



Workers without Platforms: The Case for Collective Bargaining Framework for Platform Workers

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1. Introduction

‘Tempora mutantur, et nos mutamur in illis’ – the quaint maxim declares as time changes, so too does the population. Similarly, holding that the maxim is true, this aptly applies to the world of work and labour systems. The platform economy is a relatively new phenomenon, however, in a short period of time, it has totally revolutionised the way in which people work. Platform work “is an employment form in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or provide specific services in exchange for payment”.¹ Although this author acknowledges there has been no succinct definition agreed upon by the academic, juristic, and the labour force which has resulted in the use of a variety of terms used interchangeably: ‘the creative economy’, ‘the sharing economy’, and ‘the gig economy’.² Lobel states “each of these terms represents an aspect of the digital platform revolution but none completely captures the entire scope of the paradigmatic shift in the ways we produce, consume, work, finance, and learn”.³ For the purposes of this paper, this author will use the term ‘the platform economy’.

This paper shall assess the collective bargaining framework for digital platform workers with particular reference to Irish and European law. This paper shall be structured as follows: it shall provide an overview of digital labour platforms; it shall assess the collective bargaining framework in Ireland for platform workers; it shall examine whether one’s employment status affects their right to

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¹ Eurofound ‘Platform Work’ (29 June 2018) <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work> (Accessed on 7 May 2020.)

² Daisy Chan – Freck Voortman – Sarah Rogers: The rise of the platform economy. *Deloitte*, December, 2018. <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf> (Accessed on 7 May 2020.)

³ Orly LOBEL: The Law of the Platform. *Minn. L. Rev.*, Vol. 101. (2016) 87.

collective bargaining; and this paper will identify whether there are any opportunities for reforming the collective bargaining process for platform workers.

2. Overview of Digital Labour Platforms

Digital labour platforms have been considered to be services which act as intermediaries in the provision of information, goods or services that are supplied to third persons.⁴ The European Commission has defined a platform as “an undertaking operating in two (or multi) – sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users as to generate value for at least one of the groups”.⁵ Whilst the European Parliament notes “it would be very difficult to arrive at a single, legally relevant and future-proof definition of online platforms at EU level, owing to factors such as the variety of types of existing platforms and their areas of activity, as well as the fast-changing of the digital world”.⁶ Finck notes “amidst such definitional challenges it is easier to define the platform by what it is not: conventional, static and easy to qualify”.⁷

Platform work involves the “exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis”.⁸ The Economic and Social Research Institute have recently reported that approximately 200,000 people work in a contingent form of employment in Ireland.⁹ A recent report by the European Commission highlights that in Europe 1.4% of the population obtain their main income from platforms.¹⁰ Comparatively, in the United States of America, a survey conducted by JP

⁴ Benoît THIEULIN et. al.: *Ambition Numérique: Pour une Politique Française et Européenne de la Transition Numérique*. 2015. 59.: (“[u]ne plateforme pourrait être définie comme un service occupant une fonction d’intermédiaire dans l’accès aux informations, contenus, services ou biens, le plus souvent édités ou fournis par des tiers”).

⁵ EUROPEAN COMMISSION: *Public Consultation on the Regulatory Environment for Platforms*. Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, 2015. 5. <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud> (Accessed 7 May 2020.)

⁶ *European Parliament Report on Online Platforms and the Digital Single Market*. (2016/2276 (INI)) https://www.europarl.europa.eu/doceo/document/A-8-2017-0204_EN.html?redirect

⁷ Michèle FINCK: Digital co-regulation: designing a supranational legal framework for the platform economy. *European Law Review*, Vol. 43., Iss. 1. (2018) 47–68.

⁸ Katriina LEPANJUURI – Robert WISHART – Peter CORNICK: *The Characteristics of those in the Gig Economy*. UK Department of Business, Energy and Infrastructure, 2018. available:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf (Accessed on 18 May 2020.)

⁹ Seamus MCGUINNESS – Adele BERGIN – Claire KEANE – Judith DELANEY: *Measuring Contingent Employment in Ireland*. Economic and Social Research Institute, 2008. Available: <https://www.esri.ie/system/files/media/file-uploads/2018-08/RS74.pdf> (Accessed on 18 May 2020.)

¹⁰ Maria Cesira URZÌ BRANCATI – Annarosa PESOLE – Enrique FERNÁNDEZ-MACÍAS: *New evidence on platform workers in Europe. Results from the second COLLEEM survey*. EUR 29958 EN. Publications Office of the European Union, Luxembourg, 2020. Available: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/new-evidence-platform-workers-europe> (Accessed on 18 May 2020.)

Morgan highlights that between 1.5% - 4%, of the American workforce is employed in the platform economy.¹¹ Thus, employment in the platform economy is consistently rising.¹²

3. Conditions Of Work For Platform Workers

Presently, there are both proponents and opponents supporting and opposing the platform economy. The World Economic Forum states that the platform economy provides flexibility, allowing services providers to decide when and where they work; extra income, the platform economy allows service providers to supplement their primary income; and inclusivity, the platform economy may reduce barriers to certain licensed services, such as taxi-driving.¹³ Prassl states “individuals are free to choose when and what to work, without the regimented working day and over bearing management control which are (stereo-)typical of traditional work”.¹⁴ Several studies have indicated that job satisfaction for platform workers is equal to or greater than the satisfaction levels of the wider workforce: a summary of research conducted by Berger et al. concludes “while Uber drivers remain at the lower end of the London income distribution, they report higher levels of life satisfaction than other workers”.¹⁵ Similarly, research conducted by Kim et al. conveys that “platforms with flexible and sophisticated quality of systems and accurate and consistent information are likely to improve workers’ autonomy and satisfaction”.¹⁶ A 2016 interview conducted with a platform worker aptly encapsulates the positivity some workers experience whilst working in the digital economy:

Most of us just loving riding around London”, [cycle courier Andrew Boxer] says of his job with courier firm Excel, which can involve 60-70 miles a day in the Saddle. “Even in appalling weather, riding along the river is an exciting experience. Most low-paid jobs aren’t this much fun.”¹⁷

¹¹ Diana FARRELL – Fiona GREIG – Amar HAMOUDI: *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors*. JP Morgan Chase & Co, 2018. Available: <https://www.jpmorganchase.com/corporate/institute/document/institute-ope-2018.pdf> (Accessed on 18 May 2020.)

