Workers Without Workplaces and Unions Without Unity:

Non-standard Forms of Employment, Platform Work and Collective Bargaining

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§4.01 Introduction, Background and Research Questions

In recent years, there has been a surge of interest in the impact of the organizational restructuring of firms and digital transformation of work, also in light of the advent of platform work. New working patterns in the gig-economy blatantly exclude workers (almost invariably categorized as independent contractors) from employment protections and social benefits traditionally afforded to employees. Concomitantly, technological change represents a major challenge for collective bargaining systems, given that they are often still predicated on the concept of a standard employment relationship (SER).

In spite of recent advances,[1] public debate on the changing world of work seems insufficiently focused on how technology is altering power relationships;[2] it also underestimates the role and implications of industrial relations patterns.[3] Accordingly, understanding the direction that work will take in the coming years must necessarily involve a greater emphasis on the collective dimension of non-standard arrangements, since the interrelation between innovation and jobs is mediated by how work is concretely organized and negotiated.[4]

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1. H. Johnston, C. Land-Kazlauskas, *On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy,* ILO Conditions of Work and Employment Series No. 94. 2018; K. Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe*, ETUI Research Paper. 2018.
2. B. Rogers, *People Analytics and Labor Standards,* Paper presented at the LLRN 3rd Conference, Labour Law Research Network, Toronto 25-27 June 2017.
3. A.C.L. Davies, *'Half a Person'. A Legal Perspective on Organizing and Representing 'NonStandard'* Workers, A. Bogg, T. Novitz (ed), *Voices at Work: Continuity and Change in the Common Law World,* (Oxford: OUP, 2014).
4. F. Hendrickx, *The Future of Collective Labour Law in Europe*, European Labour Law Journal, 1(1), 59-79, 2010.

Declining union power, falling union density, diminishing collective bargaining coverage, the shift toward individual decentralized bargaining, the individualization of the workforce, and the trend among firms to outsource core and non-core activities have molded a fragmented labor market by contributing to the spread of casual labor in developed and developing economies.[5] Non-standard forms of employment (NSFE) now makes up around one in three jobs in Organisation for Economic Co-operation and Development (OECD) countries.[6]

Against this backdrop, something unexpected is happening in sectors where working conditions are far from transparent, predictable, and sustainable.[7] Ways of generating social bonding at work and expressing collective action are taking on new forms.[8] In the "fissured workplace,"[9] workers find themselves confronted with the need to define or rebuild a specific identity in order to ensure recognition and overcome invisibility. The questions to be addressed are whether and to what extent non-standard workers can build impactful movements (or even unions) with a view of exercising the right to organize and bargain collectively. Moreover, how can traditional and institutional workers' organizations resist the trend toward precariousness and support actions aimed at bettering working conditions[10]?

After presenting the legal determinants of NSFE, this article investigates challenges to freedom of association and the effective recognition of the right to collective bargaining for non-standard workers, from a legal and practical perspective. In particular, the article examines the existing legal framework with a critical approach and stresses the relevance of legal hurdles that non-standard workers face, with a particular focus on the implications related to competition law and its rigid limits in the European Union (EU) system. Finally, the article sketches a mapping exercise of initiatives of workers' organization, by distinguishing classic resources of unionization from other tools (e.g., social media groups, strategic litigation, rating widgets) in a selection of European countries.

5. International Labour Office, *Non-standard employment around the world: Understanding challenges, shaping prospects.* Geneva: ILO. 2016.
6. OECD, *In It Together: Why Less Inequality Benefits All*, Paris. 2015.
7. A. Broughton, et al., *Precarious Employment in Europe: Patterns, Trends and Policy Strategies* (Studies for the European Parliament's Committee on Employment and Social Affairs, 2016).
8. K. Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe*, ETUI Research Paper. 2018.
9. D. Weil, *The fissured workplace: Why work became so bad for so many and what can be done to improve it*, (Cambridge: HUP, 2014).
10. C. Garden, *Unions are wondering: Resist or assist?*, retrieved from https://goo.gl/cCm4dD. 2017, March 15.

§4.02 An Updated Nomenclature of Misused Definitions

[A] Non-standard Forms of Employment

Non-standard forms of work can be investigated as a litmus test in order to get a better understanding of the state of the art of the "collective" dimension of digital transformation of work.

One of the key challenges to the research on this topic is the lack of a common definition and conceptualization.[11] This section will define the scope of a working definition of "non-standard," "atypical," "casual," "irregular," "alternative," "precarious," or even "contingent" forms of employment for theoretical purposes. It has to be acknowledged that the proposed labels cover various arrangements that might have widely different normative and social implications while sharing a significant number of features. Moreover, criteria for identifying what the legal system recognizes as an NSFE vary appreciably among local jurisdictions or may be influenced by the constantly evolving socioeconomic context.[12] For instance, at the European level, casual work can be distinguished from other NSFE, such as part-time, fixed-term or temporary agency work, which has already received growing political attention and consequent regulatory intervention.[13]

There is no universally accepted legal definition of non-standard employment other than "employment offering less security and fewer benefits than the standard employment relationship"[14] defined as a subordinate employment (full-time and of indefinite duration) that guarantees a stable income and secures pension payments and a wide range of benefits for the workers.[15] This generally acceptable characterization operates by contrast and encompasses a heterogeneous set of employment forms, mostly work that "deviates," along one or more axes, from the definition of SER which in turn is a rather strict classification, failing to take into account the "internal" diversity of this "prototype."[16]

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11. A. Gillespie, et al., *Technology induced atypical work-forms. report for the office of technology assessment of the European Parliament* (Brussels: STOA, 1999).
12. A. Lo Faro, *Core and Contingent Work: A Theoretical* Framework, E. Ales, O. Deinert, J. Kenner (ed), *Core and Contingent Work in the European Union: A Comparative Analysis*, (Oxford: OUP, 2017): 7-23.
13. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9; Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L175/43; Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.
14. M. Jeffery, *Not Really Going to Work? Of the Directive on Part-Time Work, 'Atypical Work' and Attempts to Regulate It*, Industrial Law Journal, 27(3), 193-213, 1998.
15. L. Delsen, *Atypical Employment Relations and Government Policy in Europe*, Labour, 5(3), 285-316, 1991.
16. I. Regalia (ed.), *Regulating new forms of employment: Local experiments and social innovation in Europe*, (London and New York: Taylor and Francis, 2006).

