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Collective Bargaining for Platform Workers: Who does the Bargaining and What are the Issues in Collective Agreements

María Luz Rodríguez Fernández *

Abstract

This article analyzes the right to collective bargaining of platform workers. While access to this right is guaranteed for platform workers who are classified as employees, such access is more debatable for self-employed platform workers. The article, therefore, analyzes ILO standards, CJEU judgments, and European Commission proposals that could underpin access to the right to collective bargaining for those who are genuinely self-employed. It also analyzes the differences in collective bargaining between workers on location-based platforms and those on online platforms, highlighting the difficulty of collective bargaining in the latter. Finally, the article analyzes the main issues of seven collective agreements for platform workers, from which the following conclusions are drawn: i) most agreements are negotiated at the company rather than the sector level; ii) most focus on guaranteeing a minimum wage and maximum working time, but they do not deal with algorithmic decisions or rankings; iii) all are negotiated by traditional unions, and iv) all of these agreements are related to location-based platforms.

Keywords: Collective Bargaining, Platform Work, Self-Employed

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1. Diversity as a Hallmark of Platform Work

While the phenomenon of platform work is recent, there is already a considerable amount of literature covering its most notable characteristics[1]. And to study the collective bargaining practices that can be applied to or for this business model, perhaps the most important of those characteristics is that it is a multiform business phenomenon. Some platforms must have their workers located in a certain area or territory to provide a particular service (courier, transport, caregiving). However, there are others whose workers provide their services online (consulting, software design, revising images for social networks), working most of the time on a computer in their own homes (where telework and platform work "shake hands"). This is how we differentiate between gig work and cloud work[2]. The former is a visible and locatable workforce; the latter is an invisible workforce, dispersed around the world. As a result, collective bargaining in the platform economy cannot be analyzed or be implemented, if applicable, according to a single paradigm, because these differences regarding platform workers mean that the same answers cannot be given to the same questions, such as who can negotiate a collective bargaining agreement, what is the scope of that agreement or even what law applies to the collective bargaining and the result of that bargaining.

A second characteristic that should be highlighted is that there are no official statistics about work in the platform economy. This notably hinders our ability to measure it and learn about the profiles of the persons who work in it. However, there are published reports that allow us to approximate the size of the phenomenon to a certain degree. Within the EU, the second COLLEEM Survey[3] estimates that 11% of people have worked at one time or another in the platform economy. The intensity of this work is vastly different according to the number of hours engaged in a job and the income that is earned. Only 1.4% of the European population work at their main job through a platform. For the majority (4.1%), such work is related to a second or marginal job.

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[1] Digital Future Society, "Digital platform work in Spain: what do we know? A literature review", (2020), https://digitalfuturesociety.com/report/digital-platform-work-in-spain-what-do-we-know/ (Accessed on 19 March 2022).

[2] Florian A. Schmidt, "Digital Labor Markets in the Platform Economy," (2017), https://library.fes.de/pdf-files/wiso/13164.pdf (Accessed on 19 March 2022).

[3] Cesira Urzí Brancati, Annarosa Pesole and Enrique Fernández-Macías, *New evidence on platform workers in Europe. Results from the second COLLEEM survey* (Luxembourg: Publication Office of the European Union, 2020), 14-16.

Therefore, what we have is a reduced number of workers for whom the platform economy represents a supplementary source of income[4]. Globally, the (meta) data indicate that between 0.3% and 22% of the adult population of working age work on digital platforms[5]. For 30% of these people, platform (online) work is their main source of income[6], from which we can deduce that for the majority globally, as in the EU, this kind of work is a secondary source of income.
Beyond that, within this set for platform workers, there is scarcely any homogeneity. For example, when asked about the reasons for working in the platform economy, those who work on online platforms claim that they want to supplement their income, while those who work on location-based platforms do so mainly because of a lack of alternative employment[7]. There are also notable differences regarding the level of education. While it is true that the level of education of platform workers tends to be higher than that of workers who do not work on platforms[8], among platform workers, over 60% of those who work online are highly educated, but only 21-24% of those who work on app-based delivery or transport platforms have that same level of education[9]. There are differences related to the work they perform, from developing a computer program to making home food deliveries on a bicycle, related to the wage they receive· and even related to how they perceive their job as an employee or as a self-employed worker[10]. Such differences consequently create a heterogeneous set of persons among platform workers, whose interests are also heterogeneous, thereby making it difficult to find a

[4] Ursula Huws et al., "Work in the European Gig Economy. Research results from the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy", (2017): 22, https://uhra.herts.ac.uk/bitstream/handle/2299/19922/Huws_U._Spencer_N.H._Syrdal_D.S._Holt_K._2017_.pdf (Accessed on 19 March 2022).

[5] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 49.

[6] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 154.

[7] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 143-145.

[8] Janine Berg et al., *Digital labor platforms and the future of work. Towards decent work in the online world* (Geneva: ILO, 2018), 36.

[9] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 141.

[10] Ursula Huws et al., "Work in the European Gig Economy. Research results from the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy", (2017): 39, https://uhra.herts.ac.uk/bitstream/handle/2299/19922/Huws_U._Spencer_N.H._Syrdal_D.S._Holt_K._2017_.pdf (Accessed on 19 March 2022).

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common nexus – beyond the obvious fact that they all work in the platform economy – and making it difficult to affirm (or not) their right to collective bargaining.

