/10.17848/wp24–405

Carvalho, S. de. (2021). Chicago School analysis on vertical restraints. International Investment Law Journal, 1(2), 151–167. http://hdl.handle.net/11328/3646

Cenzartowicz, A. (2002). Formy ograniczeń handlu w prawie amerykańskim. *Roczniki Nauk Prawnych*, *12*(1), 257–278.

Davis, R. T. (2018). Talent can't be allocated: A labor economics justification for no–poaching agreement criminality in antitrust regulation. *Brooklyn Journal of Corporate, Financial & Commercial Law*, *12*(2), 279–310.

Déchamps, P., Descamps, A., Arduini, F., Baye, C., & Damstra, L. (2019). Labour markets: A blind spot for competition authorities? *Competition Law Journal*, *18*(4), 190–199. https://doi.org/10.4337/clj.2019.04.07

Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/1152 z dnia 20 czerwca 2019 r. w sprawie przejrzystych i przewidywalnych warunków pracy w Unii Europejskiej. Dz.U. L 186 z 11.7.2019, 105–121. https://eur–lex.europa.eu/legal–content/PL/ALL/?uri=CELEX%3A32019L1152

European Commission. (2022). *Wytyczne Komisji Europejskiej w sprawie stosowania prawa konkurencji Unii do układów zbiorowych dotyczących warunków pracy osób pracujących na własny rachunek niezatrudniających pracowników*. https://eur–lex.europa.eu/PL/legal–content/summary/guidelines–on–applying–eu–competition–law–to–collective–agreements–regarding–the–working–conditions–of–solo–self–employed–persons.html

European Commission. (2023). *Communication from the Commission*. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co–operation agreements. *Official Journal of the European Union*, C 259, 1–125. https://eur–lex.europa.eu/legal–content/EN/TXT/?uri=oj:JOC_2023_259_R_0001

European Commission. (2025). *Decision of 2 June 2025 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40795 – Food Delivery Services)*. https://ec.europa.eu/competition/antitrust/cases1/202530/AT_40795_1262.pdf

European Parliament and Council. (2019). Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union. https://eur–lex.europa.eu/legal–content/EN/TXT/?uri=CELEX:32019L1152

Federal Trade Commission. (2024a). *Non–compete clause rule: Final rule*, *16 CFR Part 910 (RIN, 3084–AB74). Federal Register*. https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete–rule.pdf

Federal Trade Commission. (2024b, 23 April). *FTC announces rule banning noncompetes*. https://www.ftc.gov/news–events/news/press–releases/2024/04/ftc–announces–rule–banning–noncompetes

Federal Trade Commission & US Department of Justice. (2016). *Antitrust guidance for human resource professionals*. https://www.justice.gov/atr/file/903511/dl

Final judgment of the United States Department of Justice of 15 August 1996 on the case of *United States v. Association of Family Practice Residency Directors* (civil action no. 95–0575–cv–w–2). https://www.justice.gov/atr/case–document/file/628591/dl

Final judgment of the United States Department of Justice of 3 June 2011 on the case of *United States v. Lucasfilm Ltd* (Case 1:10–cv–02220–RBW, Document 6–1). https://www.justice.gov/atr/case/us–v–lucasfilm–ltd

Frankiewicz, M., & Grzebieniak, J. (2024). Prawo konkurencji a sektor publiczny: Ujęcie porównawcze praktyk antymonopolowych na przykładzie wybranych przedsiębiorstw. *Ius et Administratio*, *2*(55), 22–32.

Gordon, A. (2021). Imposing silence through settlement: A first–amendment case study of the New York Attorney General. *Albany Law Review*, *84*(2), 335–381.

Jebelli, K. H. (2010). *EU ancillary restraints: A reasoned approach to Article 101(1)*. https://ssrn.com/abstract=2166318

Jones, A., & Kovacic, W. E. (2020). Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, *The Antitrust Bulletin, Vol. 65(2),* 227–255.

Judgment of the Court of Justice of the European Union of 25 March 1998 on the case of *Becu and Others v. Gedi et al.*, C–22/98. https://eur–lex.europa.eu/legal–content/EN/TXT/PDF/?uri=CELEX:61998CC0022

Judgment of the Court of Justice of the European Union of 21 September 1999 on the case of *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, C–67/96. https://eur–lex.europa.eu/legal–content/EN/TXT/PDF/?uri=CELEX%3A61996CJ0067

Judgment of the Court of Justice of the European Union of 4 June 2009 on the case of *T–Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C–8/08. https://eur–lex.europa.eu/legal–content/PL/TXT/PDF/?uri=CELEX:62008CJ0008

Judgment of the Court of Justice of the European Union of 14 March 2013 on the case of *Allianz Hungária Biztosító v. Magyar Biztosítók*, C-32/11 P. https://eur–lex.europa.eu/legal–content/PL/TXT/?uri=CELEX:62011CJ0032

Judgment of the Court of Justice of the European Union of 11 September 2014 on the case of *Groupement des Cartes Bancaires v. Commission*, C–67/13 P. https://eur–lex.europa.eu/legal–content/PL/TXT/?uri=CELEX:62013CJ0067

Judgment of the United States Supreme Court of 4 December 1899 on the case of *Addystone Pipe & Steel Co. v. United States*, 175 U.S. 211. https://tile.loc.gov/storage–services/service/ll/usrep/usrep175/usrep175211/usrep175211.pdf

Jurkowska–Gomułka, A. (2012). Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 roku. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, *1*(1), 33–49.

Kobayashi, B. H. (2001). Antitrust, agency, and amnesty: An economic analysis of the criminal enforcement of the antitrust laws against corporations. *George Washington Law Review*, *5–6*, 715–744.

Lafontaine, F., Saattvic, I., & Slade, M. (2024). *No–poaching clauses in franchise contracts: Anticompetitive or efficiency enhancing?* (CEPR Discussion paper DP19548). Centre for Economic Policy Research. http://dx.doi.org/10.2139/ssrn.4404155

Lee, T. (2020). Too much, too soon: The high–tech cases reveal criminal antitrust enforcement inappropriate for no–poach and wage fixing. *Federal Communications Law Journal*, *72*(2), 197–220.

Lehmann, J.–Y. K., Althans, O., Hyun, Y., & Mantovanelli, F. (2025). *Recent developments in labor market antitrust enforcement in the United States, Europe, Canada, and China*. ABA Antitrust Law Section. https://www.analysisgroup.com/globalassets/insights/publishing/2025_aba_article_recent_developments_in_labor_market.pdf

Lianos, I., Countouris, N., De Stefano, V. (2019). *Re–thinking the competition law/labour law interaction: Promoting a fairer labour market*. (CLES Research paper series 3/2019, 1–49).

Luisetto, L. G. (2025). Shaping corporate behavior through enforcement: Evidence from the No–Poach Initiative. *SSRN Electronic Journal*. http://dx.doi.org/10.2139/ssrn.5360151

Mączyńska, E., & Pysz, P. (2014). Liberalizm, neoliberalizm i ordoliberalizm. *Ekonomista*, *3*, 221–240.

Majewska, M., & Samol, P. (2016). *Rozwój elastycznego rynku pracy: Uwarunkowania prawno–ekonomiczne*. Wydawnictwo Naukowe UAM.

Marinescu, I., & Posner, E. A. (2020). Why has antitrust law failed workers? *Cornell Law Review*, *105*(5), 1343–1393. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4851&context=clr

Miąsik, D. (2004). *Reguła rozsądku w prawie antymonopolowym: Studium prawnoporównawcze*. Kantor Wydawniczy Zakamycze.

Naidu, S., Posner, E. A., & Weyl, E. G. (2018). Antitrust remedies for labor market power. *Harvard Law Review*, *132*, 536–601.

Nealis, P. (2006). Per se legality: A new standard in antitrust adjudication under the rule of reason. *Ohio State Law Journal*, *61*, 347–398.

Nyka, M., & Zapolska, K. (2024). The impact of the DAC7 directive on the functioning of platforms and platform operators, from the perspective of the legal model of their collaboration with individuals. Bialystok Legal Studies, 29(2), 177–193. https://doi.org/10.15290/bsp.2024.29.02.13

OECD. (2026). OECD Employment Outlook 2026: Geographic disparities in jobs and incomes. OECD Publishing. Paris. https://doi.org/10.1787/7e710f54–en

Plea agreement of the United States Department of Justice of 30 April 2015 on the case of *United States v. Topkins* (Case 3:15–cr–00201–WHO, Document 7). https://www.justice.gov/atr/case–document/file/628891/dl

Pawłowski, M. (2018). Idee liberalne i konserwatywne w myśli ordoliberalizmu. *Archiwum Filozofii Prawa i Filozofii Społecznej, 18*(2), 102–111. https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight–15aa335a–c396–47c2–98b7–99a0626c3f6c/c/Idee_liberalne_i_konserwatywne_w_mysli_ordoliberalizmu_–_Pawlowski_Michal.pdf

Polański, J. (2020). Neobrandisianism and the political content of antitrust. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, *5*(9), 44–48. https://doi.org/10.7172/2299–5749.IKAR.5.9.4

Posner, E. A. (2021). *How antitrust failed workers*. Oxford University Press.

Prager, E. (2025). *Antitrust enforcement in labor markets* (NBER Working paper no. 34572). National Bureau of Economic Research. https://www.nber.org/papers/w34572

Sejm Rzeczypospolitej Polskiej. (2007). Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów (Journal of Laws of 2024, item 1616).

Śliwa, R., & Waląg, P. (2007). Regulacje w świetle koncepcji ordoliberalnych. *Zeszyty Naukowe Małopolskiej Wyższej Szkoły Ekonomicznej w Tarnowie*, *9*, 77–84.

Steinbaum, S. (2019). Antitrust, the gig economy, and labor market power. *Law and Contemporary Problems*, *82*, 45–64.

Stock, E. J. (2025). State antitrust enforcement in the national economy: Promoting more democratic and effective outcomes through state reliance on federal law. *Antitrust*, *39*(2), 14–20.

Taladay, J. M. (2018). Defending antitrust allegations of wage–fixing and no–poaching agreements. *SSRN*. https://ssrn.com/abstract=4053926

Taladay, J. M., & Mehta, V. (2017). Criminalization of wage–fixing and no–poaching agreements. *https://www.competitionpolicyinternational.com/wp–content/uploads/2018/05/North–America–Column–June–Full–1.pdf*

Emiliou, N. (2025). Opinion of the Advocate General on the case of *Tondela and Others*, C–133/24. Court of Justice of the European Union. https://eur–lex.europa.eu/legal–content/EN/TXT/?uri=celex:62024CC0133.

United States Congress. (1890). Sherman Antitrust Act. Act of 2 July 1890; 26 Stat. 209. https://www.govinfo.gov/content/pkg/COMPS–3055/pdf/COMPS–3055.pdf

United States Department of Justice & Federal Trade Commission. (2025). *Antitrust guidelines for business activities affecting workers*. https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrust-guidelinesbusinessactivitiesaffectingworkers2025.pdf

Urząd Ochrony Konkurencji i Konsumentów. (2023). *Zmowy i nadużycia na rynku pracy. Prawo konkurencji a sprawy pracownicze. Poradnik*. https://uokik.gov.pl/zmowy–na–rynku–pracy–ty–tez–mozesz–oddac–glos–na–nasz–poradnik

Vatiero, M. (2010). Ordoliberal competition. *Concorrenza e Mercato*, 2010, 371–382. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473443

Vejseli, M. (2024). The role of competition law in regulating wage–fixing and no–poach agreements. *EU and Comparative Law Issues and Challenges Series ECLIC 8 – Special Issue*, *8*, 363–376.

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Balancing Interests in Trade Secrets Protection under EU Law: A Human Rights and Freedoms Perspective[1]

Abstract: This article examines the challenges in balancing employers' and employees' conflicting interests regarding trade secrets protection under EU Directive 2016/943. It analyses provisions of the Directive that may be relevant for such a balancing exercise and highlights the challenges associated with their application, particularly the problem of subjectivity. The study identifies key human rights and freedoms relevant in this context, including the right to privacy, freedom to conduct a business and freedom to choose an occupation. It explores EU Member States' obligations to consider these rights when protecting trade secrets. The article proposes using a perspective on human rights and freedoms to facilitate the balancing exercise. To minimize subjectivity, it suggests the application of a structured balancing test for human rights conflicts as proposed by Smet. The article argues that this approach could support a judicious balance between employees' and employers' competing interests in cases of trade secrets protection.

Keywords: Directive 2016/943, employer–employee interests, employment relationships, human rights balancing, trade secrets

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Introduction

The idea that certain valuable information deserves safeguarding against misappropriation has long been recognized as a significant legal principle.[2] Informal practices of secrecy and the preservation of valuable know-how can be tracked back to various ancient civilizations.[3] It was not, however, until the advent of industrialization that broader protection of trade secrets and, over time, of the know-how underlying industrial processes gained recognition and enforcement by English common law courts (e.g. *Newbery v. James*; Judgment of the High Court of Chancery, 1817). Legal protection against the misappropriation of trade secrets aimed at addressing the risks associated with new production modes in large factories, where substantial numbers of employees were often strangers both to their employer and to one another. At the same time, the innovative technologies used there required significant skills training, and forced employers to share critical technical knowledge with employees (Hrdy, 2019, pp. 2423–2424; see also the literature indicated therein).

However, the protection of trade secrets was not unlimited. From the very beginning, in cases with a background of an employment relationship, courts recognized that there is a need to balance employers' rights with the legitimate interests of employees. For example, in 1869 in *Leather Cloth Co. v. Lorsont* (Judgment of the High Court of Chancery, 1869), it was emphasized that '[p]ublic policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into'. This approach led to the development of the 'general knowledge, skill, and experience' doctrine, which initially emerged in the context of non-competition agreements (Hrdy, 2019, p. 2424).

Trade secrets protection in the context of an employment relationship is complex for several reasons. First, successful business operations are often impossible without sharing certain secrets with employees. Moreover, there are strong justifications for granting protection to trade secrets obtained by employees, arising from the rights of employers, including the right to protect business interests, confidential information and, in general, the right to privacy. At the same time, a strict approach to this protection could lead to a situation where employees are restricted from working elsewhere, simply because they have been exposed to their employer's secrets. This could ultimately infringe on the employees' individual rights, including the right to engage in work. Therefore the tension between employer interests in protecting trade secrets

2 On the historical background of trade secrets protection, see for example Menell et al., 2023; Schiller, 1930; Watson, 1996, p. 19.

3 On forms of protection in the past for the products of inventors' and artists' creativity, see Suchman, 1989.

and employee interests in being able to freely choose an occupation and workplace is of fundamental importance.

Within the EU, prior to the harmonization of rules about trade secrets protection, the approaches of its Member States to this issue varied. Sweden was the first country to have legislation on trade secrets. Other EU members provided protection through unfair competition law (Austria, Germany, Poland and Spain), provisions in industrial properties codes (Italy, France and Portugal), tort law (the Netherlands and Luxemburg) or the common law of confidence and contract law (UK, Ireland and Malta). Interestingly, the vast majority of Member States (excluding Cyprus, the Czech Republic, the Republic of Ireland, Luxemburg, Malta and the UK) had specific provisions on trade secrets in national labour laws or civil codes (European Commission, 2013, p. 4).

In order to strengthen the protection of trade secrets in the EU, Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure has been adopted.[4] It is binding for EU Member States, as well as for Iceland, Lichtenstein and Norway.[5] Directive 2016/943 harmonizes many aspects of trade secrets protection,[6] while adopting a minimal harmonization approach. This allows EU members to implement more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets, provided that the safeguards explicitly outlined in this Directive, designed to protect the interests of other parties, are respected (Article 1(1) and Recital 10).

The aim of this article is to identify key challenges in balancing the conflicting interests of employers and employees regarding trade secrets protection under Directive 2016/943, and to propose actionable recommendations for improving the reconciliation of these competing interests. To achieve this objective, the paper first examines the provisions of the Directive that explicitly refer to trade secrets protection in the context of employment. It also considers general provisions that may be relevant for balancing the competing interests of the parties to a dispute, highlighting the challenges associated with their application, in particular the problem of subjectivity. Subsequently, the article identifies the specific human rights and freedoms of employers and employees that are relevant to trade secrets protection in an employment relationship context, namely the right to privacy, freedom to conduct a business and freedom to choose an occupation and the right to engage in work. It also analyses

4 This had to be transposed by EU Member States by 9 June 2018 (Article 19(1) of Directive 2016/943).

5 These countries were included in the European Economic Area (EEA) Agreement by Decision 91/2019 of 29 March 2019.

6 Such as the definition of trade secrets; the acquisition, use and disclosure of trade secrets; measures, procedures and remedies, or sanctions.

to what extent EU Member States are obliged to take into account these human rights and freedoms when protecting trade secrets. Finally, the paper argues that turning to the principles of the protection of human rights and freedoms can facilitate the process of balancing the competing interests of employers and employees regarding trade secrets protection. As a tool to minimize the subjectivity of decisions taken in individual cases, the paper proposes applying a structured balancing test for the resolution of human rights conflicts, as proposed by Smet. It is argued that applying the criteria from this test could support the judicious balancing of the competing interests of employers and employees. This research is based on the dogmatic method of legal research.

1. The balancing of employer's and employees' legitimate interests under Directive 2016/943

The problem of the misappropriation of trade secrets within the context of employment is significant, as employees and former employees are the most common perpetrators of such acts.[7] Directive 2016/943 repeatedly refers to freedom of establishment (Recital 13) and the free movement and mobility of workers (Recitals 3, 13, 21, Article 1(3)) that employers and employees stand behind. Despite the fact that the tension between the legitimate interests of employers and employees with regard to employers' trade secrets is obvious, Directive 2016/943 does not establish completely separate rules for the protection of trade secrets against misappropriation by employees. Instead, it introduces only minor modifications to account for the employment context, in comparison to its general rules about the protection of trade secrets. The aim of this section is to verify how, if at all, this Directive addresses the challenge of balancing the competing interests of employers and employees in trade secrets protection.

First and foremost, Directive 2016/943 introduces a modification of the general rules of trade secrets protection in the employment context, which affects the outcome of an assessment of whether an employee's use of their employer's trade secrets was unlawful. This modification is connected to the experience and skills acquired by employees in the course of their employment. These have been addressed in Article 1(3)(b), which states that the Directive shall not offer any ground for limiting employees' use of the experience and skills honestly acquired in the normal course of their employment. The question arises of whether experience and skills can be considered trade secrets at all. Pursuant to Article 2(1) of Directive 2016/943, a 'trade secret' means information which meets all of the following requirements:

7 In the public consultation conducted by the European Commission (2012, p. 13) prior to the adoption of Directive 2016/943, over half of the respondents identified former employees as the most typical perpetrators of trade secrets misappropriation.

a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
b) it has commercial value because it is secret;
c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[8]

The concept of trade secrets is very broad, and the Directive's threshold for information to qualify as a trade secret is low (see e.g. Irgens-Jensen, 2023, pp. 501–509; Korycińska-Rządca, 2024, p. 167). Directive 2016/943 does not address the experience and skills gained by an employee during their employment in the definition of 'trade secret' contained in its Article 2(1)(a). In particular, this provision does not explicitly exclude employees' experience and skills from the concept of trade secrets, nor does any other provision in the main body of the Directive. In contrast, the Preamble to the Directive states, in Recital 14, that the definition of a trade secret excludes, among other things, the experience and skills gained by employees in the normal course of their employment. It seems that there is inconsistency between the provisions contained in the main body of the Directive and its Preamble, because the latter explicitly excludes experience and skills from the concept of trade secrets, whereas the main body remains inconclusive on this point. This has led to differences in the approaches of national courts. Polish courts, despite existing practical difficulties, follow the approach supported by the wording of Recital 14 of the Preamble and acknowledge that employees' experience and skills are excluded from the concept of trade secrets and therefore are not protected as such (Korycińska-Rządca, 2024, pp. 166–167). On the other hand, courts in Denmark, Germany, France, Norway and Sweden, instead of attempting to make such a distinction, focus on the weighting of interests (Irgens-Jensen, 2023, pp. 510–511).[9] The latter approach appears to more accurately reflect the provisions of the Directive. This is primarily due to the fact that the preamble to any directive has no binding legal force and plays a limited role in interpreting the provisions contained in the main body (see for example Judgment of the CJEU,[10] 1998, para. 54; Judgment of the CJEU (Sixth Chamber), 1998, para. 30; Judgment of the CJEU (Fifth Chamber), 2005, para. 32). Moreover, Recital 14 lists,

8 These requirements recall the criteria of 'undisclosed information' contained in Art 39(2) of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); the wording is identical (at least in the English version of these acts).

9 Interestingly, the French Code de Commerce does not explicitly exclude an employee's experience and skills from the definition of a trade secret. However, Article L-151–158(3) reiterates Article 5(d) of Directive 2016/943, stating that a trade secret cannot be enforced when it has been acquired, used or disclosed in order to protect a legitimate interest.

10 For the sake of consistency, the acronym CJEU is used throughout the main text to refer to the Court of Justice, including for judgments delivered prior to the entry into force of the Treaty of

along with employees' experience and skills, information that is generally known among, or is readily accessible to, persons within the circles that normally deal with such information as a category excluded from the definition of a trade secret. Such information is explicitly excluded from the concept of trade secrets under Article 2(1)(a) of the Directive. Therefore it can be assumed that if the EU legislature had intended to exclude employees' experience and skills from the concept of trade secrets, it would have done so in the same manner.

An important implication is that these rules regarding the experience and skills gained by an employee during their employment constitute the basis for balancing the legitimate interests of both the employer and the employee when determining whether, in an individual case, an employee's use of their employer's information was unlawful. Still, it has been argued in literature that when determining whether an employee's conduct was unlawful, a broad weighting of interests is in compliance with Directive 2016/943 (see Kolasa, 2018, pp. 155–156; Irgens-Jensen, 2023, p. 512, as well as the literature indicated therein).

Second, Directive 2016/943 introduces mechanisms that allow for the modification or dismissal of certain measures and remedies against an unlawful use of employers' trade secrets by their employees. These mechanisms are provided both at the stage of drafting national legislation and when the law is applied. At the legislative stage, Article 14(1) of the Directive permits Member States to limit employees' liability for damages when misappropriation occurs without intent. This provision grants flexibility to national legislatures, allowing them to consider the potential imbalance of power in employment relationships when shaping liability rules. By doing so, they can prevent disproportionate consequences for employees who inadvertently misuse trade secrets. This flexibility is rooted in the need to balance competing interests.

At the stage of applying rules to individual cases, Article 7(1)(a) requires that the measures, procedures and remedies provided for in the Directive be applied in a proportionate manner. This means that any measure or remedy imposed to protect trade secrets must be carefully balanced to ensure that it does not jeopardize fundamental rights and freedoms, the public interest or the mobility of workers, as indicated in Recital 21, which specifies various factors that should be taken into account in this balancing process, including the value of the trade secret, the seriousness of the conduct resulting in its misappropriation and the impact of such conduct. It also underscores that judicial authorities should have the discretion to weigh the interests of the parties involved in legal proceedings, as well as those of third parties. It can be concluded that the requirement of proportionality in ordering measures and remedies against the misappropriation of trade secrets aims to ensure a balance between the interests of employers and employees. However, this balancing exercise – unlike the

Lisbon. In the reference list, all such judgments are uniformly attributed to the Court of Justice of the European Union.

one related to experience and skills – does not take place at the stage of determining whether an employee's conduct was unlawful, but rather at the stage of imposing specific measures and remedies once misappropriation has been confirmed.

An important implication is that Directive 2016/943 provides mechanisms that require balancing the competing interests of employers and employees in a given case. At the same time, it does not provide clear guidance on how this process should be carried out properly. The Preamble only mentions certain factors that should be considered within the balancing process, including the need to take fundamental rights and freedoms into account, in relation to the requirement of the proportionality of measures, procedures and remedies.

2. Trade secrets and human rights

2.1. General remarks

Directive 2016/943 provides mechanisms requiring a balancing exercise between the competing interests of employers and employees when determining whether trade secrets protection should be granted in a given case. However, it fails to offer clear and comprehensive guidance on how this process should be conducted. As a result, the question arises as to whether referring to the human rights and freedoms of employers and employees could help facilitate the evaluation of whose legitimate interests deserve protection in a given case.

Trade secrets law is often framed in the context of promoting business innovation and facilitating the efficient exchange of valuable information.[11] Sunder (2013, p. 335) accurately indicates that this perspective highlights only the economic benefits of trade secrets protection but tends to overlook its broader social implications, where trade secrets law – beyond its economic role – profoundly shapes the social relationship between employers and employees, influencing fundamental human rights and freedoms. In regard to the question of whether human rights and freedoms may facilitate the process of balancing the competing interests of employers and employees in a given case, it should be emphasized that Recital 34 of Directive 2016/943 lists several fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union (the Charter) signed on 7 December 2000 in Nice.[12] Recital 34 states that the fundamental rights and principles listed therein are

11 The issues of competitiveness, innovation-related goals and the protection of knowledge exchange between businesses are repeatedly emphasized in the Preamble of Directive 2016/943 (Recitals 1–4, 8–9, 16–17).

12 The Charter was subsequently amended and re-signed by the presidents of the European Parliament, the EU Council and the European Commission during the Lisbon Summit on 12 December 2007. It became a legally binding instrument following the adoption of the Lisbon Treaty, which entered into force on 1 December 2009.

respected and observed by the Directive. These include the right to respect for private and family life, the right to protection of personal data, freedom of expression and information, the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business, the right to property, the right to good administration and in particular access to files, while respecting business secrecy, the right to an effective remedy and to a fair trial, and the right of defence. It should be noted, however, that not all of these rights and principles seem relevant when considering the balancing of employers' and employees' interests.

This section identifies the human rights and freedoms of employers and employees that may be relevant when determining whether trade secrets protection should be granted. On the one hand, it focuses on human rights and freedoms safeguarded by the Charter, which Directive 2016/943 directly refers to. On the other, it reviews the provisions of the European Convention on Human Rights (ECHR or the Convention), signed in Rome on 4 November 1950, that all EU members are bound by. Although the Convention primarily safeguards civil and political rights, the European Court of Human Rights (ECtHR) does not entirely exclude economic interests from the scope of its protection.[13] On the contrary, in *Airey v. Ireland*, it acknowledged that '[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature' and concluded 'that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention' (Judgment of the ECtHR, October 1979, para. 26). Notably, the Charter distinguishes itself from the Convention by explicitly recognizing certain economic rights (such as the freedom to conduct a business, guaranteed under Article 16 of the Charter) and thus may be considered to be a more modern document (Wiśniewski, 2023, p. 12). Although neither the Convention nor the Charter explicitly safeguard the right to protect trade secrets, several of their provisions are relevant for establishing a human rights perspective for such protection. These provisions are discussed below.

2.2. The right to privacy

Both the Convention and the Charter recognize the right to privacy as a fundamental human right. Given this, one may question whether the protection of trade secrets can be linked to it. Pursuant to Article 8(1) ECHR, everyone has the right for their private and family life, their home and their correspondence to be respected. This right undoubtedly applies to employees (Judgments of the ECtHR, 1997, 2007, September 2017, November 2017), but this statement contributes very little to the issue of protect-

13 In fact, the ECtHR has identified violations of one or more Convention rights in numerous cases involving socio-economic issues (see Leijten, 2018, pp. 25–58).

ing the trade secrets of employers. A much more significant issue here is likely to be whether the right to privacy can also be recognized as a right of employers, which could serve as a justification for granting protection over trade secrets. Based on the English version of the Convention, it might seem that the term 'private life' and 'home' cannot apply to businesses, as the notion of a company having any form of life (or home) appears inconceivable (Oliver, 2009, p. 1449). However, there are notable differences between the English and French versions (both are authentic) of this provision, as the latter, instead of using terms 'private life' and 'home', refers to a '*vie privée*' (a standard term for 'privacy' in French) and '*domicile*' (a term with broader implications than 'home', which can include, for example, also a professional office).

The case law of the ECtHR has expanded the scope of Article 8(1) ECHR to encompass professional matters. In the judgment on *Niemietz v. Germany*, which was the first case where the ECtHR ruled that the right to privacy applies to businesses, the Court observed that '[t]here appears […] to be no reason of principle why […] the notion of "private life" should be taken to exclude activities of a professional or business nature' (Judgment of the ECtHR, 1992, para. 29). It further stated that interpreting 'private life' and 'home' to include certain professional or business activities or premises aligns with the fundamental aim of Article 8, which is to protect individuals from arbitrary interference by public authorities (para. 31). It can be observed that over time, the ECtHR extended the scope of the application of Article 8(1) ECHR even further, indicating in *Société Colas Est and Others v. France* that the concept of 'home' also covers 'a company's registered office, branches or other business premises' (Judgment of the ECtHR, 2002, para. 41). The ECtHR has yet to address whether Article 8(1) extends to the protection of trade secrets. However, as Oliver (2009, p. 1451) has accurately pointed out, the recognition of trade secrets as falling within the scope of this provision would only represent a minor conceptual shift.[14]

The right to respect for private life enshrined in Article 8 ECHR is substantially reproduced in Article 7 of the Charter (see Judgment of the CJEU (Grand Chamber), 2008, para. 64), which states that everyone has the right to respect for his or her private and family life, home and communications.[15] In *AKZO Chemie BV v. Commission*, the CJEU held that business secrets are afforded very special protection, and that the protection of business secrets constitutes a general principle of Community

14 In this context, Oliver has also recalled *Goodwin v. the United Kingdom* (Judgment of ECtHR, 1996), stating that the protection of business secrets was recognized there as a legitimate reason for restricting freedom of speech. It should be noted, however, that this case did not concern the protection of trade secrets but focused on freedom of expression and the possibility of its limitation in order to protect the confidentiality of a journalistic source, which provided a journalist with the confidential information of an undertaking (albeit there was no sufficient ground to claim that this information constituted a business secret).

15 With the same notable differences in the wording between the English and French versions, as in the case of Article 8(1) ECHR.

law (Judgment of the CJEU (Fifth Chamber), 1986, para. 28). This view was confirmed in *SEP v. Commission* (Judgment of the CJEU (Fifth Chamber), 1994, paras. 36 and 37). In his Opinion in the case of *Ismeri v. Court of Auditors*, Advocate General Ruiz-Jarabo Colomer indicated that the principle of confidentiality, which is present in EU law and case law, replicates the fundamental right established in Article 8 ECHR (CJEU, 2001, para. 73). Interestingly, in *Varec v. Belgian State*, the CJEU raised the protection of confidential information and business secrets to the status of fundamental rights, as it referred directly to Article 8 ECHR and Article 7 of the Charter (Judgment of the CJEU (Third Chamber), 2008, para. 48). In that sense, the CJEU has gone further than the ECtHR, as the latter has not yet ruled on whether Article 8 ECHR covers the protection of trade secrets.

Based on the analysis presented above, there is solid ground to consider an employer's right to privacy as a relevant human right, which should be taken into account when evaluating whose legitimate interests – those of the employer or the employee – deserve protection in a given case.

2.3. The freedom to conduct a business

The use of information, including trade secrets, obtained by employees in the course of their employment for purposes other than fulfilling their duties under the employment relationship (such as using them at a subsequent employer or in the employee's own business activity) may significantly affect the employer's business activity and cause them serious damage. This raises a question of whether such actions by an employee may be considered an infringement of their employer's freedom to conduct a business.

As mentioned above, the Convention safeguards civil and political rights, without explicitly recognizing any right directly related to conducting economic activities. In contrast, the Charter takes a broader approach to fundamental rights; Article 16 recognizes the freedom to conduct a business in accordance with EU law, national laws and practices. The concept of this freedom is not extensively elaborated in this provision, however. Explanations relating to the Charter indicate three components of this freedom: (1) the freedom to exercise an economic or commercial activity – the Explanations suggest that it has been recognized in *Nold* (Judgment of the ECtHR, 1974, para. 12) and *SpA Eridania and Others* (Judgment of the ECtHR, September 1979); (2) freedom of contract – the Explainations cite *Sukkerfabriken* (Judgment of the ECtHR, January 1979) and *Commission v. Spain* (Judgment of the CJEU (Sixth Chamber), 1999); and (3) free competition, which has been recognized in Article 119(1) and (3) TFEU (European Union, 2007, p. 23[16]). Incidentally, a close examination of the judgments in

16 It should be noted that the Explanations were originally prepared under the authority of the Praesidium of the Convention, which drafted the Charter, and do not have the status of law.

the above-mentioned cases raises serious doubts about whether the wording of Article 16 of the Charter represents a straightforward codification of case law.[17]

The concept of the freedom to conduct a business has been clarified through case law. It follows that this freedom ensures that economic actors have a certain degree of autonomy in relation to other actors and the state, which enables them to engage in commercial activities and exercise their entrepreneurial rights without undue interference (see Judgment of the CJEU (First Chamber), 2004, paras. 51–52; Judgment of the CJEU (Third Chamber), 2011, paras. 46–53). Advocate General Cruz Villalón explained in *Mark Alemo-Herron* that 'the freedom to conduct a business protects economic initiative and the ability to participate in a market, rather than the actual profit, seen in financial terms, that is earned in that market' (CJEU, 2013, para. 51). In the literature there is a discussion as to the precise status of the freedom to conduct a business, namely whether Article 16 of the Charter lays down a directly enforceable 'right' or merely a 'principle' (see e.g. O'Connor, 2024, pp. 120–122, 133–134; Oliver, 2013, p. 295). The reference in Article 16 of the Charter to 'Union law and national laws and practices' may be indicative of a principle, rather than a right. However, in *Sky Österreich*, the CJEU considered the freedom to conduct a business a specific 'right', rather than merely a 'principle' (Judgment of the CJEU (Grand Chamber), 2013, para. 46; see also O'Connor, 2024, pp. 121–122; Oliver, 2013, pp. 295–296). Notably, in the foreword to a report entitled 'Freedom to conduct a business: Exploring the dimensions of a fundamental right', the EU Agency for Fundamental Rights referred to the freedom to conduct a business as a 'right'.[18]

17 In *Nold*, there is a reference to the right to the free pursuit of business activity, but it is only due to the fact that the applicant claimed that this right was protected by the *Grundegesetz* in Germany and other national constitutions as well as the European Convention on Human Rights, and claimed that this right was violated (Judgment of the ECtHR, 1974, para. 12). The judgment makes no reference to the freedom to conduct a business, and the Court did not examine this case on the basis of this freedom. Similarly to *Nold*, the *SpA Eridania and Others* judgment is a reference to an economic activity in the context of fundamental rights, but purely due to the fact that this judgment was a result of a reference for a preliminary ruling, and one of the submitted questions was 'based on the view that the carrying on of economic activity must be guaranteed because it forms part of the fundamental rights which Community law is also concerned to uphold' (Judgment of the ECtHR, September 1979, para. 20). Contrary to what has been stated in the Explanations, this judgment does not explicitly indicate that the freedom to conduct a business constitutes (or should constitute) a fundamental right. Notably, paragraph 19 of the *Sukkerfabriken* judgment, cited in the Explanations, makes no mention of the freedom to contract. Having said that, the subsequent paragraph of this judgment merely refers to that concept without, however, establishing it as a fundamental right. In *Kingdom of Spain v. Commission* (Judgment of the CJEU (Sixth Chamber), 1999), it was acknowledged that the right of parties to amend contracts concluded by them is based on the principle of contractual freedom, and any restrictions on it must be clearly articulated. See also Hogan, 2023, pp. 762–765, and the literature indicated therein.