Although the contours continue to change, by using a broad and inclusive definition based on spatial, temporal and employment protection legislation divergences,[17] it could be said that NSFE include temporary employment, part-time work, temporary agency work, self-employment, dependent self-employment, disguised employment relationships, and other (new) forms of work such as platform-mediated arrangements. In this respect, Eurofound conducted a "mapping exercise" resulting in the identification of nine distinct forms of employment as new forms (or, better, ways) of work since 2000, namely employee sharing, job sharing, interim management, casual work, ICT-based work, voucher-based work, portfolio work, crowd and collaborative employment.[18]

It would be tedious and beyond the scope of this article to list and describe all forms in detail (for a preliminary attempt to identify sub-categories of NSFE according to four institutions, *see* Table 4.1). Needless to say, the incidence of these different types, and hence, the challenges posed for trade unions, vary considerably across countries.[19]

Table 4.1 Different Forms of Non-standard of Employment, According to Four Institutions[20]

	EU	*ILO*	*OECD*	*Eurofound*
Fixed-term or temporary contracts	✓	✓	✓	✓
Part-time work	✓	✓	✓	✓
Temporary agency work	✓	✓	✓	✓
Self-employment or independent contract work	✓	✓	✓	✓
Dependent self-employment		✓	✓	
Disguised employment relationship		✓		

17. A.C.L. Davies, *Regulating Atypical Work: Beyond Equality*, N. Countouris, M. Freedland (ed.), *Resocialising Europe in a Time of Crisis*, (Cambridge: CUP, 2013): 230-249.
18. Eurofound, *New forms of employment*, Luxembourg. 2015a.
19. R. Gumbrell-McCormick, *European Trade Unions and 'Atypical' Workers*, Industrial Relations Journal, 42(3), 293-310, 2011.
20. Authors' own elaboration. *See* European Commission, *Employment and Social Developments in Europe 2014*, Luxembourg, 2015; International Labour Office, *Non-standard employment around the world: Understanding challenges, shaping prospects.* Geneva: ILO. 2016); OECD, *New forms of work in the digital economy*, Digital Economy Papers No. 260. Paris. 2016, 17; Eurofound, *Exploring self-employment in the European Union*, Publications Office of the European Union, Luxembourg. 2017.

[B] Self-employment

Little attention has traditionally been paid to the situation of self-employment arrangements, which should be listed among the numerous non-standard forms of work.[21] A preliminary remark must be made about the distinction of two different forms that are often overlapping from a material point of view although they should be considered separately in strictly legal terms. The literature has commonly labeled these intermediate zones in the "grey area," identifying "work that lie[s] half-way between work under an employment contract and self-employment,"[22] as (i) "economically dependent work" and (ii) "bogus self-employment."

If the employee status is the "gateway" to full employment coverage, in several jurisdictions an intermediate category has been created to offer a "secondary entrance" to a limited set of social rights.[23] The acceptance, or tolerance, however called, of an intermediate category of "quasi-subordinate" workers is increasing. However, some authors have claimed that "[t]he description or definition of economically dependent workers starts from the premise that (1) such workers are not employees, and (2) economically dependent work must not be used to hide the true nature of the employment relationship."[24] Depending on the specific national rules, these workers are commonly outside the scope of labor law protection (e.g., the rules on dismissals) and collective bargaining coverage and are subject to "promotional" fiscal and tax regulations.

As noted in a previous article, such an intermediate category of worker is quite widespread.[25] Several legal systems have experimented with implementing a legal tool similar to an "in-between" category to cover economically dependent workers, but the level of protection afforded and even the definition of dependency vary among countries.[26] Among the countries identifying a third status, two main approaches exist: either the creation of a totally new hybrid worker status with specific rights

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21. A. Burke (ed), *The handbook of research on freelancing and self-employment*, (Dublin: Senate Hall Academic Publishing, 2015).
22. A. Perulli, *Economically dependent/quasi-subordinate (parasubordinate) employment: Legal, social and economic aspects*, Study for the European Commission (Brussels, 2003).
23. Relevant examples can be found in Germany, *see* B. Waas, *What Role for Solopreneurs in the Labour Market?*, European Labour Law Journal, 8(2), 154-177, 2017; Italy, *see* M. Del Conte, E. Gramano, *Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System*, Comparative Labor Law & Policy Journal, 39(3), 579-605, 2018; Spain, F. Trillo Párraga, *Economía digitalizada y relaciones de trabajo*, Revista de Derecho Social, 76, 59-74, 2016.
24. F. Rosioru, *Legal Acknowledgement of the Category of Economically Dependent Workers*, European Labour Law Journal, 5(3-4), 279-305, 2014.
25. M.A. Cherry, A. Aloisi, "*Dependent Contractors" in the Gig Economy: A Comparative Approach*, American University Law Review, 66(3), 635-689, 2017.
26. M. Freedland, *Application of Labour and Employment Law Beyond the Contract of Employment*, International Labour Review, 146(1-2), 3-20, 2007.

or the recognition of a specific subcategory in the independent work domain.[27] Some jurisdictions have concentrated on a legal threshold of economic dependency (e.g., Germany[28] and Spain[29]) while others have focused on the worker's strict coordination with the principal's business organization (e.g., Italy[30]).

In most cases, "economically dependent" and "bogus" or "false" self-employment share working conditions reflecting those of employees rather than of self-employed workers. But these commonalities aside, each expression emphasizes a different "prevailing feature." The first group represents a legal definition for an intermediate category (often singled out as a subset of self-employment), while the second formula relates to cases of evasion. When it comes to "false self-employment," the illicit and premeditated aim is to conceal an employment relationship and circumvent statutory or collectively agreed provisions, payroll taxes, and social security contributions.[31]

This fraudulent situation occurs when a company manipulates employment contracts in order to misrepresent the underlying reality, thus nullifying or attenuating legal responsibilities and protection afforded by the law.[32] For this reason, the most effective, yet unpredictable, way to contrast this

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27. M. Pallini, *Il lavoro economicamente dipendente*, (Padova: CEDAM, 2013).
28. German law also recognizes a third category of employee-like person (*arbeitnehmeraehnliche Person*). An employee-like person must perform his or her duty to (1) the benefit of a client; (2) under service contract for a specific project; and (3) personally and largely without collaboration of subordinate employees. Importantly, the employee-like person works mainly for one client and relies on a single client for 50% of his or her income. These workers cannot claim unfair dismissal but do have access to labor courts, and conclude collective agreements with normative effect. Moreover, they are entitled to annual leave and protection against discrimination.
29. In Spain, a specific category for economically dependent autonomous workers has existed since 2007. The Spanish Statute for Self-Employed Workers crafted a third category of workers: *"Trabajador Autonomo Economicamente Dependiente"* (or TRADE). The TRADE workers were extended a fairly comprehensive package of benefits and protections that are almost as good as those given to employees. The crucial component is a dependence on the principal for at least 75 % of the worker's income.
30. In Italy, contracts of coordinated and continuous collaboration (*"contratti di collaborazione coordinata e continuativa"*) have existed since 1973 when Law 533 prescribed that the rules of procedure for labor litigation also applied to the "relationship of agency, of commercial representation and other relations of collaboration materializing in a continuous and coordinated provision, predominantly personal, even if not of subordinate character". The ultimate result is a return to the binary distinction of employee and self-employed workers, although the 2015 reform has extended employment protection to workers whose performance is organized by the client.
31. A. Thörnquist, *False Self-Employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market*, International Journal of Comparative Labour Law & Industrial Relations, 31(4), 411-429, 2015.
32. E. Ales, M. Faioli, *Self-employment and bogus self-employment in the European construction industry*, Expert Report, Self-employment and bogus self-employment in the construction industry in Italy. 2010, http://www.efbww.org/pdfs/Annex%2014%20-%20Final%20report%20italy.pdf. According to the Employment Relationship Recommendation, 2006 (No. 198), "disguised employment relationships" is the situation occurring "when an employer treats an individual as other than an

condition is to challenge the formal classification before a tribunal. The rise of NSFE and misclassification of employment relationships are strongly intertwined, not least because the emergence of the "hybrid" contractual templates could make the disguise of "bogus self-employment" even easier.