In any event, there does seem to be at least one element that is common to them all: the labor and social protection they enjoy is, as a general rule, weaker than that which is enjoyed by workers who do not work on platforms. The works of Berg et al.[11] and the ILO[12] show that the wages of these workers and their working time are worse than those who do not work on platforms, among other reasons because they spend a considerable amount of time waiting to access a job on the platform, or they have to pay fees to be able to access work on the platform or because their working time on the platform is added to their working time at their main occupation. On their behalf, the EU-OSHA[13] has warned of the risks to the health and safety of platform workers, who are not necessarily covered by suitable protective measures, especially because many of them do not have health or accident insurance. Finally, the work by Spasova et al.[14] shows that the social protection for these workers is much less intense than that of those who do not work on platforms, especially regarding unemployment protection. There are many distinct reasons for all of this, some derived from the characteristics of platform work, but mainly because the majority of people who work on platforms do so as self-employed workers, whether genuine or false self-employed[15].

2. Formulas for Alleviating the Weakness of Labor and Social Protection for Platform Workers

Due to the aforementioned situation, there are three tested formulas for improving the labor and social protection of platform workers. The first is

[11] Janine Berg et al., *Digital labor platforms and the future of work. Towards decent work in the online world* (Geneva: ILO, 2018), 50-67.

[12] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 154-156, 166.

[13] EU-OSHA, "Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU", (2017): 25, https://osha.europa.eu/en/publications/protecting-workers-online-platform-economy-overview-regulatory-and-policy-developments-eu/view (Accessed on 19 March 2022).

[14] Slavina Spasova et al., *Access to social protection for people working on non-standard contracts and as self-employed in Europe* (Brussels: European Commission, 2017), 41-47.

[15] María Luz Rodríguez Fernández, "Protección social para los trabajadores de la economía de plataforma: propuestas para aliviar su vulnerabilidad", *Revista de Derecho de la Seguridad Social* 57 (2020): 177.

to deny the self-employed nature of this kind of work, the second is to create specific legal figures according to which these workers can be legally classified and the third is to expand the rights of employed workers to self-employed workers[16].

It is well known that, from the very beginning, platform work has been followed by controversy around the world, mainly related to i) refuting that this is genuine self-employed work and ii) showing that the particular characteristics of an employment contract are present. The judgments handed down in this regard have not necessarily followed the same criterion. Today, court decisions that declare the genuine existence of self-employed work coexist with those that declare the existence of an employment contract between the worker and the platform (with the latter gaining the majority). This judicial dynamic and the union mobilization that has most often been behind it[17] have subsequently been placed on the legislative agenda, and in certain countries, laws that presume the existence of employment contracts have been enacted, thereby deeming that platform workers are, at least initially, employees. This was the case of the law enacted in the State of California, known as AB25[18]; the case in Spain with the approval of Law 12/2021[19]; and the case of the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, published on 9 December 2021[20].

Spain has also been one of the pioneering countries to create intermediate figures, thereby breaking the binomial of employed work / self-employed work. This was done through the Statute of Self-employment of 2007[21],

[16] María Luz Rodríguez Fernández, "Calificación jurídica de la relación que une a los prestadores de servicios con las plataformas digitales", in *Plataformas digitales y mercado de trabajo,* ed. María Luz Rodríguez Fernández (Madrid: Ministerio de Trabajo, Migración y Seguridad Social, 2019).

[17] Hannah Johnston and Chris Land-Kazlauskas, *Representación, voz y negociación colectiva: la sindicalización en la economía del trabajo esporádico y por encargo* (Ginebra: OIT, 2018), 6.

[18] Retrieved from https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. As it is known, Proposition 22 was passed on 3 November 2020, which counteracted the effects of AB5. The text of P22 is available at https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf. However, in August 2021, this rule was declared unconstitutional by the Supreme Court of California.

[19] Retrieved from https://www.boe.es/buscar/act.php?id=BOE-A-2021-15767

[20] Retrieved from https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10120

[21] Retrieved from https://www.boe.es/buscar/act.php?id=BOE-A-2007-13409

and not in the heat of the debate about the legal classification of platform work. Repeatedly, the Spanish figure of the "economically dependent self-employed worker" and the English figure of "worker" have been presented as examples of ways to resolve the particulars of platform work, which, at least for some, fails to comfortably fit within the figure of either employment or self-employment. The central idea of this option is to create a regulatory body of labor and social protection rights midway between those that apply to employed workers and those that apply to self-employment, such that they can be applied to these special workers, who are considered neither entirely self-employed workers nor entirely employees. The Argentinian bill, the Statute of the On-demand Digital Platform Worker, of May 2020, could be an example of this formula[22].
Finally, Italy and France could serve as examples of the third route. Italian Law No. 128 of 2 November 2019[23] has bolstered the presumption of the existence of an employment contract between the worker and the platform, but it has also established that, even though a worker may be a true self-employed worker, they have the right to the application i) of the collective bargaining agreement of the sector of activity in which they are engaged or ii), if such a collective bargaining agreement does not exist, the application of a "minimum level of protection" that, among other rights, guarantees the payment of insurance for accident or occupational disease. In turn, French Law No. 2016-1088[24], based on the concept of the platform's "social responsibility" to those who provide services through it, obliges the platform to pay the installments of the occupational accident insurance that a self-employed worker has taken out, as well as recognize their right to professional training and to belong to a union. There is also Law No. 2019-1428[25], which sets forth that self-employed transport and delivery platform workers should have a "card" that allows them to have access to "complementary social protection guarantees". As we can see, both of these pieces of legislation extend the rights of the world of employed work to platform workers, even if they might be genuine self-employed workers.
This different approach to achieving better occupational and social protection for platform workers is significant in terms of collective bargaining. If these workers are deemed to be employees, then it would

