

PLATFORM WORK IN EUROPE

A Comparative Analysis

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1. THE EXTENT OF 'PLATFORM WORK'

Before examining the legal issues that platform work poses, it is necessary to first ask (as do all the national reports on the matter in this book) what the current extent of the phenomenon is and, thus, concretely, how many 'platform workers' there are.

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All national reports highlight the lack of official statistics on the quantitative impact and growth of the introduction of 'platform work' on the active population concerned.

One of the main reasons for the lack of official data lies, in all probability, in the fact that – as is well known – most of the workers used by the platforms have a self-employment relationship with a platform and often even a totally informal relationship. This makes data collection extremely difficult. Only unofficial estimates can thus be used.

Unofficial data specific to each country shows that the estimates for each country are very divergent from one survey to another.

Data on the percentage of the active population involved in the gig economy is most common. It is complemented by data that distinguishes between workers who are mainly dependent upon the income derived from platform work and those who gain complementary income from platform work.

The overall tendency is that the proportion of gig workers is growing rapidly, although it usually never exceeds 5 per cent, with the exception of a Trade Union Confederation report that indicates a tantalising 9.6 per cent of the adult population in UK and also 10.4 per cent of the active population in Germany, according to a COLLEEM survey carried out in 2018.¹

All in all, the dominant feature is that of a male and less-than-middle-aged worker.

If the numbers are, therefore, growing rapidly, it is urgent to ask what these workers' status is and what applicable individual and collective protections they have.

2. CONTRACTUAL RELATIONS AND APPLICABLE PROTECTIONS

2.1. SUBJECT MATTER OF THE RESEARCH: 'WORK VIA PLATFORM'

A juridical debate must begin with definitions. We must, therefore, first ask ourselves what is meant by the term 'platform work'. This term is in

¹ N. COUNTOURIS, 'Platform Work: Regulatory And Jurisprudential Perspectives. The UK Case' *in this volume*, section 1 and R. KRAUSE, "App-Based" Work: The German Case' *in this volume*, section 2.

everyday usage and, at first glance, is actually very broad and generic in meaning because it encompasses all those employment contracts entered into *using* an online (digital) platform or an application on a smartphone (or some other such device) by virtue of which people undertake to carry out their tasks either completely online (crowdwork, cloudwork) or in the physical world (gig work; on-demand work). Clearly, such employment contracts can vary widely from each other depending on the *role* the platform actually plays:² the platform may act as a mere intermediary, limiting itself to bringing the parties to the employment contract into contact with each other, that is, the subordinate or self-employed person and the employer or principal (intermediary platforms). On the contrary, the platform can act as a staff leaser, that is, arrange for a worker to go to a user, who manages and coordinates that person's activities for their personal benefit (staffing platforms). Lastly, the platform can act as an employer or principal in the event the employer or principal makes the employee work directly for it, subordinate or self-employed work, thus making the employee part of the user's organisation, in order to provide a service to third parties ('work via platform').³ It is clear that only the judge in a specific employment dispute can decide what role the platform plays. In theory, however, one can debate whether the rules of national judicial systems are already suitable to incorporate these new forms of work.

Given the particular interest this subject has in labour law, the reports gathered in this book all focus on the last form of employment contract mentioned above, namely, so-called 'work via platform' – specifically, that employment agreement by which people, connected to the platform via an app on their smartphones, conduct their activities entirely in the physical world ('work on-demand via app'). Indeed, this was the first form of 'work via platform' to disseminate in various countries and for which case law was called on to decide, given that the cases examined mostly concerned food delivery platform riders and taxi-hailing platform drivers (only in the German judicial system is there a ruling on the issue of crowdworking offered only via web).⁴

The basic question that is asked is whether the kinds of contractual relationships that exist in the various judicial systems are suitable to also

² R. KRAUSE, above n. 1, section 3.1.

³ See the different kinds of platforms presented by F. KÉFER, 'Platform Work: The Belgian Case' *in this volume*, section 4 and A.T.J.M. JACOBS, 'Platform Work: The Dutch Case' *in this volume*, section 3.

⁴ R. KRAUSE, above n. 1, section 3.2.

include ‘work via platform’ within their scope and to provide the necessary employee protection, or if ad hoc legislation is necessary.

To this end, the national reports cited in this book cover very different situations.