[C] Platform-Mediated Work

Coming now to platform-facilitated arrangements, the commonly used formulas are "sharing," "on-demand" or "gig" jobs. Despite that, very different models are lumped together under the umbrella definition of "platform-mediated work" in everyday parlance and this is not helpful. The literature seems to agree on a "*summa divisio*" between crowdsourcing and work on-demand through platform;[33] legal experts tend to "focus separately […] on online and offline workers, because their places of work (remote versus face-to-face) and the relationship with clients (tele-mediated versus direct) create very different patterns of work, exposing workers to different risks."[34] A preliminary distinction between crowdsourcing and work on-demand can be drawn by taking into account the place of performance of work and the mechanisms through which work is requested or obtained. In the first model, the client and the service provider rarely (if ever) experience a face-to-face interaction, and services are electronically and globally transmittable, while the second form is often carried out in-person, locally, and with customer and worker in physical proximity.[35]

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employee in a manner that hides his or her true legal status as an employee". However, disguised employment relationships "may also involve masking the identity of the employer, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers", International Labour Office, *The employment relationship*, International Labour Conference, 95th Session, 2006 Report V(1). 2006. *See also* J. Heyes, T. Hastings, *The practices of enforcement bodies in detecting and preventing bogus self-employment*, European Platform Undeclared Work, (European Commission, Brussels, 2017).

33. V. De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy"*, Comparative Labor Law & Policy Journal, 37(3), 471-504, 2016, A. Aloisi, *Commoditized Workers. Case Study Research on Labor Law Issues Arising from a Set of 'On-Demand/Gig Economy' Platforms*, Comparative Labor Law & Policy Journal, 37(3), 653-690, 2016.

34. U. Huws, et al., *Work in the European gig economy. research results from the UK, Sweden, Germany, Austria, The Netherlands, Switzerland and Italy,* (Foundation for European Progressive Studies, 2017).

35. V. De Stefano, A. Aloisi, *European Legal framework for digital labour platforms*, (Luxembourg: Publications Office of the European Union, 2018).

[D] Collective Rights, Focus on Collective Bargaining

From the worker's perspective, the organization of common interests along collective lines has traditionally proved to be the most effective way to achieve a countervailing power to the employer and re-establish a balance of forces in the employment relationship.[36] Hence, unionization is aimed at levelling the bargaining "playing field" between capital (or management) and labor. Because of the ever-present threat of a withdrawal of labor power, collective bargaining tends to be far more effective for workers than individualized bargaining.

This section provides a definition for the "imprecise" notion of "collective bargaining"[37]—a process typically associated with workers in regular employment.[38] Collective bargaining is "a collective voice mechanism expressly based on a rationale which can be construed as "anti-competitive"—that labour is not a commodity and individual workers should not be required to compete over the terms and conditions on which they sell their labour."[39] Collective agreements and other expressions of collective voice and interests have been essential vehicles for securing decent working conditions for workers. Collective labor rights, together with corporate governance, active labor market policy, and work-life balance laws, may play a crucial role for mitigating dualism and rebalancing bargaining powers.[40] It has been demonstrated that, in those areas of the economy where collective agreements apply and work representatives are active, workers enjoy far better conditions and protection.[41] Indeed, collective agreements serve as important tools adjusting legal principles to specific economic situations of particular sectors.[42]

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36. S. Liebman, *Individuale e collettivo nel contratto di lavoro*, (Milano: Giuffré, 1993).
37. Understood as the legal tool (i) "determining working conditions"; (ii) "regulating relations between employer and workers"; and (iii) "regulating relations between employers' and workers' associations" (ILO Convention No. 154).
38. M. Rodriguez Piñero, B. Ferrer B., *International protection of collective bargaining*, *Labour law: Its role, trends and potential*, (Geneva: ILO, 2006).
39. P.A.J. Syrpis, S. McCrystal, *Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union*, A. Bogg, T. Novitz (ed), *Voices at Work: Continuity and Change in the Common Law World,* (Oxford: OUP, 2014): 421-435.
40. C. Hobden, *Domestic workers organize—but can they bargain? Mapping collective bargaining and other forms of negotiation in the domestic work sector*, ILO's Work in Progress, retrieved from https://goo.gl/iqAeNW. 2015.
41. OECD, *New forms of work in the digital economy*, Digital Economy Papers No. 260. Paris. 2016, 17.
42. European Commission, *Green Paper, Modernising labour law to meet the challenges of the 21st century*, Luxembourg, 2006.

§4.03 The Current Legal Framework, Between Fundamental Rights Recognition and Antitrust Restrictions[43]

This section explores the key legal issues pertaining to access to collective action and bargaining by providing a short summary of international legal standards.[44]

By operating as "enabling" or instrumental rights, freedom of association and the right to collective bargaining and collective action can make labor rights (more) effective for both employees and non-standard workers without the need to return to burdensome and intimidating individual protection and enforcement mechanisms, such as grievance procedures or individual lawsuits. Thanks to the "growing relevance of legal intervention and action on a level above the state,"[45] freedom of association and the right to collective bargaining are guaranteed in numerous international treaties, incorporated into the universal catalog of human rights.

The freedom of association and the right to collective bargaining were initially recognized by the Community Charter of the Fundamental Social Rights of Workers of 1989. Moreover, the European Convention on Human Rights (ECHR) guarantees the freedom of association (Article 11). The European Court of Human Rights extended protection of freedom of association to self-employed persons[46] and the Grand Chamber held that the right to bargain collectively and to enter into collective agreements does constitute an essential element of Article 11.[47] Article 5 of the European Social Charter (Revised) (ESC) (adopted in 1996) sets out the right to form, join, and actively participate in associations designed to protect their members' professional interests. Article 6 of the ESC illustrates the content of the right "to bargain collectively" by listing the actions parties can undertake in order to ensure "its effective exercise," including active promotion. Article 28 of the Charter of the Fundamental Rights of the EU protects the right to collective bargaining, by specifically referring to "national laws and practices." The European Committee of Social Rights clarified that self-employed workers are protected under Article 6(2) of the ESC.[48]

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43. This section draws from V. De Stefano, A. Aloisi, *Fundamental Labour Rights,Platform Work and Protection of Non-standard* Workers, J.R. Bellace, B. ter Haar (ed), *Labour, Business and Human Rights Law*, (Cheltenham: Edward Elgar Publishing, 2019).
44. C. Rubiano, *Precarious Work and Access to Collective Bargaining: What Are the Legal Obstacles?*, International Journal of Labour Research, 5(1), 133-151, 2013; OECD, *Employment Outlook 2017*, Paris. 2017.
45. F. Hendrickx, *The Future of Collective Labour Law in Europe*, European Labour Law Journal, 1(1), 59-79, 2010.
46. ECtHR, 17/07/2010, *Vörður Ólafsson v. Iceland,* No. 20161/06.
47. ECtHR, 12/11/2008 (GC), *Demir a. Bayjara v. Turkey*, No. 34503/97, paragraph 153.
48. European Committee of Social Rights, *Irish Congress of Trade Unions* (ICTU) v. *Ireland*, Complaint No. 123/2016, 12 September 2018.

