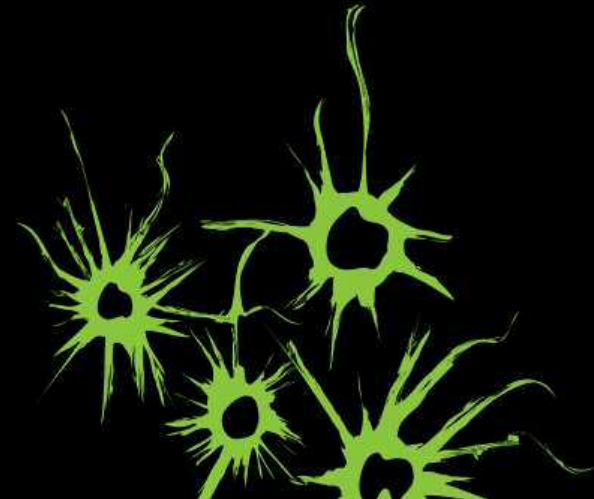
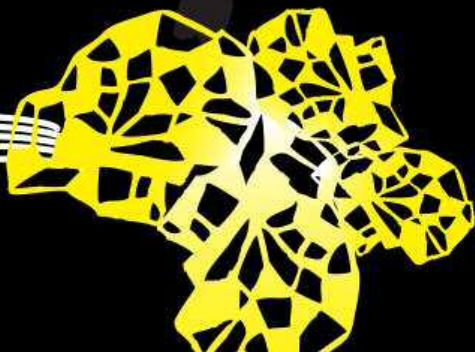


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# LABOR LAW AND COMPETITION LAW IN THE EU: BALANCING VERTICAL AND HORIZONTAL COMPETITION

PRESENTATION PREPARED FOR THE JFTC, 21 JUNE 2019

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# STRUCTURE OF THIS PRESENTATION

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1. Overview of the issues and main questions
2. Review of the EU competition law doctrine as applied to markets for human resources (supply and demand side)
3. Reflection on other related fields of law
4. Conclusion

# THE MARKET FOR HUMAN RESOURCES

## FUNDAMENTAL PROBLEMS OF MARKET REGULATION

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- Fundamental economic problems:
  - Perishability
  - Individual capacity constraints
  - Time lag in response to market signals
- Depending on the type of labor:
  - Limited substitutability
  - Oversupply or undersupply

# THE MARKET FOR HUMAN RESOURCES

## FUNDAMENTAL LEGAL ISSUES OF DEALING WITH HUMANS

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- Constitutional rights of *humans* and of *workers*
- *Human* rights (international and supranational law): e.g. dignity, non-discrimination, freedom of speech, privacy, etc.
- Fundamental rights of *workers* (international law and supranational law) – see e.g. CoE Decision No. 123/2016 Irish Congress of Trade Unions v. Ireland

# **THE CURRENT APPROACH: LABOR LAW AND REGULATION, COMBINED WITH FUNDAMENTAL RIGHTS**

MOSTLY ADDRESSES ISSUES OF VERTICAL COMPETITION

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- Minimum standards (e.g. wages, safety conditions, holidays, sick leave)
- Mandatory terms (e.g. regarding dismissal)
- Possibility for collective bargaining (cartel exemption) and strikes (boycott exemption)

# CHALLENGES OF THE STATUS QUO

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- Under political pressures related to equality, solidarity between generations and groups in society
- Under pressure from globalization
- Under pressure due to technological developments (e.g. automatization)
- Under pressure due to legal constructions (e.g. temp agencies, self-employed)
- Difficulties in reconciling the business needs of quality, flexibility and security of supply with societal needs.

# THE QUESTIONS

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- What issues of human resource markets regulation are ***not*** solved by labor law and regulation in combination with fundamental rights?
- To what extent can competition law fill these gaps?

