



Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social

XXIII Congreso Mundial

7 - 10 de Septiembre de 2021 - Lima, Perú

# RETOS DE LOS SISTEMAS DE LEGISLACIÓN LABORAL Y SEGURIDAD SOCIAL

- Transformación del trabajo: desafíos para el Derecho del Trabajo
- Comercio internacional y trabajo
- Nuevos retos de la Seguridad Social
- Trabajadores migrantes
- Trabajadores atípicos e informales
- Igualdad en el trabajo
- El Estado y las nuevas formas de voz colectiva



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## AUSPICIADORES



<b>Retos de los Sistemas de Legislación Laboral y Seguridad Social</b>
PRIMERA EDICIÓN DIGITAL MARZO 2023
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<p>ISBN: 978-9972-9422-4-2  Hecho el Depósito Legal en la Biblioteca Nacional del Perú N.º 2023-02736  Publicado en el mes de marzo de 2023  DERECHOS RESERVADOS. Prohibida su reproducción parcial o total (D. Leg. 822)</p>

En su edición electrónica, el libro alcanza a un número de lectores peruanos y del extranjero, de los ámbitos universitario, gremial, profesional, impulsando el estudio del Derecho del Trabajo y de la Seguridad Social. Esta edición se encuentra alojada y disponible para descarga libre en la página web de la Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social: [www.spdtss.org.pe](http://www.spdtss.org.pe)

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**EL ESTADO Y LAS NUEVAS  
FORMAS DE VOZ COLECTIVA**

**THE STATE AND NEW FORMS  
OF COLLECTIVE VOICE**

# THE STATE AND NEW FORMS OF COLLECTIVE VOICE

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**SUMMARY:** I. Introduction. II. Platform Work and Digitalisation of the Workplace. 1. Platform Work: Online and Offline. 2. The Challenges. a) Worker Status. b) Organisational Obstacles. c) Weak Bargaining Power. III. Ensuring Collective Voice in the Digital Economy. 1. Channels of Collective Voice. a) Union Voice. b) Works Councils and Co-determination. c) Civil Society Organisations. 2. Existing Arrangements in the Platform Economy. a) The Actors. aa) The Role of Trade Unions. bb) Other Actors. b) Means. aa) Apps and AI: OUR Walmart. bb) Rating Platforms: Faircrowdwork.org. cc) The Visibility of a Platform and Public Pressure: Coworker.org. IV. The Role of the State. 1. Collective Voice: To what Extent is it the State's Business?. 2. Areas of Action. a) Clarifying Employment Status. b) Collective Bargaining for Self-Employed Workers. aa) The Prohibition of Cartels and the Case Law of the CJEU. bb) The Position in the Member States. cc) International Law. dd) EU-Action. c) Opening-up other Channels. V. Conclusion

## I. INTRODUCTION

The term „worker voice“ has been widely used in literature on human resource management and industrial relations. Nevertheless, some may not be familiar with the concept behind it. A closer look reveals that such a uniform concept does not even exist. Many people understand the term in very different ways. For the purposes of this study, it is intended to be broad. “Worker voice” then refers to the ways and means by which workers can assert their interests vis-à-vis the employer and, in this sense, can effectively raise their voice and „have their say“. It should be emphasised that this study is about the „collective voice“, i.e. not about the assertion of a personal concern of an individual, but about the assertion of an interest of a group of workers.

The question of how workers can influence the decisions of employers is by no means a new one, but was already being asked in times when there were no labour law regulations to protect workers. *Adam Smith* already stated in *Wealth of Nations* that „the laborer[’s] (...) voice is little heard and less regarded [except] upon some particular occasion, when his clamour is animated“.<sup>1</sup> Since then, the problem has repeatedly been examined from different angles. Comparative

1 Quoted according to *Kaufmann*, Employee voice before Hirschman: its early history, conceptualization, and practice, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.), *Handbook of Research on Employee Voice*, 2015, 17 (18).



legal considerations have always played a special role. For example, it has been discussed time and again how systems of uniform representation of interests by trade unions relate to systems in which the assertion of employees' interests is entrusted not only to unions but also to elected works councils. Since the conditions that influence the effective representation of workers' interests are subject to constant change, the issue is never settled once and for all, but must continuously be re-examined. However, the changes in the labour market that can be observed for some time are dramatic, so that the issue of worker voice needs more than just a routine examination. The question is rather whether fundamentally new challenges have to be met with completely new concepts.

Indeed, the problem of securing workers' voice has become a major issue for some time. This is mainly because in many countries and regions there has been a weakening of trade unions due to shrinking membership and a decline in collective bargaining.<sup>2</sup> The consequences triggered by this are now exacerbated by the platform economy and the digitalisation of the world of work, to say the least. For example, digitalisation has led to the emergence of new, hitherto unknown forms of employment, the legal classification of which is obviously causing great difficulties for the courts, but also for the academic literature. It may well be that some phenomena, such as the division of tasks into small and smallest subtasks on crowdwork platforms, are ultimately „old wine in new bottles“.<sup>3</sup> It is also true that a historical perspective can be valuable in dealing with new phenomena. However, given the speed and force of change in the labour market, it is clear that simply sitting back and leaving things as they are is not an option when it comes to workers' participation opportunities. The present study is intended to contribute to the upcoming discussion in this respect.

The starting point will be a sketch of the platform economy and the digitalisation of working life in general (II.). Much has already been said about this, so in the present context it can only be a matter of working out the main challenges that arise with regard to the adequate representation of workers' interests. Subsequently, the problem of the employee voice will be examined in more detail (III.). This discussion will first focus on the channels of perception of employee interests, which have always played a role in the context of the discussion on sufficient employee voice. Despite all the innovations brought

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2 Statistical data available at: <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>

3 Cf. *Vandaele*, Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe, ETUI Working Paper 2018.05 (9).

about by digitalisation, this does not mean that the wheel has necessarily to be reinvented in terms of collective voice. For example, it may be a good idea for legislators to consider the possibility of collective voice for platform workers through elected works councils. The fact that this form of interest representation has been discussed in the literature for a long time is of course no obstacle. However, we must not leave it at that, but ask two further questions, namely, firstly, what forms of interest representation can already be observed today, and secondly, how effective interest representation can be ensured in the future. The latter question brings us closer to the role of the state, which will also be examined in more detail below (IV.). It is true that the legal and especially the constitutional framework may vary from country to country. However, it can hardly be denied that the state, and especially the state legislature, has a special responsibility to ensure that workers have sufficient opportunities to make their voices heard. In this respect, it is not only necessary to discuss the mandate of the state, but also to describe concrete tasks that the state should address in the current context. In all this, it will be useful to make some basic reflections, especially on the relationship between the state and the social partners. The study will conclude with a brief conclusion.

## II. PLATFORM WORK AND DIGITALISATION OF THE WORKPLACE

The platform economy has developed rapidly in recent years and is becoming more and more important. For workers, it offers both advantages and disadvantages. The advantages should not be underestimated. To give just one example: A recent ILO report suggests that digital labour platforms have the potential to transform the livelihoods of young refugees.<sup>4</sup> However, despite the benefits associated with employment on platforms and the opportunities they open up for many, the low level of protection for workers is a cause for concern

### 1. Platform Work: Online and Offline

In the platform economy, the viewer is confronted with a bewildering array of different business models and contractual practices that are constantly changing. At least some clarity has been brought to the topic, though. Above all, the distinction between online and offline platform work has proved helpful.