The United Nations (UN) efforts for the protection of the right to association and collective bargaining include the Universal Declaration of Human Rights (UDHR) in 1948. Two of its provisions are of particular interest: Article 20(1) on the freedom of assembly and association and Article 23(4) on the right to form and join trade unions "for the protection of [one's own] interests." The International Labour Office (ILO) classifies four categories of Fundamental Principles and Rights at Work: freedom of association and the effective recognition of the right to bargaining collectively, elimination of all forms of forced or compulsory labor, effective abolition of child labor, and elimination of discrimination in respect of employment and occupation. These principles and rights are universal and, thus, apply to all workers.

In addition to this, according to ILO principles, the right to strike—an intrinsic corollary to the right to organize protected by Convention No. 87—is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. It is not an absolute right; however, outside restricted situations (i.e., public servants, essential services and in case of acute national emergency), non-standard workers should be entitled to the right to strike, including the right to strike in solidarity. Article 2 of ILO Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without prior authorization.[49] Article 4 of Convention No. 98 stipulates that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. According to Convention No. 98, governments have an obligation to promote collective bargaining for all workers and employers.

Despite that, a strict interpretation and enforcement of competition law effectively prevent self-employed and non-standard workers from bargaining collectively, on the grounds this could be considered illegal cartel action. In general, competition laws may operate as an impediment to the expression of collective voice by workers through collective bargaining. Where individual workers selling their labor are indeed classed as "undertakings," collective bargaining over pay by workers could constitute anti-competitive conduct. In most jurisdictions, this is avoided by providing that certain labor market transactions are exempted from antitrust prohibitions. Such exemptions may be expressly enacted or created through judicial interpretation. Indeed, "the rising prevalence of atypical

49. L. Fulton, *Trade unions protecting self-employed workers*, (Brussels: ETUC, 2018); J. Hodges-Aeberhard, *The Right to Organise in Article 2 of Convention No. 87—What Is Meant by Workers Without Distinction Whatsoever*, International Labour Review, 128, 177-193, 1989.

forms of labour market engagement takes ever larger numbers of workers outside the scope of the competition law exemptions, in particular those workers engaged as 'independent contractors', and thereby risks limiting access to meaningful collective bargaining,"[50] unless workers are authorized or exempted to express their voices by courts or competition authorities.

In the EU's framework, despite the recognition of collective bargaining rights beyond a strict definition of "employee" (subordinate worker),[51] the Court's approach still falls short of a recognition of freedom of association and collective bargaining as universal labor rights, i.e., regardless of employment status. The Court of Justice of the European Union (CJEU) is still attached to its *Albany* decision,[52] the key case discussing the applicability of Article 101(1) TFEU to labor market collective agreements, decided by the European Court of Justice in 1999. In *Albany*, the question was whether a decision made by the organizations representing employers and workers in a given sector, in the context of a collective agreement, to set up a single pension fund responsible for managing a supplementary pension scheme, was contrary to what is now Article 101(1) TFEU. After explaining the reasons why the agreement might be thought to be capable of infringing on what is now Article 101 TFEU, the Court stated that it was important to bear in mind that the Treaties contain not only goals of competitiveness but also social policy objectives. Thus, the Court concluded that:

> [i]t is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [Article 101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment.

First, when analyzing the nature of the agreement, the Court argued that the agreement "was concluded in the form of a collective agreement and is the outcome of collective negotiations between organizations representing employers and workers" (paragraph 62). Second, when it comes to defining its purposes, the Court stated that the scheme "seeks generally to guarantee a certain level

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50. P.A.J. Syrpis, S. McCrystal, *Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union,* A. Bogg, T. Novitz (ed.), *Voices at Work: Continuity and Change in the Common Law World,* (Oxford: OUP, 2014): 421-435.
51."The EU 'worker' concept is undoubtedly one that endorses a notion of subordination that includes 'control', but it also acknowledges more nuanced and loose concepts such as 'direction or supervision', that may include within its scope some domestic notions of quasi-subordinate work relations". N. Countouris, *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope',* Industrial Law Journal, 47(2), 192-225, 2017.
52. C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1999) ECLI:EU:C:1999:430.

of pension for all workers," thus "contribut[ing] directly to improving one of their working conditions, namely their remuneration" (paragraph 63). It is pivotal to underline that these features may well characterize an agreement potentially reached by non-standard workers' representatives.

Importantly, given the relevance that the Treaty of Lisbon also assigns to the ECHR, the *Albany* "exception-to-rule" approach does not seem consistent or even compatible with the jurisprudence of the Court of Strasbourg that considers the right to collective bargaining as an essential element of freedom of association under Article 11 of the ECHR and the importance assigned by this latter Court to the opinions of the ILO supervisory bodies when the Court determines the scope of the ECHR protection of collective rights. This is all the more relevant since the Court of Strasbourg also recognizes the freedom of association of the self-employed as protected under the Convention.[53]

Legal scholars cannot disregard these elements in treating future potential conflict between antitrust regulation and collective rights. Given the unequivocal recognition of these rights as fundamental and human rights—at least in European law and under ILO sources—these rights should be restricted only when they conflict with other human rights or, in ECHR terms, when a restriction is "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Article 11(2)).[54]

In addition, it is important that the existence of general exemptions for collective bargaining does not lead to complacency over the potential threat posed by competition law to worker voice expressed through collective bargaining. This is significant for two main reasons. On the one hand, workers continue to move toward more atypical forms of work, on the other, collective bargaining continues to fragment in many sectors of the economy. As a result, the protection afforded by the exemptions becomes ever narrower.

