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Title: Access to collective labour rights for platform workers under European Union Law
an analysis based on the republican idea of freedom as non-domination

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Access to collective labour rights for platform workers under European Union Law: an analysis based on the republican idea of freedom as non-domination

Ricardo Matías Buendía Esteban

A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of Ph.D. in the Faculty of Social Sciences and Law, University of Bristol Law School, September 2022.

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Abstract

This thesis analyses the exclusion of platform workers in the European Union (EU) from accessing collective labour rights and discusses how using a republican approach of freedom as non-domination helps to understand and address such exclusion.

After exploring what is the platform economy and platform work, this thesis contends that the exclusion of platform workers from access to collective labour rights in the EU has been possible due to the power of platforms to set the terms and conditions of work for platform workers, including the determination of platform workers’ employment status, which is the gateway for accessing many labour rights in the EU, including collective labour rights. Such exclusion is reinforced by platforms’ capacity to harness norms and practices favourable to their idea of platform work, such as EU competition law.

This thesis contends that the injustice arising from the exclusion of platform workers from access to collective labour rights in the EU can helpfully be understood using the republican idea of freedom as non-domination. Freedom as non-domination goes beyond a negative account of freedom as non-interference upon which EU labour law is built and a positive account of freedom as autonomy to focus on how some exercise arbitrary interference in the choices of others.

This thesis finishes by exploring recent EU initiatives to ensure platform workers’ access to collective labour rights. It advocates for expanding one of these initiatives using the republican idea of freedom as non-domination while broadening boundaries of labour law based on whether working people have the tools to contest the power of their employing counterparties.
Dedication

Para el Luchín, pasado, presente y futuro.

Para Chiara, ¡la creadora del Luchín!

Para la Violeta, el trabajo y el optimismo.

Para la Zoila, la inteligencia y el carácter.

Para el Fernando, la rectitud.

Para la Pili, el trabajo bien hecho.

Para Ricardito, la alegría.

Para el Ángel, por hacer lo que quiere.

Para la Pía, porque todos deberíamos ser como tú.

Para la Camila, por estar ahí.

Para el Raulín, por el Minecraft.

Para la Juli, por los videos de Youtube.

Y para todos los otros (que son muchos).
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I would also like to thank my PhD colleagues and the community at Uni. Bristol for welcoming me and making me feel part of something bigger, a project of change and solidarity of people anxious to thrive for the common good. Thank you for making me feel part of such an exciting academic community.

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Lastly, I would like to thank the University of Bristol, the Modern Law Review and Becas Chile for supporting this project.
Author’s declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Ricardo Matías Buendía Esteban DATE: 11 September 2022
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Introduction

At least since the 1980s, the economic and social policies in the Netherlands have been built on a system of dialogue and consensus termed the ‘polder model’. The polder model is a way to address common social problems by relying on the capacity of stakeholders to reach agreements.¹ The polder model became popular because it helped address the Netherlands’ economic and social crisis that emerged after the oil crisis between 1979 and 1982. In 1982, trade unions and employers’ associations, backed by the Dutch government, used the polder model to address rampant unemployment. This agreement was termed the ‘Wassenaar Agreement’. The Wassenaar Agreement led to a redistribution of jobs by enabling workers to work fewer hours for less salary and promoting early retirement.² The result of the Wassenaar Agreement was impressive job growth across the Netherlands, leading to social peace by diminishing protests.³ These achievements led economists to term this period ‘the Dutch Miracle’.⁴

After the success of the Wassenaar Agreement, the polder model continued to be applied in the Netherlands, with trade unions occupying a pivotal role in defusing social conflict through social dialogue. However, the continuous decline of trade union membership and the expansion of self-employment led to questions about the adequacy of the polder model.⁵ For instance, in 2015, only one in five workers in the Netherlands was a trade union member.⁶ Also, the number and type of self-employed persons have increased in the Netherlands, impacting the labour

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⁴ Touwen (n 2) 172–174.
⁵ Woldendorp and Keman (n 1); Dekker (n 3).
⁶ Dekker (n 3).
market composition. In 2017, 10.3 per cent of the Dutch workforce was self-employed, of which fifteen per cent reported having just one or a dominant client. Also, 31.3 per cent of the self-employed in the Netherlands declared their clients had control over their work time. The growth of self-employment diminished trade union membership in the Netherlands, impacting the negotiating strength of trade unions as a key stakeholder in the polder model.

These changes in the labour market pushed Dutch trade unions to include the self-employed in their structures to recover their negotiating strength before the polder model. Since 1997, the major Dutch trade unions have established branches to organise self-employed workers. However, the inclusion of the self-employed within trade union structures led to a clash with the Dutch competition authority. Such a clash became visible in the labour market of orchestra musicians.

During 2006-7, the Netherlands Trade Union Confederation (FNV, the largest trade union in the Netherlands) through its branch ‘FNV Kunsten Informatie en Media’ (FNV Kunsten) and the

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11 As its website declares, FNV has 1.1 million affiliated workers and plays a central role in concluding over 800 collective agreements for a total of 5.1 million workers with several employers in the Netherlands. These collective agreements could be for a single company or an entire industry and for a myriad of issues, for example concerning wages and working hours. See ‘Exploring the FNV: Roles Responsibilities and Partnerships’ <https://www.fnv.nl/getmedia/9e316c1c-dcb2-4f56-9207-21ad9443135e/Exploring-the-FNV-1111484-1_2.pdf>. 
NTB ‘Nederlandse toonkunstenaarsbond’ (Netherlands Musicians’ Union, an association of musicians not affiliated to a trade union) concluded a collective labour agreement with an employers’ association named ‘Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten’ (Association of Foundations for Substitutes in Dutch Orchestras).

Among other things, the agreement regulated the conditions for replacing employed orchestra musicians with self-employed substitutes. In the Netherlands, self-employed musicians are less expensive to hire by employers than employed musicians because employers do not need to pay for self-employed health insurance, unemployment contributions and other worker protective measures related to dependent employment.\(^{12}\) In the case at hand, there was the risk that employers would gradually prefer to hire self-employed musicians over employed musicians.

The employers’ associations and trade unions agreed to impose a minimum fee for hiring self-employed substitutes. Suppose employers decided to replace orchestra musicians with self-employed substitutes. In that case, the hired self-employed substitutes should receive at least the same fees as the employed musicians plus a sixteen per cent increase. The idea was to raise the price of labour for the self-employed musicians to prevent undercutting the employed musicians and enable the self-employed substitutes to buy social and labour protection. This agreement should have ended another chapter of social dialogue between management and labour in the context of the polder model. However, the inclusion of the self-employed in the negotiations caught the attention of the Dutch competition authority.

The Netherlands Competition Authority (NMa, now the Authority for the Financial Markets, ACM) stepped in. The NMa argued the collective agreement infringed Article 16(a) of the Dutch Competition Act. The Dutch Competition Act prohibits associations of undertakings aiming to

\(^{12}\) Grosheide and ter Haar (n 7).
hinder, impede or distort competition in the Dutch market.\textsuperscript{13} Article 16(a) envisages an exemption to the application of the Dutch Competition Act for collective agreements between labour and management. Such an exemption is significant as it prevents labour agreements between trade unions and employers from being considered anticompetitive agreements between undertakings.

The NMa reasoned the self-employed substitute musicians were not covered by the Article 16(a). For the NMa, the self-employed could not access trade union agreements because they were not workers. The NMa demanded the removal of the collective bargaining section regulating the minimum fees to pay to the self-employed substitute musicians without further reasoning. In the face of risking a high fine by the NMa, employers’ associations and the Netherlands Musicians’ Union stepped out of the agreement. \textit{FNV Kunsten} however challenged the NMa’s opinion, forcing the NMa to explain its arguments further. Such further arguments came in late 2007 through the so-called ‘Vision Document on Collective Bargaining Provisions for the Self-Employed’ (Vision Document).\textsuperscript{14}

In the Vision Document, the NMa argued the establishment of minimum fees for the self-employed musicians in a collective agreement concluded between employed musicians and their employers was not exempted under Article 16(a) of the Dutch Competition Act. The NMa equated the self-employed musicians with entrepreneurs, claiming that ‘self-employed persons

\textsuperscript{13} Article 16 of the Dutch Competition Act says:

\textbf{Article 6} (1) shall not apply to the following:

\begin{itemize}
\item[a.] collective labour agreements as defined in Article 1(1) of the Dutch Collective Labour Agreement Act;
\end{itemize}

In turn, Article 6 says:

\begin{itemize}
\item[1.] Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited. Dutch Competition Authority, ‘Dutch Competition Act. Act of 22 May 1997, Providing New Rules for Economic Competition’ <http://www.dutchcivilaw.com/legislation/competitionact.htm>.
\end{itemize}

should be categorised as entrepreneurs, not employees'\textsuperscript{15} and thus ‘... minimum tariffs for “self-employed persons without employees” shall not be included’ in the exemption.\textsuperscript{16} The NMa concluded that the establishment of minimum fees for self-employed musicians would reduce the labour market competitiveness, negatively impacting the price consumers must pay for the services offered by the self-employed.\textsuperscript{17} René Jansen, NMa Board Member, suggested that collective bargaining should not conceal anticompetitive deals for the self-employed: ‘It should be at all times be avoided that anti-competitive deals can be justified by reference to collective bargaining contracts.’\textsuperscript{18}

The NMa backed its conclusions with its interpretation of EU law developments in the area. According to the NMa, EU competition law applies differently to workers and self-employed persons. On the one hand, people meeting the EU definition of worker shall be deemed as workers. On the other hand, people not meeting such definition of a worker (such as the self-employed) will be considered undertakings. If the self-employed are considered undertakings, negotiations between the self-employed musicians and the trade unions to agree on setting minimum tariffs will form a new association of undertakings. Such a new undertaking would not be exempted from Article 16(a) of the Dutch competition law, as the new undertaking does not only encompass workers. Thus, negotiations in this case will not be between management and labour, but between management and a new undertaking that encompasses self-employed and trade unions.

Using this interpretation of EU competition law, the NMa reinforced the conclusion that self-employed substitute musicians' fees cannot be fixed in collective agreements between

\textsuperscript{16} ibid.
\textsuperscript{17} ibid.
\textsuperscript{18} ibid.
management and labour. *FNV Kunsten* started a lengthy legal process to challenge NMa’s view, eventually leading the Court of Justice of the European Union (CJEU) to consider the case. This was a process that would not end until 2015. This process and its impact on access to collective bargaining for platform workers are further discussed in chapter 4.

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The struggles of self-employed workers to have a collective voice to challenge the power of employers are, of course, not limited to the above case. The EU is in a context of growing self-employment where it is hard to distinguish between bogus and genuine self-employment.  

There are approximately 32 million self-employed workers in the EU, representing fourteen per cent of the EU workforce. Like the self-employed Dutch musicians, in most EU Member States, access to labour rights such as collective labour rights rely on employee status. Thus, it is safe to say a large portion of the self-employed workforce in the EU is excluded from accessing labour law to challenge the power of their counterparties, and their collective organisations risk becoming subjects of local and EU competition law.

Self-employed workers have traditionally been excluded from accessing labour rights because it was assumed they have more market power than workers. Self-employed workers would be

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22 Eric A Posner, ‘The Gig Economy and Independent Contractors’, in Eric Posner (ed) How Antitrust Failed Workers (Oxford University Press 2021) 158. Also, this thesis does not concern the UK distinction between an employee and a worker. The focus of this thesis concerns who is a ‘worker’ under EU law. Thus, further references in this thesis to ‘worker’ are unrelated to this UK distinction.
more likely to be able to contest the power of their employing counterparties compared to the monopsony conditions that workers experience and that labour law aims to alleviate. Monopsony is a market scenario where only one or few employers buy services from many workers, strengthening employers' bargaining power. Monopsony generates inequalities of bargaining power in favour of employers. Employers can take advantage of the large availability of workers to unilaterally impose their terms on workers, enhancing their monopsony surplus at the expense of workers’ surplus. There is little room for workers to negotiate with the employers under monopsony conditions as there is a considerable risk of being replaced by another worker.

It was assumed self-employed workers such as liberal professionals, skilled workers, and small capital owners were not significantly subject to monopsony power as they enjoy more market power than workers to oppose their counterparties. However, a more varied self-employed workforce in the modern EU labour market is increasingly subject to monopsony conditions, creating power differences between self-employed workers and their counterparties. Self-employed workers now also feature in industries such as agriculture, education, transport, industry, construction and other services. Also, even for the more traditional varieties of self-employed, the inequalities of bargaining power with their counterparties are becoming increasingly apparent, impacting their capacity to make choices in the market.

This thesis explores how workers of the so-called ‘platform economy’ in the EU are unilaterally classified by platforms (acting as their de-facto employers) as self-employed, experiencing

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24 Posner (n 22).
25 Eurofound (n 20).
27 Eurofound (n 20); Rainone and Countouris (n 26).
similar problems of exclusion from accessing collective labour rights as the Dutch self-employed musicians and other EU self-employed. Due to a pervading use of a narrative on entrepreneurialism and the intensive use of new technologies, platform work has been presented by platforms as incompatible with traditional work arrangements and more aligned with self-employed entrepreneurship. Such a combination of factors has ignited social and legal debates across the EU Member States concerning whether platform workers should be deemed workers or self-employed entrepreneurs, and thus whether platform workers should enjoy access to labour rights such as collective labour rights.28

Since in most EU Member States employment status is the gateway for accessing labour rights, if platform workers are not considered workers but self-employed, they cannot access collective labour rights such as collective bargaining and the right to strike. Similar issues arise at the EU level concerning access to collective labour rights. There is a tension between economic and social objectives in the EU concerning the applicability of EU competition law to collective agreements between management and labour. The CJEU addressed this tension by exempting the agreements between management and labour from the operation of EU competition law.29 However, similar to the Dutch self-employed musicians’ case, it is key for platform workers to meet the EU definition of worker to enjoy the exemption. This thesis will show that the type of jobs created by the platform economy, and the heterogeneity of platform workers makes it difficult for platform workers to meet such a definition of worker.