18 It has been explained in the report that the main aim of the freedom to conduct a business 'is to safeguard the right of each person in the EU to pursue a business without being subject to ei-

Nevertheless, the freedom to conduct a business has been considered a rather 'weak' right. Oliver describes the language used in Article 16 of the Charter as 'diffident', in contrast with several other provisions of the Charter. Moreover, he notes (2013, p. 285) that the phrase 'in accordance with Union law and national laws and practices' lessens the intensity of this provision even further. On the other hand, Groussot, Petursson and Pierce (2014, p. 336) have asked whether the seemingly weak wording of Article 16 has the potential to be significantly strengthened through judicial interpretation. Analysis of CJEU case law regarding the freedom to conduct a business provides some evidence to confirm such a thesis. Most of the attempts to invoke the freedom to conduct a business have ended unsuccessfully, as the CJEU has repeatedly emphasized that the freedom to conduct a business is not absolute and must be viewed in relation to its social function (see e.g. Judgment of the CJEU (First Chamber), 2004, paras. 51–52; Judgment of the CJEU (Third Chamber), 2012, para. 54, and the case law cited therein; Judgment of the CJEU (Grand Chamber), 2013, para. 45). In fact, the freedom to conduct a business has been used as a counterweight to other fundamental rights, such as the rights to privacy (Judgments of the CJEU, February 2012, para. 48; March 2012, para. 50), health (Judgment of the CJEU (Third Chamber), 2012, para. 55) and intellectual property rights (Judgment of the CJEU, February 2012, para. 48; Judgment of the CJEU (Third Chamber), 2011, para. 50). However, some cases demonstrate that Article 16 of the Charter has a broader potential. For instance, it appears that it is relatively often relied on in horizontal situations when the interpretation of secondary EU law involves the balancing of rights at the national level (as in *Scarlet Extended*[19] or as in highly controversial and widely criticized Judgment of the CJEU (Third Chamber), 2013[20]), or in cases of the validity of EU secondary law arising at a national level in a proceeding involving private parties (as in Judgment of the CJEU (Grand Chamber), 2013) (see Groussot et al., 2014, p. 331). Hogan (2023, p. 783) has emphasized that the concept of this provision appears to be extremely broad, despite attempts to frame the freedom to conduct a business as a freedom supplemented by the limitations outlined in Article 16.[21] As follows from the above, the freedom to conduct a business is used as a counterweight to other

ther discrimination or disproportionate restrictions' (European Union Agency for Fundamental Rights, 2015, p. 21).

19 In this case, the Court held that the imposition of an injunction on an internet service provider to filter all electronic communications passing through its services constituted a violation of Article 16 (Judgment of the CJEU (Third Chamber), 2011, para. 48).

20 In *Mark Alemo-Herron*, the Court held that a national measure which went beyond the scope of harmonization required or allowed by the Directive violated Article 16 of the Charter; as a result, the judgment negatively impacted employees' rights, which the Directive was supposed to protect. On the critics of this, see Hogan, 2023, pp. 769–772, and the literature indicated therein.

21 She also expresses concern about the idea 'that any action taken in the running of a business constitutes the exercise of a fundamental right, and that any regulation or measure that affects a business's operations constitutes a prima facie interference with that right' (Hogan, 2023, p. 783),

fundamental rights, and may be considered relevant in the evaluation of whose legitimate interest should be protected in an individual case with an employment relationship context.

2.4. The freedom to choose an occupation and the right to engage in work

When searching for human rights or the freedoms of employees that could be relevant in the process of balancing interests, the freedom to choose an occupation and the right to engage in work should be considered. These have a well-recognized status within the broader framework of human rights. At the international level, their protection has been guaranteed, among others, under Article 23(1) of the Universal Declaration of Human Rights,[22] Article 6(1) of the International Covenant on Economic, Social and Cultural Rights,[23] and the International Labour Organization Convention no. 143 on migrant workers. These instruments are legally binding on EU Member States under their international commitments. Also, within the legal framework of the Council of Europe, Article 15(1) of the Charter has been recognized as being inspired by Article 1(2) of the European Social Charter,[24] which has been ratified by all EU members. At the EU level, the freedom to pursue one's trade or profession has been acknowledged as a general principle of EU law by the CJEU in *Keller* (Judgment of the CJEU (Third Chamber), 1986, para. 8) and subsequently safeguarded in the Charter.

Pursuant to Article 15(1), everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Furthermore, Article 15(2) guarantees every EU citizen the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Advocate General M. Bobek, in the Opinion delivered on 21 March 2017 in the case of *Werner Fries v. Lufthansa CityLine GmbH*, stated that the right to engage in work and to pursue a freely chosen or accepted occupation 'enhances personal autonomy and self-realisation, with human dignity serving as its foundation' (CJEU, 2017, para. 66).

Article 15 of the Charter can be interpreted broadly as covering the freedom to choose an occupation and the legal form of its performance (i.e. whether it is performed within the framework of an employment relationship or in another form, in-

questioning whether the freedom to conduct a business should have been included in the Charter at all.

22 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.'

23 '[T]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to make his living by work, which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

24 Article 1(2) states that, '[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake (…) to protect effectively the right of the worker to earn his living in an occupation freely entered upon'.

cluding independently), to seek employment and to work (including the freedom to make a declaration of intention both to enter into an employment relationship and to terminate it), as well as to exercise freedom of establishment and to provide services.[25] In the light of such an understanding, the obligation of employees to preserve the confidentiality of their employer's trade secrets acquired during their employment can conflict with this. This is because the obligation to keep information belonging to employers confidential, and the inability to legally use that information for purposes other than the performance of duties under the employment relationship, may restrict an employee's ability to seek new employment opportunities or to start their own business. In some cases, particularly for highly specialized employees, it can even eliminate those opportunities entirely if the employee intends to remain in the same profession. The foregoing considerations suggest that the freedom to choose an occupation and the right to engage in work may be a relevant factor in balancing employer and employee interests in an individual case.

3. Trade secrets and human rights: EU Member States' obligations

In addition to the obligations arising from EU legislation, EU Member States, as parties to the ECHR, are under an obligation to secure the rights and freedoms defined there for all individuals within their jurisdiction (Article 1 ECHR). In the context of the right to privacy enshrined in Article 8 ECHR, their responsibility may be engaged not only when the infringement of this right is a result of direct intervention by national authorities, but also when they fail to act to secure the observance of this right (Judgment of the ECtHR, September 2017, para. 110; see also Judgment of the ECtHR, 23 September 2010, *Obst*, paras. 40 and 43; 23 September 2010, *Schüth*, paras. 54 and 57). The Charter's provisions are addressed primarily to EU institutions, bodies, offices and agencies, with due regard for the principle of subsidiarity (Article 51(1)). This means that they should adopt legislation and apply it in a manner that respects the rights protected by the Charter, observes their principles and promotes their application within their respective powers. The Charter does not establish any new power or task for the EU, nor does it modify any power or task prescribed by the treaties (Article 51(2)). This basically means that despite the fact that the rights and freedoms safeguarded in the Charter are of a fundamental nature, the Charter does not solely empower or oblige any EU authority to adopt legislation in order to protect them, but if they do adopt legislation on the basis of their respective powers, they are obliged to take into account and properly protect the fundamental rights protected by the Charter. Additionally, it follows from the case law of the CJEU that the provisions of EU law should be interpreted in such a way that fundamental rights are not

25 On the material scope of Article 15 of the Charter, see García Coso, 2024, pp. 172–175.

violated (see Judgment of the CJEU (Third Chamber), 1991, para. 12). The provisions of the Charter also apply to EU Member States, but only when they are implementing EU law (Article 51(1)), including in cases of failure to act.

Considering the above, EU members are under an obligation to incorporate appropriate safeguards for employers' right to privacy, guaranteed under Article 8 ECHR among other things, in the context of protection against the misappropriation of trade secrets by employees. In particular, they are required to ensure that existing legal provisions are applied in a manner that effectively safeguards this right. As regards the freedom to conduct a business, as well as the freedom to choose an occupation and the right to engage in work, enshrined in the Charter, the latter has a limited binding extent for EU Member States. This implies that when implementing EU secondary legislation on trade secrets protection into national laws and applying it in individual cases, Member States have to adequately safeguard these freedoms. These considerations suggest that when applying trade secrets protection rules to a case within the context of an employment relationship, the right to privacy, the freedom to conduct a business and the freedom to choose an occupation and the right to work must be taken into account.

4. How human rights can facilitate the process of balancing the competing interests of employers and employees

In cases concerning the permissible scope for employees' and former employees' use of information obtained during their employment period for purposes unrelated to their duties, a conflict of interest between employers and employees may easily arise. When such a conflict occurs, it is essential to strike a fair balance between these competing interests, taking into account the specific circumstances of each individual case (Judgment of the CJEU, 2002, para. 43; Judgment of the ECtHR, September 2017, para. 112).

As demonstrated above, on the one hand Directive 2016/943 provides mechanisms that require balancing competing interests in a given case. However, it does not offer comprehensive guidance on how this balancing exercise should be conducted, and nor does it address various practical challenges, such as the issue of subjectivity (Smet, 2017a). On the other hand, the right to privacy, the freedom to conduct a business, and the freedom to choose an occupation and the right to work are relevant in trade secrets cases with an employment relationship background.[26] Thus reference to (or consideration of) these human rights and freedoms in an individual case is inevitable. The question should therefore not be whether reference to human rights and freedoms can support the proper balancing of competing interests, but rather how it

26 See the discussion in section 2 of this article.

should be implemented to facilitate this balancing process and to enhance the objectivity of the outcome. In order to reflect the competing human rights and freedoms of employers and employees within the balancing exercise in a case of trade secrets protection, the application of a balancing test can be valuable. Among the various methods proposed in the literature, in cases concerning the permissible scope for employees' and former employees' use of information obtained during their employment period for purposes unrelated to their duties, the structured balancing test proposed by Smet (2017b, pp. 38–57) offers particular advantages. This test allows for a nuanced and context-sensitive assessment of the dynamic interactions between the competing rights of both parties to a dispute, ensuring that the balancing exercise sufficiently reflects the interests of both.[27]

The structured balancing test proposed by Smet is a methodological approach used to resolve conflicts between competing human rights by comparing their relative strength in a given context. It involves a structured comparison of the justifications for and against each right, determining which should prevail in an individual case (Smet, 2017b, p. 45). Smet's test is composed of seven balancing criteria, four of which (the impact criterion, the additional rights criterion, the general interest criterion, and the responsibility criterion) may be relevant in a balancing exercise in trade secrets protection cases with an employment context. The remaining three criteria (the value criterion, the core–periphery criterion and the purpose criterion) have no practical significance and thus will not be discussed further.[28] The criteria of the structured balancing test are designed to work together in constructing 'nets of reasons' that support each of the conflicting human rights. Comparing the strength of both 'nets' makes it possible to determine which human right should prevail in a given case (Smet, 2017b, p. 49).

The impact criterion is the first issue that may be relevant; on its basis, it is possible to examine the damage suffered by (or the impact on) conflicting human rights or

27 By contrast, Alexy's (2003, 2014) proportionality test, for example – widely regarded as the standard framework in European constitutionalism – relies heavily on the abstract balancing of competing interests, which may make it somewhat less well suited to capturing the nuanced and multi-dimensional interactions that can arise in trade secrets protection disputes between employers and employees, and could thus make it more challenging to ensure the objectivity and comparability of the outcome.

28 The value criterion is useful only when the right to life competes with other human rights (Smet, 2017b, p. 47). The core–periphery criterion is intended to assess whether damage is done to a central or a peripheral aspect of the human right in conflict (Smet, 2017b, p. 48); it seems to have no added value to the resolution of the conflicting rights of employers and employees in the process of balancing competing interests in an individual case, because such disputes usually concern core rights and freedoms on both sides. The purpose criterion makes it possible to verify whether one human right stands in the function of another, conflicting, human right (Smet, 2017b, p. 49). This criterion is irrelevant for balancing employers' and employees' rights, as neither of the conflicting human rights in question stands in the function of the other.

the likelihood that such damage might actually occur (Smet, 2017b, p. 47). Smet proposes a five-stage scale, which enables the categorization of damage suffered by each conflicting human right as 'very serious', 'serious', 'moderate', 'light' or 'very light'. Another five-stage scale enables the categorization of the likelihood of damage as 'certain', 'a real and immediate risk', 'reliable', 'maintainable' and 'unlikely' (Smet, 2017b, p. 47). In order to assess both – the damage suffered by each conflicting human right or freedom and the risk of such damage occurring – it is crucial to consider the circumstances of a given case.

On the one hand, the nature and value of an employer's information that is acquired by the employee during their employment should be examined. At this point, it may be key to verify whether the relevant information is (or may be) used by the employee in direct competition with their employer (e.g. information enabling the creation of an item equivalent to the one sold by the employer). If so, this may be grounds for assuming that the use of such information by the employee would infringe their employer's human rights and freedoms more significantly than the rights and freedoms of the employee. By contrast, if it is information concerning other areas of the business activity of the employer, which do not directly touch upon the core of the business (e.g. general information memorized by the employee about the ideas, concepts or plans, names and prices of the products or customers lists), the damage to the employer's human rights and freedoms and the likelihood that such damage will occur will usually be assumed to be significantly lower. On the other hand, it is important to consider the individual situation of the employee, including the specific nature of their profession and the type of information necessary to perform their duties (e.g. if the employee performs a specialized job in a highly specialized market). The damage suffered to the employee's freedom to choose an occupation and the right to work may be increased if the employee is deprived of the possibility to legally use certain information elsewhere.

The second aspect to consider is the additional rights criterion, which allows the consideration of other human rights beyond the two main rights in conflict, whether held by one of the parties or by third persons (Smet, 2017b, pp. 48–49). At this stage, it may be relevant to look at the motives of the employee for using the information acquired during the employment relationship elsewhere. This criterion allows for considering, within the balancing exercise, whether the employer treated the employee unfairly, as well as whether the employee acted to the detriment of the employer.

The third relevant criterion is that of general interest, which is intended to take into account the broader context behind a conflict between human rights and to examine whether any of the conflicting rights are supported by an important general interest (Smet, 2017b, p. 49). At this stage, it is useful to take into consideration society's interest in the mobility of workers (Irgens-Jensen, 2023, p. 511).

Last is the responsibility criterion, which enables the assessment of the relevance of duties that correlate with human rights (Smet, 2017b, p. 49). This criterion may permit the consideration of employees' duty of loyalty towards their employers, provided that such a duty derives from national laws (Domeij, 2020, p. 163; Irgens-Jensen, 2023, p. 498; Kolasa, 2018, p. 156). It also allows for consideration of whether the parties signed a confidentiality agreement, and whether the employee received remuneration from the employer for maintaining confidentiality.

A comparison of the strength of the 'nets of reasons' supporting each of the conflicting human rights and freedoms, as assessed through these four criteria, may facilitate the process of balancing the competing interests of employers and employees in cases of trade secrets protection. Due to the structured nature of the test, referencing conflicting human rights in a given case and balancing them using the test could enhance the objectivity of the process, increasing transparency and the comparability of judgments.

Conclusions

Keeping confidential company information secret is often challenging, especially when these secrets are critical to maintaining the company's competitive edge. Operating a successful business without sharing any confidential information would only be possible for undertakings that do not employ anyone. However, for an undertaking with employees, at least at some stage of its development, it becomes inevitable that some business secrets will be disclosed to them. At the same time, the fact that employees have access to their employer's confidential information creates a delicate and potentially conflict-prone situation between employers and employees.

The analysis presented in this article highlights key challenges in balancing the conflicting interests of employers and employees concerning the protection of trade secrets within the EU. Directive 2016/943, as a key instrument of EU law aimed at the harmonization of trade secrets protection across EU Member States, provides mechanisms requiring the balancing of employers' and employees' interests in trade secrets disputes. This balancing exercise occurs both when determining whether an employee's conduct was unlawful (the experience and skills exclusion) and when deciding on measures and remedies against the unlawful use of an employer's trade secrets by their employee (the possibility for EU members to limit employees' liability for damages in cases of unintentional misappropriation and the general requirement of proportionality in measures, procedures and remedies). However, Directive 2016/943 does not provide explicit guidance on how to reconcile these competing interests in a given case. This lack of clear direction may result in subjective decision-making and inconsistencies in the application of trade secrets protection laws across EU Member States.

To address these challenges, this article proposes a structured approach to balancing the competing interests of employers and employees by considering relevant human rights and freedoms. Specifically, the right to privacy, the freedom to conduct a business, and the freedom to choose an occupation and the right to engage in work have been identified as crucial factors in the context of trade secrets protection in employment relationships.

The article proposes the application of Smet's structured balancing test for resolving human rights conflicts as a recommended tool to enhance objectivity and transparency in decision-making. This test, which involves assessing the strength of reasons supporting each conflicting right through specific criteria, can provide a more systematic and comparable approach to balancing competing interests. The application of such a structured methodology could not only facilitate the process of balancing the competing interests of the employer and employee, but can also work towards a more consistent and fair application of trade secrets protection rules to cases with an employment context while respecting the human rights and freedoms of both parties.

REFERENCES

Alexy, R. (2003). Constitutional rights, balancing, and rationality. *Ratio Juris*, *16*(2), 131–140.

Alexy, R. (2014). Constitutional rights and proportionality. *Revus*, *22*, 51–65.

Court of Justice of the European Union. (2001). Opinion of Advocate General Ruiz-Jarabo Colomer in *Ismeri Europa Srl v. Court of Auditors*, C-315/99 P. ECLI:EU:C:2001:432.

Court of Justice of the European Union. (2013). Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, C-426/11. ECLI:EU:C:2013:82.

Court of Justice of the European Union. (2017). Opinion of Advocate General Michal Bobek in *Werner Fries v. Lufthansa CityLine GmbH*, C-190/16, ECLI:EU:C:2017:225.

Domeij, B. (2020). The Trade Secret Directive and employees. In J. Schovsbo, T. Minssen, & T. Riis (Eds.), *The harmonization and protection of trade secrets in the EU* (pp. 149–170). Edward Elgar Publishing.

European Commission. (2012). *Public consultation on the protection against misappropriation of trade secrets and confidential business information: Summary of responses*. https://single-market-economy.ec.europa.eu/consultations/public-consultation-protection-against-misappropriation-trade-secrets-and-confidential-business_en

European Commission. (2013). *Study on trade secrets and confidential business information in the internal market: Final study*. https://ec.europa.eu/docsroom/documents/14838/attachments/1/translations/en/renditions/pdf

European Court of Human Rights. (1950, 4 November). *European convention on human rights*. https://www.echr.coe.int/documents/d/echr/convention_ENG

European Parliament and Council of the European Union. (2016, June 8). Directive (EU) 2016/943 of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure (O. J. L 157, 15.6.2016, 1–18).

European Union. (2007). Explanations relating to the Charter of Fundamental Rights. (2007/C 303/02) (O. J. C 303, 14.12.2007, 17–35).

European Union. (2012). Charter of Fundamental Rights of the European Union (O. J. C 326, 26.10.2012, 391–407).

European Union Agency for Fundamental Rights. (2015). *Freedom to conduct a business: Exploring the dimensions of a fundamental right*. Publications Office of the European Union.

García Coso, E. (2024). Article 15. In A. Silveira, L. Araújo Coelho, M.I. Costa, T. S. Cabral (Eds.), *The Charter of Fundamental Rights of the European Union: A commentary* (pp. 167–175). JusGov/ UMinho Law School.

Groussot, X., Petursson, G. T., & Pierce, J. (2014). *Weak right, strong court: The freedom to conduct business and the EU Charter of Fundamental Rights* [Legal Research Paper Series no. 01/2014]. Lund University. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181

Hogan, H. (2023). The origins and development of Article 16 of the Charter of Fundamental Rights. *European Law Open*, *2*(3), 753–783.

Hrdy, C. A. (2019). The general knowledge, skill, and experience paradox. *Boston College Law Review*, *60*, 2423–2495.

Irgens-Jensen, H. (2023). Departing employees, confidentiality clauses and European trade secret protection. *IIC – International Review of Intellectual Property and Competition Law*, *54*, 495–526.

Judgment of the Court of Justice of the European Union of 19 November 1998 on the case of *Gunnar Nilsson, Per Olov Hagelgren, Solweig Arrborn*, C 162/97, ECLI:EU:C:1998:554.

Judgment of the Court of Justice of the European Union of 11 July 2002 on the case of *Mary Carpenter and Secretary of State for the Home Department*, C 60/00, ECLI:EU:C:2002:434.

Judgment of the Court of Justice of the European Union of 16 February 2012 on the case of *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog, N. V.*, C 360/10, ECLI:EU:C:2012:85.

Judgment of the Court of Justice of the European Union of 29 March 2012 on the case of *Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)*, C 1/11, ECLI:EU:C:2012:194.

Judgment of the Court of Justice of the European Union (First Chamber) of 9 September 2004 on the case of *Kingdom of Spain (C-184/02) and Republic of Finland (C-223/02) v. European Parliament and Council of the European Union*, joined cases C 184/02 and C 223/02, European Court Reports 2004 I–07789, ECLI:EU:C:2004:497.

Judgment of the Court of Justice of the European Union (Third Chamber) of 8 October 1986 on the case of *Staatsanwaltschaft Freiburg v. Franz Keller*, C 234/85, European Court Reports 1986–02897, ECLI:EU:C:1986:377.

Judgment of the Court of Justice of the European Union (Third Chamber) of 10 July 1991 on the case of *Jean Neu and Others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture*, joined cases C 90/90 and C 91/90, European Court Reports 1991 I–03617, ECLI:EU:C:1991:303.

Judgment of the Court of Justice of the European Union (Third Chamber) of 14 February 2008 on the case of *Varec SA v. Belgian State*, C 450/06, European Court Reports 2008 I–00581, ECLI:EU:C:2008:91.

Judgment of the Court of Justice of the European Union (Third Chamber) of 24 November 2011 on the case of *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C 70/10, ECLI:EU:C:2011:771.

Judgment of the Court of Justice of the European Union (Third Chamber) of 6 September 2012 on the case of *Deutsches Weintor eG v. Land Rheinland-Pfalz*, C 544/10, ECLI:EU:C:2012:526.

Judgment of the Court of Justice of the European Union (Third Chamber) of 18 July 2013 on the case of *Mark Alemo-Herron and Others v. Parkwood Leisure Ltd*, C 426/11, ECLI:EU:C:2013:521.

Judgment of the Court of Justice of the European Union (Fifth Chamber) of 24 June 1986 on the case of *AKZO Chemie BV and AKZO Chemie UK Ltd v. Commission of the European Communities*, C 53/85, European Court Reports 1986–01965.

Judgment of the Court of Justice of the European Union (Fifth Chamber) of 19 May 1994 on the case of *Samenwerkende Elektriciteits-Produktiebedrijven (SEP) NV v. Commission of the European Communities*, C 36/92 P, European Court Reports 1994 I–01911, ECLI:EU:C:1994:205.

Judgment of the Court of Justice of the European Union (Fifth Chamber) of 24 November 2005 on the case of *Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*, C 136/04, European Court Reports 2005 I–10095, ECLI:EU:C:2005:716.

Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 25 November 1998 on the case of *Giuseppe Manfredi v. Regione Puglia*, C 308/97, European Court Reports 1998 I–07685, ECLI:EU:C:1998:566.

Judgment of the Court of Justice of the European Union (Sixth Chamber) of 5 October 1999 on the case of *Kingdom of Spain v. Commission of the European Communities*, C 240/97, European Court Reports 1999 I–06571, ECLI:EU:C:1999:479.

Judgment of the Court of Justice of the European Union (Grand Chamber) of 29 January 2008 on the case of *Productores de Música de España (Promusicae) v. Telefónica de España, S. A. U.*, C 275/06, European Court Reports 2008 I–00271, ECLI:EU:C:2008:54.

Judgment of the Court of Justice of the European Union (Grand Chamber) of 22 January 2013 on the case of *Sky Österreich GmbH v. Österreichischer Rundfunk*, C 283/11, ECLI:EU:C:2013:28.

Judgment of the European Court of Human Rights of 14 May 1974 on the case of *J. Nold, Kohlen – und Baustoffgroßhandlung v. Commission of the European Communities*, C 4–73, European Court Reports 1974–00491, ECLI:EU:C:1974:51.

Judgment of the European Court of Human Rights of 16 January 1979 on the case of *Sukkerfabriken Nykøbing Limiteret v. Ministry of Agriculture*, C 151/78, European Court Reports 1979–00001, ECLI:EU:C:1979:4.

Judgment of the European Court of Human Rights of 27 September 1979 on the case of *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v. Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali*, C 230/78, European Court Reports 1979–02749, ECLI:EU:C:1979:216.

Judgment of the European Court of Human Rights of 9 October 1979 on the case of *Airey v. Ireland*, application no. 6289/73.

Judgment of the European Court of Human Rights of 16 December 1992 on the case of *Niemietz v. Germany*, application no. 13710/88.

Judgment of European Court of Human Rights of 27 March 1996 on the case of *Goodwin v. the United Kingdom*, application no. 17488/90.

Judgment of the European Court of Human Rights of 25 June 1997 on the case of *Halford v. United Kingdom*, application no. 20605/92.

Judgment of the European Court of Human Rights of 16 April 2002 on the case of *Société Colas Est and Others v. France*, application no. 37971/97.

Judgment of the European Court of Human Rights of 3 April 2007 on the case of *Copland v. United Kingdom*, application no. 62617/00.

Judgment of the European Court of Human Rights of 23 September 2010 on the case of *Obst v. Germany*, application no. 425/03.

Judgment of the European Court of Human Rights of 23 September 2010 on the case of *Schüth v. Germany*, application no. 1620/03.

Judgment of the European Court of Human Rights of 5 September 2017 on the case of *Bărbulescu v. Romania*, application no. 61496/08.

Judgment of the European Court of Human Rights of 28 November 2017 on the case of *Antović and Mirković v. Montenegro*, application no. 70838/13.

Judgment of High Court of Chancery of 27 March 1817 on the case of *Newbery v. James* 35 English Reports 1011.

Judgment of High Court of Chancery of 10, 12 November 1869 on the case of *Leather Cloth Co v. Lorsont* 9 L. R. Eq. 345, 354.

Kolasa, M. (2018). *Trade secrets and employee mobility: In search of an equilibrium*. Cambridge University Press.

Korycińska-Rządca, P. (2024). Trade secrets in the digital age: How do the measures provided for in EU law face the challenges of protecting an employer's trade secrets against unauthorised acquisition, use and disclosure by its employees? *Bialystok Legal Studies*, *29*(2), 163–176.

Leijten, I. (2018). *Core socio-economic rights and the European Court of Human Rights*. Cambridge University Press.

Menell, P. S., Lemley, M. A., Merges, R. P., & Balganesh, S. (2023). Intellectual property in the new technological age: 2023. *Clause 8 Publishing: Vol. 1. Perspectives, trade secrets & patents*. https://doi.org/10.2139/ssrn.4507044

O'Connor, N. (2024). *Business freedoms and fundamental rights in European Union law*. Oxford University Press. https://doi.org/10.1093/9780191982132.003.0006

Oliver, P. (2009). The protection of privacy in the economic sphere before the European Court of Justice. *Common Market Law Review*, *46*. https://ssrn.com/abstract=2394179

Oliver, P. (2013). What purpose does Article 16 of the Charter serve? In U. Bernitz, X. Groussot, & F. Schulyok (Eds.), *General principles of EU law and European private law*. Wolters Kluwer. https://ssrn.com/abstract=2567786

Schiller, A. (1930). Trade secrets and the Roman law: The *actio servi corrupti*. *Columbia Law Review*, *30*, 837–845.

Smet, S. (2017a). *Resolving conflicts between human rights: The judge's dilemma*, Routledge. https://ssrn.com/abstract=3172820

Smet, S. (2017b). Conflicts between human rights and the ECtHR: Towards a structured balancing test. In S. Smet & E. Brems (Eds.), *When human rights clash at the European Court of Human Rights: Conflict or harmony?* (pp. 38–57). Oxford University Press.

Suchman, M. C. (1989). Invention and ritual: Notes on the interrelation of magic and intellectual property in preliterate societies. *Columbia Law Review*, *89*, 1264–1294.

Sunder, M. (2013). Trade secret and human freedom. In S. Balganesh (Ed.), *Intellectual property and the common law* (pp. 334–352). Cambridge University Press.

Watson, A. (1996). Trade secrets and Roman law: The myth exploded. *Tulane European and Civil Law Forum*, *11*, 19–33.

Wiśniewski, A. (2023). The protection of entrepreneurs and the European Convention on Human Rights. *Białostockie Studia Prawnicze*, *28*(4), 12–29.

World Trade Organization. (1994). *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Marrakesh Agreement establishing the World Trade Organization, annex 1C*. https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm

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The Employment Status of a Person Performing Work through a Digital Platform

Abstract: Performing work through a digital platform is most often done on the basis of self-employment or a civil law contract. Doubts arise when there are elements characteristic of an employment relationship in work through a digital platform. Directive (EU) 2024/2831 introduces a mechanism for presuming an employment relationship on the basis of facts related to the actual performance of work, including how the work is performed and the degree of control and management exercised by the digital platform. The classification of the legal relationship does not depend on the name of the contract concluded between the parties but on the actual performance of the work. The platform has the right to challenge the legal presumption and show that the work is not related to an employment relationship.

Keywords: digital platforms, legal presumption, employment relationships

Introduction

The aim of Directive (EU) 2024/2831 on Improving Working Conditions in Platform Work is to improve the employment conditions of people performing work through digital platforms, increase the transparency of algorithmic management, and address the issue of the classification of platform employment. Platform work is a form of employment in which organizations or individuals use an online platform

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to reach out to other organizations or individuals to solve specific problems or perform specific services in exchange for a fee. Currently, the majority of people working through online platforms in the EU have self-employed status, although some of them perform work in a manner similar to that of employees (Tomaszewska, 2025). Directive (EU) 2024/2831 introduced a legal institution aimed at countering such abuses, namely the presumption of an employment relationship if there are factual circumstances – according to national law, EU case law, and collective bargaining agreements – indicating that employees are subject to management and control by the employer. The burden of proof is on the digital platform, which means that it has to prove that the employment relationship does not exist.

The performance of platform work as part of self-employment under conditions similar to an employment relationship is a violation of the constitutional principle of labour protection (Article 24 of the Polish Constitution), which is also a manifestation of the protection of human rights. On the other hand, the introduction into Polish law of the institution of the presumption of an employment relationship, i.e. the classification of platform employment as an employment relationship, may cause negative consequences for entrepreneurs. These relate to an increase in employment costs and a restriction of market competition, and as a result, a restriction of freedom of economic activity (Article 20 of the Constitution). Thus in platform work, the interests of both parties, the employer and the employed, clash. The institution of legal presumption regulated by Directive (EU) 2024/2831 requires Member States to define the criteria for its determination. The Polish legislature is therefore bound to meet this requirement, as national regulations should be in place by 2 December 2026. The purpose of this paper is to clarify the criteria for the legal presumption of an employment relationship regulated generally in the Directive that should be taken into account by the Polish legislation in the new legal regulation. The final section presents an assessment of the impact of the institution of the legal presumption of an employment relationship on the protection of workers and the situation of employers. Some European countries have national laws that protect those employed via digital platforms; this paper will therefore present the Italian legal solutions.

1. Characteristics of platform employment

Article 2 of Directive (EU) 2024/2831 defines terms related to working through online platforms, such as a digital labour platform, platform work, a person performing platform work, and a platform worker. A 'digital labour platform' is an individual or legal person providing a service that meets all of the following requirements: 1) it is made available, at least in part, at a distance by electronic means, such as a website or mobile application; 2) it is provided at the request of the customer; 3) it includes, as a necessary and essential element, organizing the work performed by individuals for remuneration, regardless of whether the work is performed online or at a specific location; 4) it involves the use of automated monitoring systems or automated decision-making systems. 'Platform work' means work organized through a digital labour platform and performed in the EU by an individual on the basis of a contractual relationship between the platform or an intermediary and the individual, regardless of whether there is a contractual relationship between them. A 'person performing platform work' is an individual performing work through a platform, regardless of the nature of the contractual relationship or the definition of this relationship by the parties involved. The type of basis of employment is not apparent from the definitions presented, but another definition stipulates that a 'platform worker' is a person performing work through a platform who is bound by an employment contract or is in an employment relationship as defined by law, collective agreements, or practice in force in Member States, taking into account the case law of the Court of Justice, or who is considered to be bound by such a contract or be in such an employment relationship. The definition of a platform worker is general, as it refers to the terms 'worker' and 'employment relationship' as defined in national law, taking into account the case law of the Court of Justice. On the other hand, the definition of a digital labour platform does not describe the employing entity or employer. However, the element that could prove an employment relationship is the requirement that the work is organized by the digital platform for remuneration. Against this backdrop, the issue of the determination of the correct employment status of a person performing work through a digital platform is problematic.