[22] Retrieved from https://federicorosenbaum.blogspot.com/2020/06/anteproyecto-de-ley-de-estatuto-del.html
[23] Retrieved from https://www.gazzettaufficiale.it/eli/gu/2019/11/02/257/sg/pdf
[24] Retrieved from https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032983213/
[25] Retrieved from https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000039666574/

automatically mean that they are awarded the right to collective bargaining under the terms and conditions that this right applies to all other employees. If a third figure is created or the labor and social rights of employed workers are extended to self-employed workers, the recognition of the right to collective bargaining is not quite so clear, given the doubts about whether or not self-employed workers can enjoy the right to collective bargaining.

3. Issues about the Collective Bargaining of Platform Employees

If the status of an employee is declared or recognized, then platform workers would enjoy the right to collective bargaining to the same extent as all other employees. But there are a few issues related to the collective bargaining of this group that should be pointed out.
The first is who should be responsible for negotiating the representation of these workers. It is not mostly or merely a question of law, but rather a matter of calling attention to the difficulty of generating interest among this class of workers in the collective defense of their interests[26]. Let us think about what means to work in the platform economy. The relationship that connects workers and platforms is not usually continuous over time, rather it has a limited duration, or we could say it is intermittent. Workers enter and exit the platform throughout the day. There are some days when they connect and others when they do not. Many workers combine platform work with their main job, and many others provide services on several platforms at the same time, consequently entering and exiting each one. Worker turnover is one of the characteristics of platform work. Added to this is the difficulty of knowing who the employer is[27], given that often the only things that workers know are the name of the platform and their ID for connecting to it. There is an additional difficulty in pinpointing the sector of activity, given that even though transport, the design of computer programs, or caregiving exist as economic sectors, the respective workers do not provide their services at companies of these sectors, rather they do so through a platform. All of this makes it difficult to build the foundation on which collective bargaining is based: employment for a company in an economic sector

[26] Hannah Johnston and Chris Land-Kazlauskas, *Representación, voz y negociación colectiva: la sindicalización en la economía del trabajo esporádico y por encargo* (Ginebra: OIT, 2018), 5.
[27] Emma Rodríguez, "El derecho a la negociación colectiva del trabajador autónomo en el contexto de la nueva economía digital", *Temas Laborales* 151 (2020): 147.

whose conditions have to be regulated. In this case, neither employment nor the company nor the industry is clear.
On the other hand, workers of the platform economy who work online do so under conditions that certainly make it difficult to coordinate the collective protection of their interests. In addition to the stated characteristics of platform work, there is also the fact that these workers work in geographic isolation through their computers, and they often do not know if their employer is the platform to which they connect or is the company/person who, through the Internet, is requesting the task in question. Furthermore, the working model of these platforms tends to be that of an online task auction, such that workers are forced to compete among themselves to be able to get the work they are going to perform. Consequently, these workers of the online platform economy cannot be classified according to either the geographic area where they work or the company for which they work, or even their profession, given the highly diverse nature of the tasks they access online (from programming to reviewing images on social networks). The classic elements used as the foundations to build the interest groups that have given rise to the organization of collectives and actions by the same are missing. These are the territory, the company, and the profession[28]. Furthermore, the competition between these workers to access tasks online turns them into adversaries and acts against any feeling of unity[29]. And we must consider that online work platforms are global, with their workforces dispersed throughout the world. This means that workers of the same platform could be working online in India, Kenya, Ukraine, or Spain. Therefore, for collective bargaining, who should represent a workforce that is located globally?
Eppur si muove or, in other words, despite all the aforementioned, entities that represent these workers have emerged. Forums have occasionally arisen, especially among online platform workers, where they can share their experiences regarding a platform to serve as an example for other possible workers[30]. In other cases, specific platform worker unions have

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[28] Vili Lehdonvirta, "Algorithms That Divide and Unite: Delocalization, Identity, and Collective Action in "Microwork"", in *Space, Place and Global Digital Work. Dynamics of Virtual Work* (London: Palgrave Macmillan, 2016).
[29] Mark Graham and Alex Wood, "Why the digital gig economy needs co-ops and unions?", (2016), https://www.opendemocracy.net/en/opendemocracyuk/why-digital-gig-economy-needs-co-ops-and-unions/ (Accessed on 19 March 2022).
[30] Rochelle LaPlante and Six Silverman, "Building Trust in Crowd Workers Forums: Worker Ownership, Governance, and Work Outcomes", (2016),

arisen, whose relations with classic unions are sometimes good and are at other times competitive. Finally, there are many cases in which classic unions have taken over the representation and defense of these workers. There are examples of all these situations: i) *Tukopticon* is one of the most well-known forums[31]; ii) the *Asociación de Personal de Plataformas*[32] (APP) [Platform Personnel Association] of Argentina is a union of platform workers, which also serves as an example of where there is tension between that specific union and the classic unions in that country; iii) the relationship between *Riders X Derechos*[33] [Riders for Rights] and the CC.OO. and UGT unions in Spain is an example of peaceful coexistence between specific and classic unions; and iv) the collective bargaining agreement signed by the CGIL, the CISL and the UIL in Italy for the workers of JustEat is an example of classic unions taking over the defense of these "new" workers.