In all the legal systems examined, except in France (where laws were passed before case law stepped in, given that the first French law on the matter was passed in 2016),⁵ the judges were the first to have to face the problem of the legal framework of ‘work via platform’. It was they who had to decide what status to give these workers by making reference to the kinds of contractual relationship already present in the various systems. In some countries there were two traditional kinds of contractual relationships: the subordinate employment contract; and the self-employment contract. These are distinct from each other depending on whether the employer has directive power and, in some legal systems, the addition by law of some specific⁶ or supplementary⁷ criteria established by law. In other areas, there are three traditional kinds of contractual relationships: the subordinate employment contract; the self-employment contract; and a subspecies of ‘weak’ self-employment contract, provided for in various forms and governed by law (the ‘employee-like person’ in Germany; the ‘hetero-organised worker’ in Italy; the ‘TRADE’ in Spain; the ‘worker’ in the UK).

Subsequently, other national legislators passed specific laws governing ‘workers via platform’ in general (in Belgium)⁸ or other specific categories of platform worker involved in ‘workers via platform’ (the riders working for food delivery platforms in Italy⁹ and France).¹⁰

2.2. THE CLASSIFICATION OF ‘WORK VIA PLATFORM’ BY JUDGES: TENDENTIAL ACKNOWLEDGEMENT OF THE SUBORDINATE NATURE OF THE EMPLOYMENT RELATIONSHIP

Starting from the position taken by the judges, one notices that there was an initial tendency in case law not to classify ‘workers via platform’ as

⁵ B. GOMES and T. SACHS, ‘Making Work Platforms Accountable Or Safe? The Battle Between the Legislator And Judges. The French Case’ *in this volume*, section 2.

⁶ R. KRAUSE, above n. 1, section 3.2.

⁷ F. KÉFER, above n. 3, section 4.

⁸ F. KÉFER, above n. 3, section 4.4.

⁹ Law Decree 101, 3 September 2019, converted into law N. 128/2019.

¹⁰ By way of art. 44 Mobility Act Law, 24 December 2019.

subordinate workers but, instead, as *tout court* self-employed workers or ‘weak’ self-employed workers.¹¹ This is essentially because some typical elements of the contract binding the worker to the platform seem to indicate – at first glance – an absence of those stringent features that distinguish subordinate work. These features include: the continuity of constraint, which constitutes a prerequisite for the employer to exercise power (a platform worker, on the other hand, is free – apparently – to accept or refuse single assignments);¹² the platform’s directive or disciplinary power (concealed by the ‘automated’ operation of the algorithm); and an exclusive personalised service (which is called into question by clauses that make it possible for workers to be replaced by others).¹³

Only later – after very thorough investigations – did the judges, in almost all the judicial systems, reveal that the freedom of the worker to choose whether, when and how to work was, in actual fact, only apparent.¹⁴

UK case law is an exception to this interpretative trend as it continued to classify people working for a platform as ‘workers’, but this was essentially because the workers’ solicitors opted for a ‘prudent’ defence strategy.¹⁵

It thus emerged that since it was the algorithm that arranged the allocation of assignments, the worker is not at all free to choose whether to work and how to work, but is, instead, forced to accept as many assignments as possible and to perform them to the letter of the ‘automated’ instructions sent by the algorithm to the worker’s smartphone in real time

¹¹ Turin Court of Appeal, 4 February 2019, and Italian Court of Cassation, 24 February 2020, N. 1663, both of which classified Uber Eats riders as ‘hetero-organised workers’; Tribunal of Milan, 28 March 2021, which classified shoppers via platform as ‘hetero-organised’ workers; M.T. CARINCI, ‘Case Law Approaches and Regulatory Choices on Platform Work: The Italian Case’ *in this volume*, section 2; Tribunal Superior de Justicia de Madrid, 19 September 2019, N. 715, which set the classification of TRADE, F. FITA ORTEGA, ‘The ‘App-Based’ Employment Relationship: The Spanish Case’ *in this volume*, sections 2.1 and 2.3; for the ‘worker’ classification under UK case law, N. COUNTOURIS, above n. 1, section 2.

¹² See: Turin Court of Appeal, 7 May 2019; Milan Court of Appeal, 10 September 2018, M.T. CARINCI, above n. 11, section 2.

¹³ See in UK case law, N. COUNTOURIS, above n. 1, section 3.