In 2014 the CJEU stated, in a judgment that has been harshly criticized,[55] that only "false self-employed" workers, disguised in order to avoid the application of some specific legislation (e.g., labor or fiscal regulations) which is considered unfavorable by the employer, have access to the right

53. N. Countouris, *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope'*, Industrial Law Journal, 47(2), 192-225, 2017.
54. V. De Stefano, A. Aloisi, *Fundamental Labour Rights, Platform Work and Protection of Non-standard Workers*, J.R. Bellace, B. ter Haar (ed.), *Labour, Business and Human Rights Law*, (Cheltenham: Edward Elgar Publishing, 2019).
55. CJEU 4 December 2014, C-413/13 (FNV KIEM) ECLI:EU:C:2014:2411. The case was about a collective agreement setting a minimum salary for both employees and self-employed people (orchestra substitutes). The provision of a minimum pay, provided for by the collective agreement, can be applied to falsely self-employed workers, regardless of the national notion of worker and without prejudice to competition.

to collective bargaining.[56] The CJEU describes false self-employment as follows: "[o]n a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organizations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, […] in other words, service providers *in a situation comparable to that of those workers*, that a provision of a collective labour agreement, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU" (paragraph 42, emphasis added). As a consequence, Article 101(1) TFEU does not apply "only when self-employed service providers who are members of one of the contracting employees' organizations and perform for an employer, under a work or service contract, the same activity as that employer's employed workers, are 'false self-employed'" (paragraph 42). To sum it up, only when the "condition" of self-employed workers is comparable to that of employees, collective bargaining agreements are exempted from EU legislation on cartels (price-fixing) and are thus legal.[57]

The EU exemption is a product of judicial interpretation. It is potentially more vulnerable, relying on a continuing shared judicial understanding of the nature of the relationship between competition law and labor law. The EU exemption is flexible and can much more easily grow so as to encompass more atypical forms of employment relationships.[58] Nevertheless, the tests used "may prove to be too strict for some quasi-dependent workers that are genuinely allowed a wide degree of autonomy in choosing the time, place and content of their work, and whose activities are mainly coordinated by the 'client/employer'."[59] As a consequence, "a number of workers that provide personal work or services with the support of some capital assets owned by them, and thus be presumed to be a separate economic unit," will most certainly be exposed to the harsh realities of EU competition law.[60]

[A] Focus on Access to Collective Bargaining for a Subset of Non-standard Workers

56. E. Grosheide, B. ter Haar, *Employee-Like Worker: Competitive Entrepreneur or Submissive Employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie*, S. Bellomo, N. Gundt, M. Łaga, M. Boto (ed.), *Labour Law and Social Rights in Europe: The Jurisprudence of International Courts. Selected Judgements*, (Gdansk University Press, 2018): 21-39.
57. M. Freedland, N. Countouris, *Some Reflections on the 'Personal Scope' of Collective Labour Law*, Industrial Law Journal, 46(1), 52-71, 2017.
58. M.C. Lucey, *Should Professionals in Employment Constitute 'Undertakings'? Identifying 'False-Employed'*, Journal of European Competition Law & Practice, 6(10), 702-708, 2015.
59. N. Countouris, *The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope'*, Industrial Law Journal, 47(2), 192-225, 2017.
60. *Ibid*.

As illustrated in **Errore. L'origine riferimento non è stata trovata.** below, while (traditional) atypical forms of employment (part-time, fixed-term, and temporary agency work), which are established under an employment relationship, currently face only practical difficulties in exercising their collective rights, two core issues arise when it comes to self-employed and platform-mediated workers. First, they are not entitled to collective bargaining unless they are falsely classified as self-employed. Second, they face inherent practical difficulties due to their temporal and spatial "non-standard" nature.

In many countries, legislatures and governments have been partly responsible for a relaxation of the rigid employee/self-employed "binary divide,"[61] and a floor of rights specifically has been "selectively extended" to a group of vulnerable workers.[62] Moreover, both in the common-law and civil law regimes, such sharp distinction relies on some assumptions that have been questioned only recently. First, the limitation of competition among employees finds justification under the monopsony of the labor market, where the labor supply structurally overcomes the demand, even on the most efficient markets. Second, the assumption that any form of coalition and collective bargaining process of independent contractors would hamper the functioning of the free market, leaving space for unlawful cartels,[63] seems exaggerated. The latter argument could not be justified under any substantial equity argument, given the fact that traditionally independent contractors are considered economic subjects capable of bargaining the conditions of their contract autonomously. Since many self-employed workers are in a very weak position in the market, it is debatable whether competition law is, in fact, the right frame of reference for them or whether different objects of legal protection come into play.

Where platform workers who work as self-employed contractors are able, within national legal systems, to engage in collective bargaining, they would have to demonstrate that they are in fact false self-employed (i.e., that they are in fact employees within the EU definition) in order to avoid the application of EU competition law to the substance of their agreements. Otherwise, genuine self-employed workers are prevented from joining force and negotiating over their terms and conditions of employment and work because such behavior among "undertakings" is considered "price fixing," to the detriment of final consumers.

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61. M.A. Cherry, A. Aloisi, "*Dependent Contractors" in the Gig Economy: A Comparative Approach*, American University Law Review, 66(3), 635-689, 2017.
62. G. Davidov, M. Freedland, N. Kountouris, *The Subjects of Labor Law: "Employees" and Other Workers*, M.W. Finkin, G. Mundlak (ed.), *Comparative Labor Law. Research Handbooks in Comparative Law Series*, (Cheltenham: Edward Elgar Publishing, 2015): 115-131.
63. C. Rubiano, *Precarious Work and Access to Collective Bargaining: What Are the Legal Obstacles?*, International Journal of Labour Research, 5(1), 133-151, 2013.

Concomitantly, a purposive interpretation of the CJEU's rulings may extend the scope of collective bargaining agreement by removing the exclusion of self-employed workers from the collective labor rights. The persistent (and ambiguous) overlap between independent contractors and ("micro" or "auto") undertakings must be challenged when taking into account the case of platform-coordinated workers whose autonomy is merely "nominal."[64] As a matter of fact, the overriding evidence confirms that transport services and delivery platforms exercise remarkable supervision, invasive direction, and far-reaching control over how the task is completed.[65] In light of what has been argued above, only self-employed individuals who do not provide "labor," but provide services by means of an independent business organization that they actually own and manage, and whose relevance in the provision of the service in terms of capital and work of other persons is considerably superior to the relevance of the individual's personal work, could be restricted in their right to bargain collectively.[66]

§4.04 Practical Difficulties and Successful Solutions: Institutional and Grassroots Initiatives[67]

A historical perspective suggests that non-standard work is neither *atypical* nor new.[68] The history of unionism provides many examples of unions organizing in areas of casual or insecure employment,[69] more or less inclusive in defining their constituency and more or less restrictive in the issues they pursue. However, foundations, regulations, and processes concerning industrial relations are rooted in the pre-digital age and designed around a prototype of the "mass-collective worker."[70]

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64. W.S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, Antitrust Law Journal, 69, 195, 2001.
65. A. Aloisi, *'With Great Power Comes Virtual Freedom'. A Review of the First Italian Case Holding That (Food-Delivery) Platform Workers Are Not Employees*, Comparative Labor Law & Policy Journal, Dispatch, 2018.
66. V. De Stefano, A. Aloisi, *Fundamental Labour Rights, Platform Work and Protection of Non-standard Workers,* J. R. Bellace, B. ter Haar (ed.), *Labour, Business and Human Rights Law*, (Cheltenham: Edward Elgar Publishing, 2019).
67. This section draws from A. Aloisi, *Negotiating the digital transformation of work: Non-standard workers' voice, collective rights and mobilisation practices in the platform economy,* EUI Working Paper MWP 2019/03. 2019, available at: http://hdl.handle.net/1814/63264.
68.. S. Cobble, L.F. Vosko, *Historical Perspectives on Representing Nonstandard Workers*, F. Carre, M. Ferber, L. Golden, S. Herzenberg (ed.), *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements*, (Ithaca: CUP, 2000): 291-312.
69. R. Saundry, M. Stuart, V. Antcliff, *It's More Than Who You Know—Networks and Trade Unions in the Audio-Visual Industries*, Human Resource Management Journal, 16(4), 376-392, 2006.
70. F. Murray, *The Decentralisation of Production—the Decline of the Mass-Collective Worker?*, Capital & Class, 7(1), 74-99, 1983.