However, the collective action taken by these entities is not always the same. If we look closely, the formulas that are closest to those of a union as we know it are concentrated around location-based platform workers, while for online platform workers there is barely any information on union organization and actions, except for the example of forums. This also results in different strategies. For example, some collective entities are not seeking collective bargaining, among other reasons because, in the platform economy, the companies (above all those that operate online) are often non-corporeal. Rather, what they seek is to get the attention of consumers and the public powers so that the former think about consuming through the platform in question and the latter feel impelled to act in defense of these workers[34]. Other collective entities have followed a more classic union path, so to speak, and have opted for collective bargaining.

Once a collective bargaining entity has been defined, the next issue is the scope or level according to which negotiation takes place. This is where the difficulty of collective bargaining related to online platforms once again becomes evident. Even if the workers of these platforms were

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https://trustincrowdwork.west.uni-koblenz.de/sites/trustincrowdwork.west.uni-koblenz.de/files/laplante_trust.pdf (Accessed on 19 March 2022).

[31] Lilly Irani and Six Silverman, "Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk," *Proceedings of CHI* April 27-May-2 (2013).

[32] See at https://es-la.facebook.com/pages/category/Labor-Union/Asociación-de-Personal-de-Plataformas-AppSindical-713319192359559/

[33] See at https://www.ridersxderechos.org

[34] María Luz Rodríguez Fernández, "Sindicalismo y negociación colectiva 4.0", *Temas Laborales* 144 (2018): 38.

effectively deemed to be employees, once again the global nature of the platforms and the dispersion of their workforces make it difficult to find an entity that could represent those workers in negotiations. Similarly, it is extremely difficult to conceive of the level at which negotiations should take place. We must consider whether or not collective bargaining on a global scale would even be possible and if it could therefore be applied in all the countries where there are workers of a certain platform: what regulations would apply to negotiations of these characteristics and how would the application thereof be guaranteed in each country?

Collective bargaining in the case of location-based platform workers would involve fewer difficulties because the collective bargaining could take place in a certain territory. Nevertheless, we must think about whether it is more appropriate for negotiations to take place at the company/platform level or the sector level, given the aforementioned characteristics of platform work. The possibility of being able to work for several platforms at the same time, or the brevity of the links that are sometimes established between workers and platforms, would seem to indicate that collective bargaining at the sector level is advisable so that coverage could be obtained regardless of the platform where a worker is working at a given time, or to obtain that coverage whenever a worker decides to work for one of those platforms. Yet what happens, in this case, is that it is not easy to define the sector: if the industry is the economic activity performed through the platform (delivery or transport) or if the industry is composed of the platforms themselves.

Finally, the content of negotiations must be discussed. And concerning this content, rather than posing the topics or aspects that should be included in the collective bargaining of platform workers, it would be better to look at the practical implementation of collective bargaining agreements by reviewing some that already exist. This will furthermore help us to determine the agents that were involved and clear up any doubts about the entities of the collective bargaining and about the levels within which negotiations were understood to take place. However, one final consideration should be made: all existing collective bargaining agreements refer to location-based platform workers, and none refer to online platform workers. Perhaps this is the best proof of the fact that declaring the existence of an employment relationship and consequently declaring the unqualified application of the right to collective bargaining is not enough for such bargaining to take place in practice and subsequently represent the source of protection for these workers, given the complexity of uniting a global and dispersed workforce around collective bargaining.

Consequently, this is where international labor standards must play a leading role in protecting these workers.

4. Main Issues of Collective Agreements in the Platform Economy

We are beginning to hear about some collective bargaining agreements that regulate platform work. Nordic countries seem to be in the lead, with agreements at Hilfr, Chabbler, Voocali, Bzzt, Instajobs, Gigstr, and Foodora[35], although they also exist in other countries and regarding other platforms. Some of these agreements will be analyzed below. Perhaps the most well-known agreement is the one that was signed in 2018 between the Hilfr ApS platform and the Danish union, 3F[36]. The initial formulation of this agreement, which included employees and self-employed workers for determining the hourly wage, has been declared to be against free competition law. We will return to this subject later, but right now we are going to focus on the content. Two essential elements need to be highlighted, one is the classification of the workers, and the other is the fact that this agreement is considered to be a trial collective bargaining agreement. These two elements tell us that, first of all, the classification of platform workers as employees or as self-employed is at the center of the union/business strategy in collective bargaining. Second, given the novelty represented by reaching an agreement on working conditions for a relatively recent sector, the parties prefer to act with caution, in the sense of testing a regulation of the working conditions, which is then subject to evaluation before becoming consolidated.
In the case of the agreement between Hilfr ApS and 3F, even though initially the condition of the employee is reached after having worked 100 hours for the platform, in the end, the worker merely has to notify the platform to either obtain this condition or remain a freelance worker, consequently leaving it up to the workers to decide on their status (para. 1). This was uncommon even for the Nordic model of labor relations[37], and it would not even be legally possible in the majority of legal systems, where mandatory rules are what define the existence of an employment

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[35] Kristin Jesnes, Anna Ilsøe and Marianne J. Horver, "Collective agreements for platform workers? Examples from the Nordic countries", (2019), https://faos.ku.dk/pdf/faktaark/Nfow-brief3.pdf (Accessed on 19 March 2022).
[36] Retrieved from https://cogens2019.blogspot.com/2019/02/collective-agreement-between-hilfr-aps.html
[37] Kristin Jesnes, Anna Ilsøe and Marianne J. Horver, "Collective agreements for platform workers? Examples from the Nordic countries", (2019), https://faos.ku.dk/pdf/faktaark/Nfow-brief3.pdf (Accessed on 19 March 2022).

