

# Solving the 'Gig-saw'? Collective Rights and Platform Work

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## ABSTRACT

There are few topics in contemporary labour law scholarship that have generated more literature than work in the so-called 'platform economy'. To date, much work has focussed on the question of defining the personal scope of the employment relationship and on the problems of using existing classifications of employment status in the context of work organised via platforms. This article seeks to address the much less-discussed issue of how collective bargaining may function in the 'platform economy', and the role of collective labour law actors, most notably the social partners. The article argues that, rather than focussing on individual employment status and litigation, it is by developing a regulatory framework supportive of, and that involves key stakeholders in, strong sectoral collective bargaining that work in the 'platform economy' can be adequately regulated to the benefit of workers, business and the State.

## 1. INTRODUCTION

There are few topics in contemporary labour law scholarship that have generated more literature than work in the so-called 'platform economy', and how, if at all, such work should be regulated.<sup>1</sup> What labour rights and obligations, if any, should attach to the workers and the platforms? Should such work come within the ambit of regulating 'labour relations' at all? Who are the key actors in terms of 'platform work', and what are their regulatory roles?

Much of the literature to date has focussed on the question of employment status. Traditionally, the scope of protective labour legislation has been confined to those in an 'employment relationship'. A standard model of

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<sup>1</sup>There are various terms used to describe such work (see V. De Stefano, 'Crowdsourcing, the Platform-Economy, and the Law' (2016) 37 *Comp. Lab L. Pol'y J* 461, 470. For ease of reference, we will use term 'platform' throughout. This should be taken to refer to temporary assignments that a person takes on, in order to fulfil a service for others, and which depends on collaborative platforms that aim to bring together two actors (the service provider, and the end-user/customer).

rules has been constructed based on a 'binary divide' between employment and self-employment, between 'subordinated labour' and 'independent' or 'autonomous' work relations.<sup>2</sup> Those who fall within the category of subordinated labour can claim to work under a contract of employment, while others, who work under a contract for services, fall outside of the 'employment' categorisation. Access to a range of statutory protections (e.g. minimum wage laws, unjust dismissal laws, working time laws) often depends on an individual's classification as being in an employment relationship. In determining this classification, courts and legislatures around the world have focussed on issues of *personal service*; *integration* into (or independence from) the employer organisation processes; *'economic reality'* (the self-employed must genuinely be in business on their own account); *'risk'* (the employee must not share in the employer's commercial risks); *mutuality of obligation*; and *control*.<sup>3</sup> Thus, we see that courts and legislatures almost everywhere are faced with the difficult task of applying long-standing tests, developed in the context of the application of protective labour legislation to a 'standard employment relationship', to increasingly differentiated labour relations, exemplified by platform work.<sup>4</sup> In some instances, this has resulted in the creation of 'intermediate categories', granting certain workers labour law protections, which are not afforded to the 'self-employed', but do not equate fully to those guaranteed to 'employees'.<sup>5</sup>

While it is important not to overly fetishise the novelty of platform work,<sup>6</sup> the advent of (and, indeed, the hype around) such work has undoubtedly contributed to the increased attention given to ways in which labour relations

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<sup>2</sup>S. Deakin, 'Does the "Personal Employment Contract" Provide a Basis for the Reunification of Employment Law?' (2007) 36 ILJ 68, 70.

<sup>3</sup>A. Todolf-Signes, 'The End of the Subordinate Worker? The On-Demand Economy, the Platform Economy, and the Need for Protection for Crowdworkers' (2017) 33 *IJCLLR* 241, 254; G. Davidov, M. Freedland and N. Kountouris, 'The Subjects of Labour Law: "Employees" and Other Workers' in M. Finkin and G. Mundlak (eds), *Research Handbook in Comparative Labour Law* (Cheltenham: Edward Elgar, 2015).

<sup>4</sup>Memorably described by the Court in *Cotter v Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015), a US case involving the employment status of 'on-demand drivers', as akin to being 'handed a square peg and asked to choose between two round holes' (at 1081).

<sup>5</sup>For example, those in the 'worker' category in the UK have statutory entitlements to holiday pay, but not protection against unfair dismissal; A. Neal, 'The Protection of Working Relationships under United Kingdom Law' in Frans Pennings and Claire Bosse (eds), *The Protection of Working Relations* (Alphen aan den Rijn: Kluwer, 2011).

<sup>6</sup>Prassl's wonderful account of the growth and operation of platform work lays bare how, in many ways, the realities of precarious work under strict algorithmic surveillance marks the return to a business model that has existed for centuries; J. Prassl, *Humans as a Service* (Oxford: OUP, 2018).

In this article, we seek to build on existing literature by addressing key questions of how collective bargaining may function, and the broader role of collective employment regulation, in the platform economy. We focus on an analysis of recent developments in Ireland, which are set in the context of wider policy and theoretical debates surrounding platform work and collective labour law, as well as developments in the case-law of the CJEU, and actions taken in this sphere by the European legislator. The growth of more differentiated labour relationships, epitomised by work in the platform economy, and the difficulties in the application and enforcement of labour rights in contemporary labour relations are ones that face all policy-makers.<sup>9</sup> The article uses the Irish case as an example to assess how common challenges are confronted in a common law context, within the framework of EU law.

<sup>9</sup>Eurofound, *Employment and Working Conditions of Selected Types of Platform Work* (2018), <https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work> (date last accessed 8 August 2019); hereinafter ‘the Eurofound study’.

The article proceeds as follows. In section 2, we look at the role of collective bargaining, and how this might apply in the context of platform work, noting, especially, the possible incompatibility of collective bargaining for platform workers with competition law/anti-trust rules (section 3). We then move on to the role of the industrial relations actors (trade unions, employers and the State) in relation to platform work. In the final section, we argue for a model of protection for platform workers, which is embedded within a regulatory framework supportive of, and that involves key stakeholders in, strong sectoral collective bargaining.