¹⁴ See Tribunal Superior de Justicia Asturias, 25 July 2019, N. 1818 and Tribunal Superior de Justicia Madrid, 27 November 2019, F. FITA ORTEGA, above n. 11, section 2.3; State Labour Court of Munich, 4 December 2019, R. KRAUSE, above n. 1, section 3.2; Court de Cassation, 28 November 2018, case ‘Take Eat Easy’, Court de Cassation, 4 March 2020, ‘Uber’ case, B. GOMES and T. SACHS, above n. 5, section 2; Criminal Court of Milan, decree 27 May 2020, Tribunal of Palermo, 24 November 2020, N. 3570, M.T. CARINCI, above n. 11, section 2; see also A.T.J.M. JACOBS, above n. 3, section 4, who mentions four decisions.

¹⁵ N. COUNTOURIS, above n. 1, section 4.

(routes to follow, expected delivery times, etc.). Failure to accept most of the assignments and to follow the automated instructions leads to the worker being penalised in subsequent allocation of assignments and even being removed from the platform. The automated system, in fact, monitors every worker's performance, checks the data provided by the app on the worker's smartphone (time taken for each delivery, routes taken, number of deliveries made during the week, etc.) and customers' feedback. Such data, which is processed by the algorithm, allows the platform to prepare a 'ranking' of workers and to select those workers with the highest scores for subsequent assignments and to penalise – by suspending, or even totally excluding – those with the lowest scores.

The clause making it possible for workers to be replaced by others was also carefully examined by the judges. Indeed, they ruled out that a mere standard clause with no significant use or that is difficult to apply could preclude the employment relationship as subordinate.¹⁶

In any case, even when they are faced with the classification of 'work via platform', the judges generally do not budge from the 'classical' 20th century concept of subordination, which is mainly focused on the employer's managerial power.

In this regard, two French rulings and one Italian ruling are exceptions.

In the 'Uber' case in France, the *Cour d'Appel de Paris*,¹⁷ first, and the *Court de Cassation*, later,¹⁸ made a qualitative leap by straying from the traditional notion of subordination – that is, the existence of the employer's hetero-directive power – and opting for a 'sort of notion of economic dependence'¹⁹ focused instead on the employer's power to organise and set the conditions of the service rendered. Indeed, in these two rulings, the judges gave significant importance to elements such as the possibility for drivers to establish their own clientele or to independently decide the price of the rides or the conditions of the service.²⁰ According to the rulings, the lack of such elements shows that the alleged self-employed worker does not actually have the power to autonomously organise their activity but that it is the principal – that is, the platform – that organises the service and must therefore be acknowledged as the employer in a real employment contract with the worker.

¹⁶ F. FITA ORTEGA, above n. 11, section 2.3; N. COUNTOURIS, above n. 1, section 3.

¹⁷ Cour d'Appel de Paris, 19 January 2019.

¹⁸ Court de Cassation 4 March 2020, B. GOMES and T. SACHS, above n. 5, section 3.

¹⁹ Likewise, B. GOMES and T. SACHS, above n. 5, section 3.

²⁰ B. GOMES and T. SACHS, above n. 5, section 2.

Even one Italian ruling on merit (the Tribunal of Palermo)²¹ departs from the ‘classical’ notion of subordination as hetero-direction, highlighting the separate notion of ‘dual alienation’, as set forth in the past in a famous, but isolated, ruling by the Italian Constitutional Court.²² According to the Tribunal of Palermo, which echoed, *verbatim*, ruling 30/1996 of the Italian Constitutional Court, subordination does not hinge on the fact that the platform has mere directive power but exists if two other conditions of alienation exist at the same time: alienation in which the end result of the assignment is for the sole use of others; and alienation of the production organisation that renders the service. Thus, this ruling, too, adopts a notion of subordination that is distinct from the employer’s directive power but instead focuses on the titleship of the organisation for which the work activity is rendered.

It is too early to say whether a different and broader concept of subordination is emerging in case law that is aimed at ensuring full protection for all those platform workers who – though not technically hetero-directed – can say they are actually as weak as subordinate workers are. Firstly, platform workers do not have their own means of production (except items of very low value: a bicycle, a motor scooter, a smartphone) and are, therefore, committed to providing mainly personal work. Secondly, they are workers without independent market opportunities and are, therefore, forced to render their service to one (or more) organisations assigned by others. Lastly, they are precarious workers because they are hired on short or very short-term contracts and without any guarantee of continuity/frequency of assignments or income.

In any case, the fact that the most recent case law acknowledges that in most of the cases examined (regarding mostly riders and drivers), platform workers having a subordinate employment relationship certainly does not solve all of the problems.