Understandably, the resurgence of highly standardized organizational modules encourages the mobilization of workers who had not previously been involved in political advocacy.[71] It has been claimed that, as labor markets have reacquired characteristics that were prevalent at the end of the 19th-century, the "labor movement" should engage to protect work and to give workers more of a say.[72] For this to happen, two pre-conditions need to be met: (i) structural conditions that make mobilization feasible (successful insurgency) and (ii) the existence of a subjective view among participants that collective action is likely to succeed (expectation to win).[73]

Having claimed that practical obstacles hinder or make less attractive the exercise of fundamental freedoms guaranteed by international conventions and national codes, this section lists a number of efforts to achieve effective representation and collective bargaining for non-standard workers carried out by both traditional and grassroots organizations.[74] In this respect, it is convenient to distinguish between classical resources of organization (e.g., representation, strikes, bargaining) and soft tools of organization (e.g., social media groups, manifestos, strategic litigation, rating widgets). Roughly speaking, the former initiatives are carried out by institutional unions, while the latter are implemented by informal and self-organized groups.

The share of non-standard workers can offer a new source of membership for traditional unions. Workers in entire sectors, from logistics to consulting, represent a new *constituency* for trade unions, but the central unions seem displaced, in the face of this change of paradigm, undecided whether to invest in the defense of traditional members or to lead a new generation of workers. In this respect, it must be acknowledged that the unions' approach toward NSFE has undergone substantial change: from the refusal to organize non-standard workers on the grounds that this would have legitimated these arrangements, to the settlement of specific "one-stop" trade-union offices in order to assist NSFE.[75]

In this respect, Pulignano et al. argue that the response of unions to atypical work arrangements has focused primarily on one of two strategies. The first has been to reject non-standard work

71. J. Stanford, *The Resurgence of Gig Work: Historical and Theoretical Perspectives*, The Economic and Labour Relations Review, 28(3), 382-401, 2017.
72. E. Heery, B. Abbott, *Trade Unions and the Insecure Workforce*, E. Heery, J. Salmon (ed.), *The Insecure Workforce*, (London and New York: Taylor and Francis, 2000): 155-180; K.V.W. Stone, *Unions in the precarious economy*, retrieved from http://prospect.org/article/unions-precarious-economy. 2017, February 21.
73. B.I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, Texas Law Review, 96(2), 351-277, 2017.
74. M. Vicente, *Collective Relations in the Gig Economy*, E-Journal of International and Comparative Labour Studies, 8(1), 83-93, 2019.
75. R. Gumbrell-McCormick, *European Trade Unions and 'Atypical' Workers*, Industrial Relations Journal, 42(3), 293-310, 2011.

arrangements, fighting instead for full-time, stable employment. The second has been to "adopt strategies aimed at improving working conditions, social rights and wages of such workers" (*ibid*). Therefore, unions responded to the needs of non-standard workers by creating specific representational opportunities in existing labor confederations for such workers.[76] While in the past unions used to found organizations specifically aimed at representing flexible workers, current strategies can be summarized as follows: (i) improve working conditions, (ii) promote litigations about misclassification of NSFE, (iii) influence the legislative process, (iv) mobilizing unorganized workers,[77] and (v) lobbying social actors such as insurance companies.[78]

Workers might prefer to organize around single issues, such as a hypothetical change to benefit provision that many employees a non-union setting feel was poorly handled by management or without adequate consultation.[79] Thus, in areas where hierarchical unions make little sense, networks (and social networks) may be a viable solution.[80] In this vein, network arrangements, internet platforms and the like may be favored by the more dispersed, occasional or individualistically-oriented workers. More importantly, another issue to be addressed is whether non-standard workers should be treated the same way as employees, treated differently within existing union structures or whether autonomous unions of atypical workers should be created.[81] By way of example, in Italy, the three unions have opened sections aimed at precarious and *freelance* workers (CGIL with *NiDIL*; CISL with *Alai* and, more recently, *vIVAce*; UIL with *CpO* and, more recently, *SindacatoNetworkers*).

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76. V. Pulignano, L. Ortíz Gervasi, F. De Franceschi, *Union Responses to Precarious Workers: Italy and Spain Compared*, European Journal of Industrial Relations, 22(1), 39-55, 2016.
77. C. Benassi, L. Dorigatti, *Straight to the Core—Explaining Union Responses to the Casualization of Work: The IG Metall Campaign for Agency Workers*, British Journal of Industrial Relations, 53(3), 533-555, 2015 (Authors review the varied factors that encourage unions to engage with agency workers. They also state that high union density and strong collective agreements are two conditions that enable unions to bargain for greater protection for NSFE).
78. K. Boonstra, M. Keune, E. Verhulp, *Trade union responses to precarious employment in the Netherlands*, (Amsterdam: Institute for Advanced Labour Studies, University of Amsterdam, 2012).
79. A. Bryson, et al., *The Twin Track Model of Employee Voice: An Anglo-American Perspective on Union Decline and the Rise of Alternative Forms of Voice*, IZA DP No. 11223. 2017.
80. B. Carneiro, *Trade Unions and Facebook: The Need to Improve Dialogue and Expand Networks*, ETUI Policy Brief, No. 5. 2018; A.J. Wood, *Networks of Injustice and Worker Mobilisation at Walmart*, Industrial Relations Journal, 46(4), 259-274, 2015.
81. M. Wynn, *Organising Freelancers: A Hard Case or a New Opportunity?*, A. Burke (ed.), *The Handbook of Research on Freelancing and Self-Employment*, (Dublin: Senate Hall Academic Publishing, 2015): 93-103.