In this context of exclusion from the exemption, platform workers not meeting the EU definition of a worker will be considered self-employed. Moreover, EU law equalises the self-employed with the overarching concept of an undertaking. Thus, similar to the reasoning of the Dutch

28International Labour Organization (n 21).
NMa, the collective organisation of platform workers would be regarded as an anticompetitive association of undertakings.

The main argument supporting platform workers being considered self-employed undertakings lies in the idea of freedom of contract. Platform workers and platforms are equally free to agree on the terms and conditions of work, including the conditions to consider platform workers as self-employed. However, platforms carefully craft platform workers’ contracts to create the conditions to deem platform workers as self-employed in national EU jurisdictions, avoiding considering them as workers protected by local or EU labour law. In times of high unemployment, platform workers would have few options to oppose. Such understanding of freedom of contract relies on an overly narrow definition of freedom which I take issue with in this thesis.

This form of conceptualising freedom is a narrow form of freedom termed ‘negative freedom’ that argues platform workers are free if their choices are not visibly the subject of active interference by other agents. Inequalities in the workplace have been traditionally addressed through the enactment of labour-protective legislation. Through labour-protective legislation, workers’ and employers’ freedom of choice has been constrained for the benefit of the worker as the weaker party. In other words, negative freedom has been constrained for the benefit of workers. While labour law gives force to the positive freedom of workers to organise, engage in collective bargaining and strike for improved terms and conditions, these positive freedoms are not obviously applicable to platform workers whose status as ‘workers’ is uncertain, excluding them from accessing key labour rights such as collective labour rights.

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In this context, the narrative on entrepreneurialism and the technological changes behind the construction of the idea of platform work have challenged the EU Member States on how best to regulate platform work. If platform workers do not come within the legal definition of a ‘worker’ they cannot claim the positive freedom to engage in collective bargaining and strike.

Also, even if platform workers manage to exercise their positive freedom to organise to tackle the power of platforms, like in the Dutch musicians’ case, competition authorities and platforms could resort to EU competition law to regard platform workers’ organisation as anticompetitive. As it will be shown, the mainstream understanding of EU competition law focuses on the goal of consumer welfare, which translates into lower prices for consumers. Consumer welfare is hard to reconcile with an association of platform workers aiming to, for example, collectively fix the price of their labour. EU competition law is ill-equipped to exempt an association of platform workers deemed self-employed from its reach, regardless of the visible inequality of bargaining power between platform workers and platforms.

Against this background, republicanism — a contemporary political doctrine focused on freedom and power — offers an alternative vision of freedom, known as freedom as non-domination. Under a republican account of freedom as non-domination, people are free if they are not dominated. In turn, people are dominated if others enjoy the capacity to exercise arbitrary interference over their choices at any time. The republican version of freedom demands to go beyond the negative account of freedom, forcing ‘... us to be more explicit about what we mean when we say that freedom is “freedom from”’. In so doing, freedom as non-domination assists in justifying access to collective bargaining as a manifestation of positive freedom.

This thesis claims the republican account of freedom as non-domination helps to better understand the problems arising from the exclusion of platform workers from accessing labour

31 Lovett and Pettit (n 30).
rights such as collective labour rights. The idea of freedom as non-domination questions the predominance of a negative account of freedom in the relationship between platform workers and the platforms and offers an alternative perspective to understand the case for legal reform to ensure access to collective labour rights for platform workers in the EU.

Republicanism shows how platform workers are not free in the EU. Even when platform workers' choices to enter and determine the terms and conditions of work are not constrained by the platforms, platforms still hold the power to interfere at any time. The potential for platforms to interfere also impacts on platform workers’ choices. In contrast, platform workers would be free if their choices could not be arbitrarily interfered with at any time. In other words, platform workers would not be free if they are only free from interference, platform workers would be free if there is no domination.

The value of the idea of freedom as non-domination features in the Dutch musicians’ case. Freedom as non-domination explains that self-employed musicians are not free if employers let them choose work conditions such as schedules or other work conditions. The Dutch self-employed musicians would be free if they have the tools (such as collective bargaining and strike) to challenge the power of employers to impose their conditions. Freedom as non-domination shows the importance of accessing collective labour rights in the Dutch musicians’ case as a tool to challenge the power of the employers.

It is not just the actual but also the potential interference from employers against workers where republicanism departs from a negative account of freedom, showing the problems in the relationship between the Dutch self-employed musicians and the employers and the relationship between platform workers and platforms. If the self-employed musicians and the employers know there are no credible tools to contest the power of the employers to impose their terms and conditions of work, the self-employed musicians would be forced to accept the employers' will, regardless of the actual attitude of the employers. Similarly, suppose platform
workers and platforms know there are no credible formal means to contest the power of platforms to unilaterally dictate and change the terms and conditions of work, including creating the conditions to consider platform workers as self-employed. In that case, there will be a shared awareness platforms can arbitrarily interfere with platform workers’ choices, creating a chilling effect on platform workers’ organisation regardless of the actual interference of platforms or the EU competition law authority.

The chilling effect is visible after the NMa’s threat of punishment in the Dutch case. After such a threat, Dutch trade unions have made no further attempts to include the self-employed in collective agreements between labour and management. In republican terms, there is domination against the self-employed musicians because employers can interfere arbitrarily over the self-employed musicians at any time as there is no chance to access collective labour rights to challenge employers’ power. Any attempt by the self-employed and workers to agree to a similar kind of collective bargaining risks a response by the employers or the NMa.

This thesis also shows how platforms in the EU can reinforce their domination over platform workers by using EU competition law as a normative form of domination. Like in the Dutch case above, EU competition law can be used against the collective organisation of platform workers deemed self-employed undertakings. As it is shown in chapter 4, EU competition authorities have interpreted EU competition law with a primary focus on consumer welfare, leaving no space to consider the interests of self-employed workers such as platform workers. Such interpretation of EU competition law reinforces the exclusion of platform workers from accessing collective labour rights as tools to challenge the power of platforms, reinforcing domination. As with the Dutch case, if platform workers manage to organise to challenge the platforms’ domination, they risk being considered anticompetitive cartels subject to EU competition laws, exacerbating platforms’ domination.
However, interference in the republican idea of freedom as non-domination is not always arbitrary. For instance, in the Dutch musicians’ case, employer interference in relation to the self-employed musicians will not be arbitrary if employers are forced to consider the interests of the self-employed musicians. Similarly, in the case of platform work, platforms interferences over platform workers will not be arbitrary if platforms are forced to consider platform workers’ interests. Republicanism requires the creation of mechanisms, under a democratic deliberative process, to contest the power of the dominating (in this case, musicians’ employers and platforms) by the dominated (such as self-employed musicians and platform workers), forcing the dominating party to consider the interests of the dominated. If such mechanisms are present, interference by the dominating will not be arbitrary, and thus there will not be domination.

The republican idea of freedom as non-domination shows the importance of creating mechanisms under democratic deliberative processes to ensure access to collective labour rights for all types of platform workers. Providing access to collective labour rights for different platform workers ensures platform workers have a mechanism to formally contest the power of platforms, forcing platforms to consider platform workers’ interests. If such tools are in place, platforms’ interferences over platform workers’ choices will not be arbitrary. Thus, there will be no domination.

This picture does not mean platform workers have accepted both forms of domination. This thesis will also show that platform workers have learned three main ways to challenge the power of platforms. Platform workers are engaging in informal-direct negotiations with the platforms, creating mutual forms of help, and engaging in forms of social dialogue with governments and platforms.

In this context of resistance by platform workers and hesitation by most EU Member States on whether and how to ensure access to collective labour rights for platform workers, the EU has
proposed a series of initiatives aiming either to consider platform workers as workers or to retract the applicability of EU competition law. This thesis explores the extent to which these initiatives ensure access to collective labour rights to diminish the domination of platforms, including the possibility of invoking EU competition law against platform workers’ organisations.

At the end of this thesis, it will become clear the EU initiatives address the domination of platforms and EU competition law against platform workers to different degrees. The most promising attempt to address domination against platform workers is the European Union Commission’s (Commission) proposal to use the idea of imbalance of power between platform workers and the platforms to retract the applicability of EU competition law. Such retraction — and the participation of platform workers in its design — is the best attempt to address the domination of all types of platform workers because it enables them to organise, forcing platforms to consider their interests, diminishing domination.

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The structure of the thesis is the following:

Chapter 1 introduces the platform economy and explains the kinds of jobs it creates. This chapter begins by arguing the best way to understand the platform economy is by combining different approaches.

The platform economy has been defined in different ways depending on the observer’s point of view. Moreover, even the idea of ‘platform economy’ has been contested. For instance, the Commission uses the term ‘collaborative economy’ whereas the Federal Trade Commission of the United States of America and some scholars prefer the term ‘sharing economy’. Common elements of these definitions are the exchange of assets through a platform.
From a historical perspective, the platform economy is not new and even predates the internet era. However, the internet and the massification of new technologies offered new possibilities for exchanging assets in digital environments. At least since 1995, different kinds of digital platforms have emerged. In the last decade, there has been exponential growth in digital platforms.

Another way of conceptualising the platform economy is by breaking down its main elements. First, platforms create and manage the digital environment where the exchanges happen. Boosted by technological breakthroughs, platforms can control and modify the exchanges between two parties in their digital environments almost in real-time.

Second, the platforms’ value benefits from adding new users on both sides of the platform, capturing what is termed ‘same and cross-sided network effects’. The bigger the size of supply and demand in a platform, the higher the number of new entrants on both sides, increasing the network effects. Also, in the platform economy, adding new platform users is almost costless, enabling platforms to capture network effects rapidly and cheaply. Technological changes boosting network effects have led platforms to a ‘winner-takes-all’ or ‘winner-takes-most’ scenario, where platforms capture significant portions of market share in different industries.

Network effects help create monopsony conditions. Concerning work in platforms, monopsonistic platforms enjoy the capacity to control the demand of work, creating imbalances between platforms and workers.

Third, the platform economy has been moving from a model focused on the casual exchange of underused assets to a more professional model, opening the platform economy for the intensive

33 International Labour Organization (n 21) ch 2.
35 Manning, ‘Why We Need to Do Something about the Monopsony Power of Employers’ (n 23); Manning, ‘Monopsony in Labor Markets: A Review’ (n 23).
exchange of used or new assets. The implications for the nature of jobs the platform economy creates are significant. For instance, platforms offering transport services are seeing how their workers are increasingly switching from the casual to the full-time provision of services. Such a move calls into question whether at least full-time platform workers would require labour law protection.

Fourth, since the emergence of digital platforms, there have been platforms operating on a non-profit basis and others operating on a for-profit basis and for a myriad of objectives. However, some for-profit platforms use the narrative of social and community collaboration of the not-for-profit platforms to sail under false colours. This thesis will show how part of the narrative behind the construction of the idea of platform work comes from this distinction.

Fifth, the platform economy alleviates the asymmetry of information between supply and demand, increasing trust in the exchanges. Platforms have created digital environments where platform users provide feedback to each other. Such feedback is structured as a virtual reputation of a platform user that is usually expressed in a score. The feedback and the virtual reputation of users on both ends of the platform enhance trust in the exchanges. However, platforms’ feedback and virtual reputation structures typically do not have mechanisms to contest negative feedback from other users or the decisions platforms make against poorly rated users. The problems of unaccounted feedback or virtual reputation structures will become visible when discussing how platforms create an architecture of participation concerning platform work. Platforms encourage users to rate and provide feedback about platform workers’ services without mechanisms to contest customers’ feedback or platforms’ decisions.

Sixth, many platforms are built over the narrative that the exchanges in the platform happen between peers with little intervention from the platform. In other words, digital platforms are built on a peer-to-peer internet architecture where platforms only match users from both ends. Such a claim is misleading. Platforms are not built under a peer-to-peer architecture as there is
significantly more intervention by platforms than mere matchmaking. This distinction is relevant in the case of work in platforms. There is a stronger call for labour law to intervene if platform workers work under a platform that controls the operation beyond a mere matching.

The last way to conceptualise the platform economy comes from its different typologies. There is an interesting distinction between capital- and labour-intensive platforms. In other words, platforms specialising in the exchanges of capital and platforms specialising in the exchanges of personal services. This thesis focuses on labour-intensive platforms as there is a higher risk of exclusion of working people and a stronger call for labour law to intervene.

After attempting to clarify the platform economy’s boundaries, this chapter discusses what platform work looks like. It is argued labour-intensive platforms emerged significantly in the context of the last global economic crisis alongside political and technological changes. Since its inception, labour-intensive platforms claimed they provide a mere matchmaking service between people offering their personal services and people in need of them. Thus, people providing their personal services should be considered entrepreneurs, not workers of the platform.

This thesis claims that considering platform workers as self-employed was possible due to the pervading applicability of the ‘Californian Ideology’ — a vision that claims platform work is incompatible with labour law — and some technological changes that enabled framing platform work as different from previously known work arrangements. This thesis termed these technological changes as ‘Core Labour Elements’ of the platform economy and explain how they relate to algorithmic management and new ways to control platform workers. The Core Labour Elements have enabled platform workers to, for example, choose schedules, hire others and sometimes pick clients and set fares. Also, the Core Labour Elements have lowered the entry barriers to work in platforms, creating a more heterogeneous workforce around industries such as taxi and food delivery. Despite such apparent freedom and heterogeneity, platforms still
retain control of the work process through the digital environments they own and control, including work surveillance and the capacity to discipline platform workers.