<sup>4</sup> ILO, Towards decent work for young refugees and host communities in the digital platform economy in Africa – Kenya, Uganda, Egypt, Geneva 2021.

Online work can be done anywhere, at home or on the road. All that is needed is a laptop and a Wi-Fi connection. In this context, we usually talk about crowdwork, which can include both micro and macro tasks. Offline work, on the other hand, is both time- and location-dependent, with work typically accessed via apps. This form of work is done either in public spaces (food delivery, ride hailing) or in private settings (cleaning, caring, etc.). While the platforms regularly operate on a national or even international level, the work itself is performed locally.

## **2. The Challenges**

### **a) Worker Status**

As already indicated, the digitalisation of the world of work has led to the emergence of forms of employment that were previously completely unknown. In the meantime, these forms of employment have been largely catalogued. However, their legal classification still poses difficulties. At the risk of oversimplifying things, it can be said that, from today's perspective, so-called crowdwork in particular can hardly be qualified as an employment relationship. Admittedly, the classification as an employment relationship is always a question of the individual case. As a rule, however, crowdworkers do not qualify as employees. In this context, lawyer encounter the additional difficulty that platform work usually involves three parties, so that the question to be answered is not only whether someone is an employee, but also who is the employer in this case. Again, the problem can be illustrated by the example of crowdwork: Is the company that places work orders on a platform considered an employer? Is the platform itself an employer? Or is it even both (company and platform) that together form something like a joint employer?

It is obvious that the question of the qualification of the employment relationship has a direct impact on the question of how to ensure effective representation of workers' interests. If one thinks in this context of the representation of these interests by a trade union, the question arises whether the possibility of collective bargaining is opened up at all if workers are not qualified as employees but as (solo) self-employed. There is thus a risk that workers will have neither labour law rights nor be able to determine their working conditions with the other party through collective agreements. Even mere uncertainty about the legal classification of workers as employees or self-employed has negative con-

sequences. Moreover, the fact that employee, company and platform are linked by a triangular relationship not only affects the assessment under contract law, which is made considerably more difficult as a result. Rather, this problem also affects the enforcement of workers' interests under collective law, since - especially when assuming a joint employer position of company and platform - it is anything but clear how to negotiate under collective law in such a case. In any case, traditional negotiation structures could not be used in such a constellation.

### b) Organisational Obstacles

In addition, apart from a climate that is often, characterised by a deeply negative attitude on the part of the platforms,<sup>5</sup> there are particular difficulties in organising workers in the platform economy. This is at least true for those workers who do their work online. In this case, the situation is characterised by the fact that workers are typically in a state of isolation. This applies first of all in spatial terms as workers do not work together side by side in the company, but are possibly scattered all over the world. In the literature it is said that the „dispersed geography is used against workers: opaque production networks conceal exploitative work practices from end-customers and end-clients; a lack of co-presence and an international labour pool of digital workers makes it hard to both organise place-based struggles for worker rights (e.g. picket lines) and enact solidarity with fellow workers on the other side of the planet“.<sup>6</sup>

### c) Weak Bargaining Power

There are also specific difficulties in other respects. In particular, the splitting of work tasks into small and smallest sub-tasks leads to a decrease in the need for workers to work together. The fact that cooperation often tends towards zero is anything but conducive to a unified representation of interests. On many platforms, it can even be observed that workers are virtually led into

5 Cf. only *Prassl*, *Collective Voice in the Platform Economy – Challenges, Opportunities, Solutions*, 2018 (14 et seq).

6 *Graham/Hjorth/Lehdonvirta*, *Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods*, *Etui*, Transfer 2017, Vol. 23(2), 135 (155). See also *Johnston*, *Labour geographies of the platform economy*, *International Labour Review*, Vol. 159 (2020), No. 1, Special Issue: Future of work (Part II): Rethinking institutions for social justice, March 2020, 25 (40) referring to the „to the interjurisdictional, dis-embedded nature of crowdwork“.

a competitive situation with others. Customer rating systems and the like play a central role in this. These conditions also form an obstacle to the collective representation of interests.<sup>7</sup> In addition to all this, work processes in the digital world are increasingly controlled by algorithms. This automatic and real-time algorithmic management not only causes an increasing asymmetry of information between workers and employers,<sup>8</sup> but also further reduces human contact.<sup>9</sup> Incidentally, this applies not only between workers themselves, but also between workers and representatives of the employer.<sup>10</sup> Finally, what makes effective organisation of workers' interests completely difficult is the fact that platform workers are typically a very heterogeneous group whose composition is also subject to constant change. Moreover, for many platform workers, earnings from employment are not the main source of their income. Accordingly, it is often more obvious for them to give up platform employment altogether rather than to take up the fight for better working conditions.<sup>11</sup>

However, even if the interests of the platform workers can be brought together, either by workers themselves forming a trade union or by an existing trade union taking on their interests, the conditions for effectively asserting these interests against employers are not particularly favourable. The main reason for this is that their bargaining power of platform workers is often rather low. In

7 Cf. only *Heiland*, Workers Voice on Platform Labour – an Overview, WSI Study No. 21, July 2020 (21 et seq.).

8 Cf. in this regard, *Rosenblat/Stark*, Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers, *International Journal of Communication* 10(2016), p. 3758 who in conclusion note the following: „Uber's claims regarding its labor model, which center on freedom, flexibility, and entrepreneurship, are complicated and contradicted by the experience of its drivers. Throughout our analysis, we have demonstrated how power and information asymmetries emerge via Uber's software-based platform through algorithmic labor logistics shaping driver behavior, electronic surveillance, and policies for performance targets. Through the Uber app's design and deployment, the company produces the equivalent effects of what most reasonable observers would define as a managed labor force“. On the point of algorithmic management, cf. most recently also *Schreyer*, Algorithmic work coordination and workers' voice in the COVID-19 pandemic: The case of Foodora/Lieferando, *Work Organisation, Labour & Globalisation*, 2021, Vol. 15, No. 1 (2021), 69.

9 Cf. also on this *Heiland*, Workers Voice on Platform Labour – an Overview, WSI Study No. 21, July 2020 (24) stating that „worker' voice becomes unlikely due to quasi non-existent contacts between workers“.

10 Cf. on the latter aspect, for example, *Gearhart*, in: Graham/Shaw (eds.): *Towards a fairer gig economy*, London 2017, p. 13 (13): „Unions cannot collectively bargain with an algorithm, they can't appeal to a platform, and they can't negotiate with an equation“.

11 Cf. again *Heiland*, Workers Voice on Platform Labour – an Overview, WSI Study No. 21, July 2020 (24).

the literature, a distinction is sometimes made „marketplace bargaining power“ and ‘workplace bargaining power’ with the former relating to the desirability of workers’ skills by employers and the latter referring to the power of workers stemming from their strategic position in a distribution or production process.<sup>12</sup> Looking at crowdwork in particular, and especially crowdwork in the form of the completion of micro tasks, there is no getting around the fact that the bargaining power that workers can bring to bear against employers is extremely limited.

Taking all these findings together, the picture is rather sobering: from a legal point of view, many platform workers are likely to be prevented from engaging in collective bargaining, and from a purely factual point of view, there are circumstances in many areas of the platform economy that make collective voice very difficult to achieve.