To conclude, for collective bargaining and for unions and business and employers' organizations to continue to be relevant in the new world of work,[82] it may be urgent to adapt or reinvent the way they currently operate.[83] There may also be a need to adjust rules and practices. A main disadvantage is that a strategy of representation at the workplace level, based on the development of permanent workplace organization, is simply not plausible for many contingent workers who are not tied to a particular workplace or particular employer and who, in many cases, work at small work-sites in industries without an established union tradition.[84] Accordingly, the new organization of work must necessarily imply a shift in the locus of union representation beyond the traditional or physical workplace.[85]

[A] Focus on Platform-Organized Workers

This section presents an exemplary outline of union and non-union strategies to reinvigorate workers' contractual power and "from above and below" responses toward non-standard employment[86] by addressing practical obstacles such as geographical disaggregation, fear of retaliation, threat of dismissal/account deactivation, opportunistic relations and authentic reluctance, with a comparative approach.[87]

Challenges stemming from legal restrictions on platform-coordinated and other non-standard workers are compounded by the solitary structure of digital labor markets. Workers often operate independently, in isolation, over large geographical areas, and in direct competition with one another: dispersion of contracts over time and space inevitably leads to a fragmentation of bargaining, since they are not usually physically present at a single workplace or may not share a common "class consciousness." These practical difficulties are especially relevant for online workers. The short-term, task-based, and on-demand nature of platform work might place gig workers in direct competition

82. For a broader overview on non-standard forms of work and the collective, *see* V. Doellgast, N. Lillie, V. Pulignano (ed.), *Reconstructing Solidarity. Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe*, (Oxford: OUP, 2018).
83. J. Wills, *Subcontracted Employment and Its Challenge to Labor*, Labor Studies Journal, 34(4), 441-460, 2009.
84. E. Heery, B. Abbott, *Trade Unions and the Insecure Workforce*, E. Heery, J. Salmon (ed.), *The Insecure Workforce*, (London and New York: Taylor and Francis, 2000): 155-180.
85. E. Heery, et al., *Beyond the Enterprise: Trade Union Representation of Freelances in the* UK, Human Resource Management Journal, 14(2), 20-35, 2004.
86. R. Gumbrell-McCormick, *European Trade Unions and 'Atypical' Workers*, Industrial Relations Journal, 42(3), 293-310, 2011.
87. J. Berg, *Addressing the challenge of non-standard employment*, retrieved from https://goo.gl/ftt61i. 2017, April 1.

with each other as online platforms seem designed to "foster a sense of competition rather than solidarity between workers."[88]

A firm's workforce may operate in multiple jurisdictions simultaneously (potentially on a global scale) thus inflating the workforce and creating conditions that encourage workers to undercut one another.[89] Furthermore, many platform companies have been unwilling to bargain with workers directly. In addition to this, technology may help employers to uncover and discourage emerging conflictual initiatives or may allow disconnection or exclusion for protest leaders and "troublemakers."[90] Many platform-organized workers, especially in the passenger transport and household services sectors, do not have the flexibility that real self-employment brings but are "subject to a subordinate labour relationship and should thus be entitled to a secure employment contract."[91] As a result, "these trends make it difficult to build collective voice; firms, however, are able to capitalize on the regulatory lacunae concerning worker agency and collective bargaining."[92]

Institutional and informal groups currently pursue a number of alternative strategies to help workers to organize and effectively express individual and collective grievances, involving the use of social media (e.g., commercial hashtag hijacking, according to the "name-and-shame" culture) and more traditional protest campaigns (e.g., mass disconnection from the staffing software during promotional initiatives and flyers inviting customers and restaurants to boycott unscrupulous or capricious clients). Several spontaneous initiatives have been developed with significant results at national level. In a few countries, examples of (traditional) industrial action have been identified, especially for time- and place-dependent on-demand work. The ease with which such workers can be replaced emphasizes insecurity, but close proximity makes organizing more feasible.[93] Moreover, public spaces help to foster social connections and promote collective engagement. As a result, couriers have triggered off a popularization of claims that until now had not been answered. They

88. M. Graham, *Digital work marketplaces impose a new balance of power*, retrieved from https://newint.org/blog/2016/05/25/digital-work-marketplaces-impose-a-new-balance-of-power. 2016, May 25.
89. V. De Stefano, *Non-standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, Industrial Law Journal, 46(2), 185-207, 2017.
90. K. Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe*, ETUI Research Paper. 2018.
91. T. Weber, *Time for a European dialogue on the platform economy*, retrieved from https://www.socialeurope.eu/time-european-dialogue-platform-economy. 2018, March 7.
92. H. Johnston, C. Land-Kazlauskas, *On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy,* ILO Conditions of Work and Employment Series No. 94. 2018.
93. J. Woodcock, *#Slaveroo: Deliveroo drivers organising in the 'gig economy'*, retrieved from http://novaramedia.com/2016/08/12/slaveroo-deliveroo-drivers-organising-in-the-gig-economy/. 2016, August 12.

also built broader alliances of cooperation with civil society organizations (CSOs) and pressure groups in an attempt to avoid the isolation where platform workers are often confined, to represent mutual interests at the local level, to stimulate public opinion and to gain attention from institutions.[94] Taken together, these developments corroborate the idea that a strong awareness and resistance are emerging amongst workers.

Moreover, independent unions are promoting a litigation strategy in many countries, with remarkable results (e.g., in the United Kingdom (UK) and the USA).[95] The international scholarly community is supporting the drafting of *Codes of Conduct* to be implemented by "fair" platforms.[96] International media outlets and militant researchers usually run extensive coverage of these activities sparking public outrage.[97] It is too early to point to concrete and systematic policy changes that resulted from these recent initiatives. However, unions, which have experienced difficulties trying to organize "new" workers, may benefit from this fresh wave of conflict. New networks can be "the launchpad for successful activism" for workplace conflict, membership renewal, and negotiation.[98]

In many industrialized and post-industrial countries, union engagement with non-standard workers has focused on applying existing collective bargaining frameworks to atypical workers. Many unions have sought to engage with non-standard and platform-based workers at times as part of a strategy to expand representation to incorporate non-standard workers more broadly.[99] In this vein, particular attention has to be devoted to initiatives of worker organization such as those carried out by traditional

94. M. Forlivesi, *Alla ricerca di tutele collettive per i lavoratori digitali: per i lavoratori digitali: organizzazione, rappresentanza*, contrattazione, Labour & Law Issues, 4(1), 36-58, 2018.
95. A. Aloisi, *'A worker is a worker is a worker'. Collective bargaining and platform work, the case of Deliveroo riders in London*, International Labor Rights Case Law, 5(1) 36-40, 2019.
96. Austrian Chamber of Labour et al., *Frankfurt Paper on Platform Based Work*, Frankfurt. 2016.
97. C. Cant, *The wave of worker resistance in European food platforms 2016-17*, retrieved from https://goo.gl/vjDPUA. 2018, January 29, collecting data on informal strikes and protest tactics by "food platform workers" on a transnational scale; A. Tassinari, V. Maccarrone, *Striking the startups*, retrieved from https://www.jacobinmag.com/2017/01/foodora-strike-turin-gig-economy-startups-uber. 2017, January 23.
98. A.J. Wood, *Networks of Injustice and Worker Mobilisation at Walmart*, Industrial Relations Journal, 46(4), 259-274, 2015.
99. International Labour Office, *Non-standard employment around the world: Understanding challenges, shaping prospects.* Geneva: ILO. 2016.

unions such as IG Metall,[100] NWW and Ver.Di in Germany as well as new union formations such as IWGB, a small base union,[101] and branches of the IWW across the UK.[102]

On the one side, trade unions appear to support initiatives of platform workers rather than attempting to compete with their spontaneous actions. On the other, alternative movements are "better seen as complements rather than as substitutes to traditional labour unions" even because of their lack of ability to bargain collectively on behalf of their members.[103] As explained by Staunton,[104] informal, grassroots organizations can learn from more institutional unions about collective bargaining and social dialogue, while the latter can reproduce the mobilization capacity of the former. This interdependency is shaped by factors such as the dynamics and strategies of the clients, including platform internal design, country-specific labor market institutions and national regulatory frameworks governing the platforms, union cultures and identities.

