



## **Collective Bargaining and the Gig Economy: Actors<sup>1</sup>**

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In general, collective bargaining has not been a central concern of approaches to the labour aspects of the platform economy. However, it can be a useful future tool in its regulation, whether on a supranational, or state legislative basis, or by the development of dialogue between the social partners themselves. Traditional trade unions have begun to adapt to new forms of employment. However, new players have emerged, who have not managed to go beyond organised representation until now. Finally, new phenomena must be taken into account, such as charters of rights or valuation websites, which can strongly condition the appearance and development of collective bargaining in this field.

In this paper, we'll first consider the possibility of a regulation, paying special attention to the influence of EU Law. In a second part, the activity of established actors will be studied, paying special attention to the European panorama. The contrast will come in the third part, where we'll propose a catalogue of innovative actors and note their inability, however, to conduct proper bargaining. The Italian, French and German situations will be a main focus of attention in the fourth part, as the most original solutions proposed.

### **1. Is There a Place Under the Sun for Collective Bargaining in the Gig Economy?**

The traditional structures of labour legislation have been decisively affected by the economic and financial crisis of recent years. The current scenario could be described as an evasion of labour law never before perceived, in which accepted conventions are being eroded at the hand of the so-called

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‘gig economy’<sup>2</sup>. Most of the research carried out on *work 4.0* and the gig economy has mainly focused on the legal status of the people involved<sup>3</sup>. In a large part of the Member States, legislative responses are scarce, and it is the courts that are having to face, on a case-by-case basis, this new reality. However, strategic litigation cases must not be overlooked, as has occurred in the United Kingdom, where some people have gone to court in search of the classification of freelance, which would shield their platforms from other interested parties<sup>4</sup>.

In any case, it cannot be omitted that a huge variety of activities of different organizational nature are grouped under the designation of ‘gig economy’ or ‘platform economy.’ Some of them are easy to identify, such as the well-known platforms for transporting people or delivering food or merchandise, but the phenomenon of *crowdworking* remains the far side of the Moon. Amazon Mechanical Turk, Joboto, Clickworker, Crowdfunder, among others, engage thousands of people, yet their labour disputes are as remote for an ordinary person on the street as Czechoslovakia was for Neville Chamberlain—and possibly with the same effects. This difference between offline and online activities has direct repercussions on the representation channels for these workers and their coverage under collective bargaining, as will be seen. Additionally, online activity presents factors of transnational competence, that should not be overlooked, when considering future regulation.

It is obvious to affirm that platform economy workers can only exercise their collective rights in so far as they are aware of their existence. The next step must inevitably be organization for the defence of those rights, primarily for information and consultation, for example, which in turn are essential for social dialogue, a basic component of the European social model within the European pillar. In the case of online tasks, this organization becomes almost utopian due to the very nature of the activity. In the case of tasks where people do in fact have a shared physical presence, it will be seen that traditional forms of organization are beginning to respond to the challenge.

Collective agreements could provide a means to include people who work in the context of the platform economy and, thus, ensure a minimum level of protection, as reflected in the ILO report on atypical employment<sup>5</sup>. Contrary to the recent evolution and decline of collective bargaining in certain States, the labour market challenges of the platform economy could therefore lead to a revival of collective bargaining as a central regulatory instrument in these areas<sup>6</sup>.

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<sup>2</sup> The beatific designation of ‘sharing economy’ is currently on the decline. No one overlooks the fact that this terrain is an authentic hotbed of neo-Orwellian terminology, where under no circumstances are words haphazardly chosen.

<sup>3</sup> An early example in Spain, María LUZ RODRÍGUEZ FERNÁNDEZ – Daniel PÉREZ DEL PRADO: *Economía digital: su impacto sobre las condiciones de trabajo y empleo*. Madrid, 2017.

<sup>4</sup> The absence of appeals in Spain against the declarations of employed status of platform workers could be another example, seeking to prevent a hypothetical contrast between different regional High Courts of Justice that would allow access to the Supreme Court for unification of doctrine.

<sup>5</sup> *Non-standard employment around the world. Understanding challenges, shaping prospects*. OIT, Geneva, 2016.

<sup>6</sup> Jeremias PRASSL: *Collective Voice in the Platform Economy: Challenges, Opportunities, Solutions*. Bruselas, ETUC, 2018. 23: “This is a crucial advantage of collective bargaining: the substantive norms can be shaped both to meet workers’ needs and business operation requirements in a flexible and tailored way”.

In this sense, it is not difficult to notice the tendency towards a fragmented solution in the absence of a harmonising intervention by the European Union. There is no doubt that the European Union could legislate on this matter. The competence set forth in Article 153.1.b of the TFEU offers the legal basis necessary to carry out this task if only working conditions are to be regulated, but the catalogue contained in Article 153.1 offers sufficient support for a more extended action. Its use, however, would require a specific pronouncement by the Union that people working in the platform economy are workers within the meaning of the jurisprudence emanating from the *Lawrie-Blum*<sup>7</sup> case. The failure of the recent Directive (EU) 2019/1152<sup>8</sup>, on transparent and predictable working conditions in the European Union, to reflect this decision highlights the delicate nature of the issue.