### III. ENSURING COLLECTIVE VOICE IN THE DIGITAL ECONOMY

As already indicated in the introduction, individual voice, that is one-on-one voice in the form of individual discussion, usually on the shop floor with a supervisor, is outside the scope of this study which deals exclusively with collective voice. Collective voice can be expressed by workers directly or by workers’ representatives collectively. Looking at the literature, there are clear differences in the evaluation of the efficacy of the different forms of voice. This also applies with regard to direct and indirect voice.<sup>13</sup> However, this subject should be left alone, as it seems unhelpful, almost cynical, to simply point out to workers in the gig economy that they could always (spontaneously) get together to raise their voices directly to the employer. Accordingly, one should concentrate on indirect voice, i.e. on independent channels like trade unions or other structures.

#### 1. Channels of Collective Voice

##### a) Union Voice

When hearing the term „collective voice“, most people probably associate it with trade unions. This concept of „union voice“ goes back to *Richard Freeman*

12 Cf. *Vandaele*, Will trade unions survive in the platform economy? Emerging patterns of platform workers’ collective voice and representation in Europe, ETUI Working Paper 2018.05 (10 et seq.).

13 Cf. only *Allen*, Hirschman and voice, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.), *Handbook of Research on Employee Voice*, 2015, 36 (41) with further references.

and *James Medoff's* ground-breaking work *What Do Unions Do?*<sup>14</sup> There, the two authors distinguished between two main functions of trade unions, which they called the two „faces“ of the trade union movement. The „monopoly face“ refers to the ability of unions to raise wages above the market level. The „collective voice face“ is influenced by *Hirschman's* so-called „voice or exit thesis“.<sup>15</sup> This argument states that there are two ways to address problems in a social or economic context: „exit“, which in the labour context is termination of the employment relationship, or „voice“, which is the use of direct communication to bring actual and desired conditions closer together“. According to *Freeman and Medoff*, the role of trade unions is to channel workers' discontent. In this respect, they offer a productive alternative to a simple „exit“.<sup>16</sup>

On an abstract level, trade union representation of workers' interests has many advantages. While non-union representation often focuses on information and consultation, trade unions are also concerned with resolving distributional issues. In principle, they also have the means of industrial action at their disposal, which increases their position vis-à-vis the employer side and gives them clout. Trade unions also often look beyond the confines of the individual workplace or company. Often they are active nationally and are also effective in the political arena. Increasingly, they also join forces with organisations from other countries.<sup>17</sup> However, for some time now, trade unions have been losing importance in many countries and regions, and the scope of collective agreements in particular is shrinking in many cases. Accordingly, there is a certain scepticism about the ability of trade unions to organise workers in sufficient numbers under the conditions of digital work and to represent their interests effectively.

## b) Works Councils and Co-determination

If we look at the representation of workers' interests by elected interest representation bodies (works councils), the picture is also mixed: on the one hand, works councils have legally defined tasks and powers, so that they can rely

14 By *Freeman/Medoff*, *What Do Unions Do?*, 1984.

15 See *Hirschman*, *Exit, Voice and Loyalty*, 1970.

16 See *Kaine*, *Union Voice*, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.), *Handbook of Research on Employee Voice*, 2015, 170 (171).

17 Cf., for instance, *Kaine*, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.), *Handbook of Research on Employee Voice*, 2015, 170 (184).

on a firm legal position when representing workers' interests.<sup>18</sup> On the other hand, problems may exist, not least in the relationship between works councils and trade unions. From the latter's point of view, there is often the fear that works councils could undermine the power of the unions and are therefore detrimental to effective interest representation in the long run. In any case, it should be borne in mind that examples from individual countries – and with regard to the collective voice via works councils, reference is made primarily and repeatedly to the German example – cannot easily be transferred to other countries. The historical and socio-economic circumstances are often so different that a simple “analogy” is impossible. This also applies with regard to another form of employee participation, namely not that in the workplace, but that in the company. This so-called corporate co-determination is also pronounced in Germany. For example, half of the members of the supervisory boards of large corporations in Germany must be worker representatives. In this respect too, however, a warning must be sounded from the start against a simple „copy and paste“ exercise.

### c) Civil Society Organisations

In view of the weakness of many trade unions (and a certain decline in collective bargaining), interest is increasingly focused on the question of representation of workers' interests by civil society organisations (CSO)<sup>19</sup> Indeed, it seems plausible to ask to what extent new actors „step in“ when others – at least partially – fail. In this context, the literature has endeavoured to elaborate differences between the representation of workers' interests by trade unions on the one hand and CSO's on the other. It is not possible to go into this in detail in the present context. In any case, there is the key difference that trade unions orient their actions towards their membership – which are, after all, the workers – whereas CSO's also have other interests in mind. This is not to say that workers' interests cannot also be in safe hands with a CSO. It is even less

18 Legal regulation of their tasks and powers distinguishes works councils from joint so-called consultative committees. Their importance of the latter for the collective voice of workers seems limited precisely because without legal support they are often dominated by the employer; cf. *Pyman*, Joint consultative committees, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.), *Handbook of Research on Employee Voice*, 2015, p. 264 (277) with regard to SME's, in particular.

19 Cf., for instance, *Heery/Abbott/Williams*, Civil society organizations and employee voice, in: *Wilkinson/Dundon/Donaghey/Freeman* (eds.): *Handbook of Research on Employee Voice*, 2015, 208 (221).



to say that CSO's would not have ways and means of effectively representing workers' interests. It is merely to say that, in contrast to trade unions, CSO's are not exclusively concerned with workers' interests, which raises the danger that the representation of workers is distorted by the simultaneous representation of „third party“ interests.

## 2. Existing Arrangements in the Platform Economy

A look at the actual conditions in the platform economy shows that quite different forms of collective voice have formed including grassroots organisations, worker cooperatives and formal unions.<sup>20</sup>

### a) The Actors

#### aa) *The Role of Trade Unions*

If we look at the way in which workers in the gig economy raise their voices, it seems plausible to first examine the role of trade unions. In this respect, it is noteworthy that there are signs of a certain „renaissance“ of trade unions. In any case, a relatively recent study by the MIT showed that almost half of non-unionized workers in the US would join a union given the opportunity, including a majority of young workers and the lowest-paid workers. Nearly six in ten Americans still approve of labour unions –and the vast majority of those in a union still would still join again if asked.<sup>21</sup> If this is taken seriously – and there is every reason to do so – then all cannot yet be lost for the trade unions.<sup>22</sup>

Indeed, trade unions have come up with a few things to (better) represent the interests of gig workers. A 2019 report by the ILO lists some important activities: „The first approach is a legal strategy to address worker misclassification claims; the second approach has been the development of associations and alliances who provide services to gig workers and lobby on their behalf; and

20 Cf., for instance, also *Lenaerts/Kilhoffer/Akgüç* Traditional and new forms of organisation and representation in the platform economy, *Work Organisation, Labour & Globalisation*, Vol. 12, No. 2, Digital Economy and the Law (Winter 2018), 60.

21 <https://gcj.mit.edu/our-work/research/worker-voice-research>.