Also, the Californian Ideology and the Core Labour Elements have led to a rebranding process of platform work, from work to entrepreneurship, which this thesis terms the ‘Ersatz Self-Employment’ process. The Ersatz Self-Employment process implies that, after a while, the association between platform work and labour law will disappear. However, this thesis also argues this process can be challenged.

This chapter concludes by arguing that the exclusion of platform workers from labour law by platforms is an exercise of power that can be understood using Lukes’ dimensions of power.36 The first (decision-making) dimension of power shows how platform workers experience first-hand the power of platforms. Supported by the idea of freedom of contract,37 platforms unilaterally set the conditions to consider platform workers as self-employed entrepreneurs. The second dimension of power (non-decision-making) explains how platform workers also experience the power of platforms indirectly through controlling the political debate. For instance, it has been recently leaked how Uber, a big player in the platform economy, had set up a strategy to control the political agenda in several countries, including some EU Member States and the EU. Among other objectives, Uber planned to convince policymakers that platform workers are not workers but self-employed entrepreneurs.

The third (ideological) dimension of power shows that the power of platforms to exclude platform workers from labour law can also have a more structural face. The third dimension of power shows how social and legal structures enable platforms to exclude platform workers from labour law. This dimension of power also shows how conscious and unconscious agents can

36 Lukes defines power as ‘A exercises power over B when A affects B in a manner contrary to B’s interests.’ See Steven Lukes, Power: A Radical View (Macmillan Education 1974) 27.
impact these social and legal structures to reinforce or avoid the exclusion of platform workers from labour law.

Chapter 2 introduces republicanism as a theoretical framework to better understand what is unjust about the exclusion of platform workers from accessing labour rights. Republicanism examines whether individuals are free from individual and structural forms of domination by other agents. The idea of freedom from domination features as an alternative to negative and positive accounts of freedom, as explained by Isaiah Berlin.\(^{38}\) Freedom as non-domination focuses not only on how some agents exercise active interference by other agents as a negative account of freedom would do. Freedom as non-domination goes beyond this negative account of freedom to also concerns about the potential of agents to interfere in the choices of others.

Freedom as non-domination also goes beyond a positive account of freedom as autonomy. Freedom as non-domination prizes more things ‘... besides participating in a democratic self-government or shaping our lives according to a plan of our own devising.’\(^{39}\) Republicanism values the role of democratic self-ruling not as an end but as a central requisite to achieve freedom as non-domination.

Concerning work, republicanism worries about the untamed power employers might enjoy concerning workers’ choices. Freedom as non-domination does accept a certain degree of interference at work, provided such interference is not arbitrary. The acceptable limit of interference is thus determined by whether workers can force employers to consider their interests. The traditional tool for workers to make employers consider their interests has been the exercise of collective labour rights such as collective bargaining and strike.

This thesis argues the capacity of platforms to create the conditions to exclude platform workers from accessing key labour rights, such as collective labour rights, can be understood as a

\(^{38}\) Berlin (n 30).

\(^{39}\) Larmore (n 32) 230.
problem of domination. Platform workers are subject to two overlapping forms of domination. First, platform workers are subject to domination by cognisable platforms, termed ‘dyadic market domination’. Through recalling the Californian Ideology and the Core Labour Elements, platforms exercise dyadic market domination by unilaterally imposing their terms and conditions on platform workers, including the conditions to consider them self-employed instead of workers subject to labour laws. Second, platform workers are subject to domination by existing norms and practices, a form of domination without a cognisable actor termed ‘structural market domination’. As discussed in chapter 3, in the EU context, platforms can reinforce dyadic market domination against platform workers by recalling the structural market domination against platform workers by the operation of EU competition law.

This chapter also notes that platform workers are organising against dyadic and structural market domination in three main ways. First, platform workers are organising to directly negotiate with the platforms, ignoring the potential use of structural forms of market domination by platforms. Second, platform workers are organising to resist dyadic and structural market power by way of self-help. Platform workers have learned to, for example, rate platforms back and join cooperatives to access better social coverage. Third, organised platform workers have engaged in social dialogue with governments and platforms organisations without directly addressing the dyadic market power of a specific platform or the structural market domination of a specific norm.

This chapter concludes by analysing different republican strategies to address dyadic and structural market domination against platform workers. This section analyses how the strategies of exit, workplace democracy, workplace constitutionalism diminish dyadic and structural market domination against platform workers. This section also suggests a fourth strategy, termed ‘centralised participation at work’.
Exit aims to address dyadic market domination by platform workers leaving or threatening to leave the platform. If executed, exit destroys the source of domination by destroying the relationship between platform workers and the platforms. Exit would force platforms to improve working conditions for the remaining or new platform workers. The problem with exit, however, is that it focuses on addressing the individual dyadic market domination of one platform against one platform worker. Exit does not address the private structures platforms create to dominate platform workers, which becomes a problem since one of the main features of platform work is the maintenance of a large pool of idle workers by platforms ready to take the next job. Also, exit does not address forms of structural market domination that norms create against platform workers.

Workplace democracy aims to incorporate platform workers’ interests in the private government of platforms in different ways. Workplace democracy can take the form of, for example, collective bargaining or co-government between platform workers and platforms. Workplace democracy provides the tools for platform workers to challenge the dyadic market power of platforms at the workplace level while also shielding platform workers from structural normative forms of domination. However, workplace democracy requires the active participation and coordination of platform workers.

Workplace constitutionalism aims to withdraw platforms’ dyadic market power to centralise this power into public norms and institutions while protecting platform workers from structural forms of market domination. Centralised norms and institutions would enable platform workers to address dyadic and structural market domination. Workplace constitutionalism features in the most recent EU initiatives aiming to ensure platform workers access to collective labour rights discussed in chapter 5. However, workplace constitutionalism risks using unfit normative definitions that can be circumvented by platforms in a context of a highly heterogeneous and dispersed platform workforce, affecting its effectiveness.
This chapter concludes by proposing the strategy of centralised participation at work as a fourth republican strategy to address dyadic and structural market domination concerning platform work. Centralised participation at work blends the features of workplace constitutionalism and workplace democracy and proposes the inclusion of platform workers’ voices to update existing and future norms concerning platform work. The idea is to ensure platform workers’ voices are considered in the private government of platforms and in the enactment of new and already existing norms concerning platform work. This strategy forces platforms and policymakers to consider platform workers’ interests, diminishing dyadic and structural market domination. However, this strategy also requires the active participation and coordination of platform workers at different governance levels.

Chapter 3 discusses the EU legal provisions ensuring platform workers’ access to collective labour rights to achieve freedom from domination. This chapter shows that platform workers’ access to collective labour rights is difficult because access to labour rights in the EU depends on employment status. The collective agreements of working people not accessing employment status — such as platform workers deemed self-employed undertakings — risks becoming disciplined by EU competition law.

The social and regulatory risks of using EU competition law against collective labour agreements were avoided by the CJEU in the *Albany* case. In this case, the CJEU developed the so-called *Albany* exemption. Under the *Albany* exemption, EU competition law must abstain from disciplining collective labour agreements between workers and their employers towards improving work conditions. However, the *Albany* exemption only applies to agreements between people enjoying employment status and employers. Thus, in principle, platform workers deemed self-employed undertakings would not be included in the *Albany* exemption.

Thus, accessing employment status in the EU becomes key to ensure access to collective labour rights for platform workers to challenge the dyadic market power of platforms and the protection from the operation of EU competition law via the *Albany* exemption. The immediate question here is whether platform workers deemed self-employed undertakings would qualify as workers to access the *Albany* exemption.

This chapter argues the EU definition of worker is based on a formula stemming from the CJEU *Lawrie-Blum*\(^\text{41}\) case (*Lawrie-Blum* formula) and refined through subsequent case-laws. However, the *Lawrie-Blum* formula does not clarify whether platform workers meet the EU definition of worker. The EU definition of worker was built to ensure the free movement of people, not protect the self-employed from the operation of EU competition law. Also, the EU definition of worker is built on the binary divide between workers and self-employed. This situation favours platforms to unilaterally alter the work conditions leading to deem platform workers as self-employed, not workers.

The difficulties for platform workers to access the EU definition of worker can be observed in the *Yodel*\(^\text{42}\) case. Here, the CJEU argued the complaining platform worker was freer than workers under more traditional agreements to choose work aspects such as schedules, tasks, workplaces and hiring substitutes. Thus, the complaining platform worker was rightly considered self-employed.

Building the definition of worker based on platform workers’ freedom of choice shows how using a negative account of freedom leads the CJEU to exclude platform workers from accessing the EU definition of worker and thus from accessing key labour rights such as collective labour rights via the *Albany* exemption. According to the CJEU, the more a worker is free from interference to choose certain work aspects, the less subjection to an employer and thus fewer chances to


access employment status. Determining employment status using a negative account of freedom ignores whether platforms have the potential to unilaterally alter the working conditions of platform workers. Instead, a republican account of freedom as non-domination demands to check whether platform workers have the tools to force platforms to consider their interests to determine whether platform workers are free, regardless of the actual interference of platforms in platform workers’ choices.

Against this background, this chapter discusses how platform workers in the EU are subject to an overlapping dyadic and structural market domination. Platforms exercise dyadic market domination against platform workers through the unilateral setting of working conditions to deem platform workers as self-employed, not workers. This form of dyadic market domination of platforms is furthered by the operation of EU competition law, which creates conditions for structural market domination against platform workers. Like in the case of the Dutch musicians, if platform workers do not meet the EU definition of a worker, they are not covered by the Albany exemption as they are considered self-employed undertakings subject to EU competition law. The operation of EU competition law excludes platform workers deemed self-employed undertakings from accessing collective labour rights, depriving them of a valuable tool to challenge the dyadic market domination of platforms.

The last section of this chapter explores how the republican strategies to achieve freedom as non-domination outlined in chapter 2 help to address the overlapping dyadic and structural market power against platform workers in the EU.

This section argues the most straightforward solution for platform workers to achieve freedom as non-domination would be to exit the dominating platform, destroying the work relationship and its dominating features. Exit is also aligned with the rationale behind the operation of platform work. Platforms rely in the constant flow of workers entering and leaving the platform.
However, exit fails under conditions of high unemployment in the EU. It is no surprise platform workers cannot threaten platforms with exiting the platform to improve their working conditions. If platform workers leave or threaten to leave the platform, other platform workers will do the next gig. Also, exit fails because it only focuses on the individual relationships between agents, not the power of platforms to set up the conditions to consider platform workers as self-employed undertakings. Suppose the power of platforms to create digital environments where the exchanges are managed is not challenged by platform workers. In that case, platform workers will likely be exiting one platform to join another. Exit also fails in the EU because it does not address job transitioning costs. Platform workers and taxpayers will carry the burden of constant job transitioning. Platform workers must invest time, ability and resources to look for jobs. Taxpayers will end up paying unemployment benefits and assistance for platform workers to find employment.

The strategy of workplace democracy features in the Albany exemption. The Albany exemption provides tools for workers to challenge the power of platforms at the workplace while protecting them from the operation of EU competition law. Suppose platform workers can access the Albany exemption or a form of co-government at work. In these cases, workplace democracy would require a high degree of coordination and active participation of platform workers to challenge the power of the platforms.

Workplace constitutionalism features in recent EU initiatives to ensure access to collective labour rights of platform workers. However, chapter 5 shows these workplace constitutional initiatives must be carefully drafted to avoid the circumvention by platforms while including a highly heterogeneous and disperse platform workforce.

Lastly, centralised participation at work might help to overcome some of the problems of workplace democracy and workplace constitutionalism by forcing the inclusion of platform workers’ voices at the workplace and before policymakers, forcing them to consider platform
workers’ interests at both levels. However, this strategy requires platform workers to coordinate and actively participate in challenging platforms’ decisions at the workplace and in revising and proposing national and EU policies.

Chapter 4 explores the options to access collective labour rights for platform workers if deemed undertakings in the EU. This chapter begins by analysing the meaning and the extension of the concept of an undertaking. It becomes clear the EU concept of an undertaking is broader than the EU concept of worker analysed in chapter 3. The breadth of the EU definition of an undertaking acts as the default applicable concept concerning platform work. If platform workers do not meet the EU definition of worker, they will meet the EU definition of an undertaking.

The breadth of the EU definition of an undertaking leads to odd results in understanding the relationship between platform workers and platforms. For instance, big multinational platforms and platform workers with no capital might be equally considered undertakings despite their differences. This chapter begins by arguing platforms and platform workers as undertakings can be distinguished based on whether they form an economic unit.

The identification of an undertaking depends on the determination of an economic unit. Such identification occurs regardless of the number of natural or legal persons composing an undertaking. Such distinction is important for platform workers because EU competition law only concerns the market behaviour of two or more undertakings. In other words, a single undertaking cannot violate EU competition law. Platform workers might form an economic unit with a platform. In this case, platform workers’ access to collective labour rights would be shielded from EU competition law as they will form a single undertaking with the platform. Despite further developments on the meaning of an economic unit, there has not yet been a firm decision from EU institutions to declare platform workers may constitute a single economic unit with platforms.
This chapter then discusses why some working people have been traditionally deemed undertakings. Workers such as liberal professionals and small business owners with or without employees have usually been considered self-employed undertakings. For the CJEU, the key aspect of identifying a worker as an undertaking concerns the worker’s capacity to offer their services in the market as part of their economic activity while bearing the financial risks of such activities, regardless of the legal categorisation of the contractual relationship.

Such developments to identify a worker as an undertaking are problematic concerning the operation of platform work in the EU. As discussed in chapter 3, platforms enjoy the unilateral capacity to create the conditions to consider platform workers as self-employed undertakings. Within this power, platforms exhibit the capacity to displace the risks from the platforms to the platform workers. In this context of domination, platform workers meet the conditions to be considered self-employed undertakings. Platform workers would be offering their services in the platform market as part of their economic activity and bearing the financial risks of it.