Firstly, the classification of these individuals as subordinate workers can always be called into question if the platforms modify the assignment organisation model adopted (e.g. by eliminating the ranking systems, which are focused on controlling performance and programmed to distribute assignments among the workers) – something that, in any case, has already occurred, as testified by the clause making it possible for workers to be replaced by others.²³ Even if the above were to happen – as is

²¹ Tribunal of Palermo 24 November 2020, N. 7283.

²² Constitutional Court 5 February 1996, N. 30.

²³ N. COUNTOURIS, above n. 1, section 3; F. FITA ORTEGA, above n. 11, section 2.2.

indeed happening – no one can have any doubt that ‘via platform’ workers, due to their inherent weakness, need protection.

Secondly, acknowledgement that there is a subordinate employment relationship does not necessarily mean platform workers are ensured all the protection they need. The extreme precariousness of the constraint and the exasperating fragmentation of the assignments can, in fact, make it difficult to extend to such workers the protection designed for ‘classical’ 20th-century subordinate work, which, on the contrary, is characterised by stability and continuity. For example, under the Belgium judicial system the classification of ‘riders’ as subordinate workers could pose significant problems over the exact definition of working time. Is it the time taken to complete a delivery? The time from the moment at which each assignment is accepted? Or the time from which the worker connects to the platform? There are also the consequent issues of remuneration due to the worker.²⁴ Under the Dutch judicial system, extension of the protection ensured to employees with zero-hours contracts or to subordinate leased employees constitutes insufficient minimum protection.²⁵

Based on this analysis, one cannot but conclude that the ‘uberisation’ of work is nothing but extreme exasperation of that precariousness of work that has long characterised all European legal systems²⁶ and which clearly needs resolute action by national legislators, as well as a deep rethink of the kind of protection to give these workers.

2.3. NATIONAL LAWS GOVERNING THE EMPLOYMENT RELATIONSHIP OF ‘WORKERS VIA PLATFORM’: DO THEY ADD OR REMOVE PROTECTION?

Though there is a debate on the need for legislative intervention in favour of ‘workers via platforms’ in all the legal systems considered, only in three has the legislator intervened: France, Belgium and Italy.

As will immediately become clear, in all three of these countries, legislative intervention was ambivalent, if not downright unfavourable to workers, if it is true it ended up discouraging requests to have their status changed to subordinate and/or to limit the protection afforded them

²⁴ F. KÉFER, above n. 3, section 4.2. See F. FITA ORTEGA, above n. 11, section 3 for analogous considerations.

²⁵ A.T.J.M. JACOBS, above n. 3, section 4.

²⁶ A.T.J.M. JACOBS, above n. 3, section 11; F. KÉFER, above n. 3, section 7; N. COUNTOURIS, above n. 1, section 8.

(so much so as to urge the judges to rule, in two cases, the laws in question unconstitutional). The first country to pass legislation on the matter was France with the *Loi Travail* of 8 August 2016, which contained a provision within the Labour Code that applied to ‘workers using an electronic networking platform’.

From careful examination, this law reflects – both in consideration of the language used and the type of protection afforded to workers (among which are the right to strike, the freedom to join a trade union and the taking out of insurance coverage against accidents at work, which gives preference to ‘private’ insurers over affiliation to general scheme) – not so much a will to protect a weak form of self-employment, but, rather, legitimisation of the organisational model adopted by the platforms by consolidating their decision to only use self-employed workers (for which the law itself ensures few embryonic protections, grouped around the title ‘social responsibility of platforms’).²⁷ In actual fact, this law did not fulfil its purpose, since French case law still held that ‘workers via platforms’, in particular the Uber drivers, were to be classified as subordinate workers.²⁸

On 24 December 2019 (after an initial attempt in 2018), the French legislator intervened again with the so-called ‘Mobility Act’, which was dedicated more specifically to workers of certain platforms: ‘for the electronic linking of platforms operating in the sector of driving a chauffeur-driven transport vehicle (VTC) and the delivery of goods by means of a two- or three-wheeled vehicle’. The ‘Mobility Act’ provided for the platform to draw up the so-called ‘social responsibility charter’ (known as the ‘social charter’) in order to define its own rights and obligations as well as those of the workers: ‘the platform may draw up a charter determining the conditions and procedures for exercising their social responsibility, defining their right and those of the workers with whom they are in contact’.²⁹ The content and function of the ‘social charter’ seem somewhat ambivalent. If acknowledgement of the need for the ‘social charter’ is itself implicit, then acknowledgement of the power exercised by the platform over the worker – at the same time that the law (art. 44 of the ‘Mobility Act’) provides that the ‘social charter’ cannot be taken by the judge as an element of proof in order to classify the contract as subordinate. Therefore, once again, the aim of the law is not so much to extend protection to a weak self-employed worker as it is, instead, to protect the platform that adopts the

²⁷ B. GOMES and T. SACHS, above n. 5, section 2.