22 Cf. *Walsh*, *Why It Matters – There's a worker voice gap in America*. If it doesn't close, employees will continue to be left behind as the economy changes. And employers could miss out on innovation and improvement: <https://mitsloan.mit.edu/ideas-made-to-matter/a-new-survey-takes-pulse-worker-voice-america>.

the third has been a push for legal and regulatory reform at municipal and state levels in order to promote organizing and bargaining rights for gig workers“.<sup>23</sup>

In addition, some unions have succeeded in gaining members in the platform economy. In this respect, the report states: „The ability of unions to integrate non-standard workers into collective bargaining or representation models may be a partial reflection of the strength of the labour movement industry-wide, regionally, or nationally“. Unions like the German *IG Metall* have not only changed their by-laws and opened up to solo self-employed workers,<sup>24</sup> but are leading the way with innovative ideas to ensure union representation of platform workers. For instance, the union participated in the updating of the so-called „Crowdsourcing Code of Conduct“ that was signed in 2017 by a couple of German platforms.<sup>25</sup> To ensure that this voluntary commitment does not remain a „toothless tiger“, it has also installed an ombudsman together with the German Crowdsourcing Association and the platforms.<sup>26</sup>

It is also noteworthy that individual countries and regions report positive experiences with the regulation of platform employment through collective agreements. This applies, for instance, in Sweden, where a number of platforms have concluded sectoral collective agreements without there having been any industrial disputes beforehand.<sup>27</sup> In this respect, it is also interesting to note the assessment that algorithmic management practices could improve compliance with rules regulating platforms, provided that the co-determination institutions function.<sup>28</sup> However, it should not be forgotten in all this that Sweden is one of the few countries where union density is still high and collective bargaining coverage is strong. These conditions are often not met in other countries.

23 *Johnston/Land-Kazlauskas*, Organizing on-demand: Representation ,voice, and collective bargaining in the gig economy, ILO Conditions and Employment Series No. 94, 2019, 5.

24 <https://www.igmetall.de/ueber-uns/ig-metall-oeffnet-sich-fuer-solo-selbststaendige>

25 Grundsätze für bezahltes Crowdsourcing/Crowdworking – Leitfaden für eine gewinnbringende und faire Zusammenarbeit zwischen Crowdsourcing Unternehmen und Crowdworkern [Principles for Paid Crowdsourcing/Crowdworking – Guidelines for a Profitable and Fair Cooperation between Crowdsourcing Companies and Crowdworkers]: <http://crowdsourcing-code.de>.

26 <https://ombudsstelle.crowdwork-igmetall.de/de.html>.

27 Cf. *Söderqvist/Bernhardt*, Labor Platforms with Unions Discussing the Law and Economics of a Swedish collective bargaining framework used to regulate gig work, Working Paper, 2019:57. Cf. also *Jesnes/Ilsoe/Hotvedt*, Collective agreements for platform workers? Examples from the Nordic countries, Nordic future of work Brief 3, March 2019.

28 Cf. *Söderqvist/Bernhardt*, Labor Platforms with Unions Discussing the Law and Economics of a Swedish collective bargaining framework used to regulate gig work, Working Paper, 2019:57.

## bb) Other Actors

The representation of workers' interests is not limited to trade unions. Rather, diverse forms of collective voice can be observed on the ground, some of which also exist alongside trade union representation of interests. Apart from grassroots organisations of workers and „quasi unions“,<sup>29</sup> some so-called online forums have been formed, for instance, which help crowdworkers, in particular, to discern between equitable and exploitative companies (requesters) in order to maximize earnings and share their experiences.<sup>30</sup> It could be added that in practice online forums also play a significant role in verifying the meaningfulness of the work of algorithmic management systems.<sup>31</sup> There are now so-called „worker centres“ which have emerged as new type of institution advocating for worker rights. „Operating independently and often within a limited geographical scope, they provide social services and labour resources to wage earners in a variety of sectors“. <sup>32</sup> In some cases, gig workers have formed cooperatives to promote

29 Cf. *Vandaele*, Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe, ETUI Working Paper 2018.05 (23 et seq.). Cf. also *Xhaufclair/Huybrechts/Pichaul*, How Can New Players Establish Themselves in Highly Institutionalized Labour Markets? A Belgian Case Study in the Area of Project-Based Work, *British Journal of Industrial Relations* 2017, 1 (a case study of SMart, a Belgian community-based labour market intermediary).

30 See for more details *Johnston/Land-Kazlauskas*, Organizing on-demand: Representation, voice, and collective bargaining in the gig economy, ILO Conditions and Employment Series No. 94, 2019 (13 et seq.).

31 See *Lee/Kusbit/Metsky/Dabbish*, Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers, CHI '15: Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems, April 2015 (without pagination), Available at: <https://dl.acm.org/doi/10.1145/2702123.2702548>: „As drivers worked independently in distributed locations, online driver forums became a primary avenue for the driver socialization and system sensemaking. Drivers discussed the workings of the ridesharing systems' algorithmic management“. It should be noted, however, that the motivation of platform workers to operate on online forums is often „primarily to ‚find good HITS‘, instead of unionizing to get better paid“; see *Ellmer/Herr/Klaus/Gegenhuber*, Platform Workers Centre Stage!, Taking stock of current debates and approaches for improving the conditions of platform work in Europe, Hand Bockler Stiftung Working Paper, Number 140, May 2019 referring to a study by *Wang, Xinyi/Zhu, Haiyi/Li, Yangyun/Cui, Yu/Konstan, Joseph* A Community Rather Than A Union. Understanding self-organization phenomenon on MTurk and how it impacts Turkers and Requesters, CHI EA '17: Proceedings of the 2017 CHI Conference Extended Abstracts on Human Factors in Computing Systems, 2210.

32 *Johnston/Land-Kazlauskas*, Organizing on-demand: Representation, voice, and collective bargaining in the gig economy, ILO Conditions and Employment Series No. 94, 2019 (16).

worker voice and control.<sup>33</sup> There have also been isolated cases, (in Austria and Germany) where works councils have been formed.<sup>34</sup>

So it can be said that there are a large number of actors in the platform economy who want to enforce workers' interests. It is also interesting to take a look at the means these actors use. It will be seen that the actors representing workers' interests use similar means to the platforms themselves.

## **b) Means**

One example that can be used to show this is the organisation OUR Walmart.

### **aa) Apps and AI: OUR Walmart**

The acronym stands for „Organization United for Respect at Walmart“. OUR Walmart was founded by the United Food and Commercial Workers (UFCW), and was a part of UFCW's organising efforts. In 2016, OUR Walmart launched a new smartphone app called Work It. The app's chat function opens up the possibility of dialogue between current and former Walmart employees. Questions are answered in real time. The use of artificial intelligence is particularly interesting. A programme works in the background of the app that recognises questions that have already been asked and answered. It also determines the best answers to these questions, so that workers receive quick and high-quality replies and no useful information is lost. OUR Walmart itself considers the combination of an internet platform with expert support from ex-

33 Cf. *Johnston/ Land-Kazlauskas*, Organizing on-demand: Representation, voice, and collective bargaining in the gig economy, ILO Conditions and Employment Series No. 94, 2019 (18 et seq.).