¹² MCGUINNESS–BERGIN–KEANE–DELANEY op. cit.

¹³ World Economic Forum: *The Promise of Platform Work: Understanding the Ecosystem*. (2020) Available: http://www3.weforum.org/docs/WEF_The_Promise_of_Platform_Work.pdf (Accessed on 18 May 2020.)

¹⁴ Jeremias PRASSL: *Collective Voice in the Platform Economy: Challenges, Opportunities, Solutions*. ETUC, September 2018.

¹⁵ Thor BERGER – Carl Benedikt FREY – Guy LEVIN – Santosh Rao DANDA: *Uber happy? Work and well-being in the ‘Gig Economy’*. *Economic Policy*, Vol. 34., Iss. 99. (2019) 429–477.

¹⁶ Rasha ALAHMAD – Sangmi KIM – Elizabeth MARQUIS – Casey S. PERCE – Lionel P. ROBERT Jr.: *The Impacts of Platform Quality on Gig Workers’ Autonomy and Job Satisfaction*. CSCW 2018: Companion of the 2018 ACM Conference on Computer Supported Cooperative Work and Social Computing, October 2018.

¹⁷ Zoe WOOD: *Love the job, hate the way we’re treated: Life on the frontline of the UK’s delivery army*. *The Guardian*, 31 July 2016. Available: <https://www.theguardian.com/money/2016/jul/30/job-pay-workers-gig-economy> (Accessed on 21 May 2020.)

Duggan, Sherman, Carbery and McDonnell state “with generally unpredictable and insecure payment plans, the reality is that many gig workers are left susceptible to low income, despite making themselves available for work”.¹⁸ Whilst Behrendt, Anh Nguyen and Rani identify that there are “gaps in social security coverage”, for platform economy workers and platform workers, as a result of their employment status, cannot avail of labour law protections afforded to employees.¹⁹ As aforementioned, the current gap in social protections afforded to platform workers has resulted in the most vulnerable in the workforce being without advocates and collective bargaining representatives. Thus, increasingly marginalising those in the workforce, who need it most. Prassl identifies three facets of a platform workers employment, which are detrimental to the social security of those employed in the digital economy, namely: legal status, remuneration and rating mechanisms.²⁰ This author suggests that the aforementioned facets of platform workers’ employment are likely to be basis for collective action to improve the working conditions of platform workers.

3.1. Employment Status

Inherent in the contract for service between the platform application and the platform service provider is the express declaration “You are not an Employee of X, you are an Independent Contractor”. This is illustrated through a review of the terms and conditions Uber B.V provides to users of the app in the Republic of Ireland:

You acknowledge that uber does not provide transportation or logistics services or function as a transportation carrier and that all such transportation or logistics services are provided by independent third party contractors who are not employed by uber or any of its affiliates.²¹

The effect of the contractual denial of an employment relationship by digital platforms has resulted in the shifting of risks and responsibilities to individual workers.²² This allows platforms to potentially disregard vicarious liability and insurance towards services users and employment laws, relating to the service provider such as complying with the national minimum wage, social security contributions, and sick/holiday pay.²³

¹⁸ James DARGAN – Ultan SHERMAN – Ronan CARBERY – Anthony McDONNELL: The rise and rise of the gig economy. *RTÉ*, 02 June 2018. Available: <https://www.rte.ie/brainstorm/2018/0530/967082-the-rise-and-rise-of-the-gig-economy/> (Accessed on 18 May 2020.)

¹⁹ Christina Behrendt – Quynh Anh Nguyen – Uma Rani: ‘Social protection systems and the future of work: Ensuring social security for digital platform workers’, *International Social Security Review*, Vol. 72., Iss. 3. (2019).

²⁰ PRASSL (2018) op. cit.

²¹ Uber B.V.: *Terms and Conditions*. Available: <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=ireland&lang=en-gb> (Accessed on 21 May 2020.)

²² Valerio DE STEFANO: The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy. *Comp. Lab. L. & Pol’y J.*, Vol. 37. (2016) 471.

²³ Brishen ROGERS: Employment as a Legal Concept. *Temple Univ. Legal Studies Research Paper*, No. 2015-33.

Prior to the digitalisation of work, the courts established employment status using a plethora of tests. In Ireland, the Courts have utilised a variety of tests, including the ‘integration test’, as Lord Justice Denning identifies “under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it”;²⁴ ‘the control test’, ie are the workers actions governed and controlled by the work provider;²⁵ ‘the reality of the situation test’, the courts shall ignore the label placed on the working relationship, where the reality of the relationship is different;²⁶ and the courts shall examine whether there is mutuality of obligation, ie whether there is an obligation on one party to provide work and an obligation on the other party to accept such work.²⁷ As Cherry and Alosi have identified, “in recent years, lawsuits alleging the misclassification of workers as ‘independent contractors’ rather than ‘employees’ have become widespread.”²⁸ In *Uber B.V. Ors v Aslam & Ors*,²⁹ the English Court of Appeal, upheld the Employment Appeals Tribunal that where the drivers had no control in the reality of the working dynamic and had no opportunity to substitute work or work for competitors, they were incorrectly classified as ‘independent contractors’ and should be reclassified as ‘workers’. However, in *Independent Workers Union of Great Britain v Deliveroo*, it was held that where the riders have the opportunity to substitute work, the classification of ‘independent contractor’ was correct.³⁰ Recently, the Court of Justice of the European Union in the matter of *B v Yodel Delivery Network Ltd*,³¹ made a reasoned order under Article 99 of the Rules of Procedure, providing that where the contractual right to substitute exists; the ability to accept/decline work exists; the ability to work for competitors exists; and the flexibility to fix hours to suit personal needs exists, one shall be classed as ‘independent contractor’. One anticipates that the upcoming hearing of *Uber BV and Others v Aslam* in the UK Supreme Court on 22-23 July 2020,³² shall provide an overall synopsis of the employment status of platform workers.