The unique characteristics of platform work mean that the existing legal constructs relating to employment do not meet its needs. On the one hand, platforms offer flexible earning opportunities, but on the other hand, their operating model poses a risk of abuse to the persons performing the work, mainly due to their unregulated legal status and, as a result, the weak legal protection (Tomaszewska, 2011, p. 269). For example, the algorithms used by platforms can give preference to certain groups of workers based on their location, availability, productivity, or low absenteeism. This is because online platforms use automated management systems that determine task assignments, performance evaluations, and worker remuneration. As a result, workers do not know on what basis decisions are made regarding their work, task assignments, and orders, which prevents them from effectively pursuing claims. Platforms define their relationships with those performing the services as a collaboration with independent contractors in the form of self-employment. In this way, platform workers lose access to labour law protections, such as minimum wage guarantees, paid vacations, guaranteed rest, and working-time limitations. Case law shows that these workers often meet the criteria that allow them to be considered an employee, such as control and supervision by the platforms and the obligation to follow certain rules, not only for using the application but also for performing tasks for customers. Also, usually, platform workers have no real ability to negotiate the working conditions (Tomaszewska, 2025, pp. 187–198).

Directive (EU) 2024/2831 provides guidance that helps establish the existence of an employment relationship. According to its Article 4, the determination of an employment relationship is based primarily on the factual circumstances surrounding the actual performance of work, including the use of automated monitoring or decision-making systems in the organization of platform work, regardless of what the relationship is called in the contracts that may have been agreed upon between the parties involved. If the existence of an employment relationship is established, the party or parties responsible for fulfilling the employer's obligations is clearly identified in accordance with national legal systems. In other words, an employment relationship can be established, regardless of the name of the contract, if supported by the factual circumstances of the work and the use of automated monitoring or decision-making systems in the organization of the work (i.e. the use of algorithms).

2. The concept of legal presumption of an employment relationship in Directive (EU) 2024/2831

The legal remedy to counter incorrect classification of the employment of persons performing platform work is the mechanism of the legal presumption of an employment relationship adopted by Directive (EU) 2024/2831. According to its Article 5, the legal presumption is that a contractual relationship between a digital labour platform and a person performing platform work is an employment relationship if facts indicating management and control are established, in accordance with national law, collective agreements, or practice in the Member States, and taking into account the case law of the Court of Justice. However, the digital labour platform can challenge this legal presumption, and the burden is on the platform to prove that the contractual relationship in question is not an employment relationship as defined by law, collective agreements, or practice, and taking into account the case law of the Court of Justice.

This leads to the conclusion that it is the characteristics of management and control established in the factual circumstances surrounding platform work, understood in accordance with national law and the case law of the Court of Justice, that determine the existence of an employment relationship. In other words, in the opinion of the EU legislature, if both these characteristics are identified as present in platform work, the person performing the work is considered an employee. Directive (EU) 2024/2831, in its current wording, does not define the criteria of 'management' and 'control', although one of its earlier drafts provided such guidance. In assessing the presumption of an employment relationship, the following criteria indicating control by the digital labour platform of the work performed had to be taken into account: 1) deciding on the remuneration and work schedules; 2) setting procedures for the performance of services; and 3) limiting the possibility of accepting orders from other entities (for more details, see Duraj, 2024, pp. 295–317; Cauffman, C. (2022), pp. 3–8). In addition, it should be noted that as early as 2006, Recommendation no. 198 of the International Labour Organization on employment relationships provided for the construction of a presumption of an employment relationship. In accordance with paragraph 11(b) of the Recommendation, in order to facilitate the determination of the existence of an employment relationship, Member States should, as part of the national policy referred to in the Recommendation, consider the possibility of introducing into their legal orders a legal presumption that an employment relationship exists when one or more of the indicators set forth in section 13 of that document are present.

3. Management and control of work by the digital platform as a criterion for the establishment of an employment relationship

3.1. The feature of worker subordination in national law

According to the definition of an employment relationship provided in Article 22 of the Polish Labour Code, the essential criterion of this relationship is the performance of work for and under the management of another person in exchange for remuneration, so its distinguishing features are hierarchical control and subordination. Other characteristics of an employment relationship include voluntariness and the mutuality of obligations, remuneration for work, continuity of the performance of work, the personal nature of the work performed, the obligation of diligent work, the risk placed on the employing entity, and the subordination of the employee to the employer in the course of the performance of work. However, the most important characteristic of work performed under an employment relationship is its subordination. An employee's obligation to perform subordinated work implies his or her submission to the employer's management. The limits of this management (subordination) are set by the type of work specified in the contract. This subordination is referred to as organizational subordination. The essence of the employer's management is the right to issue instructions to the employee. It is assumed that the employer's management is expressed in three basic spheres: the employer may specify the type of work and, within its framework, make decisions concerning the employee regarding the place, time, and manner of work performance (Judgment of the Supreme Court, 2014). The criterion of employee subordination distinguishes an employment relationship from other forms of employment, especially civil law forms (Duraj, 2011, pp. 35–61).

In addition to having the right to issue instructions, the employer also has the power to control the performance of the tasks assigned to employees. The purpose of such control should be related to the performance of the employment relationship and may involve the verification of the diligence and care of the employee in the performance of the work and the verification of the course of the work process, including compliance with occupational health and safety regulations, the protection of property, the protection of information constituting the employer's secrets, and the protection of the personal data processed by the employer.

Digital labour platforms can exercise control over the tasks performed and the time and manner of work performance in a similar way to customers (Sundararajan, 2016); customer evaluations are the primary form of control. This is a characteristic feature of work performed through online platforms. The platform, on the other hand, exercises the same elements of control as any employer, such as dictating the time, place, and manner of work. Regardless of the employment status, in the case of platforms for deliveries, for example, the platform tracks the progress of the deliveries and the location of suppliers via their smartphones and, based on this, generates data on employee performance in an automated manner, such as the average speed and number of deliveries per hour. The digitized organization of the work is data-driven. In turn, the data underpinning the digitization technologies and created by them can be used to optimize the organization of the work. At the same time, it can also be used to monitor and control the workers.

Under Polish labour law, there may be difficulties with the legal interpretation of the control that could establish the existence of an employment relationship for a person performing platform work. It is generally accepted that mere control (general supervision) of the work performance process, if it contains no elements of authority, is not sufficient to establish the existence of an employment relationship, since it is also a typical immanent feature of civil law forms of employment, including self-employment (Duraj, 2024, pp. 253–273).

3.2. Classification of an employment relationship in the case law of the Court of Justice: The concepts of management and control

In its rulings, the Court of Justice of the EU points to such characteristics of an employment relationship as the performance of work of economic value for and under the management of another person, for remuneration and for a specified period of time, as in Case 75/63, *Mrs. M. K. H. Hoekstra* (Judgment of the Court of Justice, 1964). This ruling drew particular attention to the term 'wage-earner or assimilated worker', as used in EEC Council Regulation no. 3 on social security for migrant workers, which, like the term 'employees' in Articles 48 to 51 of the EEC Treaty, has a Community meaning referring to all persons who, as such and under whatever title, are covered by the various national social security systems. In contrast, in Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg* (Judgment of the Court of Justice, 1986), the Court of Justice stated that it follows from the autonomous definition of a worker in EU law that an employee is a person who provides work of economic value under the direction of an employer. The basic characteristic of an employment relationship is that for a certain period of time, a person provides services for and under the management of another person, in exchange for the remuneration received.

It is worth noting a landmark judgment by the UK Supreme Court, which settled a case to determine the existence of an employment relationship between a digital labour platform and a person performing platform work (a service). In its judgment of 19 February 2021, in the case *Uber BV and Others (Appellants) v. Aslam and Others (Respondents)* brought by former Uber BV drivers, the UK Supreme Court ruled that Uber drivers provided their services under the terms of their employment as employees and were entitled to rights related to the minimum wage, working hours, and the right to paid annual leave as defined by regulations. The Court emphasized that the conditions regarding the organization of the provision of the service to passengers are unilaterally imposed by Uber (Uber imposes standards for the provision of a service that is allegedly not an Uber service). Another premise that the UK Supreme Court analysed was control. The level of Uber's control over the service consisted, on the one hand, in the fact that although it was the driver who provided the transportation service, it was on the basis of Uber's information advantage (e.g. the driver was not informed of the passenger's destination), and on the other hand, the fact that Uber monitored the driver's rate of acceptance (and cancellation) of ride orders. It was also pointed out that at the time of logging into the app, a driver's decision-making power on whether to accept ride orders was limited by Uber, which sets the thresholds for fulfilling orders. Uber retains complete freedom to accept or reject any request for a ride from a passenger (that is, it influences the number of customers). An example of this control is reliance on ratings, that is, making decisions about drivers based on feedback (ratings) from passengers. According to the UK Supreme Court, this is the classic form of subordination that is characteristic of an employment relationship.

The use of technological tools (the application) in the process of work performance does not invalidate the achievements of labour law in identifying the characteristics of an employment relationship. However, these characteristics should be updated, taking into account new technological solutions, such as the use of algorithms (Gospodarek, 2021, p. 17).

4. The impact of the legal presumption of an employment relationship on worker protection

Non-standard forms of work involve instability and uncertainty about future employment, as well as a remuneration system set most often on a commission basis, with the resulting lack of constancy in the payment of wages. A platform work system may limit the application of the basic guarantees provided for in labour law, which in Polish law are formulated, among other pieces of legislation, in the Constitution, such as the requirement to set a minimum wage (Article 65(4)), the provision of safe and healthy working conditions (Article 66(1)), and the right to rest (Article 66(2)) (Nerka, 2025, pp. 131–146; Todolí-Signes, 2021, pp. 65–83.

According to Article 24 of the Polish Constitution, any work is subject to protection, in terms of both the form in which it is performed (employment contract, civil law contract, running a business, volunteering) and the type of work (including work on a farm or mobile work), as well as the entities performing it, which are primarily employees performing home-based work but also self-employed persons and even employers (Tuleja, 2023, pp. 101–102). This principle allows the possibility of differentiating the level of protection according to the basis of employment, which is especially true for work provided on the basis of an employment relationship and work performed under civil law contracts (Ludera-Ruszel, 2017, p. 50). As a result, a person providing services through a digital labour platform may also be protected under Article 24 of the Constitution. A consequence of the principle of labour protection is the state's obligation to supervise the conditions of work, as set forth in Article 24, sentence 2, of the Polish Constitution, as well as further obligations of the state set forth in Chapter II, Articles 65–67, which focus on economic and social freedoms and rights (Ludera-Ruszel, 2017, p. 49). Platform workers should be entitled to basic workers' rights, with dignity as a starting point for the adoption of relevant legislation (Mitrus, 2014, pp. 133–147).

5. Classifying platform work as an employment relationship and the implications for businesses

The main consequence for businesses in relation to platform work is the risk of establishing an employment relationship. This may result in an obligation to pay social and health insurance contributions and wages, and provide employee benefits (e.g. social benefits, paid leave). Businesses would also have an information obligation as to the terms and conditions of employment, and digital labour platforms would also be required to make available to the competent authorities and representatives of persons performing platform work information regarding the operation of the platforms, the scale and nature of the employment, and the working conditions (Unterschuetz, 2025, p. 248; see more de Groen, W. P., & Kilhoffer, Z. (2019).

Attention should be paid to the aspect of the competitive advantage for businesses hiring for platform work. Platform companies can compete to an unlimited extent with employers offering better working conditions. They are not required to comply with basic workers' rights and they offer more flexibility in the performance of services; particularly notable in this regard are services provided in the food industry, for example by the Pyszne.pl and Glovo digital labour platforms. An extraordinary (aggressive) pressure is created in the market for food delivery or passenger transportation. It can be claimed that businesses compete with each other using human resources. Such a situation leads to the lowering of labour standards by better employers and sets a precedent for the deterioration of conditions in other industries. Business organizations view labour platforms as unfair competition only in the industries in which they operate or could operate. Such platforms are growing rapidly, enabling businesses to significantly reduce the cost of doing business. Allegations of unfair competition are raised against digital labour platforms not only because of, for example, the drastic reduction in the wages of private drivers providing transportation services on behalf of platforms such as Uber, but also because of the lack of taxation of the activities of private drivers who are employed part-time and who also are increasingly treating Uber work as a major source of income (Świątkowski, 2019, p. 18–24). Businesses are concerned about the loss of the balance favourable to their own economic interests caused by the public interest in being able to benefit from employment in non-standard forms. Work provided through platforms is incomparably cheaper than the same work performed by employees hired under an employment contract (Skład, 2015, pp. 17–21; Świątkowski, 2022, p. 33–41).

6. The employment status of persons performing platform work: The example of Italy

In Italy, the topic of platform work became the subject of legislation as early as 2019 with the entry into force of the Decree with the Power of a Statute no. 101 – art. 2, decreto legilativo n. 81/2015 (transformed into Act no. 128 of 2 November 2019), which introduced a new type of 'work organized through a digital platform' and provided workers with certain rights such as a written contract and an obligation to provide information about working conditions; it also set out the platform's responsibility for health and safety protection, criteria for setting wages according to an hourly rate (and the prohibition of piecework systems), the obligation to have insurance against accidents at work and occupational diseases, the prohibition of discrimination, and the right of passengers to refuse platform delivery offers (Carinci, 2021). Such rights would be questionable under the general provisions of Italy's self-employment law (Act no. 81/2017; see Gramano & Del Conte, 2018).

Another decree, no. 104/2022 (implementing EU Directive no. 2019/1152), contains a separate chapter on information obligations when an employer uses automated decision-making or monitoring systems to provide relevant information for recruitment, management, and termination of an employment relationship. On the other hand, a digital labour platform is considered to be an employer if at least two of the following criteria are met: setting the level of remuneration, supervising the performance of work electronically, imposing restrictions on the freedom to set working hours or accept or reject orders, setting binding rules on how to deal with customers and perform work, and restricting the ability to build a customer base or perform work for third parties. As a result, when at least two of these criteria are met, work provided through digital platforms and with the use of algorithms is considered an employment relationship.

Initially, Italian courts were hesitant to classify couriers performing platform work as employees, given their likely freedom to decide about their working hours (e.g. by not logging into the app), which traditionally has indicated self-employment (Gangemi & Turco, 2020). In the case involving the Foodora food delivery platform, the court of first instance in Turin (case no. 778 of 7 May 2018) ruled that couriers were self-employed. In making this classification, the Court took into account that food couriers are free to accept an 'invitation' to deliver food, which is incompatible with the status of an employee since the employing party cannot demand performance or exercise its managerial and control powers. Another argument to rule out employee status was ownership of the means of production (a bicycle and a telephone) by the courier, which is one of the traditional indicators used by judges to determine subordination. In contrast, in 2019, the Court of Appeal in Turin (case no. 26 of 4 February 2019) adopted a different interpretation, citing Article 2 of the Italian Employment Law (Decree no. 81/2015). According to that, workers whose work is continuously and systematically organized by the customer in terms of time and place enjoy the same protection as full-time employees. Such persons are an intermediate category between employees and self-employed persons. In its Judgment no. 1163/2020 of 24 January 2020, the Italian Supreme Court confirmed this interpretation, according to which Foodora's couriers, although formally employed as collaborators (self-employed), were entitled to the full range of workers' rights due to the 'hetero-organization' of their platform work. The court found that the platform imposed the time and place of work through task assignment procedures and availability requirements during certain time slots, thus creating a legal 'grey area' between self-employment and traditional employment (Piera, 2023, p. 134). This court ruling established an intermediate category in employment in Italy, providing the minimum wage, insurance, and protection from discrimination comparable to that of regular employees (Aloisi, 2022; for more information, see Degoli, 2021). Subsequently, the aforementioned guarantees for platform workers were reflected in Decree no. 101/2019, transformed into Act no. 128/2019 (known as the Amending Decree), which introduced Italy's first statutory protections for platform workers. It also establishes three main guarantees to protect platform workers 'outside employment': 1) assimilation, which occurs when self-employed persons are treated as employees or presumed to be employees; 2) the granting of rights to persons who are not employees, either by separating subcategories in the area of self-employment or by introducing an intermediate category between employment and self-employment; and 3) the creation and/or promotion of collective bargaining mechanisms for persons who are not employees (Piera, 2023, p. 134).

The issue of riders' legal and employment classification has been addressed in subsequent rulings by Italian labour courts. The Milan Labour Court (2023) confirmed that the activity of a digital platform can indeed meet the characteristics of subordinate work and cannot be considered autonomous work. Platforms operate by organizing riders' work through an app and by ranking and assigning tasks, while working hours are determined from the moment riders log in to the app to the moment they log out. Therefore the regulations on dependent work and the related contributions and insurance obligations for the periods during which the rider performs work should be applied.

On 31 October 2025 the Italian Supreme Court (*Corte di cassazione*) upheld a 2022 ruling by the Turin Court of Appeal with a new ruling, no. 28772/2025, establishing that food delivery riders must be classified as *collaboratori etero-organizzati* (externally organized collaborators). This classification subjects them to the protections and rules of subordinate employment, despite their formal contractual autonomy. The dispute centred on whether platforms' organizational control over tasks and performance justified reclassifying riders as employees. The court rejected the companies' argument that owning personal tools (e.g. bikes) alone justified independent contractor status.

Conclusions

The provisions of Directive (EU) 2024/2831 on the presumption of an employment relationship, the transparency of algorithmic management, and protection of personal data are aimed at ensuring better working conditions for persons performing work through digital platforms, including the elimination of the incorrect classification of employment. This will contribute to providing greater guarantees of workers' rights, particularly as a result of the legal presumption of an employment relationship and the requirement to identify the entity responsible for fulfilling the employer's obligations. On the other hand, the employing entity, which may be the digital platform, has the right to challenge this legal presumption, and therefore the burden is on the platform to prove that the contractual relationship in question is not an employment relationship as defined by law, collective agreements, or practice in the Member States, and taking into account the case law of the Court of Justice (on the classification of platform workers, see Mendez & Kurzynoga, 2023, p. 210).

The implementation of these provisions at the national level remains one of the greatest challenges. The different legal systems in Member States, the differences in social protection, and the lack of uniform standards for monitoring the operations of digital labour platforms may hinder the full implementation of the Directive. Under the Directive, it is up to Member States to define the conditions for such a presumption in national law. Consequently, the Polish legislature may introduce various scenarios for implementing the institution of the legal presumption of an employment relationship; therefore the question is whether it will choose to include this institution in the Labour Code or in a separate statute on platform work, which seems more reasonable. Due to its specific characteristics, platform work requires redefining the characteristics of the employment relationship. In particular, national legislatures will have to clarify the EU concepts of 'management' and 'control', which are the criteria for establishing an employment relationship and are a manifestation of subordination.

The identification of subordination to a digital platform that operates using algorithms must be based on those mechanisms of operation that cause the actual limitation of the worker's independence. The use of monitoring or decision-making systems in the organization of platform work should also be evaluated. As for *de lege ferenda* recommendations, the platform-work relationship in the European Union may be based on the concept of algorithmic subordination.

The implementation of Directive (EU) no. 2024/2831 into Polish law is expected to improve the working conditions of those performing work via digital platforms. Currently, most platform workers in the EU are formally self-employed, but at the same time, many must abide by the same rules and restrictions as full-time employees. The Directive is thus intended to guarantee easier access to their workers' and social rights (Bujalski, 2024). One can venture to say that platform work is not a separate category of employment; it is only a tool with which the performance of certain activities is assigned, and the nature of the legal relationship between the parties should be defined by the factual features that are present (or not), such as organizational subordination, economic dependence, performance of duties at a designated place and/or time, and the manner of their performance (Zakrzewska, 2022). In the event of a legal presumption of an employment relationship for a person performing platform work, a legal protection identical to that enjoyed by employees must apply. However, the characteristics of an employment relationship will not be present in every case, so only an individual analysis of the circumstances of platform work will make it possible to determine whether this is subordinate work within the meaning of the provisions of labour law. Therefore the factual circumstances will determine whether an employment relationship can be established.

REFERENCES

Act of 26 June 1974, Polish Labor Code, Journal of Laws of 2025, item 277

Aloisi, A. (2022). Boss ex machine: Employer powers in workplaces governed by algorithms and artificial intelligence. In A. Lo Faro (Ed.), *New technology and labour law: Selected topics* (pp. 15–34). Giappichelli.

Biasi, M. (2022). Beyond employment: The protection of platform workers in a holistic perspective. In A. Lo Faro (Ed.), *New technology and labour law: Selected topics* (pp. 139–152). Giappichelli.

Boot, G. (2022). Platform work in Europe: The need for a multilevel solution to protect the so-called self-employed. *European Labour Law Journal*, *13*(1).

Bujalski, R. (2024). *Większa ochrona dla pracowników platform internetowych*. LEX/el.

Carinci, T., & Dorssemont, F. (2021). *Platform work in Europe: Towards harmonisation?* Intersentia, Cambridge

Cauffman, C. (2022). Towards better working conditions for persons performing services through digital labour platforms. *Maastricht Journal of European and Comparative Law*, *29*(1), pp. 3–8.

Constitution of the Republic of Poland of 02.04.1997 (Journal of Laws no. 78, pos. 483, as amended).

Decreto Legislativo 81/2015 of Italy (Jobs Act).

de Groen, W. P., & Kilhoffer, Z. (2019). *On-location client-determined moderately skilled platform work: Employment and working conditions* [Working paper]. European Foundation for the Improvement of Living and Working Conditions (Eurofound).

Degoli, M. C. (2021). New jobs, old rules: How can non-standard workers fit into standard social security schemes? In A. Perulli & S. Bellomo (Eds.), *Platform work and work 4.0: New challenges for labour law* (pp. 87–101). Wolters Kluwer.

Duraj, T. (2011). Tradycyjne ujęcie pracowniczego podporządkowania – wybrane problemy prawne. *Studia Prawno-Ekonomiczne*, *83*, 35–61.

Duraj, T. (2015). Ewolucja pracowniczego podporządkowania jako cechy konstrukcyjnej stosunku pracy w świetle przepisów prawa pracy. *Studia Iuridica Lublinensia*, *24*(3), pp. 159–179.

Duraj, T. (2024). Implementacja do polskiego porządku prawnego Dyrektywy platformowej – problem domniemania stosunku pracy (wprowadzenie do dyskusji). *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, *31*(4), pp. 253–273.

Eurofound. (2018). *Employment and working conditions of selected types of platform work*. Publications Office of the European Union.

EEC Council Regulation no. 3 (1958, 25 September) on social security for migrant workers

European Union. (2024, 23 October). Directive on the Improvement of Working Conditions via Platforms (Journal of Laws L 2024, pos. 2831).

Gangemi, A., & Turco, V. (2020). *The protection of riders in Italy: A work in progress*. https://portolano.it/en/newsletter/portolanocavalloinformemploymentequality/theprotectionofridersinitalyaworkinprogress#:~:text=Although%20case%20law%20has%20confirmed,for%20the%20entire%20work%20relationship

Gospodarek, G. (2021). Wyrok brytyjskiego Sądu Najwyższego w sprawie Uber BV przeciwko Aslam i inni. *Praca i Zabezpieczenie Społeczne*, *62*(7), p. 12–18.

Gramano, E., & Del Conte, M. (2018). Looking to the other side of the bench: The new legal status of independent contractors under the Italian legal system. *Comparative Labor Law and Policy Journal*, volume 39, issue 3, pp. 579–605.

International Labour Organization. (2006). Recommendation ILO no. 198 on employment relationships. https://www.mop.pl/doc/html/zalecenia/z198.html

Judgment of the Court of Appeal in Bialystok of 17 July 2013, III AUa 43/13, Legalis.

Judgment of the Court of Appeal in Łódź of 3 September 2014, III AUa 2070/13, Legalis.

Judgment of the Court of Justice of the European Union of 19 March 1964 on the case of *Mrs. M. K. H. Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, 75/63 EU:C:1964:19.

Judgment of the Court of Justice of the European Union of 3 July 1986 on the case of *Deborah Lawrie-Blum v. Land Baden-Württemberg*, 66/85 EU:C:1986:284.

Judgment of the Italian Supreme Court of 31 October 2025 on the case of riders https://www.dottrinalavoro.it/wp-content/uploads/2025/11/Cassazione-sentenza-28772–2025-Riders.pdf

Judgment of the Milan Labour Court of 19 October 2023 on the case of food delivery riders no. 3237/2023. https://www.dirittoegiustizia.it/#/documentDetail/10724175

Judgment of the Supreme Court in Poland of 19 March 2014, I PK 187/13, Legalis.

Judgment of the United Kingdom Supreme Court of 19 February 2021 on the case of *Uber BV and others (Appellants) v. Aslam and Others (Respondents)*, no. UKSC 2019/0029.

Ludera-Ruszel, A. (2017). Samozatrudnienie ekonomiczne zależne a konstytucyjna zasada ochrony pracy. *Roczniki Nauk Prawnych*, *27*(1), pp. 43–61.

Mendez, L. M., & Kurzynoga, M. (2023). The presumption of the employment relationship of platform workers as an opportunity to eliminate obstacles arising from competition law in the conclusion of a collective agreement: The example of Spain. *Białostockie Studia Prawnicze*, *28*(4), pp.197–216.

Mitrus, L. (2014). Godność jako podstawa aksjologiczna praw pracowniczych. In M. Skąpski & K. Ślebzak (Eds.), *Aksjologiczne podstawy prawa pracy i ubezpieczeń społecznych* (pp. 133–142). Ars boni et aequi Publishing Company – Michał Rozwadowski

Mitrus, L. (2024). Polska regulacja pracy platformowej de lege ferenda z perspektywy Prawa Unii Europejskiej. *Acta Universitatis Lodziensis Folia Iuridica*, *107*, pp. 147–157.

Nardo, G. (2021). Platform work: Legal categories and protection perspectives. In A. Perulli & S. Bellomo (Eds.), *Platform work and work 4.0: New challenges for labour law* (pp. 3–14). Wolters Kluwer.

Nerka, A. (2025). Ochrona danych osobowych osób wykonujących pracę na platformach cyfrowych – wybrane zagadnienia. *Acta Universitatis Lodziensis. Folia Iuridica*, *1*(11), 131–146.

Piera, L. (2023). Classifying digital platform workers. In A. Lo Faro (Ed.), *New technology and labour law: Selected topics* (pp. 123–138. Giappichelli.

Skład, A. (2015). Przegląd czynników organizacyjnych istotnych w zarządzaniu bezpieczeństwem i higieną pracy. *Bezpieczeństwo Pracy. Nauka i Praktyka*, *524*(5), 17–21.

Sundararajan, A. (2016). *The sharing economy: The end of employment and the rise of crowd-based capitalism*. The MIT Press

Świątkowski, A. (2019). Elektroniczne platformy zatrudnienia. *Monitor Prawa Pracy*, *7*, 18–24.

Świątkowski, A. (2022). Projekt dyrektywy Parlamentu Europejskiego i Rady w sprawie poprawy warunków pracy za pośrednictwem platform internetowych. *Praca i Zabezpieczenie Społeczne*, *10*, 33–41.

Todolí-Signes, A. (2021). The evaluation of workers by customers as a method of control and monitoring in the firm: Digital reputation and data protection. *International Labour Review*, *160*(1), 65–83.

Tomaszewska, M. (2025). Transparency and algorithmic oversight in the digital workplace: Legal challenges under directive 2024/283. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, *3*, pp. 187–198.

Tuleja, P. (Ed.). (2023). *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (2nd ed). Wolters Kluwer

Unterschuetz, J. (2025). Karne prawo pracy a implementacja Dyrektywy platformowej. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, *32*(3), 239–252.

Zakrzewska, M. (2022). Jaki wpływ na gospodarkę Gig Economy *będzie miał wyrok Sądu Najwyższego Wielkiej Brytanii, uznających kierowców Ubera za pracowników? Studia z Zakresu Prawa Pracy i Polityki Społecznej*, *29*(2), 233–249.

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The Renaissance of the Right to Strike in the United States Inside and Outside of Traditional Labour Law

Abstract: The epithets on the grave of the American labour movement have long been written. Yet hope springs eternal. Recent developments, such as the Covid pandemic and the role of artificial intelligence in disrupting traditional work models, have prompted suggestions that labour unions may yet become reinvigorated and have a role in safeguarding worker rights in the face of these changes. This article examines these prospects, particularly through the lens of the strike and other forms of collective action. While traditional union activity – notwithstanding raised hopes – remains hamstrung by regressive US labour law and low prospects for legislative change, collective action in the wider sense does have potential to boost worker rights. Such action includes both lawful and unlawful strikes and protests in key sectors, by union and non-union employees, and even non-employees, such as independent contractors. The subject of these actions may even go beyond traditional employment concerns and include human rights. Potential obstacles under traditional labour law and antitrust law are not insurmountable.

Keywords: strike, unions, artificial intelligence, collective bargaining, human rights, antitrust, independent contractors

Introduction

Membership in American labour unions continues to plummet. In 2024, 5.7% of private sector workers in the US were union members. Unions' share of public-sector employees was higher, at 32.2%, for an overall level of 9.9% of all workers (US DoL, 2025a). These figures represent a severe decline from 1983, when union membership levels stood at 20.1% of the workforce (US DoL, 2025a), and even a bigger drop from the peak in the 1940s of approximately 34.2% (Romero & Whittaker, 2023). Such a

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long-term and seemingly irreversible slide would seem to condemn American unions into irrelevance as we progress further into the 21st century. Yet there is a notion that in current conditions, unions are essential for the protection of workers' rights, and even more broadly, American society as a whole. To the extent unions were on life support, their immediate resuscitation is required.

Drastic changes in working conditions were made possible by the Covid-19 pandemic and the continued acceleration of the development of artificial intelligence (AI) and its application to the workplace. The pandemic exposed vulnerabilities in the lack of a social safety net for workers (no right to paid sick leave, health insurance connected to employment, minimal unemployment benefits). It also made clear the capacity of employers to effectively move work from a physical office to a virtual one online. AI has amplified the ability of platforms to transform work from an employment model to a gig work or independent contractor model, particularly with respect to ride-sharing and food delivery. Even more ominously (to the extent gig work will be limited to certain fields), AI reveals a potential to automate a wide range of jobs, even those traditionally thought of as white-collar or professional. In the face of this instability, government has either too been slow or even unwilling to help ease workers legitimate concerns and anxieties. As in the late 19th century in response to the excesses of industrialization, independent trade unions are seen as one hope to ensure that workers' rights are protected.

However, to the extent unions can be revived to fulfil this role, they will not do so through the use of traditional labour law mechanisms. Perhaps it is too dramatic to say that the National Labor Relations Act (NLRA)(US Congress, 1947), the primary federal statute governing labour management relations in the US, is a dead letter, but it is close to it. For much of 2025, the National Labor Relations Board (NLRB), the administrative agency charged with enforcing the NLRA, lacked a quorum after President Trump fired its chair, rendering it unable to make any decisions (Weissner, 2025). In any case, even under more benign and ostensibly labour-friendly administrations, the structure of the NLRB and the enforcement of labour law are such that cases often take an interminable time to be resolved. Moreover, where violations are found, penalties are light, giving employers little incentive to obey the law.

Instead, unions – and workers – can only make a difference by pursuing strikes, protests or other, similar industrial actions. Such actions have three effects, where successful. First, they can force employers to directly resolve issues on favourable terms to workers. Second, they can bring attention to an important employment issue: even if the strike did not force a particular employer to make all the concessions sought by the workers, by the publicity generated it may swing public support behind the workers' position. In turn, this might prompt state or federal legislation to correct the problem. Third, industrial action by unions may stimulate unrepresented workers to engage in concerted activity, including withholding work and protesting, to protect themselves or issues that they care about. These issues could include sexual harassment, racism, or even human rights violations abroad that might affect their work. This might lead to direct or indirect change, and ultimately lead to union representation.

This article will demonstrate the viability of this strategy. First, it will be shown that in the immediate post-pandemic years, there was a wave of strikes, at a level not seen in decades. This demonstrates a new need and even demand for industrial action. Next, the existing constitutional and legislative framework for strikes in the US will be examined. Special emphasis will be placed on the legal limitations on the right to strike, which in turn force unions to be innovative and bold in order to succeed. Finally, four (4) examples of union and/or worker collective action (strike, protest or otherwise) provide a roadmap of how these actions may be effective. These examples include strikes against AI; a new California law allowing rideshare drivers to unionize, collectively bargain and engage in concerted activities; protest or concerted activity by unrepresented workers in response to human right violations; and wildcat (unauthorized and even illegal) strikes.

1. The renaissance of strikes in the United States

After decades of decline, strike activity in the United States has recently dramatically increased (LeClercq, 2024, p. 219).[1] This increase has been both qualitative and quantitative, and was a dramatic reversal from the seemingly irreversible downward trend that had set in. Qualitatively, the strike wave of 2023–2024 involved high-profile national industries, mostly in the private sector, and included autoworkers, actors, screenwriters and healthcare workers. For the first time in history, the United Auto Workers (UAW) struck all of the big three American auto manufacturers simultaneously (Ford, General Motors and Stellantis, in a show of strength. Approximately 49,000 workers were on strike for almost five weeks (Rua & Tito, 2024). The Screen Actors Guild–American Federation of Television and Radio Artists (SAG-) and the Writers Guild of America (WGA) went out on strike for five–six months against the major Hollywood film studios and streaming service provides, including Netflix. In October 2023, 75,000 healthcare workers struck Kaiser Permanente. A last-minute settlement averted a strike by 300,000 Teamsters union drivers against UPS, a major US and international delivery service (Reiter, 2023, p. 3). The protagonists of these strikes were all highly visible and the work involved was connected to people's everyday lives – buying cars, watching films, receiving packages and accessing healthcare.

Moreover, the issues involved in these strikes deeply resonated with the American public. SAG and WGA members were fighting against the threat of being replaced

1 'There has been a dramatic resurgence of workplace strife in America, from auto plants to grocery stores to universities to Hollywood, garnering the Summer of 2023 the "Hot Strike Summer". That resurgence has renewed attention on unions and their ability to fight for greater democracy and power at the workplace'.

by Artificial Intelligence (AI), perhaps the most advanced (and even threatening) type of automation yet. As ChatGPT and the increased use of computer-generated imagery (CGI) in film demonstrated, AI could conceivably do a significant portion of work previously done by actors and writers. In the back of the public's mind was the danger that AI could take their jobs away too. The UAW strike represented the future of manufacturing in the US after the pandemic. The government had promised to build back better and to secure American industry in key sectors, especially those related to the green economy. One issue in the UAW strike was ensuring that electric-car manufacturing and the production of car batteries would be well-paid union jobs based in the US. The healthcare strike against Kaiser Permanente involved staffing issues, as nurses and others were asked to care for more and more patients. Again, an employer understaffed and employees overworked was an issue most Americans could relate to.