Suppose platform workers are considered self-employed undertakings. In that case, the question is whether EU competition law envisages an exemption for the self-employed to organise and whether platform workers would fit in that exemption.

This section argues in most CJEU cases, self-employed are forbidden to exercise their collective voice to, for example, set fees for their work. However, in some instances, the CJEU has accepted self-employed can organise and engage in collective bargaining with their counterparties to secure the practice of the legal profession or national procedures setting tariffs for some self-employed. Also, in the FNV Kunsten case — the continuation of the Dutch musicians’ case outlined above and discussed in chapter 4⁴³ — the CJEU recognised some self-employed might be false self-employed, opening another door for some self-employed to access labour rights. However, that door seems to be closed for platform workers. To be false self-employed, self-

⁴³See chapter 4, S II 2.
employed cannot bear financial or commercial risks and must operate as an auxiliary within the
principal undertaking. In all these cases, the collective organisation of self-employed
undertakings will be protected from the operation of EU competition law. However, this chapter
shows how these exemptions seem unlikely to fit the realities of platform workers.

This chapter then explores whether rethinking EU competition law goals might enable access to
collective labour rights for platform workers. This section argues EU competition law goals are
governed by the goal of consumer welfare, which seeks to ensure the lowest prices, best quality,
efficiencies or technological developments for consumers in a market. Other relevant EU
competition law goals are the protection of the competition structure and fairness.

This section argues EU competition law goals are hard to reconcile with ensuring access to
collective labour rights for platform workers because it is hard to show how platform workers’
access to collective labour rights might improve consumer prices, quality, efficiencies,
technological developments or improve the competition structure.

The closest EU competition law goal to ensuring access to collective labour rights for platform
workers would be fairness. Fairness can serve as a standard to assess the imbalance of market
power between platforms and platform workers, which might justify platform workers’ access
to collective labour rights. However, fairness does not necessarily enable platform workers to
access collective labour rights. EU institutions can also use fairness to dismantle the
monopsonistic power of platforms — which might be welcome to address the power of
platforms. However, this idea of fairness does not necessarily enable platform workers to access
collective labour rights.

The last section of this chapter investigates whether the prevailing neoliberal conception of
consumer welfare over a more ordoliberal notion of the protection of the competition structure
and fairness might help understand why EU competition law is ill-suited to ensure access to
collective bargaining for platform workers.
After explaining both comprehensive economic theories, this section argues the primacy of the neoliberal vision of consumer welfare justifies why EU competition law prohibits platform workers from accessing collective labour rights. EU competition law assumes self-employed people have more bargaining power to set prices and other conditions that may harm consumer welfare than workers covered by the *Albany* exemption. This section discusses how this conception is no longer tenable in labour markets and requires EU competition law to revisit how consumer welfare obscures monopsony concerns regarding platform work that can be addressed by ensuring platform workers’ access to collective labour rights.

Chapter 5 examines the recent initiatives taken by the Commission, the European Parliament (Parliament) and other stakeholders to enable access to collective labour rights for platform workers as a tool to address the dyadic and structural market domination. This chapter contends these initiatives can be divided into two groups. First, initiatives aiming to clarify who should be covered by labour rights, including collective labour rights. Second, initiatives aiming to limit the reach of EU competition law so that it does not prevent workers such as platform workers from accessing collective labour rights. This chapter also discusses how both groups of initiatives advance freedom as non-domination for platform workers.

Within the first group of initiatives, this section begins by discussing how the European Trade Union Confederation (ETUC) proposed ensuring access to labour rights for platform workers regardless of employment status by drawing on International Labour Organization (ILO) standards and other applicable European fundamental and human rights instruments. The ETUC advocated for a broader application of fundamental and human rights for everyone, including platform workers deemed self-employed undertakings, that triumphs over other legal bodies such as EU competition law.

The ETUC’s initiative can be understood as a workplace constitutional strategy. Platforms’ power to create the conditions to consider platform workers as self-employed undertakings would be
withdrawn to be centralised in public rules governed by fundamental and human rights standards at work. This way, platform workers would access collective labour rights not based on employment status but because collective labour rights should be seen as fundamental human rights for everyone. The ETUC’s approach provides valuable tools for platform workers to challenge dyadic and structural market domination in the EU. However, the ETUC’s approach does not address whether and how this approach might clash with other valuable rights and freedoms, for example, by making consumers pay higher prices.

Another set of initiatives within the first group stemmed from the Parliament, namely the Parliament proposal for an EU directive ‘on Digital Platform Workers’44 (Parliament Proposal) and the Parliament resolution ‘on fair working conditions, rights and social protection for platform workers — New forms of employment linked to digital development’45 (Parliament Resolution). The Parliament Proposal aimed to align the rights of platform workers with ‘standard’ workers. Without further clarification on what counts as a ‘standard’ worker, the Parliament Proposal aimed to ensure access to labour rights for platform workers.

The Parliament Resolution complemented the Parliament Proposal. The Parliament Resolution aimed to equalise the labour rights of workers and platform workers of ‘the same category’. Without clarifying the meaning of ‘the same category’, the Parliament Resolution aimed to ensure access to labour rights for platform workers by reinforcing the idea that work relationships should be built based on the reality of the work relationship and by ensuring platform workers can join trade unions and engage in collective bargaining. The Parliament Resolution underpinned access to labour rights for platform workers by inserting a rebuttable presumption of employment in favour of platform workers, forcing platforms to prove there is

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no working relationship. Also, the Parliament Resolution let the Member States define who is a worker and what a platform.

Both Parliament initiatives can be understood as strategies of workplace constitutionalism. The Parliament Proposal withdraws some of the power of platforms to create the conditions to consider platform workers self-employed undertakings. However, the Parliament Proposal fails to connect its measures with its reliance on fundamental human rights at work. First, the Parliament Proposal fails to cover all platform workforce as it only covers ‘offline’ platform workers. Second, the Parliament Proposal links access to labour rights for platform workers to the presence of a contract of work and definitions of a platform and a platform worker that platforms can easily circumvent.

The Parliament Resolution also aims to withdraw the power of platforms to create the conditions to consider platform workers as self-employed undertakings. However, leaving the key definitions of who is a worker and what is a platform to national developments enables platforms to circumvent those definitions on a local level and does not provide uniformity on the point where EU competition law should retract.


The Commission Directive Proposal relies on more comprehensive definitions of a platform worker and a platform than the Parliament initiatives to build a rebuttable presumption of work

relationship in favour of platform workers. This rebuttable presumption is triggered if at least two criteria are met. The criteria range from the capacity of platforms to determine remunerations to the ability of platform workers to choose schedules or hire substitutes.

The Commission Directive Proposal also represents a strategy of workplace constitutionalism. The Commission Directive Proposal withdraws the power of platforms to create the conditions to consider platform workers as self-employed undertakings through a rebuttable presumption of employment in favour of platform workers. However, the Commission Directive Proposal also requires Member States to ‘avoid capturing the genuine self-employed’, opening an area for platforms to rebut the application of the presumption. Platforms can create the conditions to meet only one or no criteria of the presumption, excluding platform workers from accessing it.

The Commission Directive Proposal also aims to extend other rights to working people beyond employment status. Such extension shows the Commission is willing to grant some rights with labour impact to every working person regardless of employment status. However, such extension does not apply to ensure access to key labour rights such as collective labour rights.

Within the second group of initiatives, the Commission launched a consultation process on 'Inception Impact Assessment Collective bargaining agreements for self-employed — scope of application of EU competition rules'\(^\text{47}\) (IIA) featuring four policy options to ensure access to collective bargaining for the ‘solo’ self-employed by retracting EU competition law. Solo self-employed were understood as self-employed without employees. The four policy options range from ensuring access to collective bargaining for all solo self-employed providing their own labour through digital labour platforms to ensuring access to collective bargaining for all solo self-employed.

self-employed providing their own labour through digital labour platforms or to professional customers of any size.

The four policy options ensure the retraction of EU competition law in different degrees of extension, providing platform workers access to collective labour rights to challenge the dyadic market power of platforms. However, the four policy options also show definitional uncertainties, enabling platforms to circumvent the policies. These definitional uncertainties show again that the strategy of workplace constitutionalism requires clear but flexible definitions to avoid circumvention by platforms while including a heterogeneous and disperse platform workforce.

Another initiative came from a group of students and a Professor in the Netherlands48 (Second Feedback) in the context of the IIA. The Second Feedback proposed to retract EU competition law to the point where there was an unequal bargaining power between the solo self-employed and the platforms. The inequality of bargaining power was non-rebuttable if wages of solo self-employed were below the marginal revenue product compared to the wages of workers on a comparable task. On the other hand, the inequality of bargaining power was rebuttable if wages of solo self-employed were above the marginal revenue product compared to the wages of workers on a comparable task. The marginal revenue would be determined using scientific evidence and under democratically legitimised bodies.

The Second Feedback was a mixture of the strategies of workplace constitutionalism and centralised participation at work. However, the Second Feedback requires a high degree of active participation of platform workers and has definitional uncertainties with the potential to affect its efficacy.

48 ‘Feedback F1604242 Provided by Pepijn van Der Lans’.
The third initiative discusses how the proposed Commission Guidelines "on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons" 49 (Proposed Commission Guidelines) sought to retract EU competition law to ensure access to collective labour rights for platform workers meeting the definition of a solo self-employed. To achieve this goal, the Proposed Commission Guidelines distinguished two scenarios. First, if solo self-employed were in a situation comparable to that of workers, their collective agreements would fall outside EU competition law. Second, collective agreements of solo self-employed aiming to correct an imbalance of bargaining power will not be treated as anticompetitive by the Commission.

The Proposed Commission Guidelines could also be understood as a strategy of workplace constitutionalism. This initiative diminished the dyadic market domination of platforms by using a broad definition of a solo self-employed and the structural market domination by retracting the applicability of EU competition law in the two ways outlined. However, this initiative still suffered from the definitional uncertainties observed in previous workplace constitutional strategies, potentially enabling platforms to circumvent it.

This chapter contends that, through the Commission Directive Proposal and the Proposed Commission Guidelines, the Commission has created three paths to ensure access to collective labour rights for platform workers deemed solo self-employed. The first path is linked to the Commission Directive Proposal and aims to clarify the employment status of solo self-employed through a rebuttable presumption. The second and third paths aim to ensure access to collective bargaining by retracting EU competition law without ensuring access to employment status. The three paths offer different ways for platform workers to access collective labour rights as a tool to address dyadic and structural market domination.

The last part of this thesis advocates for using the idea of freedom as non-domination to expand the third path. Such expansion implies ensuring access to collective labour rights (and not just to collective bargaining) to every working person (and not just solo self-employed). Using the idea of freedom as non-domination, every working person (including platform workers) lacking the tools to challenge the arbitrary power of their counterparties (including platforms) created by an imbalance of bargaining power should access collective labour rights to force their counterparties to consider their interests. This enhanced third path will contribute to diminishing the dyadic market domination of platforms and the structural market domination by ensuring the retraction of EU competition law to this point.

The idea of freedom as non-domination in the context of platform work in the EU shows the need to update the boundaries of labour law to include new work realities such as platform work. Freedom as non-domination will help depart from the assumption that only workers meeting employment status are subject to monopsonies and thus should be protected by labour law. Freedom as non-domination would require expanding access to key labour rights such as collective labour rights for every working person subject to the arbitrary power of another, changing the boundaries between labour law.
Chapter 1: Work in the Platform Economy

Introduction

This chapter introduces the platform economy and discusses the problems of outlining its contours through analysing definitions, characteristic elements and typologies. This chapter also examines the nature of work created within the platform economy. This chapter probes the mainstream narrative and some distinctive features of the work available through platforms. Lastly, this chapter explores how theories of power can assist in understanding what is problematic in the current operation of platform work. The structure of this chapter will be as follows.

The first section outlines the operation of the platform economy. This section shows the problems of agreeing on a definition of what is the platform economy. Also, in this section it will become clear that the platform economy is not new. This section argues the platform economy is a business model based on a matchmaking process that existed long ago. However, technological developments boosted the emergence of a diversity of platforms, including labour-intensive platforms.

The second section further clarifies the boundaries of the platform economy by studying its core elements. This section explains and discusses the importance of network effects, new or idle assets, paid or free assets, trust, and a peer-to-peer architecture as core elements to understand the platform economy. This section also flags the misuse of the idea of peer architecture to build the narrative around platform work.

The third section probes different typologies of the platform economy and focuses on labour-intensive platforms as distinguishable from capital-intensive platforms. This section maps the types of work identifiable in labour-intensive platforms, showing the heterogeneity of labour-intensive platform work.
The fourth section traces the construction of the idea of platform work. This section outlines the emergence of platform work based on two main arguments. The first focuses on the construction of a narrative around platform work based on entrepreneurialism. The second focuses on distinctive features of platform work that seem to distort the traditional vision of work. This section claims that the combination of both arguments creates a structuration process around platform work that appears capable of creating normative confusion as to whether platform workers are workers or independent self-employed entrepreneurs.

The last section of this chapter focuses on power as the main catalyst behind presenting platform work as independent self-employed entrepreneurship. This section explores the emergence and fluctuating legal battles concerning work status for platform work through the lenses of power as explained by Steven Lukes. After discussing how platforms exercise power directly and through controlling the public discussion around platform work (the first and second dimensions, respectively), this section explores how platforms take advantage of norms and social practices to exacerbate their power and how conscious and unconscious agents can tip the balance (third dimension of power). The third dimension of power helps explain the current structuration process of platform work as self-employed work. The third dimension of power also helps to elucidate the role of agents in reinforcing or challenging such a structuration process.