As a consequence, it is crucial to "discard" the exclusionary distinction between employees and other categories of workers[105] and to develop new engagement and negotiation techniques. In this respect, successful collective bargaining is the best means to increase the attractiveness of collective autonomy in the digital era.[106] Notably, collective agreements can introduce measures to offset the

100. In 2016, in Germany, IG Metall (*Industriegewerkschaft Metall*, Industrial Union of Metal Workers), the largest industrial trade union in Europe, changed its statute to allow the self-employed to become members. In 2016, IG Metall launched Fair Crowd Work, a type of watchdog organization run in collaboration with Austrian and Swedish trade unions. Fair Crowd Work collects information about crowd work platforms and produces a rating system based on the platforms' terms and conditions and worker reviews for online platforms. Additionally, it informs workers of their legal rights in an accessible language and lists trade unions they can join. *See* M.S. Silberman, L. Irani, *Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015*, Comparative Labor Law & Policy Journal, 37(3), 505-542, 2016.

101. The Independent Workers Union of Great Britain (IWGB) provides one of the best-known examples of new union formation for gig workers. The IWGB was formed explicitly to organize non-traditional, low wage and immigrant workers. The group opens membership to "all employees, workers and any other persons who accept the principles, objectives, and rules of the union" (Independent Workers' Union of Great Britain (IWGB), *"Constitution and Rulebook",* retrieved from https://iwgbunion.files.wordpress.com/2017/12/policy-booklet-dec-2017.pdf. 2017).

102. A. Donini, et al., *Towards Collective Protections for Crowdworkers: Italy, Spain and France in the EU Context*, Transfer: European Review of Labour and Research, 23(2), 207-223, 2017.

103. OECD, *Issues Paper: Labour Relations in the Future World of Work,* Paris. 2018.

104. B. Staunton, *Grassroots action prominent in the platform economy*, retrieved from https://www.opendemocracy.net/en/can-europe-make-it/grassroots-action-prominent-in-platform-economy/. 2018, December 16.

105. C. Crouch, *Redefining Labour Relations and Capital in the Digital Age*, M. Neufeind, J. O'Reilly, F. Ranft (eds), *Work in the Digital Age Challenges of the Fourth Industrial Revolution*, (London and New York: Taylor and Francis, 2018): 187-197.

106. European Commission, *Employment and Social Developments in Europe Annual Review 2018*, Luxembourg, 2018.

imbalances that might result from the digital transformation of work in a way that is faster and more accurate than through legislative intervention.

§4.05 Closing Remarks and Policy Recommendations

The future of organized labor depends on a more inclusive strategy that accommodates the interest of previously marginalized categories of workers.[107] Indeed, since collective action has been instrumental in achieving the existing labor regulations both at domestic and international level,[108] established social partners might play an active role in representing non-standard workers. While unions are usually perceived to be mainly concerned with securing wage rises, individual and collective grievance handling, a conspicuous aspect of their work will become increasingly important with intensified and technologically-driven managerial control, the growth of non-standard (and precarious) employment and the risk of technological displacement. "Negotiating the digital transformation of work" could become a crucial objective of social dialogue and action for employers' and workers' organization.[109]

Positive signs are indeed emerging all over Europe.[110] In May 2018, a territorial collective agreement was signed in Bologna by institutional trade unions, workers' autonomous collectives and the management of the company "Sgam-MyMenu." The "Charter" sets out a fixed hourly rate in line with the minimum wage in the respective industry, compensation for overtime, holidays, bad weather and bicycle maintenance, accident and sickness insurance. It also guarantees trade union rights.[111] In July 2018, a "historic collective agreement" was signed between the Danish trade union 3F and "Hilfr.dk," a platform providing cleaning services.[112] Thanks to the agreement, domestic cleaners, who were formerly invariably classified as self-employed, will be considered employees after completing 100 hours of work, unless they explicitly opt out of this status. The agreement sets a significant hourly minimum wage, protection in case of dismissal, data protection rights and a system

107. Z. Jiang, M. Korczynski, *When the 'Unorganizable' Organize: The Collective Mobilization of Migrant Domestic Workers in London*, Human Relations, 69(3), 813-838, 2016.
108. K. Sisson, *Putting the record straight: Industrial relations and the employment relationship*, Warwick papers in industrial relations, No. 88, 2008.
109. V. De Stefano, *'Negotiating the algorithm': Automation, artificial intelligence and labour protection*, (Geneva: ILO, 2018).
110. A. Aloisi, *At the table, not on the menu: Non-standard workers and collective bargaining in the platform economy*, retrieved from https://euideas.eui.eu/2019/06/25/at-the-table-not-on-the-menu-non-standard-workers-and-collective-bargaining-in-the-platform-economy/. 2019, June 25.
111. V. De Stefano, A. Aloisi, *Employment and working conditions of selected types of platform work. National context analysis: Italy*, (Luxembourg: Publications Office of the European Union, 2018b).
112. J. Hale, *In Denmark, a historic collective agreement is turning the "bogus self-employed" into "workers with rights"*, retrieved from https://goo.gl/AjUbHH. 2018, July 4.

regulating the cancellation of shifts. In February 2019, the British courier company "Hermes" negotiated an agreement with the GMB union,[113] offering drivers guaranteed minimum wages and holiday pay in a deal to provide trade union recognition.[114]

To counterbalance the challenges NSFE generate for the organization of workers, the recognition of shared problems, and the enforcement of collective interests, it is essential to identify ways to enable and strengthen collective action through trade unions and collective bargaining. Two layers of intervention are required. On the one hand, it is important to ensure that solo self-employed people have the fundamental right to negotiate collectively and that they are considered as individual workers rather than "undertakings," exempted from EU rules on anti-competitive practices if they act collectively. This can be done by updating the most obsolete regulations to accommodate new forms of work. On the other hand, it is vital to update unions' agendas in order to include NSFE in their constituency. To do so, collective agreements need to be enforced and modernized in order to extend existing protection standards to the digital economy workers. Interestingly though, collective autonomy and its mechanism may well represent a swift and flexible solution to ensure fair conditions for non-standard workers, while new legislation or legal claims might struggle to respond promptly and adequately to current challenges.[115]

113. GMB, *GMB wins monumental victory in employment case against Uber,* retrieved from http://www.gmb.org.uk/newsroom/GMB-wins-uber-case. 2016, October 28.
114. S. Butler, *Hermes to offer gig economy drivers better rights under union deal*, retrieved from https://goo.gl/2SLzqB. 2019, February 4.
115. OECD, *Employment Outlook 2019*, Paris. 2019.