## 2. THE ROLE OF COLLECTIVE BARGAINING

As noted above, much of the literature on platform work and labour rights has focussed on the question of defining employment status in terms of the scope of individual labour law protections. By contrast, comparatively little attention has been paid to the relationship between 'non-employees' and collective representation. As Freedland and Kountouris have noted, it is striking to recognise:

to what an extent *individual* employment law has constituted not merely the prime location but actually the engine room and driver of the 'personal scope of labour law' discussion, to the effective exclusion of *collective* labour law.<sup>10</sup>

The Eurofound study identifies mixed practices across Europe in the extent to which platform workers are represented by collective actors. For example, in some countries (e.g. Denmark) self-employed workers are prohibited by law from joining trade unions, in others self-employed workers may only join specific unions established for the self-employed (e.g. Poland), in some countries, specific unions have been established to represent the interest of precarious workers (e.g. Slovenia, where members are mostly self-employed), and in a number of countries (e.g. Germany), trade unions have relatively recently opened up their membership to the self-employed, making them accessible to platform workers. However, the study notes:

The uncertainty around [platform workers'] employment status and the intermediary role of platforms imply that existing industrial relations and social dialogue structures are often not a good fit with platform work.<sup>11</sup>

<sup>10</sup>M. Freedland and N. Kountouris, 'Some Reflections on the 'Personal Scope' of Collective Labour Law' (2017) 46 ILJ 52, 53 (emphasis added).

<sup>11</sup>Eurofound, *supra* n.9, at 53.

We will consider the role of trade unions and other actors more explicitly in the following section, but here we focus on a key impediment to the effective collective representation of platform workers, whose status as ‘employees’ is contested; namely the intersection between collective bargaining and competition (antitrust) rules. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which...(a) directly or indirectly fix purchase or selling prices or any other trading conditions...

The Court of Justice has made it clear that Member States must not introduce or maintain in force measures, ‘even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings’.<sup>12</sup> Collective bargaining processes, however, are based precisely on combining employees to fix wages (prices) in order to alleviate the pressure to undercut the price of each other’s labour, sometimes in bargaining with single employers and sometimes in bargaining with associations of employers. Therefore, competition rules which, at their core, prohibit cartels or agreements between undertakings which distort competition, clearly conflict with the right to conclude binding collective agreements (often referred to as ‘wage cartels’), the purpose of which is to set prices (wages).

This conflict is one with which courts, and legislatures, must grapple. Biasi argues, in tracing the historical development of competition rules alongside that of labour rights in common law and civil law jurisdictions, that the ‘the delicate relationship between antitrust and labour has not been directly confronted by neither the European nor the US policymakers’.<sup>13</sup> However, he notes, that, in both systems, courts developed an antitrust immunity for labour, the scope of which was limited to employment relationships, ‘leaving self-employed workers “free” to (individually) defend themselves in the market and not (collectively) from the market’.<sup>14</sup>

This position is clear from the case law of the Court of Justice. In *Albany*, the Court held that collective agreements do *not* fall within the scope of

<sup>12</sup>Case C-96/94 *Centro Servizi Spediporto* ECLI:EU:C:1998:454 [1995] E.C.R. I-2883, para 20.

<sup>13</sup>M. Biasi, “We Will All Laugh at Gilded Butterflies”: The Shadow of Antitrust Law on the Collective Negotiation of Fair Fees for Self-Employed Workers’ (2018) 9 *ELLJ* 354, 372.

<sup>14</sup>*Ibid.* at 372.

Article 101 TFEU when two cumulative conditions are met: (i) they are entered into in the framework of collective bargaining between employers and employees and (ii) they contribute directly to improving the employment and working conditions of workers.<sup>15</sup> As the Court's case law refers explicitly to 'employees', collective agreements involving the self-employed fall outside of the '*Albany* exception'. The Court's position, then, is that, unless a worker has 'employee' status, s/he is an independent undertaking, and forbidden from coming to mutual arrangements over basic terms such as minimum payments.

In *FNV Kunsten*,<sup>16</sup> the question was whether EU competition rules applied to a Dutch collective labour agreement, which contained provisions on the minimum fees to be paid not only to *employees* of an orchestra, but also to *self-employed musicians* who work for orchestras on an occasional basis as substitutes for employed musicians. The Court held that a self-employed musician should 'in principle' be treated as an 'undertaking', and that an organisation negotiating on behalf of self-employed service providers should not be treated as a social partner but should be characterised as an 'association of undertakings'.<sup>17</sup>

Therefore, the agreement in question could not fall under the '*Albany* exception'. However, the Court went on to note that the boundaries between the self-employed (as undertakings) and employees are not so easy to determine in a fluid employment market, and it identified a category of workers which it called the 'false self-employed', namely 'service providers [who are] in a situation comparable to that of employees' who, subject to certain conditions, *can* benefit from an *Albany*-type exemption.<sup>18</sup> Summing up the CJEU position, Freedland and Kountouris note that:

the ability of self-employed workers to receive union representation for the purposes of collective bargaining processes aiming at improving their terms and conditions of employment founders on three main obstacles: the absence of a rights-based approach in respect of protecting collective bargaining either as a

<sup>15</sup>Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:28 [1999] E.C.R. I-5751.

<sup>16</sup>Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* ECLI:EU:C:2014:2215.

<sup>17</sup>*Ibid.* paras 27–28.

<sup>18</sup>*Ibid.* paras 31–32. The factors to be considered in establishing 'false' self-employment would include the extent to which the worker acts under the direction of another; whether the worker shares in the employer's commercial risks, and whether, for the duration of the relationship, the worker forms an integral part of the employer's undertaking (para 36).

constitutional or as a fundamental right; the alleged absence from the Treaties of a right to bargain collectively for workers who are not employees; and the very strict binary divide between dependent workers on the one hand and self-employed service providers, on the other, with the latter category being invariably classified as ‘undertakings’.<sup>19</sup>

We argue here that this position needs to be substantially reconsidered. First, the fundamental right to bargain collectively is only meaningful if the full autonomy of the parties is respected and guaranteed. The current position, where collective agreements are subject to the control of competition authorities at EU, and national, level, undermines this right to autonomy.<sup>20</sup>

Secondly, as noted by Advocates General Jacobs (in *Albany*) and Wahl (in *FNV Kunsten*), there are cogent economic<sup>21</sup> and social<sup>22</sup> reasons to restrict, or even to eliminate, wage competition among workers through collective bargaining. Obviously, there are many who would take an opposing view (particularly to the economic arguments in favour of collective bargaining),<sup>23</sup> but we emphasise these points here in order to highlight the Court’s complete lack of engagement with these arguments, in favour of a strict, and narrow, ‘binary divide’ approach. Equally, it should be noted, the Court did not engage with Advocate General Wahl’s much more nuanced balancing of the interests of collective bargaining and competition rules in *FNV Kunsten*. In particular, the AG accepted the argument that the provisions of the collective agreement did improve the working conditions of the *employees* concerned (the musicians employed directly by the orchestra), by aiming to prevent social dumping. Applying the terms of the agreement to the self-employed musicians would help ensure orchestra employees could not be replaced by lower-cost self-employed workers; not applying it to the

<sup>19</sup>Freedland and Kountouris, *supra* n.10, at 64.

