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Collective Bargaining and Unpaid Care as Social Security Risk: An EU Perspective

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This article contributes to the debate on how collective agreements can enhance social security from the perspective of unpaid care work. It defines the risk of giving up employment in favour of unpaid care as a social security risk (the care risk). It analyses how collective agreements in the EU can address this risk without compromising gender equality. The analysis is conducted with a focus on analysing the risks emerging from European Union law on a regulatory practice yet to emerge: the inclusion of institutional (child) care provisions in collective agreements. The article concludes that it is disruptive for innovative collective bargaining strategies if interpreted from a standpoint focusing merely on economic integration.

Keywords: Occupational Social Security, Work-Life Balance, EU Competition Law, Collectively Agreed (Child) Care Institutions, European Union, EU Law

1 INTRODUCTION

Policy reactions to the Covid-19 pandemic have unexpectedly highlighted the relevance of unpaid care obligations for continuity of employment: the closure of schools and other childcare institutions, and the ban on in-house care, have led to many parents reducing their working hours or, if working from home, facing a new reality of multitasking. If any evidence were needed, this demonstrates that the lack of care for children or elderly relatives will induce individuals, especially women, to give up or cut down on paid work in favour of unpaid care work.[1]

* Professor of Law, Queen's University Belfast, Centre for European and Transnational Studies. Preparatory work for this article was presented at a workshop on the Social Partners and the Welfare State (Stockholm March 2019) and at a panel at the LLRN 2019 in Valparaiso, both convened by Petra Herzfeld Olsson, whose invitation prompted me to engage with this theme. I am grateful to the convenor and the discussants and participants at those occasions, and the constructive feedback of anonymous referees and support by the journal editors. The usual disclaimers apply.
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1 For first assessments on parental labour market drop-outs *see* Titan M. Alon et al., T*he Impact of Covid 19 on Gender Equality*, NBER Working Paper Series (2020, For the USA); Jonas Jessen & Sevrin Waights, *Effects of COVID-19 Day Care Centre Closures on Parental Time Use: Evidence from Germany,* Vox CEPR Policy Portal (2020), https://voxeu.org/article/covid-19-day-care-centre-closures-and-parental-time-use; Claudia Hupkau & Barbara Perongolo, *Work, Care and Gender During the Covid-19 Crisis*, London: Centre for Economic Performance (2020, for the UK), http://cep.lse.ac.uk/pubs/download/cepcovid-19-002.pdf; Abi Adams-Prassl et al., *Inequality in the Impact of the Coronavirus*

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However, the risk of losing or reducing paid employment in favour of unpaid care work is not conventionally addressed as a social security risk, nor is it at the centre of debates on using collective agreements to provide or complement social security provision, either at sectoral or company level.

The geographical scope of this study is Europe, more specifically the European Union. Both social security and collective bargaining first developed in Europe, where collective bargaining has developed into a complex multipolar system, in which national and subnational law and practice interact with European Union law and policy.[2] The role of EU law and policy is contradictory: while in the initial phases of European integration, there was a general expectation that the Common Market would result in a European industrial relations system,[3] today national and sub-national industrial relations systems co-exist with EU-level industrial relations in a multi-level governance scenario[4] with increasing disruption from EU law and policy.[5]

The article argues that the care risk can be defined as a new social security risk, building on the European tradition of social security, and that in principle it is not beyond the reach of collective bargaining. It derives from the extensive literature on work-life balance and gender equality that the provision of (child) care is particularly suitable for dealing with that risk. After identifying the initial cautious steps to integrate the provision of childcare into collective bargaining, it examines the question of whether and to what extent institutions set up by the social partners in collective agreements are vulnerable to challenges under EU competition and internal market law (EU economic law). Evidence is provided in support of the hypothesis that EU economic law is disruptive for innovative collective bargaining strategies if interpreted from a standpoint focusing merely on economic integration.

The next section contextualizes the argument within debates on work-life balance, gender equality and collectively agreed social security measures, identifying the extent to which it contributes innovative concepts. Section III examines

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Shock: Evidence from Real Time Surveys, IZA Discussion Paper (2020, several countries), https://www.iza.org/publications/dp/13183/inequality-in-the-impact-of-the-coronavirus-shock-evidence-from-real-time-surveys (accessed 29 May 2020).

2 *See* recently Bengt Furåker & Bengt Larsson, *Trade Union Cooperation in Europe: Patterns, Conditions, Issues* 14–16 (Palgrave Pivot 2020).

3 John T. Dunlop, *Industrial Relations Systems* 75 (Holt 1958); Gerda Falkner, *EU Social Policy in the 1990s: Towards a Corporatist Policy Community* 196–197 (Routledge 1998).

4 Maarten Keune & Paul Marginson, *Transnational Industrial Relations as Multi-Level Governance: Interdependencies in European Social Dialogue*, 51 (3) Brit. J. Indus. Rel. 473 (2013).

5 Sergio González Begega & Mona Aranea, *The Establishing of a European Industrial Relations System: Still Under Construction or Chasing a Chimera?*, 40 (4) Emp. Rel. 600, 611–614 (2018); Paul Marginson, *Work and Employment Relations in an Internationalized Economy*, 69(5) ILR Rev. 1033, 1040–1041, 1045–1047 (2016).

the aspect of the care challenge that can be defined as a social security risk, homing in on childcare, and the provision of childcare institutions as the most promising way of addressing the care risk. Section IV discusses whether addressing the (child) care risk is a suitable matter for collective bargaining. Section V reports on initial attempts in European industrial relations to address the (child) care challenge, and identifies the risks emanating from EU competition law for establishing those institutions by collective agreement.

2 CONTEXT

2.1 Work-life balance, unpaid care work and gender equality in employment

Only a brief overview can be provided of the extensive literature on work-life balance, gender equality and the distribution of unpaid care work. The debate on the ethics of care and working life casts light on the ubiquity of caring in human interaction, and analyses how unequal responsibility for care can cause imbalance of opportunities in any setting, including the workplace.[6] Other approaches question the ability of capitalism to integrate care[7] or provide a feminist analysis of how welfare states respond to emerging care risks.[8] The question of whether unpaid care work should be redistributed between women and men, or replaced as far as possible by paid care work, has divided generations of feminists.[9] Extreme positions include those who suggest reserving care work for women while increasing its moral and economic appreciation and those who insist that women should resist the expectation to take on unpaid care work in order to improve their employability.[10] The middle ground is occupied by those who demand that both

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6 Martha Fineman, *The Autonomy Myth* (The New Press 2004); Jonathan Herring, *Caring and the Law* (Hart 2013); for an overview of the debate *see* Eugenia Caracciolo di Torella & Annick Masselot, *Caring Responsiblities in EU Law and Policy* 44–49 (Routledge 2020).

7 Nancy Fraser, *Contradictions of Capital and Care*, 100 New Left Rev. 99 (2016).

8 Rosella Ciccia & Diane Sainsbury, *Gendering Welfare State Analysis: Tensions Between Care and Paid Work*, 1(1–2) Eur. J. Pol. & Gender 93 (2018).

