

The (non/) response of trade unions to the “gig” challenge

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Abstract

The advent of platform work has led to deepened debate about the role of trade unions in our contemporary, segmented labour market. One of the crucial questions unions face is how to approach the protection, and organisation, of platform (“gig”) workers. The dilemma about whether to extend employment protection to more of those who work outside of the classical employment relationship can be solved in at least two ways: by changing labour legislation, and/or by extending the scope of collective agreements. This paper analyses two different approaches, from a common law and civil law perspective within the EU, and evaluates their efficacy. The common law perspective is analysed by looking at the case of Ireland, while from the civil law perspective the case of Slovenia is presented. In both countries, trade unions have been struggling to define strategies to approach the issue of the diversification of work relations. On the one hand, unions are wary of eroding the benefits of “employee” status, but on the other, in the context of membership decline, demonstrating relevance to increasing numbers of “non-standard” workers (including “gig workers”) is more important than ever. The paper assesses the union movements’ response in both countries to the “Uberisation” of work.

Keyword: Platform workers; Trade unions; Collective agreements; Ireland; Slovenia.

1. Introduction.

The increasingly differentiated nature of employment relations, including the “Uberisation” of work, has significantly influenced both the individual and collective

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dimension of employment relations. There is an increase in the prevalence of non-standard forms of work, and “new” working relationships, with the consequence that more and more workers cannot neatly be classified in terms of the traditional binary divide as either “employees” or as “self-employed”¹. Trade unions are not just challenged by the concern that “new” forms of work might lower employment and social standards, but also by the question of how to represent the increasing diversity of interests amongst workers, in order to retain existing members and attract new ones.

One of the crucial questions facing trade unions is how to approach the protection, and organisation, of platform (or “gig”) workers. Trade unions traditionally thrive where there exist large workforces, with identifiable common interests and employers, and which are physically and geographically bounded. The characteristics of much platform work are that workers are often isolated (and, often, of course, are designated as “self-employed”), the question of who bears the traditional “employer” function in relation to specific employment obligations is often unclear, and there is usually no physical workplace, as the work can be done via apps from anywhere, and for end-users who may be located in any part of the globe. The obstacles to organisation, and mobilisation, therefore, are considerable. Nonetheless, trade unions are beginning to come to terms with these challenges and strategies are beginning to be developed². This paper analyses two different approaches, from trade unions located in a common law (Ireland) and civil law (Slovenia) tradition within the EU. In both countries, trade unions have been struggling to define strategies to approach the issue of the diversification of work relations. On the one hand, unions are wary of eroding the benefits of “employee” status, but on the other, in the context of membership decline, demonstrating relevance to increasing numbers of “non-standard” workers (including platform workers) is more important than ever. The paper assesses the union movements’ response in both countries to the “Uberisation” of work. The two countries have different legal systems (civil law and common law), and different legal and policy traditions in the area of labour relations. However, we assess the legal responses of the two countries in this sphere, within the overall framework of legal and policy developments at EU level. The paper also uses qualitative data, garnered from interviews to assess how legal changes are impacting on the collective representation of platform workers in practice. We conducted interviews in both countries in 2018-2019 with the labour inspectorates, “platform” employers, “traditional” employer organisations, and trade unions. The focus of the interviews was to gain an in-depth understanding of the implications of platform work for labour relations, in general, and collective labour relations, in particular.

In a seminal work, Ewing has drawn the distinction between the “representational” and “regulatory” functions of trade unions³. A representational perspective sees collective bargaining as a *private* market activity conducted by unions, usually at the level of the enterprise, as agents of a tightly circumscribed bargaining unit. A regulatory model, however, sees collective bargaining take on an explicitly *public* role, as labour standards are set, and applied, not only for employers that recognise trade unions and union members, but for

¹ Davidov G., Freedland M., Kountouris N., *The Subjects of Labour Law: “Employees” and Other Workers*, in Finkin M., Mundlak G. (eds), *Research Handbook in Comparative Labour Law*, Edward Elgar, Cheltenham, 2015.

² See, for example, Vandaele K., *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers’ Collective Voice and Representation in Europe*, in *Transfer: European Review of Labour and Research*, 2018.