In any case, the Union could resort to other more *audacious* avenues. Article 115 of the TFEU continues to allow, as it has done since 1957 when it was Article 100 of the TEEC, “the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.” Using this as legal basis, the European Union could approve a Directive that creates a minimum level of rights for people working in the platform economy, regardless of their national legal categorization. National competences would thus be respected, rights guaranteed, and there would be a supranational response to a supranational situation.

In this scenario of anaemic anomie, collective bargaining can play a very important role. In part, the lack of this intervention without borders derives from the influence of competition law of the European Union itself. A ‘mixed’ collective bargaining, in line with what was pointed out internally, would immediately come up against the arguments of the well-known *FNV Kunsten*<sup>9</sup> judgment. According to the same,

“a provision of a collective labour agreement [...], in so far as it was concluded by an employees’ organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.”

In the eyes of the Court of Justice, the problem resided in the nature of independent economic operators related to companies, the subjects of the *FNV Kunsten* case. Such criteria must be handled with caution when being transferred to the situation of the platform economy. It cannot be overlooked that the Court itself, three years later, in a Grand Chamber with three of the five judges from the previous case present, redefined the boundaries of working under the direction of another in the *Elite*

<sup>7</sup> C-66/85 *Lawrie-Blum v. Land Baden-Württemberg* [ECLI:EU:C:1986:284].

<sup>8</sup> 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, L 186/105, 11.7.2019.

<sup>9</sup> C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* [ECLI:EU:C:2014:2411].

*Taxi*<sup>10</sup> case. The judgement noted the “decisive influence over the conditions under which that service is provided,” that digital platforms wield over their drivers. Specifically, it highlighted “the maximum fare, [...] paying part of it to the non-professional driver of the vehicle, and [...] the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.”

The indicated elements allow us to discard the company status of any natural person who is subject to such Draconian subordination. There would not be any independence to endorse the exclusion indicated by the Court of Justice. Rather, quite the opposite, since in *FNV Kunsten* it was unambiguously stated, “a provision of a collective labour agreement, in so far as it sets minimum fees for service providers who are ‘false self-employed,’ cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.”

Everything said could remain in mere legal hair-splitting. However, the current Vice President for a Europe fit for the Digital Age, Margrethe Vestager, with the entry into office of the new von der Leyen Commission, has spoken on the subject: “We need to make sure that there is nothing in the competition rules to stop those platform workers from forming a union, to negotiate proper wages as you would do in any other business”<sup>11</sup>. The European Parliament had already stressed, “the paramount importance of safeguarding workers’ rights in the collaborative services – first and foremost the right of workers to organise, the right of collective bargaining and action, in line with national law and practice,”<sup>12</sup> but the affirmation has now become of increased importance and the competence of the European Union contained in Article 153.1.f of the TFEU could be called to the stage for its long-awaited debut on the European scene.

This opens a new scenario for the future, in which the interpretation of the *Albany*<sup>13</sup> judgment and its continuators could in fact be exactly the opposite of what it has been governing for years. It is time to dust off Paragraph 60 and give it a contemporary reading adapted to these new realities:

“It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101](1) of the Treaty.”

<sup>10</sup> C-434/15 Asociación Profesional Elite Taxi v. Uber Systems Spain SL [ECLI:EU:C:2017:981]. About this important decision, Yolanda MANEIRO VÁZQUEZ: La jurisprudencia del Tribunal de Justicia en materia de economía de plataformas: a propósito de Uber. *Revista Galega de Dereito Social*, no. 9, 2019.

<sup>11</sup> *Financial Times*, 26 October 2019, <https://www.ft.com/content/0cafd442-f673-11e9-9ef3-eca8fc8f2d65>.

<sup>12</sup> European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy [2017/2003(INI)].

<sup>13</sup> C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [ECLI:EU:C:1999:430].

Another possible source of supranational regulation would be the Council of Europe, on the basis of the European Social Charter<sup>14</sup>. The platform economy is beginning to form part of its concerns, as evidenced by the draft report “The societal impact of the platform economy”<sup>15</sup>. While the contents of the report are not particularly innovative and do not address collective aspects, it implies a first step, and the Council has other possible avenues of expression.

Indeed, in a recent complaint brought before the European Committee of Social Rights, *Irish Congress of Trade Unions v. Ireland*<sup>16</sup>, it was discussed whether self-employed workers should have the right to bargain collectively through organizations that represent them. The basis for the complaint was that when labour providers do not have a substantial influence on the content of the contractual conditions, they should be given the possibility of improving the power imbalance through collective bargaining. The final decision established that there was no violation of the Charter. In the dissenting opinion, however, signed by Professor Kresal, it was argued that the State must promote collective bargaining for all categories of workers. It thus remains to be seen what progression future complaints will follow, whether adhering to the majority opinion or changing the criteria and following the dissenting vote, in a contemporary imitation of Wendell-Holmes.

