The Cambridge Handbook of Labor in Competition Law

As scholars and policymakers around the world seek a systematic approach to the question of "gig work," one of its regulatory dimensions – the intersection of labor and competition law – points toward a deeper reconceptualization of the conventional legal and economic categories typically brought to bear upon the issue of gig work. A comparative approach to the question of gig work further reveals the variety and contingency of background assumptions that are often overlooked in the context of domestic policy debates. By combining a detailed comparative doctrinal survey of the regulation of non-employee workers in domestic competition law systems with a set of essays reframing the underlying questions raised – in terms of international legal frameworks, freedom of association norms, alternative approaches to law and economics, and more – The Cambridge Handbook of Labor in Competition Law moves the debates over the fissured workplace and the labor – competition law intersection forward in novel ways.

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The Cambridge Handbook of Labor in Competition Law

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Preface

The idea for this volume first came from our editor, Matt Gallaway. Shae and Sanjukta met at the LLRN (Labour Law Research Network) conference in Amsterdam, discovering that they had both been working on the problem of competition law in relation to work beyond the bounds of employment in their respective jurisdictions. Subsequently, Shae visited Detroit in December, 2018 – coming from the Australian summer to the Michigan winter – and the plan for the book was hatched out in earnest, including the decision to invite Ewan McGaughey onboard as an expert on the UK and Europe. One motivation for the project was of course to bring together and begin to systematise thinking across jurisdictions on the competition law aspects of work in the so-called gig economy. But a deeper motivation for the project was to begin to generate comparative and international perspectives on the nascent normative broadening within competition law itself – which has work, workers and smaller players at or near its centre.

The rise of digital labour platforms and the ‘gig’ economy has acted as a catalyst for debate over the legitimate role for competition law and policy in regulating the collective action rights of working people. The need for this debate is significant and pressing. The problems highlighted by the gig economy are unlikely to be solved simply by relying on definitional expansion in labour law, which, while welcome, even when viable may invite further manipulation of boundaries by economically powerful actors. And while in many jurisdictions there are promising signs of a shift in approach to defining coverage of labour regulation, these are not universal. For example, in Australia, a jurisdiction with a relatively enlightened regulatory structure for collective bargaining for small businesses, the High Court (the apex court) in Workpac v. Rossato [2021] HCA 23 has signalled a return to contractual formalism for employment contracts, in which the wording of an employment contract will be pre-eminent in determining its ultimate form, leaving many workers in ‘employment-like’ working conditions unable to argue that in reality their contract is one of employment. This unexpected change of approach within the common law of that country reinforces the importance of engaging with, and challenging, competition law regulation on its own terms, as part of a multipronged approach. Even in jurisdictions that embrace the broadest possible expansions of the category ‘employment’ (or another category triggering collective action rights), powerful firms may seek to evade those rights by further reclassifying workers or groups of workers as, for instance, franchisees or simply tiny firms. (See how Uber reacted to the prospect of an expansive legal definition of employment in California, threatening to reclassify drivers as franchisees.1) This does not at all mean that such reforms should not be pursued; it just means that the competition law issues here cannot simply all be outsourced to labour law.

Preface

It is within this context that this volume makes its contribution. To engage and challenge competition law on its own terms, it is first important to understand how it applies to working people, and the context in which the laws have been developed. Our goal was to first set out the theoretical, policy, economic and legal contexts for the intersection of competition law and collective action by working people, and then to map the laws as they applied across a range of different jurisdictions internationally. From this comparative overview, we have sought to identify commonalities and differences, and to offer a clear and accessible explication of these regulatory frameworks, particularly for those working within labour relations contexts where competition regulation is unfamiliar. We also hope that a comparative perspective on these issues will help to destabilise common operating assumptions that often are taken to be obvious or ineluctable; while this often occurs in law, it is especially salient in contemporary competition law. There is much more to do in this respect, but we hope that this volume is a beginning.

We are grateful for and offer profuse thanks to the wide ranging and very talented group of colleagues who agreed to contribute to this collection. They readily agreed to the challenge presented by our brief. The strength of this collection is down to their collective efforts.

We also thank Cambridge University Press, and particularly Matt Gallaway, for his support for the project, right from the beginning, and for his endless patience in allowing us to get our act together. We are grateful to Jadyn Fauconier-Herry, Laura Blake, Helen Kitto and Jayavel Radhakrishnan for their able assistance in shepherding us through the production process.