# ISSUES GENERALLY NOT SOLVED BY LABOR LAW

## ISSUES OF HORIZONTAL COMPETITION

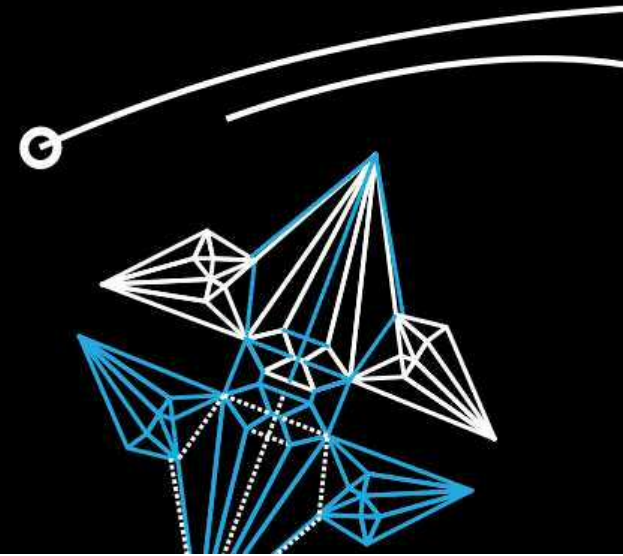
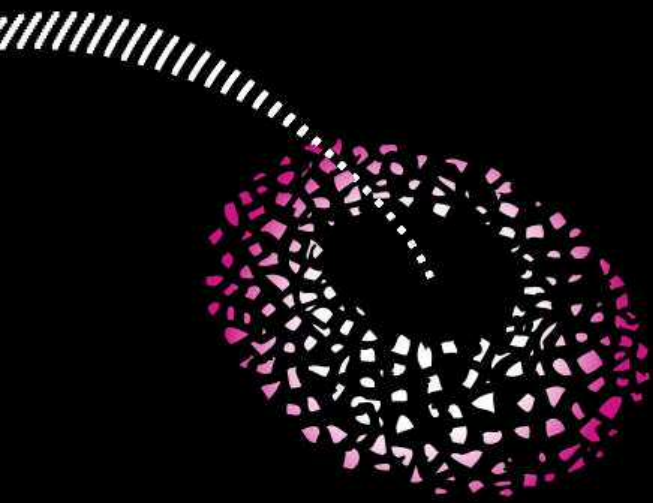
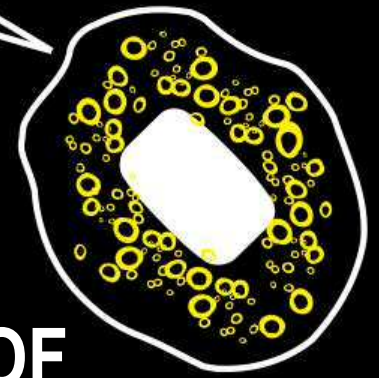
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- Questions related to horizontal competition on the demand side
- Some issues of horizontal competition on the supply side \*
- Questions related to substitution (e.g. automation)



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# COMPETITION LAW AND THE DEMAND SIDE OF HUMAN RESOURCE MARKETS



# COLLUSION ON THE DEMAND SIDE

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- No-poach agreements: on the radar of European and national authorities (decisions in the Netherlands, Germany, Spain, Italy, UK, Croatia, Serbia)
- Fixing wages or compensation – (outside the scope of a sectoral agreement) – generally prohibited as a buyer cartel (*T-Mobile*)
- Hub and spoke agreements (\*no case law but possibilities given AC Treuhand)

# ABUSE OF DOMINANCE

## ARTICLE 102 TFEU

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- Foreclosing competitors on the demand side of the market by virtue of a dominant position or special rights (*MOTOE*)
- Exploitative abuse on the demand side of the market - e.g. by imposing exploitative market access conditions (*Laurent Piau*)
- Exploitative abuse – limiting compensation\* - national cases (e.g. Vodafone Ireland Ltd re top-up, Aer Lingus re agents' compensation, British Airways re agents' compensation)