<sup>20</sup>D. Schiek et al., *EU Social and Labour Rights and EU Internal Market Law: Study for the EMPL Committee* (2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL\\_STU\(2015\)563457\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU(2015)563457_EN.pdf) (date last accessed 8 August 2019), at 26.

<sup>21</sup>‘Collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency’; Case C-67/96 *Albany International BV*, *supra* n.15, paras 181 and 232.

<sup>22</sup>‘I also believe that the promotion of social peace and the establishment of a system of social protection which is equitable for all citizens are aims of the greatest significance in any modern society’; Case C-413/13 *FNV Kunsten Informatie*, *supra* n.16, para 33, and fn 14.

<sup>23</sup>For a classic account, see R. A. Posner, ‘Some Economics of Labor Law’ (1984) 51 *University of Chicago Law Review* 990.



self-employed, equally, would weaken the *collective bargaining power of employees* in negotiations.<sup>24</sup>

Third, however, we argue from a normative standpoint that the CJEU position needs to be reconsidered in so far as it takes a narrow, and exclusive, view of the scope of collective bargaining, at odds with that laid down in key International Labour Organisation (ILO) instruments. Article 2 of the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87) establishes that the principle of freedom of association has a universal application that covers workers and employers 'without distinction whatsoever'. The right to collective bargaining set out in Article 4 of the *Right to Organise and Collective Bargaining Convention, 1949* (No. 98), similarly, '[w]ith the exception of organisations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State' has been recognised as 'general in scope and all other organisations of workers in the public and private sectors must benefit from it'.<sup>25</sup> In the next section, we will flesh out some of these points by looking at a concrete example from Ireland.

### 3. CARTELS, COMPETITION AND COLLECTIVE BARGAINING: A CASE STUDY

A long-running dispute in Ireland centres not around platform workers (the concept was unknown in 2004, when the dispute began), but, echoing the point earlier about the 'novelty' of the issues raised by platform work, certain freelance workers; namely voice-over actors, session musicians and freelance journalists. In 2004, the Irish Competition Authority (now the Competition and Consumer Protection Commission) issued a decision that an agreement between the trade union Actors' Equity SIPTU and the Institute of Advertising Practitioners (an association of advertising agencies) setting out specific fees for services rendered, and various other terms and conditions, amounted to price-fixing.<sup>26</sup> For years, Ireland's only trade union confederation, ICTU (Irish Congress of Trade Unions), lobbied for

<sup>24</sup>Case C-413/13 *FNV Kunsten Informatie*, supra n.16, paras 74–79 (emphasis added).

<sup>25</sup>ILO, *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012), at 85.

<sup>26</sup>Competition Authority Decision E/04/002.



change in respect of these three specific categories of workers. Although a commitment was entered into between ICTU and the Irish Government to address the issue via legislation in 2008 (in the tripartite social pact, *Towards 2016*), the economic crisis that hit Ireland that year, and the subsequent need to enter into a ‘bail-out’ programme with the ‘Troika’ of the European Central Bank, the European Commission, and the International Monetary Fund, meant that the issue was not progressed.<sup>27</sup> However, the unions continued to keep the issue alive, and it was subject of much discussion at the ILO in subsequent years, in the context, indeed, of Ireland’s compliance with Convention No. 98 more generally. The ILO supervisory bodies (and, in Ireland’s case, most notably the Committee of Experts on the Applications of Conventions and Recommendations [CEACR]) have consistently held that the rights and principles included in Convention No. 98 are universal, and apply to self-employed workers.<sup>28</sup> In 2015, the CEACR invited the Irish Government and the social partners to develop specific collective bargaining mechanisms relevant to self-employed workers.<sup>29</sup>

In 2017, legislation was finally passed to address the issue; the *Competition (Amendment) Act 2017*. The Act provides that section 4 of the *Competition Act 2002* (prohibiting cartel action) shall not apply to collective bargaining and agreements in respect of certain categories of workers. There are three such categories. First, the Act specifically applies to voice-over actors, session musicians, and freelance journalists. Secondly, the Act introduces the concept of the ‘false self-employed’ worker; this is defined, in section 15(D), as an individual who:

- (a) performs for another person, under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person,
- (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship,

<sup>27</sup>Discussed further in section 3. For an account of the impact of the ‘bail-out’ on labour relations in Ireland at this period, see M. Doherty, ‘It Must Have Been Love...But It’s Over Now: The Crisis and Collapse of Social Partnership in Ireland’ (2011) 17 *Transfer: European Review of Labour and Research* 371.

<sup>28</sup>See the excellent discussion on collective bargaining and the self-employed in N. Kountouris and V. De Stefano, *New Trade Union Strategies for New Forms of Employment* (Brussels: ETUC, 2019). The authors discuss the Irish case extensively at 50–54.

<sup>29</sup>*Ibid.* at 51.

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- (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work,
- (d) does not share in the other person's commercial risk,
- (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her and
- (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking.

Thirdly, the Act introduces the concept of the 'fully dependent self-employed worker', defined, in section 15(D), as an individual:

- (a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing) and
- (b) whose main income in respect of the performance of such services under contract is derived from not more than two persons.

In both of these last cases, a trade union which represents a class of false self-employed, or fully dependent self-employed, worker may apply to the Minister to include the class of worker in question as falling within the scope of the Act, in order to allow the union to bargain collectively, and conclude collective agreements, on behalf of the workers. The union must provide evidence under section 15(F) that the workers who are the subject of the application fall within the relevant definitions. The application must also be accompanied by evidence that extending the Act's provisions to the class of workers in question:

- (i) will have no or minimal economic effect on the market in which the class of self-employed worker concerned operates,
- (ii) will not lead to or result in significant costs to the State and
- (iii) will not otherwise contravene the requirements of (the Competition Acts) or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services.

The Minister must also be satisfied that extending the scope of the Act's provisions to the class of workers in question is 'appropriate'.

As Doherty notes, 'the legislation represents an innovative attempt to extend collective bargaining rights to vulnerable workers, who do not fit within the classic "employee" definition' and sets out in law 'the principle that collective representation should not be automatically denied to those

who cannot satisfy traditional tests of employee status.<sup>30</sup> Clearly, the legislation could be utilised to cover certain categories of platform workers.