²⁴ *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, see *The Sunday Tribune Ltd (in Liquidation)* [1984] IR 505.

²⁵ *Roche v Patrick Kelly & Co.d Ltd* [1969] I.R. 355.

²⁶ *Denny & Sons Limited v Minister for Social Welfare* [1998] I.R. 34.

²⁷ *The Minister for Agriculture and Food v Barry & Ors* [2009] 1 IR 215.

²⁸ Miriam A. CHERRY – Antonio ALOISI: Dependent Contractors in the Gig Economy: A Comparative Approach. *Am. U. L. Rev.*, Vol. 66. (2017) 635.

²⁹ *Uber B.V & Ors v Aslam & Ors* [2018] EWCA Civ 2748.

³⁰ *Independent Workers Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo* [2017] TUR1/985(2016).

³¹ Case C692/19 *B v Yodel Delivery Network Ltd*, ECLI:EU:C:2020:288.

³² Rosalind McCARDLE: Employment Status: ECJ ruling under the Working Time Directive in *B v Yodel Delivery Network Ltd*. *DWF*, 06 May 2020. Available <https://www.dwf.law/en/Legal-Insights/2020/May/Employment-Status-ECJ-ruling-under-the-Working-Time-Directive-in-B-v-Yodel-Delivery-Network-Ltd> (Accessed on 21 May 2020.)

3.2. Remuneration

A 2019 publication by the payroll software company ‘Paycor’ highlights that labour costs can account for as much as 70% of a company’s business costs.³³ Using the example of Uber, Uber has approximately 3.9 million drives in 700 cities globally,³⁴ if those drivers were employees, Uber would be subject to an abundance of responsibilities. However, as a result of such drivers being classified as ‘independent contractors’, the platform has the ability to avoid social security contributions, complying with minimum wages laws, providing sick leave and ensuring health and safety standards.³⁵ However, Graham et al. note “many governments, third-sector organisations and private sector actors continue to see a significant development potential in digital Labour: jobs can be created for some of the world’s poorest by taking advantage of connectivity and the willingness of an increasing number of firms to outsource business processes”.³⁶

Mahatma Gandhi ominously declared “the true measure of any society can be found in how it treats its most vulnerable members”.³⁷ Unfortunately, for those working in the platform economy, it appears society treats them least-favourably. Research conducted by the Labour Labor Research Centre at University of California, Berkeley anticipates that the continued expansion of platforms into food delivery shall result in the development of sub-minimum wages, particularly in an American context, where workers in restaurants are reliant on tips.³⁸ A UK Government publication reports that Deliveroo drivers receive £6 per hour plus £1 for each delivery.³⁹ Furthermore, the contempt in which platform workers are viewed is illustrated by Lukas Biewald, CEO of Crowdfunder, a crowd-work platform:

Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore.⁴⁰

³³ PAYCOR: The Biggest Cost of Doing Business: A Closer Look at Labour Costs. Available: <https://www.paycor.com/resource-center/a-closer-look-at-labor-costs> (Accessed on 25 May 2020.)

³⁴ Uber: *Company Info*. Available: <https://www.uber.com/en-GB/newsroom/company-info/> (Accessed on 25 May 2020.)

³⁵ PRASSL (2018) op. cit.

³⁶ Mark GRAHAM – Isis HJORTH – Vili LEHDONVIRTA: Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods. *Transfer: European Review of Labour and Research*, Vol. 23., Iss. 2. (2017) 135–162.

³⁷ Cited in Maeve O’SULLIVAN – Christine CROSS – Jonathan LAVELLE: The low-paid workers keeping Ireland running during the pandemic. *RTÉ*, 8 April 2020. Available: <https://www.rte.ie/brainstorm/2020/0402/1127997-low-paid-workers-ireland-gig-economy-coronavirus-pandemic/> (Accessed on 25 May 2020.)

³⁸ The Restaurant Opportunities Centers United: *The Gig Is Up: The new gig economy and the threat of subminimum wages*. Food Labor Research Center, University of California Berkeley, March 2019. Available: <https://rocunited.org/wp-content/uploads/sites/7/2020/02/TheGigIsUp.pdf> (Accessed on 25 May 2020.)

³⁹ Andrea BROUGHTON – Rosie GLOSTER – Rose MARVELL – Martha GREEN – Jamal LANGLEY – Alex MARTIN: *The experiences of individuals in the gig economy*. HM Government, February 2018.

⁴⁰ Moshe Z. MARVIT: The Wages of Crowdfunder. *The Nation*, Vol. 298., Iss. 8. (2014) 18–25, cited in A. L. KALLEBERG – M. DUNN: Good jobs, bad jobs in the gig economy. *LERA for Libraries*, Vol. 20., Iss.1–2., 2016.

3.3. Ratings

In the traditional employment setting, if a worker was the recipient of an unjust appraisal there were modus-operandi available to challenge such an appraisal, however, for platform workers no such opportunities exist.⁴¹ However, Basili and Rossi state “platforms often use reputation systems to actively perform a ‘regulatory’/control role, by excluding from access to the platform users with ratings below a given threshold”.⁴² Aloisi identifies that online reputation has a pivotal role in the allocation of work in the platform economy: on the completion of a task/job, the consumer completes an ex post evaluation that affects ex ante selection, ie the more favourable a platform workers ratings are, the greater the likelihood the algorithm shall assign more tasks.⁴³ Therefore, the importance of fair and accurate ratings systems are crucial to the livelihood of platform workers.