9 *See* for an overview from US perspectives Joan Williams, *'It's Snowing Down South': How to Help Mothers and Avoid Recycling the Sameness/Difference Debate,* 102 Colum. L. Rev. 812 (2002), from European perspectives Caracciolo di Torella & Masselot, *supra* n. 6, at 33–38.

10 Swedish authors represent a European variety of the latter, by openly referring to the potential loss of societal investment due to promoting housewifery: 'Since women are at least as educated as men, the single-breadwinner model has also led to a plethora of highly educated housewives in Europe. This is an expensive arrangement, both for society and individual families. Society invests in the education of people who then disappear from the labour market for long periods, with the attendant high risk that their knowledge will become obsolete (…) Employers will be reluctant to employ or invest in women if they assume that they will leave work as soon as they have children. The single-breadwinner model also makes families more vulnerable to the risk (…) (of) unemployment and illness'. Annelie Nordström, *A Holistic Approach to the Provision of Care: A Key Ingredient for Economic Independence*, in *Visions for Gender Equality* 45 (Francesca Bettio & Silvia Sansonetti, eds European Commission 2015).

parents be supported by maternity/paternity and parental leave entitlements with continuity of pay or benefits, while having access to high-quality care services, in order to redistribute unpaid care work evenly.[11] While the policy debate on the remunerated work of mothers (parents) is as old as industrial work,[12] increasing life expectancy gives rise to new expectations to take up unpaid elder care once children have outgrown the need for unpaid care.[13] These debates have recently led to a new EU Directive requiring Member States to provide unpaid leave for elder care in addition to benefits for paternal and parental leave,[14] preceded and followed by intense debate.[15]

This article builds on the results of these debates rather than engaging with them. The evidence provided in the academic debate confirms that the lower engagement of women in remunerated work globally is partially due to the expectation that all women undertake significant amounts of unpaid care. While some hail a 'shift to equal parenting' in families,[16] current statistics show that such a shift is excruciatingly slow.[17] Academic studies commissioned by the International Labour Organization (ILO),[18] in addition to those conducted by the OECD[19] and policy reports for the EU,[20] confirm that a combination of expanding acceptable child day-care institutions and reducing the cumulated time mothers spend on

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11 For example, Caracciolo di Torella & Masselot, *supra* n. 6; Jill Rubery & Aristea Koukidiakis, *Closing the Gender Pay Gap. A Review of the Issues, Policy Mechanisms and International Evidence* (International Labour Office 2016), for some data supporting the combination of medium length maternity leave with full compensation for lost earnings with comprehensive provision of non-familial childcare *see* Gender, Equality and Diversity & ILOAIDS, *Care Work and Care Jobs for the Future of Decent Work* 83–95, 119–120 (International Labour Office 2018).

12 The ILO recently celebrated the 100th anniversary of the first ILO convention on maternity protection. The resulting report again recommended to increase institutional childcare provision as one of the main preconditions for improved equality. International Labour Organization, *A Quantum Leap for Gender Equality: For a Better Future of Work for All* 12, 77–88 (International Labour Office 2019).

13 Katharina Herlofson & Martina Brandt, *Helping Older Parents in Europe: The Importance of Grandparenthood, Gender and Care Regime,* 22 (Advance Article) European Societies (2019), doi.org/10.1080/14616696.2019.1694163.

14 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188/79 of 12 July 2019.

15 Denis Bouget et al., *Towards New Work-Life Balance Policies for Those Caring for Dependent Relatives*, in *Social Policy in the European Union: State of Play* 155 (Bart Vanhercke et al. eds, European Trade Union Institute 2017); Chieregato, *A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158*, 36(1) ICL 59 (2020); Ivana Isailovic, *Gender Equality as Investment: EU Work-Life Balance and the Neoliberal Shift*, (forthcoming) Yale J. Int'l L. (SSRN 2020), https://ssrn.com/abstract=3523289 (accessed 29 May 2020), for a rejection of compulsory maternity leave under EU law *see* (Miguel de la Corte Rodrıguez, E*U Directives on Maternity Leave: A Misleading Social Risk Approach and Its Unsatisfactory Effects on Both Mothers and Fathers*, 9(2) Eur. Lab. L. J. 171 (2018)), *see also* Jenny Julén Votinius in this issue, text around fn. 6–7.

16 Joan Williams et.al., *Beyond Work-Life 'Integration'*, 65 Ann. Rev. Psychol. 515 (2015).

17 Gender, Equality and Diversity & ILOAIDS, *supra* n. 11.

18 Rubery & Koukidiakis, *supra* n. 11.

19 OEDC, *Closing the Gender Gap: Act Now,* 202–203, 210–214 (OECD Publishing 2012).

20 *Visions for Gender Equality* (Francesca Bettio & Silvia Sansonetti eds, European Commission 2015).

maternity and parental leave will best contribute to securing women's position in paid employment. It is also necessary for acceptable care services to be available for older people. The difference compared to children is that older persons have lived a long life in which they have been able to pay into social insurance, which can then ensure access to care or the refund of care costs.[21]

2.2 Gender equality policy and collective bargaining

The trade unions have increasingly engaged with policies on work-life balance and care. Traditionally, collective agreements have preceded or complemented legislation granting maternity leave or parental leave, occasionally with compensation for loss of earnings.[22] These collective bargaining strategies attract the same criticism as legislative policies providing for maternity leave and/or parental leave: in particular US authors underline how generous leave policies in Europe may increase female employment at the price of limiting equal access for women to more qualified positions.[23] Further, the ambiguity of including the entitlement to request leave, part-time work or flexibilization of working time in collective agreements is illustrated by the role of those measures in the discourse on flexicurity: the willingness of parents to reduce pay by working less, or more flexibly, constitutes the main example for the interest of employees in flexibility, while staff retention represents the main example of the interest of employers in security.[24] In the flexicurity matrix, the term 'combination security' indicates the flexibility gain for the employee of being able to take leave instead of having to exit the labour market.[25] However, leave entitlements also induce employees to forgo remunerated work in favour of providing unpaid care, thus enhancing the flexibility gains of employers.[26] More traditional collective bargaining measures, such as limiting daily and weekly hours of paid employment may indirectly promote a fairer division of unpaid care by enhancing every adult's opportunity to engage in unpaid

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21 *See* already Jozef Pacolet et al., *Social Protection for Dependency in Old Age* (Ashgate 2000) more expansively Aug. Österle & Heinz Rothgang, *Long-Term Care*, in *The Oxford Handbook of the Welfare State* 378 (Francis G. Castles et al. eds, Oxford: Oxford University Press, OUP 2010).

22 For a recent overview *see* Daniela Ceccon & Iftikar Ahmad, *Do Collective Bargaining Agreements Increase Equality and Promote Work-life Balance? Evidence from the WageIndicator Database* (Leuven, Industrial Relations in Europe Conference 2018), *see also* Jenny Julén Votinius in this issue for the practice in Sweden.

23 Nordström, *supra* n. 10; Ann Shola Orloff, *Gender*, in *The Oxford Handbook of the Welfare State* 252 (Francis G. Castles et al. eds, OUP 2010).

24 Per Kongshøj Madsen, *Flexicurity: A New Perspective on Labour Markets and Welfar States in Europe*, 14 (1&2) Tilburg L. Rev. 57, 57–58 (1997).