I. Context, definitions and the emergence of platform economy

According to BrandZ (an equity database), in 2020, of the ten most valuable global brands, nine operate as a digital platform. These nine digital platforms operate in the spheres of retail (Amazon and Alibaba), payments (Visa and Mastercard), and the overall category of ‘technology’ (Apple, Microsoft, Google, Tencent, and Facebook). The only exception in this ranking is
McDonald’s, in 9th place. However, McDonald’s also operates through partnerships with delivery platforms such as UberEats.¹

PriceWaterhouseCoopers, predicted that, by 2025, five key sectors of the platform economy have the potential to reach 335 USD billion of revenues. These industries are travel, car sharing, finance, staffing, music and video streaming.² The American multinational financial services corporation MasterCard estimates the platform economy generated USD 204 billion in gross volume from customers in 2018.³ From a more institutional perspective, a study of Pierre Goudin for the European Parliamentary Research Service notes that the potential economic gain through under-used assets in the platform economy is estimated at EUR 572 billion.⁴

Also, the growth of the platform economy is starting to have significant implications in other areas. For instance, the platform economy seems to blur the lines between consumers and content creators. A study conducted by the Pew Internet & American Life Project in 2005 found that, in the United States, there are more teens creating content on internet platforms than consuming it.⁵

Behind these and other studies lies a not fully resolved set of questions: What is the platform economy? Why is it becoming so ubiquitous? And what does work in platforms look like? The following sections aim to shed some light on the meaning and the emergence of the platform economy before discussing work in the platform economy.

1. Definitions of the platform economy

There is difficulty in defining the platform economy. Even the term ‘platform economy’ has many synonyms in the literature. Terms such as sharing economy, collaborative economy, on-demand economy, gig economy, peer to peer and access economy are treated as synonymous in everyday use, which adds to the confusion when studying the platform economy.6

The Commission uses the term ‘collaborative economy’ to refer to the platform economy. The Commission defines the collaborative economy as ‘... business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.’7 The Commission uses a definition that encompasses the existence of at least three actors: users on both sides of the market and a platform that intermediates their exchanges.8

In a 2016 report, the Federal Trade Commission of the United States of America prefers to use the term ‘sharing economy.’ The US Federal Trade Commission refers to the sharing economy as ‘... activity on peer-to-peer platforms that are primarily commercial in nature.’9

Some scholars have also attempted to define the platform economy. For Hou, the ‘sharing economy’ can be defined as ‘... a two-sided online platform that allows people to exchange...’

8 ibid. ‘The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis (‘peers’) or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them (‘collaborative platforms’). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.’
directly under-utilised capacity (goods or services) with each other.’¹⁰ Other scholars conducted an extensive semantic study on the available definitions of the ‘sharing economy.’ They concluded that a sound consolidation of all the definitions would be that ‘... the sharing economy is an IT-facilitated peer-to-peer model for commercial or non-commercial sharing of underutilised goods or service capacity through an intermediary without transfer of ownership.’¹¹ There are also voices advocating for a more overarching meaning of the platform economy. For Lichfield, the ‘sharing economy’ is ‘... the restructuring of the traditional relationships between workers, resources, and customers made possible by digital systems for connecting them to one another with low transaction costs.’¹²

The minimum common elements of all these definitions are the exchange of assets (including work) by users mediated by a platform that provides a digital environment for the exchanges to happen. These common elements within the platform economy can be complemented to grasp what is distinctive about the platform economy and platform work.

2. The emergence of the platform economy

The platform economy is not a new business model. The exchange of assets by users mediated by a third party providing a platform for the exchange to happen has existed long ago. For instance, during the Ming Dynasty in China, a type of broker commonly known as Meiren had the task of arranging marriages between two families. Meirens roamed in different towns helping to find suitable marriage partners for families’ offspring. Meirens had to be persuasive and convince both parties of the benefits of the proposed marriage, for which Meirens charged

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¹¹ Daniel Schlagwein, Detlef Schoder and Kai Spindeldreher, ‘Consolidated, Systemic Conceptualization, and Definition of the “Sharing Economy”’ (2020) 71 Journal of the Association for Information Science and Technology 817, 829.
¹² Lichfield (n 6).
a fee.\textsuperscript{13} Other examples of matchmaking peoples’ needs in the pre-internet era include organ donation processes, job agencies, or housing brokering.

But it has been the rise of the internet which has created an explosion in the emergence of digital platforms. During the early times of the internet, the first attempts to connect people’s needs through a digital platform were carried out. In 1995, Craig Newmark decided to join the movements behind Net, WELL and Usenet, community-oriented discussion groups considered early versions of online social networks.\textsuperscript{14} Newmark innovated by writing computer code that automatically uploaded the emails exchanged by users to a website named ‘Craigslist.’\textsuperscript{15} Newmark created one of the first digital platforms where people exchanged goods and services.

In the same year, Pierre Omidyar started eBay. eBay is a digital platform for exchanging goods by professional and casual users through public auctions or a set price. Omidyar’s idea was to create a digital platform resembling a physical marketplace for exchanging goods and services. A key factor for the worldwide success of eBay was the increase in trust, access, and transparency of the exchanges. These features were achieved primarily through the adoption of PayPal, an online automated clearinghouse for money transfer, and the capacity of buyers to rate sellers.\textsuperscript{16}

\begin{thebibliography}{9}
\end{thebibliography}
A different type of early digital platform was Couchsurfing. This platform began in 2003, some years after Casey Fenton, a computer programmer, found in 1999 a cheap flight ticket from Boston, United States, to Iceland. Fenton had no acquaintances nor a place to stay in Iceland, so Fenton decided to spam the email accounts of 1500 students from the University of Iceland, asking for a place to stay. Eventually, Fenton received ‘... about 50 to 100 responses.’

Couchsurfing started as a digital platform free of use that connects users from all over the world looking for places to stay while abroad.

These examples show the diversity of platforms' objectives and purposes since the internet's early times. eBay was conceived as a digital marketplace for the exchange of goods and Couchsurfing for the exchange of experiences with no profits involved. Craigslist was positioned somewhere between eBay and Couchsurfing, as its purpose is the exchange of goods, services, experiences, gifts, stories, and anything that could be legally (and even sometimes illegally) shared on the internet, including work.

The platform economy kept growing exponentially over the last decade. Many other platforms appeared in a variety of industries such as mobility, retail, tourism, accommodation, entertainment, multimedia, finances, energy, and human resources. A period that some term the 'internet 2.0.' The rapid evolution and expansion of the platform economy add to the

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20 Adam Osztovits and others, ‘Sharing or Paring? Growth of the Sharing Economy’ (PWC 2015).
21 Nicholas John, ‘Sharing, Collaborative Consumption and Web 2.0’ (2013) 26 MEDIA@LSE Electronic Working Papers.
confusion to agree on a definition, raising questions about the kinds of jobs these platforms were producing. New platforms appear in existing or new industries, while the most successful platforms remain zealous in guarding against disclosing their information. This is problematic as it may conceal significant information for debating and policymaking the platform economy, including work in platforms.

Another complementary way to elucidate the contours of the platform economy and what working in platforms looks like would be to dissect its core elements. The following section will examine the core elements of the platform economy and discuss how they affect the nature of platform work.

II. Core elements of platform economy

This section identifies the core elements of the platform economy and discusses the implications of such core elements in platform work. This section explores the construction of a digital network and the role of the actors involved. It also outlines some of the implications of the so-called ‘network effects’ in platform work. Also, this section explores the kind of asset involved in the operation of platforms and how it impacts platform work, challenging the assumption that the platform economy only uses casual idle assets. Instead, it is argued that the platform economy also involves new, intensive, and professional use of assets, raising questions about the appropriate regulation for platform workers.

Further, this section explores how the platform economy can involve paid or free transactions. Reflections in this area will be significant to elucidate the real from the declared purpose of platforms concerning work arrangements. Also, this part discusses the importance of trust behind the operation of the platform economy. This section finishes outlining the misuse of the

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idea of a ‘peer’ in the platform economy and exploring key implications of that misuse for developing a narrative of independent self-employed entrepreneurship behind platform work.

1. Two- and three-sided networks

Two-sided networks (sometimes called two-sided markets) are platforms that bring together two distinct parties in the market. These parties are traditionally sellers and buyers. Two-sided networks are not new and predate the internet. Markets can be physical platforms (in the sense of places) where customers and producers meet and exchange goods and services for money. In turn, two-sided networks on the digital platform economy are a digital representation of physical platforms where two parties meet to exchange through an internet platform that serves as an intermediary. In two-sided networks, costs and income stem from both sides, and the intermediary platform provides the infrastructure for this exchange to happen.

Networks can also be three-sided. This concept refers to the presence of an active ‘middleman’ that takes control of a significant part of the operation and monetises gains. For example, Airbnb is a digital platform operating in the accommodation sector. Airbnb matches hosts and guests while performing quality control to guarantee the accommodation experience for a service fee. Hosts incur in costs by allowing users to use the accommodation according to Airbnb standards while receiving payment in return. Guests incur costs through payments to the platform to access the accommodation. Airbnb (as the middleman) manages the service and

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24 Eisenmann, Parker and Alstyne (n 23).
monetary exchanges between the network users while charging an administration fee to — usually — both parties.

Platforms also own and control the digital environment where the exchanges occur, taking advantage of the two- or three-sided markets. The unchecked private ownership of the platform has significant consequences for people working through platforms. As further explained in this chapter, platforms can control and discipline platform workers almost in real-time by relying on technological breakthroughs.

2. Network effects

Supply and demand are attracted to the platform through a matchmaking mechanism in two and three-sided networks. The successful attraction of users invites new users at both ends to exchange goods and services on the platform, which increases the value of the exchanges and the platform. This is a win-win situation that scholars term ‘network effects’. Network effects are cross-sided when the two sides of a market attract each other. Network effects are same-sided when users of one side attract more users from the same side. For example, telephone landlines enjoy network effects. As more users acquire a landline telephone, the value of obtaining a landline telephone for other users increases. New landline telephone users added to the industry's overall value because the growing use of a landline telephone increases the number of people who want to use it.

Successful platforms have captured network effects. An example of a successful platform that captured same and cross-sided network effects is Facebook. Facebook captures cross-sided network effects when matching users and advertisers through Facebook ad or when matching

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28 Sundararajan (n 26) 120.
sellers and buyers through Facebook Marketplace. Also, Facebook captures same-sided network effects by attracting new users based on the social connections people can make on the platform.\(^2^9\) Another example is Uber (a transport platform). If Uber has many drivers, it is more likely that customers will find a ride using the app. In turn, happy customers will likely return to Uber for the next ride and will also recommend the platform to other potential users. At the same time, other drivers will be attracted by the increasing number of customers using the platform. This scenario will create more value within Uber—including more value to the drivers—creating cross- and same-sided network effects.

What is distinctive about capturing network effects in the platform economy is the intensity to which platforms can capture the network effects. Due to the negligible marginal cost for platforms to add another user on each side of the network, platforms can take advantage of network effects to take the whole market share in a ‘winner-takes-all’\(^3^0\) or ‘winner-takes-most’\(^3^1\) formula by scaling up quickly.\(^3^2\) In this context, it is no surprise that only a few platforms in different markets have a significant market share.\(^3^3\)

The ‘winner-takes-most’ formula can also be used to explain the success of platforms offering the provision of personal services. The service of an additional user at a negligible cost for food delivery platforms like Deliveroo makes it easy for them to scale up as far as it is technically and

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legally possible.\textsuperscript{34} Network effects and the capacity to scale up quickly in a ‘winner-takes-most’ formula helps explain how Deliveroo could announce 15,000 new ‘riders’ to operate in the UK within three months.\textsuperscript{35}

All these elements composing network effects help to create monopsony conditions concerning the labour market in the platform economy. In this case, a monopsony is a market scenario where many workers buy services from one or a few platforms.\textsuperscript{36} The implications of having a monopsony concerning platform work are significant to ensure access to collective labour rights for platform workers and will be discussed in the EU context throughout this thesis.

Also, the value of network effects is not shared equally. It has been reported that a traditional strategy of platforms to capture and sustain network effects is to subsidise customers at the expense of sellers of goods and service providers. Subsidising customers adds to customers’ wealth by saving money on subscriptions or service fees.\textsuperscript{37} In turn, sellers of goods and service providers typically do not enjoy subsidies from platforms. Instead, some studies suggest that some service providers, such as platform workers, are experiencing fare decreases.\textsuperscript{38}

Also, achieving a significant growth of network effects is not enough to achieve the ‘winner-takes-most’ market goal. In theory, a successful platform needs to ‘disrupt’ a new or existing

\textsuperscript{34} Labour intensive-platforms also relies on information technologies and the displacement of risks, both aspects will be further discussed on the implication of working on platforms. See Zhu and Lansiti (n 32).


market by capturing network effects to scale up as fast as possible. For instance, ride-hailing platforms have disrupted local taxi markets by capturing network effects. However, the capture of network effects must be also sustained throughout time to secure the platform’s network strength. It has been argued that the strength of network effects relates to the capacity of a platform not to be detrimentally affected by a new competitor. The more fragmented the network effects are into local clusters, the less strength the network will possess. Thus, the platform is more vulnerable to competition. Platforms like Airbnb, Amazon, and Facebook exhibit strong and sustained network effects as they have more capacity to connect as many networks as possible within their global reach. On the other hand, more locally clustered platforms such as Uber, Deliveroo and TaskRabbit must continuously battle against new local competitors. The fierce competition between Uber, Didi and other incumbents for the transport market in China is proof of the importance of sustaining network effects to achieve the ‘winner-takes-most’ market goal. As it will be furthered concerning the typologies of the platform economy, this picture shows that platforms are not all the same, forcing them to adapt their business models to their realities, impacting the kind of jobs they create.