Another contentious issue regarding ratings systems for platform workers is the fact that ratings are not portable. Ratings “crystallise hard-won reputations; they are the passport to future earning power”.⁴⁴ For example, where an Uber Eats delivery driver moves to a city where the platform is not registered and seeks to work for Deliveroo, despite the goodwill established with the former, he shall repeat the vicissitudes of developing his reputation again from the bottom of the algorithmic ‘table’. Such a contention has been acknowledged in the UK by the Taylor Review, which suggests:

Governments should strongly encourage gig platforms to enable individuals to be able to carry their verified approval ratings with them when they move platform and to share them with third parties.⁴⁵

4. Collective Bargaining

For jurists such as Sir Otto Kahn-Freund, the primary objective of labour law is to be “a countervailing force to counteract the inequality of bargaining which is inherent and must be inherent in the employment relationship”.⁴⁶ Cusack notes to remedy the inequality of bargaining power between employees and employers, “acting collectively, a unified workforce could forcibly redress the unequal bargaining power which would otherwise inherently exist between an individual employee and their

⁴¹ Sarah O’CONNOR: Let gig workers control their data too. *Financial Times*, 03 April 2018. Available: <https://www.ft.com/content/a72f7e56-3724-11e8-8b98-2f31af407cc8> (Accessed on 25 May 2020.)

⁴² Marcello BASILI – Maria Alessandra ROSSI: Platform-mediated reputation systems in the sharing economy and incentives to provide service quality: The case of ridesharing services. *Electronic and Commerce Research and Applications*, Vol. 39. (2020).

⁴³ Antonio ALOISI: Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms. *Comp. Lab. L. & Pol’y J.*, Vol. 37. (2016) 653.

⁴⁴ Gavin KELLY: Give me my reputation back. *Medium*, 12 October 2017. Available: <https://gavinkellyblog.com/give-me-my-reputation-back-clfa5daca78c> (Accessed on 25 May 2020).

⁴⁵ Matthew TAYLOR: *Good Work: The Taylor Review of Modern Working Practices*. Department for Business, Energy and Industrial Strategy, 11 July 2017.

⁴⁶ Otto KAHN-FREUND: *Labour and the Law*. London, Steven and Sons, 1972.

employer”.⁴⁷ The International Labour Organization defines collective bargaining as “all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers organisations, on the other for – (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations”.⁴⁸ Freedom of association and the right to collective bargaining have been described as a “fundamental right”,⁴⁹ and as “a means to solve ‘labour problems’, evolving out of widespread social unrest connected with a massive expansion of work and corresponding poor working conditions”.⁵⁰ Previous scholars have highlighted that labour law statutes governing the employment relationship developed “as the result of the failure of collective bargaining”,⁵¹ although this author rejects such a proposition.

4.1. Ireland

In Ireland, Article 40.6.1.iii of the Constitution of Ireland provides “the right of the citizens to form associations and unions”, subject to “laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right”.⁵² In *Doyle v Croke*, Costello J. conveyed that freedom of association in Ireland shall not be restrictive: “if the constitutional right of citizens to form associations and unions is to be effective the Article in which it is to be found should not be construed restrictively”.⁵³ Casey notes “a trade union, even one which holds a negotiating license, cannot claim a constitutional right to be recognised for negotiating purposes, nor will its members have a right of action if it is not recognised”.⁵⁴ Similarly, in *Equality Authority v Portmarnock Golf Club*, Hardiman J. stated “the right to freedom of association is a pre-existing natural right”.⁵⁵ Thus, it is evident that the right to freely associate is strongly protected by the Superior Courts of Ireland. However, Doherty comments “in terms of collective employment rights, Ireland provides notably weak legal protection for collective bargaining, and collective worker representation”.⁵⁶

⁴⁷ Alan CUSACK: Too Many Cooks: Overcrowding in the Labour Law Landscape and the Decline of Collective Negotiations. *Irish Employment Law Journal*, Vol. 9., Iss. 2. (2012) 45–52.

⁴⁸ International Labour Organisation: *Convention Collective Bargaining Convention 1981*. (No. 154).

⁴⁹ Adam Elebert: Striking a Balance: Freedom of Association in Ireland and Germany. *Irish Law Times*, Vol. 38., Iss. 6. (2020) 80–85.

⁵⁰ Zachary KILHOFFER – Karolien LENAERTS – Miroslav BEBLAVÝ: The Platform Economy and Industrial Relations: Applying the old framework to the new reality. *CEPS Research Report*, No. 2017/12.

⁵¹ Mary REDMOND: The Future of Labour Law. *Irish Employment Law Journal*, Vol. 1., Iss. 1. (2003) 3–5.

⁵² Constitution of Ireland. Available: <http://www.irishstatutebook.ie/eli/cons/en/html> (Accessed on 14 October 2020.)

⁵³ *Doyle v Croke* (unreported, High Court, May 6, 1988).

⁵⁴ James CASEY: *Constitutional Law in Ireland*. Dublin, Round Hall Sweet & Maxwell, 2000.

⁵⁵ *The Equality Authority v Portmarnock Golf Club and Ors.* [2009] IESC 73/2.

⁵⁶ Michael DOHERTY: New Morning? Irish Labour Law Post-Austerity. *Dublin University Law Journal*, Vol. 39., Iss. 1. (2016) 51–73.