Finally, the work of the ILO cannot be disregarded. In its report “Digital labour platforms and the future of work – towards decent work in the online world,” the Organization has indicated that one of the 18 criteria that must ensure the characterization of decent work in the framework of platforms is freedom of association of its workers and the right to collective bargaining. The same text points to codes of conduct in the absence of collective agreements, a course of action that, as will be seen later, is already being implemented in some countries.

Whatever the supranational source from which hypothetical regulation may come, it must contain a series of challenges that boil down to two alternatives: to make the platform economy fit into traditional formulas or to seek a new approach. The voices that have manifested in the second way are not few, pointing out that the platforms should even be considered a separate sector due to their particularities. There the hypothesis, “an agreement for those employees whose work conditions and type of work are similar to each other,” could have a place. The identification of the ‘similarity link’ is one of the possibilities that would open if this new avenue were to be explored. In other words, how homogeneous does the group of employees have to be and who would be their counterparty in the negotiation? The algorithm?

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<sup>14</sup> About this instrument, María del Carmen SALCEDO BELTRÁN: Sinergias entre la OIT y los instrumentos internacionales de protección de los derechos sociales: estado actual y perspectivas. *Revista de Trabajo y Seguridad Social*, no. 434, 153–188.

<sup>15</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28128&lang=en>

<sup>16</sup> No. 123/2016.

## 2. Traditional Actors Facing the Platform Economy

In this context, the subjects implanted in the different national labour markets have been subjected to a curious initial paradox. On the one hand, *they were already there*. Its organizational structures should have functioned as a first dam against the overflow of labour law channels. On the other hand, these same organizational structures have revealed themselves as one of the main obstacles when responding to the traditional models of structuring labour relations. As noted, “the trade union and its typical action don’t seem to be in question, but the kind of trade unions that manage the disputes already occurring in the digital economy.”<sup>17</sup>

Despite this paradox, trade unions and business associations have shown that they are able to react to these new situations. The European Trade Union Confederation, for example, has launched a European Observatory on the Platform Economy<sup>18</sup> focused on identifying all useful experiences in this regard and promoting the exchange of best practices.

The first movements have been geared towards ensuring representation of platform workers. Paraphrasing the riotous Americans, *no negotiation without representation!* It seems clear that it is necessary to secure a certain implementation that can be translated into representation if one wishes to work “from within” in the field of platforms. At a minimum, the objective must be to offer these workers a reference for the knowledge and defence of their rights.

The French case, in turn, is quite remarkable. In 2016, the Labour Code was amended by the law of August 8<sup>th</sup> of that year to incorporate, with the usual lightness of the Gallic text, a new Title IV of Book III of Part Seven, dedicated to “Workers using an electronic platform.”<sup>19</sup> The great feature is that the provisions of this Title affect self-employed workers, to whom the labour regulation is partially extended under the designation of “social responsibility.”

Its Chapter II, dealing with platforms’ social responsibility, includes article L. 7342-6, establishing that “the workers referred to in Article L. 7341-1 shall enjoy the right to form and join a trade union organisation and to assert through it their collective interests”<sup>20</sup>. This last indication may point to the possibility of collective bargaining, but has not yet been implemented.<sup>21</sup>

<sup>17</sup> Patricia NIETO ROJAS: Acción colectiva en las plataformas digitales. ¿Sindicatos tradicionales y movimientos de base para representar idénticos intereses? In: AA.VV.: *El futuro del trabajo: Cien años de la OIT - XXIX Congreso Anual de la Asociación Española de Derecho del Trabajo y de la Seguridad Social*. Madrid, Ministerio de Trabajo, Migraciones y Seguridad Social, 2019. 1525.

<sup>18</sup> [www.digitalplatformobservatory.org](http://www.digitalplatformobservatory.org) .

<sup>19</sup> “Travailleurs utilisant une plateforme de mise en relation par voie électronique.”

<sup>20</sup> “les travailleurs mentionnés à l’article L. 7341-1 bénéficient du droit de constituer une organisation syndicale, d’y adhérer et de faire valoir par son intermédiaire leurs intérêts collectifs”

<sup>21</sup> For a critical assessment, Marie Cécile ESCANDE-VARNIOL: The Legal Framework for Digital Platform Work: the French Experience. In: AA.VV.: *Law and the “Sharing Economy”. Regulating Online Market Platforms*. Ottawa, University of Ottawa Press, 2018. 344.: “This recent reform gives raise to two observations. On the one hand, the workers concerned are excluded from the application of the *Code du Travail*, which can only be seen as regrettable. On the other, platforms that until very recently operated entirely outside the realm of labour law are now starting to bear some obligations. As the *Projet pour un autre Code du travail* suggests, however, a solution that would offer more protection might have included these digital workers within an expanded definition of the employment contract”.



The *Union des auto-entrepreneurs et des travailleurs indépendants* existed prior to this regulation, but it has never been considered a trade union nor has it had especially prominent activity in terms of the platform economy. Conversely, the UNSA transport sector union, which does not have the status of most being representative at the intersectoral level, was the first to create its own organization called SCP/VTC UNSA. It initially integrated drivers, both taxi drivers and those working under the direction of Uber or other platforms, subsequently increasing its scope. The intersectoral unions soon followed suit and *Force Ouvrière* created FO-CAPA VTC in 2017, incorporating an association of self-employed workers from the taxi sector, thus taking the step from association movement to trade union.