# **BOTH EXCLUSIONARY AND EXPLOITATIVE**

BKA V. DOSB AND IOC

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- Background: IOC rule limits the possibility of athletes to profit from non-IOC approved advertising during the Olympics (narrow approval criteria)
- Exclusionary effect: advertising during the Olympics is essentially channeled via the IOC and its bodies; sponsors limited in their ability to obtain advertising opportunities directly with athletes
- Exploitative effect: athletes do not profit sufficiently from the IOC-approved advertising and are precluded from other sponsorship
- Outcome: commitments negotiated in 2017 and 2018 to limit the scope of the IOC advertising ban

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# SOME VERTICAL RESTRAINTS

## ARTICLE 101 TFEU

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- Exclusivity agreements with self-employed aimed at restricting competitors and other forms of input foreclosure (Rai/Unitel, Commission v. ISU)
- Non-compete clauses following sale of IPR (Reuter/BASF)
- Restrictive covenants (non-compete, non-dealing, non-solicitation) – increasing interest from authorities

# **BOTH EXCLUSIONARY AND EXPLOITATIVE**

COMMISSION V ISU

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Background: speed skaters faced a lifetime ban from the ISU if they agree to participate in an event not endorsed by the ISU

Exclusionary effect: alternative speed skating competitions foreclosed because due to difficulty of recruiting athletes and obtaining authorization from the ISU

Exploitative effect: athletes survive on meagre wages; subject to monopsony power

Outcome: no fine; ISU should refrain from unjustified and disproportionate penalties on athletes; in the case of authorizations, ISU should apply objective, transparent and non-discriminatory criteria

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# CONCENTRATION ON THE DEMAND SIDE

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- Merger control – does not explicitly take labor concerns into account
- But!
- Acquired Rights Directive – merger cannot be used as an excuse to fire workers (see next slide)

# TRANSFER OF UNDERTAKINGS IN THE EU

## ACQUIRED RIGHTS DIRECTIVE

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- Meant for: transfer of undertakings – mergers, outsourcing
- Goal: safeguarding of employment conditions
- Consequence: restrictions on dismissal of employees
- Exception: Economic, technical or organisational reasons
- *“The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for **Economic, Technical or Organisational** reasons entailing changes in the workforce” (Article 4.1)*



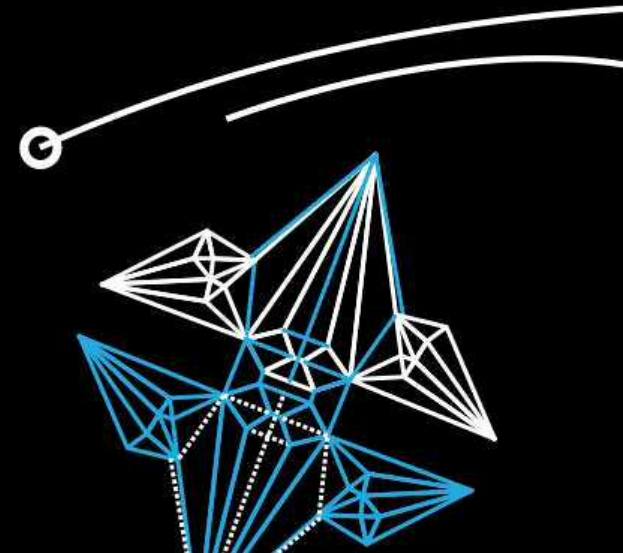
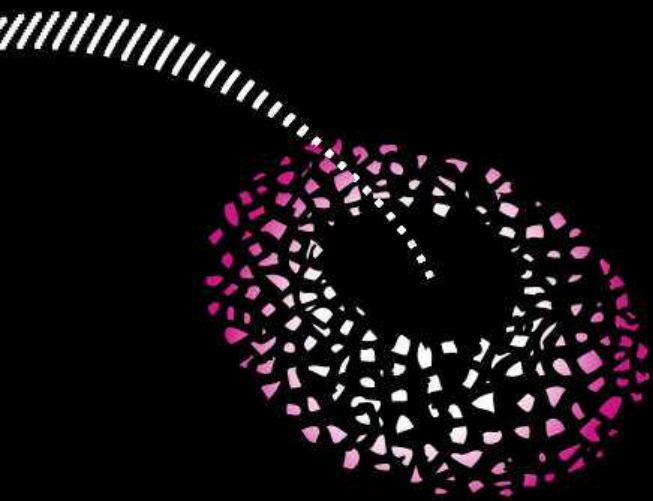
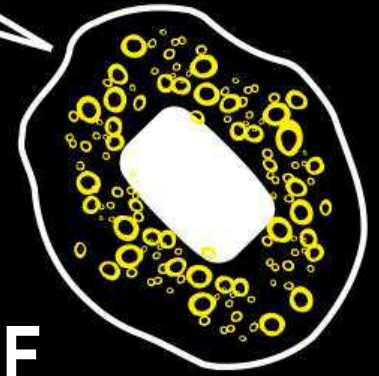
# CHALLENGES FOR COMPETITION LAW