The Industrial Relations (Amendment) Act 2015 provides: “collective bargaining comprises voluntary engagements or negotiations between any employer or employers’ organisation on the one hand and a trade union of workers or excepted body to which this Act applies on the other, with the object of reaching agreement regarding working conditions or terms of employment, or non-employment, of workers”.⁵⁷ Evans lists a number of pre-conditions which must be satisfied for the Labour Court to hear a referral by a union seeking an employer to partake in collective bargaining: (1) The matter must be a trade dispute concerning employees’ terms and conditions; (2) there must be a significant number of employees subject to the dispute; and (3) there isn’t an ‘expected body’⁵⁸ established which engages in negotiations with the objective of reaching an agreement with the employer.⁵⁹ *Freshways Food Company v SIPTU* held that 170 out of 250 employees was a significant number for the dispute to be referred and the fact the employer was engaged in consultation with a staff representative group was not an ‘expected body’, because it was held not to be independent from the employer.⁶⁰ *Conduit Enterprises Limited v Communications Workers Union* held 30% of workers was a significant number of employees and that the intention of the 2015 Act was not to divide public and private sector employees, rather compare those with a similar line of work.⁶¹ Whilst in *Zimmer Orthopaedics Manufacturing Ltd v 53 General Operatives (represented by SIPTU)* the Labour Court accepted the employer’s argument that 53/410 employees was insignificant and rejected the union’s claim, where they failed to specify whom they represented.⁶²

Furthermore, in 2017 the Oireachtas amended the Competition Act 2002 to provide that Section 4 of that Act (prohibiting anti-competitive agreements) shall not apply to collective bargaining and agreements in respect of a ‘relevant category of worker’.⁶³ Schedule 4 of the Competition (Amendment) Act 2017 provides that voice-over actors, session musicians and freelance journalists shall have the right to collective bargaining. Similarly, Section 15F (1) of the 2017 Act provides “a trade union which represents a class of – (a) false-self-employed worker,⁶⁴ or fully dependent self-employed worker, may

⁵⁷ Section 27(1A).

⁵⁸ Section 27(1B) of the Industrial Relations (Amendment) Act 2015: defines an ‘expected body’ as a body that is independent and not under the domination and control of an employer or trade union of employers, all the members of which body are employed by the same employer and which carries on engagements or negotiations with the object of reaching agreement regarding the wages or other conditions of employment of its own members (but of no other employees).”

⁵⁹ Bláthnaid EVANS: Collective Bargaining? What is the current state of play in Ireland. *Leman Solicitors*, 30 October 2018. Available: <https://leman.ie/collective-bargaining-what-is-the-current-state-of-play-in-ireland/> (Accessed on 19 May 2020.)

⁶⁰ LCR 21242.

⁶¹ LCR21388 and LCR21722.

⁶² LCR21729.

⁶³ Organisation for Economic Co-operation and Development (OECD): *Competition Issues in Labour Markets – Note by Ireland*. Directorate for Financial and Enterprise Affairs Competition Committee, 05 June 2019.

⁶⁴ Section 15(D) of the Competition (Amendment) Act 2017 defines ‘false self-employed worker’ as an individual who – (a) performs for a person (‘other 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, (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) or the duration of the contractual relationship, forms an integral part of the other person’s undertaking;

for the purposes of collective bargaining agreements on behalf of the class of worker so represented, apply to the Minister in accordance with this section, to prescribe such class of false self-employed worker or fully dependent self-employed worker for the purposes of this part”. Whilst it is reported that no litigation has occurred thus far regarding employment status pursuant to the 2017 Act, it provide a method for those working in the platform economy to challenge their employment status, which prohibits their right to collective bargaining.

It is apparent that an appetite for changes exist within the legislature to remedy those, particularly in the platform economy, who are denied the existence of social protections and the right to collective bargaining as a result of being labelled as a ‘independent contractor’. This is reflected most recently by the ‘Prohibition of Bogus Self Employment Bill 2019’, sponsored by Willie O’Dea TD. Willie O’Dea expressly refers to “among other consequences for the cohort of false-self-employed is the inability to bargain collectively”.⁶⁵ Section 2 of the proposed 2019 Bill provides that where an employer falsely classifies a person as an ‘independent contractor’, “they shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both”.⁶⁶ It is important to note that the proposed legislation lapsed with the dissolution of the Oireachtas on 14 January 2020.

4.2. Europe

Golubovic notes “freedom of peaceful assembly and freedom of association are proclaimed basic human rights and enshrined in a number of international instruments designed to ensure their protection”.⁶⁷ The right to collective bargaining was recognised in EU law by Article 28 of the Charter of Fundamental Rights in the EU and in Article 12 of the Community Charter of Fundamental Rights of Workers 1989. Furthermore, the ‘the right to bargain collectively’, was declared a fundamental right in the 1961 European Social Charter of the Council of Europe.⁶⁸ Article 156 of the Treaty on the Functioning of the European provides “the Commission shall encourage cooperation between Members State and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to: .. the right of association and collective bargaining employers and workers”.

‘Fully dependent self-employed worker’ means 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 2 persons.

⁶⁵ Willie O’DEA TD: Prohibition of Bogus Self Employment Bill 2019: First Stage. *Dáil Éireann debate*, (27 March 2019) Vol. 981., No. 1.

⁶⁶ Section 2 of the Prohibition of Bous Self Employment Bill 2019.

⁶⁷ Dragan GOLUBOVIC: Freedom of association in the case law of the European Court of Human Rights. *The International Journal of Human Rights*, Vol. 17., Iss. 7–8. (2013) 758–771.

⁶⁸ Article 6.