34 The German start-up Gorillas has recently announced on its website that it is supportive of the formation of a works council which would include „among other things, providing the election committee with premises for meetings, assisting in the preparation of materials relating to the works council election in various languages, making internal communication channels accessible to inform as many colleagues as possible about the election, and appointing a central contact person to provide advice and support on implementation issues: <https://gorillas.io/en/blog/gorillas-position-on-a-works-council>“. In the past, however, there have been fierce disputes in the food delivery services sector about the establishment of works councils. See Kramer: *Aufstand der Essenskuriere*, Zeit Online, 9. 3. 2018: <https://www.zeit.de/arbeit/2018-02/foodora-deliveroo-kuriere-betriebsrat>.

perienced trade union organisers to be an important building block, for example, in the successful struggle to increase the minimum wage paid at the company.<sup>35</sup>

### **bb) Rating Platforms: Faircrowdwork.org**

As has been described time and again in the literature, platforms exert considerable influence on their workers through rating systems.<sup>36</sup> However, the tables can also be turned (at least up to point). There are now platforms that provide interested parties with information about the quality of platforms. For example, the website *faircrowd.work* offers so-called platform reviews that contain not only background information gathered from the web, but also reviews based on worker surveys as well as assessments of platforms' terms and conditions. In this respect, *fairwork.org* is similar to the online forums mentioned above whose concept was expanded to allow insights into the working conditions of a number of different platforms.<sup>37</sup>

### **cc) The Visibility of a Platform and Public Pressure: Coworker.org**

Coworker is a digital organising platform that was founded in 2013. The website informs workers about their rights and offers the possibility to contact colleagues and start online petitions to advocate for changes in the workplace. While it is true that the founding of Coworker was the result of the work of trade union members, the organisation consciously operates outside the boundaries of traditional union organising. It is also interesting to note that Coworker.org is not tied to a specific industry or employer. Accordingly, the platform offers resources for workers from all sectors to strengthen their voice. In doing so, workers can use the website to communicate with colleagues and develop strategies together. In the literature, the approach has been assessed in this way: „Digital organizing accelerates speed and scale of network-building, enabling workers to line up a large volume of workers and allies rapidly. Workers can elicit engagement and signatures at a far faster rate than traditional organizers

35 Cf. *Avins/Larcom/Weissbourd*, New forms of worker voice in the 21st century, Harvard Kennedy School of Government and MIT Sloan School of Management, 2018 (35 et seq.).

36 Cf., for instance, *Prassl*, Collective Voice in the Platform Economy – Challenges, Opportunities, Solutions, 2018 (14) quoting *Slee*, What's yours is mine: Against the sharing economy, 2017, 100-1.

37 Cf. *Harmon/Silberman*, Rating Working Conditions on Digital Labor Platforms, Computer Supported Coop Work 2019, Vol. 28, 911: <https://doi.org/10.1007/s10606-018-9313-5>.

could knock on doors or change minds in the break room, and can build dense online worker networks across geographies and even companies. Ultimately, Coworker.org uses digital tools to draw on the oldest source of worker power: community. As more and more workers operate as independent contractors or feel psychologically isolated within their work environments, online networks offer an avenue to build quick connections<sup>38</sup>. However, the main objective is probably to balance the information asymmetry that exists in favour of the employer side.<sup>39</sup>

What is also noteworthy is that Coworker primarily aims to influence the opinion of decision-makers by influencing public opinion in the interest of workers. In doing so, it targets not only employers directly, but also shareholders. In this context, the organisation is capitalising on the rise of impact investing and impact-oriented shareholder advocacy. However, while there are solid tools for reporting on environmental standards, serious recording of social practices in companies still lags behind.<sup>40</sup> This led the organisation some time ago to think about filling this “market gap” by setting up a subscription service that would give investors access to workers’ reports on e.g. (lived) anti-discrimination policies in companies to help them make more informed investment decisions. What is interesting here is that not only the possibilities of the internet are used, as is the case with commercial platforms, but also a similar business model is pursued. The fact that Coworker relies on the accumulated knowledge of workers can be seen as a copy of the approach of commercial platforms that offer their clients the “skills of the crowd”.

38 Cf. *Avins/Larcom/Weissbourd*, *New forms of worker voice in the 21st century*, Harvard Kennedy School of Government and MIT Sloan School of Management, 2018 (47).

39 See also on this point *Avins/Larcom/Weissbourd*, *New forms of worker voice in the 21st century*, Harvard Kennedy School of Government and MIT Sloan School of Management, 2018 (47 et seq.): „Typically, a key source of employer power –particularly in an increasingly fissured economy –is power over data and information. The employer controls systems, wages, and scheduling, and isolated workers can only self-advocate based on their anecdotal experience or data released by employers themselves (e.g., public data on gender pay disparity). Using digital networks, Coworker.org connects workers, enabling them to aggregate information, spot trends, and diagnose systemic problems“.

40 Cf. on this more generally *Waas*, *The ‘S’ in ESG and International Labour Standards* (April 14, 2021). *International Journal of Disclosure and Governance*, 2021 <https://doi.org/10.1057/s41310-021-00121-5>, Available at SSRN: <https://ssrn.com/abstract=3826537>.

Reviewing these examples, one could say that unions and other actors are using the platforms' arsenal in their struggle to assert workers' interests. Accordingly, the literature rightly raises the question of whether social media have become a new form of voice,<sup>41</sup> although one should not expect social media to work miracles, for instance in terms of the possibility of transcending national borders.<sup>42</sup> In any case, the use of social media etc. should not lead to the assumption that platforms and workers' representatives are on an equal footing. The use of similar means does not mean that one is at eye level with the other party. So the use of technology can help overcome some organisational barriers. However, this alone does not make for equal negotiating partner.

#### IV. THE ROLE OF THE STATE

Finally, let us take a look at the position of the state with regard to collective voice. Here, a couple of rather principled considerations seem appropriate, especially with regard to the relationship between the social partners on the one hand and the state on the other. Subsequently, the tasks that states face with regard to securing opportunities for employee participation in the platform economy will be sketched out.

##### 1. Collective Voice: To what Extent is it the State's Business?

When examining collective voice, one cannot avoid also looking at the role of the state. This is obvious insofar as collective voice is exercised via works councils. Works councils do not spring up out of nowhere. Rather, legal regulations are required that govern their tasks, responsibilities and powers vis-à-vis the employer.

Things are less clear when one thinks of union voice. This applies in particular to the representation of workers' interests through the conclusion of collective agreements, since collective bargaining is an expression of the autonomy of the parties involved (trade unions on the one hand, employers or employers' associations on the other). Tripartite agreements involving the state

41 See *Holland/Cooper/Hecker*, Social Media at Work: A New Form of Employee Voice?, in: *Holland/Teicher/Donaghey* (eds.), *Employee Voice at Work*, 2019, 73.

42 Cf. *Geelan/Hodder*, Enhancing Transnational Labour Solidarity: The Unfulfilled Promise of the Internet and Social Media, *Industrial Relations Journal*, Vol. 48, Issue 4, 2017, 345.

may have their uses. However, the fact that they are different from collective bargaining is underlined not least by international law. The Committee of the Experts on the Application of Conventions and Recommendations (CEACR) has expressed it as follows: “In general, the Convention [Right to Organise and Collective Bargaining Convention, 1949 (No. 98)] tends essentially to promote the bipartite negotiation of terms and conditions of employment, namely between employers and employers organizations, on the one hand, and workers organizations, on the other“. It goes on to say that „tripartism (...) may be appropriate for the settlement of issues that are broader in scope, such as the formulation of legislation or economic and social policy“. It is also noted that „the presence of the government may also be justified if the general collective agreement is limited to fixing the rate of the minimum wage“. However, there is a clear caveat associated with this as „the negotiation of other terms and conditions of employment must be undertaken in a bipartite context and the parties must enjoy full autonomy in this respect in order to ensure that the content of the agreement so concluded is not dependent on the policy choices of successive governments“. <sup>43</sup> Collective bargaining, one could also say, is not collective bargaining if the state does not stay out of it.