In the case of Belgium, given the curious scenario of abundance of platforms and a lack of regulation or case law, since June 2019 one of the main traditional trade unions, the *Confédération des Syndicats Chrétiens* has begun to affiliate self-employed workers, after several years of discussion among its members. They include people in the platform economy field, but are not the only objective. Moreover, as an example of an extreme measure taken against the workers' organization, Deliveroo Belgium moved its call centre to Madagascar.

In the Netherlands, a *Riders' Union* was created for Deliveroo delivery people, with the support of the traditional FNV<sup>22</sup>. Given that Dutch law defines a trade union as a workers' organization, it is again faced with the circular problem so frequent in numerous European States. It is a curious paradox in one of the few countries that allowed mixed collective bargaining, punished by the *FNV Kunsten* judgment mentioned above. The parent union, in any case, has pressed for collective agreements in force to be applied to platform workers.

The German trade unions, for their part, launched online information campaigns<sup>23</sup> in the services sector, or the Facebook specific profile of the NGG union, of the food sector, aimed at delivery people under the name of "*liefern am Limit*." In the latter case, company committees were established in Cologne and Münster. Although collective agreements have not been concluded because of the restrictive nature of their legislation, they have implemented numerous innovative initiatives in the area of collective bargaining, which will be discussed later. Finally, an exceptionally striking case in Germany is the Delivery Hero platform, which became a European Society, constituting its transnational workers' representation body.

Leaving aside the numerous problems that the articulation of representation of this type of worker poses in accordance with Spanish legislation<sup>24</sup>, it is interesting to highlight the websites maintained by the main trade unions<sup>25</sup>. They are, to some extent, the first attempt to *fight the enemy* with their

<sup>22</sup> <https://www.ridersunion.nl/>

<sup>23</sup> Such as <https://www.ich-bin-mehr-wert.de> from Ver.di

<sup>24</sup> Lidia GIL OTERO: Plataformas digitales y la dimensión colectiva de la presunta relación laboral. In: AA.VV.: *El futuro del trabajo: Cien años de la OIT – XXIX Congreso Anual de la Asociación Española de Derecho del Trabajo y de la Seguridad Social*. Madrid, Ministerio de Trabajo, Migraciones y Seguridad Social, 2019. 1373 y ss.

<sup>25</sup> <https://www.turespuestasindical.es/>, by UGT, and <https://precaritywar.es/>, by CCOO.

own weapons. In a world of apps and websites, traditional unions have sought to take a step towards the idea of the *smart trade union*. From a more traditional point of view, the creation of a trade union section of CNT Madrid in Deliveroo must also be highlighted. In any case, keep in mind that Spanish trade union legislation seems to be better prepared to deal with the platform economy with traditional tools than that of other countries in the field of union membership. Article 3.1 of the Act on Trade Union Freedom of Association would serve to cover the affiliation of platform workers without any problem, prior to discussing their exact legal status.

Looking to the national level regarding collective bargaining experiences, an early example comes from Austria. In March of 2017, the delivery people of the company Foodora, under the aforementioned Delivery Hero, formed a works council in Vienna with the idea of negotiating an agreement on their working conditions<sup>26</sup>. This committee, however, represents only those who have the recognized status of employee, a group that accounts for a mere third of the workforce. The negotiation does not seem to have been fruitful thus far.

The situation in Italy is also of great interest, since there have been episodes at two very different levels. Initially, on July 18, 2018, it was agreed between the employers AGCI Servizi, Confcooperative Lavoro e Servizi and Legacoop Produzione e Servizi, and the Filt-Cgil, Fit-Cisl, Uiltrasporti trade unions to incorporate delivery people into the national collective agreement in the logistics sector. The agreement made specific mention to platform workers<sup>27</sup>. Thanks to this agreement, they were included in its scope, with a catalogue of specific rights<sup>28</sup>.

Among the related contents were remuneration, work schedules, part-time work, training, personal protection equipment and third-party liability insurance. The agreement concluded with a reference to second level contracting as the appropriate area for development, and incorporating in specific areas for extension.

The second scenario in Italy presents added value, since it is a collective agreement negotiated by traditional trade unions with a digital platform, putting into practice what was discussed. The agreement of May 8, 2019 was signed by the organizations Filt Cgil, Fit Cisl and Uiltrasporti, for the social part, with the company Laconsegna Srl, based in Florence. Under this agreement, the delivery people are recognized by the company as salaried workers and are subject to the national collective agreement in the logistics sector.