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- Benchmark for assessment: worker (producer) welfare or other goals such as consumer welfare or protecting the competitive process
- Finding dominance outside specific contexts such as sport or regulated professions; situations of oligopoly or superior bargaining power
- Benchmarks for exploitative abuse (unfair prices and unfair terms)
- Method of assessment of vertical restraints such as non-compete agreements

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# COMPETITION LAW AND THE SUPPLY SIDE OF HUMAN RESOURCE MARKETS



# THE CARTEL EXEMPTION... AND ITS LIMITS

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- *Albany* case – the provisions under a collective bargaining agreement are not in breach of competition law because of solidarity
- *Wouters* – restrictions by professional organization (on partnership with third parties) fall outside the scope of Article 101 TFEU.
- But see *Pavlov* – provisions imposed by the members of a profession which apply to self-employed may be contrary to competition law (unless they are *de minimis*)
- Exemption from the cartel prohibition for false self-employed but not for genuine self-employed (*FNV Kiem*); a number of national cartel cases confirm this (e.g. voice-over actors in Ireland, medical doctors in Bulgaria, substitute musicians in the Netherlands).

# THE BOYCOTT EXEMPTION... AND ITS LIMITS

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- The Viking/Laval cases (2007) – fundamental labor rights (including right to strike) must be balanced against economic rights (e.g. freedom of establishment)

# CHALLENGES OF GIG WORK

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- \*Vertical competition (see Daskalova 2018)
- Horizontal competition – issue raised in the Opinion of AG Wahl but not discussed by the Court (!)

# THE QUESTION OF HORIZONTAL COMPETITION

## IN A BROADER LEGAL CONTEXT

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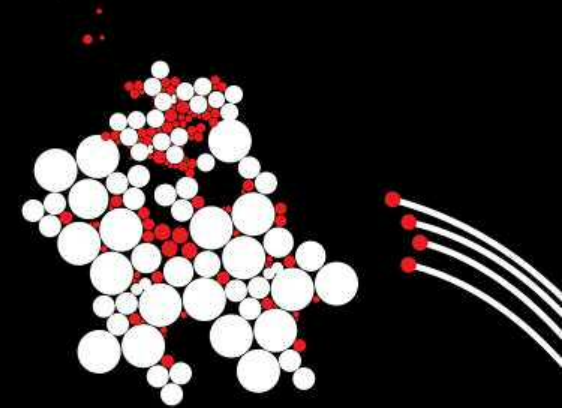
- Free movement within the EU (internal market law)
  - Directive on the posting of workers (revised 2018)
- Trade and migration law
- The freelancer construct (and the *FNV Kiem* judgment)

# CONCLUSIONS

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- Need for normative alignment between competition law and labor law
- More active enforcement of competition law can improve the regulation of human resource markets
- Assessment criteria need to be clarified
- The question of dominance (or superior bargaining power) should be addressed

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**THANK YOU.  
COMMENTS AND QUESTIONS ARE WELCOME!**

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