³ Ewing K. D., *The Function of Trade Unions*, in *Industrial Law Journal*, 34, 1, 2005.

enterprises which do not engage in collective bargaining. This can happen through multi-employer collective bargaining, such as where joint industrial councils set standards for an industry or sector, or where legal mechanisms permit the extension of collective agreements to all employers in a sector, and such standards may be mandatory even for employers not affiliated to sectoral or industry-level employer associations⁴. Additionally, Ewing points to the “governmental and public administration” functions of trade unions, whereby unions need to engage with government, first, in order to secure legislative change, which will enable them to fulfil their functions, and, secondly, to ensure involvement in the development, implementation, and delivery of government policies⁵. We use Ewing’s framework in order to illustrate how trade unions in these Member States have responded to the “gig challenge”.

2. The EU Influence.

As EU Member States, Ireland and Slovenia must, of course, ensure any actions taken in relation to addressing the challenges of platform work confirm to the requirements of EU law. There are three key aspects of EU law of relevance to our argument⁶:

a. The Directive on transparent and predictable working conditions.

In launching the European Pillar of Social Rights (EPSR), the Commission noted that it “flanks” the EPSR with a number of concrete legislative and non-legislative initiatives. In terms of platform work, the legislative changes set out in the Directive on Predictable and Transparent Working Conditions could be significant⁷. The Directive sets out minimum rights for workers who have “an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, with consideration of the case law of the Court of Justice” (Art 1). These include rights to information (to be given to the worker within seven days of work commencing), including where the work pattern is entirely or mostly unpredictable (Arts 4-5). Article 10 sets out some minimum rights for workers where the work pattern is entirely or mostly unpredictable, including that employers must provide reference hours and days within which the worker may be required to work, and a minimum notice period to which the worker is entitled before beginning a work assignment. Article 11 refers specifically to on-demand contracts. Member States must take action to prevent abusive practices as regards these arrangements, by limiting the use and duration of on-demand contracts, or by introducing a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; or by some other measure. Article 16

⁴ Doherty M., *When You Ain’t Got Nothin’, You Got Nothin’ to Lose... Union Recognition Laws, Voluntarism and the Anglo Model*, in *Industrial Law Journal* 42, 4, 2013, 369-397.

⁵ Ewing K. D., n. (3).

⁶ For fuller discussion of the issues, see Bednarowicz B., *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, in *Industrial Law Journal* 48, 4, 2019, 604-623; and Doherty M., Franca V., *Solving the “Gig-saw”? Collective Rights and Platform Work*, in *Industrial Law Journal*, 2019.

⁷ Directive 2019/1152/EU on transparent and predictable working conditions in the European Union.

provides that Member States must ensure an effective means of redress for those whose rights under the Directive have been breached.

b. Competition Law.

A key problem lies in the intersection between a key labour right - the right to bargain collectively - and competition/anti-trust law. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits:

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

Member States must not introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings⁸. Collective bargaining processes, however, are based precisely on combining employees to fix wages (prices) in order to alleviate the pressure to undercut the price of each other’s labour, sometimes in bargaining with single employers, and sometimes in bargaining with associations of employers. Therefore, competition rules which, at their core, prohibit cartels, or agreements between undertakings which distort competition, clearly conflict with the right to conclude binding collective agreements (often referred to as “wage cartels”), the purpose of which is to set prices (wages). This conflict is one with which courts, and legislatures, must grapple. In *Albany*, the Court held that collective agreements do not fall within the scope of Article 101 TFEU when two cumulative conditions are met:

“(i) they are entered into in the framework of collective bargaining between employers and employees and;
(ii) they contribute directly to improving the employment and working conditions of workers”⁹.

As the Court’s case law refers explicitly to “employees”, collective agreements involving the self-employed fall outside of the “*Albany* exception”. In *FNV Kunsten*¹⁰, the Court reiterated this stance, but also identified a category of workers which it called the “false self-employed”, namely “service providers [who are] in a situation comparable to that of employees” who, subject to certain conditions, can benefit from an *Albany*-type exemption¹¹.

⁸ CJEU - Case C-96/94 *Centro Servizi Spediporto*, ECLI:EU:C:1998:454 E.C.R I-2883, paras 20.

⁹ CJEU - Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:28 E.C.R I-5751.

¹⁰ CJEU - Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2215.

¹¹ *Ibidem* paras 27-28.

c. Making and Enforcing Employment Rights.

A key role is explicitly afforded in the Treaties to social dialogue (Articles 152, 154 and 155 TFEU); the model of law-making evinced by these articles is: “a model which allows for parallel law-making by social institutions, including collective bargaining and social dialogue as the highest expression of what is in effect a process of collective bargaining between the social partners”¹².

The EPSR expresses “principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe” (Recital 14). Section 8 focuses on social dialogue and the need to both encourage the autonomy of the social partners in terms of negotiating and concluding agreements, and encourage their capacity to promote social dialogue.