Article 11 of the European Convention on Human rights provides: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”. In *Young, James, Webster v UK*, the ECtHR identified three features of an association: (i) a higher degree of institutional organisation; (ii) voluntary character; and (iii) the pursuit of a common goal.⁶⁹ The ECtHR has found no ground in a trade union’s claim that they have the right to demand the signing of collective bargaining agreements;⁷⁰ the right to consultations;⁷¹ the right to have a representative in the state labour council; and the right to industrial action, provided a state has secured corresponding measures to protect their rights.⁷²

The Court of Justice of the European Union (CJEU) has also provided several seminal judgments regarding the right to collective bargaining. In *Becu*, the CJEU held employees in an employment relationship are not undertakings under competition law and the collective agreements were not prohibited by anti-trust legislation.⁷³ Whilst in *Albany*, the CJEU ruled that collective agreements between trade unions and employers relating to conditions of employment and working conditions fell outside competition law regulations as these agreements met social objectives which should not be prohibited by competition rules.⁷⁴ However, in the ‘*Dutch Musicians*’ Case, the CJEU held where genuine self-employment exists, such persons shall be restricted from collective bargaining.⁷⁵ Similarly, the CJEU held where an association of geologists sought a minimum fee for their members (independent contractors), it was a breach of competition law.⁷⁶

Correlating with the views expressed by Irish TDs, “Margrethe Vestager, the EU’s competition chief, has called for the gig economy workers to be allowed to collectively bargain for their rights”.⁷⁷ Reflecting the protectionist sentiment expressed by Commissioner Vestager, Directive 2019/1152 on Transparent and Predictable Working Conditions shall be applicable to all classifications of ‘worker’ throughout the Union.⁷⁸ All workers shall have the right to: complete information in writing about the essential aspects of their job; seek additional employment (a ban on exclusivity clauses); know a reasonable period in advance when work shall occur; and receive subsidised mandatory training.⁷⁹ Whilst Directive 2019/1152 does not directly address the issue of collective bargaining for platform

⁶⁹ Application no. 7601/76; 7806/77, judgment of 13 August 1981.

⁷⁰ *National Union of Belgium Police v. Belgium*, Application no. 4464/70, judgment of 27 October 1975.

⁷¹ *Swedish Engine Drivers’ Union v. Sweden*, Application no. 5614/72, judgment of 6 February 1976.

⁷² *Schmidt and Dahlström v. Sweden*, Application no. 5589/72, judgment of 6 February 1976.

⁷³ Case C-22/98 *Criminal Proceedings Against Jean Claude Becu* [2001] 4 C.M.L.R. 96.

⁷⁴ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [2000] 4 C.M.L.R. 446, [AG206].

⁷⁵ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

⁷⁶ *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013] EU:C:2013:489.

⁷⁷ Javier ESPINOZA: Vestager says gig economy workers should ‘team up’ on wages. *The Financial Times*, 24 October 2019. Available: <https://www.ft.com/content/0cafd442-f673-11e9-9ef3-eca8fc8f2d65> (Accessed on 26 May 2020.)

⁷⁸ European Commission: *Transparent and predictable working conditions*. Available: <https://ec.europa.eu/social/main.jsp?catId=1313&langId=en> (Accessed on 26 May 2020.)

⁷⁹ *Ibid.*

workers, it is noteworthy that the beneficiaries of the directive are declassified of their employment status ie it is unilaterally applicable to all workers within the union (full-time/part-time/agency etc). This author anticipates, as a result of Commissioner Vestager's comments, that the prospect of legislating affecting platform worker's collective bargaining rights shall be forthcoming in the future.

The next section of this paper shall explore the issues inhibiting the collective bargaining rights of those in the platform economy.

4.3. Collective Bargaining and the Platform Economy

4.3.1. Avoiding Anti-Trust Restrictions

Traditionally, the ability for independent contractors to engage in collective bargaining has been restricted by anti-trust laws. Professor Michael Doherty notes "under EU and Irish competition law, it is not possible for the self-employed to conclude collective agreements".⁸⁰ Prassl states "once work in the on-demand economy is properly classified as employment, on the other hand, workers will be able to organise themselves and form trade unions to bargain directly with platforms over their terms and conditions".⁸¹

In the Concept of the Employer, Jeremias Prassl proposes for the reconceptualization of the definition of employer.⁸² Fudge emphasises the "need to go beyond contract and corporate form, and adopt a relational and functional approach to ascribing employment-related responsibilities in situations involving multilateral work arrangements in employing enterprises".⁸³ Prassl and Risak state "a functional conceptualisation of the employer, then is one where the contractual identification of the employer is replaced by an emphasis on the exercise of each function whether by a single entity, or in situations where different functions may be exercised from more than one focus of control".⁸⁴ Therefore, it is suggested that an entity shall be deemed an employer where it is responsible for the following functions: (i) the inception and termination of employment; (ii) receiving labour and its fruits; (iii) providing work and pay; (iv) coordinating the factors of production; (iv) and managing the enterprise of the external market.⁸⁵ The 'functional employer' concept is best exemplified through the illustration of Uber's business model:

⁸⁰ Michael DOHERTY: *Bogus Self-Employment Discussion*. Joint Committee on Employment Affairs and Social Protection debate, 14 February 2019.

⁸¹ PRASSL (2018) op. cit.

⁸² Jeremias PRASSL: *The Concept of the Employer*. Oxford, Oxford University Press, 2016.

⁸³ Judy FUDGE: The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection. In: G. DAVIDOV – B. LANGILE (eds.): *Boundaries and Frontiers of Labour Law*. Hart, 2006. 310–313.

⁸⁴ Jeremias PRASSL – Martin RISAK: Uber, Taskrabbit, and Co.: Platforms as Employers – Rethinking the Legal Analysis of Crowdwork. *Comp. Lab. L. & Pol'y J.*, Vol. 37. (2016) 619.

⁸⁵ Ibid.

4.3.1.1. Inception and Termination of Employment

Once an Uber downloads the ‘driver app’, the driver is required to input personal data regarding his/her license, vehicle, identification and vehicle prior to commencing driver for Uber.⁸⁶ The consumer opens the Uber app and seeks ‘a ride’ from their present location to their requested destination. The app then matches the consumer with drivers in the area, who have the option of accepting or rejecting the offer. Upon acceptance of the offer to drive, the driver transports the consumer to their requested destination, upon arrival at the destination the transaction is completed.⁸⁷ Whilst Uber is also responsible for the termination of drivers’ ability to use the platform for a variety of reasons, including ratings falling below a specific threshold; unsafe driving; due diligence/background check issues; inactive status; post-ride contact; serious complaints; expired documents; and violating the terms of service.⁸⁸ Therefore, it is apparent that Uber are in control of the inception and termination of employment.