contract. On the other hand, a "joint declaration" is made in the agreement, which effectively acknowledges that it is a trial, whose aim is "an attempt to build a bridge between digital platforms and the Danish labor market model", meaning that is an attempt to begin the path down which collective bargaining on platforms is standardized within the labor relations model. Renegotiation of the agreement will depend on Hilfr ApS becoming a member of the Danish Industries Confederation and on this Confederation being involved in the negotiations. The agreement signed in Italy in 2021 by CGIL, CISL, and UIL with JustEat is somewhat similar[38]. The subject of worker classification once again comes up where it declares that the parties are interested in "defining an innovative model of *subordinate* labor regulation of Riders (...) that favors the insertion of this category of workers within the organizational and regulatory context of *subordination*" (the italics are mine). Moreover, it is conceived of as an "experimental" collective bargaining agreement that will be subject to evaluation (Article 24).

A significant detail regarding these two agreements is that they are both reached at the company level and are both signed by traditional unions. And one final point regarding the latter: Article 5 declares part-time work to be a "common form of work at the company", thereby considering the "characteristics of the service", subsequently establishing the rules about working time. It seems that this subject of working time and how it is distributed should be one of the star subjects in the collective bargaining of platform work. Given that the workday is, to a large extent, defined by workers connecting to or disconnecting from a platform, by accepting or rejecting the services proposed by a platform, and by whether or not these services are ordered during the connection time, it would seem logical to think that the regulation of working time would be one of the core points of this collective bargaining. This is what happens in the Italian agreement and in the collective bargaining agreement signed in Austria in 2020 by the Transport and Services Union, VIDA, and by the Association for the Transport of Merchandise with the Austrian Chamber of Commerce[39] to regulate the working conditions of delivery platform workers. Unlike the preceding agreements, this latter one is a sector collective bargaining agreement, which shows how there are several different levels at which collective bargaining is taking place in the platform economy. Its content

[38] Retrieved from https://www.eclavoro.it/wp-content/uploads/2021/04/accordo_integrativo_aziendale_riders_290321.pdf

[39] Retrieved from https://lohnspiegel.org/osterreich/arbeitsrecht/datenbank-der-tarifvertrage/kv_vida-wk-_2020

is centered on the regulation of working time (Article VI), on determining a minimum hourly/weekly/monthly wage, and on something that is also essential in the platform economy: compensation for the personal assets that workers place at the disposal of a platform for performing the work, in this case, a bicycle and a mobile phone (Article XVIII).
Both types of content are consistent with the characteristics of the sector. Work in the platform economy involves "down" time (connected to the app, waiting to perform the service/task), which, if not somehow considered for remuneration purposes, could cause that remuneration to be significantly reduced. The same thing happens with the more than widespread practice of intensively hiring workers so that, by having many who are competing for the same service/task that is available on the platform, the price of that task will be lower. This practice is somewhat eliminated by establishing minimum wages. Yet it is still rather surprising that these collective agreements do not expressly refer to how "down" time should be considered (whether it is working time or rest time) and to how it should be remunerated. The Collective agreement on food delivery work for 2021-2023, signed by 3F and the Danish Chamber of Commerce (which applies to JustEat workers)[40], does determine how to include it. This collective agreement determines when working time on a platform begins and ends and when the time will not be remunerated, even if a worker is connected to the platform: "the times of the start and end of working hours are when the worker signs in and signs out respectively [but] no wages are payable for the time during the shift when a worker is not available for the performance of work" (Article 3.1).
On the other hand, it also makes sense that the collective bargaining agreements should refer to compensation for any personal assets placed at the disposal of the employer, given that this is one of the characteristics of the platform economy: the use of private assets as physical capital of the company[41]. Another example of this is the collective bargaining agreement signed in Chile in 2018 between the Cornershop Company Union and Delivery Technologies SpA[42]. It regulates the working conditions of so-called shoppers (negotiated at the company level by the union established

[40] Retrieved from https://www.danskerhverv.dk/siteassets/mediafolder/dokumenter/03-overenskomster/overenskomst-2020-2023/collective-agreement-on-food-delivery-work-2021-2023-madudbringningsoverenskomsten.pdf

[41] Nick Srnicek, *Platform Capitalism* (Cambridge: Polity Press, 2017).

[42] The author would like to thank the Chilean trade union CUT for providing access to the text of this collective agreement for use in this research.

at the company), according to which the platform is bound to pay an allocation to workers "whose purpose is to support the financing of the cost of their data plan in proportion to its use for smartphones as a work tool" (Article 19).

In Spain, a formula that is different from the aforementioned has been tried. In 2019, the UGT, CC.OO., and CIG unions signed an amendment to the 5th Labor Agreement with FEHR and CEHAT[43]. It has a national scope for the Hotel and Restaurant Services sector and includes digital platform riders within its functional scope (Article 4). Aside from the legal doubts (according to the legal-labor scheme in force in this country) that could arise by including riders in a collective bargaining agreement signed by business organizations of the hotel and restaurant services sector, the fact is that this formula, first of all, ventures on negotiating at the sector level and not at the company level; and second, it does not conceive of platform workers as essentially different from all other workers in the sector, to the extent that the collective agreement does not refer to what their working conditions could be, differentiated by the fact that services are provided through a platform. It would certainly be advisable to assess this union strategy, which is so different from the preceding ones, to see if such non-differentiation of the working conditions causes, or not, any dysfunctions when they are implemented (and if the collective agreement itself is being applied).