Doherty and Franca argue that extending the scope of protection for *individuals* is insufficient to adequately regulate work in the platform economy, but that it is a responsibility of governments (and social partners) to ensure that adequate dispute resolution mechanisms exist for those engaged in platform work, and indeed, consumers of platform-based services¹³. Adams-Prassl has recently argued, in a paper on the effective enforcement of EU labour, that Article 47 of the Charter of Fundamental Rights, may come to play a central role in developing alternatives to the individual enforcement of employment rights “whether through collective redress mechanisms, the empowerment of social partners, or domestic labour inspectorates”¹⁴.

It is in this context that we move on to present data from the two countries, utilising Ewing’s framework (the representational, regulatory, and governmental/public administration functions of trade unions) before presenting some conclusions.

3. Representational perspective.

3.1. Ireland.

The Irish trade union representatives stressed that while platform work is “sexy” right now in terms of media discourse, the focus for them is more on “*traditional sectors*” where, increasingly, services are being provided by those whose employment status is somewhat uncertain (terms like “bogus self-employed” are often used). Examples, in particular, include work in contract cleaning and domestic care. While these are traditional sectors, there are platforms emerging in this space (and these are a feature in many other European countries). It was also noted that there have been very few approaches *from* platform workers to the union; “maybe we are not seen as the appropriate union for these types of workers”. The labour inspectorate representative considered the issue of platform work to be “probably a little exaggerated...the most pressing issue with platform work is the internationalisation of

¹² Ewing K., Hendy J., *New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining*, in *Industrial Law Journal*, 46, 1, 2017, 23-51, 32.

¹³ Doherty M., Franca V., n. (6).

¹⁴ Adams-Prassl J., *Article 47 CFR and the Effective Enforcement of EU Labour Law: Teeth for Paper Tigers?*, in *European Labour Law Journal*, 2020, 1.

jobs (e.g. Taskrabbit, etc), which tends not to come to the WRC”¹⁵. The representative also noted that issues of precarious work in “traditional” sectors remain of most concern. The platform representative confirmed that on-demand work is still relatively new in Ireland and that the number of those working within the sector is still low in terms of the overall workforce in Ireland. However, the representative noted that the platform receives hundreds of applications each week at certain times, and that that the “demand for this new way of working will continue to grow, particularly as companies offer additional benefits and security”. The representative noted that the platform does not engage with unions in Ireland, “our experience has been that we have always had a good relationship directly” with the service providers.

The Irish trade union (one of the largest in the State) is working with *other civil society organisations* (notably a migrant’s rights organisation), particularly around publicity campaigns in sectors with high numbers of precarious workers (and sectors with high numbers of migrant workers, and female workers, such as cleaning and domestic care). This type of “coalition building”, has been noted by Eurofound, which documents “new formats of institutionally organised collective voice” for platform workers (co-operatives, advice bureaux, online fora and groups), and instances of collective action by platform workers (boycotts, flash-mobs, protests, etc), some of which are explicitly, or implicitly, supported by trade unions (albeit often newer, independent unions like the IWU in the UK)¹⁶. The union representative noted that many of the UK “platform” cases are taken by a small number of London legal firms; this type of “coalition building” (with lawyers) would be something very new for the Irish unions. The representative noted that there is some debate in the Irish trade union movement about the advantage of “new pop up” unions (like IWU in UK). Some see the benefits, but others worry about the sustainability of such unions, and would be “wary” of offering material support to such organisations.

The use of *technology*, however, in organising is a priority. The union has developed an app for workers in the care sector, to keep in contact with workers (who, by definition, are fragmented, and do not have one physical workplace). A recent dispute involving healthcare workers, for example, was conducted by “combining apps with “old style” organising”. A big focus for the union also is on “*freelancers*”, especially musicians, journalists, and actors (these may not be “gig workers”, but similar issues in terms of employment status and accompanying labour rights arise). Again, the union is trying to coordinate action with civil society groups in this space: “we are trying to support these groups, even though they may not be union members”. In this respect providing *servicing* functions (especially around insurance, debt collection, and legal advice; e.g. on contracts) is important.

¹⁵ The Workplace Relations Commission is the State Body responsible for monitoring and enforcing employment rights, and promoting good employment relations. The WRC provides adjudication, dispute resolution, and advisory services, and houses the State Labour Inspectorate service.

¹⁶ Eurofound, *Employment and Working Conditions of Selected Types of Platform Work*, 2018: <https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work>.