25 Paul Marginson & Manuela Galetto, *Engaging with Flexibility and Security: Rediscovering the Role of Collective Bargaining*, 37(1) Econ. & Indus. Democracy 95, 102 (2016).

26 On resulting critique of the EU flexicurity strategy *see* Jill Rubery & Gail Hebson, *Applying a Gender Lens to Employment Relations*, 60(3) J. Indus. Rel. 414, 419–420 (2018).

care.[27] Strict limits on paid employment also remove the illusion of the 'unencumbered worker',[28] i.e. the idea that employees are truly free to dedicate so many hours to paid employment that no time remains to care for their own reproduction.

The pursuit of gender equality through collective bargaining goes beyond reconciling paid employment and unpaid care work. Lower pay for women (often referred to as the gender pay gap) is not exclusively attributable to the need to provide unpaid care. Bargaining for gender equality most certainly encompasses bargaining for equal pay, complemented or replaced by litigation strategies depending on national tradition.[29] Bargaining for equality may also include agreements on specific equality plans, as required by French legislation at company-level. In addition, bargaining for equality may include attempts to lay down minimum requirements for atypical employment contracts.[30]

Collective bargaining for gender equality is also narrower than reconciliation of this kind. Equal pay and equal treatment are not usually pursued exclusively for those wishing to undertake unpaid care work. Addressing the desire of an increasing proportion of men to actively participate in unpaid care goes beyond gender equality. Establishing childcare institutions also has a wider effect on family life, as highlighted by the closure of childcare institutions in the current pandemic.

2.3 Occupational social security as a field for collective bargaining

Reconciliation is only one of the four risks addressed by occupational welfare programmes.[31] The literature on the potential for collective bargaining agreements to step into the void left by welfare state entrenchment, and in particular the

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[27] Eurofund, *Working Time Patterns for Sustainable Work* 2, 39–43, (Publication Office of the European Union 2017).

[28] Caracciolo di Torella & Masselot, *supra* n. 6, at 35–37.

[29] In the UK equal pay principles were first introduced through collective bargaining (Simon Deakin et al., A*re Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A study of the British Equal Pay Act*, 39(2) Cambridge J. Econ. 381–403 (2015)); on the role of strategic litigation in other countries *see* Gesine Fuchs, *Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries,* 28(2) Can. J. L. & Soc. 189 (2013). The general impact of unionization and collective bargaining on the gender pay gap varies (Alex Bryson et al., *Gender Differences in the Union Wage Premium? A Comparative Case Study*, 26(2) Eur. J. Indus. Rel. 173 (2020)).

[30] Pierre Courtioux & Christine Erhel, *Is France Converging or Not? The role of Industrial Relations*, in *Towards Convergence in Europe. Institutions, Labour and Industrial Relations* 101, 112 (Daniel Vaughan-Whitehead ed., Edward Elgar 2019); Gerhard Bosch, *Does the German Social Model Support the Convergence of Living Conditions in the EU*, in *Towards Convergence in Europe: Institutions, Labour and Industrial Relations* 139, 154–157 (Daniel Vaughan-Whitehead ed., Edward Elgar 2019).

[31] David Natali et al., *Occupational Welfare in Europe: Risks, Opportunities and Social Partner Involvement*, 241 (European Trade Union Institute 2018).

reduction of social insurance benefits, has been burgeoning,[32] at times stressing the potential of collective bargaining to contribute in innovative ways to inclusive growth.[33] The limits laid down by EU economic freedoms and competition rules for collectively agreed pension schemes have recently re-emerged in response to the increasing relevance of occupational welfare.[34]

2.4 The contribution beyond the context

The ensuing discussion moves beyond these contextual debates.

First, it presents a fresh perspective by conceptualizing the care risk from the perspective of the person who is challenged to give up remunerated work in favour of unpaid labour, while becoming economically dependent on family relations. Traditionally, the care risk is viewed as a macroeconomic risk, best avoided by activating the family support regime, potentially creating dependency.

Second, it is suggested that the care risk, once classified as a new social security risk, can partially be addressed by means of collective bargaining. Within the gender equality perspective outlined above, the focus is on providing care through institutions. This strategy takes on a new urgency in the wake of the Covid-19 pandemic: private care institutions may become economically unsustainable after prolonged closure, rendering institutions set up by collective bargaining a necessary complement to provision by a public sector that is under strain.

Third, the article examines specific risks arising from EU competition law in cases in which collective agreements establish care institutions. In the past, social security institutions established by collective agreements have been challenged under EU competition law and economic freedoms, raising the question of whether a restrictive interpretation of those provisions has the potential to prevent progressive solutions to current problems.

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[32] Alexandre de le Court, *Collective Bargaining on Social Protection in the Context of Welfare State Retrenchment: The Case of Unemployment Insurance*, in *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century*? 213 (Julia Lopez Lopez ed., Hart 2019); Natalie et al., *supra* n. 31; Ylenia Curzi et al., *Getting Flexicurity Right: New Ways to Reconcile Welfare, Flexibility and Competitiveness in a Post-Crisis Europe*, 4(2) Quaderni Fondazione Marco Biagi 31–54 (2015); *see also* the other contributions in this issue.

[33] Sem Vandekerckhove, *Inclusive Growth Through Collective Bargaining*, CAWIE research paper 3.1, KU Leuven (2018).

[34] Hans van Meerten & Elmar Schmidt, *Compulsory Membership of Pension Schemes and the Free Movement of Services in the EU*, 19 (2) Eur. J. Soc. Sec. 118 (2017); Eva Vanherle, *Compulsory Membership: Can It Be Valid in the Future and Does It Fit with Freedom of Services and Competition Law?* (KU Leuven, Faculty of Law 2019).

3 PROVIDING UNPAID CARE WORK AS A SOCIAL SECURITY RISK

Care – for children, older persons, and people who are sick or disabled – was not among the social risks initially addressed by social security schemes in Europe. This section discusses whether engagement in unpaid care work is correctly classified as a social security risk.

3.1 Defining social security risk

The basic risk underlying the provision of social security at the time of industrialization was constituted by the emergence of the working classes, who could only provide for their shelter and sustenance by engaging in paid work.[35] Incapacity to work due to illness, unemployment and old age thus constituted a risk to the ability to obtain shelter and sustenance. The risks of illness, unemployment and old age (as a synonym for frailty) were thus the first social security risks. Modern welfare states go beyond the aim of ensuring mere survival by protecting human dignity in more wide-ranging ways[36] encompassing measures ensuring participation in social life, cultural activities and access to information. Accordingly, post-industrial social security[37] not only addresses the risk of the loss of income, but also wider risks relating to the loss of capacity to engage in (employed) work, such as daily exchanges with other adults while using skills acquired in education that are deemed to provide a useful contribution to society. These risks are dealt with by payments in lieu of income, but also by providing institutions and programmes to avoid the loss of and ensure access to employment.

To avoid an overly complex argument, this definition of the social security risk conceptualizes the risk of losing the capacity to engage in remunerated work as external to the employment process. The definition thus disregards the interrelation of conditions of employment and the realization of risks. For example, working conditions could lead to contracting an illness or induce workers to prefer unpaid care work over unsatisfactory employed work.