However, this is not the whole truth. While the state must respect the autonomy of the social partners, it is also true that it must ensure the functioning of collective bargaining. To be more precise, the state must ensure that a legal framework exists within which collective bargaining can run its way. This is what is meant when Article 4 of ILO Convention No. 98 states that “measures (...) shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations”. The Collective Bargaining Recommendation No. 163 proposes a series of means to facilitate and promote collective bargaining, in accordance with Article 4 of Convention No. 98. These include measures with a view to, among other things, “facilitating the establishment and growth, on a voluntary basis, of free, independent and representative employers’ and workers’ organizations”; of “establishing procedures for the recognition of the most representative organizations”; and “ensuring that collective bargaining is possible at any level whatsoever”. These, then, are the means that the state may have to use to breathe life into collective bargaining,

<sup>43</sup> General Survey on the fundamental Conventions, Giving globalization a human face, International Labour Conference 101<sup>st</sup> Session, 2012, para 214.



For the states, this results in a task that can certainly become a balancing act in individual cases. On the one hand, it is obliged to open up a (sufficient) space for the social partners. On the other hand, it must not “interfere” in this area with the measures it takes and in this sense become “invasive”.

## 2. Areas of Action

If we now turn to concrete fields of action, several areas come to mind: In view of the current uncertainties, it seems necessary to intensify efforts to clarify the status of platform employees, also with a view to the collective voice of the employees. Next, it is necessary to remove obstacles to the conclusion of collective agreements that (may) arise from anti-trust regulations. Finally, in view of the circumstances in the platform economy, the state appears to be obliged to consider establishing new channels for the representation of workers’ interests.

### a) Clarifying Employment Status

It has already been mentioned that the emergence of new forms of employment confronts courts,<sup>44</sup> academics and legal practitioners everywhere with the question of whether or not an employment relationship exists in a given case. The question is of course also relevant to those who deal with collective voice rights. For it depends on the qualification of the contractual relationship whether a person can raise his or her voice within the channels provided for workers.

Clarifying employment status is difficult enough in itself. The question of whether a person is an employee cannot be answered in the abstract, but depends on the circumstances of the individual case. The standards by which this is decided vary from country to country, but they have to be filled in everywhere and the criteria and indicators that go into the overall assessment have a weight that cannot be fixed from the outset. With regard to the conditions of the platform economy, there is now the added difficulty that it is unclear what significance is to be attached to rating systems or the possibility of remote control of screens, for example. The courts in particular are faced with difficult tasks, but lawmakers may also feel challenged. In 2017, the German legislator codified the concept of

<sup>44</sup> Cf. *Hießl*, Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions (May 2, 2021). Forthcoming, *Comparative Labour Law & Policy Journal*, Available at SSRN: <https://ssrn.com/abstract=3839603> or <http://dx.doi.org/10.2139/ssrn.3839603>.

employee for the first time. Previously, it had only relied on case law. However, it failed to “modernise” the term by adapting it to the realities of the platform economy. The Federal Labour Court, on the other hand, recently moved and in a much-noticed decision found that crowdworkers can be employees under certain circumstances.<sup>45</sup>

Interesting developments are emerging at the European level, however. Some time ago, the European Commission launched a public consultation on possible measures to address the challenges related to working conditions in platform work and has identified employment status as the “core problem”.<sup>46</sup> The Commission explicitly mentions the introduction of a “rebuttable presumption of employment status or reversal of the burden of proof” as possible options to combat the misclassification of employment status in platform work.<sup>47</sup>

## b) Collective Bargaining for Self-Employed Workers

While there may be a secret desire on the part of some labour lawyers to extend the scope of labour law as far as possible, it must be recognised that many platform workers are not employees by any applicable or conceivable standard. However, this does not necessarily mean that they must be excluded from collective bargaining. On the contrary, it seems quite plausible that certain groups do not participate in the blessings of (statutory) labour law, but are nevertheless not deprived of the possibility of concluding collective agreements on contractual terms with the other side.<sup>48</sup> The stumbling block in this respect,

45 Federal Labour Court of December 1, 2020 – 9 AZR 102/20.

46 Consultation Document – First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, Brussels, 24.2.2021, C(2021) 1127 final, 7. Based on the replies received, the Commission concluded that there is a need for further EU action to ensure basic labour standards and rights to people working through platforms.. Accordingly, on June 15, 2021, the Commission launched a so-called second-stage consultation of European social partners on how to improve the working conditions for people working through digital labour platforms: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2944](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2944).

47 Consultation Document – First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, Brussels, 24.2.2021, C(2021) 1127 final, 27.

48 Similarly, for instance, *Degner/Kocher*, *Arbeitskämpfe in der „Gig-Economy“?*, *Kritische Justiz* 2018, 247, (265): „Collective organisation can make an important contribution to the social organisation of work beyond the dogmatic categories of labour law, especially where mandatory labour and social law protection regulations do not (yet) apply“.

at least with regard to the situation in Europe, is competition law, as it imposes narrow limits on such agreements.<sup>49</sup>

### **aa) The Prohibition of Cartels and the Case Law of the CJEU**

In Europe, or more precisely in the Member States of the European Union, the legal situation is shaped by European law. This contains – In the form of Article 101 of the Treaty on the Functioning of the European Union (TFEU) – a ban on cartels, which must be taken into account in the question of whether and to what extent platform workers, who qualify as (solo) self-employed, can participate in collective bargaining. This provision was also the focus of a decision of the European Court of Justice (CJEU), which is of central importance for the discussion of the issue.

The ruling was based on a case from the Netherlands: The Trade Union Organisation FNV Kunsten and the Workers' Association of Dutch Sound Artists, an employees' association, on the one hand, and the competent employers' association, on the other, had concluded a collective labour agreement relating to musicians substituting for members of an orchestra. Among other things that collective labour agreement laid down minimum fees not only for substitutes hired under an employment contract, but also for substitutes who carried on their activities under a contract for professional services and who were not regarded as "employees" for the purposes of the agreement itself. Later, however, the Dutch competition authority published a reflection document in which it stated that a provision of a collective agreement laying down minimum fees for self-employed substitutes was not excluded from the scope of Article 101 of the TFEU. According to the authority, a collective agreement regulating contracts for professional services changes its legal nature and acquires the characteristics of an inter-professional collective agreement, as it is negotiated on the trade union side by an organisation which, in this respect, does not act as an employees' association but as an association of self-employed persons. Following that, the employers' association and the employees' association, terminated the collective labour agreement and refused to conclude a fresh agreement containing a provision on minimum fees

<sup>49</sup> Similar problems arise, however, in, Australia. Cf. *McCrystal*, Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis (July 27, 2015). Melbourne University Law Review, Vol. 37, No. 3, pp. 662-698, 2014, Sydney Law School Research Paper No. 15/64, Available at SSRN: <https://ssrn.com/abstract=2636600>.

for self-employed substitutes. The FNV then brought an action before the CJEU for a declaration that it was not contrary to either Dutch or EU competition law for a provision of a collective agreement to oblige the employer to comply with minimum fees not only for employed substitutes but also for self-employed substitutes, and for an order requiring the Dutch State to correct the position adopted by the Competition Authority.