Quantitatively, the surge in strikes in 2023 was also impressive. Thirty-three major strikes occurred involving 458,000 workers, most of whom were in the private sector (US DoL, 2024b). These strikes caused 16,673 lost workdays. This was the highest number of workdays lost due to strikes since 2000, and prior to that year, since 1989, and the largest number of strikes since 2000. These numbers were in stark contrast to those of the preceding 20 years. In the period 2000–2017, the number of annual strikes had levelled off to its lowest numbers in history. By 2009, there were only five strikes involving approximately 12,500 workers throughout the entire country (US DoL 2024a). In most years during that period, there were less than 20 strikes per year, involving less than 190,000 workers. From 2013, the figures were even worse, with no more than 15 strikes per year involving less than 100,000 workers. In 2017, only seven strikes occurred, idling 25,000 workers. These figures amounted to a dramatic drop-off from the totals during the period 1947–2000. In the post-war period up until 1979, 1 to 2 million workers would be participating in hundreds of strikes in a typical year. From 1980 to 2000, the absolute numbers of strikes per year never passed 100, and the amount of workers on strike typically did not exceed several hundred thousand, itself a significant decline from the previous period, but still a much more robust figure than in the period that would follow (US DoL, 2024a). Put another way, the season of strikes in 2023 was not just a slight statistical anomaly, and it begs a closer analysis.

Mostly, the increase in strike activity in the US was in response or related to the Covid-19 pandemic in 2020–2022. The pandemic, as it did in Europe, had an enormous social and economic impact in the US. Over 1 million Americans died, and many more fell ill, including those who continue to suffer long Covid. This catastrophe led many people, including workers, to consider their own mortality and question their willingness to work in undesirable, underappreciated and even unsafe conditions (Hill, 2023, pp. 359–360; Ressler, 2022, p. 1497). A significant number of older workers opted for early retirement during this period as a result, wondering whether it was worth the risk working a few more years in such an environment (Frankford, 2022, p. 999). At the same time, the federal government pumped huge amounts of money into special programmes and state unemployment insurance schemes that enable people to keep their jobs and income, or receive enhanced unemployment benefits to maintain their standard of living while they were out of work. Indeed, by American standards, these benefits were quite generous, to the extent that they at times exceeded the wages paid for many low-skill jobs. While these benefits ultimately ceased as the pandemic wound down, there was a buffer period in which many individuals had little incentive to accept work that paid less than the benefits they were receiving from the government (Perdue, 2023, p. 249).[2]

Finally, all this massive spending by the federal government, largely to support vulnerable business and workers, eventually had an inflationary effect. Prices for goods and services rose, and wages lagged behind (Vereckey, 2024). But during the time of the pandemic itself, there was limited opportunity for workers to spend their wages or unemployment benefits; a number of sectors of the economy were almost entirely shut down, including the entertainment, restaurant and travel industries. Consequently, workers saved their money, hoping to spend it in better times (Stein, 2022, pp. 75–76).

Taken together, these effects of the pandemic had an important impact on the US labour market. On one hand, there was pent-up consumer demand to spend the money they had saved over the course of the pandemic, not only because it was there, but as a release to celebrate and enjoy the things they had been denied over the long pandemic years. On the other, the 'great resignation' – workers taking early retirement, refusing to return to bad jobs, and remaining on social benefits until the last possible moment rather than taking new work – led to a labour shortage. In other words, there were many new economic opportunities for businesses after the pandemic to meet consumer demand, but these same businesses had difficulties in hiring adequate numbers of staff to operate.

The pandemic also accelerated a re-evaluation of the relative merits of unfettered free trade and globalization. The US was caught backfooted when it found that some basic medical supplies were exclusively imported from China, with no alternative sources of domestic production. After the pandemic subsided, there was an increased commitment to ensuring American production in key sectors of the economy, including industrial output. This circumstance created a strange political convergence of interests, as President Trump's protectionist tendencies over the course of 2016–2020 appeared to be at least partially validated and were in large part kept in place by his successor, Democrat Joe Biden (Bhattarai, 2022; Jacobs, 2024; Wiseman, 2024).

In other respects, however, President Biden significantly diverged from President Trump's other pro-business policies. Biden was an old school, pro-labour Democrat, distinct from Presidents Clinton and Obama and their centrist approach. He openly

2 Summarizing view that enhanced benefits were a disincentive for individuals to return to work; to encourage people to return to work, many states slashed Covid-era unemployment benefits.

supported the cause of labour unions and even walked on a picket line in support of the UAW during its nationwide strike. He also made appointments to the NLRB and the US Department of Labor to ensure both administrative entities would take a more favourable approach towards unions and workers (Nicholas, 2023; Press, 2024).

All these events contributed towards a favourable environment for strikes to take place in 2023. The labour shortage blunted the risk that employers would be easily able to permanently replace striking workers, even in low-skilled fields. There was money to be made in satisfying all the pent-up post-pandemic consumer demand, and employers could not afford to have their businesses idled by strikes. Consequently, employers showed an unusual willingness to go a long way towards meeting striking workers' wage demands as the price to keep their businesses up and running. This led to a positive loop of strikes being resolved on favourable terms towards workers and unions, justifying the decision to go out on strike in the first place and encouraging similar actions going forward. The turn from globalization, and focus on reindustrialization in key US sectors (favouring American businesses in the build back better programme), further lent an aura of security over many sectors of the US economy, emboldening unions to take the risk of industrial action. Finally, these events were presided over by the most pro-union president in decades, lending political support to unions that they had lacked since the 1970s.

The number of strikes declined slightly in 2024, as compared to 2023 (31 to 33), but still well above pre-pandemic levels (US DoL, 2025c). The drop in the number of workers involved in these strikes was more significant, however, going from 458,000 to 271,500 (US DoL, 2025b). Strike data for 2025 was not available at the time this article was completed, so it is not clear what effect the election of President Trump and his assumption of the office in January 2025 have had on the willingness of workers to walk off the job. Trump has been generally hostile to organized labour, and initially paralyzed the NLRB by firing a Biden-appointed board member before her term expired, thereby leaving the NLRB without a quorum and thus unable to act. More recently, he successfully appointed new, pro-business members of the NLRB, and it can be assumed that the newly constituted NLRB will reverse most of the pro-union decisions made by the Biden-era board. At the same time, Trump has pursued an anti-free trade agenda and promised to boost domestic manufacturing, which may give workers more confidence to risk a strike.

2. Legal regulation of the right to strike in the US

2.1. Overview

American law, unlike its European counterparts, does not provide a broad right to strike. Strikes do not receive federal constitutional protection. For private-sector employees, strikes are regulated by the NLRA. Nominally, there is a general right to strike for these employees, but this is undercut by the Supreme Court's decision allowing employers to permanently replace most striking workers. Some state constitutional provisions and a patchwork of federal and state legislation regulates strikes by public-sector employees. Generally, federal employees and most state employees do not have a right to strike. Exceptionally, some states grant certain categories of public employees (such as teachers) a limited right to strike.

This restrictive legal regime creates many challenges for unions and workers considering industrial action. The potential for job loss or fines or penalties for illegal strikes creates a chilling effect, where job action only occurs where the workers believe they have some economic leverage or otherwise feel compelled to take a stand on an important issue, notwithstanding the risk.

2.2. Constitutional issues

In most respects, the right to strike is not a constitutional issue in American law. The US Constitution does not expressly provide for a right to strike, nor has one been implicitly found to exist by the federal courts (US District Court for the District of Columbia, 1971).[3] There have been creative efforts by unions to carve out a constitutional right to strike, mostly focusing on the First and Thirteenth Amendments to the US Constitution, but these have been unsuccessful. The Thirteenth Amendment to the US Constitution prohibits involuntary servitude, and, rather uniquely in the Constitution, this applies to both government and private conduct (the US Constitution is designed to protect people from government action). In a number of different contexts, mostly involving public employees who were prohibited from striking by federal or state law, unions argued that forcing such employees to continue to work, when they desired to strike (or forcing them to return to work after staging an illegal strike), amounted to involuntary servitude. In rejecting these arguments, the courts have held that the Thirteenth Amendment acts as a prohibition against slavery. Government workers are merely prohibited from formal strike action. They receive fair wages for their work and at an individual level, may always choose to permanently resign their employment (California Court of Appeals, 1970; Missouri Supreme Court, 1970).

Arguments based on the First Amendment are focused exclusively on the right to strike for public employees, as this provision (and the rest of the Constitution) acts only as a restriction on state action. The First Amendment provides the rights to free speech, free association and free assembly. Unions have argued that this gives employees the right to join a labour union, i.e. they have the right to associate with a union in order to voice their concerns about working conditions and bargain with their employer. The US Supreme Court, in rejecting this contention, stated that:

3 Holding that there is no constitutional right to strike.

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. The government is prohibited from infringing upon these guarantees
> […] But the First Amendment is not a substitute for the national labour relations laws. […] The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it. (US Supreme Court, 1979) (emphasis added)

Thus, while the First Amendment allows public employees to join and associate with labour unions, there is no corresponding constitutional obligation upon the employer to bargain with (or even listen to) the union. As the First Amendment does not act as a labour law, and provides no right to bargain, it likewise does not provide any right to strike (Supreme Court of Arizona, 1987).[4]

While there is no US *federal* constitutional right to collectively bargain and to strike, several states in the US have placed labour rights in their respective state constitutions. In the US federal system, the US Constitution is the highest law of the land and applies to the states, superseding any conflicting state law. However, each state has its own constitution, which applies to subjects within the competence of the states. One of these competences is to regulate labour relations of certain employees excluded by federal labour law, including state and local public employees, agricultural workers and intrastate workers (i.e. private-sector employees working for employers not involved in interstate commerce, and who are excluded from coverage of the NLRA). Specifically, Florida, Hawaii, Missouri, New Jersey and New York provide for the right to organize and collectively bargain in their respective constitutions (Florida, 1968; Hawaii, 1978; Missouri, 1945; New Jersey, 1947; New York, 2001).

An original threshold problem with some of these state constitutional provisions was whether or not they were self-executing, i.e. whether they could immediately be enforced by the courts, or whether they needed enabling state legislative action in order to be effective. In Missouri, the state Supreme Court originally held that its collective bargaining provisions was not self-executing, but ultimately reversed this decision in 2012. In that case, the Missouri Supreme Court ordered a town to collectively bargain with a police union based on the state constitution, notwithstanding the absence of applicable legislation (Missouri Supreme Court, 2012). The Hawaii Supreme Court reached a similar conclusion under its state constitution. The NLRA

4 ‘[T]here is no First Amendment right to strike.’

was already in effect when Hawaii became a state with its own constitution, as were collective bargaining provisions in state constitutions in New York, New Jersey and Missouri. In this context, the constitutional clause granting the right to collective bargaining 'as defined by law' did not require any additional Hawaiian legislative action. Rather, it was a reference to the scope and meaning of the term 'collective bargaining' as already defined by the NLRA and these other state constitutions (Hawaii Supreme Court, 2002).

A further issue is whether a state constitutional right to strike can be necessarily inferred by a constitutional provision guaranteeing the right to organize and collectively bargain. None of the state constitutional clauses mentioned expressly provides for a right to strike. Indeed, the Florida Constitution states the opposite, indicating that public employees do *not* have the right to strike (Florida Constitution, 1968).[5] The New Jersey Supreme Court has clarified that, at least with respect to private employees, implicit within the state constitutional right to organize and bargain is the right to strike (NJ Supreme Court, 2009).

Considered as a whole, the right to strike is not constitutionally protected in the US, apart from the possibility that some state constitutional provisions may implicitly provide this right as an extension of the right to organize and bargain. Perhaps individual states, particularly those with high union density, will enact or further develop state constitutional causes to protect the right to strike. Unlike labour legislation, such constitutional provisions would be difficult to amend or delete in the future. Moreover, giving strikes constitutional protection would be a signal that it is an important right, on a par with other constitutional protections such as free speech.

2.3. Legislation

The right to strike, where it exists, is mostly a matter of legislative prerogative in the US. At the federal level, the NLRA gives most private-sector employees in the US the right to strike (US Congress, 1935). Important exceptions include supervisors, independent contractors and agricultural employees (US Congress, 1935). The Railway Labor Act (RLA), which covers airline and rail workers, likewise gives these employees a right to strike, albeit with many procedural conditions (LeRoy, 1995). In contrast, employees of the federal government are statutorily prohibited from going out on strike (Cholden-Brown, 2022). Whether or not state and local public-sector employees have a right to strike is determined by the states. In this respect, states have chosen one of two options: prohibiting all public employees from striking, or allowing some public employees in non-essential public services to strike, often under specific limitations and restrictions.

Within these broad categories, the relevant legislation does balance the right to strike with other important legislative and constitutional interests, such as education,

5 'Public employees shall not have the right to strike.'

public safety and even commerce. For private-sector employees covered under the NLRA, there is nominally a very broad right to strike. However, this is largely undercut by Supreme Court precedent permitting employers to permanently replace most striking workers (US Supreme Court, 1938). Technically, there is a slight distinction between being 'permanently replaced' and being fired, but this is a nuance only a lawyer would love (namely, a permanently replaced striker has a right to reinstatement or be placed on a preferential hiring list if their job has already been filled, if they unconditionally offer to return to work) (Reddy, 2021, pp. 436–437). An exception to this principle is when the workers are striking against the illegal conduct of the employer, rather than for purely economic reasons. In that case, the striking workers would have the right to return to work at the conclusion of the strike (Moberly, 2011, pp. 138–139). Even in that instance, it is often difficult for the union to prove its true motivation for the strike, and the issue can be tied up in years of litigation. In the meantime, the workers may be without a job.

There are also various restrictions on the manner in which the strike is conducted. The strike must be total – a complete cessation of work for a block of time. Partial or intermittent strikes are prohibited. Thus employees may not accept some tasks and refuse others under the guise of a strike (US Court of Appeals, DC Circuit, 2015).[6] Similarly, the strike cannot be conducted every other day, or every other Saturday (US Court of Appeals, 8th Circuit, 1999). The timing of the strike is also regulated, by contract and by statute. Most collective bargaining agreements contain a no-strike clause, where the union pledges not to strike for the duration of the agreement (US Supreme Court, 1970);. Indeed, courts have even inferred such a no-strike clause even when the agreement does not expressly contain one (US Supreme Court, 1976, p. 407). The NLRA also requires that unions give 60 days' notice of a strike occurring upon the expiration of a collective bargaining agreement, and as well as notice to relevant federal and state labour mediation bodies (US Congress, 1947).

Healthcare workers have additional, special notice requirements under Section 8(g) of the NLRA. They must give ten days' notice before commencing a strike against a healthcare institution (US Congress, 1974),. This was a legislative compromise to both preserve the right to strike, but also to ensure patient safety. With advance notice, hospitals had the opportunity to reschedule elective procedures and transfer patients who were in need of critical care. In essence, this compromise has been effective – there are no reports of any patient dying as a result of a properly noticed strike by healthcare workers (Davies, 2005, p. 1821). They also must give 90 days' notice of a strike at the expiration of a collective bargaining agreement, as opposed to the usual 60 days' notice required by other workers (US Congress, 1974).

The Taft–Hartley amendments to the NLRA, enacted in 1947, prohibiting secondary boycotts, made the general strike illegal under American labour law. The un-

6 'A strike is protected under the NLRA only if it is a "complete" strike.'

ion must have a primary dispute with the employer in order to lawfully go out on strike (Duff, 2014). Thus the UAW may call a strike against Ford, the employer with which the autoworkers have a primary labour dispute. If the Communications Workers of America (CWA) called a strike against AT&T, a telecommunications company, in support of the UAW, it would be an illegal secondary boycott. The CWA has no primary dispute with Ford.

Certain harmful conduct related to the strike may also be restricted. The Norris–LaGuardia Act (US Congress, 1932) goes so far as to prohibit courts from enjoining or restraining a lawful strike, but even this law contains exceptions which permit courts to limit picketing and other behaviour when the strike has turned violent (US Congress, 1932; US District Court for the Central District of California, 2020). Likewise, the union may be liable for damages when it destroys the employer's property in conjunction with the strike (US Supreme Court, 2023).

For railway and airline workers, the RLA guarantees the right to strike, but places numerous procedural obstacles upon the union before the strike may commence (LeRoy, 1995, p. 3). Under the RLA, labour disputes are divided into two categories, major and minor. Minor disputes are resolved by binding arbitration, and involve the interpretation of language in an existing collective bargaining agreement. A union cannot call a strike over a minor dispute (US District Court for the Northern District of Illinois, 2024). Major disputes involve larger issues connected with wages, hours and other working conditions. Unions have the right to strike over a major dispute, but only after a lengthy statutory 'cooling off' period and efforts at mediation (US Court of Appeals for the 5th Circuit, 2020, pp. 334–335). Even after all these procedures are exhausted, Congress may pass special legislation to enable the president of the U.S to impose final contract provisions (and thereby prohibit a strike) if he or she concludes that the strike poses a threat to the US economy (Garver, 2022). These restrictions on the right to strike represent a balance between it and the harm and inconvenience a transportation strike might impose upon the public and the overall economy.

Various states have different laws on whether state and local public employees have a right to strike. Most states do not permit any public employee strikes, and therefore have made the policy choice that a strike's harm to the public outweighs any notion of a right to strike. A number of other states grant a limited right to strike to some public employees, primarily based on whether they perform essential services or not. Police, firefighters and prison guards, fall on the side of essential services, and do not have a right to strike. Sometimes, in lieu of the right to strike, they are given the opportunity to submit their contract demands to interest arbitration. In this procedure, an arbitrator determines the terms of a collective bargaining agreement between (for example) a police union and a city, often based on comparative data (what compensation do police offers receive in comparable cities) (Summers, 2003, p. 450).

Teachers, in contrast, may or may not be granted the right to strike, depending upon the state's policy judgement. The education of children can be considered an essential public service, and in some states even a constitutional right. Where states have allowed teachers the right to strike, there are normally strict safeguards in place to ensure that the children will still receive their education. In Pennsylvania, for example, a school year must include a minimum of 180 days in the classroom; teachers may strike, subject to the students' ability to complete these number of classroom days. A ten-day strike may result in the school year being extended by ten days into the summer, which would be acceptable. However, a much longer strike could be illegal, if there was not enough time to make up the school days lost to the strike (Pennsylvania Commonwealth Court, 2009).

3. Threading the needle: How unions and workers can still use strikes and concerted action to secure better working conditions

3.1. Strike over high-profile issues, like the use of artificial intelligence

A significant challenge is represented by artificial intelligence which is significantly impacting the right to strike, especially in the USA. A key strike in 2023 involving actors and writers pitted against Hollywood studios and streaming giants should give us reason to reconsider this battle or zero-sum game, of sorts, between essential services and the right to strike. Instead, we should see the issue quite differently. The right to strike is necessary to *preserve* essential services, in the broadest sense of that term. The ability of humankind to continue to work and be gainfully employed is essential to our existence. As explained below, the actors and writers' strike successfully preserved creative work in the face of a threat to replace these jobs by AI. This success demonstrated that unions, and strikes, have a key role in our future in preserving some of our essential characteristics (the ability to engage in meaningful work) in the face of new and sometimes poorly regulated new technologies.

Some of the highest profile strikes in the US over the course of 2023–2024 involved the Screen Actors Guild (SGA) and the Writers Guild of America (WGA) against the main employers in the American motion picture industry. In one sense, they were considered high-profile because they involved well-known Hollywood actors and actresses and the key film production and streaming companies, such as Netflix and Amazon, which were all recognizable household names. But in another, even more important sense, these strikes struck a chord with the public (in the US and internationally) because of what the unions were striking about. A major issue for both the SAG and WGA was the film companies' use of artificial intelligence (AI) to replace actors and screenwriters. For many people, even outside the entertainment industry, this represented an existential threat to work itself, going beyond the previous threats posed by various types of automation (Wilkinson, 2023).

The release of ChatGPT to the general public showed the vast potential of AI for creative writing. Not only could ChatGPT provide short answers to standard internet queries, but it could also write an essay, book or play, sometimes of reasonable quality. This potential was not lost on Hollywood. With further improvements, it was not difficult to imagine that ChatGPT or its successor could generate huge quantities of screenplays and scripts for use in film – for free, or at least for far less than the cost of paying a union screenwriter (Kinder, 2024).

Actors, too, were threatened by the use of new digital imaging and voice sampling technology. Digital avatars of well-known actors could be generated by AI, and could be used on an unlimited basis in future films and series – even after the actor him – or herself was dead (Catanzaro, 2023, p. 4; Curren, 2023, pp. 160–161).

SAG and WGA recognized that AI had the capacity to drastically undermine the future employment opportunities of actors and screenwriters, and sought appropriate protections in its new collective bargaining agreement with the studios. When the studios refused, this became a major issue in the strike. Another big issue was restructuring the manner in which residual payments were paid to actors and writers. Residuals had been an important source of income for actors and writers, particularly where they were involved in a hit television programme which was rerun in syndication for many years after the original run of the show ended. These payments were based on the programmes ratings (i.e. viewership), which determined the advertising rates for commercials shown during these programmes. However, with the rise of streaming, residuals were extremely curtailed. Programmes run on streaming services did not have ratings, in the usual sense. Instead, the streaming services kept internal records as to how many people viewed these shows. Since there were no ratings, there were no residual payments issued to actors and writers involved in these streamed programmes (Morrison, 2024).

The SAG strike lasted from July to November 2023, and the WGA strike from May to September 2023. Both strikes were largely successful. The studios agreed in the respective collective bargaining agreements that followed to limit the use of AI. The studios had to obtain the express, written consent of actors before using their digital image or voice; advance 48 hour notice must be provided by the studios of their intent to use digital replicas or synthetic performers; compensation for their use must be negotiated; and actors should be paid their normal rate for scenes using their digital replicas, to the extent they lost work as a result of their use, among other provisions (Patten, 2023). Likewise, the writers obtained concessions, whereby the studies agreed to limit the use of AI in screenwriting. Writers would receive notice about AI content in any written materials provided to them by the studios; AI cannot not be source material for scripts; cannot be a credited writer, and cannot write or rewrite literary material. These points were key provisions, since a film must have a credited writer and must be based on source material. Consequently, AI cannot replace union screenwriters. Writers, moreover, cannot be compelled to use AI as a supplement to their own writing. The studios retained the right to use scripts owned by them to train AI systems, though the writers did not waive their right to challenge this practice through other legal means (i.e. copyright infringement clams) (Coyle, 2023; Wilkinson, 2023). Finally, both agreements revised the manner in which residuals were paid from streamed shows, ensuring that actors and writers received reasonable bonuses for their work on shows that had large numbers of viewers (Morrison, 2024).

For the labour movement in general, the successful SAG and WGA strikes have many implications. First, unions and workers have the opportunity to control their own fate. AI is a dramatic form of automation, with the potential to eliminate jobs on a scale never seen before. It is also very fast developing. In these circumstances, working people are left with two options: to encourage their legislatures to regulate AI to provide necessary protections, and/or to engage in self-help. Self-help may have many different forms, but a major one is strike action coordinated by unions. The workers and unions accomplished this feat on their own, without the need to wait for government intervention, in an environment in which many observers felt that AI would inevitably lead to job loss. This is proof of the continued power and relevance of the strike. A major advantage of achieving these protections through a strike is that the terms of the settlement are directly negotiated by the unions in the interests of the workers they represent. They are not the result of legislative compromise, influenced and possibly diluted by the interests of other stakeholders.

Second, a strike settlement can be faster than a legislative solution. While too long for the workers involved, the SAG and WGA strikes lasted approximately five to six months before a tentative settlement was reached. By legislative standards, however, this is extraordinarily quick. As AI continues to develop and improve, waiting several years for legislation that may already be obsolete is not a viable option.

Finally, the success of the SAG and WGA strikes gives society notice and hope that what unions do is in the public interest. Historically, authoritative regimes have attacked and tried to eliminate independent trade unions as part of their assault on democracy; these unions were one of the last obstacles to the success of these plans. Now, the unbridled and unrestricted use of AI threatens the future of work and the structure of society itself, and unions again find themselves on the barricades. The public has taken note of what unions have done, and may give them increased support and backing to defend our common interests.

3.2. Push for gig workers and independent contractors to have the right to bargain and engage in concerted activity

Independent contractors are excluded from the definition of ‘employee’ within the meaning of the NLRA. Therefore they do not have the right to join unions, collectively bargain and strike. Theoretically, states could step in and provide legislative protection for independent contractors under state labour law. Farmworkers, for example, are also excluded from the protections offered by the NLRA, but states such as California have filled this gap by enacting their own agricultural labour relations laws that provide them with similar rights. However, even if states where willing to take these steps (and some are, as explained below), there is an additional obstacle – antitrust law. Under antitrust principles, individual business owners are not permitted to agree to set minimum prices. An independent contractor would be considered a small business, and if they colluded to set a minimum wage (i.e. a price for service), this would run foul of US antitrust law. Just as hairdressers could not band together and set a minimum price for a haircut, independent contractors such as Uber drivers could not do so with respect to minimum ride-share fees.

This is not necessarily an insurmountable obstacle. An exception exists in antitrust law whereby a state under certain conditions may regulate an activity, even though the regulation may have an anticompetitive effect. This exception was at issue in *Chamber of Com. of the US v. City of Seattle* (US Court of Appeals for the 9th Circuit, 2018). In that case, Seattle relied on a state law which permitted municipalities to regulate some transportation issues, in order to pass an ordinance that permitted platform drivers (independent contractors) to organize unions and collectively bargain. Even to the extent that this amounted to permitting anticompetitive behaviour, Seattle argued that it was allowed under the state action exception. On appeal, however, the Court ruled that this exception did not apply; specifically, the court found that the state law at issue generally dealt with transportation issues, and did not explicitly authorize Seattle to regulate collective bargaining for platform drivers. Moreover, the state was not significantly involved in overseeing the law at the municipal level. Since the exception did not apply, the Seattle ordinance violated and was preempted by antitrust law (US Court of Appeals for the 9th Circuit, 2018; Delfino & Szymanski, 2024).

Perhaps learning the lessons of the *City of Seattle* case, California recently passed the Transportation Network Company Drivers Labor Relations Act, AB 1340, which went into effect on 1 January 2026. The law allows certain ride-share drivers (i.e. those with a minimum number of weekly rides) to join a union, collectively bargain and engage in concerted activity. Such drivers are considered independent contractors under California law. AB 1340 is innovative in the American context, as it envisages sectoral bargaining between the drivers and the ride-sharing platforms. The platforms must supply information on all drivers who are eligible to join a union to the California Public Employment Relations Board (PERB) (California Legislature, 2025). If a union receives support from 10% of the eligible drivers, an election is conducted. If the union receives support from 30% of eligible drivers, it becomes the certified bargaining representative for all the ride-share drivers working for California ride-share platforms and obtains the right to negotiate a collective bargaining agreement on their behalf. There are additional provisions which allow mediation and even for interest arbitration should negotiations reach an impasse (California Legislature, 2025).

> AB 1340 specifically states that:
> The benefit to the state's economy from negotiated agreements between transportation network company drivers and the transportation network companies, including where those agreements are multiparty, sectoral agreements, outweighs the anticompetitive effect of those agreements. It is the state's intent that the state action antitrust exemption to the application of federal and state antitrust laws shall apply to the activities of transportation network company drivers, transportation network company driver organizations, bargaining representatives for transportation network company drivers, and transportation network companies when they are participating in negotiations and other activities as authorized or regulated by this chapter (California Legislature, 2025).

Distinct from the Seattle ordinance, AB 1340 is a state law (and not a municipal ordinance) that expressly is intended to qualify for the state action exemption under antitrust law. On its face, this would appear to directly address the concerns raised by the court in the *City of Seattle* case. Moreover, on a practical level, the main California ride-share companies – Uber and Lyft – supported the passage of AB 1340, thereby making it unlikely that they would subsequently challenge the law in court on antitrust grounds (Romero, 2025).[7]

Nevertheless, some antitrust lawyers have raised doubts that AB 1340 satisfied the state action antitrust exception, as articulated in *City of Seattle*. The thrust of this argument is that the state is not itself engaged in regulating activity in AB 1340 but is simply permitting private actors (unions and ride-sharing firms) to engage in anticompetitive behaviour (Gott, 2025a; Gott, 2025b). This argument appears to be misplaced. The court in *City of Seattle* did not make this point, but instead focused on the lack of specific intent in the relevant state law to regulate collective bargaining and the state's lack of supervision of the application of the law by the city. As noted above, both of these concerns were directly addressed by AB 1340: it is a state law regulating ride-share driver bargaining, and it is enforced by the PERB (a state agency) with specific supervisory guidelines by the state as specified in the law.

Approximately 800,000 ride-share drivers are expected to be covered by AB 1340, who would gain the right to unionize and collectively bargain (Fitzgerald, 2025). The sectoral bargaining structure of the Act, which allows 30% of the eligible drivers to authorize a union to bargain on behalf of all eligible drivers, makes it somewhat easier to organize than the traditional NLRB model (requiring a 50% + 1 majority vote). The right to strike is not expressly granted by AB 1340, although the right to engage in concerted activities (California Legislature, 2025) would be reasonably interpreted

7 Explaining that in exchange for their support of AB 1340, the ride-share companies received relief from maintaining high levels of insurance for their drivers' cars.

to convey that right. In any case, given the interest arbitration provisions in AB 1340, it is most likely that problems in reaching an agreement would in the end by resolved by an arbitrator. Interest arbitration has generally been a favourable process for public employees in safety sensitive positions, such as police and firefighters, who cannot strike under state law (Su et al., 2022).

To the extent that the gig economy remains stable or expands (due to developments in AI and the shift to working online from home or another remote location), AB 1340 is an important legislative development. It empowers independent contractors, who normally would not be able to organize, to form a union and collectively bargain for a fair contract. These workers do not need to wait for further legislation, which may never come, or beneficial court decisions to obtain and defend basic rights at work. With a union and a favourable collective bargaining law (with sectoral bargaining and interest arbitration), the workers can obtain these rights directly themselves (Delfino & Szymanski, 2024; Romero, 2025).[8]

3.3. Stand up for human rights and values

Under American law, there has long been a dichotomy between the general right to protest and demonstrate under free speech/First Amendment principles and the rights of workers to strike and engage in boycotts and protests. The First Amendment offers robust protections to demonstrators but, apart from some application to public employees, no support for employees and unions in the private sector. Instead, their rights of expression and to strike are governed by restrictive labour law principles outlined in section II, infra. These labour law rights stem from Section 7 of the NLRA, which provide a right to strike and to engage in concerted activity for mutual aid or protection. These rights, however, are connected to the union or employees' relationship with their primary employer, i.e. the employer with whom the union and employees have a dispute. They do not amount to a general right of free expression outside of this specific context.

With respect to union activity, this point was made clear by the Supreme Court in *International Longshoremen's Association v. Allied International* (US Supreme Court, 1982). In that case, a dockworkers' union refused to unload shipments originating from the Soviet Union at the main port in Jacksonville, Florida. The union did so as a protest against various human rights violations committed by the Soviet Union. The primary employer of the union at the port filed unfair labour practices charges against the union, alleging that the work stoppage amounted to an illegal secondary boycott under Section 8(b)(4) of the NLRA. The employer argued that the union's main dispute was with the Soviet Union, the source of the cargo that the union refused to unload at the port, and not with the employer itself. The union tried

8 Noting that Massachusetts and New York City have also enacted laws granting ride-share drivers the right to collectively bargain.

to reframe the dispute as one with the employer rather than with the Soviet Union – the union was protesting the *employer's* decision to handle cargo from a country with such a poor human rights record. The Supreme Court sided with the employer, however, concluding that the union's industrial action had a secondary objective, to protest against the Soviet Union. The primary employer was not responsible for the human rights record of the Soviet Union. Consequently, the work stoppage was an illegal secondary boycott that violated the NLRA.

While this decision has received criticism (Ramahi, 2019), it remains good law. It severely limits a union's ability to actively protest human rights violations committed by entities other than the primary employer with whom the union has (or seeks) a relationship. This is particularly relevant in today's times, where Russia's invasion of Ukraine and Israel's actions in Gaza (among other international crises) have troubled many Americans. They would like to express their displeasure in various forums, including at work, particularly where their employer has a relationship with one of these actors (for example, the Russian state or the Israeli military). In the unionized workplace, their union cannot take any concrete steps to voice its members' concerns. To be sure, it is not illegal under the NLRA for the union, without more, to generally voice support for a particular cause, like divestment from the Israeli firms doing business in the West Bank (Ramahi, 2019, p. 153),. But any industrial action or boycott taken by the union in support of these views would be prohibited.

Non-union employees have sometimes spontaneously engaged in action at work, in the form of a protest or work stoppage, to voice their concerns on important social issues. The NLRA does offer both union and non-union employees protection to engage in concerted activities for mutual aid or protection (US Congress, 1935);. The key requirements are that the protest be collective in nature (by a group of employees or dealing with an issue that affects more than one employee) and that it be related to mutual support at work. In the classic example, a group of non-union employees who walked off the job in response to excessively cold temperatures at work were found to have engaged in protected concerted activity (Judgment of the US Supreme Court, 1962; LeClercq, 2024, p. 243). With regard to protests about social or human rights issues, the question would be whether they are collective and are connected to working conditions at the employer to determine if they were protected or not.