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35 Stein Kuhnle & Anne Sander, *The Emergence of the Western Welfare State, in The Oxford Handbook of the Welfare State* 61 (Francis G Castles et al. eds, OUP 2010).

36 Marcin Wujczyk, *Constitutionalisation of Social Security Rights as the Way to a Social Justice State,* in *The Right to Social Security in the Constitutions of the World: Broadening the Moral and Legal Space for Social Justice* vol. I Europe 1, (Alexandre Egorov ed., International Labour Office 2016).

37 Esra Dundar Aravacik, *Social Policy and the Welfare State*, in *Public Economics and Finance* (Bernur Açıkgöz ed., InTechOpen 2019); Giuliano Bonoli, *Time Matters: Postindustrialization, New Social Risks, and Welfare State Adaptation in Advanced Industrial Democracies*, 40(5) Comp. Pol. Stud. 495 (2007).

3.2 The care risk

Proceeding from this functional perspective, what exactly constitutes the care risk? Again, for the purposes of simplification, we disregard the person in need of care, and focus on the perspective of the potential carer, whose capacity to engage in paid work may be inhibited by providing unpaid care. The aspect of care which gives rise to the care risk is the need to look after those who are unable to fulfil their own care needs.[38] While there are more aspects to care, this response to care requires long hours of engagement excluding other (employed) work, as well as recovery from such work. The care risk arises if an employed person reduces or gives up employment in order to provide unpaid care. It is created not only by the need to provide care for children, older persons or people with disabilities, but also by the absence of care provided through paid employment by professional carers.

The classical way to address the care risk consists of providing leave entitlements: maternity leave, parental leave, paternity leave, carers' leave. While maternity leave is self-evidently reserved for women, due to the need to safeguard the unborn child and provide sufficient post-natal rest for the mother, parental leave and carers' leave is also overwhelmingly used by women, while paternity leave is a recent development, and often of short duration.[39] As discussed above, these measures promote work-life balance (or rather the balance between paid and unpaid labour), but also reinforce traditional gender roles in that they lead women to provide unpaid care for children and older persons. Substituting unpaid care by means of the provision of paid care constitutes an alternative to reinforcing traditional gender roles. This alternative can take two fundamentally different forms. On the one hand, care can be provided in an institutional setting, such as a childcare institution or a retirement home. These institutions can be funded privately or publicly, and this may include funding by social security contributions. On the other hand, those needing institutional support for care can be given funds enabling them to employ domestic workers in the home to provide care alongside other household chores, possibly supported by medical staff visiting on a periodic basis. This model, sometimes called 'cash for care' is more typical for long-term care,[40] but it is also to be found in the childcare sector.[41]

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38 Mary Daly, *Care as a Good for Social Policy*, 31(2) J. Soc. Pol'y 251 (2002).

39 *Supra* sub 2.1.

40 On comparative empirical studies on 'cash for care' schemes *see* Barbara Da Roit & Christiano Gori, *The Transformation of Cash-for-care Schemes in European Long-term Care Policies*, 54(3) Soc. Pol'y & Administration 515 (2019).

41 Gender, Equality and Diversity & ILOAIDS, *supra* n. 11, at 148–150; for a practical example where Italian legislation of 2012 introduced inter alia a voucher system to pay for childcare in lieu of parental leave: *see* Annamaria Simonnazzi, *Italy: How Could Industrial Relations Help a Return to Economic and Social Convergence?,* in *Towards Convergence in Europe. Institutions, Labour Relations and Industrial Relations* 205, 219 (Daniel Vaughan-Whitehead ed., Edward Elgar 2019).

As discussed above, medium-length maternity leave entitlements accompanied by compensation for loss of earnings in combination with a comprehensive network of institutions for childcare and care for older persons ensure the highest level of female participation in the labour force.[42] However, the lack of childcare institutions, or the threat of their insufficient return after the global pandemic, requires primary attention, as leave entitlements with or without a payment component are already widely accepted.

4 COLLECTIVE BARGAINING AND THE CARE RISK

This section addresses the question of whether and to what extent the care risk can and should be addressed by collective bargaining. This is by no means a matter of course. For example, the ILO promotes a state-centred approach to childcare institutions, envisaging collective bargaining for securing the rights of employed care workers only.[43] First, we ask whether social security provision is a suitable matter for collective agreements, or other trade union activity. Second, we ask whether addressing the care risk is a suitable function for collective bargaining or other trade union activity.

4.1 Collective bargaining and social security

In industrial relations systems where trade unions were set up together with benevolent and mutual societies, social security stood at the heart of collective bargaining in the initial phase. These societies used contributions of workers to support colleagues in need as they became unemployed or ill. This eventually grew into the Ghent system of wholly trade-union provided unemployment insurance.[44] Social insurance as an emanation of 'corporate self-help'[45] represented an independent function of trade unions. The method of mutual insurance,[46] also known as 'service function',[47] complemented collective bargaining, arbitration and 'legal enactment'.[48] These functions were perhaps never fully exclusive of each other. Today, mutual insurance has blended into social insurance, which in Europe is

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42 Gender, Equality and Diversity & ILOAIDS, *supra* n. 11, at 83–95, 119–120.
43 *Ibid*., at 117.
44 Social dialogue remains relevant for Belgian unemployment insurance, *see* van Tim Rie et al., *Ghent Revisited: Unemployment Insurance and Union Membership in Belgium and the Nordic Countries,* 17(2) Eur. J. Indus. Rel. 125; on the current Swedish system under conditions of fragmented labour markets *see* Caroline Johansson, *A-kassan och den nya abretsmarknaden*, in *Labour Law and the Welfare State* 169 (Laura Carlson et al. eds, Författarna och Iustus Förlag 2019).
45 Sinclair & Beatrice Webb, *Industrial Democracy*, 145 (2d ed., Longman 1902).
46 *Ibid*., at 152–170.
47 Keith Ewing, *The Function of Trade Unions*, 34(1) Indus. L. J. 1 (2005).
48 Webb & Webb, *supra* n. 45, at 171–221, 222–246, 247–278.

predominantly state-based. However, trade unions as well as employers' associations are involved in the administration of social security institutions in many countries.[49]

The flourishing debate on occupational social security via collective bargaining[50] should not obscure the fact that occupational social security is not necessarily a suitable matter for collective bargaining. Provided at company level, occupational social security constitutes a retainment strategy for the employer. Non-transferable benefits such as pensions, health plans or childcare tend to act as a disincentive for employee mobility. The resulting 'welfare dualization'[51] results in higher levels of entitlement for employees that the company wishes to retain than for those deemed to be dispensable. This gives rise to the question of whether any functions of collective bargaining and collective agreements are suitable to legitimize collective bargaining on social security.