For its part, the United Kingdom is the EU Member State where the platform economy has been most implemented. The linguistic factor gives *crowdworking* a special power, allowing a production decentralization online to other continents that is without comparison. Regarding the specific case

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<sup>26</sup> <https://effat.org/featured/se-works-council-agreement-signed-at-delivery-hero/>

<sup>27</sup> “anche attraverso l'utilizzo di tecnologie innovative (piattaforme, palmari, ecc...)”: Also through the use of innovative technologies (platforms, laptops, etc)

<sup>28</sup> A sociological analysis in Sergio BOLOGNA – Sergio CURI: Relazioni industriali e servizi di logistica: uno studio preliminare. *Giornale di diritto del lavoro e di relazioni industriali*, vol. 41., no. 1. (2019) 161.



of Deliveroo, the traditional trade unions are trying to organize the workers, but for this to occur a previous declaration of their condition as salaried is necessary, which is not easy. The GMB union, meanwhile, has been able to enter into a voluntary access collective agreement with the distribution company Hermes. Under this agreement, self-employed delivery people working under the direction of Hermes may voluntarily join the classification of “self-employed plus.” This situation will entitle them, among other benefits, to paid vacations, negotiation of hourly earnings and union representation.

In the case of Denmark, the star example is the company agreement of Hilfr.dk<sup>29</sup>, a intermediary platform for services in the home, concluded with the 3F union, which was the largest in the entire Scandinavian country according to its own definition. Under that agreement, the personnel made available by Hilfr can be self-employed or salaried workers. In the second case, the difference is the establishment of a minimum hourly wage,<sup>30</sup> vacation pay, and sickness and retirement coverage. Interestingly, in all cases, both the client and Hilfr are covered by private insurance.

In the Spanish case, the most prominent element is, without a doubt, the current wording of Article 4 of the V State Labor Agreement for the hospitality sector<sup>31</sup>, which, after its 2019 modification, establishes that its functional scope is as follows:

“Also to be included is the delivery service of elaborated or prepared foods and beverages, on foot or in any type of vehicle that does not require administrative authorization established by transport regulations, as provision of the establishment’s own service or on behalf of another company, including digital platforms or through them.”

To some extent, it can be said that this is a *second-degree* solution. The social partners cannot provide input on the condition of being salaried, or not, of those in the service of the platforms. However, once that declaration has been made, the collective agreement will absorb these people. Note the duality of the writing, which produces an expansionary effect by including the platforms or the services provided through them.

Can the agreement carry out this extension of its subjective scope? Certainly the decision can be described at first sight as *negotiating imperialism*. It is not difficult to assume that the Spanish Confederation of Hotels and Tourist Accommodations and the Spanish Hospitality Federation do not include among its members non-hotel international capital platforms such as Glovo or Deliveroo. On the social side, there is the Federation of Services for Mobility and Consumption of UGT and the Federation of Services for Workers’ Commissions (CCOO). In principle, none of this would hinder the recognition of overall effectiveness.

<sup>29</sup> <https://hilfr.dk/en/about-super-hilfrs>

<sup>30</sup> 141.21 DKK per hour, the equivalent of about 19 euros, which can be increased by the worker of his or her own accord.

<sup>31</sup> [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2019-4645](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-4645)

The obvious obstacle posed by the application of these clauses affects representativeness on the platforms of the negotiating subjects, hence it is not ruled out that this situation would lead to a challenge of the agreement by the platforms, claiming that their business activity is not part of the bargaining unit. The challenge would be aimed at demonstrating the lack of homogeneity in this bargaining unit that allows “establishing a uniform regulation of working conditions, which forces it to be defined in accordance with objective criteria that allows establishing, with clarity and stability, the set of labour relations regulated by the agreement and its correspondence with the levels of stability required.”<sup>32</sup>

There is also in the national experience some other collective product that aims to regulate the working conditions of the service providers of the Deliveroo platform, formally registered as economically dependent autonomous workers, through two professional interest agreements: the first signed with the association Asoriders<sup>33</sup>, and the second, much more recent, signed with the Asociación Autónoma de Riders<sup>34</sup>.

From these international experiences, which continue to grow day by day, some conclusions can be drawn. In countries where collective bargaining is strictly legislated, traditional trade unions are the only ones that will be able to negotiate collective agreements, unless there is serious legislative change, which is unlikely at the moment. Reality is showing that the level conducive to it, within the use of classic tools, is the sector as a general rule, with a centripetal force that leads to the integration of new forms of work into existing categories, compared to what was initially thought. This situation is not surprising. The sector agreement is the area where the monopoly of representation of the trade unions is most powerful and thus the battlefield in which they must choose to introduce combat. The platforms' evasion of being classified as employers also results in their social desertion of the role of negotiating counterparty, which makes it difficult for the collective bargaining agreement to bear fruit, except in very specific cases.

### 3. New Collective Actors in the Platform Economy

Incidentally, emerging realities have ushered in emerging subjects. It is here that the difference between offline and online work is revealed again. Delivery people or drivers, in taking the best-known examples, can be seen physically, and from community and coexistence organization is born. Representation structures that parallel the traditional ones are arising in many countries. They may pose a serious risk of competition to be the voice of workers with traditional trade unions

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<sup>32</sup> Judgment no. 139/2015 of the National Court of 11 September 2015 [ECLI:ES:AN:2015:3272].