3.2. Slovenia.

Slovenian trade unions, to date, have not developed very concrete strategies on how to tackle the diversification of labour relations, and have struggled to address the needs of a variety of *non-standard workers*, including, but not limited to, platform workers. In Slovenia anyone can become a union member, without restrictions¹⁷, including platform workers. However, recent research¹⁸ has showed low levels of engagement by precarious workers with trade unions, as well as low levels of awareness about collective rights. For instance, just 10% of agency workers, only 7 % of the self-employed, and none of the platform workers researched were trade union members. The majority of respondents attributed their low union involvement to their perception that the unions would not be effective in promoting their interests. Partially this is understandable as collective rights are related to the existence of an employment relationship, and the conclusion of an employment contract. As mentioned above, a key issue in relation to platform work is that the contractual status of those doing the work is ill-defined¹⁹; most of those involved in the research *considered* themselves as self-employed, students²⁰, working on the basis of civil (not employment) contracts, or as undertaking undeclared work.

Thus, is it unsurprising that platform workers tend not to be trade union members. However, platform workers are also clearly not joining the Trade Union of Precarious Workers, which was established in 2016 as a response to the rise of atypical forms of work. It seems this union has mostly attracted quite highly educated “freelance” workers (e.g. translators, architects, and designers) and formally “self-employed” workers, many of whom appear to be, in reality, in a “regular” employment relationship.

All interviewees admit that social partners in general have not adequately adapted themselves to the “new reality” in the labour market, and the need to adapt traditional approaches to better serve the needs of precarious worker in general, and platform workers, in particular. As in Ireland, the Trade Union of Precarious Workers has been seeking to build *coalitions* in efforts to represent platform workers, in particular with cooperatives. Equally, as in Ireland, the Trade Union of Precarious Workers has acknowledged the need to provide particular *services* to specific groups. In terms of the workers they attract, they seek to provide services such as legal advice (especially on contracts), accounting services, insight into the solvency of the “employer”, and so on. As the trade union interviewee put it: “this is our only future”. Although the employer organisation recognised the rise of platform work, it has not focused overmuch on the issue of to date, certainly in terms of negotiations with trade unions. The CEO of the Slovenian platform we interviewed (operating in the cleaning sector) was critical of the trade unions, as not being alive to the diverse nature of platform work; “they just see Uber and its exploitation of workers”. A prerequisite of the platform is

¹⁷ As for example Rakovec J., Franca V., *Sindikavno organiziranje prekarnih delavcev*, in *Pravna praksa* 36, 5, 2017, II-VII.

¹⁸ Domadenik P. et al., *Empirična analiza prekarnosti na trgu dela v Sloveniji*, in Strban G. et al. (eds.), *Prekarno delo*, 2020.

¹⁹ As the Eurofound report notes, however, many platform workers are “unsure of the employment status deriving from their platform work and what it entailed” (Eurofound, n. (17), 19).

²⁰ Under Slovenian law, student work is a regulated form of work, which can be used just under certain conditions and limited to those who regularly study; more in Franca V., *Tveganja za prekarnost pri študentskem delu*, in *Delavci in delodajalci*, 19, 4, 2019, 299-318.

that workers have a regulated legal status. Thus, the cleaners are mostly self-employed, one-person limited liability companies, or perform the work as students or pensioners²¹. Although they could be classified as “non-standard” workers, they are not wholly excluded from the social security system, as it is the case with many platform workers. Some of them are professionals, with cleaning as their only occupation, while others clean as a way to make some extra money. Many of the workers lost their jobs in the last economic crisis, so it is no surprise that their “partners” (as the platform addresses them) are often highly educated and skilled workers (architects, photographers, etc).

4. Regulatory perspective.

4.1. Ireland

The *Industrial Relations (Amendment) Acts 1946-2012*, allow “joint labour committees” (on which representatives of employers and workers sit) to set binding terms and conditions, with *erga omnes* effect, in certain sectors. The union has successfully been involved in concluding agreements in the cleaning sector, in particular. The *Industrial Relations (Amendment) Act 2015* allows for representative unions (alone or jointly with representative employers) to apply for “sectoral employment orders”, which, again set binding terms and conditions, with *erga omnes* effect, in the sector in question (e.g. construction). In both cases, the terms and conditions proposed must be approved by the Labour Court²², and confirmed by the Minister. Thus, the Irish trade unions have been quite active in recognising, and promoting the value of *sectoral standard-setting*, which is binding on *all* employers and workers in the sector in question. The employer representative also pointed to benefits of sectoral wage-setting, via negotiation, as being preferable to “all these laws coming” (the *Employment (Miscellaneous Provisions) Act 2018* being a case in point; see below).