Actions taken in support of the #MeToo movement (protesting sexual harassment) and Black Lives Matter (BLM, protesting racial discrimination) are more likely to be found to be protected concerted activity. This is especially where the employee is protesting their own employer's culture of sexual harassment or racial discrimination, or otherwise is attempting to eliminate such behaviour at their workplace. This is a collective issue and directly impacts working conditions (i.e. to be free from harassment or discrimination at work) (Chhoy & Pearce, 2024, pp. 390–391; Tippett, 2018, pp. 251–252; US Court of Appeals for the 8th Circuit, 2024).[9]

Protests connected to human rights abuses in Gaza, over the employer's connection to Israeli firms or the Israeli government, or other abstract human rights issues are a different matter, however. Under a traditional analysis, these questions do not directly impact the employees' wages, hours or terms of conditions of employment. Moreover, American labour law has always given employers huge leeway in making entrepreneurial decisions, such as the nature of the business model and with whom the company does business. These decisions are the exclusive domain of the employer. Moreover, even concerted activity which results in certain kinds of product disparagement may lose protection under the NLRA. Under this standard, Google was within its rights to fire employees who walked off the job in protest at Google's support of the Israeli military (Beydoun, 2025, p. 82; Bresee, 2024; Smith & Crain, 2025, pp. 1517–1519; Stabbert & Ivy, 2025).[10]

While this is the current state of US labour law, in many ways it is archaic when it is applied to social and human rights protests, and it should change. More and more companies connect their brand to certain values. These values could include sustainability, protecting the environment, or even safeguarding human rights in their supply chains. These messages are not only conveyed to consumers and clients, but also to current and prospective employees (Smith & Crain, 2025, pp. 1520–1521). As a result, employees may choose to remain at a given employer, or accept a new position there, on the basis of the values that the employer has professed. When the employer changes its values, or engages in conduct that is contrary to the values it has expressed, this does have an impact on employee working conditions. Along with wages and hours, the employer's values are part and parcel of the employee's working environment. As such, employees (and where applicable, the unions that represent them) should have the right to strike, protest or engage in industrial action when these values are jettisoned by the employer.

Until the law on this point changes, unions would do well to support those social movements that are directly connected to working conditions at their members' employers, such as #MeToo, BLM and whatever the next movement may be. In the case of #MeToo and BLM, the protests started from below, by individual workers, and were only later supported by the labour movement. By getting out in front of these is-

9 The Court of Appeals avoided reaching a decision on whether a worker placing a BLM symbol on his apron at work was concerted activity; even if it was, the Court found that special circumstances existed that permitted the employer to require that the employee remove the symbol.

10 Citing possibility of Pennsylvania employees of losing their jobs for voicing support of Gaza on Instagram.

sues, the unions will be in a better position to support them and also, in turn, be supported by the general public for taking a stand (Szymanski, 2021).[11]

3.4. Engage in wildcat and illegal strikes when necessary

Thus far, union and employee strikes and protests have been examined through the prism of existing US labour law. There are more radical possibilities to consider, however. The president of the AFL-CIO (the main body of American trade unions) in the 1980s, Lane Kirkland, famously stated that unions would be better off with no labour law (UPI, 1984). labour law was so restrictive, it served to shackle the actions of labour unions more than protect them and their members. He may have had a point.

In the late 19th and early 20th centuries, organized labour made most of their gains in spite of the law, and not because of it. Labour relations were governed by civil law, which disfavoured unions, and which in any case was interpreted in a hostile manner by the courts at the time. Unions' success in adding members and convincing employers to enter into collective bargaining agreements was only due to their own efforts and ultimately, public support (Reddy, 2021, pp. 430–433). By 1935, the Wagner Act (the predecessor to the NLRA) stabilized labour relations and brought the organizing and collective bargaining activities within a favourable legal framework. Ultimately, stabilization lead to stagnation and in recent decades, decline.

More recently, American workers revived the concept of the illegal strike on a large scale and achieve significant success. In 2018–2019, teachers in a number of southern states in the US walked off the job, seeking higher pay and better working conditions. Significantly, many of these states did not give teachers the right to collectively bargain, and all of them prohibited teacher strikes. Notwithstanding these legal restrictions, the teachers nevertheless decided to go out on strike. In places where they were members of a union, the union expressly disavowed the strike to avoid legal liability (this is known as a wildcat strike, where the workers decide to strike without the permission of the union). Initially, the strikers were threatened with fines and the loss of their jobs. As time passed, however, the striking teachers received strong support from their communities and above all, from the parents of their students. The parents agreed that the teachers should have a respectable salary, so as to ensure that qualified people were educating their children. Moreover, they had an interest in the strike ending so that their kids could return to school, for educational purposes but also to ease child care problems that arose as a result of classes being cancelled. In the end, the public pressured the school districts and other state and local officials to settle the strike on terms favourable to the teachers (Reddy, 2021, p. 454; Szymanski, 2022).

One should not overstate the relevance of union and worker successes over 100 years ago and in the instance of wildcat teacher strikes in 2018. The legal framework in the US makes strikes difficult and in many situations there is a big risk of strikers

11 Making the point with respect to #MeToo.

losing their jobs or suffering financial harm as a result of an ill-considered industrial action. Still, there are useful lessons. Where workers are pushed to the brink, they need to take action, irrespective of unfavourable labour law. In a scenario where the worst fears of AI are realized, and certain industries face job losses of 70–80%, unions and workers do not have much to lose, and they need to strike to have any chance of saving their jobs. Strikes which also touch on an issue that the public supports also have a greater possibility of success. Again, this may be about the excesses of AI, but also sexual harassment or equal treatment. At the point of no return, unions and workers must make the decision not to be silent (Reddy, 2021, p. 448).[12]

Conclusions

The paradox of American labour relations is that unions are at the brink of oblivion, and at the same time represent the best hope for improving the average American's conditions at work at a time of massive change. This paper is an attempt at squaring that circle. There is strong evidence that workers want higher pay, benefits, job security and a more favourable work environment, and are willing to risk going out on strike to achieve these goals. The immediate post-pandemic period showed an almost 20-year high in the number of major strikes in the US. Thi s surge has taken place notwithstanding the extremely restricting legal regime applicable to strikes and industrial action. There is no federal constitutional right to strike. Legislative protections contained in the NLRA are limited. While there is a broad formal right to strike, strikers may be permanently replaced in most instances, and the nature of strikes are themselves restricted. Most significantly, the general strike (termed a secondary boycott in US labour law) is prohibited: unions may only take action against a primary employer with which they have a dispute.

In this context, where there is a pent-up demand to improve working conditions and even to strike, but strikes themselves are restricted and may put workers and unions in legal jeopardy, unions are placed in a difficult position. But there is a path forward. First, unions should engage in targeted work stoppages over high-profile issues that resonate with the American public, just as SAG-AFTRA and WGA did in their strike over the use of AI in the film industry. This will force change by the employers themselves and also push legislatures to address the issue. At the same time, it will improve unions' public image and garner them more support. Second, gig workers and

12 Posing this excellent question: 'For those who believe that a stronger labor movement is needed to counterbalance the concentrations of economic and political power in this new Gilded Age, one important question is not just whether the law is bad (it is), but whether strikes can be effective nonetheless. If labor activists are correct that there is "no such thing" as an illegal strike, just an unsuccessful strike, the question follows: what makes a strike successful enough, under current conditions, to transcend legal constraints?'

independent contractors should not be forgotten. They represent a significant and expanding segment of the workforce. The key is to promote legislation in sympathetic states that would allow them to organize and collectively bargain and even strike. This was recently accomplished in California with AB 1340, which allowed ride-share drivers to organize and bargain on a sectoral level with Uber, Lyft and similar companies. As a result of this law, 800,000 such drivers are now eligible to be unionized. Third, unions and workers should embrace social and human rights issues and even strike and protest over these issues. There are legal obstacles here, particularly with human rights issues connected with international events (Gaza) that more tangentially impact working conditions. However, it is argued herein that an employer's values, or lack thereof, actually should constitute a condition of employment, especially since employers often shape their identity around their alleged adherence to these values (sustainability, respect for human rights, etc.). As such it should be the legitimate subject and cause of a work stoppage. Again, unions need to take the lead on these issues, instead of being reactive to them (Huq, 2025).[13] Finally, where all else fails, unions and workers should consider unauthorized and even illegal strikes to protect their interests. In these ways, unions may chart a path between Scylla and Charybdis, reclaiming their relevance and acting as a vanguard to protect American workers.

REFERENCES

Beydoun, K. (2025). Playing politics: Social media, censorship, and speech gamification. *Emory L. J.*, *75*, 59–134.

Bhattarai, A. (2022, 26 May). Davos elite reassess globalization amid turmoil of pandemic and war. *The Washington Post*. https://www.washingtonpost.com/business/2022/05/26/davos-globalization-covid-war/

Bresee, A. (2024). The consumer's choice to boycott. *Seattle U. L. Rev.*, *48*, 185–202.

California Legislature. (2025). Transportation Network Company Drivers Labor Relations Act, AB 1340.

Catanzaro, Z. (2023). Beyond incentives: Copyright in the age of algorithmic production. *N. Y. U. J. of Intell. Prop. & Ent. Law*, *13*, 1–55.

Chhoy, M., & Pearce, M. G. (2024). Worker outbursts, workplace rules and a resurgence of worker voice. *Geo. J. Poverty Law & Policy*, *31*, 355–392.

Cholden-Brown, L. (2022). Unionizing in the chambers of government. *Rich. Pub. Int. L. Rev.*, *25*, 101–129.

13 Providing the following poignant quote from the largely Muslim New York Taxi Workers Alliance, in the context of explaining their opposition to the war in Gaza, 'Labor organizations have built our movements based on solidarity and the basic struggle for a just, humane world. Unions are called to action in times of darkness and despair, for the solidarity of our collective humanity'.

Coyle, J. (2023, 27 September). *In Hollywood writers' battle against AI, humans win (for now)*. AP News. https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence39ab-72582c3a15f77510c9c30a45ffc8

Curren, A. (2023). Digital replicas: Harm caused by actors' digital twins and hope provided by the right of publicity. *Tex. L. Rev.*, *102*, 155–183.

Davies, R. (2005). Strike season: Protecting labor–management conflict in the age of terror. *Geo. L. J.*, *93*, 1783–1833.

Delfino, M., & Szymanski, C. (2024). Platform work and trade union participation: European and American perspectives. *Italian Law Journal*, *10*(1–2), 73–97.

Duff, M. (2014). Alt-labor, secondary boycotts, and toward a labor organization bargain. *Cath. U. L. Rev.*, *63*, 837–877.

Fitzgerald, L. (2025, 23 December). *California gig drivers gear up for union rights in 2026*. Jefferson Public Radio. https://www.ijpr.org/labor-employment/2025–12-23/california-gig-drivers-gear-up-for-union-rights-in-2026

Florida. (1968). Constitution.

Frankford, D. (2022). How COVID-19 has infected the totality of life (including law). *Rutgers U. L. Rev.*, *74*, 973–1035.

Garver, R. (2022, 22 December). *Biden signs bill averting strike, to rail unions' dismay*. Voice of America. https://www.voanews.com/a/biden-signs-bill-to-block-us-railroad-strike-/6860131.html

Gott, A. (2025, 8 October). *Can states grant federal antitrust immunity? Part 1: Why California's new gig-driver law won't survive Parker*. The Antitrust Attorney Blog. https://www.theantitrustattorney.com/can-states-grant-federal-antitrust-immunity-part-1-why-californias-new-gig-driver-law-wont-survive-parker/

Gott, A. (2025, 20 October). *Can states grant federal antitrust immunity? Part 2: The Sherman Act vs. Sacramento: Why AB 1340 is preempted by federal law*. The Antitrust Attorney Blog. https://www.theantitrustattorney.com/can-states-grant-federal-antitrust-immunity-part-2-the-sherman-act-vs-sacramento-why-ab-1340-is-preempted-by-federal-law/

Hawaii. (1978). Constitution.

Hull, S. (2023). Work disguised as leisure, leisure disguised as work: The roots and consequences of the bifurcated economy. *Yale J. L. & Human.*, *34*, 303–363.

Huq, C. (2025). Muslim American workers, faith and labor organizing. *St. Louis L. J.*, *69*, 299–330.

Jacobs, J. (2024, 22 July). *The rebirth of American manufacturing: Growth and innovation*. BlackRock. https://www.blackrock.com/us/financial-professionals/insights/exploring-us-manufacturing

Judgment of the California Court of Appeals of 1970 on the case of *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers*, 13 Cal. App. 3d 863, 867 (1970).

Judgment of the Pennsylvania Commonwealth Court of 2009 on the case of *Marion Ctr. Area Sch. Dist. v. Marion Ctr. Area Educ. Ass'n*, 982 A.2d 1041 (Pa. Cmwth. 2009).

Judgment of the Supreme Court of Arizona of 1987 on the case of *Arizona Farmworkers Union v. Whitewing Ranch Management*, 154 Ariz. 525, 532 (1987).

Judgment of the Supreme Court of Hawaii of 2002 on the case of *United Pub. Workers, AFSME, Local 646 v. Yogi*, 101 Haw. 46 (2002).

Judgment of the Supreme Court of Kentucky of 1970 on the case of *Jefferson County Teachers Asso. v. Board of Education*, 463 S.W.2d 627, 630 (Ky. 1970).

Judgment of the Supreme Court of Missouri of 2012 on the case of *E. Mo. Coalition of Police v. City of Chesterfield*, 386 S.W.3d 755 (Mo. 2012).

Judgment of the Supreme Court of New Jersey of 2009 on the case of *Lourdes Medical Center of Burlington County v. Board of Review*, 197 N.J. 339, 364 n. 15 (2009).

Judgment of the US Court of Appeals for the 5th Circuit of 2020 on the case of *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 973 F.3d 326, 334–335 (5th Cir. 2020).

Judgment of the US Court of Appeals for the 8th Circuit of 1989 on the case of *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989).

Judgment of the US Court of Appeals for the 8th Circuit of 2025 on the case of *Home Depot U.S.A., Inc. v. NLRB*, 158 F.4th 910 (8th Cir. 2025).

Judgment of the US Court of Appeals for the 9th Circuit of 2018 on the case of *Chamber of Com. of the US v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

Judgment of the US Court of Appeals for the District of Columbia Circuit of 2015 on the case of *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1140 (D.C. Cir. 2015).

Judgment of the US District Court for the Central District of California of 2020 on the case of *William Morris Endeavor Entm't, LLC v. Writers Guild of Am., West, Inc.*, 2020 U.S. Dist. LEXIS 247744, *14–15 (C.D.Ca. 2020).

Judgment of the US District Court for the District of Columbia of 1971 on the case of *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971).

Judgment of the US District Court for the Northern District of Illinois of 2024 on the case of *Belt Ry. Co. of Chi. v. Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers, Transp. Div.*, 2024 U.S. Dist. LEXIS 53681, *16–17 (N.D. Ill. 2024).

Judgment of the US Supreme Court of 1938 on the case of *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938).

Judgment of the US Supreme Court of 1962 on the case of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Judgment of the US Supreme Court of 1970 on the case of *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970).

Judgment of the US Supreme Court of 1976 on the case of *Buffalo Forge Co. v. United Steelworkers of America*, 428 US 397, 407 (1976).

Judgment of the US Supreme Court of 1979 on the case of *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979).

Judgment of the US Supreme Court of 1982 on the case of *Longshoremen's Association v. Allied International*, 456 US 212, 226 (1982).

Judgment of the US Supreme Court of 2023 on the case of *Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Loc. Union no. 174*, 598 U.S. 771 (2023).

Kinder, M. (2024, 12 April). *Hollywood writers went on strike to protect their livelihoods from generative AI. Their remarkable victory matters for all workers*. Brookings. https://www.brookings.edu/articles/hollywood-writers-went-on-strike-to-protect-their-livelihoods-from-generative-ai-their-remarkable-victory-matters-for-all-workers/

LeClercq, D. (2024). Labor strife and peace. *U. C. Irvine L. Rev.*, *15*, 216–271.

LeRoy, M. (1995). Employer treatment of permanently replaced strikers, 1935–1991: Public policy implications. *Yale L. & Pol'y Rev.*, *13*, 1–43.

Missouri. (1945). Constitution.

Moberly, M. (2001). Striking a happy medium: The conversion of unfair labor practice strikes to economic strikes. *Berkeley J. Emp. & Lab. L.*, *22*, 131–173.

Morrison, S. (2024). What's the deal with residuals? *Los Angeles Lawyer*, *47*, 32–48.

New Jersey. (1947). Constitution.

New York. (2001). Constitution.

Nicholas, P. (2023, 26 September). *Biden makes history by joining striking autoworkers on the picket line*. NBC News. https://www.nbcnews.com/politics/white-house/biden-makes-history-striking-auto-workers-picket-line-rcna117348

Patten, D. (2023, 12 November). *Read full SAG-AFTRA deal summary released ahead of ratification vote; Analysis of AI & streaming fund*. Deadline. https://deadline.com/2023/11/sag-aftra-deal-summary-released-read-it-1235600852/

Perdue, A. (2023). Caregiver accommodation. *Berkeley J. Emp. & Lab. L.*, *44*, 207–280.

Press, E. (2024, 18 April). Biden is the most pro-labor president since F. D. R. Will it matter in November? *The New Yorker*. https://www.newyorker.com/news/daily-comment/biden-is-the-most-pro-labor-president-since-fdr-will-it-matter-in-november

Ramahi, Z. (2019). Secondary boycotts in American labour law and the First Amendment: An application to the boycott, divestment, and sanctions movement. *Berkeley J. Emp. & Lab. L.*, *40*, 151–167.

Reddy, D. (2021). 'There is no such thing as an illegal strike': Reconceptualizing the strike in law and political economy. *Yale L. J. F.*, *130*, 421–459.

Reiter, H. (2023). Editor in Chief's page. *Energy L. J.*, *44*(2), 1–22.

Ressler, J. (2022). Workplace anonymity. *Buffalo L. Rev.*, *70*, 1495–1560.

Romero, F. J. (2025, 3 October). *California gives Uber, Lyft drivers collective bargaining rights*. KQED. https://www.kqed.org/news/12057798/california-gives-uber-lyft-drivers-collective-bargaining-rights

Romero, P., & Whittaker, J. (2023). *A brief examination of union membership data*. Congressional Research Service. https://www.congress.gov/crs-product/R47596

Rua, G., & Tito, M. (2024). *Tapping the brakes: The effect of the 2023 United Auto Workers strike on economic activity*. US Federal Reserve (Fed Notes). https://www.federalreserve.gov/econres/notes/feds-notes/tapping-the-brakes-the-effect-of-the-2023-united-auto-workers-strike-on-economic-activity-20240416.html

Smith, P., & Crain, M. (2025). Woke-washing at work. *Wash. U. L.Rev.*, *102*, 1509–1581.

Stabbert, Jr., G., & Ivy, K. (2025). Focus on employment law. Beyond politics: Achieving civility in the workplace. *AZ Attorney*, *61*, 58–61.

Stein, B. (2022). Consumer corner I. A reversal of fortunes: The drop in consumer filings is running out of road. *American Bankruptcy Institute Journal*, *41*(1), 40–76.

Su, R., O'Rourke, A., & Binder, G. (2022). Defunding police agencies. *Emory L. J.*, *71*, 1197–1271.

Summers, C. (2003). Public sector bargaining: A different animal. *U. Pa. J. Lab. & Emp. L.*, *5*, 441–452.

Szymanski, C. (2021). The idea of the general clause in American labor law. *Bialystok Legal Studies*, *26*(2), 11–49.

Szymanski, C. (2022). Organized labor and the tech giants. *Giornale di diritto del lavoro e di relazioni industriali*, *173*, 69–108.

Tippett, E. (2018). The legal implications of the MeToo movement. *Minn. L. Rev.*, *103*, 230, 251–252.

United States Congress. (1932). Norris–LaGuardia Act, 29 US C.

United States Congress. (1935). National Labor Relations Act, 29 US C., as amended.

United States Congress. (1947). National Labor Relations Act, 29 US C., as amended.

United States Congress. (1974). National Labor Relations Act, 29 US C., as amended.

UPI. (1984, 16 August). *AFL-CIO president Lane Kirkland says federal labor laws do more harm than good for workers*. https://www.upi.com/Archives/1984/08/16/AFL-CIO-President-Lane-Kirkland-says-federal-labor-laws-do/5286461476800/

US Department of Labor, Bureau of Labor Statistics. (2024, 21 February). *Annual work stoppages involving 1,000 or more workers, 1947 – present*. https://www.bls.gov/web/wkstp/annual-listing.htm

US Department of Labor, Bureau of Labor Statistics. (2024, 21 February). *News release: Major work stoppages*. https://www.bls.gov/news.release/pdf/wkstp.pdf

US Department of Labor, Bureau of Labor Statistics. (2025, 28 January). *Union membership (annual) news release*. https://www.bls.gov/news.release/union2.htm

US Department of Labor, Bureau of Labor Statistics. (2025, 20 February). *Major work stoppages*. https://www.bls.gov/news.release/archives/wkstp_02202025.htm

US Department of Labor, Bureau of Labor Statistics. (2025, 6 March). *31 major work stoppages began in 2024*. https://www.bls.gov/opub/ted/2025/31-major-work-stoppages-began-in-2024.htm

Vereckey, B. (2024, 17 July). *Federal spending was responsible for the 2022 spike in inflation, research shows*. MIT Management Sloan School. https://mitsloan.mit.edu/ideas-made-to-matter/federal-spending-was-responsible-2022-spike-inflation-research-shows

Wiessner, D. (2025, 28 January). *Trump paralyzes US labor board by firing Democratic member*. Reuters. https://www.reuters.com/world/us/trump-fires-us-labor-board-member-hobbling-agency-amid-legal-battles-2025–2001-28/

Wilkinson, A. (2023, 2 May). *The looming threat of AI to Hollywood, and why it should matter to you*. Vox. https://www.vox.com/culture/23700519/writers-strike-ai-2023-wga

Wiseman, P. (2024, 21 May). *Trump or Biden? Either way, US seems poised to preserve heavy tariffs on imports*. AP News. https://apnews.com/article/trump-biden-trade-tariffs-china-inflation-1c17b1d223080b7a594326905380845a

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Artificial Intelligence in Labour Relations: Is Ukrainian Labour Law Ready for European Standards?

Abstract: This article aims to carry out a comparative analysis of the regulation of AI use in labour relations in Ukraine and the EU, with a view to identifying common trends and differences and formulating recommendations for enhancing Ukrainian legislation in the context of digitalization. The study uses methods of comparative analysis and formal legal and functional approaches. It analyses the main aspects of AI application in labour relations, in particular in recruitment, personnel management, management decision-making, and the protection of employees' personal data. The authors examine the

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main international and EU regulations (GDPR and AI Act) that set requirements for processing the personal information of employees using AI. Thus it is determined that Ukraine does not have a specialized legal framework for regulating such processes, while the EU is developing relevant standards which guarantee the transparency of algorithms, the protection of employees' rights, and the ethical use of digital technologies. Consequently, the authors suggest a conceptual model of the regulation of AI application in the labour sphere, which covers the basic principles, stages of interaction, risk classification, subject–object relations, and institutional control mechanisms. The presented model may serve as a basis for developing a Ukrainian law on AI use in labour relations.

Keywords: personal data, labour relations, artificial intelligence, digital ethics, GDPR, e-commerce workforce regulation

Introduction

Modern labour markets and administrative decision-making now incorporate AI as a structural component. Its use in hiring, performance reviews, and workforce management changes traditional employment relationships and creates new legal issues, especially in the areas of algorithmic control and personal data security. While AI presents new legal challenges in the identification of its operations, the ability of robots to analyse data, learn, and make decisions opens up new opportunities. However, technological advances pose challenges for legal systems to regulate and protect the rights and interests of citizens (Getman et al., 2023).

Working life is affected by the rise and development of the knowledge-based economy and communication technologies. While productivity and competitiveness are benefiting from these developments, there are several risks and obstacles (Bondarenko et al., 2022). Knowledge and information are now essential components of the post-industrial labour economy; as a result, there is a marked increase in information flows in labour relations. This is particularly influenced by the new human resource management, which views employees as the key to corporate success. Furthermore, the globalization of the economy, the increase in international corporate mergers, and the development of an information society driven by technological innovation have increased the information needs of both companies and the workforce.

Information regulation, including the protection of employees' personal information, is directly related to labour relations, which are particularly sensitive to it. For this reason, the protection of employees' data has become a pressing issue and is the focus of ongoing academic and applied debate, legislation, and research at the international, European, and national levels. At every level of employment, a significant part of the duties that employees regularly perform at work already involves the gathering and processing of personal information. The purpose of modern advances in human resource management is to boost the value of human capital in business in terms of work organization and the use of technologies; as a result, personal information about employees is constantly collected and processed at work.

Consequently, the fundamental human rights of workers, including the right to privacy and the protection of personal data, along with the role of effective employment in promoting a robust economy, the creation of more and better jobs, and the nurturing of an inclusive society, are gaining increasing recognition (Kalina et al., 2022). Several scholars have studied the topic of AI and human rights. In their study of personal data protection in the context of AI use, Bielova and Byelov (2023a) analysed challenges such as the instability of technological progress and security threats such as unauthorized access and algorithmic bias; they proposed recommendations to ensure data security and privacy, such as strict processing rules, encryption, and data anonymization. Asiryan (2023a) analysed the regulation of AI use, personal data protection, and the transparency of automated systems, claiming that the EU was active in protecting the rights of citizens, but pointing out that further measures are needed to develop standards on digital rights. The issue of protecting the privacy of personal information in labour relations, particularly in light of the proliferation of artificial intelligence, was examined by Kronivets and Dorosh (2024), who placed particular emphasis on the importance of establishing precise guidelines for the utilization of such data in conjunction with ethical considerations.

Kolesnikov and Karapetian (2023) studied the current state, opportunities, threats, and limitations of AI in Ukraine and worldwide. They outlined the main aspects of AI implementation in Ukrainian society and pointed out the need for legislative regulation in the areas of privacy and data protection, ethical aspects, the regulation of inter-sectoral relations, and support for innovation and start-ups. Predmestnikov and Yarmolyuk (2023) analysed the problems of human rights protection in the digital environment; they investigated the social, legal, and ethical facets of these technologies and created regulatory frameworks to reconcile innovation with the defence of human rights.

However, this issue requires additional research due to the speed at which AI technologies are developing and the need to establish a legal framework to regulate AI use in Ukraine. In addition to comparing Ukrainian and EU approaches, this study aims to determine if Ukrainian labour law is prepared to adopt European standards on AI regulation and under what legal circumstances such harmonization is feasible. Hence our objectives are as follows:

- to analyse the legislation on AI use in labour relations in Ukraine;
- to study approaches to AI regulation of labour in the EU, in particular the GDPR and the AI Act;
- to define the main legal, ethical, and security aspects of AI application in recruitment, HR management, and employee rights protection;
- to compare Ukrainian and EU legislation in the main areas of AI regulation in labour;
- to suggest a conceptual model for the regulation of AI application in labour in Ukraine.

1. Methodological framework

Several research methods were used to achieve the research aim and objectives. The dialectical method was the basis of the research, and helped us to identify the current state of the topic under consideration through a thorough study of procedures for collecting, processing, and protecting employees' information against the background of digital transformation. This facilitated an assessment of the inconsistencies and conflicts that arise, in order for us to consider these processes as a connected system and to understand their evolution. In addition, this strategy encourages multidisciplinary research, which is critical to understanding the current situation and the potential future directions of the sector.

The functional method has proven to be an important part of analysing systemic relationships in the context of employee data protection. By describing the functions of and links between different components of the system, its use allows us to consider these as functional parts of the system. This method helps us to understand the interaction between data protection procedures and functions within the system, as well as between other systems and the outside world. As a result, this methodology ensures an effective approach to data protection and helps us to highlight important aspects of employee data protection.

The critical analysis of the current labour legislation that regulates the protection of employees' data in the light of AI was conducted using the formal-logical method. This approach allowed for a systematic and logical analysis of the legal acts regulating these issues. Using this approach, specific recommendations were developed to strengthen the laws that address legal issues of the security of employees' personal information in the context of AI development. By identifying these shortcomings and inconsistencies in Ukrainian legislation and suggesting solutions, this strategy helps to ensure more effective regulation of these issues.

In order to examine the European experience of the legal regulation of AI use with regard to employees' data protection, the paper employs the comparative technique. This methodology makes it possible to compare national norms and strategies for dealing with this matter with EU laws and practices. Analysing the European experience can yield best practices and recommendations that can be used to reinforce national laws pertaining to the protection of personal data. In addition to understanding the trends and quirks of controlling this issue in the context of AI development, such a comparative analysis aids in the creation of more efficient data management and security techniques.

2. Results

2.1. The Ukrainian legal framework on AI use in labour relations

The creation and adoption of suitable legislation that governs the AI processing of employees' personal data in labour relations is crucial to prevent the possibility of leaks or misuse of data and violation of employees' privacy. Several normative legislative acts that govern this sector are now included in Ukraine's national legislation. First, Article 32 of the Constitution of Ukraine forbids the gathering, storing, using, and disseminating of private information about an individual without that person's agreement, unless it is in situations allowed by law and exclusively in the interests of human rights, economic prosperity, and national security (Verkhovna Rada of Ukraine, 1996).

The Law of Ukraine no. 2297–VI 'On Personal Data Protection' establishes the rights and obligations of subjects of personal information and the requirements for organizations that process such data. It is aimed at ensuring the confidentiality and protection of the personal data of citizens of Ukraine and other persons staying on the territory (Verkhovna Rada of Ukraine, 2010). Furthermore, when an employment contract is signed, it is illegal to ask someone who has been accepted for work for information about their origin, political party and national affiliation, place of residence or where their stay is registered, and any documents whose submission is not required by law, according to Article 25 of the Labour Code of Ukraine (Verkhovna Rada of Ukraine, 1971). This standard highlights how crucial it is to safeguard privacy and avoid discrimination in the workplace on the basis of individual traits.

However, the right to protect personal information, and in particular to ensure the confidentiality of health information, has real value only when it can be protected in the event of a violation. Thus Article 188–39 of the Code of Ukraine on Administrative Offences establishes responsibility for violations of legislation on personal data protection (Verkhovna Rada of Ukraine, 1984). The civil law of Ukraine therefore does not restrict the right to protection to actions taken by the government or other recognized entities that have the authority to use coercive measures against criminals. The link between victims' rights and self-defence is mostly governed by Article 19 of the Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003). Therefore a person has the freedom to pick their own protection methods based on the specifics of the right that has been violated, the type of violation committed, and its repercussions.

Initial measures to control the use of AI have already been implemented in Ukraine: the Concept of Artificial Intelligence Development in Ukraine was developed in 2020, outlining the definition, goals, guiding principles, and objectives of AI development for the first time at the legislative level (Ministry of Digital Transformation of Ukraine, 2020). A working group on AI regulation was also created by the National Association of Lawyers of Ukraine. The working group protects personal data collected by AI systems, establishes guidelines for its use and storage, and analyses legal issues related to AI application (Vyshnevskyi, 2023); it also defines the limits of its application in various industries. The working group strives to guarantee that human rights are appropriately safeguarded when AI systems are utilized (Bielova & Byelov, 2023b).

Furthermore, the ratification of the Artificial Intelligence Act (European Parliament, 2024) will directly affect AI regulation in Ukraine. Consequently, the Ukrainian government has decided to implement a regulated sandbox for AI developers. Gordiy Rumyantsev, a state expert in the Directorate of European and Euro-Atlantic Integration at the Ministry of Digital Transformation of Ukraine, has posited a managed ecosystem within which developmental enterprises would be empowered to cultivate their products from the outset, encompassing design considerations, with the objective of aligning with the stipulated criteria of the impending EU standards. This legislation signifies a major milestone in the realm of AI legislation, offering a framework for addressing concerns regarding the potential implications of this technology while fostering innovation (Ministry of Digital Transformation of Ukraine, 2020).

When implementing AI systems into organizational processes and the work environment in Ukraine, there are several legal challenges related to ensuring the confidentiality and protection of the personal data of employees. The list of AI applications that improve labour relations, especially when used by employers, is not exhaustive, nor are the procedures that require them. Therefore, scholars have identified the stages of labour relations that are associated with computerized databases, data processing programs, and customer relationship management (CRM) systems which also collect personal data:

a) Interviews with a potential employee, because at the stage of receiving a CV, the employer already receives the relevant data.
b) The conclusion of an employment contract, filling out an identity card, and other documents necessary for employment.
c) The dismissal process, after which the personal data of the employee must be destroyed immediately or after a certain period, which is determined by consent and the policy of personal data processing by the employer.

The vast majority of these processes are carried out by HR specialists, who use AI technologies to automate the relevant activities. It is appropriate to note that the World Economic Forum has predicted, based on analytical data and various studies, that from 2025 the encryption industry will grow and the field of robotics will develop, which will also necessarily be reflected in labour relations (Predmestnikov & Yarmolyuk, 2023). With this in mind, employers should take extra care when collecting and using employee data. Legislation should delineate the limits on and types of data that AI can process. For example, it would be reasonable to include relevant norms in the Law of Ukraine 'On Artificial Intelligence', if it is adopted (Vavzhenchuk & Zhmaka, 2024).

AI techniques can be unpredictable and complex, so it can be difficult to understand and defend the choices they make. This may affect the right to a fair trial and the right to explanation, two important provisions of the GDPR (European Parliament, 2016), determining who is responsible for the decisions or actions of AI systems, especially when those actions cause a breach of security or privacy involving employees. They may misidentify or recognize employees, violating their right to privacy and confidentiality. AI systems could discriminate against workers because of their differences, which would violate human rights and create inequality (Nikitenko et al., 2024).

When AI systems are used in an organizational environment, personal data about employees can be collected and processed in large volumes from various sources using a range of technologies. This may involve automating HR procedures, tracking performance, evaluating staff performance, and analysing workplace behaviour. To avoid any breach of employee privacy and confidentiality, strict data protection and security guidelines must be followed when collecting and processing personal information. To guarantee employees' privacy and to protect their rights, it is important to ensure that they are fully informed about how AI systems will use their data and that they give their consent.

A comprehensive strategy that integrates technological, legal, and ethical responses is needed to address these legal challenges in a way that protects workers' rights and complies with data protection regulations. By taking the actions discussed below, the state can resolve legal issues related to the security of the personal data of employees when AI systems are used (Asiryan, 2023b). It is important to create and implement special laws in Ukraine that regulate AI use when employees' personal data are processed; this may entail new legislation or changes or additions to current data protection laws.

Effective implementation will necessitate institutional capacity, supervisory procedures, and procedural protections that ensure adherence to data protection standards in AI systems related to employment, in addition to legal reform. However, rather than depending only on voluntary corporate practices, such measures must be included in a logical legal framework. For example, by implementing reporting and auditing systems, organizations can be encouraged to be open and transparent about AI use and the processing of personal data (Raji et al., 2020). An appropriate legislative framework will enable the adoption of AI systems, and these measures will facilitate the protection of the privacy and confidentiality of employees' personal data (Asiryan, 2023b). Thus the implementation of all recommendations in practice should reduce the probability of data security failures and guarantee the confidentiality of personal data in employment contracts.