²⁸ See, in particular, Court of Cassation, 4 March 2020, B. GOMES and T. SACHS, above n. 5, section 2.

²⁹ For which see B. GOMES and T. SACHS, above n. 5, section 2.

‘social charter’ against the risk of a reclassification of the relationship and to discourage the worker – who in this way is afforded only a minimum cluster of rights – from demanding application of all the labour law protections, which would naturally lead to the acknowledgement of subordination. In 2019, however, the Constitutional Council (decision N. 2019/794) ruled that art. 44 of the ‘Mobility Act’ was unconstitutional, while the rules that legitimise the introduction of the ‘social charter’ are still in force.

Between 2018 and 2020, the Belgium legislator made even more radical provisions. The law had in fact provided that all ‘workers via platform’ below a certain income threshold (€6,340 in 2020) – regardless of how, concretely, the relationship was conducted – were exempt from all forms of taxation and, above all, exempt from application of a large part of the protective legislation governing subordinate work (Employment Contract Act; Act on Protection of Remuneration; Act on Collective Labour Agreements; Act on Working Hours; Act on Health and Safety at Work), as well as application of all social security laws. By way of order N. 53 dated 23 April 2020, the Constitutional Court ruled that such laws were unconstitutional.³⁰

In Italy, a law passed in 2019 governing ‘workers via platform’ is even more ambiguous (Decree Law 101/2019, converted into Law 128/2019). Italian law has taken two directions: on the one hand, it explicitly confirmed that the ‘worker via platform’ – no matter the type of activity provided by the platform – can fall into the category of hetero-organised self-employment, for which all the protections provided for subordinate work apply (art. 2, Legislative Decree 81/2015, the so-called ‘Jobs Act’). On the other hand, it introduced a mandatory minimum protection (in terms of health and safety, compensation, prohibitions on discrimination, protection of privacy, etc.) in favour of ‘workers via platform’ who deliver goods on behalf of others using bicycles or motor scooters and who fall into the category of ‘pure’ self-employment (*titolo V bis* Legislative Decree 81/2015).

At first glance, therefore, it seems that the Italian legislator has gone against the trend set by the French and Belgian legislators; this is also in consideration of the fact that the broad notion of hetero-organisation accepted in case law means that in many cases ‘workers via platform’ (including delivery platform riders) fall into this contractual relationship.³¹ However, it should be noted that even Italian legislation is ambiguous. In fact, with reference to hetero-organised work, the law provides that the

³⁰ F. KÉFER, above n. 3, section 4.

³¹ M.T. CARINCI, above n. 11, section 3.

national collective agreements stipulated by the most representative trade unions may depart, in whole or in part, from the discipline of subordinate work, which, in principle, the law says is applicable. That this provision is not destined to remain on paper is proven by a collective agreement signed in 2020 between Assodelivery and UGL explicitly aimed at derogating *in peius* from the protective provision provided by the law on riders (in particular, reintroducing piecework pay, which was banned by law). A contract stipulated, furthermore, by a union whose representational authority for riders is questioned.³²

It is clear from what has been examined that all national legislators have so far encountered serious difficulties fending off the pressure from those centres of economic power, which are, undoubtedly, the platforms. It is therefore urgent that collective representation of ‘via platform’ workers be consolidated so that they can not only sit at the negotiating table, which would already be a leap forward, but also influence political power and raise public awareness (i.e. of consumers) to ensure these workers also have the means for a free and dignified life.

3. PLATFORM WORK AS A CHALLENGE FOR INDUSTRIAL RELATIONS

3.1. THE NATURE OF THE CHALLENGE FOR TRADITIONAL AND ALTERNATIVE TRADE UNIONS

Historically, systems of collective employment relations have been established in an industrial setting that respects the rules of classical theatre. Workers were acting in conformity with the rule of unity in time and space. They were part of a working community that was physically situated in an establishment. Platform workers, whether they carry out crowdwork or work on demand, often have no idea of each other’s existence. A number of notions such as shop rules, shop stewards and workers’ assemblies are problematic in the absence of a shop. The workplace has not merely fissured, it has become virtual. In the case of crowdwork, even work has become virtual.