Here, the majority decision of the European Committee of Social Rights on the merits of the complaint *Irish Congress of Trade Unions (ICTU) v Ireland* should be noted.<sup>31</sup> The Committee found that the position in Ireland prior to the 2017 amendment was in breach of Article 6 of the European Charter of Social Rights, in that the ‘categories of persons included in the notion of “undertaking” were over-inclusive’ (para 98). Moreover, the Committee (at para 100) did not consider that

permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees).

The Committee also noted that an overly restrictive interpretation of section 15(F) of the 2017 Irish legislation by the Minister ‘would run the risk of being in violation of Article 6§2 of the Charter’ (para 111). A minority dissenting opinion considered that Irish law *remained* in violation of the Charter by placing the right to collective bargaining of self-employed workers (other than those named in the Act) in the hands of the executive, and making the realisation of the right ‘entirely dependent and conditional on prior decision of the executive power’ (para 32).

Kountouris and De Stefano describe the Irish legislation as ‘cautious’ in terms of the categories of self-employed persons to be exempted from competition law provisions, noting, in particular, that in the platform economy, workers often derive earnings from multiple sources (platforms, clients, and/or employers) so that the satisfying a test of ‘main income in is derived from not more than 2 persons’ may be difficult.<sup>32</sup> Furthermore, the

<sup>30</sup>M. Doherty, ‘Trade Unions and the “Gig Economy”’ in F. Hendrickx and V. De Stefano (eds), *Game Changers in Labour Law: Shaping the Future of Work* (Alphen aan den Rijn: Kluwer, 2018), 106. It is not being claimed here that the Irish law is completely original or unique; see, for example, in the Canadian context, E. Kennedy, ‘Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors”’ (2005) 26 *Berkeley Journal of Employment and Labor Law* 143. Our focus rather, in the context of debates on the employment rights of ‘non-employees’, is on the need to confront the difficulties inherent in the EU law intersection of competition rules with collective bargaining rights, and to suggest a regulatory model, based on social partner engagement, which is set out in section 3.

<sup>31</sup>No 123/2016; published 12 December 2018.

<sup>32</sup>Kountouris and De Stefano, *supra* n.28, at 50.

requirement that the Minister may only extend the Act's provisions to a class of self-employed workers where it can be shown this will have 'no or minimal economic effect' on the market in which that class operates seems a very restrictive test, which pushes at the edge of what might be considered collective bargaining autonomy, as is suggested by the dissenting minority opinion.

The minority opinion is also emblematic of the argument that the legislation only incrementally moves the situation forward, in that it proposes a solution whereby, in order to engage in collective bargaining, certain groups failing the 'traditional' employee test, can seek *exemptions* from competition law rules from relevant authorities before engaging in collective negotiations.<sup>33</sup> Thus, it is a negative right to be protected from competition law scrutiny, rather than a positive right to conclude collective agreements. Nonetheless, what is perhaps most significant to our argument is that, rather than simply offering the possibility of re-classification of employment status to, or indeed *imposing* a re-classification (with attendant rights and responsibilities attached) on, *individuals* (including, of course, platform workers), it vests a right in trade unions to negotiate *collectively* on behalf of those who actively seek or desire labour law protections.

Of course, the efficacy of the legislation will depend significantly on the role of trade unions, and other actors, and we move to this point in section 4.

## 4. THE INDUSTRIAL RELATIONS ACTORS

### A. 'Traditional' Industrial Relations and the Platform Economy

The Eurofound study provides the most comprehensive summary to date of the varied approaches taken by trade unions across Europe to tackle the challenge of organising, and representing, platform workers. Again, we see considerable variation. In some countries, for example, trade unions have sought to accommodate the interests of platform workers within existing structures (e.g. Sweden), in others, specific sections have been established to focus exclusively on the needs of 'precarious workers', including platform workers (e.g. Italy and Slovenia), and there is the somewhat unique case of France where, since 2016, platform workers, have explicitly been given the legal right to take collective action, to form or join a

<sup>33</sup>Biasi, *supra* n.13.

union, and to have their collective interests defended.<sup>34</sup> The report also documents ‘new formats of institutionally organised collective voice’ for platform workers (co-operatives, advice bureaux, online fora and groups), and instances of collective action by platform workers (boycotts, flash-mobs, protests etc),<sup>35</sup> some of which are explicitly, or implicitly, supported by trade unions.

At least two problems present themselves in relation to the matters described in the report. First, the spontaneous, ‘new’ forms of collective voice, by their nature are likely to be hard to sustain, and their effectiveness is uncertain. Many rely extensively on online activities to take, and coordinate, action and ‘tend to suffer from some of the typical problems of online activism.’<sup>36</sup> The coordination, experience, and financial ‘muscle’ a trade union can offer may be crucial in the achievement of longer-term goals. Furthermore, ‘in practice, activists, or a critical mass thereof, have a crucial role to play in a sequential process of framing the use of workers’ disruptive capacity’; again, the training and support of such activists has long been the ‘bread and butter’ work of trade unions.<sup>37</sup>

However, the difficulties for trade unions in organising and mobilising platform workers, given the confusion around employment status, the threat platform work may pose to the livelihoods of traditional/existing union members, the heterogenous nature of the workers involved, and the lack of a physical workplace (to name just a few) cannot be understated either.<sup>38</sup> Nonetheless, the much-publicised collective agreement signed by Danish trade union, 3F, and the platform Hilfr signed in April 2018 demonstrates that there may yet be role for ‘traditional’ industrial relations in the ‘brave new world’ of the platform economy.<sup>39</sup> Similarly, in early 2019, the courier firm, Hermes Parcelnet, recognised the GMB union, the first recognition deal for

<sup>34</sup>Eurofound, *supra* n.9, at 53–54.

<sup>35</sup>*Ibid.* at 54–56.

<sup>36</sup>V. De Stefano, *The Rise of the ‘Just-in-Time-Workforce’: On-Demand Work, Crowd Work and Labour Protection in the ‘Gig Economy’* (Geneva: ILO, 2016), at 9.

<sup>37</sup>K. Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers’ Collective Voice and Representation in Europe* (Brussels: ETUI, 2018), at 11.

<sup>38</sup>Bearing in mind that trade unions across Europe are increasingly finding it difficult to attract the membership of ‘traditional’ workers. Note, however, Vandaele’s point that ‘[w]hether workers are employed by digital labour platforms or not, unions’ internal challenges, contradictions and complexities in organising, mobilising and representing workers with contingent work arrangements are well-known, explored and debated’; *Ibid.* at 27.