<sup>33</sup> <https://www.asoriders.es/2018/07/15/acuerdo-de-interes-profesional-con-deliveroo/>

<sup>34</sup> <https://autoriders.es/a-i-p/>

Various factors can explain this situation. First, there are organizational difficulties derived from the limited stay of people in the company, which makes traditional representation structures unfeasible. It is easier for an electronic identity to last than the person who created it, in the manner of Pirate Roberts. The ease of the platforms to remove people in a discretionary way contributes to this, without the identification yet occurring between such disconnections and anti-union behaviours, in the case of activists. That said, it is proven that there is a definite distrust from workers towards the unions on the suspicion that they intend to appropriate the conflict, whether or not this fear is justified.

Apart from that, it cannot be overlooked that the mentality and structure on the business side are also novel. First, because it is easy to notice that the platforms evade the classification of employer and do not want to assume the role of negotiating subject. Companies that can respond to the initial idyllic notion of ‘sharing economy’ and that are usually presented as cooperatives do not need collective bargaining.

As noted, in most of the countries where digital platforms arise, new movements of workers’ organization are emerging and also new forms of expression of collective disputes<sup>35</sup>. The emergence of these movements in a context where organization by the workers and their resistance activity have the advantage of using telecommunication makes understanding the phenomenon more complex since there are several actors who seek to capitalize on this<sup>36</sup>.

In Germany, an anarchist-oriented labour union, *Freie ArbeiterInnen Union (FAU)*, has gained prominence, organizing a demonstration in Berlin in 2017. More recently, a *flashmob* organized by the NGG union (the food and catering branch, member of the traditional *Deutscher Gewerkschaftsbund*) took place in Cologne in 2018.

The Belgian case is also notable, since it was a commitment to self-organization in cooperatives of delivery people<sup>37</sup>. Before 2018, a large part of Deliveroo’s delivery people were “employees” of a cooperative, SMart, a very particular company that specialized in guaranteeing the rights and working conditions of self-employed workers (initially, only artists), and offering its members employment contracts. For more than two years, the delivery people were in fact employees of SMart, and SMart billed the cost of delivery to Deliveroo. SMart had used its unique situation to ask for the respect of a series of basic labor rights: a minimum wage, ample insurance, a minimum working time, etc. The doctrinal reception of this approach varied. From the legal point of view, some criticized the experimental nature of this solution. Others celebrated the creativity of a solution that allowed, for a limited time, the application of labor laws.

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<sup>35</sup> Vanesa CORDERO GORDILLO: La huelga y otras medidas de acción colectiva en el ámbito de las plataformas digitales. In: AA.VV: *El futuro del trabajo: Cien años de la OIT – XXIX Congreso Anual de la Asociación Española de Derecho del Trabajo y de la Seguridad Social*. Madrid, Ministerio de Trabajo, Migraciones y Seguridad Social, 2019.

<sup>36</sup> Francisco TRILLO PÁRRAGA: Economía digitalizada y relaciones de trabajo. *Revista de Derecho Social*, no. 76., 2016. 80.

<sup>37</sup> [https://smartbe.be/wp-content/uploads/2018/07/06-2018-deliveroo\\_final.pdf](https://smartbe.be/wp-content/uploads/2018/07/06-2018-deliveroo_final.pdf)

In Italy, within the context that gave rise to the Charter that will be examined later on, the Riders' Union Bologna<sup>38</sup> emerged, organizing protest measures differently from the usual efforts. Among them, it is worth mentioning a procession of cyclists responding to the cessation of the service provision, where there was special care paid to maintaining the anonymity of the protest leaders.

The legislative vicissitudes described above have prevented the implementation of the Charters from becoming a reality in France. However, it is possible to speculate on its meaning within the framework of the subject it occupies. The texts of the Charters can be negotiated by the platforms with workers' representatives, which generally respond to the new models and not to that of the classic trade union. The legal value of this negotiation, however, will be non-existent, since the representation requirements that lead to the approval of a collective agreement are not met. There may therefore be negotiation, but outside the framework of the law.

In Spain, the organization *Riders X Derechos*<sup>39</sup> is well known. It defines itself as a 'platform,' which may seem paradoxical. Apart from the assessment of its important current work, if it were constituted as a collective subject, protected by Article 22 of the Spanish Constitution, there would be no obstacle to recognizing its ability to negotiate an extra-statutory collective agreement as an expression of Article 37.1 of the Spanish Constitution<sup>40</sup>. Another form of expression of collective autonomy would be possible through the *Intersindical Alternativa de Catalunya*, to which they are linked. This situation is not optimal and would in any case require considerable pressure on the platforms involved to agree to negotiate various company agreements with this regime. The content, of course, should respect the rules established by the Supreme Court on matters prohibited in this instrument. Prohibition would not reach, however, "the regulation of the salary structure and the salary tables, nor to the regulation of labour peace," central themes in the concerns of this type of worker.