Systems of industrial relations emerged with the rise of trade unions. It presupposes actors organising and representing the workforce. These

³² M.T. CARINCI, above n. 11, section 5. Recently the Court of Bologna (Court of Bologna, decree, 30 June 2021) decided in this sense.

actors do not necessarily need to be created nowadays. In all the countries reported here, trade unions exist at the intersectoral level and at the sectoral level. The question arises of whether they have shown an interest in organising and defending platform workers and/or whether the platform workers have tried to organise themselves outside the traditional trade union movement. Subsequently, the further question arises of whether the prerogatives attributed to these (representative) trade unions within an instituted system of industrial relations are suitable tools in order to defend and promote the interests of platform workers.

The country reports show that 'traditional' trade unions in Belgium, Germany, Italy, the Netherlands and the UK have indeed taken an active interest in organising and representing platform workers. In a number of cases, this interest has even amounted to the conclusion of collective agreements. This begs the questions of whether this openness needs to be based upon the presumption that all platform workers are bogus self-employed workers, or whether the trade unions are also open to organising genuine self-employed workers, which, however, do not function as employers themselves and lack the kind of economic autonomy that is essential to qualify them as entrepreneurs. The Dutch trade unions are willing to accept self-employed workers, irrespective of their status. This is an issue that needs to be addressed in the constitution of these trade unions. Insofar as the right to form and join trade unions is regulated by a non-optional legal framework, it is essential that such a framework does not prevent workers, without any discrimination based upon the nature of their work, from being part of a trade union that can defend the interests of these workers, irrespective of the formal qualification of such a structure as a trade union.³³

The French *Loi Travail* explicitly recognises the right of platform workers to form and join trade unions. Quite remarkably, the law does not refer to a '*syndicat*' but to an '*organisation syndicale*'. Inevitably, the question arises as to whether they could thus deviate from the mandatory '*Loi Waldeck Rousseau*'. The latter does not require members of a '*syndicat*' to be remunerated workers in a state of subordination. It is sufficient that they exercise a professional activity.

This interest of trade unions for platform workers went hand-in-hand with the efforts of the latter to organise themselves outside the traditional trade union movements in a number of countries such as Germany and

³³ See *Manole and 'Romanian Farmers Direct' versus Romania*, no. 46551/06, ECtHR, 16 June 2015.

Spain. In Belgium, a collective of riders has set up a Facebook group that comes closer to the virtual exercise of the freedom of assembly than to the exercise of the freedom of association.³⁴ It has not been set up against the traditional trade unions and is in fact being supported by the socialist trade union. In Germany, the traditional trade union IGMetall and the YouTubers union set up the association 'Fair Tube e.v.'. The German trade union Verdi also established an independent organisational unit for individual counselling of self-employed members.³⁵

These experiences show how platform riders in particular have employed the technology that is used to exploit them as a means to organise themselves. Ortega refers in this respect to 'cyberunionism'.³⁶ The question of whether a platform of workers or a Facebook group can qualify as a trade union fit to be recognised as a representative trade union for the purposes of instituted systems of collective bargaining remains unanswered. Paradoxically, if one takes the discourse of drivers as independent, autonomous and self-employed 'entrepreneurs' (too) seriously, one might wonder if associations of employers – some of which also organise self-employed people – have taken an interest in organising these workers. The national reports provide no evidence of this. The interest of employers' associations in the issue of platform work is obviously key, albeit not essential, in order to arrive at any system of industrial relations. The sole question is: at what level or levels is or should such bargaining be taking place? In practice, one can imagine a bargaining process taking place at the enterprise level or at the sectoral level. For this first level of bargaining, the interest of an employers' organisation is not essential.

The national reports provide evidence of bargaining at both levels. In the UK, the union GMB concluded an agreement with the delivery firm Hermes in February 2019.³⁷ The Spanish report provides evidence of a collective agreement at the branch level in the hostelry sector, which includes the activity of delivering food and beverages.³⁸ In view of the overall representativeness of management and labour, this collective agreement binding *erga omnes* can cover the specific subsector of food and beverage delivery. Such a collective agreement cannot be applied to independent or self-employed platform workers. The Italian report provides evidence of

³⁴ F. KÉFER, above n. 3, section 5, R. KRAUSE, above n. 1, section 5 and F. FITA ORTEGA, above n. 11, section 3.