3. Just idle assets?

Another core feature of the platform economy is its apparent reliance on the underused or idle capacity of assets. The massive spread of information technologies led to lower entry barriers

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40 Zhu and Lansiti (n 32).
41 ibid.
43 See section 3 of this chapter.
44 See the different accounts in Schlagwein, Schoder and Spindeldreher (n 11) 826.
into platforms, facilitating the market entry of users offering their idle assets. James Surowecki captures the apparent centrality of idle assets for the platform economy:

There are a lot of slack resources in the economy. Assets sit idle—the average car is driven just an hour a day—and workers have time and skills that go unused. If you can connect the people who have the assets to people who are willing to pay to rent them, you reduce waste and end up with a more efficient system.\(^45\)

Markets formerly dominated by a few actors now witness the entry of many small competitors mediated by platforms. For instance, Airbnb and Couchsurfing, through its hosts, compete for market share against traditional big accommodation companies like the Marriott chain, making Marriott accommodate its business model.\(^46\)

However, the platform economy is not only about using idle assets. First, even though it is true that some of the most successful platforms declare they focus on attracting idle asset owners into the platform, there have always been platforms with broader objectives. For instance, eBay and Craigslist do not focus solely on exchanging idle assets. Both platforms also include professional offerors of goods and services.\(^47\)

Second, even the platforms declaring a focus on idle assets now openly welcome users bringing dedicated assets into the platform. This turn in the market niche results from a professionalisation process of users’ activities on platforms. This claim includes people working in platforms. For instance, it has been reported that platform drivers in Seattle, United States, increasingly look at their work on the platform as an opportunity for full-time employment.

\(^47\) See https://bristol.craigslist.org/ and https://pages.ebay.co.uk/selling_manager_pro/
According to a study, in 2021, full-time drivers in Uber and Lyft (a transport platform) in Seattle, United States, will represent 33 per cent of all platform drivers. This 33 per cent of workers will account for 55 per cent of all the trips on these platforms.\textsuperscript{48} This example shows how full-time platform work is increasingly becoming dominating compared to the idea of people working in platforms when idle to complement a main job.

The professionalisation of the exchanges in platforms go beyond work. Other platforms such as Airbnb have started to incorporate ‘professional hosts.’ This strategy means Airbnb welcomes users renting full-time properties into the platform.\textsuperscript{49} As a consequence, professional hosts are starting to displace nonprofessional hosts. In this regard, spare rooms listed on Airbnb by nonprofessional hosts dropped from 90 per cent in 2016 to 78 per cent in 2019.\textsuperscript{50} It has been reported in central Lisbon that Airbnb incentivises more a buy-to-let type of investor than the real use of idle assets by resident hosts.\textsuperscript{51}

As will be further discussed throughout this thesis, the trajectory from the use of idle assets to the professionalisation of activities as a core feature of the platform economy leads to the question of whether people working on platforms during idle-time or full-time deserve protection via labour law.


4. Paid or free

Some platforms operate to create and manage a network of users where no profit is involved in the exchanges. Examples of not-for-profit platforms are Couchsurfing (in its original version), Warmshowers and Napster (in its first version). In Couchsurfing\(^{52}\) and Warmshowers,\(^{53}\) users from both ends of the platform exchange places to stay for free while visiting a place. Users can act both as hosts and guests. Napster\(^{54}\) functioned as a community of users exchanging music files for free on a platform where users could download or upload music directly from their hard disks. These platforms encompass forms of exchange between users free of charge and with a community-driven purpose.

Some platforms exhibit both profit and not-for-profit features. For example, Blablacar, a ride-sharing platform, began allowing drivers to charge only a lump sum for petrol for a cheaper car ride while declaring the service environmentally friendly and social. Now, Blablacar also charges a commission between 10-12 per cent to the passengers based on the cost of the ride advertised by the driver to, allegedly, keep the platform services running.\(^{55}\)

Other platforms are for-profit. The two most researched for-profit platforms are Uber and Airbnb. In the for-profit business model, both platforms and users (including service providers)

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52 See Couchsurfing declaration of values: ‘Couchsurfing is a global community of 14 million people in more than 200,000 cities who share their life, their world, their journey. Couchsurfing connects travellers with a global network of people willing to share in profound and meaningful ways, making travel a truly social experience.’ https://about.couchsurfing.com/about/about-us/. However, due to the COVID-19 financial crisis, Couchsurfing abandoned its free service and turned it into a subscription service. See https://blog.couchsurfing.com/we-hear-you/also https://blog.couchsurfing.com/couchsurfing-needs-your-help/


55 https://www.blablacar.co.uk/faq/question/why-are-there-service-fees
make a profit. Users profit from exchanging goods and personal services while the platforms charge a service fee and gather valuable data.\textsuperscript{56}

Distinguishing the economic goals of platforms helps to untangle the differences between what the platforms declare they do and what they actually do. The fact that some profit-seeking platforms argue their goals are social collaboration and the construction of community adds to the idea that some of these platforms sail under false colours for regulatory purposes. More will be said below when discussing the narrative behind the construction of the idea of platform work.

5. Trust and the lemons problem

Just like in traditional markets, users looking for goods and services on the internet have little access to information. This problem impedes users from knowing the reputation of other users selling the services they want beforehand, affecting the capacity of users to engage in exchanges.

The economist George Akerlof termed this information asymmetry in markets as the ‘lemons problem’. In short, the lemons problem refers to information asymmetries between different market actors that affect trust in the exchanges. Akerlof’s classic example of the lemons problem refers to the American slang ‘lemon’: a used car found defective after buying it. In the used car market, it is almost impossible for the buyer to engage in a fair agreement with the seller, as the seller is likely to be an expert on used cars and probably knows which cars are ‘lemons’ and which are not. If information asymmetry is sustained over time, there is a risk of driving away good-quality products. People will not risk paying more for the same product, eventually leading to a market collapse.\textsuperscript{57}


The platform economy alleviates the lemons problem through an ‘architecture of participation’. Platforms act as information brokers in industries with significant information asymmetries through reputation-feedback mechanisms involving users. Platforms encourage users of both ends to rate and provide feedback on each other. Users’ ratings and feedback help build a digital reputation of users, enhancing trust for future exchanges. For instance, Couchsurfing is built on reviews and feedback from both sides of the network. Crossed reviews and feedback by hosts and guests through the platform help build a digital reputation that helps them engage in future exchanges with other hosts and guests. This architecture of participation boosts trust in the exchanges, which helps build a transnational community of people sharing places to stay. In Couchsurfing’s words, to share with ‘friends you haven’t met yet.’ There are several other mechanisms to build trust on platform exchanges. Platforms such as YouTube, Instagram or Facebook build trust based on the number of views, thumbs up or down, likes, shares, and comments by users. Encouraging users to rate and provide feedback to each other challenges the traditional assumption that consumers are passive subjects in the production processes. Rating and feedback in this context bring the idea of a ‘prosumer,’ a person that consumes while also producing.

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60 Couchsurfing ‘Our Story’ https://about.couchsurfing.com/about/about-us/
There are two sides to this core feature of the platform economy. Tools improving trust and participation in exchanges promise to ‘revolutionise modern marketplace regulations’ through addressing information asymmetries and other market failures. On the other hand, when tools improving trust and participation in the exchanges rely on a few platforms with no democratic accountability, there is the risk these platforms exercise arbitrary power over users, including people selling labour capacity. For instance, it has been reported that feedback and rating mechanisms lead to arbitrary forms of discrimination. Also, it has been reported that platform workers do not have mechanisms to contest platform decisions.

6. Peer-to-peer architecture and the platform economy

Many scholars include peer-to-peer technologies as a defining core feature of the platform economy. However, this section argues that the platform economy is not peer-to-peer as it resembles the relationship between a client and a server.

Peer-to-peer is an internet type of architecture that conceives the client as also a server. The server being a client and vice versa means a user can access the resources of other members of the network directly through an internet protocol. Clients and servers become ‘peers’ and share items like files, messages and data storage. This view of the internet challenged the traditional client-server approach, which pointed to an asymmetrical relationship where users had only access to information through a powerful centralised platform controlling the exchanges.

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64 Thierer and others (n 59) 877–878.
65 ibid.
68 Schlagwein, Schoder and Spindeldreher (n 11).
exchange data through a centralised server if ordinary users can handle it themselves? In other words, why does the internet need a platform that controls peoples’ exchanges?

Peer-to-peer networks can be distinguished between ‘pure’ and ‘hybrid’.\textsuperscript{70} Under a pure peer-to-peer network, exchanges between users travel directly through the internet into the users’ hardware. In other words, there is no intermediary platform. An example of a pure peer-to-peer network would be Gnutella, an internet protocol for distributed file-sharing supported by the Free Sharing Foundation.\textsuperscript{71} In turn, hybrid peer-to-peer networks include an intermediary in the exchanges with absent or very little control.\textsuperscript{72} Hybrid peer-to-peer networks place themselves between a ‘pure’ peer-to-peer network and the client-server architecture. An example of a hybrid peer-to-peer network would be the original version of Napster. In this version of Napster, the platform intermediated users’ exchanges by providing a search engine and an algorithm to find the best route to download the audio file from the hardware of another user.

Platforms operating in the platform economy are not pure nor hybrid peer-to-peer networks. Instead, platforms have created a client-server relationship. Platforms exhibit more control than the pure or hybrid versions of peer-to-peer networks on the platform exchanges. The focus on control through intermediation is useful to challenge views that portray the platform economy as a peer-to-peer network. As will be further discussed in this thesis, platforms exercise a degree of control beyond pure or hybrid peer-to-peer networks concerning platform work. However, platforms have built a narrative based on a hybrid peer-to-peer network architecture.

Suffice to say here, there is a lesson to be learned from the emergence of peer-to-peer networks that is missing in the kind of work that platforms produce: that it is possible to create work on

\textsuperscript{70} Rüdiger Schollmeier, \textit{A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications} (2001); Kisembe and Jeberson (n 69).
\textsuperscript{72} Schollmeier (n 70).
the internet without a central controlling authority. Howe best explains this when reflecting on the operation Linux, an open-source operating system:

The development of the Linux operating system proved that a community of like-minded peers was capable of creating a better product than a corporate behemoth like Microsoft. Open source revealed a fundamental truth about humans that had gone largely unnoticed until the connectivity of the Internet brought it into high relief: labor can often be organised more efficiently in the context of community than it can in the context of a corporation.\(^73\)

So far, this chapter has explored the boundaries of the platform economy by studying the definitions, the emergence, and its core elements. The upcoming sections of this chapter will delve into work in the platform economy. First, through exploring what is platform work, and second, by analysing the construction of the idea of platform work. This chapter finishes by discussing how power helps to understand the exclusion of platform workers from accessing valuable labour rights such as collective labour rights.

III. A typology of platform work

The platform economy has received attention from many disciplines. Scholars developed several typologies depending on the goals and activities of platforms and the point of view of the observer. Many typologies pay attention to platforms that specialise in the matchmaking process between users to provide personal services. These are platforms intermediating the process of humans hiring other humans to work in the form of short ‘tasks,’ ‘gigs,’ or ‘jobs.’ Platforms specialised in the provision of personal services have been growing exponentially over the last decade. These platforms can be found in various industries such as food delivery,
transport, babysitting, cleaning, pet care, human care and tour guides.\textsuperscript{74} The stress on work from scholars\textsuperscript{75} and corporate research\textsuperscript{76} shows two features of the platform economy. First, the importance of people to carry on most activities in the platform economy, and second, the difference between capital and labour. This second distinction is important because it helps to make a further distinction between labour-intensive and capital-intensive platforms.

Labour-intensive platforms are characterised by the prominence of users’ labour in exchanges, whereas capital-intensive platforms refer to the importance of capital rather than work in the exchanges. For example, a platform like eBay is not labour but capital intensive, as eBay’s business relates mainly to the sale of goods by users rather than personal services. On the other hand, a platform like TaskRabbit (a freelance platform) is labour-intensive and not capital-intensive as the provision of personal services prevails. Labour-intensive digital platforms can also be classified based on geographical and individual features. In this regard, and despite other interesting efforts,\textsuperscript{77} the work of Schmidt\textsuperscript{78} is helpful to understand some additional specificities around platform work better.

\textsuperscript{74} An example of this sort of platforms is TaskRabbit. TaskRabbit is a platform founded in 2008 that matches the demand for handyman work. The platform’s website offers a staggering number of personal and ‘contactless’ tasks that include plumbing, cleaning, furniture assembling, moving, delivery, gardening, computer help, etcetera. See ‘TaskRabbit’ <https://www.taskrabbit.co.uk/>.


\textsuperscript{76} JP Morgan Chase, ‘The Online Platform Economy in 2018’; PwC (n 2).


\textsuperscript{78} Schmidt (n 75).
Schmidt offers a straightforward typology of work in digital labour platforms⁷⁹ based on two questions: is work bound to a specific location? And is work bound to a specific person? The answer to the first question leads to a subsequent division between online cloud work (or web-based digital work) and offline gig work (or location-based digital work). In turn, the answer to the second question leads to a distinction between crowd and individual work.