More recently, the CCOO and UGT unions have signed a collective bargaining agreement with JustEat[44]. This defines the open-ended contract as the contracting prototype on the platform and establishes a fixed employment quota of 80 percent, such that temporary workers will represent no more than 20 percent. Part-time contracting is also possible, but in this case with a minimum of 12 hours on weekends and a minimum of 16 hours for the full week. Mini part-time contracts of meager duration thus are not permitted. Finally, the platform undertakes not only to respect the right to data protection and the right to digital disconnection but also to inform the workers' representatives about the algorithm that the platform uses to manage the work. A joint committee is therefore created, the "algorithm committee," thereby complying with the duties of transparency and human judgment in algorithmic decision-making, which

[43] Retrieved from https://www.boe.es/boe/dias/2019/03/29/pdfs/BOE-A-2019-4645.pdf

[44] María Luz Rodríguez Fernández, "First collective agreement for platform workers in Spain", (2022), https://socialeurope.eu/first-agreement-for-platform-workers-in-spain (Accessed on 19 March 2022).

has become the banner of protest by platform workers throughout the world.
Other than the preceding, barely any traces of the characteristics of platform work are included in all the other analyzed agreements. Except for the above, no other collective agreement alludes to the algorithmic decisions that govern the lives of the workers, there are no explicit references to the rankings and their effects on working conditions, and there are scarcely any measures for protecting the data of workers. Only two of the collective agreements analyzed do so. The first is the Danish agreement between Hilfr ApS and 3F, in which workers are allowed to request, at any time, that derogatory, false, and offensive remarks be deleted from their profile, as well as any unfavorable assessments that have been received (Protocol 1). The second is the collective agreement signed by 3F and the Danish Chamber of Commerce. This collective agreement states that the provisions of the General Data Protection Regulation (EU) 2016/679 must be implemented such that the ongoing "practice of collecting, storing, processing, and disseminating personal data […] can continue" (Annex 26). Moreover, among the clauses that can be included in employment contracts is one that allows platforms "to collect data from the GPS and logistics systems to check that the car is only used in the service of the employer" (Annex 32). Even if this collective agreement is limited to supervising the work performed by platform workers, it fully legitimizes the extraction of workers' personal data by the platform.
In conclusion, this collective bargaining is just beginning and is more concerned about establishing the classification of platform workers as employees and guaranteeing basic rights regarding working time and wages than about getting into details related to working through a platform. This bargaining is practiced more at the company level than at the sector level and is led by traditional trade unions, which is a crucial point.

5. Issues about the Collective Bargaining of Self-employed Platform Workers

Platforms have burst onto the labor market under a narrative that refutes their nature as undertakings and denies that they have workers for which they are accountable. This means that the figure most used to staff a workforce is that of an independent contractor or a self-employed worker. In those cases, in which this classification has not been "deactivated," the

most recurring question is if self-employed workers of the platform economy have access to the right to collective bargaining.
It seems doubtful, at least in practice. And this is because the collective bargaining agreements tested to date have been disputed. On the one hand, the collective bargaining agreement signed in Italy in 2020 between the business association, AssoDelivery, and the UGL union[45], which regulated the working conditions of self-employed riders, has been declared to be illegal in the Judgement of 30 July 2021 by the Court of Bologna[46] because the signatory union "lacks valid negotiating power" because, in turn, it lacks "the requirement of greatest representation". On the other hand, as it was previously stated, the agreement between Hilfr ApS and 3F, which initially also determined the minimum hourly wage that freelancers should receive from the platform, was deemed on 26 August 2021 to be contrary to free competition by the Danish Authority of Competition and Consumer Affairs[47] based on the fact that "the minimum rate per hour could create a 'minimum price' that might restrict competition among [freelancers]". This is precisely the key to the legal debate: the extent to which collective bargaining agreements of self-employed workers can be understood to be contrary to free competition.
Collective bargaining has always had a hazardous relationship with free competition. The same thing that happened at the dawn of this institution – considered at the time to be a plot designed to alter the price of things – is happening again today regarding self-employed workers of the platform economy. However, the context within which the contradiction between collective bargaining and free competition is once again arising is not comparable to what it was then, among other reasons because the recognition of collective bargaining as a fundamental right means that the point of view according to which the dispute is judged could be different.
To begin with, the right to collective bargaining has, since 1998, been considered one of the Fundamental Labor Principles and Rights by the ILO, and its Convention No. 98 on the Right to Organize and Collective

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[45] Retrieved from http://www.bollettinoadapt.it/contratto-collettivo-nazionale-per-la-disciplina-dellattivita-di-consegna-di-beni-per-conto-altrui-svolta-da-lavoratori-autonomi-c-d-rider/

[46] Retrieved from https://www.lavorodirittieuropa.it/images/Tribunale_Bologna_Nidil_ed_altri_c._Deliveroo.pdf