The *Competition (Amendment) Act 2017* provides that section 4 of the *Competition Act 2002* (prohibiting cartel action; this Act enacts in domestic law the principles set out in Article 101 TFEU) shall not apply to collective bargaining and agreements in respect of certain categories of workers. There are three such categories. First, the Act specifically applies to voice-over actors, session musicians, and freelance journalists. Secondly, the Act introduces the concept of the “false self-employed” worker; this is defined, in section 15(D), as an individual who:

- “(a) performs for another person, under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person,
- (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship,
- (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work,
- (d) does not share in the other person’s commercial risk,

²¹ Similar to student work, the Labour Market Regulation Act regulates work by pensioners, which can be undertaken with certain limitation (maximum monthly working hours, for example).

²² Despite its moniker, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions and employers, and chaired by a government nominee.

- (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and
- (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking".

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

- "(a) who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and
- (b) whose main income in respect of the performance of such services under contract is derived from not more than 2 persons".

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

The legislation represents an attempt to extend collective bargaining rights to vulnerable workers, who do not fit within the classic "employee definition" and sets out in law the principle that collective representation should not be automatically denied to those who cannot satisfy traditional tests of employee status. We interviewed one of the legislators who had a large role in drafting and passing the Act. It was noted that a letter had been sent from the Commission to the Irish Government, while the Bill was going through the legislative process, which suggested that "the Bill was a disproportionate response [to the inability of certain self-employed workers to engage in collective bargaining], and that it was not proportionate to seek an exemption from competition law altogether"²³. The legislator feels the law will be a "slow burn"; i.e. it directly affects those classes of workers named (actors, etc), but it will take time for more groups of workers to be included. However, it was noted that it could be a potential recruiting tool for trade unions. The unions thus far have only focused on negotiating for the classes of workers named in the Act. It seems that the union is going to be careful in selecting a first "test" case for other groups of workers.

The employer representative was very worried about the introduction of the 2017 Act. The main fear expressed was that the new definitions (false/ dependent self-employed) would not be confined to collective bargaining under the Act itself, but would "leak into" other laws not related to collective bargaining. The representative was also concerned about insufficient consultation with employers on this law (a point raised by Irish employers at the ILO); "a big fear is that laws are being introduced without getting the employer bodies to buy into them". Interestingly, the platform representative also made this point in relation to another Bill (which ultimately was not enacted); the *Protection of Employment (Measures to Counter*

²³ Note the recent decision of the European Committee of Social Rights in *Irish Congress of Trade Unions (ICTU) v Ireland* (No 123/2016; published 12 December 2018), where the Committee found that the position in Ireland prior to the 2017 amendment was in breach of Article 6 of the European Charter of Social Rights, in that the "categories of persons included in the notion of "undertaking" were over-inclusive" (para 98).

False Self-Employment) Bill. The platform representative noted that “it would be good for industry to have some input as the concern would be that measures or definitions included in the Bill, could (unintentionally) impact sectors that are genuine about working well with contractors, such as ourselves”.

The labour inspectorate representative felt that the idea and ambition behind the Act was good, as “competition law should not be focused on small players (musicians, etc) but on large-scale price-fixing”. However, the representative noted that this is really an issue for EU-level action; “this is an intergovernmental issue across the EU and requires action at that level”.

4.2. Slovenia.

Both trade union *and* employers’ organisations interviewed believed that “non-standard” workers, including platform workers, should be covered by collective agreements at sectoral level. Both trade unions *and* employers’ organisations in Slovenia have been having problems in attracting new members, and both voiced some concern about the role of Uber (in particular; see below) and other platforms. The trade unions are concerned about low payment, poor working conditions and the exclusion of platform workers from the social security system, while members of the employers’ organisation, mostly “traditional employers”, believe that platforms may distort competition in the market. However, despite some commonality of interest, there have been no developments in negotiating sectoral agreements. A key factor, undoubtedly, is the low levels of trust that exist between the Slovenian social partners (at national, sectoral, and local levels), exemplified by the failure of recent attempts at social dialogue²⁴. Given this “trust deficit”, it is perhaps unsurprising that unions and employers, while they both acknowledge possible adverse consequences of not regulating platform work, have been unable to develop a coherent shared strategy to tackle the issue.