The classical functions of trade unions can be seen as mitigating structural imbalances in the labour market. The combination of workers is a means to oppose the economically driven urge to subsume their entire lives to earning a wage. This not only serves to achieve adequate wage-work bargain but also ensures that workers can become involved in the organization of work.[52] Multi-employer collective bargaining in particular can have other functions beyond class conflict. Its regulatory function consists of laying down rules for the workplace with a sectoral or even national dimension.[53] By removing the price of labour and working conditions from inter-firm competition, collective agreements provide a level playing field for employees and employers alike, which can translate into a surplus,[54] or merely a smoother organization of work. Collective bargaining offers employers and workers alike an opportunity to benefit from the collective knowledge of those closely involved in the work process. This enables the parties to collective agreements to draft work rules that are not only socially responsible but also profitable in a sustainable way. Collective bargaining can thus become a source of innovation.[55] Historically, many institutions of labour law have started out as clauses in collective agreements, and their innovative function thus seems suitable

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[49] Bernhard Ebbinghaus, *Unions and Employers*, in *The Oxford Handbook of the Welfare State 196* (Francis Castles et al. eds, OUP 2010).

[50] *See* above text around fn. 31–34.

[51] Daniel Natali et al., *Sixty Years After Titmuss: New Findings on Occupational Welfare in Europe,* 52(4) Soc. Pol'y & Administration 435, 437 with further references.

[52] *Voices at Work*: *Continuity and Change in the Common Law World* (Alan Bogg & Tonia Novitz eds, OUP 2014).

[53] Ewing, *supra* n. 47, Webb & Webb, *supra* n. 48; for empirical evidence for the regulatory function *see* Susan Hayter et al., *Collective Bargaining for the 21st century*, 53(2) J. Indus. Rel. 225 (2011).

[54] *See* Franz Traxler, *European Trade Union Policy and Collective Bargaining – Mechanisms and Levels of Labour Market Regulation in Comparison,* 2(2) Transfer 287, 289–290 (1996).

[55] *See* again Hayter et al., *supra* n. 53, at 238–239.

for addressing new risks. The debate on addressing welfare retrenchment via collective bargaining also draws on this innovative function, partly seeking to reconsider how the provision of welfare can be improved if it is based on social partner involvement.[56]

4.2 Collective bargaining and the care risk

The close link between the care risk and the gendered division of labour may give rise to doubt about whether it is aligned with the class-function of collective bargaining. If the risk of losing earning capacity due to unpaid care work is addressed effectively, this strengthens the position of those traditionally providing unpaid care vis-à-vis the other members of the family. Granting leave entitlements with some form of income substitution is less intrusive into the family, since unpaid care is secured alongside the family income until that time. This may be the reason why the predominant way of addressing the care risk through collective agreements is by means of leave entitlements or flexibilization of working time.

Addressing the care risk also requires the provision of remunerated care work, either in care institutions or through domestic workers, or a combination of the two. Access to childcare institutions provided by employers is viewed as an element of occupational welfare,[57] that is often provided by employers for selected categories of employees. Providing child care as elements of collective agreements could avoid the differentiation and potential regulatory effect of such provision.[58] After all, addressing the care risk has an element of improving working and living conditions, which is the overall aim of collective bargaining. Moreover, such agreements could draw on the innovative function of collective bargaining.

There are arguments to support the ILO position, which favours state provision of care institutions.[59] In particular, the interests of children or those in need of long-term care are not represented by the trade unions or employers' associations, and might thus be neglected in the collective bargaining process. On the other hand, the interests of employees include the well-being of those cared for, and collaboration with a variety of community institutions could contribute a further bulwark against the danger of low-quality provision. For collective agreements, the provision of paid vouchers for existing care institutions, or institutions set up on a communal basis constitutes a potential regulatory strategy. Care institutions could also be provided through the service functions of trade unions. These are strategies

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[56] Curzi et al., *supra* n. 32; Natali, et al., *supra* n. 31; Olga Rymkevich, *Overview of the Findings of the Project*, 4(2) Quaderni Fondazione Marco Biagi 55 (2015).
[57] Curzi et al., *supra* n. 32, at 34.
[58] *Ibid*., at 47.
[59] Gender, Equality and Diversity & ILOAIDS, *supra* n. 11, at 117.

that could be comprised in particular in the innovation function of collective bargaining.

5 CARE RISK AND COLLECTIVE BARGAINING UNDER EU LAW

5.1 Potential of EU level collective bargaining for care institutions

EU level collective bargaining as one element of collective bargaining in Europe[60] has addressed the care risk: the very first agreement between EU level employers' associations and trade unions was on parental leave.[61] Its rapid adoption in less than ten months exemplified the corporatist character of implementing EU level social partner agreements by Directive.[62] The modest Parental Leave Directive was replaced by the more ambitious Work-Life Balance Directive,[63] which the EU level social partners did not endorse. Employers and trade unions at EU level could also devise model agreements on securing or establishing (child) care institutions, or on how collective agreements could and should address interim care crises arising from pandemics, which are likely to increase. However, given the reluctance around the Work-Life Balance Directive and the reluctance of the EU Commission to implement EU level social partner agreements in recent years,[64] it seems more fruitful to turn to opportunities at national level.

5.2 Steps towards care institutions via collective agreements under national law

The suggestion that collective agreements in Europe should include commitments to provide childcare is not as utopian as it may seem. A study of the Italian case identified the setting up of social services by collective agreement as a frequent occurrence in occupational welfare, with a specific demand for childcare or

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60 *Supra* text with notes 2–4.

61 Framework Agreement on Parental Leave between the European Trade Union Congress (ETUC), the European Centre of Employers and Enterprises providing Public Services and Services of General Interest (CEEP) and the Union of Industrial and Employers' Confederations of Europe (UNICE) of 14 Dec. 1995, implemented as a Community law instrument by Council Directive 96/34/EC of 3 June 1996 OJ L 145/4.

62 Gerda Falkner, *The Council or the Social Partners?,* 7 (5) J. Eur. Soc. Pol'y 705 (2013), on the differentiation between the corporatist and autonomous route *see* Dagmar Schiek, Europäische Kollektivvereinbarungen, in *Tarifvertragsgesetz* 264 (W. Däubler ed., Nomos 4th ed. 2016).

63 *Supra* n. 14.

64 *See* the documentation on refusing to implement an agreement on occupational health and safety for hair dressers by Filip Dorssemont & Klaus Lörcher, On the Duty to Implement European Framework Agreements, 48 (4) Indus. L. J. 571 (2019).

assistance for non-self-sufficient family members.[65] Similarly, a study of collective bargaining on social risks in the Netherlands identified a significant number of collective agreements providing childcare support – before employers were under a statutory obligation to contribute to childcare.[66] These are cautious steps, as the established instruments in collective agreements to respond to care needs consist of working time rules, options for part-time work or leave entitlements to a greater extent than required by legislation. However, these established instruments could constitute a risk to gender equality at work.

5.3 Potential barriers under EU law

EU law is relatively neutral on collective agreements relating to working time, including limits to daily and weekly working time in order to allow all adults to contribute to informal care work. While one court ruling found a violation of a national ban on cartels by strict limits on working time in the banking sector,[67] such an approach is not mirrored by the case law of the Court of Justice of the European Union (CJEU). Nor are there any indications that collective agreements on leave entitlements or bonus payments enabling workers to source care ('cash for care') would be affected. However, the risks emanating from EU competition law and economic freedoms (EU economic law) intensify in cases in which collective agreements establish social security institutions.

The following sections provide an overview of the relevant case law and outline the risks emerging if it were to continue along the present path. Subsequently, an alternative reading of EU economic law is developed, based on the constitutional values underpinning the EU.