<sup>39</sup><https://blog.hilfr.dk/en/historic-agreement-first-ever-collective-agreement-platform-economy-signed-denmark/> (date last accessed 8 August 2019).

platform economy workers in the UK.<sup>40</sup> Other initiatives, which fall short of fully developed collective bargaining processes, have also been in evidence, particularly in relation to workers who carry out tasks remotely (rather than 'in-person' work, like cleaners, or delivery workers). One example is the work led by German union IG Metall on the 'Fair Crowd Work' project, part of which involves a process of dialogue with several German platforms, and has resulted in joint work on a 'Crowdsourcing Code of Conduct'.<sup>41</sup>

In the following sections, we outline the challenges for, and responsibilities of, the core industrial relations actors.

### B. Trade Unions

In a seminal work, Ewing has drawn the distinction between the 'representational' and 'regulatory' functions of trade unions.<sup>42</sup> A representational perspective sees collective bargaining as a *private* market activity conducted by unions, usually at the level of the enterprise, as agents of a tightly circumscribed bargaining unit. A regulatory model, however, sees collective bargaining take on an explicitly *public* role, as labour standards are set, and applied, not only for employers that recognise trade unions and union members, but also for enterprises which do not engage in collective bargaining. This can happen through multi-employer collective bargaining, such as where joint industrial councils set standards for an industry or sector, or where legal mechanisms permit the extension of collective agreements to all employers in a sector, and such standards may be mandatory even for employers not affiliated to sectoral or industry-level employer associations.<sup>43</sup> Additionally, Ewing points to the governmental and public administration functions of trade unions, whereby unions need to engage with government, first, in order to secure legislative change, which will enable them to fulfil their functions, and, secondly, to ensure involvement in the development, implementation, and delivery of government policies.<sup>44</sup>

<sup>40</sup><https://www.theguardian.com/business/2019/feb/04/hermes-to-offer-gig-economy-drivers-better-rights-under-union-deal> (date last accessed 8 August 2019).

<sup>41</sup>S. Silberman et al., *Crowd Work and the 'On-Demand' Economy* (2017), [https://www.etui.org/content/download/33208/308073/file/Hesamag\\_16\\_EN-36-39.pdf](https://www.etui.org/content/download/33208/308073/file/Hesamag_16_EN-36-39.pdf) (date last accessed 8 August 2019).

<sup>42</sup>K. D. Ewing, *The Function of Trade Unions* (2005) 34 ILJ 1.

<sup>43</sup>M. Doherty, 'When You Ain't Got Nothin', You Got Nothin' to Lose... Union Recognition Laws, Voluntarism and the Anglo Model' (2015) 42 ILJ 369.

<sup>44</sup>Ewing, *supra* n.42, at 5.

We have touched on the challenges for trade unions seeking to organise and represent workers in the preceding section (and future work by the authors in preparation will focus primarily on this issue). Here, however, our focus is on the regulatory and governmental roles trade unions can play in the platform economy. In Ireland, the trade unions have been explicit in strategically linking regulatory and governmental functions. We have already examined the *Competition (Amendment) Act 2017*, which links the issues of employment status and collective bargaining, in respect of certain categories of workers. Furthermore, the unions have lobbied strongly for new legislation to address the needs of precarious workers (including platform workers), which covers much of the same ground as the new Directive on Predictable and Transparent Working Conditions;<sup>45</sup> the *Employment (Miscellaneous Provisions) Act 2018*.<sup>46</sup> The law provides, *inter alia*, for improved and more timely provision of information on terms and conditions, minimum hourly payments for employees with unpredictable schedules, and for an entitlement to request a contract which reflects the reality of hours worked by employees over a reference period.<sup>47</sup>

The unions, though, have also successfully lobbied for new laws on binding *sectoral* terms and conditions; the *Industrial Relations (Amendment) Act 2015*. This Act allows ‘joint labour committees’ (on which representatives of employers and employees sit) to set binding terms and conditions, with *erga omnes* effect, in certain sectors (for example, contract cleaning, and security). It also allows for representative unions (alone or jointly with representative employers) to apply for ‘sectoral employment orders’, which, again set binding terms and conditions, with *erga omnes* effect, in the sector

<sup>45</sup>Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union OJ L186/105.

<sup>46</sup>The Act applies to ‘employees’, while Directive 2019/1152 applies to workers with ‘an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice’. This latter definition differs from the original proposed wording, which was to apply the provisions to ‘workers’, as set out in CJEU case law; ‘a person who for a certain period of time performs services for and under the direction of another person in return for remuneration’ (Art. 2, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union COM/2017/0797 final—2017/0355 [COD]). The adopted definition seems to tie the concept of ‘worker’ more closely to national law than had originally been envisaged. The import of this change, however, is debatable; as Kountouris has noted, the ‘worker’ concept in EU law itself suffers from many of the strictures arising from the traditional binary divide between employment and self-employment on which it is essentially premised; Kountouris, *supra* n.7, at 192. Member States have until 2022 to transpose the Directive.

<sup>47</sup>A provision in the legislation making it a *criminal* offence for an employer to incorrectly designate an employee as self-employed was removed late in the legislative process.



in question (e.g. construction). In both cases, the terms and conditions proposed must be approved by the Labour Court<sup>48</sup> and confirmed by the Minister. Thus, the Irish trade unions have been quite active in recognising, and promoting the value of sectoral standard-setting, which is binding on *all* employers and employees in the sector in question.

However, Ireland does not act in a vacuum when it comes to the role sectoral collective bargaining may play in standard-setting in the economy in general, and for platform work in particular. In the next section, we consider, first, the role of the EU in this arena, and, secondly, propose some measures that Member States might adopt to ensure effective regulation of labour relations.

### C. The Role of the Regulatory State

Although Member States have resisted ceding law-making powers in the labour relations field to the EU in 'core' areas such as wage-setting, freedom of association, and the right to strike (Article 151(5) TFEU), as is now well documented, the *Viking* and *Laval* cases,<sup>49</sup> decided just before the entry into force of the Lisbon Treaty, 'destroyed any cosy assumptions to the effect that labour law may in some way be insulated from the internal market case law of the Court'.<sup>50</sup> In particular, an area where measures have been taken that impact significantly on national collective bargaining, and wage-setting, relates to the establishment of a strict economic governance package for all Eurozone countries.<sup>51</sup> Notwithstanding the lack of competence in the sphere of labour law afforded to the EU legislator in the Treaties, the Euro Plus Pact is quite clear about what Member States must do in order to 'foster competitiveness':<sup>52</sup>

Review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms.

<sup>48</sup>Despite its moniker, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions and employers, and chaired by a government nominee. The Labour Court, depending on the nature of the dispute before it, may grant legally binding 'determinations' or 'recommendations', which are *not* legally binding.