2.2. International and EU standards on AI in labour relations

The growth of information in today's world has advanced significantly over the past few decades. AI is now widely used in many aspects of society, including labour relations. For example, in a dynamic workplace, hiring selection, employee performance analysis, and several company processes can be automated using the latest information-processing techniques. However, these technologies also pose some challenges, such as protecting the privacy of personal information, in addition to their many benefits.

In light of the increasing use of AI in labour relations, protecting the privacy of personal data is an important issue that needs to be given more attention by legislatures, employers, and employees alike. AI makes possible the efficient management of personnel and the monitoring and forecasting of trends in the labour market, as well as the automation of many other important operations, thanks to its analytical and predictive capabilities. Algorithmic management, according to De Stefano (2019), alters traditional labour relations by transferring managerial authority to opaque digital systems. This leads to a structural imbalance and necessitates procedural labour safeguards that go beyond typical data protection standards. The development of technology not only simplifies the gathering and processing of personal information, which is widely applied in many industries, but can also become a tool for violating people's freedoms and rights (Yaroshenko et al., 2023). According to its definition, AI is a structured collection of information technologies that can be used to process information that is created on its own or acquired while working, as well as to create and apply one's own knowledge, decision-making models, information-processing algorithms, and task-solving techniques (Bielova & Byelov, 2023a).

Regarding international standards, it is essential to bring up the General Data Protection Regulation (European Parliament, 2016), the European Convention on Human Rights (Council of Europe, 1950), and the Universal Declaration of Human Rights (United Nations, 1948). For instance, the main goal of Article 8 of the Convention is to shield an individual from arbitrary interference with his or her home, communications, and private and family life. The European Court of Human Rights has established the state's procedural requirements in the context of this Article, which are crucial in establishing the bounds of a Member State's discretion. The decision-making process that leads to the intervention must thus be fair and such that it ensures due regard for the interests guaranteed to the individual under Article 8, even though this article does not contain any explicit procedural criteria, based on recognized prior practice (Havrylov, 2023).

It is crucial to distinguish between the laws of the European Union (such as the GDPR, the Artificial Intelligence Act, and the Platform Work Directive 2024) and the Council of Europe (such as the European Convention on Human Rights and Convention 108+ (Council of Europe, 2018)). While EU law becomes pertinent in the context of European integration and legal approximation, Ukraine is a member of the Council of Europe and is directly bound by its treaties (Asiryan, 2023a). General principles of lawful processing, openness, data minimization, and restrictions on fully automated decision-making are established by the GDPR inside the EU legal framework. These principles include the right to relevant information about the reasoning behind such choices. A risk-based approach is introduced by the Artificial

Intelligence Act, which also imposes stricter compliance requirements on some AI systems related to employment. Furthermore, algorithmic management is expressly covered by the Platform Work Directive, which calls for human oversight of important choices, the transparency of automated monitoring systems, and the ability to contest algorithmic results.

Protection of the right to privacy and legal use of personal information in the process of the training and work of AI has become an urgent problem that has to be solved by regulatory bodies in various countries. In addition to establishing guidelines for the gathering, use, and preservation of personal data inside the EU, the GDPR also sets strict privacy protection requirements (European Parliament, 2016). Because the respective data protection authorities (National Commission on Informatics and Liberty and Garante) have taken proactive stances on AI-related data protection issues, France and Italy can be presented as examples. Their actions show how EU regulations are implemented in practical situations. Both jurisdictions are appropriate case studies for illustrating how EU-level norms function in national legal systems because they have also produced useful guidelines and enforcement practices on algorithmic management in employment.

These national and international standards are therefore aimed at respecting the fundamental rights to personal privacy and data protection in the digital era. They establish frameworks to prevent the unauthorized collection and use of personal information and to monitor issues affecting people's privacy and confidentiality in the workplace and other areas of life. However, there are still issues with the actual implementation of protections in AI systems related to employment, especially in regard to algorithmic transparency, accountability, and efficient worker remedies, even with the GDPR and AI Act in place. Despite adopting a comprehensive legal framework, the EU is still in the early stages of institutional adaptation and enforcement when it comes to its actual use in employment contexts (Kaplina et al., 2023).

In June 2023, the European Parliament took a significant step towards creating legislation for the effective and ethical use of AI by approving the Artificial Intelligence Act. One of the primary objectives of the law is to safeguard rights against the impact of AI. The legislation sets rules and regulations for processing personal data using automated decision-making systems and other AI applications in order to guarantee the transparency, equity, and legality of data processing (Kariev, 2022). Its scope extends to all fields and forms of AI, except the military. This Act regulates the actions of companies that provide AI systems and those who use them for work purposes, although it primarily establishes obligations for providers and deployers rather than introducing new individual rights (Razmetaeva & Razmetaev, 2021).

The Artificial Intelligence Act also classifies AI use according to the possible level of risk. This classification consists of three key groups: prohibited practices, high-risk systems, and other AI technologies. It is forbidden to use AI to intentionally manipulate or abuse human weaknesses, which could lead to physical or psychological harm. Law enforcement agencies are prohibited from using AI-generated social scoring systems to limit the rights of individuals or groups, as such practices are expressly banned under the Artificial Intelligence Act. However, certain uses of real-time biometric identification may be allowed under strictly defined conditions, including appropriate authorization and compliance with legal safeguards (Kronivets & Dorosh, 2024). The law defines high-risk systems as those that present a serious threat to human security or health. According to the requirements of the Artificial Intelligence Act, for particularly high-risk applications such as medical devices, the results of the supplier's self-audit must be verified by an authorized assessment body under relevant EU regulations (Prystai, 2023).

A broad approach to the Law on Artificial Intelligence was agreed by the European Council on 6 December 2022 (Pingen, 2023). Germany does not yet have any laws pertaining to autonomous AI, only current legislation and voluntary arrangements. One of the likely recommended steps is to require AI product makers, like OpenAI, the maker of ChatGPT, to disclose whether their system was trained using copyrighted content (Kolesnikov & Karapetian, 2023).

The law obliges Member States to establish their authorized bodies, as already noted. A conformity assessment is carried out to confirm whether AI systems meet the requirements enshrined in the Artificial Intelligence Act. This conformity assessment can be performed by a third party, i.e. an authorized organization, or independently, i.e. by an AI-system vendor who verifies the conformity itself. Audits can still be conducted by notified organizations to make sure the conformance assessment is completed accurately. According to critics, the current paradigm does not seem to necessitate third-party compliance reviews for many high-risk AI systems. This critique is based on the notion that in order to guarantee complete security, such systems need to be assessed by an unbiased third party (Bielova & Byelov, 2023b).

2.3. Regulation of AI use in labour relations in Ukraine and the European Union

Unlike Ukraine, the EU is developing a special set of legislative acts regulating AI as a technology in general and its application in labour relations, taking into account human rights risks. In this regard, the Artificial Intelligence Act establishes categories of AI risks and relevant requirements for developers and users. Along with this document, the GDPR is particularly strict in regulating the automated processing of personal data that directly affects employees (Table 1). Furthermore, particular guidelines for algorithmic management are introduced by Directive (EU) 2024 on platform work, which calls for human oversight of critical choices, openness in automated monitoring systems, and the right of employees to contest algorithmic conclusions and obtain explanations.

Table 1. Comparison of AI regulation in labour relations in Ukraine and the EU.

Aspect	Ukraine	EU
Legal framework	There is no special legislation on AI in labour relations. It is regulated by general labour law, the law on personal data protection, and information laws. Ethical and security issues are mostly addressed at the level of employers' internal policies.	Comprehensive legislation has been developed (Artificial Intelligence Act, GDPR). Ethical, legal, and security standards are taken into account.
AI in recruitment and personnel management	There are no special requirements for the transparency of algorithms, explanation of decisions, or appeal of decisions made by AI. There is protection of personal data, but control of algorithms is not regulated.	There is mandatory transparency, a right of employees to explain automated decisions, and the possibility of appeal. Conduct of risk audits, preventing discrimination.
AI application control and liability	The employer is liable under the general rules of labour and civil law. There are no special control bodies or audit procedures. Cybersecurity and ethics are mostly regulated by corporate policies.	Specialized control bodies have been introduced. The responsibilities of developers, users, and employers are defined. Mandatory audit and monitoring of AI systems.
Personal data protection	Regulated by the Law 'On Protection of Personal Data' (Verkhovna Rada of Ukraine, 2010), which partially complies with the GDPR but contains less detail on automated processing. Employees have general data protection rights.	The GDPR provides a high level of protection: strict requirements for automated processing, employee rights to access data, rectification, appeal, and the right to explain decisions.
Ethical and security requirements	Partially regulated by employers' internal policies; a lack of legislative provisions.	Legally enshrined requirements for ethics and safety, minimizing risks to employee rights.
Regulation level	Initial stage, lack of a coordinated approach, fragmentation of norms.	Well-developed legislation with clear requirements and continuously improving controls.

Source: Compiled by the author

As Table 1 shows, in Ukraine there are no specific regulatory requirements for the use of AI-based automated systems in the recruitment or management of personnel. This means that employers can use different technologies, but there are no requirements for transparency, explanations of AI decisions or the possibility to challenge such decisions. At the same time, employees have the right to personal data protection, but control over algorithms is not regulated. By contrast, in the EU such practices are strictly controlled. Thus the use of algorithms in recruitment must be transparent, and employees have the right to receive explanations for automated decisions (the right to an explanation). However, as Edwards and Veale (2017) and Wachter, Mittelstadt, and Floridi (2017) show, the GDPR establishes a restricted transparency framework rather than a fully developed individual right to explanation. Because automated choices have the potential to greatly impact workers' rights, this theoretical argument is especially pertinent to employment relations. Moreover, the law obliges employers to conduct risk assessments to avoid discrimination and human rights violations. The GDPR imposes restrictions on automated decisions without human intervention.

Furthermore, in Ukraine control over AI use in labour relations is exercised by general mechanisms of labour and civil law. The responsibility lies with the employer, but there are no specialized control bodies or clear procedures for auditing algorithms. Cybersecurity and ethics issues are usually regulated by internal corporate standards that are not legally binding. In contrast, in the EU specialized control mechanisms are being created to audit AI systems and monitor compliance with security and ethical standards. The responsibility of employers, AI developers, and suppliers is defined to minimize risks for employees and society.

Personal data protection is key in the context of AI in labour relations, as AI is often based on the processing of large amounts of employees' data. In Ukraine personal data protection legislation has basic compliance with the GDPR but contains certain differences and a lower level of detail regarding automated data processing. This creates the risks of privacy violations and the inability to control algorithmic decision-making. In the EU the application of the GDPR is mandatory, which provides for high standards of transparency and control over the processing of personal information. Strict rules also apply to automated decisions that may affect employees. Employees have the right to information and access to it, and may challenge automated decisions (Edwards & Veale, 2017).

On the contrary, the regulation of AI use in labour in Ukraine is at an early stage. Currently, it is based on general labour law and personal data protection legislation, i.e. the Law of Ukraine no. 2297–VI 'On Protection of Personal Data' (Verkhovna Rada of Ukraine, 2010), with no specialized AI regulations. This creates certain risks related to the transparency of algorithms, employee rights, and control over AI. In the EU, a clear legal framework includes personal data protection and special requirements for AI use, including in labour relations. The emphasis is on minimizing risks, transparency, ethics, and ensuring control by the state and society.

3. The regulatory model for harmonizing AI use in labour relations

In response to the challenges linked to the integration of AI systems into labour, a model of multi-level regulation of AI use in labour relations in Ukraine is suggested. Its conceptual framework is based on a combination of national legislation and European law, in particular the GDPR and the principles enshrined in the Artificial Intelligence Act. The model is based on several key principles that should be implemented in the regulation of labour. First, the principle of legality stipulates that all processes of collecting, processing, and using employees' personal data using AI must have a legal basis. Moreover, the principle of proportionality means that the amount of information collected corresponds to the necessary purpose and does not violate the employee's privacy. Apart from that, the principle of non-discrimination prohibits the use of algorithms that directly or indirectly create inequality between employees. In addition, the principle of transparency requires providing access to the logic of automated solutions, and data minimization means limiting their volume to what is necessary to perform job functions. The regulation should take into account all stages of labour relations, from hiring to dismissal. Table 2 illustrates this model of the implementation of legal restrictions and the procedures of AI use in labour at each stage.

Table 2. Model of multi-level regulation of AI use in labour relations.

Stage	Actions	Legal requirements
1. Recruitment	Automated CV selection, chatbots, candidate scoring	Obtaining informed consent of the applicant; prohibition of discrimination; algorithmic transparency
2. Performance evaluation	Work monitoring, behavioural and performance assessment	Employee's right to access data; limitation of information; technical guarantees
3. Decision-making	Appointment, dismissal, bonuses	Human control over automated decisions; the right to appeal
4. Termination of employment	Archiving and deletion of personal data	Regulated retention periods; requirement to destroy or anonymize data

Source: Compiled by the author

As demonstrated in Table 2, a specific function is attributed to the entities tasked with implementing and overseeing compliance within the context of the proposed model. The employer must ensure the transparency of data processing, develop personal information protection policies, and appoint a Data Protection Officer. Employees, in turn, have the right to be informed, access their data, correct it, and refuse processing or limit it to the extent permitted by law. At the same time, public authorities supervise and control the compliance of the applied AI systems with EU legal standards. In this regard, regulatory tools include contractual regulation (the inclusion of AI terms in employment contracts), an AI impact assessment before implementation of high-risk systems, algorithmic audits for bias or errors, and the creation of effective complaint mechanisms (Kaminski & Malgieri, 2021). It is also important to integrate Ukrainian legislation with the EU law on AI through the implementation of the GDPR, the Artificial Intelligence Act, and Convention 108+.

Another important component of the model is institutional support through the creation of specialized bodies, including the National Centre for Artificial Intelligence Ethics, which would act as an advisory and expert body in the formation of policy on the use of AI in the labour sphere. Such a centre could provide recommendations to employers, assess the risk level of specific solutions, and develop ethical standards of conduct for labour market participants. Thus the suggested model seeks to strike a balance between innovation in HR management and respect for employees' labour and personal rights. Its implementation will help harmonize regulation in

Ukraine with the EU standards, reduce the risks of human rights violations, and increase confidence in digital technologies in the labour market. Even before Ukraine joins the EU, the suggested approach may be progressively adopted. However, additional harmonization within the scope of European integration would be necessary for its complete realization. At the same time, the model allows the preservation of national legal traditions and the adaption of EU standards to Ukraine's digital and labour market realities.

Conclusions

The evolution of labour relations is now significantly influenced by artificial intelligence. Its incorporation into hiring procedures increases productivity but poses serious concerns about workers' rights and the security of personal information. According to this analysis, Ukrainian labour law does not yet have a thorough and specialized regulatory framework that is on a par with European norms. It is possible to classify Ukrainian labour law as normatively unprepared but partially institutionally ready. Although there are general data protection measures in place, there are no particular assurances about algorithmic transparency, human monitoring, or automated decision-making.

This analysis has shown a significant difference between the level of regulation of AI use in labour relations in Ukraine and the EU. From a doctrinal standpoint, there are no particular protections against algorithmic managerial authority in Ukrainian labour law, a problem that is frequently addressed in modern labour studies (De Stefano, 2019). Therefore regulatory readiness cannot be assessed solely through general data protection legislation. The EU has already created laws that protect employees' rights in the context of digitalization, ensure the transparency of algorithms, promote the ethical use of technologies, and provide effective control mechanisms. Meanwhile, in Ukraine, the legislation on AI is at an early stage of development and does not contain specialized rules governing the use of AI in the labour process.

Given the growing influence of digital technologies on the labour market, it is critical that Ukraine create legislation that includes the particulars of AI use in the workplace while also taking employee rights into consideration. The harmonization of Ukrainian legislation with European standards, such as the GDPR and the AI Act, will be a prerequisite for creating legal guarantees of transparency and the accountability of automated solutions. However, mechanisms for ethical assessments, risk audits, and control over the use of digital technologies in the labour sphere should be introduced. The adaptation of European experience to Ukrainian realities will thus strengthen the protection of workers' rights. In such a way, it will also promote the sustainable and responsible introduction of innovative technologies in the national labour market.

Suggested legislative actions include the following: a unique Ukrainian law for the application of AI to work relations should be adopted; high-risk systems must undergo AI impact assessments; to guarantee that automated choices are examined by a human, the Labour Code ought to be modified; it should be forbidden for dismissal decisions to be fully automated; a dedicated monitoring body for AI in the workplace should be created. These suggestions align with EU regulations regarding automated decision-making and algorithmic management in the workplace. Practically speaking, their implementation in Ukraine would necessitate changes to the Labour Code that would require algorithmic management systems to be transparent, would grant employees the right to human review of automated decisions, and would provide procedural safeguards that would enable workers to contest algorithmic results in labour courts.

Ukrainian labour laws should take into account the Platform Work Directive's specific requirements, which include human oversight of important choices, the transparency of automated monitoring and decision-making technologies, and efficient channels for contesting algorithmic results. Furthermore, the GDPR framework supports restrictions on purely automated judgments and upholds employees' rights to information and to challenge, while the AI Act views some employment-related AI systems as high-risk, which justifies the required AI impact studies and frequent algorithmic audits.

REFERENCES

Asiryan, S. R. (2023a). Legislative practice of Singapore on the use of artificial intelligence. *Analytical and Comparative Jurisprudence*, *3*, 313–317. https://doi.org/10.24144/2788–6018.2023.03.57

Asiryan, S. R. (2023b). Steps of the EU countries in the direction of protecting the constitutional rights of citizens in the era of artificial intelligence. *Scientific Bulletin of Uzhhorod University: Series: Law*, *2*(76), 285–290. https://doi.org/10.24144/2307–3322.2022.76.2.45

Bielova, M. V., & Byelov, D. M. (2023a). Challenges and threats of personal data protection in working with artificial intelligence. *Scientific Bulletin of Uzhgorod University: Series: Law*, *2*(79), 17–22. https://doi.org/10.24144/2307–3322.2023.79.2.2

Bielova, M. V., & Byelov, D. M. (2023b). Implementation of artificial intelligence in pretrial investigation of criminal cases: International experience. *Analytical and Comparative Jurisprudence*, *2*, 448–453. https://doi.org/10.24144/2788–6018.2023.02.78

Bondarenko, S., Bratko, A., Antonov, V., Kolisnichenko, R., Hubanov, O., & Mysyk, A. (2022). Improving the state system of strategic planning of national security in the context of informatization of society. *Journal of Information Technology Management*, *14*, 1–24. https://doi.org/10.22059/jitm.2022.88861

Council of Europe. (1950). *Convention on the protection of human rights and fundamental freedoms*. https://www.echr.coe.int/documents/d/echr/convention_ENG

Council of Europe. (2018). *Convention 108+. Convention for the protection of individuals with regard to the processing of personal data*. https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09–10/Convention_108_EN.pdf

De Stefano, V. (2019). *Negotiating the algorithm: Automation, artificial intelligence, and labour protection*. International Labour Organization. https://www.ilo.org/publications/negotiating-algorithm-automation-artificial-intelligence-and-labour

Edwards, L., & Veale, M. (2017). Slave to the algorithm? Why a 'right to an explanation' is probably not the remedy you are looking for. *Duke Law & Technology Review*, *16*, 18–84. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972855

European Parliament. (2016). General Data Protection Regulation. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

European Parliament. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) no. 300/2008 (EU) no. 167/2013 (EU) no. 168/2013 (EU) 2018/858 (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA Relevance). http://data.europa.eu/eli/reg/2024/1689/oj

Getman, A. P., Yaroshenko, O. M., Sereda, O. H., Maliuha, L., & Zhygalkin, I. P. (2023). Social dialogue at the national and European levels as a factor in the formation of a common labor and social policy. *Society Register*, *7*(3), 51–72. https://doi.org/10.14746/sr.2023.7.3.04

Havrylov, M. V. (2023). Using artificial intelligence to detect malicious software in X in real time. In *Materials of the 11th Scientific and Technical Conference 'Information Models, Systems and Technologies' (Ternopil, 13–14 December 2023)* (pp. 7–27). Ternopil National Technical University.

Kalina, I., Khurdei, V., Shevchuk, V., Vlasiuk, T., & Leonidov, I. (2022). Introduction of a corporate security risk management system: The experience of Poland. *Journal of Risk and Financial Management*, *15*(8), article number 335. https://doi.org/10.3390/jrfm15080335

Kaminski, M. E., & Malgieri, G. (2021). Algorithmic impact assessments under the GDPR. *SSRN Electronic Journal*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811067

Kaplina, O., Tumanyants, A., Krytska, I., & Verkhoglyad-Gerasymenko, O. (2023). Application of artificial intelligence systems in criminal procedure: Key areas, basic legal principles and problems of correlation with fundamental human rights. *Access to Justice in Eastern Europe*, *6*(3), 147–166. https://doi.org/10.33327/AJEE-18–6.3-a000314

Kariev, I. Y. (2022). Protection of privacy when using cookies: Analysis of the state of legal regulation abroad. *Information and Law*, *3*(42), 80–88. https://doi.org/10.37750/2616–6798.2022.3(42).270239

Kolesnikov, A., & Karapetian, O. (2023). Artificial intelligence: Benefits and threats of use. *Efficient Economy*, *8*, 1–13. https://doi.org/10.32702/2307–2105.2023.8.9

Kronivets, T., & Dorosh, V. (2024). Ensuring the confidentiality of personal data in labor relations in connection with the spread of the use of artificial intelligence technologies. *Information and Law*, *1*(48), 133–138. https://doi.org/10.37750/2616–6798.2024.1(48).300797

Ministry of Digital Transformation of Ukraine. (2020). *Concept of artificial intelligence development*. https://stip.oecd.org/stip/interactive-dashboards/policy-initiatives/2023%2Fdata%2FpolicyInitiatives%2F99993318

Nikitenko, V., Voronkova, V., Tupakhina, O., & Sorokina, O. (2024). European practices of digital humanism in the context of global challenges. *Humanities Studies: Social Philosophy and Philosophy of History*, *18*(95), 52–64. https://doi.org/10.32782/hst-2024–18-95–06

Pingen, A. (2023). *Council's common position on Artificial Intelligence Act*. Eucrim. https://eucrim.eu/news/councils-common-position-on-artificial-intelligence-act

Predmestnikov, O., & Yarmolyuk, O. (2023). Problems of human rights protection in the era of artificial intelligence and machine learning. *Scientific Collection 'InterConf'*, *156*, 285–291. https://archive.interconf.center/index.php/conference-proceeding/article/view/3486

Prystai, R. (2023). Privacy by design: User-held data model as a basis for privacy and personal data protection in social networks. *Scientific Bulletin of the Uzhhorod National University: Series: Law*, *80*(1), 551–556. https://doi.org/10.24144/2307–3322.2023.80.1.84

Raji, I. D., Smart, A., White, R. N., Mitchell, M., Gebru, T., Hutchinson, B., Smith-Loud, J., Theron, D., & Barnes, P. (2020). Closing the AI accountability gap: Defining an end-to-end framework for internal algorithmic auditing. In M. Hildebrandt, C. Castillo, E. Celis, S. Ruggieri, L. Taylor, & G. Zanfir-Fortuna (Eds.), *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency (FAT*)* (pp. 33–44). ACM. https://arxiv.org/abs/2001.00973

Razmetaeva, Y., & Razmetaev, S. (2021). Justice in the digital age: Technological solutions, hidden threats and enticing opportunities. *Access to Justice in Eastern Europe*, *2*(10), 104–117. https://doi.org/10.33327/AJEE-18–4.2-n000061

United Nations. (1948). *Universal declaration of human rights*. https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf

Vavzhenchuk, S.Ya., & Zhmaka, V. O. (2024). Problems of protecting labor rights during hiring using artificial intelligence algorithms. *Problems of Legality*, *164*, 19–38. https://doi.org/10.21564/2414–990X.164.288964

Verkhovna Rada of Ukraine. (1971). *The labor code of Ukraine*. https://zakon.rada.gov.ua/laws/show/322–08?lang=en#Text

Verkhovna Rada of Ukraine. (1984). *Кодекс України про адміністративні правопорушення*. https://zakon.rada.gov.ua/laws/show/80731–10#Text

Verkhovna Rada of Ukraine. (1996). *The constitution of Ukraine*. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text

Verkhovna Rada of Ukraine. (2003). *Цивільний кодекс України*. https://zakon.rada.gov.ua/laws/show/435–15#Text

Verkhovna Rada of Ukraine. (2010). *Law of Ukraine no. 2297–VI 'On protection of personal data'*. https://zakon.rada.gov.ua/laws/show/2297–17?lang=en#Text

Vyshnevskyi, V. O. (2023). Personal data in data compilations (databases): Preserving the balance between the right to freedom of expression and the right to privacy. *Bulletin of the Kyiv University of Law*, *3*, 136–141. https://chasprava.com.ua/index.php/journal/article/download/972/908/

Wachter, S., Mittelstadt, B., & Floridi, L. (2017). Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation. *International Data Privacy Law*, *7*(2), 76–99. https://academic.oup.com/idpl/article/7/2/76/3860948

Yaroshenko, O. M., Lutsenko, O. Ye., Melnychuk, N. O., Mohilevskyi, L. V., & Vapnyarchuk, N. M. (2023). The impact of digitalization on labor relations in Ukraine. *InterEULawEast*, *10*(1), 67–82. https://doi.org/10.22598/iele.2023.10.1.4

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The Pan-European Lifeline of a Labour Non-Compete Clause. Protecting Competition in Labour Markets through a Human Rights Narrative: The Example of Serbia

Abstract: This article sets out to present the constituent elements of a labour law-specific non-compete clause through the example of legislative solutions from several EU jurisdictions and by considering the popularity of an extreme pole of thought that has emerged as a result of tendencies to restrict the enforceability of labour non-competes. The authors focus on the EU concept of the non-compete clause, providing an overview of legislative solutions in EU Member States, and by drawing on insights from competition law, they suggest that through the implementation of the requirement of the employer's legitimate interest, competition in the labour market is indirectly protected through a human rights narrative and framework. The authors present examples from case law, illustrating solutions that apply strict EU conditions and that also employ a proportionality-based analysis. They argue for preserving the enforcement of non-compete clauses under EU-style conditions, which include a rights-based proportionality assessment; a good model solution for a non-compete clause must be based on the principle of legal certainty (attained by explicit normative codification of clearly defined constituent elements), applied in a manner that includes a proportionality-based analysis, on a case-by-case basis. The paper also provides insight into Serbian jurisprudence and regulation on this subject, and formulates suggestions for alignment with current tendencies.

Keywords: non-compete clauses, labour law, competition law, employers' legitimate interests

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Introduction

Non-compete clauses have been a significant subject of legal, economic, and policy debate worldwide. When included within employment agreements, these covenants are traditionally used as a mechanism to prevent employees from engaging in activities in competition with their current employers, and subsequently their former employers, for a specified period, within a defined geographic area, and, in most cases, in exchange for adequate compensation. While their primary justification lies in protecting legitimate business interests, such as trade secrets and the confidentiality of essential information, non-compete clauses also affect employee mobility, labour market competition, and fundamental rights, including the right to work and the free development of one's personality. The enforceability and scope of non-compete clauses vary considerably across jurisdictions. While the EU approach to such clauses is rather traditional, requiring a maximum duration, a defined territorial scope, and adequate financial compensation, the United States by contrast has shown a tendency to shift toward approaches advocating a ban on non-compete clauses at the federal level.

Studies have shown that non-compete clauses are common across different types of occupations and income levels, not only among highly skilled, high-level, or managerial employees but also among lower-wage workers. Arguments *pro et contra* exist, varying between those supporting the position that non-compete clauses are used as a means of restricting worker mobility and competition in the market as a whole, to those arguing that non-compete clauses are justified due to the importance of protecting employers' interests and their investments in high-skilled workers. This is where the intersection of competition law and labour law, as reflected through the institution of non-compete clauses, is of particular interest.

This paper adopts a critical and comparative approach to the regulation of non-compete clauses, with a particular focus on Serbia, an EU candidate country. Accordingly, it examines the different legal frameworks in selected EU Member States and the United States for the purpose of identifying the key elements of non-compete clauses and the role of jurisprudence in identifying a possible path toward a balanced solution. By placing Serbian law and jurisprudence within this broader context, the article aims to identify possible avenues for alignment with emerging trends.

1. Method and scope

We have selected the legislative solutions of Austria, Germany, Italy, France, Poland, and the Netherlands for presentation, taking into account the availability of sources and because they collectively represent a sample of the Romance, Germanic, and Slavic legal traditions within the continental (civil law) family, in order to illustrate key national variations of the model, which represent a selection criteria for the jurisdictions considered in this paper. For the purposes of the article, we consider a 'good model solution' to be a legislatively anchored and judicially developed framework for labour non-compete clauses that regulates each of the constituent elements of the non-compete clause in sufficient detail, but also includes a rights-based proportionality test applicable to the core elements of the restraint, including a legitimate business interest, necessity, and strict proportionality (reasonableness), in light of the employee's freedom and right to work, supported within that framework by adequate compensation during the restraint.

We argue for the balancing of employers' interests against the worker's freedom to choose an occupation using a rights-based proportionality test, drawing on the framework of Articles 15 and 52(1) of the EU Charter (European Parliament, Council & Commission, 2012). As for Serbia, we argue for the same approach, drawing on the principles that govern limitations on human and minority rights (National Assembly of the Republic of Serbia, 2006), operationalized through more detailed regulation of the non-compete clause's duration, territorial reach, and scope of activity, and complemented by adequate compensation. The Republic of Serbia is included in the comparative analysis due to its status as an EU candidate country, the ongoing process of EU accession, and its obligation to harmonize its legislation with the legislation of the European Community and the European Atomic Energy Community, as set out in the Stabilisation and Association Agreement between the European Communities and their Member States on the one part and the Republic of Serbia on the other (European Communities and Member States, 2013). The research question that we set out to explore is whether the 'good model' – namely, the enforcement of non-compete clauses through a human rights-based proportionality analysis – indirectly safeguards competition in the labour market, considering that individual labour law agreements fall outside the scope of EU competition law.

The contribution of this paper lies not only in its descriptive mapping but also in its proposal of an appropriate legislative solution aligned with the standards adopted in EU Member States. It adopts a functional comparative approach within the civil law tradition. The comparison is organized around a common practical problem: how legal systems structure and constrain non-compete clauses to protect legitimate interests while safeguarding freedom to work. Based on predefined comparative dimensions – validity requirements, compensation, the intensity of judicial review, and remedies – the analysis develops a typology of regulatory regimes and maps selected jurisdictions within the Romance, Germanic, and Slavic civil law traditions.

2. The key principles of non-compete clauses: Definitions, comparison, similarities, and summary

While regulations vary in different countries, some of the constituent elements of non-compete clauses have been widely recognized by European legislatures, allowing for the development of working definitions. To begin from its essence, a non-compete clause is a form of agreement including a promise given by the employee to the employer to not engage in employer-related business activities for an agreed duration. In most cases, non-compete clauses are in writing (Bloomberg Law, 2023). Non-compete clauses as a sort of restriction of employee rights must be narrowed to the specific industry one cannot enter and the geographic area to which the restriction applies, and have a defined timespan (Barnett & Sichelman, 2020, p. 956). Because they restrict an individual's ability to engage in business activities, they are generally accompanied by adequate financial compensation for the worker bound by them.

A review of the most relevant regulations in EU countries reveals key shared principles governing provisions on non-compete clauses. In Austria, post-contractual non-competes for salaried employees are governed by the *Angestelltengesetz* (Salaried Employees Act), while the *Arbeitsvertragsrechts-Anpassungsgesetz* (Employment Contract Law Adaptation Act) applies to workers not covered by the Angestelltengesetz. Under both regimes, a restraint is valid only if the worker was an adult at the time of agreement and if it is confined to the employer's line of business, does not exceed one year, and does not unreasonably hinder the worker's professional advancement in light of the employer's legitimate interest (Parliament of Austria, 1921/2015, 1993/2015). The statute also addresses termination scenarios: if the employer has given justified cause for the employee's immediate resignation or termination through their culpable conduct, the employer may not invoke the non-compete; similarly, where the employer terminates the contract, the employer may not rely on the clause unless the employee was at fault or the employer declared it would pay the employee's last due remuneration for the duration of the restraint (Parliament of Austria, 1993/2015). Any contractual penalty agreed for a breach is worth only up to six times the worker's net monthly remuneration for the last month of the employment relationship, with special payments disregarded; where such a penalty is promised, the employer may only claim the forfeited penalty, with performance and additional damages excluded (Parliament of Austria, 1993/2015).

German law prescribes that the non-compete clause, as an agreement between the principal (employer) and the commercial employee, restricts the employee's business activities and must be concluded in writing, and imposes an obligation for the principal (employer) to provide such an agreement in the form of a document signed by them containing the agreed stipulations. Under the German legislation's approach, the non-compete clause shall be binding only if the principal (employer) undertakes to pay compensation. A legitimate business interest is the most important criterion, rendering the non-compete clause non-binding if it does not serve to protect the principal's legitimate business interest. There are other legally prescribed reasons that render a non-compete clause non-binding, such as cases in which the compensation granted constitutes an unreasonable obstacle to the employee's career prospects. The prohibition imposed by the non-compete clause cannot exceed two years from the termination of the employment relationship. German law also protects minors by prescribing that the clause shall be void if the employee is a minor at the time of the contract (German Federal Parliament, 2025).

Italian law offers a less detailed approach, prescribing that the non-compete clause shall be null and void if it is not concluded in writing, if no compensation is agreed, and if no restriction is set within certain limits as to subject matter, time, and place, with a maximum duration of five years for managerial positions and three years in other cases (Italian Parliament, 2025).

In France, the regulation of non-compete clauses has been shaped by jurisprudence. In one of its decisions, the French Court of Cassation identified the relevant criteria which are of primary importance for the validity of a non-compete clause, emphasizing that 'a non-compete clause is only lawful if it is essential to the protection of the legitimate interests of the company, limited in time and space, takes into account the specificities of the employee's job and includes an obligation for the employer to pay the employee financial compensation, these conditions being cumulative' (French Court of Cassation, 2002).