5.3[a] *Collectively Agreed Common Institutions and EU Economic Law – the Position under Existing and Evolving Case Law*

Nearly all the core cases on EU competition law and collective agreements evolved around common institutions of the social partners established by collective agreements, more specifically sectoral pension and health care

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65 Andrea Ciarini & Silvia Lucciarini, *Collective Bargaining and Occupational Welfare in Italy*, LI(2) Economia & Lavoro 143, 149–151 (2017).

66 Mara Yerkes & Kea Tijdens, *Social Risk Protection in Collective Agreements: Evidence from the Netherlands*, 16(4) Eur. J. Indus. Rel. 369, 375–379 (2010).

67 For example, KG (Berlin) 21 Feb. 1990, U 4357/89, AP 60 to Art. 9 GG (short English summary in Dagmar Schiek et al., *EU Social and Labour Rights and EU Internal Market Law,* 38 (European Parliament 2015)).

funds.[68] EU competition law lays down a ban on cartels (Article 101 Treaty on the Functioning of the European Union - TFEU) and of an abuse of a dominant market position (Article 102 TFEU), as well as a ban on state aid (Article 107 TFEU), though this has not been applied to collective agreements yet and need not be considered here.[69] State endorsement of collective agreements, in the form of an extension for general application, may constitute a violation of Article 4(3) TEU in conjunction with Article 101 or 102 TFEU. CJEU case law has carved out a limited exclusion for collective labour agreements from Article 101 TFEU, but not from Article 102 TFEU, though some social security institutions were exempted from the scope of Article 102 as they were deemed to be services in the general economic interest (Article 106(2) TFEU).

The Court first established that employees (or their associations) do not constitute undertakings,[70] thus preventing a full doctrinal return to the times when ring-fencing agreements between workers were criminalized, as well as agreements between collectives of workers and individual employers or their organizations.[71] However, the EU anti-trust clause, Article 101 TFEU, remains relevant for sectoral collective agreements. These equate some of the parameters on which employers could compete as economic actors, enabling the courts to classify the employers' associations' conclusion of a collective agreement as a decision of an association of undertakings under Article 101 TFEU. In a series of judgments in 1999,[72] the Court embraced this view. Instead of exempting collective bargaining generally from the application of competition law,[73] it established a limited exclusion from Article 101 TFEU for collective agreements between trade unions and employers or their associations, known as the Albany exclusion.[74] Accordingly,

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[68] For more detail *see* Dagmar Schiek et al., *supra* n. 67, at 35–44. For references to the extensive discussion on the Dutch occupational pension system under EU competition law, *see* Vanherle, *supra* n. 34, at 8–17.

[69] A pending case on the privatization of the Slovak health insurance system may provide indirect indications on the matter (Opinion of AG Pikamäe of 19 Dec. 2019, Case C-262, 271/18 P *COM and Slovak Republic v. Dôvera zdravotná poist'ovňa*, EU:C:2019:1144).

[70] Case C-22/98 *Becu* EU:C:1999: 419, paras 26–27, on the question whether transport undertakings using Ghent harbour could be required by law to use recognized dockworkers, whose wages were set by collective agreement, which also defined the notion of registered dockworkers.

[71] Examples include the British Combination Act 1799, which stated that 'all contracts, covenants and agreements (… .) made between any journeymen, manufacturers or other persons (…) for obtaining an advance of wages (…) or altering their usual hours or time of working' were 'illegal, null and void'. Similarly, the Loi de Chapelier prescribed that 'it is contrary to the (…) Constitution for citizens with the same profession s (…) to (..) make agreements among themselves designed to set prices for their (…) labour', adding that any such agreements 'shall be declared unconstitutional and void'.

[72] Case C-67/96 *Albany* EU:C:1999:430; Case C-115-117/97 *Brentjens* EU:C:1999:434; Case C-219/97 *Drijvende Bokken* EU:C:1999:437.

[73] Directorate for Financial and Enterprise Affairs, Competition Committee. *Competition Concerns in Labour Markets – Background Note (DAF/COMP (2019) 2)*, 8 (OECD 2019).

[74] The Court later confirmed that this exclusion only applied to collective agreements concluded in favour of workers, including those falsely declared as self-employed (Case C-413/13 *FNV KIEM* EU:

collective agreements do not fall under Article 101 TFEU in so far as they pursue certain social objectives. Initially this was justified by reference to the overall social aims of the Treaties and their explicit recognition of collective bargaining (the present-day Articles 3, 152, 154, 155 TFEU).[75] The 2011 AGR2 ruling referred to those social objectives as 'intended to improve employment and working conditions'.[76] Thus, the Court has recognized that providing protection against classic social security risks also improves employment and working conditions, leading to the exclusion of those collective agreements from the ban on cartels under EU law.

However, there is a risk that common institutions established by collective agreement are classified as cartels under Article 101 TFEU. This is illustrated by the EFTA Court's *Holship* ruling of 2016, concerning the activities of the Administration Office (AO), a pooling agency for dockworkers in a Norwegian port set up by collective agreement. In line with ILO Convention No 137, the AO was tasked with ensuring that the priority engagement of dockworkers registered with them was in line with the collective agreement, by employing dockworkers and hiring more on temporary contracts if necessary. The EFTA European Economic Area Agreement for the members of the European Free Trade Area (EFTA Court) Court held that, due to a 'combination of a business objective with NFT's (Norsk Transarbeiderforbund, i.e. Norwegian Transportworker Union) core task as a trade union' deriving from its engagement 'in the management of an undertaking' the priority clause as well as the creation of the common institution were 'not (…) limited to the establishment or improvement of working conditions of the workers (…) and go beyond the object and elements of collective bargaining'.[77] This reasoning would make any common institution of trade unions and employer associations, as well as institutions run by trade unions, subject to the ban on cartels, if those institutions qualify as establishments under EU competition law. The Court of Justice of the European Union will soon have the opportunity to engage with the EFTA opinion in the *Holship* case: two cases are pending before the Court on the Belgian Dockers' scheme.[78] The challenge

C:2014:2411). This is relevant for the potential to conclude collective agreements for own-account workers including those working in the 'gig economy' (*see* Dagmar Schiek & Andrea Gideon, *Outsmarting the Gig-economy Through Collective Bargaining – EU Competition Law as a Barrier?*, 32(2) Int'l Rev. L., Computers & Tech. 275 (2018)), and has recently been questioned in the light of the European Committee of Social Rights decision No 123/2016 (12 Dec. 2018) on a complaint against Irish legislation excluding self-employed workers from collective bargaining rights (Michael Doherty & Valentina Franca, *Solving the 'Gig-saw'? Collective Rights and Platform Work*, 49 Indus. L. J. Advance Art. (2019), https://doi.org/10.1093/indlaw/dwz026). This problem is not addressed here.

75 ECJ *Albany, supra* n. 72, para. 60.

76 Case C-437/09 *AG2R Prévoyance* EU:C:2011: 112, para. 29.

77 EFTA case E-14/15, *Holship*, para. 49–50, *see* also John Hendy & Tonia Novitz, *The Holship Case*, 47 (2) Indus. L. J. 315.