<sup>49</sup>Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* ECLI:EU:C:2007:772; Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809.

<sup>50</sup>P. Syrpi and T. Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in Alan Bogg et al. (eds) *The Autonomy of Labour Law* (Oxford: Hart, 2015), at 295.

<sup>51</sup>E. Balamoti, 'Evaluating the New Rules of EU Economic Governance in Times of Crisis' (2014) 4 *ELLJ* 97.

<sup>52</sup>Euro Plus Pact, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/120296.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf) (date last accessed 8 August 2019).

The ‘Country-Specific Recommendations’ (CSRs) now issued to Member States have become ever more intrusive in the area of labour law, focussing increasingly on wage-setting mechanisms.<sup>53</sup> Indeed, one of the demands of the ‘Troika’, in the context of Ireland’s ‘bail-out’ agreement, was that there would be an independent review of the sectoral standard-setting arrangements, with terms of reference and follow-up actions to be agreed with the Commission, in order to ensure there were no ‘distortions’ of wage conditions across sectors associated with the presence of sectoral minimum wages in addition to the national minimum wage.<sup>54</sup> The Troika also refused to allow the exemptions from competition law for the classes of self-employed workers ultimately granted in the 2017 Act; it was only after Ireland exited the ‘bail-out’ that the legislation could be progressed.<sup>55</sup>

Interestingly, and by comparison, the key role afforded *explicitly* in the Treaties to social dialogue (Articles 152, 154 and 155 TFEU) appears to have become almost irrelevant. The model of law-making evinced by these articles is:

a model which allows for parallel law-making by social institutions, including collective bargaining and social dialogue as the highest expression of what is in effect a process of collective bargaining between the social partners.<sup>56</sup>

However, as Ewing and Hendy note ‘[s]ocial Dialogue at EU level is dying, if not already dead’.<sup>57</sup> Disappointingly, while the Commission notes the ‘the decreases in terms of organisational density and representativeness’ and the need for the social partners to ‘further build their capacities to engage in a better functioning and effective social dialogue’,<sup>58</sup> there is ‘no sense of

<sup>53</sup>S. Bekker and S. Klose, ‘Changing Legal Context of Employment Policy Coordination: How Do Social Policy Issues Fare after the Crisis?’ (2014) 5 *ELLJ* 6.

<sup>54</sup>M. Doherty, ‘Can the Patient Survive the Cure? Irish Labour Law in the Austerity Era’ (2014) 5 *ELLJ* 81.

<sup>55</sup>*Irish Congress of Trade Unions (ICTU) v Ireland*, supra n.31, paras 53–54. In carrying out research for this article, the authors were shown a letter from the Commission to the Irish government urging the government *not* to introduce the 2017 Act, legislation the Commission felt was ‘disproportionate’ in the extreme.

<sup>56</sup>K. Ewing and J. Hendy, ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ (2017) 46 *ILJ* 23, 32.

<sup>57</sup>*Ibid.* at 33.

<sup>58</sup>European Commission, *First preliminary outline of a European Pillar of Social Rights* COM(2016) 127 final, at 11. See also, Eurofound, *Exploring the Connections between EU and National Level Social Dialogue* (2018), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef18030en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef18030en.pdf) (date last accessed 8 August 2019).

Commission responsibility for contributing to the problem of “representativeness” or any commitment on their part to deal with it.<sup>59</sup>

Still, in this arid landscape, where sectoral bargaining and social dialogue seem destined to wither under the intense heat of economic reform and the decentralisation of labour standard-setting, we can also find the oasis (or mirage....) of the European Pillar of Social Rights. The Pillar expresses ‘principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe’ (Recital 14). It lays out a number of these relevant to the issues discussed in this article, for example, ‘adequate minimum wages shall be ensured...All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners’ (section 6). Section 8 focuses on social dialogue and the need to both encourage the autonomy of the social partners in terms of negotiating and concluding agreements, and encourage their capacity to promote social dialogue.

While the lack of precision in the Pillar, and its uncertain legal status, have already come in for significant criticism,<sup>60</sup> and it is not the intention here to discuss its merits and demerits in detail, we wish to highlight two salient points. First, we argue that it cannot but be a step forward, after almost a decade without any substantive labour relations legislative initiatives at EU level,<sup>61</sup> to have new measures in the social field that focus on the challenges examined in this article, such as the Directive on Predictable and Transparent Working Conditions (already discussed), the establishment of the European Labour Authority,<sup>62</sup> and the proposal for a Recommendation on access to social protection for workers and the self-employed.<sup>63</sup> Secondly, and importantly for the purposes of this article, the proclamation of the Pillar, and the roll-out measures, can, and should, be interpreted as a political

<sup>59</sup>Ewing and Hendy, *supra* n.56, at 33.

<sup>60</sup>K. Lörcher and I. Schömann, *The European Pillar of Social Rights: Critical Legal Analysis and Proposals* (Brussels: ETUI, 2017).

<sup>61</sup>There were some important measures designed at better enforcement of existing law, such as Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System (‘the IMI Regulation’) OJ L159/11.

<sup>62</sup>Regulation of the European Parliament and of the Council establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344.

<sup>63</sup>Proposal for a Council Recommendation on access to social protection for workers and the self-employed COM(2018) 132 final.

signal for Member States to proceed with the ‘instrumentalities’ needed to put the values clearly espoused in the Pillar, the TFEU and the Charter of Fundamental Rights to work.<sup>64</sup>

In this respect, a focus on *collective, sectoral standard-setting* is crucial. This, as noted above, moves in the opposite direction to the Commission’s recent penchant for demanding decentralising measures, and a focus on a minimum, legislative floor of rights. However, this is to ignore the reality (and policy choice) that, certainly in the EU:

no country relies solely on statutory standard-setting or solely on collective standard-setting. In fact, statutory legislation and collective bargaining are perceived as parts of a larger whole, in continental Europe at least, aiming at compensating for the inequality of bargaining power in particular.<sup>65</sup>

Rogers, writing from a US perspective, argues, using the example of Uber, that the question of when employment duties should be imposed is not one that can be left simply to the courts

litigation is time-consuming and expensive, and individual cases are an imperfect vehicle for addressing broader considerations of distribution and social equality... legislatures should strongly consider socializing employment-related benefits and imposing employment duties on an industry specific basis.<sup>66</sup>

However, can we identify an industry or sector when it comes to platform work? This may not be as difficult as it first appears. Prassl, for example, has already elaborated criteria typical of platform work, namely work intermediated through a platform, which will often be in a much better bargaining position compared to the service providers, and which may therefore dictate the conditions of the service.<sup>67</sup> Ewing and Hendy (arguing for a new standard-setting regime for the UK) propose that a ‘sectoral map’ could be drawn up by governments, in consultation with employers and trade unions, to identify relevant sectors, and sub-sectors, which would be set down in law.<sup>68</sup> Brameshuber and Zwinger note that platform workers (drivers and riders) in the small food delivery industry,

<sup>64</sup>J. Fudge, ‘The Way Forward for Social Europe: How Do We Get There from Here?’ (2014) 77 *MLR* 808, 817.