In its judgement, the CJEU recalled that, „according to settled case-law, although certain restrictions of competition are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be seriously compromised if management and labour were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment“.<sup>50</sup> The Court then went on to say, that “a provision of a collective labour agreement, such as that at issue in the main proceedings, 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“.<sup>51</sup> However, that finding could not prevent such a provision of a collective agreement from being regarded also as the result of dialogue between management and labour „if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact ‘false self-employed’, that is to say, service providers in a situation comparable to that of employees“.<sup>52</sup> It is precisely this passage in the reasons for the judgement that is causing commentators headaches. The problem is that it is not clear who exactly the court had in mind. Was the Court referring to “bogus self-employed”, i.e. persons who are only self-employed in name but are in fact employees? Or was the Court referring to persons who, although self-employed and thus not employees, are in any event in need of protection in a comparable way? Opinions still differ on the question of how the ruling should be understood.

50 CJEU of December 4, 2014, Case C-413/13 (FNV Kunsten Informatie en Media), marginal 22.

51 CJEU of December 4, 2014, Case C-413/13 (FNV Kunsten Informatie en Media), marginal 30.

52 CJEU of December 4, 2014, Case C-413/13 (FNV Kunsten Informatie en Media), marginal 31.

### **bb) The Position in the Member States**

The significance, not to say the brisance, of the ruling can be seen particularly clearly in the example of German law.<sup>53</sup> In Germany, the so-called autonomy of collective bargaining enjoys constitutional protection. The freedom of association protected in Article 9 (3) of the Constitution includes the right to bargain collectively. The matter is regulated by law in the Collective Bargaining Act (*Tarifvertragsgesetz*), which originally dates from 1949 but was promulgated again in 1969. Section 12a of the *Tarifvertragsgesetz* provides for the possibility of concluding collective agreements for so-called “employee-like persons“. According to this provision, „employee-like persons“ are persons who are „economically dependent and in need of social protection comparable to that of an employee (...), if they work for other persons on the basis of service contracts or contracts for work and services, if they perform the services owed personally and essentially without the cooperation of employees“ and either „work predominantly for one person“ or „receive from one person on average more than half of the remuneration to which they are entitled for their gainful employment as a whole“. <sup>54</sup> It cannot be said clearly enough: „Employee-like persons are self-employed. The personal dependence that characterises the employment relationship is replaced by the characteristic of economic dependence. Economic dependence is regularly given if the employee is dependent on the utilisation of his labour power and the income from the activity for the contractual partner to secure his livelihood“. <sup>55</sup> The decision of the European Court of Justice has raised the question of whether German law is (still) in line with Union law.

### **cc) International Law**

The legal situation becomes even more complicated when international law is also taken into account.<sup>56</sup> According to Article 4 of the Right to Organise

53 See for more details on the position in Germany, *Rummel*, in: Waas/Hießl (eds.), *Collective Bargaining for Self-Employed Workers in Europe – Approaches to Reconcile Competition Law and Labour Rights*, 2021, 123.

54 Section 12a(1) no. 1 of the *Tarifvertragsgesetz*.

55 Thus the Federal Labour Court of December 21, 2010 – 10 AZB 14/10, marginal 8.

56 Cf. in this regard also *Countouris/De Stefano*, *The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively*, in: Waas/Hießl (eds.), *Collective Bargaining for Self-Employed Workers in Europe – Approaches to Reconcile Competition Law and Labour Rights*, 2021, 3 (4 et seq).

and Collective Bargaining Convention, 1949 (No. 8) „measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements“. In this context, it should be noted that the right to collective bargaining also extends to self-employed workers.<sup>57</sup> Accordingly, the CEACR has repeatedly recalled, also in light of the ruling of the CJEU in *FNV Kunsten*, that „as regards the self-employed (...) the right to collective bargaining should also cover organizations representing the self-employed“ though the Committee acknowledged „that the mechanisms for collective bargaining in traditional workplace relationships may not be adapted to the specific circumstances and conditions in which the self-employed work“.<sup>58</sup>

Looking at other EU Member States, the picture is rather mixed. This applies, for example, to the question of whether a third group or “intermediate group” is recognised alongside employees and the self-employed as is the case in Germany. This is indeed true in one form or another in Austria, Italy, Slovenia, Spain and Sweden.<sup>59</sup> The key question of whether and to what extent collective agreements can also be concluded for the self-employed also presents an extraordinarily mixed picture. In the Netherlands, section 1(2) of the Collective Bargaining Act (*Wet op de collectieve arbeidsovereenkomst*) of 1927 explicitly provides for this. The law in Sweden has a similar provision to that in German law.<sup>60</sup> In Poland, the law was fundamentally reformed in 2018. Since then, rights

57 See General Survey on the fundamental Conventions, Giving globalization a human face, International Labour Conference 101<sup>st</sup> Session, 2012, para 209.

58 Observation (CEACR) – adopted 2015, published 105th ILC session (2016) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Ireland (Ratification: 1955). The Committee then invited the Government „to hold consultations with all the parties concerned with the aim of limiting the restrictions to collective bargaining“ and suggested „that the Government and the social partners concerned may wish to identify the particularities of self-employed workers that have a bearing on collective bargaining, so as to develop specific collective bargaining mechanisms relevant to them“. See also Observation (CEACR) – adopted 2016, published 106th ILC session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Ireland (Ratification: 1955) noting progress, and Observation (CEACR) – adopted 2017, published 107th ILC session (2018) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Netherlands (Ratification: 1993).i

59 Cf. *Hießl*, Comparative Analysis of Country-Level Experience, in: Waas/Hießl (eds.), *Collective Bargaining for Self-Employed Workers in Europe – Approaches to Reconcile Competition Law and Labour Rights*, 2021, 265 (271).

60 Cf. *Westregård*, Sweden, in: Waas/Hießl (eds.), *Collective Bargaining for Self-Employed Workers*

arising from the Trade Union Act also apply to “persons who perform paid work”. Interestingly, with the amendment of the law, the legislator attempted to take into account a decision of the Constitutional Court in 2015, in which the Court had also referred ILO Convention No. 87.<sup>61</sup>

#### dd) *EU-Action*

In the literature, the CJEU has been called upon by some to „readjust“ its ruling if necessary.<sup>62</sup> In the meantime, however, the European Commission has also taken action and carried out a public consultation. In a so-called „Inception Impact Assessment“, the Commission acknowledged the emergence of new forms of work, particularly in the platform economy and stated that „people working through platforms are often not involved in the determination of the price of their services and may lack the individual bargaining power to negotiate their terms and conditions“.<sup>63</sup> It further noted that „ensuring that EU competition law does not stand in the way of collective bargaining by those who need it can be one part of the puzzle to ensure that the working conditions of (some) self-employed, including people working through platforms, improve“.<sup>64</sup> Finally, the Commission hinted at a possible need to act on the EU-level, not least from the point of view that the uncertain legal situation as such could already discourage actors from collective bargaining: „In the absence of EU intervention, self-employed, including those in need of protection, may be prevented from entering into collective bargaining. As boundaries between employment and

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in Europe – Approaches to Reconcile Competition Law and Labour Rights, 2021, 247 (250 et seq.).

61 Cf. for more details, *Mitrus*, Poland, in: Waas/Hiefl (eds.), *Collective Bargaining for Self-Employed Workers in Europe – Approaches to Reconcile Competition Law and Labour Rights*, 2021, 199 (210 et seq).