4.3.1.2. Receiving Labour and its fruits

Upon the completion of the transaction between the driver and consumer, the total payment is received by Uber, who obtain between 20% - 30% on commission, and the driver is paid with a direct deposit.⁸⁹ Similarly, Uber is responsible for issuing invoices and receiving complaints.⁹⁰ Therefore, it is evident that the individual driver is external to the payments and disputes process associated with the platform.

4.3.1.3. Providing Working and Pay

As aforementioned, Uber receives the total payment for each trip taking by a driver, obtains commission, and subsequently deposits the remaining sum into the driver’s bank account. Similarly, it is argued that the provision of work is facilitated by the Uber Platform, which may be argued is the workplace where drivers network with consumers.⁹¹

⁸⁶ Uber: Partner-driver requirements. Available: <https://www.uber.com/ie/en/drive/requirements/> (Accessed on 27 May 2020.)

⁸⁷ Uber: How to use the Uber app. Available: <https://www.uber.com/ie/en/about/how-does-uber-work/> (Accessed on 27 May 2020.)

⁸⁸ Brett HELLING: Uber Deactivation: Why Drivers Get Deactivated [and How to Get Reactivated]. (Ridester.com, 04 April 2020) Available: <https://www.ridester.com/uber-deactivation/> (Accessed on 27 May 2020.)

⁸⁹ Ridesharing Driver: How Do Uber Drivers Get Paid? And How to Fix Pay Errors. Available: <https://www.ridesharingdriver.com/how-do-uber-drivers-get-paid-and-how-to-resolve-payment-errors/> (Accessed on 27 May 2020.)

⁹⁰ Uber: Trip Issues. Available: <https://help.uber.com/riders/section/trip-issues-and-refunds?nodeId=595d429d-21e4-4c75-b422-72affa33c5c8> (Accessed on 27 May 2020.)

⁹¹ FUDGE op. cit.

4.3.1.4. Coordinating the Factors of Production

Uber is responsible for providing the route which drivers should follow on their trip, which if departed from may be subject to complaint.⁹² In Ireland for example, to qualify as an UberTaxi driver, one must “drive a clean and professional vehicle licensed as a Taxi, such as a Skoda Octavia, Toyota Avensis or Prius”.⁹³ Similarly, to qualify as an UberBlack driver one must “drive a 2006 or newer long wheel – base S-Class (or equivalent) or 2009 E-Class or newer (or equivalent) vehicle, licensed as a limousine, in excellent condition”.⁹⁴ Therefore, Uber are in control of coordinating how the transportation of consumers occur, whilst drivers, in reality, lack autonomy relating to the method and mode of transportation.

4.3.1.5. Managing the Enterprise – External Market

Prassl and Risak state “the most important indicator of driver’s earning ability, on the other hand, is Uber’s pricing algorithm, which determines remuneration for distance and time on the basis of factors such as an individual city pricing levels or even demand specific to a particular location and tie though so-called surge pricing”.⁹⁵ Furthermore, Uber is has complete control over branding. For example, in its 2018 IPO filing, Uber spent \$3,151,000,000 on sales and marketing.⁹⁶ Thus, Uber are responsible for the external operations of the business rather than an individual driver.

Therefore, this author opines that using the functional conceptualisation of an employer as proposed by Prassl and Risak,⁹⁷ would increase the recognition of employment relationships between digital platforms and platform workers. Resultantly, if such a conceptualisation is utilised by legislatures, it would provide a mechanism for platform works to recognised as employees and bargain collectively, without being in breach of anti-trust legislation.

⁹² Uber: How the Driver App Works Available: <https://www.uber.com/us/en/drive/driver-app/> (Accessed on 27 May 2020.)

⁹³ Uber: Vehicle requirements in Ireland. Available: <https://www.uber.com/ie/en/drive/requirements/vehicle-requirements/> (Accessed on 27 May 2020.)

⁹⁴ Ibid.

⁹⁵ FUDGE op. cit.

⁹⁶ United States Securities and Exchange Commission Filing for Uber Technologies Inc, filed on 11 April 2019. Available: https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dsl.htm#toc647752_9 (Accessed on 27 May 2019.)

⁹⁷ FUDGE op. cit.

4.3.2. Organisation of Platform Workers

Traditionally in Ireland, an employee representative for industrial relations was present in the workplace. The Workplace Relations Commission provide that employee representatives should “represent members fairly and effectively in relation to matters arising within the undertaking or establishment in which they work”, participate in negotiation and grievance procedures in the place in which they work; and co-operate with management ensuring the implementation of collective bargaining agreements.⁹⁸

However, what happens if there is no traditional workplace? Continuing to use the example of Uber, it operates in 63 countries, in over 700 cities, with 14 millions trips completed globally each day.⁹⁹ Whilst a 2019 report by Mastercard provides “the global gig economy currently generates \$204 bn in Gross Volume, with transportation-based services (ride-sharing) comprising 58% of this value. The size of the gig economy is projected to grow by 17% CAGR (compound annual growth rate)”.¹⁰⁰ Thus, identifying a mechanism to provide collective bargaining for a dispersed workforce, such as those working in the platform economy may appear to be a difficult task. However, Prassl notes “the very technology which enables the dispersion of workers is also the key to their organisation: the platform-based workforce is highly computer literate, proficient in digital communication, and nearly always online. While traditional organising might not be able to speak to platform workers, digital campaigns are key”.¹⁰¹

Online fora are one alternative proposed to remedy the issue of workforce dispersion. Johnston and Land-Kazlauskas state “forums help workers to discern between equitable and exploitative requesters in order to maximise earnings and share experiences”.¹⁰² Similarly, Ether Lynch, Confederal Secretary for the European Trade Union Confederation notes “in the same way you have ratings against workers, you have workers who are beginning to provide ratings for employers, and I think that all of these strategies are good because they offer opportunities for engagement with workers”.¹⁰³ ‘We Are Dynamo’, an online forum for Amazon Mechanical Turk Workers, best exemplifies the potential forums provide for platform workers. Dynamo has been described as “a community platform designed to gather ideas, energy and support directed towards collective action”.¹⁰⁴ ‘We Are Dynamo’,

⁹⁸ Workplace Relations Commission: Duties and Responsibilities of Employee Representatives. Available: https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop11/ (Accessed on 27 May 2020.)