Polish law reflects key shared principles, such as the requirement that a non-compete clause must clearly define the scope of the restricted activity, establish the obligation to compensate the employee, and specify the amount of that compensation, and has the requirement that the non-compete clause must be in writing (Sejm of Poland, 2025).

Dutch legislation prescribes that the clause is only valid, inter alia, if it is in writing and if the employee is an adult (Dutch Parliament, 2025). A distinction is made between the possibility of imposing this restriction on an employee who is engaged for an indefinite period and on one who is engaged under a fixed-term employment agreement; additional justification is required in the case of the latter due to the substantial importance of the business activities involved. Seriously culpable acts or omissions on the part of the employer in the termination or non-continuation of an employment agreement are sanctioned by the legislation, leaving the employer without the possibility of deriving any rights from this clause in such cases. An interesting aspect of the legislation's approach is that, in the case of seriously culpable acts or omissions by the employee that cause the termination or non-continuation of the employment agreement, the employee is not entitled to compensation (Dutch Parliament, 2025).

The examples of Austria, Germany, Italy, France, Poland, and the Netherlands reveal several key shared principles that are widely recognized by the respective legislatures, such as the requirement of a mandatory written form and the necessity of a legitimate business interest, which simultaneously represent the primary justification for imposing post-contractual restrictions. Most countries also require financial compensation for the employee during the period of restriction (e.g. Germany, France, and Poland). Furthermore, duration and spatial limitations are universally recognized, with maximum durations typically covering one to two years, except in Italy where managerial roles allow up to five years. The protection of vulnerable groups such as minors, as well as the prohibition of clauses that constitute an unreasonable obstacle to career advancement, are also emphasized. Several systems (e.g. Austria and the Netherlands) introduce sanctions for seriously culpable conduct by either party, which may render the clause unenforceable.

3. Core human rights and principles

The common trait of all of the above-mentioned elements of a non-compete clause is that they stand in tension with core human rights and the principles of labour law, including those recognized in the European Union. The freedom to choose an occupation and the right to engage in work and to pursue a freely chosen or accepted occupation are provided for in Article 15 of the EU Charter, along with the freedom to seek employment, to work, and to exercise the right of establishment and the freedom to provide services in any Member State, while Article 16 recognizes the freedom to conduct a business (European Parliament, Council & Commission, 2012). With regard to cross-border mobility, freedom of movement for workers within the EU is provided for in Article 45 of the TFEU; it entails the right to accept offers of employment actually made and to move freely within the territory of Member States for that purpose (European Union, 2012).

The above-mentioned freedoms of EU law do not contain any definitions pertaining to labour non-compete clauses, and there is no Europe-wide rule on non-compete clauses as such. As was confirmed approximately two decades ago, there has been no European legislation dealing specifically with non-compete clauses between employer and employee after the end of their contract, and the Commission has had no plans to make proposals for legislation in this respect (European Parliament, 2003).

Hence the tension has had to be resolved within the applicable framework, for which Article 52(1) of the EU Charter (European Parliament, Council & Commission, 2012) remains crucial. In operational terms, each of the constituent elements of a non-compete clause must be treated as an expression of a limitation on the guaranteed freedoms (the freedom to work and the freedom to exercise free movement on the one hand, and the right to conduct a business on the other), thus making the core principles of proportionality (taking into account the essence of the right that is limited), legitimate aim (taking into account the importance of the purpose of the limitation, its nature and scope, and the relationship between the limitation and its purpose), necessity (whether the purpose of the limitation can be achieved by this particular limitation), and the choice of the least restrictive means (whether the purpose of the limitation can be achieved by a narrower limitation of the right) fundamental to the assessment of the proportionality of a non-compete clause.

4. Defining 'legitimate business interests'

In the pursuit of determining the effect of an individual non-compete clause on the right to work as well as on competition, i.e. on the competitive setting of a (relevant) labour market, it is essential to understand the comparative approach toward one of the elements necessary for stipulating a legally enforceable non-compete clause: the element (or condition) of a 'legitimate business interest'. This is of particular interest due to its breadth and its capacity, which on the one hand serve as the limit for the effectuation of the employer's desires and on the other are the outer edge of the employees' right to work. As mentioned above, this condition is different and separate from the condition of proportionality and reasonableness, which usually concerns the requirement that the non-compete clause must not be an unreasonable impediment in terms of its subject matter, duration, and territorial scope. As noted above, in some comparable jurisdictions, the existence of a 'legitimate business interest' is not explicitly regulated. In others, its scope is either set and defined or is given as a legal standard, with its contents to be developed through case law.

In examining labour non-compete clauses from this perspective, it could be stated that their purpose is to limit the ability of an employee to compete with their former employer, although such a general interpretation (the prevention of all, i.e. ordinary, competition) is refused in US court practice (Judgment of the Supreme Judicial Court of Massachusetts, Middlesex, 1974; see Kesan & Hayes, 2013, p. 383). Rather, it is accepted that it is legitimate for the employer to prevent unfair competition, i.e. the employee's improper use of a business advantage or opportunity that the employee had gained through their previous employment (Kesan & Hayes, 2013, p. 384).

The most common things that are cited as legitimate business interests are the protection of trade secrets, confidential information, and customer contracts (Kesan & Hayes, 2013, p. 384), with account also being taken of investments in training, which lead to the same result – the employee's possession of information that influences the employer's position. As such, it protects any interest in the non-disclosure of information that is market-sensitive in the relevant product market in which the employer competes. As for the labour market, market 'sensitivity' to the information acquired by the employee is displayed most strongly in the period immediately preceding the end of the employment relationship, when the employee's leverage is about to be utilized in relation to a new employer, thus making such sensitivity felt most vividly on the selling side of the labour market: the employee's market power is displayed most fully at the moment when they are in possession of this information and in a position to use it to obtain better working conditions, affecting the level and quality of supply in the market, in negotiations for employment with a competitor of the former employer. If observed at that moment through the prism of the purpose of the non-compete clause according to labour law, the 'legitimate business interest' requires that the employer must have a justification for limiting the employee's right to work, i.e. limiting competition on the supply side of the labour market. When viewed from the perspective of the employer's legitimate business interests, this information is protected by other measures, such as those mentioned above: data protection, trade secret rules, and competition law. However, although the parallels with these areas of law are clear, the subject of protection and the addressees of the norms contained in these rules differ. The proportionality and legitimate business interest elements of a non-compete clause tie into the analysis of whether well-drafted non-disclosure agreements may provide the protection required. All of the above makes the individual non-compete clause a tool that remains very attractive to employers, and with good reason. We will discuss this element further in relation to the overall impact of non-competes on the labour market.

5. Non-compete clauses influencing the right to work

Considering the nature of the restrictions that non-compete clauses impose on employees, affecting not only an individual's financial status directly but also their prospects for professional growth, the acquisition of new knowledge, and future income, which are closely linked to employment and are in most cases achievable through it, it is important to assess how and to what extent such restrictions affect employees' right to work. To what extent one's right will be restricted by a non-compete clause depends on the answer to the question of what position the prospective employee holds in the negotiation phase and whether they have a real influence to agree provisions that will mitigate the risk of harsh restrictions in the case of the non-compete clause being enforced. It is not uncommon that employees are faced with non-negotiable documents on a take-it-or-leave-it basis (Vaheesan & Buck, 2020, p. 116). When employees can negotiate employment terms individually, their bargaining typically focuses on the most immediate aspects of employment, such as working hours, pay, and benefits (Estlund; see Vaheesan & Buck, 2020, p. 134). Some scholars have opined non-compete clauses are too broad because they deprive workers of the freedom to use their full experience, knowledge, and skills', and in relation to that, 'employers, insofar as they need to protect their investment in intangibles, have several less restrictive alternatives, such as trade secret laws, improved employee retention policies, and employment contracts' (Vaheesan & Buck, 2020, pp. 117–118). Some authors follow this line of thought, stating that non-compete clauses deprive workers of labour market mobility (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 141). Most employees under a non-compete clause are typically faced with three choices: remaining with their current employer, seeking work in a field or location not covered by the non-compete clause, or waiting until the restriction period ends before finding new employment. These options are quite unpopular with workers. Even if employers do not enforce non-compete clauses, such provisions can still discourage employees from pursuing new job opportunities (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 141). Workers who have decent financial resources, such as an inheritance or substantial investments, may be able to remain unemployed for an extended period and wait for a non-compete clause to expire. For instance, to comply with his non-compete agreement with Microsoft, one tech executive took a year off before joining Google, using that time for philanthropic activities (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 142).

Non-compete clauses can significantly restrict employees' right to work, not only in the short term by restricting immediate employment opportunities but also by hindering long-term professional growth and financial prospects. While employers justify these clauses as necessary to protect their investments in training, the resulting constraints on labour mobility and bargaining power often outweigh the intended benefits for employees.

6. Bridging the rights-based and market-based perspectives

Non-compete clauses should be assessed on two analytically distinct yet closely connected planes. The first is the individual plane, on which such clauses restrict the employee's freedom to change employment, pursue professional development, and translate accumulated knowledge, skills, and experience into improved working conditions. At this level, the principal concern is the extent to which the clause limits the employee's right to work and weakens their bargaining position vis-à-vis the employer. The second is the market plane, on which the use of non-compete clauses may, when sufficiently widespread, affect labour mobility and the competitive conditions under which employers recruit and retain labour. Although a single clause is ordinarily examined under labour law standards – most notably legitimate business interest and proportionality – the aggregate use of such clauses may reduce workers' outside options, dampen inter-employer competition for labour, and thereby influence wages and working conditions, particularly in labour markets characterized by concentration, specialized skills, or limited geographic mobility.

These perspectives are not mutually exclusive; rather, they are complementary and jointly inform the legal assessment of non-compete clauses. The rights-based perspective explains why post-employment restraints require strict justification at the level of the individual employment relationship. The market-based perspective explains why legal systems should remain cautious about the broader normalization of such restraints, even where they may be justified in particular cases. Accordingly, the doctrinal requirements of legitimate business interest and proportionality should be understood not only as instruments for balancing the interests of the employer and the employee in an individual case but also as safeguards against the wider market effects that may arise from the routine or excessive use of non-compete clauses.

7. Non-compete clauses may influence markets

While precise market delineation in labour markets is often difficult, the relevant concern for present purposes is narrower: non-competes are most likely to distort labour market conditions where workers possess specialized skills and face a limited number of realistic alternative employers within a defined occupational and geographic sphere. To assess whether non-compete clauses and the general coverage of a labour market with non-competes can have an impact on the supply and/or demand sides of that market, analysis should begin with determining the relevant market, i.e. to evaluate market impact, its scope and boundaries must be defined beforehand. As has been stated, 'absent differential job amenities, a perfectly competitive labour market delivers a uniform wage for a worker of a given skill type, so any attempt to cut the wage below this competitive wage will lead to all workers leaving the firm immediately', while 'in a monopsonistic labour market this is no longer the case (Alves et al., 2024, pp. 7). The specificity of an (imperfect) labour market, apart from the fact that information asymmetries are more pronounced for workers than they are for firms (Jäger et al., 2021, as cited in Alves et al., 2024, p. 8), means that the employer sets the price. The settings that demonstrate monopsony on labour markets are cases of single-firm monopsony (one company, one town) and a small number of companies, high market coverage and power, due to concentration or simple lack of options. In such a setting, the effect of individual labour non-compete clauses on labour markets is demonstrable, as employees cannot easily move across areas or have skills that are not easily transferable between industries and firms. Apart from pay, evidently, other factors, such as nature of the work, company culture, co-workers, managers, commute time and other work conditions are also considered. (Alves et al., 2024, pp. 7–8)

We infer that a labour market can be differentiated insofar as, and to the extent to which, the number and comparability of work positions can serve as substitutes for the subject's position in a particular industry, thus comprising a 'relevant labour market' as opposed to the labour market in general. The notion of a 'relevant labour market' is not established in literature or practice and represents an elusive concept. Inadvertently, labour markets bear the burden of being inherently differentiated.

Thus the problem for labour markets is that fragmentation is pervasive, if not universal (Naidu & Posner, 2018; as cited by OECD, 2020). This further implies that establishing determinable effects on the labour market is elusive, giving rise to further complexities in determining the effects of individual labour non-compete covenants on the relevant segments of the labour market.

To contribute to the above, when considering the influence of non-compete clauses, and especially taking into consideration legal-economic analysis, some authors state that the narrowing of outside options through non-compete clauses weakens an employee's bargaining power in relation to their employers, which creates a 'lock-in' effect, leading to reduced worker mobility, longer job tenure, and stagnant or declining wages (Balasubramanian et al., 2022; as cited in Alves et al., 2024, p. 5). On the other side, one of the main justifications employers offer for non-compete clauses is that they help protect their investment in employee training, espousing the view that non-compete clauses are necessary to keep employees who might otherwise leverage newly acquired skills and certifications, funded by the employer, to use that investment for a new role or opportunity (Alves et al., 2024, p. 13).

8. The convergence of competition law/antitrust and individual labour non-compete clauses

A clear distinction must be drawn between horizontal restraints in labour markets, such as wage-fixing and no-poach agreements between employers, and individual post-employment non-compete clauses contained in employment contracts. Competition law applies to wage-fixing and no-poach agreements between employers, as these represent horizontal restraints and involve coordination between undertakings. As these have been classified as restrictions by object, a (detailed) relevant market assessment is not required, thus sidelining discussion of the 'relevant labour market' in practice. By contrast, an individual non-compete clause is typically contained in an employment contract between an employer and an employee, meaning that, from a competition law perspective, it is not examined under EU competition law.

Under EU competition rules, individual employees are not classified as 'undertakings', and thus employment contracts cannot be scrutinized as agreements under Article 101 of the TFEU. EU competition law applies to undertakings, not employees, as they form part of the undertaking as the same economic unit (*Jean Claude Becu*; see Whish & Bailey, 2021, p. 92). In such a setting, EU competition law has been perceived to have little manoeuvring space as a tool for the protection of workers' interests via the context of the protection of the labour market. However, some authors state that this seems to be changing, notwithstanding wage-fixing and no-poaching, that is, non-solicit agreements, which have been definitively categorized as restrictions by object, that is, horizontal restrictive agreements (Aresu et al., 2024, p. 1; EU Commission, 2025, para. 75).

Individual labour non-competes are therefore unlikely to become the direct subject of EU anticompetitive analysis in the near future. Although discussion exists about theories of harm in regard to scrutinizing labour non-competes in general (limiting the mobility of employees or keeping wages artificially low, stifling competition, and creating downstream barriers to entry), as a definitive difference between the EU and US, US antitrust law has previously been keen to explore employment non-competes as a vertical restraint (lawful, but judged under the rule of reason, balancing anticompetitive effects and procompetitive benefits).

As stated by the Federal Trade Commission's (FTC) clear discourse on the use of post-employment non-competes, US legal thought has decisively stated that such clauses interfere with competitive conditions in the labour market. In justifying the categorical ban on non-competes, the FTC reasons that public policy leans in favour of employee mobility (Godfrey, 2024, pp. 3, 167; as cited by Lee, 2024, p. 247). The FTC has stated that 'non-competes, in their aggregate use, reduce the number of opportunities available to workers by restricting their ability to obtain jobs that are more suitable to their skillsets' (Non-Compete Clause Rule, 89 Fed. Reg. at 38380; see Lee, 2024, p. 228). However, the FTC announced that it would withdraw its appeals in *Ryan, LLC v. FTC* and *Properties of the Villages v. FTC*, and agreed to the vacatur of the Non-Compete Clause Rule, following a 3–1 vote, thereby effectively confirming that the rule will not take effect (Federal Trade Commission, 2025). Abandoning a nationwide ban, the FTC will pursue an individual, case-by-case approach when assessing non-compete clauses. Notwithstanding the outcome of the nationwide ban, the FTC's stance sparked consideration of potential reforms in this area, shifting the manner in which this matter is examined – not only in the examination of individual cases through case law but also through a broader, almost legislative approach to the topic. Turning to United States case law, although courts have consistently treated vertical restraints as warranting the rule of reason, this is not a bright-line rule under the Supreme Court's precedents, as the Court cautioned against the use of the per se rule because the judiciary may have insufficient experience with the restraint or conduct at issue (Judgment of the U.S. Supreme Court, 1972; see Lee, 2024, p. 246).

Accordingly, the relevance of competition law to individual labour non-compete clauses is primarily conceptual. It lies not in the direct application of antitrust prohibitions to employment contracts but in the use of labour market competition concerns as an interpretive lens. In that sense, competition law does not directly govern the validity of individual non-compete clauses; rather, it helps explain why courts should construe legitimate business interest narrowly and apply proportionality strictly when reviewing post-employment restraints.

9. Cases handling non-compete clauses in the USA and EU

9.1. United States cases

The enforceability of non-compete clauses in the United States differs from one state to another; each jurisdiction has its own approach to interpreting and upholding these agreements. In states that allow the enforcement of non-compete clauses, their legality is evaluated by the 'means of reasonableness' framework (Vaheesan & Buck, 2020, p. 125). The Restatement (Second) of Contracts serves as a benchmark test platform for this evaluation (Judgment of the Court of Appeals of the State of New York , 1999; Judgment of the Supreme Court of Vermont, 2005; ; see Vaheesan & Buck, 2020). Under the Restatement standard, a non-compete clause tied to a valid agreement is considered an unreasonable restraint of trade either if it imposes restrictions beyond what is necessary to safeguard the employer's business and goodwill or if the employer's interest is preponderated by the burden on the employee and the potential harm to the public (American Law Institute, 1981; see Vaheesan & Buck, 2020, p. 125).

A substantial body of case law in the United States has examined the enforceability of non-compete clauses. Many of these cases offer valuable insights into the reasoning and methodology that the courts apply, particularly when evaluating criteria that often prove difficult to apply in practice. For example, it was determined that geographical restrictions can lead to a certain level of ambiguity, while the same distance does not have the same meaning and implications in different states (Kesan & Hayes, 2013, p. 385). In one case, in the state of Oklahoma, the court assessed whether a 20-mile non-compete clause imposed on a cardiovascular surgeon in Tulsa was reasonable. Because all of the nearest hospitals were outside the radius of 20 miles, and since the nearest hospital outside that radius was more than 100 miles away, the court concluded that the limitation was unreasonable (Judgment of the Supreme Court of the state of Oklahoma, 2002; see Kesan & Hayes, 2013, p. 385).

In the context of ambiguity, the language of a non-compete clause can be confusing, which has its own consequences (Kesan & Hayes, 2013, p. 386). US federal states in general, including Alaska, Mississippi, Montana, Tennessee, Virginia, and Wyoming, interpret non-compete clauses in the employee's favour (Judgment of the Supreme Court of Virginia, 2005; see Kesan & Hayes, 2013, p. 386), while the legislation of the state of Floridaexplicitly provides that vague language contained in a non-compete clause should be construed in the employer's favour (Florida Legislature; see Kesan & Hayes, 2013, pp. 386–387).

One component of the assessment of whether a non-compete clause is enforceable in the United States, that is often taken into account by courts is the assessment of public interest. For example, in North Dakota, public interest has served as the primary justification for courts and the reason non-complete clauses are almost always invalid in an employment law scenario, under the law of that state (Judgment of the Supreme Court State of North Dakota, 2001; see Kesan & Hayes, 2013, p. 385).

9.2. EU cases

EU cases also provide useful insights into how courts evaluate the key elements of non-compete clauses, on which enforceability often depends, adopting a different approach and holding that the non-compete clauses at issue were valid, even though at first glance they may seem to have a significant impact on the employee. In one case before the Italian Court of Cassation concerning a non-compete clause covering the territory of Italy, France, Switzerland, Germany, and Austria, the court upheld the validity of the clause on the ground that it had not prevented the employee from taking up employment with another employer in the same field and at an appropriate salary 15 days after the termination of the employment relationship (Judgment of the Court of Cassation (Italy), 2001; see Boeri et.al, 2022, p. 19). In another case, the same court upheld the validity a non-compete clause covering the entire territory of the EU, taking the position that the establishment of a new, competing firm was unlawful (Judgment of the Court of Cassation (Italy), 2003; see Boeri et al., 2022, p. 19).

The Milan Court upheld the extended geographic scope of a non-compete clause, holding that 'with regard to the alleged excessive width of the object and the territory, it seems clear that in today's globalized dimension of the economy and, in particular, of the companies involved in this affair, a non-compete agreement can almost never usefully be limited to the national territory but must cover at least the European dimension' (Judgment of the Milan Labour Court, 2005; see Boeri et al., 2022, p. 19). Comparing this decision with the Oklahoma case illustrates the contrast in what constitutes a justified geographic scope, even considering that the cases involved different facts and different legal systems: the EU court's position that the non-compete clause must cover at least the European dimension is in contrast to the Oklahoma case, in which a 20-mile limitation was regarded as unreasonable.

In one of its decisions, the Portuguese Court of Appeal placed emphasis on equality between the parties bound by the non-compete clause by stressing the onerous and bilateral nature of such clauses, contractual fairness, the principle of good faith, and the employer's legitimate interest (Judgment of the Lisbon Court of Appeal, 2023). In the same decision, the Court referred to the reasoning in one of its judgments in relation to the employer's waiver of the non-competition agreement, highlighting the part in which emphasis is placed on criticism of the employer's unilateral withdrawal, and stating that such a withdrawal violates the principle of good faith (Judgment of the Lisbon Court of Appeal, 2023).

10. Judicial practice and regulation in Serbia

Serbia is an EU candidate country, and its Constitution contains an explicit provision that Serbia is established on an affiliation to European principles and values (National Assembly of the Republic of Serbia, 2006). The Serbian Labour Law contains a provision regulating in-employment and post-employment non-compete clauses (National Assembly of Serbia, 2005). The phrasing is such that, as part of the employment contract and by the effect of this clause, certain activities, i.e. work, that the employee performs during the employment relationship cannot be performed for anyone other than the employer without the employer's consent. This prohibition can be established and stipulated in the employment contract only if there are conditions where the employee, by virtue of working for the employer, acquires new and particularly important technical knowledge, a wide array of business partners, or important business information and secrets, with a determination of territorial validity but dependent on the kind of work to which the prohibition is related. As for the post-employment non-compete obligation, it is stipulated that the employee and the employer may specify the conditions of the non-compete after a termination of employment, but it must be no longer than two years, with a statement that this can be stipulated only if, by virtue of the employment agreement, the employer pays monetary compensation to an agreed amount.

Serbian law does not use the term 'legitimate business interest', but it effectively requires it: a non-compete clause is valid only if the employee could, in the course of their employment, acquire particularly important know-how, a wide network of business partners, or access to confidential business information. Territorial limits are not specified, and it defaults instead to general contract law. Post-employment restrictions last two years, which is strict given Serbia's market size, with no set criteria for mandatory compensation. However, legislatively, no proportionality-based test exists. As for competition law and its application to non-compete clauses in individual (or collective) labour law agreements, the Serbian Law on Protection of Competition explicitly states that it does not apply to labour relations between employers and employees (National Assembly of Serbia, 2009), leaving no room for interpretation on whether competition law rules have a say in the matter of individual non-compete clauses.

Judicial trends in Serbia encompass instances from the highest court that increasingly exclude general contract law principles from contractual relations in labour law, predominantly to the benefit of the employee, with the most important example being the general invalidity of contractual penalties imposed on the employee under the guise of its 'inappropriateness' in labour law matters. In a case before the Appellate Court of Novi Sad, the Court took the position that there is no statutory basis for providing for the institution of a contractual penalty in an employment contract according to the law of obligations, because the relationship between the employee and the employer is not one of debtor and creditor but rather a relationship governing rights, obligations, and liabilities arising from and in connection with work (Judgment of the Appellate Court in Novi Sad, 2017). In a decision of the Supreme Court of Cassation, the Court overruled the lower courts' decisions and took the position that, given that the Labour Law precisely defines the content of an employment contract, the employer does not have the freedom to unilaterally introduce sanctions that differ from those prescribed by law; it concluded that a contractual penalty is an institution of the law of obligations and does not apply to employment contracts (Supreme Court of Cassation, 2020). In another instance, the Supreme Court (formerly the Supreme Court of Cassation) took the position that stipulating a contractual penalty in the event of non-performance of a work obligation (remaining employed with the same employer) for a period twice the duration of the specialization cannot be enforced and such a clause is null and void (Supreme Court, 2023).

In Serbia, legal debate exists over whether employers can unilaterally waive non-compete clauses, with the predominant conclusion that this is possible but that it must be done in writing (Balšić, 2025, p. 25.) This is also reflected in case law (Judgments of the Supreme Court of Serbia, 2024; the Commercial Appellate Court of Serbia, 2021; the Appellate Court in Belgrade, 2021).

In a recent case that concerned the matter of enforcing a post-employment non-compete compensation payment and the unilateral waiver of the clause, the court of first instance reached the same conclusion by utilizing a human rights narrative – by rationalizing the standpoint that, by default, the non-compete clause represents a limitation of the employee's right to work (Judgment of the First Basic Court in Belgrade, 2024). The Court began its rationale by stating that the right to work is one of the basic human rights; that it entails the right of every person to freely choose and accept employment and to work for a living; that it is guaranteed by the Constitution of Serbia; that human rights guaranteed by the Constitution are directly applicable; that the provisions of human and minority rights must be interpreted for the benefit of promoting the values of a democratic society, in accordance with international standards of human and minority rights, as well as the practice of international institutions that supervise its implementation; and that, according to Article 20 of the Constitution, when limiting human and minority rights, all state bodies, especially courts, are obliged to consider the essence of the right that is limited, the importance of the purpose of the limitation, the nature and scope of the limitation, the relation of the limitation and its purpose, and whether there is a manner in which the purpose of the limitation can be attained with a lesser limitation. It stems from the reasoning of the decision that the Court concluded it is always in the best interests of the employee to be 'set free' from a particular non-compete clause, regardless of its wording, implying that non-compete clauses are inherently intended to be utilized only in the interest and for the benefit of employers, making whether a non-compete clause is effective always subject to the will of an employer, either by their simply not paying the compensation due or by declaring the clause ineffective by unilateral waiver. Simply put, the court established that it is generally preferable for employees to be released from such clauses and become ineligible for compensation, regardless of the clause wording. This approach treats non-compete clauses as primarily serving the employer's interests, with their validity dependent solely on the employer's actions, such as withholding compensation or unilaterally waiving the clause. Serbian jurisprudence has therefore now taken the clear stance that if an employer provides written notice of a waiver of the post-employment obligation during termination, both parties are released from their obligations, as the release of the employee in writing ends the tension with the right to work that is limited by the non-compete clause.

As competition law does not explicitly directly govern individual non-compete clauses in Serbia, the protection of competition in labour markets must operate indirectly through stricter labour law criteria: a legitimate business interest that would be tied to proportionality through a necessity to tailor the territorial scope, and through a minimum compensation requirement.

Conclusions

This paper has comparatively examined selected regulations and has showcased the effects of labour non-compete clauses by reviewing European jurisdictions and US legislative solutions in contrast with Serbian trends. We have highlighted that there are still strong tendencies for individual non-compete clauses to be used by employers, with complexities regarding their effects on the relevant labour market. Judicial authorities evaluate essential considerations: employee mobility, labour market competition, and employers' legitimate business interests, all within the framework of employees' fundamental rights. Comparative insight reveals a stricter approach and clearer requirements for non-compete clauses, such as mandatory compensation and proportionality, particularly within the EU. Serbian law reflects many European principles but would benefit from further alignment, especially regarding territorial scope and compensation standards, reflected in a minimum amount of compensation. In that sense, where competition law does not directly govern individual employment restraints, as in Serbia, protection of competition in labour markets can be pursued indirectly through labour law doctrines that subject non-compete clauses to a strict review of legitimate business interests, necessity, territorial tailoring, and adequate compensation, which would all need to be scrutinized through the lens of a proportionality-based analysis. We propose that Serbian legislation should introduce a rule that the territorial scope must reflect the territories in which the employee could use the knowledge acquired in the course of employment, particularly important know-how, a wide network of business partners, or access to confidential business information. As for the compensation standard, we propose that the minimum amount of compensation should be set higher than in most of the jurisdictions that were showcased, by tying it to the average of the three monthly salary payments preceding the termination of the employment relationship.

REFERENCES

Alves, P., Serra, B., Greenberg, J., Guo, Y., Harjai, R., & Van Reenen, J. (2024). *Labour market power: New evidence on non-compete agreements and the effects of M&A in the UK* [Discussion paper no. 1976]. Centre for Economic Performance. https://eprints.lse.ac.uk/126835/1/dp1976.pdf

American Law Institute. (1981). *Restatement (Second) of Contracts*. American Law Institute.

Aresu, A., Erharter, D., & Renner-Loquenz, B. (2024, May). Antitrust in labour markets. *European Commission Competition Policy Brief*, *2*, 1–8. https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8–4202-958d-198cf0740ce3_en

Balasubramanian, N., Chang, J. W., Sakakibara, M., Sivadasan, J., & Starr, E. (2022). Locked in? The enforceability of covenants not to compete and the careers of high-tech workers. *Journal of Human Resources*, *57*(S), S349–S396. https://doi.org/10.3368/jhr.monopsony.1218–9931R1

Balšić, A. (2025). The relationship between freedom of work and non-compete clauses: (Re)concilable legal institutions. *Harmonius – Journal of Legal and Social Studies in South East Europe*, *2025*(1), 15–33. https://doi.org/10.51204/Harmonius_25101A

Barnett, J. M., & Sichelman, T. (2020). The case for noncompetes. *University of Chicago Law Review*, *87*, 953–1002. https://lawreview.uchicago.edu/sites/default/files/BarnettSichelman_CaseForNoncompetes_87UCLR953.pdf

Bloomberg Law. (2023). *Non-compete clauses in employment and commercial contracts*. https://pro.bloomberglaw.com/insights/contracts/non-compete-clauses-in-employment-and-commercial-contracts/

Boeri, T., Garnero, A., & Luisetto, L. G. (2022). *The use of non-compete agreements in the Italian labour market*. Fondazione Rodolfo Debenedetti. https://www.frdb.org/wp-content/uploads/2022/05/Boeri-Garnero-Luisetto-Non-compete-agreements-Italy_FINAL.pdf

National Assembly of the Republic of Serbia, 2006. Constitution of the Republic of Serbia. (2006). *Official Gazette of the Republic of Serbia*, 98/2006. https://www.refworld.org/legal/legislation/natlegbod/2006/en/71120

Dutch Parliament. (2025). Dutch Civil Code, Article 7:653. https://wetten.overheid.nl/BWBR0005290/Boek7/Titel7/Afdeling9/Artikel653

European Communities and Member States & the Republic of Serbia. (2013, 18 October). *Stabilisation and Association Agreement between the European Communities and Their Member States of the One Part, and the Republic of Serbia, of the Other Part* (O. J. L 278, 18.10.2013, p. 16; consolidated version). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02013A1018%2801%29–20211206

European Commission (2025), Decision of 02.06.2025. relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT. 40795 – Food delivery services), https://ec.europa.eu/competition/antitrust/cases1/202530/AT_40795_1262.pdf

European Parliament. (2003). *Parliamentary question – E-1637–2002 (ASW), Answer given by Mr Monti on behalf of the Commission* (O. J. C 92 E). https://www.europarl.europa.eu/doceo/document/E-5–2002-1637-ASW_EN.html

European Parliament, Council and Commission. (2012). Charter of Fundamental Rights of the European Union. (2012/C 326/02). *Official Journal of the European Union*, C 326. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT#d1e751–393-1

European Union. (2012, 26 October). Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union*, C 326, 47–390. https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj/eng

Federal Trade Commission. (2025, 5 September). *Federal Trade Commission files to accede to vacatur of Non-Compete Clause Rule*. https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule

Florida Legislature. (2024). Florida Statutes § 542.335. http://www.leg.state.fl.us/statutes/

French Court of Cassation. (2002, 10 October). Decision on non-compete clauses, no. 00–45.135. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007046365/

German Federal Parliament. (2025). *Handelsgesetzbuch (HGB)*. https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html

Italian Parliament. (2025). Codice Civile, art. 2125. https://www.brocardi.it/codice-civile/libro-quinto/titolo-ii/capo-i/sezione-iii/art2125.html

Jäger, S., Schoefer, B., & Heining, J. (2021). Labor in the boardroom. *Quarterly Journal of Economics*, *136*(2), 669–725. https://doi.org/10.1093/qje/qjab001

Judgment of the Appellate Court in Belgrade (Serbia) of 19 March 2021, file ref. Gž1 1900/2020.

Judgment of the Appellate Court in Novi Sad (Serbia) of 3 July 2017, file ref. Gž1 1363/2017.

Judgment of the Commercial Appellate Court in Belgrade (Serbia) of 2 September 2021, file ref. Pž 5978/2021. Judgment of the Court of Appeals of the State of New York (US) of 13 May 1999 on the case of *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999).

Judgment of the First Basic Court in Belgrade (Serbia) of 5 November 2024, file ref. P1 1716/20.

Judgment of the Supreme Court (Serbia) of 14 December 2023, file ref. Rev2 3218/2021.

Judgment of the Supreme Court (Serbia) of 28 February 2024, file ref. Rev2 1330/2022.

Judgment of the Supreme Court of Cassation (Serbia) of 11 March 2020, file ref. Rev2 2350/2019.

Judgment of the Supreme Court of the State of Oklahoma (US) of 9 April 2002 on the case of *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210 (Okla. Civ. App. 2002).

Judgment of the Supreme Court State of North Dakota (US) of 5 September 2001 on the case of *Warner and Co. v. Solberg*, 634 N.W.2d 65 (N.D. 2001).

Judgment of the Supreme Judicial Court of Massachusetts, Middlesex (US) of 12 March 1974 on the case of *All Stainless, Inc. v. Colby*, 308 N.E.2d 481 (Mass. 1974).

Judgment of the U.S. Supreme Court (US) of 29 March 1972 on the case of *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

Judgment of the Vermont Supreme Court (US) of 19 August 2005 on the case of *Summits 7, Inc. v. Kelly*, 886 A.2d 365 (N.H. 2005).

Judgment of the Virginia Supreme Court(US) of 16 September 2005 on the case of *Omniplex World Services Corp. v. US Investigations Services Inc.*, 618 S.E.2d 340 (Va. 2005).