78 The case numbers of these references are C-407/19 and C-471/19: neither is yet scheduled for a hearing.

focuses on freedom to provide services, which the claimants perceive as unjustifiably restricted by an obligation to use only registered dockworkers for activities in the harbours of Zeebrugge and Antwerp. The collective agreement in question has been extended for general application, and it too establishes a dockworker pool.[79] Thus, should the CJEU follow the EFTA Court for once, the establishment of joint institutions by collective agreement would risk attracting the wrath of the competition authorities.

Furthermore, even if a collective agreement is excluded from Article 101 TFEU, a social security institution set up by the same collective agreement could still obtain a dominant market position and abuse it, thus violating Article 102 TFEU. It may escape that control if it is not an undertaking under EU competition law. Under the functional notion of an undertaking, a public or non-profit organization can be deemed to be an undertaking if operating on the same market as for-profit organizations. As most social security provisions are also provided by private insurance or institutions (such as hospitals), social security institutions would normally constitute undertakings. An exception applies if they are organized on the basis of solidarity and also under state supervision. The first condition is fulfilled if the institution provides benefits irrespective of the contributions paid, as is typical for social insurance. A pension fund or health care fund which has been established by collective agreement can fall under state supervision, if the collective agreement is extended for general application and at the same time the institution is integrated into the compulsory national social insurance. As soon as there is an element of choice, the institution might remain an undertaking. For example, in the AGR2 case, the parties to the collective agreement could have decided to replace the providence fund as the manager of their health insurance system, which was why the Court assumed that they might be an undertaking.[80] The health care fund was classified as an institution providing services of general economic interest under Article 106(2) TFEU, for which reason the extension of the collective agreement for general application did not violate Article 102 TFEU in conjunction with Article 106(1) TFEU.[81] Unsurprisingly, the EFTA court in the *Holship* case found that the AO constituted an undertaking, though the referring court had not sufficiently investigated the facts of the case in order to find or exclude a dominant market position and an abuse of that position.[82]

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[79] On the principles underlying the organization of dock work *see* Patrick Verhoeven, *Dock Labor Schemes in the Context of EU Law and Policy*, XIV (2) Eur. Research Stud. 149 (2011); Isabelle van Hiel, *Between Registered and Precarious: Priority of Engagement for Dockworkers in European and International Law*, in *The New Foundations of Labour Law*, 165 (Kerstin Ahlberg & Niklas Bruun eds, Peter Lang 2017).

[80] *Supra* n. 76, paras 40–65 with reference to previous case law.

[81] Paragraphs 73–80.

[82] *Supra* n. 77, paras 84–100.

Since the risks emerging from Article 102 TFEU have been overcome in a number of cases, litigants have taken to using Article 56 TFEU (freedom of services) or Article 52 (freedom of establishment) as an alternative route. This was encouraged by the infamous *Laval* quartet,[83] in which the Court held that there is no collective bargaining exclusion from the economic freedoms. The first case applying this to a collective agreement on occupational social security was decided in 2010. It related to the question of whether a collective agreement could specify the institution suitable to supervise a third-pillar pension scheme. While the Court answered in the negative,[84] the AG opinion developed an argument shaping future case law: the autonomy of the parties to a collective agreement would not be impacted upon by subjecting them to an obligation to conduct a public procurement procedure, and to provide transparency in relation to the criteria decisive for becoming the trustee of the third-pillar pension fund.[85] The 2015 UNIS case specified those conditions in relation to occupational health care. The Court had to rule on a referral by the French *Conseil d'État* on whether a collective agreement extended for general application could impose one provider for occupational health care on all artisan bakeries in a region. The CJEU found parallels to the Albany situation: in both cases, a collective agreement set up a social security institution. Once the collective agreement is extended for general application, that body 'acquires an exclusive right'.[86] Transferring principles developed in public procurement law, the Court concluded that an obligation to maintain transparency must be complied with: the public authority (not the parties to the collective agreement) would have to give potentially interested economic actors the opportunity to become the institution chosen by the social partners. Thus, once an extension of the collective agreement is applied for, the social partners can no longer maintain the institution they have set up. Again, the EFTA Court in the *Holship* ruling[87] proposed a slightly stricter limitation of collective bargaining rights: a trade union attempting to ensure that a Norwegian branch of a Danish company complies with Norwegian collective agreements constitutes a restriction of freedom of establishment. This is in spite of the fact that companies establishing in another Member State of the European Economic Area (EEA state) can be

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[83] This term refers to four rulings of the Court relating to posted workers and protection of wages under national collective agreements and/or legislation (Case C-341/05 *Laval* EU:C:2007: 809); Case C-438/05 *ITWF v. Viking*, EU:C:2007: 772, Case C-346/06 *Rüffert* EU:C:2008: 189, judgment of 19 June 2008 COM *v.* Lux C-319/06 EU:C:2008: 350.

[84] Case C-271/08, C*OM v. Germany*, EU:C:2010:426, confirmed recently in case C-699/17 *Allianz Vorsorgekasse AG* EU:C:2019:290.

[85] Opinion of 14 Apr. 2010, EU:C:2010:183, paras 200–230, on transparency paras 215–220.

[86] Case C-25 & 26/14, *Union de syndicats de l'immobilier (UNIS) & Beaudout Père et Fils SARL*, EU:C:2015:821, para. 34, with reference to *Albany* (*supra* n. 72), para. 90.

[87] *Supra* n. 77.

expected to integrate into the local legal framework. While the Court found that the national court might find a justification in favour of the dockworker pooling, it laid down extremely strict requirements for such a justification.[88]

5.3[b] *How Does This Apply to Establishing Care Institutions in Collective Agreements?*

In cases in which collective agreements establish childcare institutions for certain sectors, it is by no means certain that they would be covered by the Albany exception, as the case law stands. While competition lawyers find it 'straightforward' to establish whether a collective agreement promotes the improvement of employment and working conditions,[89] there are numerous disagreements about that alleged clarity. An approach more aligned with traditional notions of competition law would only extend the exception to clauses that do not impact on the interests of market operators other than employees,[90] while a labour law approach would align with a wider notion of employment and working conditions. Such an approach encompasses collective agreements regulating the composition of products, the choice of suppliers as well as the requirement that suppliers comply with collective agreements or environmental considerations.[91] The arguments outlined above for accepting the care-risk as a social security risk lend support to classifying the provision of care institutions by collective agreements as clauses improving employment and working conditions. However, care institutions benefit not only the workers, but also third parties. There is thus a risk that the Court would not view these institutions as related to working and employment conditions.

The provision of childcare institutions as common institutions on the basis of a collective agreement could also be challenged on the grounds of violating Article 102 in conjunction with Article 106 TFEU. If a collective agreement is extended for general application, and as a result the choice of childcare services for parents and employers is limited, such arguments might succeed in subjecting the collective agreement to the control of the competition authorities. In any case, a childcare or other care institution, even if jointly administered by trade unions and employer associations, would almost certainly constitute an undertaking: care is big business, and access of those covered by a collective agreement amounts to a membership construction in the private sector. An abuse of market position

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88 *Supra* n. 77, paras 115–130.