³⁵ R. KRAUSE, above n. 1, section 5.2.

³⁶ F. FITA ORTEGA, above n. 11, section 5.

³⁷ N. COUNTOURIS, above n. 1, section 6.

³⁸ F. FITA ORTEGA, above n. 11, section 3.2.

an agreement concluded at the branch level between an organisation that represented the formal employers as opposed to platforms in the transport and logistics sectors. It cannot be applied to genuine self-employed or independent drivers. Hence, the creation of an association representing the platforms as economic actors created a steppingstone to conclude a more relevant collective agreement, applicable to self-employed riders. The representative status of the signatory trade union is debated. Hence, the question arises as to the extent to which this agreement allows one to derogate *in peius* from Italian statutory law as far as, for example, the issue of piecework-based remuneration is concerned.

3.2. COLLECTIVE BARGAINING

The examples of collective bargaining described in the national reports highlight both the thresholds and the catalysts affecting the prospect of collective bargaining. It is interesting to observe that the most documented cases of collective agreements (UK and Italy) that appear to be applicable to self-employed workers both concern systems of industrial relations that are not institutionalised on the basis of a heteronomous statutory framework dealing with collective agreements and are both examples of concession bargaining. More institutionalised systems of collective bargaining might prove to be less suitable, insofar as statutory frameworks might describe their scope in function of formal employees. On the other hand, they tend to provide greater leeway for a more universal coverage of collective agreements.

The most important legal threshold for collective bargaining relates to the dark shadow of EU competition law. Hence, an extension of the immunity from competition law should be extended to collective agreements that affect workers who cannot be construed as genuine entrepreneurs. The focus should be less on the issue of whether they are working in subordination. The question of how a directive could ever solve this problem, which is of a constitutional nature, therefore arises. However, the issue of collective bargaining has been integrated into the issues of the first stage of consultation on improving the working conditions of platform work – albeit as Ratti indicates, quoting the directive, it: ‘does not address the issue of potential impacts of EU competition law, notably prohibitions under Article 101(1) TFEU, on platform work.’³⁹

³⁹ L. RATTI, ‘Crowdwork and Work On-Demand in the European Legal Framework: Promises and Expectations’ *in this volume*, section 5.

3.3. COLLECTIVE ACTION

The willingness of platforms to play a role as bargaining partners should not solely depend upon the advantage offered by *in peius* bargaining. It is inherent in the dialectics of systems of industrial relations that economic actors offering employment are more inclined to bargain under the threat of some collective pressure that is being exerted against them. Inevitably, this begs the question of what kind of pressure platform workers could and are allowed to exercise, if any. The national reports do not highlight examples of massive walkouts (i.e. practices of workers who disconnect). Such massive walkouts presuppose that platform workers get organised and that a vast majority of them would be able to refuse to execute a request to perform a specific task. Several problems come into play. At first sight, many systems of platform work formally allow a worker not to take a specific task on board as an individual. This refusal will be registered by the algorithm, and platform workers might fear retaliation from the platform. Hence, it is crucial that they are protected against such retaliation, insofar as the individual refusal is part of a concerted action.

In this respect, the legislative good practice of the French law needs to be welcomed.⁴⁰ Article L 7342-5 recognises that the concerted refusal to offer their services cannot give rise to contractual liability, nor does it constitute a reason for *stante pede* termination of the employment relation, nor a reason for retaliation. This statutory intervention is prefigured by Italian Art. 47 *quinquies*, paragraph 2 of Legislative Decree N. 81/2015. This provision prohibits the exclusion of workers from the platform or the reduction of their work opportunities due to a refusal to accept tasks offered to them. This provision has a narrower scope than the French provision and is solely applicable to self-employed riders. The principle is, however, also applicable in a mandatory way to riders performing subordinated work or work which is organised by third parties.⁴¹ A clause in the Italian 2020 collective agreement states that the refusal of a rider to take on a specific task cannot have an impact on the distribution of job opportunities.

The question of whether these provisions boil down to a recognition of a right to strike is complicated. *Prima facie*, the right to refuse a task comes close to a right to strike. However, some caveats seem warranted. Firstly, domestic laws might consider that the right to strike presupposes

⁴⁰ B. GOMES and T. SACHS, above n. 5, section 1.