Cloud work recalls the idea of someone working anywhere with at least a computer and an internet connection. In turn, cloud work admits two categories: first, freelance marketplaces where individual workers offer their services; and second, freelance marketplaces where work is not bound to a specific individual, but to a crowd. This second category of cloud work (crowd work) can take the form of an auction (contested-based crowd work) or the form of small units of work (microtasking crowd work).⁸⁰ In turn, gig work entails the work of individuals at a specific location, which requires more than just a computer, internet connection and human capacities. Gig work is bound to specific local jurisdictions and is also more visible.⁸¹

⁷⁹ According to Schmidt’s terms, see ibid.
⁸⁰ ibid 5. Examples of cloud work platforms would be Amazon Mechanical Turk, Fiverr or Clickworker. Amazon Mechanical Turk was launched in 2005 and is a platform that created a digital marketplace for the completion of digital tasks to be completed by human intelligence. According to the official website, Amazon Mechanical Turk offers benefits to both users of the two-sided network: ‘businesses [have] access to a diverse, on-demand, scalable workforce and gives Workers a selection of thousands of tasks to complete whenever it’s convenient.’ The type of tasks is short and finite and include, among others, the identification of objects in photos or videos, writing product descriptions for websites, transcribing audios or identifying data details. See Amazon Mechanical Turk, ‘FAQs’ <https://www.mturk.com/worker/help>; Birgitta Bergvall-Kåreborn and Debra Howcroft, ‘Amazon Mechanical Turk and the Commodification of Labour’ (2014) 29 New Technology, Work and Employment 213.
⁸¹ Examples of gig work platforms are Uber, TaskRabbit, and Deliveroo. Uber was launched in 2009 (using the name of Ubercab) as a matchmaking platform for people looking for a ride and car-owners with empty seats. The model evolved into a more for-profit version, and nowadays Uber includes ride services similar to taxis, courier, freight transport, scooter rental, and even UberKittens (a 15-minute cat snuggle delivery). However, its core business remains the on-demand rides. Clients using the Uber application find riders around them, and riders need to accept through the application to take them for a given fare. See UberNewsroom, ‘Company Info’ <https://www.uber.com/en-GB/newsroom/history/>.
Many detailed typologies concerning different platform work realities have been carried out.\textsuperscript{82} However, the primary concern of this thesis relates to the fact that labour-intensive platforms reclassify all these various forms of platform work as self-employment. The following sections probe the construction of the idea of platform work and discuss the role of power in this reclassification process.

**IV. The construction of the idea of platform work**

The years of 2008-9 found both a global economic crisis and the rise of platforms. In the aftermath of the crisis, mostly young people found themselves unemployed or underemployed. Also, political and technological changes enabled forms of temporary work to combat the labour crisis. This scenario was fertile ground for the emergence of platform work.\textsuperscript{83} This period has been termed ‘the Uber of x’.\textsuperscript{84} The Uber of x period witnessed the rapid expansion of platforms fuelled by venture capital that reaped the antisystem sentiment of the time by making big promises of social change, including working. For instance, carbon footprint reduction, city decongestion, real human interaction, cosier and human-scale production, and more freedom at work.\textsuperscript{85}


\textsuperscript{83} Ursula Huws, Neil Spencer, Dag Syrdal, K Holts, ‘Work in the European Gig Economy’ (FEPS, UNI Europa, University of Hertfordshire, 2017).

\textsuperscript{84} Schor (n 82).

Labour-intensive platforms offering a different labour experience were boosted during the Uber of x period. These platforms claimed (and still do)\(^\text{86}\) that they provide a mere matchmaking service of people offering personal services and people in need of them. Thus, people working through platforms should not be considered workers or employees of the platform in the traditional sense but entrepreneurs, peers, or partners. Doing otherwise would put the operation of the business model at risk, including the availability of tasks and resultant income.\(^\text{87}\)

Seeing platform work as entrepreneurship (and not work) was possible for two main reasons. First, because labour-intensive platforms convinced workers, clients, and regulators in many jurisdictions — although in different degrees — that the breaking technological advances behind platform work are part of a much larger revolution that do not fit local labour law moulds. Second, because some aspects of platform work are distinct from previously known forms of work, which creates confusion. The following subsections explore and discuss the construction of the idea of platform work, what can be said to be distinctive, and the problems of considering work as entrepreneurship.

1. The Californian Ideology

The American countercultural movement\(^\text{88}\) was not just about contesting already-existing structures and institutions; it was also about experimenting with alternatives.\(^\text{89}\) In this regard, the incipient emergence of computer science was at crossroads. On the one hand, computing technology was deemed intrinsically servile to the establishment and harmful to society since it had enabled a considerable enhancement of the warfare capacity during the cold war and the

\(^{86}\) International Labour Organization (n 30).


\(^{89}\) Lechner (n 88).
military intervention in Vietnam. On the other hand, optimists argued technology was not intrinsically harmful, and it could be developed for the benefit of society and produce social change.  

The hopes of technology optimists started to take form with the emergence of the ‘Whole Earth Catalog’ (WEC) in 1968. The WEC was a revolutionary tool to free access and share information with strangers that pointed to empower individuals to make their own choices. We might think of WEC today as a ‘blog’. The WEC inspired many of the builders of personal computer systems and the internet as we know it. On a famous speech, Steve Jobs (former Apple CEO) held that the WEC ‘... was sort of like Google in paperback form, 35 years before Google came along: it was idealistic, and overflowing with neat tools and great notions.’ The WEC inspired the ‘Whole Earth “Lectronic Link”’ (the WELL), one of the first internet-based virtual places where people met to discuss a myriad of topics. This optimism around the role of technology in changing society connected to libertarian economic values brought by neoliberal waves during the 80s to give birth to what Barbrook and Cameron termed in 1996 the ‘Californian Ideology.’ The Californian Ideology is a view of technology born in Silicon Valley, California, that ‘promiscuously combines the free-wheeling spirit of the hippies and the entrepreneurial zeal of the yuppies.’ Platforms found inspiration in the Californian Ideology to build a narrative that praised entrepreneurialism and diminished traditional work arrangements. Using this narrative,

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90 Turner (n 88) Introduction.
93 Ryan (n 14).
96 ibid.
97 Daniel Cockayne, ‘Sharing and Neoliberal Discourse: The Economic Function of Sharing in the Digital on-Demand Economy’ (2016) 77 Geoforum 73; Julian Posada and Leslie Regan Shade,
alongside a strategy of ‘break the law and figure out how to stay in business later’, platforms claim traditional labour regulations run contrary to the entrepreneurial spirit offered by the platform economy. Labour laws would make entrepreneurs workers swamped in a burdensome public bureaucracy to force them to pay taxes, social security obligations, and obtain permits to operate. This narrative has been so pervasive that platforms have even convinced the public to shield platforms against attempts to regulate platform work. For instance, in California, United States, voters passed the so-called ‘Proposition 22’, a regulation that enables labour-intensive platforms to consider their workers as self-employed entrepreneurs.

Against this background, labour-intensive platforms represent themselves as market actors that offer a service of labour intermediation. This labour intermediation would not fit the labour law mould, enabling labour-intensive platforms to control the workforce without the obligations envisaged by labour laws. This narrative is key to understanding the operation of platform work.

Beyond this picture, there are elements around platform work that also invites consideration of whether there is something distinctive around work in platforms. The following section will deal with this inquiry.

2. ‘Core Labour Elements’ of the platform economy

This section probes whether algorithmic management and new ways of control — together termed ‘Core Labour Elements’ — help to better understand the operation of platform work. Also, this section explores whether the combination of previously identified core elements of

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98 Schor (n 82) ch 6.
99 Schor (n 82).
the platform economy and Core Labour Elements enables platforms to secure control of the whole operation behind platform work.

Before discussing algorithmic management, however, an additional clarification must be provided, what is an algorithm? In simple terms, algorithms can be defined as a ‘... set of instructions designed to perform a specific task’, or ‘... a series of steps undertaken in order to solve a particular problem or to accomplish a defined outcome.’ Algorithms operate like train lines: depending on the direction of the train line (meaning the design of the algorithmic formula), the type of information the algorithm will process and the outcome. Also, sophisticated algorithms need a great deal of data, and in the platform economy, there is plenty. Abundant data collection is possible due to new information technologies that automatically gather users’ information using websites, phones, GPS systems, and other internet-based information technologies. For this thesis, it suffices to say that algorithms are a set of instructions that automatically process large amounts of data to perform a task.

Algorithmic management in platform work is then the design of algorithms by platforms to process large amounts of data to make automated decisions in real time about certain aspects of platform work. However, algorithmic management concerning platform work also needs a different kind of data. Here is where the innovations concerning trust and the architecture of participation in the platform economy come into play. Platforms gather complex human-made data from customers, employing algorithms to translate such information into ratings and

104 See section ‘Trust and the lemons problem’ above in S. II of this chapter.
other forms of feedback on the performance of platform workers. In turn, ratings and feedback also lead to other forms of algorithmic management, such as creating a virtual reputation and the design of rankings of workers by platforms.

In turn, new ways of control refer to enhanced means of tracking platform workers and control of labour supply by platforms. First, due to the massive access to GPS technologies and other internet-based networks, platforms (and clients through the platforms) can often track in real-time what platform workers do. Tracking the position of the workforce in real-time — even during inactiveness — is also another form to supervise platform workers and collect data. Examples of new ways of control of the workforce by tracking are taking screenshots and live monitoring the screen of platform workers, keyboard and mouse strokes, real-time location, speed, and couriers’ routes.105

Second, platforms control labour supply in real-time by maintaining a large pool of workers available for the next job. The oversupply of platform workers is key to most platforms’ operations.106 It can be argued the maintenance of a large pool of workers waiting for the next job is not a new feature of labour markets. For instance, it existed in the British ports during the early twentieth century.107 However, now control of labour supply happens in real-time, with little human interaction, and with the potential to become transnational.108

These two Core Labour Elements in the operation of platform work have been framed as the digital version of the ‘scientific management’ of the workforce proposed by Frederick Taylor

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105 Wood and others (n 67); Howcroft and Bergvall-Kåreborn (n 77) 10; Janine Marie Berg and others, Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World (2018) International Labour Office Introduction.
107 Prassl (n 46) ch 3.
108 Wood and others (n 67); Schmid-drüner (n 106).
back in 1911. The Financial Times has even termed these management techniques ‘Taylorism on steroids.’

However, platform work seems to represent something more than a new version of Taylorism. Platforms enable platform workers to enjoy more freedom of choice than previously known working arrangements. For instance, platform workers can choose schedules, when — and where — to work, subcontract, and in some cases pick clients and set a fare. Platform work also exhibits low entry barriers, enabling a more heterogeneous workforce. Such heterogeneity of the workforce can be seen in two levels. First, platform workers exhibit diverse educational backgrounds and income levels for the same job. Second, platform workers evidence different levels of economic dependency on the platform according to whether platform work is their main or complementary source of income and whether platform work is attached to an owned asset.

Despite this apparent additional freedom of choice, platform workers also experience enhanced control in the shadows by the platforms. As discussed above, platforms retain much more control of the exchanges (including work) than a hybrid peer-to-peer network. Still, platforms present themselves as a matchmaking digital place where platform workers enjoy more freedom of choice than traditional work arrangements. Subsequent chapters of this thesis will further discuss the operation of platform work in the EU context.

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109 Prassl (n 46) ch 3.
110 Sarah O’Connor, ‘When Your Boss Is an Algorithm’ (Financial Times, 2016) <https://www.ft.com/content/88fdc58e-754f-11e6-b60a-de4532d5ea35>.
111 Schor (n 82).
112 International Labour Organization (n 30).
113 Schor (n 82).
114 See ‘peer-to-peer architecture and the platform economy’ above in S. II of this chapter.
3. ‘Ersatz Self-Employment’

By drawing on the Californian Ideology and the Core Labour Elements of the platform economy, platforms have tended to successfully exclude platform workers from accessing labour rights by considering them entrepreneurs — not workers. The main legal implication of considering platform workers as entrepreneurs is that they can be classified as self-employed. In this context, many national jurisdictions struggle with whether platform workers should be regarded as workers or self-employed.\(^\text{115}\)

Considering platform workers as workers or self-employed is key because many jurisdictions enable labour rights only to workers or employees, not self-employed. This context highlights the importance of accessing employment status to access labour rights such as collective labour rights. One explanation for the importance of employment status to access labour rights relies on its historical context. The first labour laws were enacted in a context where the difference of market power\(^\text{116}\) between work and self-employment was easier to identify, creating a binary divide between workers and self-employed to assign labour rights.\(^\text{117}\)

The world of work has changed since, yet, determining employment status remains necessary for workers to access the protection of labour law. Similarly, access to employment status has become the gateway for accessing labour rights for platform workers.\(^\text{118}\) However, as outlined above in this section,\(^\text{119}\) platforms across the globe argue access to employment status for platform workers is a threat to their business model. In this context, contemporary societies are

\(^{115}\) For instance, see Pieter de Groen and others (n 82); Valerio De Stefano and Antonio Aloisi, ‘European Legal Framework for “Digital Labour Platforms”’ (2018); De Stefano (n 77); Lianos, Countouris and Stefano (n 31); Zachary Kilhoffer and others, ‘Study to Gather Evidence on the Working Conditions of Platform Workers’ (CEPS 2019)

\(^{116}\) Further explanation on this idea can be found in the introduction and in chapter 4 S IV of this thesis.


\(^{118}\) International Labour Organization (n 30) ch 5.