5. Governmental/ Public Administration perspective.

5.1. Ireland.

As noted above, the unions have lobbied (successfully) for *legislative change* in relation to sectoral measures. In addition, the unions have also lobbied strongly for the introduction of new laws providing strengthened rights to information on terms of employment, to prohibit “zero-hours contracts”, and to provide more rights to workers with unpredictable working hours (e.g. a right to a minimum payment for low-paid, vulnerable workers who may be called in to work for a period, but not actually provided with that work; workers on “low hour contracts” (not defined) who consistently work more hours each week than provided for in their contracts of employment, are entitled to be placed in a band of hours that reflects the reality of the hours they have worked over an extended period). The *Employment (Miscellaneous Provisions) Act 2018*, mirrors, to some extent, the Directive on Predictable and

²⁴ For more see Franca V., Doherty, M., *Careless whispers: confidentiality and board-level worker-representatives*, in *Employee Relations*, 2020, 42, 3, 681-697.

Transparent Working Conditions²⁵, but goes beyond some of the proposals in the Directive. This was criticised by the employer representative, who stressed that some of the changes in the law had been introduced in several large retail companies via (local) collective bargaining; “a more appropriate manner”.

The Act, however, only applies to “employees”. In terms of legal status, the union representative noted that some Irish legislation (e.g. minimum wage laws) does extend beyond “employees” (as long as the service is provided “personally” by the worker). Very few, if any, cases though, have been taken, either by workers themselves, or the union. The union representative put this down to a *lack of awareness on behalf of workers* of their rights; “many believe they are self-employed, even if they might come under the minimum wage legislation”.

The union is of the view that while definitions of “employee” under Irish law are a little bit fragmented, the representative was not convinced that a “*third category*” (like the UK’s “worker” category) would be very useful; “it might lead to unintended consequences, and reduced rights for some that would now be employees... We would also need to revise tax and social security codes, as well as employment law...” for this to be effective. Equally, the union representative did not see a great practical advantage in having a “*presumption of employee status*” introduced into Irish law, as the problems of individual workers accessing the employment tribunals in the first place would remain (particularly: fear of reprisal, lack of awareness, cost, and time).

Perhaps counter-intuitively, the employer representative was not, in principle, opposed to the creation of a third category (dependent self-employed, etc), but more concerned about the rights to which such a category would be entitled. The representative was worried that these would be difficult to “contain”; there might be few rights to start with (e.g. to social protection payments), but these would probably expand over time. The representative agreed with the union respondents that there was no need to introduce a “presumption of employee status”; which would likely just lead to more legal argument and complexity before the tribunals. The employer representative stressed that, were traditional “employee” rights (in terms of *social security*, in particular) to be extended, this would have to be funded by the State, rather than increased employer contributions.

The labour inspectorate representative noted that while the “binary model does have the advantage of simplicity (as opposed to introducing a third category), the “multi-employer” relationship is probably becoming more common (not just in relation to platforms)”. The representative stressed that a good model for now might to focus “on four or five key issues (e.g. pay, working time, health and safety, dismissal) and specify who is the “employer” for these only” (leaving the rest of the employment relationship based on traditional tests/contract); i.e. “pick out key underlying areas of most exploitation potential (and, especially, issues facing migrant workers)”.

From the employer representative’s point of view, the importance of maintaining flexibility was stressed: “the narrative is that all will be well if everyone has a contract of employment/ regular hours/a suite of employment rights - but this is not the case for everyone! The false self-employed is not a huge cohort, and is not homogenous - it’s a complex issue, but the public discourse suggests it’s easy to solve with employee status”.

It was noted that “the cumulative effect of over-regulating the employment contract” could affect Ireland’s ability to attract foreign direct investment (especially from the USA).

²⁵ Directive 2019/1152/EU on transparent and predictable working conditions in the European Union.

At the last minute, a section of the Bill (on “*bogus self-employment*”) was dropped from the final legislation. This would have made it a *criminal* offence for an employer to incorrectly designate an employee as self-employed. The employer representative we spoke to was very concerned about this provision (at the time of the interview the proposal was still in the draft legislation), as it would “lead to a situation where it will be very difficult for people to genuinely operate as self-employed” and be a huge negative for Ireland’s “flexible labour market”. The representative also noted that two queries had already been brought to the employers’ group as to what would happen “if the worker refuses to be classified as an employee, when the employer feels they should be!”. This raises the difficult questions of collusion and/or incentives; if workers and/or employers benefit (for example in terms of taxation) from a “non-employment” status, there will be situations where one or both sides wish to persist in the “fraud”. This issue was also noted by the labour inspectorate representative.

The platform representative noted that the definitions of both employee and self-employed are restrictive “in what we can offer to the [service-providers] by way of additional benefits. We currently provide free insurance that covers things like sick pay... we would like to offer more but under the rules this would risk reclassification, putting at risk the flexibility our [service providers] say is the main reason they enjoy working with us”.