89 Hendrik Nordling, *State of the Union: The Applicability of Article 101(1) TFEU to Collective Bargaining Agreements After FNV Kunsten Media*, 14(1) Comp. L. J. 37 (2015).

90 *See* AG Jacobs in his opinion on Case C-67/96, *Albany*, EU:C:1999:28, para. 43.

91 Dagmar Schiek & Daniel Ulber, *Tarifvertrag und nationales und supranationales Kartellrecht*, in Tarifvertragsgesetz 193, 197 (4th edn, Wolfgang Däubler ed., Nomos 2016).

would only emerge if the care facilities acquired a dominant market position, which seems a utopian prospect at present.

As discussed above, this could lead to an attack on the provision as a violation of freedom to provide services. If collective agreements establish care institutions for the use of employees in certain sectors, an argument might be raised that service provision by other care institutions headquartered in other Member States would be made less attractive. In a similar fashion as in *COM v. Germany* and *UNIS*, an argument could be made that the powers of the parties to a collective agreement did not include establishing or choosing a certain institution, but only allowed a process to be adopted to allow bidding for care provision. Whether such a claim would be raised would obviously depend on the Commission taking the matter into their own hands, or a chain of care providers challenging their exclusion from a certain market.

All these consequences could be avoided if collective agreements on mitigating the care risk were to provide only allocation rights in care institutions provided by third parties, that are not controlled by the parties to the collective agreements, possibly even a mix of different institutions. This however presupposes a scenario in which collective agreements are no longer necessary to address the care risk because the public and private sector provide sufficient care institutions.

Thus, in a realistic scenario, the regulation modes addressing the care risk that are most effective from a gender equality perspective are also at the highest risk of challenge under EU economic law.

5.3[c] *Alternative Future Directions*

These problems could be overcome if the Court were to reconsider its case law on the relation between EU economic law and collective agreements, in order to align it with the human rights guarantees of collective bargaining. The relevance of human rights has increased since 1999 with the Charter of Fundamental Rights of the European Union (CFREU) becoming legally binding in 2009.[92] The CFREU guarantees freedom of association in Article 12, and collective bargaining rights specifically in Article 28. Since Article 12 CFREU is not conditioned by a reference to the rights specification in the Treaty, and also mirrors Article 11 European Convention on Human Rights (ECHR), collective labour rights are protected in the strongest possible form.[93] Conversely, competition law is not protected by human rights, while the CFREU mirrors the guarantee of economic

[92] This is also stressed by Ioannis Lianos et al., *Re-thinking the Competiton Law/Labour Law Interaction: Promoting a Fairer Labour Market*, 10(3) Eur. Lab. L. J. 291, 308–309.

[93] Schiek et al., *supra* n. 67, at 83–89.

freedoms in Articles 15 and 16. Both these Articles protect the right to freedom of movement and the right to conduct a business only in line with Treaty rights and other human rights guarantees.

Taking account of the precepts of competition law, the autonomy of collective bargaining as required by these CFREU provisions can be achieved in two ways. First, as regards Article 101 TFEU, the construct of ancillary constraints would allow the alignment traditional competition law precepts with those safeguards. After all, collective bargaining agreements are necessary to allow workers to achieve acceptable working conditions in an autonomous way. The correlative agreement between employers is necessary to achieve such an aim, in other words, 'the consequential effects restrictive of competition are inherent in the pursuit of those objectives', as the Court stated in the *Wouters* case, relating to a regulation adopted by the Dutch Bar Association.[94] Any anti-competitive effects of the collective agreement would constitute ancillary restraints. Such an approach would be the most elegant way to achieve the immunity of collective labour agreements from competition law, without preventing the competition authorities from pursuing the abusive circumvention of the ban of cartels and abuse by utilizing collective agreements.[95]

Turning to Article 102 in conjunction with Article 106 TFEU, the reference to solidarity allows an interpretation which also safeguards human rights requirements. As regards limits emanating from economic freedoms, these have been widely debated ever since the *Laval* quartet[96]: since the Charter of Fundamental Rights for the European Union (CFREU) became legally binding, a constitutional interpretation of economic freedoms should prevail. Due to the fact that rights derived from freedom of association (Article 12 CFREU) are protected unconditionally, these rights condition the use of free movement rights (Article 15 CFREU) and the freedom to conduct a business (Article 16 CFREU). Under EU law, business must be conducted in a way that presupposes freedom of association and related rights, such as the conclusion of collective agreements. Protecting collective bargaining rights would not just become an afterthought in justifying a restriction of economic freedoms. Instead, economic freedoms would be interpreted in such ways that collective agreements cannot restrict them, except in cases in which the collective agreement is abused for the purposes of limiting economic freedoms.

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[94] Judgment of 19 Feb. 2002 Wouters C-309/99 [2002] ECR I-1577 EU:C:2002:98, para. 97; confirmed in judgment of 18 July 2006 Meca Medina C-519/04 P, EU:C:2006:492, para. 45.

[95] Lianos, *supra* n. 92, at 306; Schiek et al., *supra* n. 67, at 37.

[96] *See* for a summary Dagmar Schiek, *Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market*, 13(4) Eur. Const. L. Rev. 611 (2017).

6 CONCLUSION

Our deliberations confirm that it is not easy to address the care risk as an emerging and complex social security risk through collective bargaining, even in a relatively prosperous region such as the European Union. There are considerable obstacles arising from the practice of collective agreements: while the limitation of working time is a traditional matter for collective bargaining, strict limitations that are necessary to allow a true balance of employed work and informal care have been abandoned by the social partners all over the world. Traditionally, collective agreements have addressed the care risk by providing for long leave entitlements, which are at best not well compensated. In practice, this means steering unpaid carers (predominantly women) away from paid employment once care needs arise. Addressing the regular care risk for employees in ways also promoting gender equality in employment, however, presupposes creating reliable care institutions, possibly adapted to sector-specific working time requirements. In the absence of sufficient public and private childcare in many EU Member States, joint institutions established via collective agreements would provide respite for active carers, and this appears to be ever more important with the expected decline of existing (child) care institutions following their prolonged closure during the Covid-19 pandemic.

In the EU, legal risks from EU competition rules as well as the economic freedoms may arise, similar to the risks experienced by agencies pooling dock work. These risks could be overcome by a modern interpretation of EU economic law, based on the enhanced position of human rights and social values in the EU Treaties since 2009. However, if a perspective on EU competition law and economic freedoms prevails that is merely guided by economic integration rationales, these rules would once again prove disruptive for collective bargaining, even if compromising innovative responses to the care risk through collective agreements, at a time when the care risk is increasing in the wake of a global pandemic.

The alternative interpretation of EU economic law in line with human rights and the EU social values is required not only in response to IT-driven developments, but also in response to risks as longstanding as the care risk. This requires an interpretation which revives the idea that collective agreements can regulate the employment relationship beyond wage bargaining. Expanding the field of engagement for collective agreements may have positive repercussions for other areas, such as the link between working life and environmental protection, or a holistic approach to resilience against recurrent pandemics. There is no easy way forward to addressing an emerging and complex social security risk such as the care risk through collective bargaining, especially if labouring under EU law. However, forging ways forward may turn out to be rewarding beyond the field of caring for others.