Faced with these scenarios where the provision of work and the externalization of the conflict it entails can be easily visible—the obscurity of online work allows it to be easily described as the *far side of the Moon*. The level of structural difficulty is the perception of who makes up the workforce, and the determination of the group that needs representation. Hence, in this area, tools for community creation have emerged in advance of the mechanisms described for offline workers.

The best-known example of *crowdworking* is perhaps the aforementioned Amazon Mechanical Turk. This already presents in its designation a remarkable ambiguity, since the original Turk was celebrated as the first automaton, but in reality it hid tiny people inside. This minimization of the human was combatted through external IT tools. It is in fact very appropriate that the preeminent position of the app was attacked through another computer program. Connectivity brings collectivity.

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<sup>38</sup> <https://www.facebook.com/ridersunionbologna/>

<sup>39</sup> <https://www.facebook.com/ridersxderechos/>

<sup>40</sup> JAVIER GÁRATE CASTRO: *Lecturas sobre el derecho a la negociación colectiva laboral*. Madrid, Cinca, 2019. 47.

The Turkopticon<sup>41</sup>, already in its version 2.0, was created jointly by the university world and the trade union world to allow workers to advertise and evaluate their employers and get in touch with each other. It is not, properly, a tool of representation for workers, and lacks any union content, but it is an interesting precedent for how new technologies can positively influence the protection of workers' rights. On the same platform, Turker Nation appeared as an online forum where workers could contact each other. Some authors have seen it as the foundation on which future digital work centres can be built<sup>42</sup>.

Furthermore, the use of social networks in these areas is striking, since, in a way, it seems to return to the origins of the labour movement. Tools like Twitter have turned out to be virtual meeting places between disorganized workers, with pseudonyms to guarantee the anonymity of activists, infiltrations by employers, dissemination to try to get the attention of users and raise awareness of the problems, etc. These are all issues that would not have been foreign to the Spanish Social Reform Commission of 1883, one of the milestones in the birth of Labour Law<sup>43</sup>.

#### 4. The Collective Bargaining Environment

Beyond these realities, a curious phenomenon can be observed in several countries, which is the appearance of documents or institutions in the realm of the platform economy that seek to influence it. In none of the cases are they collective bargaining instruments, but because of their originality, in search of a third way that is championed by some, they deserve to be examined.

The first position among these documents is claimed by the Bologna Charter, or, by its own designation, the “*Carta dei diritti fondamentali dei lavoratori digitali nel contesto urbano*,” approved by the City Council of the Italian city in May of 2018 and that has no effective legal value. It consists of twelve articles that are intended to promote safe and dignified employment, but at the same time is compatible with the adaptability of the digital labour market, guaranteeing the improvement of the living and working conditions of service providers.

The Charter opts for a pragmatic approach by proclaiming such rights regardless of the job classification of service providers. Articles 9 and 10 reflect the contents closely related to the collective dimension that is being presented here. First, freedom of union organization is guaranteed for all of them, both in adhesion and constitution. The right to assembly is proclaimed and, finally, the right to

<sup>41</sup> The best description by its own creators, Lilly C IRANI – M. SIX SILBERMAN: *Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk or Stories We Tell About Labor: Turkopticon and the Trouble with “Design”*, available online.

<sup>42</sup> Kathryn ZYSKOWSKI – Kristy MILLAND: A Crowded Future: Working against Abstraction on Turker Nation. *Catalyst: Feminism, Theory, Technoscience*, vol. 4., no. 2 (2018): “We argue that workers’ labor belies conventional class classification, such as white-collar and blue-collar labor, and instead lays the groundwork for how to structure future digital workplaces”.

<sup>43</sup> Juan José GONZÁLEZ SÁNCHEZ: La Comisión de Reformas Sociales (1883-1903). In: AA.VV.: *Segismundo Moret Presidente del Consejo de Ministros de España: cuestión social y liberalismo*. Madrid, Cinca, 2016.

collectively refrain from work for a common purpose is recognized. As can be seen, representation and disputes are present in the Charter, but there is no mention of collective bargaining. Perhaps the authors of the text understood that it was to go *ultra vires* in excess by proclaiming a mixed negotiation that does not exist in Italian legislation. It must be taken into account that it also omits the word ‘strike’ and opts for a euphemism that encompasses both categories.

In any case, by recognizing the two essential tools for negotiation, the identification of active subjects and the acceptance of pressure measures, the Bologna Charter is creating the right environment for a collective bargaining process to develop as corollary of that recognition. It is true, though, that Article 4 establishes as reference the sector collective agreements signed by the most representative trade union organizations. This fits perfectly with the business practice described above in Italy. However, it must be taken into account that the sensation perceived by the workers’ representatives is that of a complete lack of interest on the part of the platforms to address any negotiation.

The case of the Charter in France has reached controversial levels that have not been seen since the Chateaubriand booklet of 1814. Initially, the law on freedom of choice of the future professional was intended to be regulated in Article 66, introducing during its processing the possibility of digital platforms establishing a Charter that determines the conditions and modalities of exercising their social responsibility towards their workers, in development of the aforementioned article L. 7342-1 of the *Code du Travail*<sup>44</sup>. During the prior checking of the constitutionality of said law, the Constitutional Council considered that there was a procedural flaw in its processing and annulled the article without analysing the substance of the matter.