<sup>65</sup>E. Brameshuber and V. Zwinger, ‘Collectively Agreed (Minimum) Labour Conditions as “Protection Boosters”’ (2018) 34 *IJCLLR* 77, at 94.

<sup>66</sup>Rogers, *supra* n.7, at 510.

<sup>67</sup>Prassl, *supra* n.6.

<sup>68</sup>Ewing and Hendy, *supra* n.56, at 38.

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for example, 'can be easily grouped together into one sector...they all deliver food (the same product) in similar circumstances'.<sup>69</sup> In the case of the poster-child of the platform economy, Uber, the Court of Justice has already been unequivocal:

an intermediation service..., the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport'...<sup>70</sup>

Indeed, in some sectors, for example domestic work, where unions have traditionally found it difficult to organise, the presence of platforms may, in fact, make it easier to engage in collective standard-setting (as noted above in the case of the Danish platform, Hilfr, which provides cleaning services).

Thus, just as we must be careful not to overstate the novelty of labour relations models in the platform economy, so we must be careful not to overstate the difficulty of effective regulation, as long as the political will exists to ensure this. Of course, arguing for effective sectoral *collective* standard-setting, implies the involvement of not only the State and trade unions, but also employers. It is to this actor we turn in the next section.

## D. Employers

The role of 'traditional' employers, and the interaction between them and platforms, has been somewhat underexplored to date. The Eurofound study notes that

Traditional employer organisations are generally not very active in bringing platforms into their organisation, as they do not perceive platforms as employers but rather as intermediaries... Platforms may refrain from joining an employer organisation because most consider themselves intermediaries, matching supply and demand, rather than employers.<sup>71</sup>

<sup>69</sup>Brameshuber and Zwinger, *supra* n.65, at 27. Of course, many platform workers are also bound up with the 'destiny' of the 'traditional' sector in which they operate. Note, for example, the strike action by UberEats riders, in conjunction with workers from McDonald's, in late-2018; <https://www.bbc.com/news/business-45734662> (date last accessed 8 August 2019).

<sup>70</sup>Case C 434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* ECLI:EU:C:2017:981.

<sup>71</sup>Eurofound, *supra* n.9, at 57.

The study further notes that:

Platforms appear to have little interest in organising and representing themselves...platforms may not always be fully aware of what sector or organisation they would best fit in (for example, IT versus transportation). In addition, platforms are still relatively new and frequently regard each other as competitors.<sup>72</sup>

A number of points may be made in response to these findings. First, 'traditional' employer associations have been noticeably quiet in debates around platform work in many countries, and certainly in Ireland. We argue this is a mistake. Platforms exercising traditional employer functions, but not subject to the same regulatory regimes, or tax and social security rules, as traditional employers unquestionably gain a competitive advantage in the marketplace, and, as Uber has demonstrated, can quickly become dominant players. Secondly, the issue of platforms being no more than 'intermediaries' is becoming increasingly difficult to sustain in many instances, given litigation across the world. Thirdly, the issue of sectoral classification we have addressed above; where there is a will there is a way! Fourthly, though, is the agency of platforms themselves. There are examples of platforms joining employer bodies, for example GoOpti is a member of the Chamber of Commerce and Industry in Slovenia. Furthermore, we have noted above the signing of a collective agreement between the Danish platform Hilfr and the trade union, 3F, the recognition deal between Hermes Parcelnet and the GMB, and the involvement of some German platforms in producing a 'Crowdsourcing Code of Conduct'.

Moreover, as Ewing and Hendy note '[i]n the modern era, all industries lobby government'.<sup>73</sup> This is certainly true of Uber. Uber has sought permission from the Irish authorities to run a 'pilot scheme' allowing private car users offer their services to passengers through Uber, which would be contrary to the current legislative position in Ireland, which prohibits anyone not in possession of a taxi licence from carrying passengers for a fee.<sup>74</sup> To

<sup>72</sup>Ibid.

<sup>73</sup>Ewing and Hendy, *supra* n.56, at 36.

<sup>74</sup>*Irish Times*, 'Uber Banned from Operating Private Car Rides in Ireland' (28 July 2017), <https://www.irishtimes.com/news/ireland/irish-news/uber-banned-from-operating-private-car-rides-in-ireland-1.3169768> (date last accessed 8 August 2019); '(The) general manager of Uber for Ireland and Northern Ireland, said he was looking forward to continuing an open line of communication with [the Minister for Transport] about the affordability, safety and regulation of the Uber car-sharing service which would use ordinary drivers rather than taxi drivers' (*Irish Times*, 'Uber Car-sharing Is "Safe", Says Irish Head of Firm' (23 May 2016), <https://www.irishtimes.com/news/consumer/uber-car-sharing-is-safe-says-irish-head-of-firm-1.2657610> (date last accessed 8 August 2019).

date, Uber has been unsuccessful in its objectives. Similarly, in Slovenia, a proposed agreement between the previous government and Uber on the terms and conditions of the platform's entry into the national transport market has been stalled (interestingly) following opposition by a combination of employer organisations, trade unions and non-governmental organisations (NGOs).<sup>75</sup> While the (then) government had indicated it wished to pursue the venture, to date this has not occurred. Other platforms, however, such as Deliveroo, explicitly acknowledge the need for interaction with regulators:

Deliveroo cares about our riders, and that's why we were the first on-demand company to call for an end to the trade-off between flexibility and security that currently exists in employment law. *We want to work with Governments in all countries to make this happen.*<sup>76</sup>

To paraphrase a quote long-attributed (albeit, disappointingly, it appears, falsely) to Henry Kissinger, there is probably no shortage of answers to the question of 'who do I call if I want to call platforms'?<sup>77</sup> However, the question of whether the platforms would answer the call ultimately depends on regulatory will, as we will argue in the concluding section.