⁹⁹ Uber: *Company Info*. Available: <https://www.uber.com/en-GB/newsroom/company-info/> [Accessed on 25 May 2020].

¹⁰⁰ Mastercard: *The Global Gig Economy: Capitalizing on a ~\$500B Opportunity*. May 2019. Available: <https://newsroom.mastercard.com/wp-content/uploads/2019/05/Gig-Economy-White-Paper-May-2019.pdf> (Accessed on 27 May 2020.)

¹⁰¹ PRASSL (2018) op. cit.

¹⁰² Hanna JOHNSTON – Chris LAND-KAZLAUSAS: *Organizing on-demand: Representation, voice and collective bargaining in the gig economy*. [Conditions of Work and Employment Series No. 94] ILO, 2019.

¹⁰³ Ibid.

¹⁰⁴ Niloufar SALEHI – Lilly C. IRANI – Michael S. BERNSTEIN – Ali ALKHATIB – Eva OGBE – Kristy MILLAND – CLICKHAPPIER: *We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers*. In: *Proceedings of the 33rd annual ACM conference on human factors in computing systems*. 2015.

provided a network for platform workers to identify their common interests and collectively draft an open letter regarding optimum practices relating to pay and conduct.¹⁰⁵ The 'We Are Dynamo' forum resulted in several hundred service users singing with the platform workers' requests.¹⁰⁶ Thus, it is evident that online forums may provide a framework to organise collective bargaining for dispersed platform workers.

Another alternative mechanism for collective bargaining for a dispersed workforce is platform cooperatives. Scholz identifies that the concept of platform co-operativism has three parts: (i) it is about cloning the platforms, embracing technology but with a different ownership model; (ii) it is about solidarity, which is solely absent in the present platform workforce; (iii) platforms should be focusing on benefitting the workforce, not just about maximising profits.¹⁰⁷ Whilst the Platform Cooperative Consortium states "platform cooperatives are businesses that use a website, mobile app, or protocol to sell goods or services. They rely on democratic decision-making and shared ownership of the platform by workers and users".¹⁰⁸ In Denver, it was previously reported that 30% of taxi drivers drive for Green Taxi Cooperative, a platform cooperative, which utilises a ride hailing app similar to those developed in Silicon Valley, but with the drivers owning the cooperative.¹⁰⁹ Whilst 'Fairbnb', a platform cooperative "a movement seeking to create a just alternative to existing home-share platforms", was established in 2016 and offers accommodation in several European cities.¹¹⁰ Whilst online cooperatives are in their beta stage, there are signs that the use of such cooperatives may provide platform workers with greater income security and social protections in comparison to working for traditional labour platforms.

5. Conclusion

This paper has aimed to highlight the issues which may be subject to collective bargaining by platform workers, whilst outlining the restrictions preventing platform workers from collectively bargaining, namely anti-trust laws and workforce dispersion. From this author's perspective, removing 'independent contractor' status from platform workers is fundamental to achieving collective bargaining rights for platform workers. Although, as reflected in the comments of Vince Chhabria, District Court Judge of

¹⁰⁵ Guidelines for academic requesters. *We Are Dynamo Wiki*, 2014. Available: https://wearedynamo.fandom.com/wiki/Guidelines_for_Academic_Requesters (Accessed on 01 June 2020.)

¹⁰⁶ JOHNSTON-LAND-KAZLAUSAS op. cit.

¹⁰⁷ Trebor SCHOLZ: *Platform cooperativism. Challenging the corporate sharing economy*. New York, NY, Rosa Luxemburg Foundation, 2016.

¹⁰⁸ Platform Cooperativism Consortium. Available: <https://platform.coop/> (Accessed on 01 June 2020.)

¹⁰⁹ Nathan SCHNIEDER: Denver Taxi Drivers Are Turning Uber's Disruption on Its Head. *The Nation*, 07 September 2016. Available: <https://www.thenation.com/article/archive/denver-taxi-drivers-are-turning-ubers-disruption-on-its-head/> (Accessed on 01 June 2020.)

¹¹⁰ Fairbnb Cooperative 'About Us' available: <https://fairbnb.coop/about-us/> (Accessed on 01 June 2020.)

the Northern District of California, the goal of determining a platform worker's employment status is comparable to being:

handed a square peg and asked to choose between two round holes. The test the ... courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous.¹¹¹

Thus, whilst one may be optimistic about discussions regarding platform workers' employment status moving from the pages of labour law journals and conference halls to the floors of the Oireachtas,¹¹² the precarity surrounding the collective bargaining rights of perhaps the most vulnerable in the workforce remains the same. Therefore, this author recognises that online fora and platform cooperatives may provide frameworks for achieving the short-term goals of platform workers, whilst legislatures at both national and Union level attempt to remedy the precarity.

Although it is universally recognised that the platform economy is in need of reform, it appears that platform workers are eagerly anticipating the delivery of their social protections from legislatures globally. In conclusion, one concurs with Johnston and Land-Kazlauskas' statement that "worker organizing, the development of agency, voice and representation, and its expression through collective bargaining, are the surest and most democratic way of achieving the future of work we want".¹¹³

¹¹¹ *Cotter et al. v. Lyft Inc.*, United States District Court, Northern District of California, Order of March 11, 2015 Denying Cross-Motion for Summary Judgment (Case No. 13-cv-04065-VC) 19.

¹¹² Prohibition of Bous Self Employment Bill 2019.

¹¹³ PRASSL (2018) op. cit.