[47] Retrieved from https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/

Bargaining has been interpreted to include self-employed workers[48]. Thus, the 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations[49] expressly states that "recognition of the right to collective bargaining is general in scope and all other organizations of workers [...] must benefit from it [...] the right of collective bargaining should also cover organizations representing […] self-employed workers" (para. 209). Further still, after the Judgement of the CJEU was handed down in the case FNK Kunsten Informatie Media, to which I will refer later, the Committee ratified its criteria in its 2018 Report[50]: "the Committee recalls that [...] the right to collective bargaining should also be applicable to organizations representing self-employed workers [...] the Committee is nevertheless aware that the mechanisms for collective bargaining applied in traditional workplace relationships may not be adapted to the specific circumstances and conditions in which the self-employed work. The Committee invites [...] to hold consultations with all the parties concerned with the aim of ensuring that all workers including self-employed workers may engage in free and voluntary collective bargaining" (p. 149).
The criterion of the EU has been developed differently. The Judgement of the CJEU in case C-67/96, Albany International BV, of 21 September 1999[51], made it clear that collective bargaining was an acceptable restriction of free competition due to pursuing the social policy objectives that are likewise relevant for the EU (paragraphs 59 and 60). To verify this compatibility, one must nevertheless examine the nature of the agreement to affirm that it is the outcome of collective bargaining and must examine its purpose to check that it contributes to improving the labor conditions of the workers (paragraph 62). This is the general doctrine that was applied subsequently to collective bargaining for self-employed workers in the Judgement of case C-413/13, FNV Kunsten Informatie en Media, of 4 December 2014[52]. In this case, the CJEU understands that free competition cannot be restricted, because the agreement is not the

[48] Valerio De Stefano, "Not as simple as it seems: the ILO and the personal scope of International Labor Standards," *International Journal Review* 160 (2021).
[49] Retrieved from https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1B).pdf
[50] Retrieved from https://ilo.primo.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1251899630002676
[51] Retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&num=C-67/96
[52] Retrieved from https://curia.europa.eu/juris/liste.jsf?num=C-413/13

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outcome of collective bargaining, but the result of an agreement between undertakings.

The starting point of this reasoning is that self-employed workers are "independent economic operators," and therefore a union that acts in their representation in collective bargaining does not act as a trade union association, but rather as an association of undertakings (paragraph 28). Therefore, the signed agreements do "not constitute the result of a collective negotiation," such that they cannot restrict free competition (paragraph 30). This is the general doctrine on the collective bargaining of self-employed workers, no matter how much this same Judgement might subsequently open the door to possible collective bargaining if the workers in question are not genuine self-employed but rather "false self-employed." It is an important gateway to the right to collective bargaining. First, the definition of "false self-employed" given by this Judgement is very broad: "service providers in a situation comparable to that of employees" (paragraph 31). Second, because the classification as self-employed nationally does not mean that that classification is the same for the application of EU Law, including the right to collective bargaining: "the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law [...] as long as that person acts under the direction of his employer [...] does not share in the employer's commercial risks [and] forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking" (paragraph 36). Under these conditions, a bogus self-employed worker could have access to collective bargaining. However, for genuine self-employed workers, the general doctrine is that they cannot access this right.

It is hard to see that some self-employed workers of the platform economy might be undertakings, and it is, therefore, difficult to see that the agreements they could reach for the defense of their interests would be agreements between undertakings. It is true that, as we stated, vastly different worker profiles exist in the platform economy and that some of them are professionals who work with complete autonomy and power in the market of the digital platform. But there are other self-employed workers of platforms who are more vulnerable and whose economic and legal powers are far weaker than those of the platform for which they provide their services. This is the reason their working conditions are poor. It is therefore perhaps appropriate to recall, according to constitutions of so-called social constitutionalism, what is the ultimate foundation for recognizing the right to collective bargaining: to achieve greater equality in a legal relationship marked by the asymmetry of power

held by both contracting parties to improve the working conditions enjoyed by one of those parties. This foundation can once again serve to justify access to collective bargaining by some self-employed workers of platforms, where the asymmetry of power and the resulting poor working conditions are evident.

This was the reason behind the creation of the "professional interest agreements" in the Spanish Statute of Self-employed Work of 2007, reserved for the collective regulation of the working conditions of economically dependent self-employed workers. These agreements represent the first European experience in collective bargaining for the self-employed established by law[53]. Agreements can be concluded between unions or associations representing self-employed workers and the undertaking for which such workers provide their activity, and they can include conditions such as how, when, and where self-employed workers carry out their activity. Agreements must be in writing, and whether or not the agreed working conditions are applied will depend on the consent of the self-employed person. Finally, when any clause in a contract between a self-employed worker and an undertaking is contrary to the content of a professional interest agreement, then it will be considered null and avoided once that self-employed person has consented to the application of the agreement (Article 13).

The preceding reasoning has also served as the foundation for compatibility between the collective bargaining of (some) self-employed platform workers and the free competition that has been decreed because of the public consultations on this matter by the European Commission in March 2021. The Draft for a Communication from the Commission, Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, was published on 9 December 2021[54]. It identifies the two cases in which collective bargaining by self-employed persons is not understood as a restriction of free competition under Article 101 TFEU: i) when the self-employed are in a "comparable situation" to that of workers; and ii)

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[53] In practice, i) only a relatively small number of professional interest agreements exist; ii) most of them have been concluded in the transport sector; and iii) their content extends beyond the conditions of performing the activity and includes contract terminations and dispute settlement procedures (Fernando Rocha Sánchez, "El trabajo autónomo económicamente dependiente en España. Diagnóstico y propuestas de actuación", *Revista de Derecho de la Seguridad Social* 10 (2017)).