## 5. CONCLUSION

At points in the article, we have cautioned against focussing overmuch on the novelty, or disruptive nature, of labour relations in the platform economy. Many of the issues discussed here are currently equally of relevance to very 'traditional' forms of work, particularly those involving precarious labour conditions. At the same time, we recognise that the growth of platform work has shone a spotlight on the scope of protective labour law. Our focus here has been on the role of collective bargaining in regulating labour relations.

Although much attention has been focussed on the need to move beyond the 'employment-self-employment' binary, in terms of the scope of labour law protection, we argue that extending the scope of protection

<sup>75</sup>Eurofound, supra n.9, at 40.

<sup>76</sup><https://deliveroo.ie/about-us> (date last accessed 8 August 2019; emphasis added).

<sup>77</sup>Kissinger was famously said to have asked 'Who do I call if I want to call Europe?'; apparently, though, this is simply an urban legend; *Financial Times*, 'Kissinger Never Wanted to Dial Europe' (22 July 2009), <https://www.ft.com/content/c4c1e0cd-f34a-3b49-985f-e708b247eb55> (date last accessed 8 August 2019).



for *individuals* is insufficient to adequately regulate work in the platform economy. What is also required is an inclusive conception of what the right to collective bargaining must entail; in this, we might adopt a normative framework that:

envisages the claims which collective labour law vindicates, grouped around the core notions of freedom of association and democratic representation, as essentially part of or continuous with the embodiment of those claims in the general political constitution. From that normative perspective, one might be far less inclined, perhaps even actively disinclined, to confine the personal scope of collective labour law precisely to subordinate workers, and more inclined to understand collective labour law as the manifestation of those general rights and freedoms in a more loosely and inclusively denominated domain of work relations.<sup>78</sup>

Crucially, this conception of collective bargaining, and the collective agreements which might result, must be freed from the shackles of review by competition authorities (unless, of course, attempts by genuine undertakings to engage in the abuse of competition rules are at issue), so that the fundamental right to bargain collectively is rendered meaningful by respecting and guaranteeing the full autonomy of the parties involved.<sup>79</sup>

However, the capacity of the social partners to effectively regulate by way of collective bargaining is in doubt in many (most?) countries across the Western world. As a result, we argue strongly for the need for the State to step in and promote, as a public good, collective bargaining ‘in the shadow of the law’; what Ewing and Hendy refer to as a ‘regulatory collective bargaining model, based on multi-employer agreements, created and grown by *administrative* law (emphasis added)’.<sup>80</sup> This should be done on a sectoral basis, and employers (both ‘traditional’ and ‘disruptive’) should play a role beyond political lobbying; if they refuse or abstain, the law, and the regulatory power of the State, should be utilised in full to ensure sectoral standard-setting in any case.

The *framework* for such model, as we have outlined, has been substantially put in place in the Irish example, with a crucial role for the social partners, the independent, but State-supported, tripartite labour relations tribunal, and the Government; the key, of course, will be the extent to which the political will exists to ensure that the framework results in tangible labour

<sup>78</sup>Freedland and Kountouris, *supra* n.10, at 55.

<sup>79</sup>Doherty, *supra* n.30.

<sup>80</sup>Ewing and Hendy, *supra* n.56, at 49.

relations outcomes.<sup>81</sup> To date, the Irish legislation has not been utilised in respect of self-employed workers other than the specific groups identified in the Act. We have identified some of the potential weaknesses in the legislative framework above, but it is likely that this is also a question of trade union strategy. It seems logical that the unions will want the first 'test case' under the Act to be as 'bullet-proof' as possible, in order to gain the executive approval required to shelter the nominated self-employment workers from competition law (and to successfully ward off any legal challenge).

Why, finally, should, or would, political will be expended on establishing the regulatory collective bargaining model proposed, which, to many, would simply threaten business innovation and flexibility, and, ultimately, economic growth and prosperity?

First, legislators cannot stand over a situation where workers, and businesses, cannot be *certain* of their labour rights and obligations,<sup>82</sup> and where this uncertainty can lead to reductions in tax revenue, and the underpayment of social security contributions, both of which, ultimately, must be made up by the citizenry.

Secondly, it is surely the responsibility of governments to lead debates on positive, but also negative, aspects of platform work; in particular, any possible erosion of working conditions, unfair competitive advantages platforms may have over traditional employers, data privacy concerns, and threats to consumer protection. It is also the responsibility of the State to ensure that adequate dispute resolution mechanisms exist for those engaged in platform work, and indeed, consumers of platform-based services. As Rogers notes, simply allowing matters to be determined by standard litigation, is insufficient:

Courts are...ill-suited to resolve complex matters of economic and social governance, since they have limited control over their caseload and must decide concrete disputes between particular parties. Employment litigation, for

<sup>81</sup> There is, of course, the related issue of the representational and organisational capacity of the trade unions, we noted in section 3. We are not blind to the need for, and value of, trade union organisation, and collective bargaining at enterprise level (in Ewing's terms the 'representative' function of trade unions; *supra* n.42). This should be intimately linked with, not separate from, the model sketched here; the authors will focus on this element of our research in a future paper.

<sup>82</sup> Note, here, the decision of the CJEU in *King v Sash Windows Case* C-214/16 ECLI:EU:C:2017:914. The Court held that workers wrongly categorised by their employers as self-employed were entitled to bring, on termination of their engagement, a claim for the holiday pay they were incorrectly denied. The Court stated that 'even if it were proved, the fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard' (para 61).

example, pits workers against companies, but can't easily take account of consumer welfare or other externalities of employment status, whether positive or negative.<sup>83</sup>

So, for example, it seems particularly important that sectors in which trust, confidence, and safety are key concerns, and in which platform work appears to be growing, would be the subject of State regulation; one can think here, for example, of domestic care services, or passenger transport services. To be clear; what we do not advocate is for the restriction of, or resistance to, platform-based services. Furthermore, we recognise well that a whole host of platform workers are highly skilled, educated and possess significant market power. The advantage of sectoral minimum standards is that 'one-size fit all' solutions are not applied, and the flexibility of collectively bargained standards means that adjustments can be made in response to changing economic and social trends. In short, our concern is not that platform work be restricted, but that it be effectively regulated. As De Stefano reminds us, we must never assume that the growth of such work (or, indeed, any 'non-standard' work) is a 'natural and irreversible economic phenomenon independent from the relevant regulatory framework'.<sup>84</sup>

<sup>83</sup>Rogers, *supra* n.7, at 514.

<sup>84</sup>V. De Stefano, 'Non-standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2016) 46 ILJ 185, 190.