62 See, for instance, *Waltermann*, *Digital statt analog: Zur Zukunftsfähigkeit des Arbeitsrechts, Recht der Arbeit (RdA) 2019*, 94 (100): „It should be made clearer that the CJEU considers non-market-oriented self-employed persons who are in a situation comparable to employees, i.e. self-employed persons similar to employees according to the German understanding, as ‘false self-employed persons’ under Union law, who can be covered by collective agreements without affecting the prohibition of cartels under competition law, or the Court could readjust the wording of its 2014 ruling with regard to the change in the world of work“. The author further claimed that „freedom of association takes precedence over the protection of a functioning internal market and competition under EU law to the extent of the Member States’ constitutional guarantees in this matter, which is not threatened at this point“.

63 European Commission, *Inception Impact Assessment*, Ref. Ares(2021)102652 - 06/01/2021, 1.

64 European Commission, *Inception Impact Assessment*, Ref. Ares(2021)102652 - 06/01/2021, 2.

self-employment are increasingly blurred, individuals may sometimes not have clarity about their employment status, and thus about their access to collective bargaining. This situation may have a ‘chilling effect’ preventing those individuals from bargaining collectively out of the fear of EU competition rules. Action at EU level may thus be needed<sup>65</sup>. A decision on how to proceed with the results of the consultation will be taken by the end of the year.<sup>66</sup>

### c) Opening-up other Channels

What remains to be clarified is whether it might not be advisable to think about opening up alternative avenues for the collective voice of workers. One avenue worth considering would be to legislate on the establishment of works councils. One has to be aware that „the development of works councils has been a singularly European development [though] it has not taken the same trajectory in each country“.<sup>67</sup> Moreover, a closer look at co-determination in Germany, for example, shows that its emergence owes much to specific historical conditions.<sup>68</sup> However, this only means that caution should be exercised, not that the model of representation of interests by works councils should not be looked at from the outset. With regard to the platform economy, a few works council have been formed or, in any event, initiatives have been taken to establish works councils – some of them hotly contested – in the food delivery sector in Germany (as well as in Austria which has a similar model).<sup>69</sup> Accordingly, there can be no talk

65 European Commission, Inception Impact Assessment, Ref. Ares(2021)102652 - 06/01/2021, 2.

66 [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en).

67 *Brewster/Croucher/Prosser*, Employee Voice and Participation: The European Perspective. in: Holland/Teicher/Donaghey (eds.), *Employee Voice at Work*, 2019, 51 (51).

68 Cf., for instance, *McGaughey*, The Codetermination Bargains: The History of German Corporate and Labour Law (March 25, 2015). (2016) 23(1) *Columbia Journal of European Law* 135, LSE Legal Studies Working Paper No. 10/2015, Available at SSRN: <https://ssrn.com/abstract=2579932> or <http://dx.doi.org/10.2139/ssrn.2579932>.

69 Cf. *Haipeter/Hoese*, Interessenvertretung bei Crowd- und Gigwork – Initiativen zur Regulierung von Plattformarbeit in Deutschland, IAQ-Report 2019-5; *Johnston*, Labour geographies of the platform economy, *International Labour Review*, Vol. 159 (2020), No. 1, Special Issue: Future of work (Part II): Rethinking institutions for social justice, March 2020, 25 (31 et seq). In the case of the company *Delivery Hero*, there was even an agreement on the participation of employees in a supervisory board with equal representation of both sides. Cf. *Lücking*, Formen der Beteiligung in der Plattformökonomie: <https://www.mitbestimmung.de/html/formen-der-beteiligung-in-der-14375.html>.



of a triumphant advance of works councils, but that should not stop us either from taking a sober look at the so-called „works constitution“ in Germany.

A major advantage of works council participation is that it is independent of the employer’s will: If the legal requirements are met, workers (possibly with the involvement of the trade union) can take the initiative to elect a works council. If the employer tries to prevent this, he or she faces legal sanctions. Once the works council is formed, it operates within a secure legal framework. In particular, it has clearly defined rights vis-à-vis the employer. It should also be noted that every worker is represented by the works council, regardless of whether he or she belongs to a union or not. This protection applies to all types of employment relationships, including includes non-standard forms of employment (such as part-time work, fixed-term contracts and temporary agency work).<sup>70</sup> It is noteworthy that in Germany there were initially strong trade union reservations about the “works constitution”. However, these dissipated as the realisation took hold that works councils are not to be feared as competition, but can be used as an instrument to strengthen trade union influence. For some time now, the consensus on the trade union side in Germany has been that “works councils need trade unions and trade unions need works council”.<sup>71</sup>

Though works councils are in principle an effective instrument for asserting workers’ interests and are also fully accepted by the trade unions, there is, however, no getting around the fact that the current works constitution in Germany is incomplete with regard to the representation of platform workers. This applies on the one hand with regard to the fact that in principle only employees enjoy the protection of works councils. However, this is also true insofar as the “works constitution” is tied to the company. The latter, however, only does limited justice to the circumstances of platform work, because here it is often difficult to identify a company and its boundaries.<sup>72</sup>

70 Cf. for more details *Waas*, Non-trade Union Workers’ Representation in Germany, in: Blanpain/Lyutov (eds.), *Workers’ Representation in Central and Eastern Europe – Challenges and Opportunities for the Works Councils’ System*, 2014, 85 (94 et seq).

71 *Artus/Röbenack/Kraetsch*: Betriebsräte ohne Gewerkschaften? Zur Praxis und Problematik gewerkschaftferner betrieblicher Mitbestimmung, Hans Böckler Stiftung, Study 428, September 2019, 7.

72 In this light, demands of the German Trade Union Confederation are to be seen, which aim at extending the personal scope of application of the Works Constitution Act (*Betriebsverfassungsgesetz*) and at adapting the concept of establishment to current conditions. Cf. DGB-Position zur Plattformarbeit, March 22, 2021.

Finally, as far as the EU level is concerned, it should be mentioned that information and consultation is also part of the public consultation already mentioned above on possible measures to address the challenges related to working conditions in platform work, launched by the European Commission. As it is stated in the Consultation Document: “The right to be informed, consulted and provide opinions as part of the digital labour platform’s decision-making process could be considered for people working through platforms, including possible representation and collective defence of the interests of workers at the appropriate platform decision-making level”.<sup>73</sup>

## V. CONCLUSIÓN

Looking at the current state of play in the platform economy, a complex picture emerges regarding collective voice of workers. Traditional actors have been joined by entirely new actors, and the means used to assert workers’ interests do not come from the traditional arsenal. In the literature, there is sometimes even talk of „new ‘guerrilla’ forms of worker representation“ in the industry.<sup>74</sup>

The fact that new paths have been and are being taken to secure a collective voice is testament to the workers’ will to assert themselves and the creativity of those involved. However, the state is also called upon to create fair working conditions in the platform economy. There is much to be said for relying on the collective voice of workers in addition to direct legal regulation of working conditions, but then it is up to the state to create the conditions for this voice to be heard on the other side.

73 Consultation Document – First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, Brussels, 24.2.2021, C(2021) 1127 final, 28. Ibid, 20: „The question of workers’ involvement and information and consultation processes in platform work is also important. This is particularly relevant to help overcome the opacity of certain aspects of platform work, such as algorithmic management and the asymmetry of information that such remote and fragmented work organisation may entail“.

74 *Bryson/Freeman/Gomez/Willman: The Twin Track Model of Employee Voice: An Anglo-American Perspective on Union Decline and The Rise of Alternative Forms of Voice*, in: Holland, Peter/Teicher/Julian/Donaghey, Jimmy (eds), *Employee Voice at Work*, 2019, 23 (46).

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