The article reappeared in the draft law on mobility orientation, in Article 20, incorporating exactly the same deleted text, which consisted of a minimum catalogue of rights that should appear in the hypothetical Charters, which, in any case, maintained their unilateral nature. The Senate, with a political composition contrary to President Macron, abolished said provision during its processing. The National Assembly, in the process of its first reading, reintroduced the provisions in June 2019 in the midst of clear union unrest. It should not be forgotten that French legislation allows the repeal *in peius* of certain legal norms on behalf of collective agreements. The response of the Senate, on November 5<sup>th</sup>, was the rejection of the law, signifying that this French avenue has had, for now, the same success as the Charter of Louis XVIII.

Germany provides several examples in this catalogue of related performances, which have an added interest that involves an incursion into the obscure realm of *crowdworking*. First, there is the Code of Conduct “Paid Crowdsourcing for the Better,” signed by several companies in the sector, where a unilateral commitment is proclaimed on their part to respect and guarantee a Decalogue of rights. It does not contain any mention of collective bargaining, but its contents approximate in a very important

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<sup>44</sup> « Lorsque la plateforme détermine les caractéristiques de la prestation de service fournie ou du bien vendu et fixe son prix, elle a, à l’égard des travailleurs concernés, une responsabilité sociale qui s’exerce dans les conditions prévues au présent chapitre ».



way those that could be subject to it at a more advanced stage. Its most prominent result is the creation of a voluntary conflict resolution mechanism of its own, managed by the IG-Metall union<sup>45</sup>. It only addresses individual conflicts, but to some extent it resembles to some extent very prominent outcomes of collective bargaining like these types of procedures.

Also important is the *Frankfurt Paper on Platform-Based Work*<sup>46</sup>, signed by seven trade union organizations from Austria, Germany, Denmark, Sweden and the United States, with a very considerable technical team of advisors. Among the essential points that it enumerates is first to respect the relevant collective agreements, but that, in a much more prominent way, it is necessary to insist on the right of workers to organize.

A consequence of that right is the ability to negotiate and the declaration that platform operators are appropriate interlocutors to enter into negotiations is particularly relevant. On the other hand, the indication that in some cases customers could also be interlocutors is striking. Another of the statements, at the time, was a real challenge to European competition law: “Laws that prohibit platform-based workers classified as independent contractors from organizing and negotiating collective agreements with platform operators should therefore be reassessed.” Nothing was followed at the time, but if the prior cited statements of Commissioner Vestager are revived, one must begin to consider a future of mixed collective bargaining.

The result of this document is a very prominent online initiative, the [faircrowd.work](https://www.faircrowd.work) platform, promoted by the German union IG-Metall together with the Austrian and Swedish signatories. In addition to serving as an information centre on trade union initiatives in the field of *crowdworking*, the platform contains an evaluation of different digital operators from a point of view that could be considered, in part, social<sup>47</sup>. Collective aspects are not contemplated, but a first step towards achieving social distinctions has already been taken.

The platform prepared by the Oxford Internet Institute, [fair.work](https://www.fair.work), goes further in this regard. In its evaluation of different platforms, one of the five aspects that it contemplates is the assessment of the representation of workers. This is once again a first step, but it is in the right direction, since that representation has to serve a purpose: “Irrespective of their employment classification, workers should have the right to organise in collective bodies, and platforms should be prepared to cooperate and negotiate with them.” The initiative, in any case, is still limited to South Africa and some regions of India. At a time when reputation means more than honour for Pedro Crespo in Calderón de la Barca’s classical play, tools such as those described may be essential as a means of pressure that lead to collective bargaining.

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<sup>45</sup> <https://ombudsstelle.crowdwork-igmetall.de/en.html>

<sup>46</sup> [http://crowdwork-igmetall.de/Frankfurt\\_Paper\\_on\\_Platform\\_Based\\_Work\\_EN.pdf](http://crowdwork-igmetall.de/Frankfurt_Paper_on_Platform_Based_Work_EN.pdf)

<sup>47</sup> <http://faircrowd.work/.platform-reviews/platform-review-information/>

## 5. Future Challenges

There is no doubt that collective actors have to adapt to changes so as not to be surpassed by them. The traditional role of trade unions should integrate new tasks such as promoting debate, raising awareness, creating states of opinion, etc. Looking to the future, two scenarios seem viable. First, there is the maintenance of current systems, which will depend greatly on the legal classification of platform workers. In that scenario, the dilemma between the company agreement and the sector agreement as regulatory sources truly responds to the strength of the negotiating agents. The first option gives the advantage to the platforms, the second to the unions. Notice how the role of employers' organizations is the opaquest of all in this future, because it no longer responds to a *class conflict*, but *of interests*.

The second scenario involves a revolution at the hands of European Union competition law, with the emergence of mixed collective bargaining forms that cover all people in the field of platforms. There is the Dutch precedent, which was questioned by the European Union itself. The hand that wielded the sword may be the one that helps to lift the fallen.