In terms of enforcement, a power to allow labour inspectors to enforce employment status - as in Slovenia - was not seen by the inspectorate representative as being difficult to implement, as “it happens informally”; however, it was stressed that labour inspectors focus on compliance, rather than prosecution, (they are the “moral conscience of the WRC”) and this can often better be done through “informal engagement with employers”.

5.2. Slovenia.

The most publicised debate in Slovenia on platform work specifically, has centred on Uber, and whether or not to change the legislation to allow the entrance of Uber onto the market.²⁶ After fierce opposition from the trade unions and some employers’ organisations no legislative steps have been taken. This debate represents the only occasion on which the topic of platform has come onto the social partners’ agenda. On the other hand, there have been several debates about atypical workers, in general, and especially how to prevent false self-employment. As in Ireland, there are instances of “collusion” where workers and platforms/ employers prefer to benefit from certain aspects of the self-employment status (notably in terms of tax). The CEO of the Slovenian platform, operating in the cleaning industry, explained that the main motive for the establishment of the platform was that around 95 % of household cleaning work in Slovenia operated as undeclared work (i.e. in the “black economy”). The platform noted that its business model at least sets certain standards for cleaners (how long they need to work for a certain amount) and for clients (how much they have to pay for having their property cleaned), in a more formal way. From the platform’s perspective, this contribution was clearly positive, in spite of the generally negative discourse around platform work in Slovenia.

²⁶ This resistance was also noticed by Eurofound n. (17) in its latest report on platform work. The “Uber question” has also been an issue of debate in Ireland, where Uber effectively cannot operate its core business model; see Doherty M. and Franca V. n. (6).

Both the labour inspectorate, and trade union, representatives suggests the need to amend *tax legislation* in order to bring the taxation of non-standard forms of work closer to the employment contract; the unions favour significant taxation changes to make direct employment a more attractive option for both traditional employing organisations and platforms.

In Slovenia, a third category of worker was introduced in the amended *Employment Relationship Act* in 2013; the “economically dependent person”:

“An economic dependant is a self-employed person who on the basis of a civil law contract performs work in person, independently and for remuneration for a longer period of time in circumstances of economic dependency and does not employ workers.

Economic dependency means that a person obtains at least 80% of his or her annual income from the same contracting authority”.

Such workers are entitled to “limited labour protection” under the legislation. However, the Slovenian experience has not been a success. The introduction of a third category has seemed to generate even greater confusion in labour relations. No cases have been brought to the courts by workers claiming rights under this category, largely, it appears, for fear of losing work, and due to uncertainty amongst such workers as to their actual employment status. This was the consensus view of all of the respondents, with the labour inspectorate representative, in particular, confirming that, while instances of misclassification have been identified (of those who would fall under the definition of “economically dependent persons”), such workers, as noted above, often prefer to retain the tax advantages associated with self-employment.

Labour scholars²⁷ suggest amending the *Employment Relationship Act* in order to guarantee more employment and social security rights to platform workers. However, doubts exist about the capacity of the labour inspectorate to adequately enforce such rights. Unions are quite critical of the labour inspectorate, claiming that the inspectors have insufficient knowledge of how to approach the issues that arise in terms of “non-standard” work, in general, and platform work in particular; according to the union representative, “it mostly doesn’t understand the concept [of platform work]”. Indeed, the union representative opined that disclosure of labour exploitation to the media is often “more efficient than [disclosing to] the labour inspectorate or sending a lawyer to the company”.

A recent attempt to combat “false self-employment” was the amendment of the Labour Inspection Act in 2017. It gave labour inspectors the right to order the conclusion of an employment contract (i.e. to enforce employment status), if there are, in reality, elements of an employment relationship in the dealings between the parties. The worker, however, retains the right to bring a claim to court in these cases. Again, though, the law seems to have been ineffective in practice. According to the interviewees it is very difficult for labour inspectors to evaluate the actual relationship between a “false employee” and an employer due to the lack of information and documents. This is a role better suited to the Labour Court, which has much greater powers in relation to compelling evidence to be produced.

²⁷ Franca V., *Delovnopravno varstvo v okolju spletne platforme*, in Repas, M. (ed.), *Digitalno gospodarstvo*, 2018; Kresal B., *Delo prek spletnih platform* in Strban, G. et al. (eds), *Prekarno delo*, 2020.