[54] Retrieved from https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10120

when the self-employed do not have sufficient bargaining power to influence their working conditions. Both cases refer to "solo self-employed persons," i.e., "persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labor from the provision of the services concerned" (paragraph 19).
The three instances in which the European Commission understands that self-employed persons are in a situation "comparable" to workers are the following: First, in the case of economically dependent self-employed persons. Economic dependency means that at least 50% of the annual income obtained by the self-employed person comes from a single undertaking (paragraph 25). Second, the situation of self-employed persons will be comparable when solo self-employed persons work "side-by-side" with workers, meaning that the self-employed persons perform the same or similar task as the workers of their undertaking, under its direction and without assuming the economic risk (paragraph 26). The third instance is platform workers.
The first point to note is that collective bargaining is granted both to those who work on online platforms and to those who work on location-based platforms (paragraph 30), despite the difficulty of developing collective bargaining for online platform workers, as was previously explained. The second point to underline is that rationale for allowing collective bargaining for self-employed platform workers is twofold. In the Draft Guidelines of the European Commission, these self-employed persons are considered in a situation comparable to workers because they have "little or no scope to negotiate their working conditions [because] platforms are usually able to unilaterally impose the terms and conditions of their relationship" (paragraph 28). This consequently comes under the possibility of collective bargaining for self-employed workers provided for in the second case allowed in the Draft Guidelines, i.e., weak bargaining power (paragraph 34). Indeed, there are self-employed workers who, because their counterparty has a certain level of economic strength, do not have sufficient power to influence their working conditions. This is very often the case with platforms, whose market power often borders on a monopsony, such that even if the platform workers are genuinely self-employed, it is practically impossible for them to negotiate with the platforms. Thus, whether or not platform workers are in a comparable situation to employed workers, they do not possess sufficient bargaining power. It is precisely this asymmetry of bargaining power that underpins the right of platform workers to collective bargaining, whether they are employees or are self-employed.

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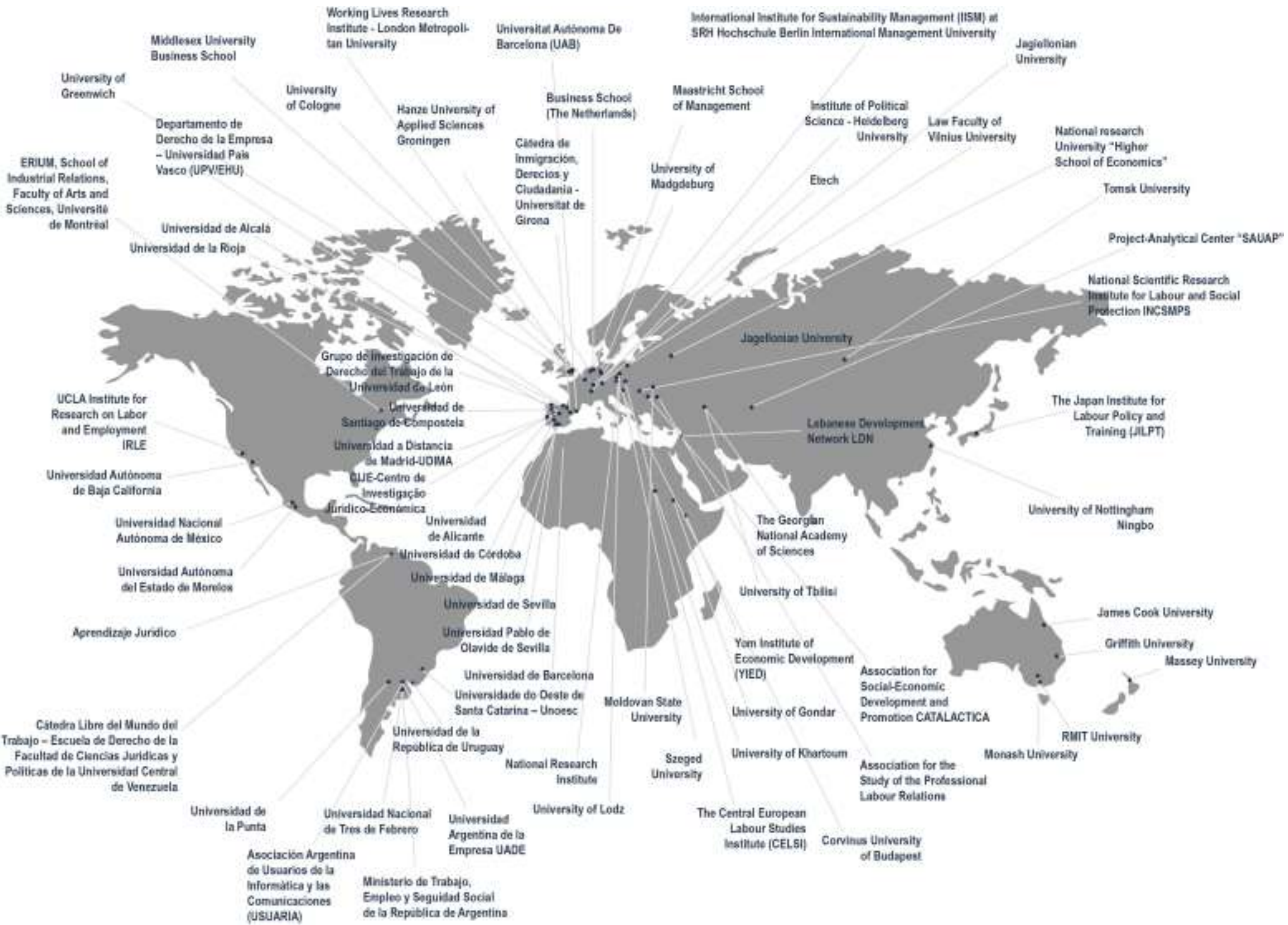

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