Kesan, J. P., & Hayes, C. M. (2013). The law and policy of non-compete clauses in the United States and their implications. In M. Pittard, A. L. Monotti & J. Duns (Eds.), *Business innovation and the law: Perspectives from intellectual property, labour, competition and corporate law* (pp. 381–399). Edward Elgar. https://doi.org/10.4337/9781781001622.00033

Lee, S. (2024). Surviving the rule of reason: An antitrust analysis of employment noncompetes. *Fordham Law Review*, *93*, 225–271. https://fordhamlawreview.org/wp-content/uploads/2024/09/Vol.-93_Oct_06_Lee-225–271.pdf

Marx, M., & Fleming, L. (2012). Non-compete agreements: Barriers to entry… and exit? *Innovation Policy and the Economy*, *12*(1), 39–64. https://doi.org/10.1086/663155

Naidu, S., & Posner, E. A. (2018). Antitrust remedies for labor market power. *Harvard Law Review*, *132*(2), 536–601. https://harvardlawreview.org/wp-content/uploads/2018/12/536–601_Online.pdf

National Assembly of Serbia. (2005). Labour Law (Zakon o radu). *Official Gazette of the Republic of Serbia*, 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017, 95/2018, 86/2019, 155/2020, 110/2021. https://www.paragraf.rs/propisi/zakon_o_radu.html

National Assembly of Serbia. (2009). Law on Protection of Competition. *Official Gazette of the Republic of Serbia*, 51/2009, 95/2013.

OECD. (2020). Competition in labour markets. https://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf

Parliament of Austria. (1921/2015). Angestelltengesetz (AngG), Art. 1 § 36 – Konkurrenzklausel (consolidated). RIS Bundesrecht konsolidiert. https://www.ris.bka.gv.at/eli/bgbl/1921/292/A1P36/NOR12092405

Parliament of Austria. (1993/2015). Arbeitsvertragsrechts-Anpassungsgesetz (AVRAG), § 2c – Konkurrenzklausel (consolidated). RIS – Bundesrecht konsolidiert. https://ris.bka.gv.at/normdokument.wxe?abfrage=bundesnormen&gesetzesnummer=10008872&fassung-vom=2022–02-14&paragraf=2c

Portuguese Court of Appeal. (2023, 15 March). Decision on non-compete clause, no. 1234/22. https://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/e99a7bb7d9d498bd80258a2f00396c0f?OpenDocument

Sejm of Poland. (2025). The Labour Code. *Dziennik Ustaw* 1974, no. 24, item 141, as amended. https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19740240141

Vaheesan, S., & Buck, M. J. (2020). Noncompetes and other contracts of dispossession. *SSRN*. https://download.ssrn.com/22/09/14/ssrn_id4219157_code1444154.pdf

Whish, R., & Bailey, D. (2021). *Competition law* (10th ed.). Oxford University Press.

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Post-Employment Non-Competition: The Content of Agreements and the Interpretation of Fairness in the Practice of Latvian Courts

Abstract: This article analyses restrictions on competition after the termination of employment in Latvia, focusing on both the regulatory framework and case law. It examines the purpose of restrictions on competition and the conditions for their validity and includes an in-depth analysis of the concept of fair compensation in modern labour law. For comparative context, the regulations of other European countries on these issues are also outlined. Due to the limited scope of the publication, issues such as the possibility of unilateral withdrawal from a non-competition agreement and legal remedies in cases where one of the parties fails to comply with the terms of an agreement are not addressed.

Keywords: restrictions on competition, non-competition clauses, termination of employment relationships, terms for restriction on competition, adequate monthly compensation

Introduction

In a free-market economy marked by intense business competition, protecting employment as a resource for economic activity through legal remedies is increasingly important. One such mechanism is agreements on post-employment restrictions on competition (non-competition agreements), which serve to safeguard the

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interests of employers. In Latvia, the special regulatory act governing labour rights is the Labour Code (LC), adopted on 20 June 2001 (Republic of Latvia, June 2001). Since its adoption, the law has included regulations on restrictions on competition after the termination of legal employment relations. Over time, several changes have been made to the law, with the latest amendments in the context of restrictions on competition made in 2017 (Republic of Latvia, 2017). Initially, when the LC came into force, the new regulation regarding restrictions on competition was not widely used, but over time it has become increasingly popular: nowadays, restrictions on competition are included in many employment contracts.

It should be noted that, unlike, for example, the Polish regulation (Republic of Poland, 1974, Article 101(1)), Latvian legislation only applies the concept of restrictions on competition to after the termination of employment, i.e. the term 'restrictions on competition' does not apply to existing employment relationships. In such cases, where there is an employment relationship between the parties, the employer can protect its legitimate and protectable interests by imposing a restriction on supplementary work (see Articles 91 and 92 of the LC).

Questions about the proportionality of agreed restrictions on competition, or non-compliance with them, have often been brought before the courts, and case law has made a significant contribution to the understanding of this legal institution and the search for a fair balance between the legal interests of employers and employees. Latvia's supreme audit institution, the State Audit Office, in an audit of restrictions on competition in the public sector, has also addressed issues related to the permissibility of restrictions on competition in the public sector and violations identified in this area, which will be discussed in the concluding part of this article.

We also analyse the main prerequisites for the validity of restrictions on competition, including an overview of findings on court practice on the search for a fair balance in this area.

1. The concept of restriction on competition and the procedure for concluding agreements

The right of every person to freely choose their occupation and place of work is enshrined in Article 106 of the Constitution of the Republic of Latvia (the *Satversme*), which stipulates that everyone has the right to freely choose their occupation and place of work in accordance with their abilities and qualifications (Republic of Latvia, 1922). Article 116, in turn, stipulates that this right may be restricted only in cases provided for by law. Given that an agreement on restriction on competition is a restriction of an employee's fundamental rights, the legislature must lay down the main principles and preconditions in regulatory enactments to ensure that such an agreement does not unduly worsen the legal situation of the employee.

The general legal definition of the term 'competition' is contained in Article 1(6) of the Competition Law, where competition is explained as 'existing or potential economic (commercial) rivalry between two or more market participants in a relevant market' (Republic of Latvia, October 2001). In turn, Article 84(1) of the LC defines the concept of restriction on competition in labour law as an agreement between an employee and an employer on the limitation of the employee's professional activities after the termination of the employment relationship. It follows that the restriction on competition is based on the employer's desire to protect itself from activities of a former employee that could compete with the employer's commercial activities, while the employee receives the compensation stipulated in the agreement for the duration of the restriction.

As indicated in the legal literature, the imposition of a restriction on competition does not provide the employer with a mechanism to protect itself against competition in general, but only to mutually agree on restrictions that are reasonably necessary to protect its legitimate interests (Bevitt & James, 2007, p. 1).[1] Agreements on restrictions on competition are recognised in the labour laws of many continental European countries. As noted by legal scholars, common law has historically been suspicious of such clauses in contracts of employment, on the basis that they restrict employees' future employment opportunities, but nowadays the approach has changed, and such clauses are recognised as valid provided that they are 'reasonable' (McMahon & Eustace, 2022, p. 411).

Article 84(1) of the LC likewise stipulates that an agreement is permissible only if it meets the following criteria:

1) its purpose is to protect the employer from professional activities of the employee that may compete with the employer's commercial activities, taking into account the employer's protected information available to the employee;
2) the term of the restriction on competition does not exceed two years from the date of termination of the employment relationship;
3) for the entire duration of the restriction on competition, it provides for the employer's obligation to pay the employee appropriate monthly compensation for compliance with the restriction on competition after the termination of the employment relationship.

In addition to this list, Article 84(2) sets out another mandatory requirement that must be met for an agreement on restriction on competition to be valid, i.e. the restriction may only apply to the field of activity in which the employee was employed during the existence of the employment relationship (Judgment of the Senate of the Republic of Latvia, 2026, para. 14.4). The basic principle to be observed when concluding an agreement on restriction on competition is that it must strike a reasonable

1 On the challenges of trade secret protection, see Korycińska-Rządca, 2024.

balance between the legal interests of the former employer and the employee. In the following sections, we will analyse these characteristics.

2. The form and time of the conclusion of an agreement on restriction on competition

Article 84(4) of the LC stipulates that an agreement on restriction on competition must be concluded in writing, specifying the type, extent, place, and time of the restriction and the compensation to be paid to the employee.

In contrast to the Latvian Civil Law (Republic of Latvia, 1937), which allows freedom of form in the conclusion of many contracts, labour law imposes a requirement that employment contracts, amendments thereto, and agreements on non-competition be written. This written requirement is designed to protect the employee, as the socially weaker party, since written documents undoubtedly facilitate proving a case in the event of a dispute.

In our opinion, if an agreement on restriction on competition is not concluded in writing but it has been established that the parties verbally agreed such a restriction and that both parties comply with these provisions (i.e. the employer pays compensation, while the employee complies with the verbally agreed restriction), then the fact that the written form has not been observed should not automatically render the restriction on competition invalid (see Article 1488 of the Civil Law; Republic of Latvia, 1937).

The LC does not specify when an agreement on restriction on competition should be concluded. In practice, such an agreement after the termination of an employment relationship is most often concluded as a separate agreement at the same time as the employment contract is terminated; in such a case, the former employer, after assessing the level of knowledge, expertise, experience, and skills acquired by an individual employee, may decide how important it is to agree that the employee will not work for the employer's direct competitors. However, the parties may just as well include an agreement on restriction on competition in the employment contract; this is the free choice of the parties, and this option is also accepted in Latvian case law. It should be emphasised that even if a non-competition clause is included in the employment contract, it is considered a separate, private law contract.

Each of these approaches has its advantages and disadvantages. For example, if an agreement on restriction on competition is concluded at the time when the parties terminate their employment relationship, employees in such a situation are often aware of the value of the knowledge they have acquired and may therefore insist in negotiations on higher compensation for compliance with the non-competition clause. This is opposed to a situation where the agreement on restriction on competition is concluded with an employee who has only just started their employment. Similarly, when an employment relationship is terminated, emotions between the parties can often run high, which can complicate the content of the agreement. Latvian law does not restrict any positions, professions, or age groups from entering into an agreement on restriction on competition, so the parties have a wide range of options.

3. The purpose of a restriction on competition

Article 84(1) of the LC clearly defines that the purpose of an agreement on restriction on competition is to protect the employer from professional activities by the employee that may compete with the employer's commercial activities, taking into account the employer's protected information at the employee's disposal.

Prior to the 2017 amendments, the LC did not contain provisions clarifying whether restrictions on competition also apply to an employee's own commercial activities or to the prohibition of poaching. With the 2017 amendments, Article 84 was supplemented with a fifth paragraph that stipulates that 'an agreement on the restriction on competition may apply to different types of restriction on competition, including permanent competitive economic activity of the employee, employment of the employee with another employer, not poaching of clients or employees of the former employer'. Thus the concept of professional activity allows not only a restriction on a former employee from working for a competing company (as an employee), but also a restriction on the former employee from engaging in commercial activities in a field of activity that competes with the employer, including providing services or professional advice as a self-employed person.

Another innovation of the 2017 amendment is that the LC now states *expressis verbis* that the restriction on competition may also apply to such practices as not poaching customers or employees of a former employer. The prohibition on poaching former employers' customers and employees has not yet been assessed in detail in Latvian legal doctrine, and in the context of poaching, it can often be difficult to identify whether a former employee has committed poaching or whether it was a voluntary move that took place on the initiative of the customer or employee themselves – specific evidence would be essential in determining such actions.

Restrictions occasionally imposed in practice on an employee's family members, such as a spouse, from competing with the former employer should be approached critically. Such a restriction would not be valid, as it does not comply with Article 1413 of the Civil Law, given that a former employee cannot legally influence the will of another person.

4. The scope of the restriction on competition

Article 84(2) of the LC stipulates clearly that a restriction on competition may only apply to the field of activity in which the employee was employed during the existence of the employment relationship. The employer does not have the right to impose an overly broad prohibition on competition; it must be proportionate and in the interests of both parties (Miller & Jentz, 2009, p. 202). For example, in its case law, the Supreme Court has found it disproportionate and unjustified to restrict a secretary of a car dealership from working for any company engaged in the sale, maintenance, repair, rental, or leasing of vehicles or their parts and accessories, from participating in such a company as an employee, or from providing services to such a company or an entrepreneur (Judgment of the Senate of the Republic of Latvia, January 2008).

5. The term of the restriction on competition

Article 84(1)(2) of the LC stipulates that the term of the restriction on competition may not exceed two years from the date of the termination of the employment relationship. However, the precise duration shall be specified in each contract. In practice, the parties most commonly agree on a restriction period of one or two years.

The regulatory acts of several European Union Member States also stipulate, similar to the LC, that the maximum term of a non-competition clause is two years (for example, Lithuania (Republic of Lithuania, 2016, Article 38), Germany (Article 74(a)); in Estonia (Republic of Estonia, 2008, Article 24) and Belgium (Belgium 1978, Article 65), the maximum duration is one year, whereas in Finland (Republic of Finland, 2001, Article 5), it may not exceed six months.

The LC sets a maximum term of two years for all employees (without differentiating by position or qualifications), whereas some countries set maximum non-competition terms depending on the employee's position. For example, in Spain, the maximum term of a non-competition clause for a qualified specialist may be two years, while for unskilled employees who nevertheless had access to their former employer's trade secrets, the non-competition period may not exceed six months (Spain, 2015, Article 21). Italy stands out with its long maximum non-competition term, where employees who have held managerial positions may be subject to a non-competition term of up to five years, while for other employees it may not exceed three years (see Mammone, 2006, p. 2).

Latvia's approach to the maximum term of agreements on restrictions on competition can be regarded as generally rational. On the one hand, it sufficiently safeguards the legitimate interests of the former employer, avoiding the limitations associated with very short terms, such as six months. On the other hand, imposing a longer period of up to two years could unduly disadvantage the employee, particularly if they are unable to work in their field of expertise during that time, potentially leading to a loss of professional qualifications and reduced competitiveness in the labour market. It is noteworthy that certain foreign jurisdictions permit lifetime restrictions on competition, which remains an exceptional approach.

From our perspective, an initial agreement on a shorter term, such as one year, does not preclude the parties from subsequently agreeing to extend the restriction for an additional period, provided the maximum statutory limit of two years is not exceeded. This flexibility differs from the extension of a probationary period, which is not generally permitted.

6. The understanding of appropriate monthly compensation

For an agreement on a restriction on competition to be valid, it is essential that the employer is obliged to pay the employee 'appropriate monthly compensation for compliance with the restriction on competition' after the termination of the employment relationship (LC 84(1)(3)). The LC does not provide specific criteria for the amount of payment, and therefore 'appropriate compensation' is a general clause that must be specified in each case.

Unlike the flexible regulation in Latvia, which provides the parties with a relatively high degree of private autonomy in determining compensation, many countries have set specific minimum compensation limits in their legislation. For example, in Poland it is at least 25% of the employee's previous salary (Republic of Poland, 1974, Article 101(2)), and in Lithuania, 40% (Republic of Lithuania, 2016, Article 38(3)). In Germany (Germany, HGB, 1897, Article 74), compensation must be at least half of the previous salary. In the context of compensation, the Danish regulatory framework is particularly noteworthy, as it prescribes in a highly detailed manner the percentage of compensation to be paid under various temporal durations and situational circumstances. Unlike many other European jurisdictions, Danish law specifies precise compensation percentages contingent on the length of the post-employment restriction period and adjusts these percentages in cases where the employee obtains alternative suitable employment during that period (Folketing of Denmark, 2015).

Given that the LC does not contain provisions on the minimum compensation to be paid, this regulatory gap has often been criticised, and authors of legal literature have sometimes attempted to define the concept of 'appropriate compensation', for example by stating that it would be fair if the monthly compensation reached 60–90% of the employee's average earnings (Gailums, 2002, p. 154).

At first glance, it might appear desirable for the LC to set a minimum threshold, but at the same time, the concept of appropriate compensation used there allows the parties to be more flexible and choose a mutually acceptable compensation. For example, if the restriction is quite narrow, such as prohibiting the employee from working for only one specific competitor of the former employer or in a small geographical area, the compensation could be lower than one-third or one-half of the previous salary, as is often stipulated in other countries.

The amount of appropriate compensation will vary in each case, and no specific limits can be set on what compensation will or will not be considered appropriate. It may be influenced by factors such as the duration of the restriction, the employee's position, the field of activity, the market situation, etc. (Zvērinātu advokātu birojs 'BDO Zelmenis&Liberte', 2020, p. 225). Since a restriction on competition does not mean that the employee is not allowed to work at all, but only not in a specific field of activity, the compensation does not have to replace all previous income. The LC does not specify the criteria to be used to determine compliance; this should be assessed individually in each situation. The compensation may be specified in the contract as a specific amount or, for example, as a percentage of the employee's previous salary, average earnings, etc. The fixed compensation payable per month may also vary; for example, it would be possible to agree that the compensation for the first six months of the restriction period is EUR 1000 but for the remaining months is EUR 500 (provided that this remains appropriate and fair).

If an agreement on restriction on competition is made at the time of establishing an employment relationship or during its existence, it would be preferable to set the compensation as a percentage of the salary rather than a specific amount, which, over time, taking into account the possibility of inflation, may no longer correspond to the concept of appropriate compensation when the employment relationship is terminated.

As mentioned above, the parties' agreement on restrictions on competition, including the compensation to be paid, may already be included in the employment contract. However, if a long period passes before the parties terminate the employment relationship, there is a possibility that the compensation initially agreed may no longer be adequate compared with the compensation prevailing in the labour market at the time of the termination of the employment relationship. Therefore, in order to assess the reasonableness and fairness of the compensation, one should be guided by the situation at the time when the restrictions on competition are actually applied, rather than those agreed upon in the contract initially.

It is also not possible to draw comprehensive objective conclusions about the amount of appropriate compensation from current case law. It can be concluded from case law that the range of compensation amounts set in Latvia is quite significant, but at the same time, the type and extent of the restrictions on competition set out in these agreements also vary considerably. When examining disputes about whether compensation is fair, courts should consider the agreed duration of the restriction on competition, the employee's position, criteria such as education and previous experience, the field of activity, and the situation in the labour market as a whole.

Prior to the 2017 amendments, the LC did not regulate when compensation should be paid, stipulating only that it be paid monthly and for the entire duration of the restriction period. At that time, the Supreme Court held that, if the parties agreed, such compensation could also be paid in advance, before the termination of employment (Judgment of the Senate of the Republic of Latvia, November 2008). The 2017 amendments clarified Article 84(1)(3) of the LC, specifying that compensation is payable as monthly payments after the termination of the employment relationship, thereby prohibiting advance payments during the employment period.

Although the parties have relatively broad discretion in determining the content of an agreement on restriction on competition, it would not be permissible to link the payment of compensation to the occurrence of certain circumstances, for example by stipulating that the compensation will only be paid if the former employee provides documentary evidence that he or she has been offered a job with a competitor of the employer, etc. As the Regional court has pointed out, the essence of a restriction on competition is not to prevent an employee from working in any paid job. Compensation for a restriction on competition is not remuneration payable to the employee, but compensation for seeking new employment (see Judgment of the Civil Division of the Riga Regional Court, 2019).

The Latvian LC does not provide for financial penalties or other forms of strengthening of obligations. For example, during the existence of an employment relationship, an employee cannot be fined or subjected to contractual penalties. However, with regard to post-employment restrictions on competition, contractual penalties are permissible, as the employment relationship between the employer and the employee has already been terminated. The Supreme Court has also recognised contractual penalties as permissible in the case of restrictions on competition (Judgment of the Senate of the Republic of Latvia, June 2008).

Sometimes, for preventive purposes, an agreement on a restriction on competition imposes an obligation on a former employee to pay compensation for damages in a specified amount, e.g. calculated according to a specific formula, payable regardless of whether the employer has actually incurred any damages as a result of the breach of the restriction on competition. When examining such a case, the Supreme Court concluded that the parties cannot agree that in the event of a breach of contract, a party will be obliged to pay a specific amount of compensation provided for in the contract without the need to prove the prerequisites for compensation for damages specified in the Civil Law, including the specific amount of damages (Judgment of the Senate of the Republic of Latvia, 2023, paras. 13–14).

During the period of restriction on competition, a former employee is considered an employee and is not eligible for the status of an unemployed person and the benefits provided for in regulatory enactments. The Law on State Social Insurance (Article 1(2)(o)) stipulates, inter alia, that an employee is ‘a person who, after the termination of the employment relationship, has an agreement on the restriction of the employee’s professional activity (restriction on competition)’. Case law shows that employees are often unaware of this aspect and have applied for unemployment benefits. If a person applying for unemployment status and benefits provides false information and is unjustifiably granted such a status and benefits, the overpayment of the benefits may be recovered at a later date (Decision of the Senate of the Republic of Latvia, 2023, para 2).

7. Understanding the location of a restriction on competition

Similar to the scope, type, and extent of a restriction on competition, the location (territorial scope) of a restriction on competition is also directly related to the economic activity of the employer. In order to assess the validity of the scope of the restriction on competition, each specific case must be evaluated, i.e. the territory in which the employer carries out its commercial activities and thus employs its employees.

The restricted territory may be a specific village, city, district, a region of a country, the entire country, or even several countries. For example, in international companies operating in several countries, agreements often stipulate restrictions on competition both in Latvia and in other countries where the company operates, and this practice is entirely permissible. In Latvia, it is common to agree on restrictions covering all three Baltic countries, as many companies operate in the Baltic states as a single market, but this would not always be proportionate, and the specific factual circumstances should be considered when assessing the admissibility of the restriction in each situation (Judgment of the Senate of the Republic of Latvia, 2007).

The territory should be determined on the basis of reasonable criteria; for example, it would be reasonable to impose a territorial restriction only if the former employer already carries out commercial activities within the specific territory or clearly knows that it will start commercial activities there in the near future, as a hypothetical possibility.[2]

8. Consequences if the restriction on competition does not meet the conditions laid down by law

In accordance with Article 84(3) of the LC, an agreement on restriction on competition is invalid insofar as, according to the type of restriction and its extent, place, and time, as well as taking into account the compensation payable to the employee, it is considered an unfair restriction on the employee's future professional activities.

The Supreme Court has ruled that 'the aforementioned legal provision links the recognition of an agreement as invalid with a restriction – insofar as the type, extent, place, and time of the restriction on competition specified therein, as well as the amount of compensation, are considered unfair' (Judgment of the Senate of the Republic of Latvia, 2007). Thus if, for example, an agreement provides for an overly

2 For more information on the elements of a restriction on competition and liability for non-compliance with such a restriction, see Kārkliņa, 2021.

broad territory of restriction on competition, this does not render the entire agreement invalid, but only the specific provision that is considered unfair. This judgment is very significant because the Supreme Court demonstrated the so-called 'blue pencil rule'; namely, it concluded that Article 84(3) grants the Court the right to declare an agreement on restriction on competition after the termination of employment relations invalid only in the part that is considered an unfair restriction on the employee's future professional activities.[3] For example, in the case in question, it was concluded that the provisions restricting the employee from working in Lithuania and Estonia were disproportionate, but that they were proportionate in relation to Latvia, and therefore there were no grounds for declaring the entire agreement invalid. In other words, the court upheld those provisions which, under the circumstances, could not be considered an unfair restriction on the employee's future professional activities, and declared invalid those provisions which, under the circumstances, were not such a restriction, thus 'rewriting' the agreement concluded by the parties (Judgment of the Senate of the Republic of Latvia, 2007).

The blue pencil rule gives a court the power either to strike out those provisions of the agreement which it considers to be unfair restrictions on the employee's professional activities, leaving in force those that comply with the requirements of the law, or to effectively amend the agreement concluded between the employer and the employee by including new provisions in accordance with the interests of the parties (see Pivateau, 2008, p. 673). However, each country's national regulations regarding the use of this rule differ, with most stipulating that courts may only delete unfair provisions, leaving the rest in force.

Although the Latvian Supreme Court has recognised the admissibility of the blue pencil rule in its practice, the LC does not provide a clear answer on the scope of its application. In our view, the Latvian legal system should accept courts' power to declare invalid and delete those provisions of an agreement that are disproportionate and overly restrictive for one party, but it would not be appropriate for courts to actually amend the agreement concluded between the employer and the employee by including new provisions in the contract. By declaring disproportionate provisions of the agreement invalid, the court already fulfils its task: to eliminate provisions that worsen the legal situation of the employee or the employer.

When examining a dispute, a court's task is to give substance to the concept of 'unfair restriction of professional activity' used in Article 84(3) of the LC. It may not interpret this concept broadly, but must assess each criterion separately, and if it finds that any of the provisions of the agreement on restriction on competition constitute an unfair restriction of the employee's future professional activity, it must declare the agreement invalid in that part (see Supreme Court of the Republic of Latvia, 2012). Authors agree with the conclusion that an agreement on restriction on competition is consid-

3 For more on the application of the blue pencil principle, see Pivateau, 2008.

ered reasonable if the factors examined, and the agreement as a whole, do not impose an unreasonable burden on the employee's future career (see Whiting, 2025, p. 309).

9. Understanding of the admissibility of restrictions on competition in state and public sector institutions

In recent years, the justification for imposing restrictions on competition in the public sector has become a topical issue in Latvia. This matter was examined by the State Audit Office, the country's supreme audit institution, in its 2021 report (State Audit Office, 2021). The audit reviewed a random selection of publicly owned capital companies, state-founded higher education institutions, and local governments, concluding that such agreements are not uncommon and that the amounts payable are often substantial. Previous analysis has focused on Article 84 of the LC, which governs agreements on restrictions on competition. In addition, public sector employers must ensure compliance with the Law on Prevention of Squandering of Public Resources and Property of Public Entities (Republic of Latvia, 1995), particularly the objective in Article 1 to use public funds and property lawfully and in the public interest. Accordingly, before concluding an agreement on restriction on competition, a public employer must assess whether there is an objective need for it (State Audit Office, 2021, p. 12).

The State Audit Office found that only a few employers provided justification for imposing restrictions on competition. During the audit, there was no evidence that public sector employers adequately assessed the impact of such agreements on labour market competition. The Competition Council also noted that it may be difficult to justify agreements concluded by employers with a dominant market position, such as capital companies. Moreover, the audit concluded that despite LC provisions, agreements often lack information on the territorial scope of the restriction and frequently fail to comply with the requirement that compensation may not be paid as a one-off payment.

In summary, the State Audit Office reasoned that in most cases, the purpose of the agreements concluded in the public sector cannot be determined and, moreover, is questionable. It should be noted that such actions by public sector employers may also be punishable by criminal law pursuant to Article 318 of the Criminal Law (Republic of Latvia, 1998) on abuse of official position if such agreements are concluded without justification and have thus caused significant damage. The possibility of criminal liability is also confirmed by a regional court's judgment of September 2025 in a case concerning benefits paid by the rector of a state-founded higher education institution to employees leaving the institution (Apollo, 2025), for which no objective justification was found. Notwithstanding the above, it should be noted that a public official may only be held liable for concluding an agreement on the restriction on professional activities if such an agreement is concluded contrary to the procedure laid down in the LC, the provisions of the Law on Prevention of Squandering of Financial Resources and Property of Public Entities, as well as the general purpose of concluding such an agreement. Otherwise, public sector employers are entitled to conclude agreements on restrictions on competition.

Conclusions

Employees may cause significant harm by disclosing a company's strategy, partners, know-how, or production secrets to competitors. Agreements on restrictions on competition after employment termination are therefore permissible and increasingly common. Article 84 of the LC sets requirements for their validity, with particular attention in the public sector to compensation and legality, as violations can entail legal or criminal liability.

Latvian law does not set fixed compensation amounts, instead requiring 'appropriate' compensation, which allows flexibility for narrow restrictions. Courts have consistently assessed appropriateness on a case-by-case basis, ensuring fairness even when the compensation agreed at the time of the contract being signed may no longer be adequate at the termination of employment.

Overall, Latvian regulation aligns with democratic principles and fundamental rights. The 2017 amendments to the LC strengthened the normative framework, but courts remain pivotal in interpreting general clauses and balancing employer protection with employees' professional freedoms.

REFERENCES

Apollo. (2025, 10 September). *Tiesa bijušo LU rektoru Muižnieku atzīst par vainīgu un piespriež naudas sodu*. https://www.apollo.lv/8321519/tiesa-bijuso-lu-rektoru-muiznieku-atzist-par-vainigu-un-piespriez-naudas-sodu

Bevitt, A., & James, L. T. N. (2007, November). *U. S. and E. U. non-competition agreements compared and contrasted*. http://documents.jdsupra.com/d5bb690a-135c-4a53-b61e-0740d11d8002.pdf

Bundesamt für Justiz. (n.d.). *Gesetze im Internet*. Retrieved 5 June 2026, from https://www.gesetze-im-internet.de

Decision of the Senate of the Republic of Latvia of 26 January 2023 on case no. SKA-479/2023. https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/497029.pdf

Folketing of Denmark. (2015). Act no. 1565 of 15 December 2015 on Restrictive Employment Clauses. https://www.bm.dk/media/7029/lov-om-ansttelsesklausuler-eng-4.pdf

Gailums, I. (2002). *Darba likums. Komentāri. Tiesu prakse. 2. grāmata. 2.* Ingus Gailuma juridiskā biznesa biroja izdevniecība.

Germany (1897, 10 May). Commercial Code (Handelsgesetzbuch, HGB). https://www.gesetze-im-internet.de/hgb/__74.html

Judgment of the Civil Division of the Riga Regional Court of 15 April 2019, case no. CA-0717–0719/1 (C32179317). https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/420721.pdf

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 29 August 2007, case no. SKC-560/2007 (not published).

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 9 January 2008, case no. SKC-6/2008.

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 4 June 2008, case no. SKC-377/2008.

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 26 November 2008, case no. SKC-424/2008. In *Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008* (pp. 465–474). Riga: Latvijas Tiesnešu mācību centrs, 2009.

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 11 March 2009, case no. SKC-99/2009.

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 30 March 2023, case no. SKC-3/2023 (C24160116). https://www.at.gov.lv/downloadlawfile/9015

Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 29 January 2026, case no. SKC-2/2026.

Judgments and Decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008. In *Latvian Judicial Training Centre* (pp. 465–474).

Kārkliņa, A. (2021). Restriction of competition after termination of employment relationships. *Journal of the University of Latvia: Law*, *14*, 158–182.

Kingdom of Belgium (1978, 3 July). Law on Employment Contracts. https://emploi.belgique.be/fr/themes/contrats-de-travail/fin-du-contrat-de-travail/clause-de-non-concurrence

Kingdom of Spain. (2015, 23 October). Royal Legislative Decree 2/2015 of approving the revised text of the Workers' Statute (Estatuto de los Trabajadores). https://www.boe.es/eli/es/rdlg/2015/10/23/2/con

Korycińska-Rządca, P. (2024). Trade secrets in the digital age: How do the measures provided for in EU law face the challenges of protecting an employer's trade secrets against unauthorised acquisition, use and disclosure by its employees? *Bialystok Legal Studies*, *29*(2), 163–176.

Mammone, G. (2006). *Non-competition clauses in labour contracts. Italy. XIVth Meeting of European Labour Court Judges*. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_dialogue/%40dialogue/documents/meetingdocument/wcms_159966.pdf

McMahon, C., & Eustace, A. (2022). Nothing to lose but their restraints of trade: Lessons for employment non-compete clauses from EU competition law. *Industrial Law Journal*, *52*(2), 409–450

Miller, R. L., & Jentz, G. A. (2009). *Fundamentals of business law: Excerpted cases* (2nd ed.) South-Western Cengage Learning.

Pivateau, G. T. (2008). Putting the blue pencil down: An argument for specificity in noncompete agreements. *Nebraska Law Review*, *84*(3), 672–707. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007599

Republic of Estonia. (2008, 17 December). Employment Contracts Act. https://www.riigiteataja.ee/en/eli/520062016003/consolide

Republic of Finland. (2001, 26 January). Employment Contracts Act. 55/2001. https://www.finlex.fi/en/legislation/translations/2001/eng/55

Republic of Latvia. (1922, 15 February). The Constitution of the Republic of Latvia. https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia

Republic of Latvia. (1937, 28 January). Civil Law. https://likumi.lv/ta/en/en/id/225418-the-civil-law

Republic of Latvia. (1995, 19 July). Law on Prevention of Squandering of Financial Resources and Property of Public Entities. https://likumi.lv/ta/en/en/id/36190-law-on-prevention-of-squandering-of-financial-resources-and-property-of-public-entities

Republic of Latvia. (1998, 17 June). Criminal Law. https://likumi.lv/ta/en/en/id/88966-criminal-law

Republic of Latvia. (2001, 20 June). Labour Code (consolidated text of 2024, as amended). https://likumi.lv/ta/en/en/id/26019-labour-law

Republic of Latvia. (2001, 4 October). Competition Law. https://likumi.lv/ta/en/en/id/54890-competition-law

Republic of Latvia. (2017, 27 July). Amendments to the Labour Law. https://likumi.lv/ta/id/292584-grozijumi-darba-likuma

Republic of Lithuania. (2016, 14 September). Labour Code of the Republic of Lithuania, XII–2603 (amended on 6 April 2023 – No XIV–1875). https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6eea48d294ea11eea70ce7cabd08f150?jfwid=-k3id7tf7e

Republic of Poland. (1974, as amended 2025). Labour Code (Kodeks pracy). https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf

Selwyn, N. M. (2006). *Selwyn's law of employment* (14th ed). Oxford University Press.

State Audit Office. (2021, 4 March). *Vai profesionālās darbības ierobežojums publiskajā sektorā tiek noteikts tiesiski?* https://lrvk.gov.lv/lv/getrevisionfile/29526-een0SJ3PxjLG8_8LfYf9BOUKRytxbysJ.pdf

Supreme Court of the Republic of Latvia. (2012). *Tiesu prakse lietās par individuālajiem darba strīdiem*. http://at.gov.lv/files/uploads/files/docs/petijumi/darba%20stridi.pdf

Whiting, M. N. (2025). The Federal Trade Commission, Germany, and non-compete agreements: An analysis of the Federal Trade Commission's proposed ban on non-compete agreements and a comparison to German Non-Compete Law. *The South Carolina Journal of International Law and Business*, *21*(2), 289–311.

Zvērinātu advokātu birojs 'BDO Zelmenis&Liberte'. (2020). *Darba likums ar komentāriem*. Latvijas Brīvā arodbiedru savienība.