⁴¹ M.T. CARINCI, above n. 11, section 2.

that the status of a worker is in a state of subordination. Such a narrow interpretation is at odds with an ILO approach.⁴² Since the right to strike is a corollary right of the freedom of association and since the freedom of association should be granted even to self-employed workers who are acting as employers or entrepreneurs, the notion of a worker who is a holder of a right to strike needs to be construed equally in a wide manner. Secondly, even insofar as such a work relation might be construed as an employment relation, in the case of on-call contracts or zero-hours contracts, the refusal might be interpreted as amounting to a non-conclusion of a subsequent contract. Hence, the relevant notion here might not be the strike, but a boycott, that is, the concerted exercise of a negative freedom to contract. This negative exercise of contractual freedom is reminiscent of older strategies of journeymen associations, known as combinations, or in French, 'coalitions'. In the absence of criminal provisions prohibiting these kinds of boycotts, there is no reason to see why this would be illegal. The difficulty is more of a practical nature due to the unorganised character of the workforce.

At the end of the day, the recognition of a right to take collective action presupposes an effective protection against discrimination based upon participation in such collective action. Given the very loose and precarious nature of the employment relation, there is a continuous risk of disruption of the employment relation with the platform. In this respect, a recent judgment of the Court Bologna of 31 December 2020 could be deemed as ground-breaking.⁴³ The court concluded that an action of trade unions calling for a negative injunction to end a discriminatory practice conducted by Deliveroo was admissible. The trade unions mobilised to that end the generic provisions combatting discrimination. By not mobilising the more specific and pioneering provisions of the *Statuto dei Lavoratori*, they were able to overcome the question of whether the contractual relation could be seen as a genuine employment relation. They managed to obtain a ruling stopping the practice that allowed Deliveroo to treat riders who did not revoke, in due time (within 24 hours), their availability as being on an unequal footing with those who did, because it was deemed discriminatory, and the union even received compensation. It is questionable whether appropriate use could be made of the *Statuto*

⁴² F. DORSEMONT, 'Fundamental Workers' Rights as an Access to Collective Labour Law for Workers in the Gig Economy' in *this volume*, sections 3 and 4.

⁴³ For a comment by Professor Ballestrero, see M.V. BALLESTRERO, 'Ancora sui rider. La cecità discriminatoria della piattaforma' [2021] *Labor. Il lavoro nel diritto* online <https://www.rivistalabor.it/ancora-sui-rider-la-cecita-discriminatoria-della-piattaforma/>.

dei Lavoratori to obtain a similar result. A recent attempt by the Italian trade unions before the Court of Florence to mobilise the *Statuto* proved unsuccessful.⁴⁴

The national reports do provide examples of alternative actions. Thus, the German report highlights how the Fair Crowd Work platform has started to rate platforms on a fairness basis.⁴⁵ The rating instrument is thus being instrumentalised as a kind of boomerang. This method of labelling platforms is reminiscent of past experiences, as well. In the 19th century, trade unions in France used to promote products and goods produced in a way that was acceptable to trade unions by attributing a trade union label. This served as an incentive for the members of the trade union to buy such goods or services. The non-attribution or withdrawal could thus serve as an implicit boycott.

3.4. WORKER INVOLVEMENT

Last but not least, the Spanish and German national reports highlight the issue of worker representation at the enterprise level. This issue is not directly related to collective bargaining, although work councils can take part in talks that amount to autonomous rules at the enterprise level.⁴⁶ The way in which an establishment is defined as a workplace in a number of laws and the way in which certain trade union activities need to be exercised physically in such a workplace do not fit well with the reality of a more or less virtual community. The tragic German example of the constitution of a *Betriebsrat* by Deliveroo in Cologne shows how easy it might be to obstruct the functioning of such a body merely by not renewing work contracts. A better way to frustrate these platforms might be to ask for the establishment of a European work council at the group level. This would force the controlling companies to highlight the structure. It would force them to take into account the workers who are part of the staff and to take into account those workers who are recognised as subordinate workers under the law of the Member State where they are active.

⁴⁴ Court of Florence, 9 February 2021.

⁴⁵ R. KRAUSE, above n. 1, section 5.2.

⁴⁶ F. FITA ORTEGA, above n. 11, section 3.3 and R. KRAUSE, above n. 1, section 5.3.