6. Conclusion.

6.1. The representational question.

Trade unions are struggling to adapt to the challenges of platform work (and, indeed, non-standard work more generally). They continue to focus on precarious work in “traditional” sectors (which emphasises that a lot of the challenges are not “new”, but that technology enables more “blurring of boundaries” when it comes to employment relationships). Some questions include: whether traditional unions can “modernise” (Ireland); whether new forms of unionism are required (Slovenia); and whether can new “coalitions” be built with other actors (cooperatives? NGOs? Even law firms?). Unions in both countries have been focusing on providing more services to gig workers (e.g. advice on contracts, etc.), reopening a well-rehearsed debate on the “organising” vs “servicing” approaches to trade union strategy.²⁸

6.2. The regulatory question.

The unions (and, to some extent, employers) in Ireland and Slovenia see the value of sectoral standards in some areas. However, crucial is the question of coverage (i.e. to the “self-employed”); what rights should be encompassed; and how far would they extend? In Ireland, there have been significant recent attempts to strengthen sectoral bargaining, and *erga omnes* coverage. We await initial results.

“Traditional” employers have been relatively quiet on the issue of gig work, certainly in terms of putting in place sectoral standards (the employers opposed the 2017 Act in Ireland, and have made no attempts to engage on this issue in Slovenia). However, employers (and the labour inspectorate in Ireland), do have some concerns about the ability of platforms to compete unfairly and benefit from competition law rules, which, arguably, have as their aims large scale price-fixing, rather than collective bargaining by groups of self-employed workers in low-pay sectors. This is an issue that will likely require movement at the level of the EU.

6.3. The governmental/ public administration question.

The personal scope of employment protection coverage remains an issue. No actors, in either study, see value in an “intermediate category” between “employee” and “self-employed” (in Ireland, it is seen as too complicated; in Slovenia it has been impossible to enforce in practice). The definition of “worker” in Directive 2019/1152 is somewhat vague, and seems to leave much to national interpretation. Equally, in the light of the Directive, it is instructive that actors feel that introducing a “presumption of employee status” in the event of a dispute is either of little prospective value (Ireland) or difficult to enforce in practice (Slovenia).

There is a big question about awareness of rights, and, therefore enforcement of rights, amongst precarious workers. There is evidence that workers do not know to what it is they are entitled, or, at best, are unsure (possibly in response to the types of civil contracts that platforms use). Disturbingly, in Slovenia, there is some suggestion of a lack of proper

²⁸ Carter B., *Adoption of the Organising Model in British Trade Unions: Some Evidence From Manufacturing, Science and Finance*, in *Work, Employment and Society*, 14, 1, 2000, 117-136.

awareness of the issues amongst labour inspectors; in Ireland, the suggestion is that “gig workers” rarely present to the authorities. In both countries, issues of how to approach instances of “collusion” arise. It is important here to note the decision in *King v Sash Windows*.²⁹ The Court held that workers wrongly categorised by their employers as self-employed were entitled to bring, on termination of their engagement, a claim for the holiday pay they were incorrectly denied. The Court stated that “even if it were proved, the fact that Sash WW considered, wrongly, that Mr King was not entitled to paid annual leave is irrelevant. Indeed, it is for the employer to seek all information regarding his obligations in that regard” (para 61). Thus, there are considerable implications if workers are mis-classified; in such instances it behoves the State, and the social partners to take proactive measures to avoid this. We noted in section 2 that some recent literature on the EPSR and the CFR has suggested the need for more, and better, mechanisms for the enforcement of labour standards, and, particularly, the need to develop alternatives to the individual enforcement of employment rights “whether through collective redress mechanisms, the empowerment of social partners, or domestic labour inspectorates”³⁰.

Platforms in both countries suggest legal change to allow the provision of more benefits to their “partners”, but which would not result “employee status”. The platforms seem to lobby for legislative change, but not to engage as traditional “social partners”. They are willing to provide some benefits (insurance, etc), but not if that risks the business model (i.e. where it could result in workers being “re-classified” as employees). Should we be concerned that platforms (note Uber) engage in sustained political lobbying, without any taking on any further role in public regulation? Doherty and Franca argue that we should and that where employers (both “traditional” and “disruptive”) “refuse or abstain, the law, and the regulatory power of the State, should be utilised in full to ensure sectoral standard setting in any case”³¹.

Lastly, it is clear the issues here go far beyond questions of labour law. The intersection with tax and social security structures, and how any changes in these are to be funded, is crucial.

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²⁹ CJEU - Case C-214/16 *Conley King v The Sash Window Workshop Ltd, Richard Dollar*, ECLI:EU:C:2017:914.

³⁰ Adams-Prassl J., (14).

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