\(^{119}\) See this section 1. ‘The Californian Ideology’.
witnessing intense social, academic, judicial, and legal battles around ensuring access to employment status for platform workers.\footnote{International Labour Organization (n 30)}

For instance, the Spanish \textit{Asociación de Plataformas de Servicios Bajo Demanda} (Association of Platforms of On-Demand Services, Spanish Association) criticised the recent legal initiative to regulate platform work in Spain, the so-called ‘\textit{Ley Rider}’.\footnote{Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.} In short, the \textit{Ley Rider} creates a legal presumption favouring platform workers to be considered workers and promotes transparency by forcing platforms to inform platform workers’ associations of the use of algorithms that may affect platform workers’ working conditions. This Spanish Association claimed the \textit{Ley Rider} forcibly turned platform workers from entrepreneurs to workers, negatively affecting the Spanish digital economy and attempting against the basic principles of freedom of enterprise and industrial property. The Spanish Association also claimed that while other European countries approve regulations supporting the digital economy, providing more protection to self-employed platform workers, Spain seems to go in the opposite direction, risking 700 million Euros to the national economy and 23,000 jobs due to the elimination of services in different cities.\footnote{Rober Solsona, ‘Las Plataformas de “food Delivery” Critican El Acuerdo Para Laboralizar “Forzosamente” a Los Repartidores’ (\textit{Europa Press}, 2021) <https://www.europapress.es/economia/laboral-00346/noticia-plataformas-food-delivery-critican-acuerdo-laboralizar-forzosamente-repartidores-20210311085053.html>.}

In 2019, the state of California, United States, enacted the AB5 Act. The AB5 Act requires applying the ABC test to clarify employment status to enable access to labour rights. Under the ABC test, a worker is considered not to be self-employed unless the hiring entity proves that: (A) the worker is free from the control and direction of the hiring entity; (B) the worker provides
services outside the usual business of the hiring entity and; (C) the worker usually acts independently from the business of the hiring entity.123

Adopting the ABC test would have benefited about one million workers, allowing them to access employment status. However, US history’s most expensive corporate-funded ballot initiative (the so-called ‘Proposition 22’ outlined above)124 was passed to exempt the AB5 bill from applying to ride-hailing and delivery platforms. The outcome of this battle — so far — is the exclusion of platform workers working in these industries to access employment status.125

Also, much of the litigation concerning platform work aims to clarify the employment status of platform workers. So far, cases in different and even same jurisdictions show diverse results on whether the relationship between platform workers and platforms is one of labour or of a civil law nature.126 For instance, the French Cour de Cassation found in 2020 that the requesting party, an Uber driver, was an employee of the platform. The Cour de Cassation based its judgment on the facts of the working relationship to contrast them to the traditional tests to identify a contract of work in France. The French Court found the requesting platform worker’s self-employed status was fictitious and that, instead, there was a subordination relationship linked to employment status.127 The Cour de Cassation found the platform worker was integrated into the business model of Uber since Uber controls service prices and other work conditions such as the prohibition of contacting passengers outside the app and the obligation of following Uber’s standards to perform the services. Also, the French Court found Uber could

126 Willem Pieter De Groen and others, ‘Digital Labour Platforms in the EU Mapping and Business Models’ (2021); Pieter de Groen and others (n 82).
127 Arrêt no 374 du 4 mars 2020 (19-13316) – Cour de cassation – Chambre sociale.
‘discipline’ the platform worker’s performance by deactivating the platform worker’s account from the platform. Another case is *Uber v Aslam*. Here, the United Kingdom Supreme Court unanimously held that Uber drivers are workers and thus able to continue their allegations on Working Time Regulations, Minimum Wage and the Employment Rights Act.

On the other hand, some courts have found platform workers are self-employed, and thus they are not workers of the platforms. For example, in Australia, courts have found platform workers such as drivers are not workers but self-employed. The Australian courts arrived at this conclusion by arguing that platform workers and platforms are free to agree on the content of contracts. In this context, platform workers have more control over the work conditions than traditional workers. For instance, platform workers have no obligation to work, and if they choose to, they can control when and for how long to work. In Chile, an employment tribunal arrived at similar conclusions, arguing that Uber workers cannot be considered workers as they have absolute freedom to connect or disconnect from the platform and accept or not a job. Akin reasoning can be seen in the *Yodel* case discussed below.

The divergences shown here flag the ambivalence about whether platform workers should be considered workers subject to labour laws or self-employed subject to civil laws. This ambivalence can be explained in part by the introduction of a narrative of entrepreneurialism concerning platform work to depart from labour law. In other words, a rebranding process of the idea of work in the context of platform work. This rebranding process keeps similarities with other rebranding processes outside the labour market. Inspired by the rebranding experience of Greek feta cheese, this process should be termed ‘Ersatz Self-Employment.’

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128 *Uber BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748
130 Segundo Juzgado de Letras del Trabajo de Santiago, Rit O 1388-2015, 14 julio 2015.
131 See Chapter 3, S. II 2.
After years of codification and international agreements, Greeks have established in the EU and elsewhere that Greek feta cheese has a protected denomination of origin (PDO). Therefore, cheese cannot bear the name ‘feta’ unless the cheese complies with a series of strict requirements. In the United Kingdom, however, it is common to find similar versions of the traditional ‘Greek feta cheese’ under different names. For instance, non-PDO forms of this cheese can be found under the names of ‘Greek-style feta’ or ‘Greek salad cheese.’ In this regard, Greek farmers have good reasons to be worried about the similarities in the names. They argue that, because of the capacity of large multinational companies to flood the market with non-PDO versions of feta cheese, over time ‘… consumers will get used to eating cheese from cow’s milk and will think it is feta.’

A similar process can be observed around platform work. Ersatz Self-Employment is a process of framing platform work as entrepreneurship that leads to treating platform workers as self-employed. Considering platform workers as self-employed has important social and normative implications. First, considering platform workers as self-employed risks leading them to situations of instability and uncertainty more associated with the risk of entrepreneurship than what traditional labour law envisages. This implication is particularly problematic for economically platform-dependent workers not owning an asset to exploit. Second, if platform workers are considered self-employed, platforms can shift social risks typically associated with a working relationship (for example, health and safety, illness, and pension scheme policies) to platform workers themselves. Third, if platform workers are considered self-employed, then platforms are capable of stifling individual and collective labour rights of platform workers.

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133 Schor (n 82).

Fourth, if platform workers are deemed self-employed, platform workers might be exposed to the application of other legal branches such as competition law. As will be discussed in chapters 3 and 4, EU competition law treats platform workers deemed self-employed as undertakings subject to EU competition laws on cartels and abuse of dominant position. Considering platform workers as undertakings raises concerns regarding the exclusion of platform workers from more protective labour laws, such as collective labour rights, exposing them to the operation of EU competition law. The application of competition laws to constrain platform workers’ collective labour rights is also problematic as it risks the creation of a gap between the law and reality. As it will be discussed in chapters 3 and 4, EU competition law does not aim to stifle ‘workers’ collective labour rights as a form of voice. Yet, considering platform workers not as workers but as undertakings subjects them to the rationale of EU competition law.

If platform workers are deemed undertakings exposed to EU competition laws, it is conceivable that, after a while, the association between platform work and labour law will disappear. However, this claim has been increasingly challenged. As outlined above in this section, platform workers are organising in many places, and authorities are beginning to design rules to challenge platforms’ power and prevent competition laws’ application to platform workers. The following chapters will discuss more in detail how platform workers resist and how EU institutions aim to challenge the power of platforms and prevent the applicability of EU competition law over platform workers by either considering platform workers as ‘workers’ or by extending the reach of labour law by retracting EU competition law.

V. Power and platform work

This section argues platform workers’ exclusion from accessing key labour rights such as collective labour rights can be better understood by focusing on how agents (in the broader sense, meaning single or collective entities) exercise power around platform work. This section
begins exploring the dimensions of power, as explained by Lukes\textsuperscript{135} concerning the problems of exclusion surrounding platform work.

The first (decision-making) dimension of power relates to concrete and observable behaviour of agents in a conflict of interests. Under this view, the prevailing agent in a conflict of interests is said to have power.\textsuperscript{136} Through algorithmic management and new ways of control, platforms prevail over platform workers in a conflict of interests, enabling platforms to unilaterally set the work conditions, including the conditions to determine platform workers’ employment status. Platforms impose non-negotiable terms and conditions of work that can be modified at any time by the platform, including payment. For example, delivery platforms provide notional freedom of choice to their platform workers by ‘suggesting’ a delivery route. However, at the same time, the platform penalises using ‘inefficient’ routes by diminishing remuneration.\textsuperscript{137} Supported by the idea of freedom of contract,\textsuperscript{138} platforms prevail in this and other conflicts of interests because, if platform workers wish to challenge a platform’s penalty when choosing an ‘inefficient’ route according to the platform, the platform can invoke the contract signed by both parties, which enables platforms to discipline platform workers’ choices without recourse against it.

Under the second dimension of power (non-decision-making power), power relates to the capacity of an agent to interfere with or impede — whether consciously or unconsciously — the public discussion of policy issues to the detriment of another agent.\textsuperscript{139} Could it be that platforms successfully prevent discussing the exclusion of platform workers from accessing key labour

\textsuperscript{135} Lukes defines power as ‘A exercises power over B when A affects B in a manner contrary to B’s interests.’ See Steven Lukes, \textit{Power: A Radical View} (Macmillan Education 1974) 27.
\textsuperscript{136} Lukes (n 133) 13.
\textsuperscript{137} Arrêt no 374 du 4 mars 2020 (19-13.316) – Cour de cassation – Chambre sociale (n 125).
\textsuperscript{139} Peter Bachrach and Morton S Baratz, ‘Two Faces of Power’ (1962) 56 The American Political Science Review 947 (as cited in Lukes (n 133) 16.)
rights such as collective labour rights? Do they do so through controlling the political agenda? Proposition 22 above exemplifies how platforms have successfully impeded the public discussion of whether certain platform workers should access labour rights, including collective labour rights. Through the most expensive public and lobby campaign in the history of California, platforms effectively exempted some platform workers from the ABC test.¹⁴⁰

Recently, it has been disclosed how Uber secretly lobbied or attempted to lobby governments to control the public discussion of policy issues concerning platform work. Uber planned to spend 90 USD million in 2016 on public relations to secure favourable changes to taxi and labour regulations. In this context, Uber secretly lobbied Emmanuel Macron (current president of France and at that time Minister of Economy of France) to enact Uber-friendly regulations in France.¹⁴¹ Also, Uber paid significant sums of money to professors in the EU and the US for publications and consultancies favourable to the operation of Uber.¹⁴² Uber has also been unsuccessful in influencing the political discussion in places like Hamburg, Germany. Uber tried to lobby Olaf Scholz (now German Chancellor) to avoid paying the minimum wage to platform workers, but its attempts were rejected.¹⁴³ This picture shows how some platforms have tried,

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¹⁴⁰ Assembly Bill No. 5 Chapter 296 An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor [2019] California Legislative Information<https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5>; Grace Manthey, ‘Prop. 22: Rideshare-Driver Measure Is Most Expensive in California History’ (ABC7) <https://abc7.com/22-california-prop-2020-ca-what-is/7585005/>.


in extraordinary ways, to exercise the second dimension of power against platform workers, albeit with mixed results.

The third (ideological) dimension of power concentrates on mapping social structures or institutions to discuss how such structures or institutions exercise power and how agents can influence in this process. This is a more radical view of power as this dimension of power does not focus on finding an agent responsible for exercising power. Instead, the third dimension of power focuses on identifying structuring practices that build social structures and institutions and how these practices entail the inclusion and exclusion of agents.\(^{144}\) Could it be that existing social structures and institutions enable the exclusion of platform workers from accessing key labour rights such as collective labour rights? This is a question that will be further tested in this thesis concerning the emergence of platform work in the EU.\(^ {145}\) Suffice to say here that it seems plausible that the exclusion of platform workers from labour law provisions might be the result of a long trajectory of exclusion of workers from social structures and institutions.\(^ {146}\)

The third dimension of power is a more comprehensive view of power that also helps to clarify the exclusion of platform workers from accessing key labour rights. This view of power enables the mapping of structures and institutions, alongside its structuring processes concerning the creation of the Ersatz Self-Employment process. The Ersatz Self-Employment process has the potential to structure the idea that platform work is a different kind of work than the forms of work regulated under labour law, excluding platform workers from more protective labour laws. However, this reification process is at crossroads as to whether this process should point in the

\(^{144}\) Haugaard (n 134) 43–44.
\(^{145}\) See chapters 3 and 4.
direction of labour, competition law, or some middle ground—the direction depends on the attitude of agents before the structuring processes and institutions.

The third dimension of power is closely related to the meaning-making processes of agents. This view of power concerns socialisation and the conscious or unconscious repetition of agents' conduct in the face of social and institutional structuration processes. If an agent is unwitting of the power of structures and institutions, then the agent's behaviour will be aligned with the current organisation of structures and institutions. This repeated unwitting behaviour of agents will contribute to the consolidation of social and institutional structuration processes. On the other hand, an agent can be reflective and discursive about the power of structures and institutions. This reflective agent is capable of assessing the organisation of social and institutional structuration processes to challenge or reinforce them.

The third dimension of power assists in understanding the role of platform workers and other agents (such as platforms and governments) in the Ersatz Self-Employment process and its potential for structuring the idea that platform work is not work but self-employment. On the one hand, platform workers and other agents can contribute to the structuration of the Ersatz Self-Employment process by being unreflective on the nature of platform work. The unwitting repetition of current platform work patterns risks that, over time, the public will not distinguish platform work from self-employment. On the other hand, agents can be more reflexive and evaluate if normative structures and structuring processes concerning platform work are beneficial. Mindful voices coming from different sectors of society such as trade unions, judiciary, legislative and scholars might help to contest the normative structures and the consolidation processes that the Ersatz Self-Employment process entails.

Through Lukes' power dimensions, it is not obvious platforms will succeed in excluding platform workers from accessing key labour rights such as collective labour rights. Even though platforms seem to control the exercise of the first dimension of power, platforms have not been able to
secure control of the public discussions concerning platform work (second power dimension). Also, there is growing evidence that mindful agents such as platform workers are willing to organise to challenge the Ersatz Self-Employment process to ensure access to their labour rights.\textsuperscript{147}

Chapters 3 and 4 of this thesis will discuss whether the current institutional and normative structure and the role of different stakeholders in the EU enable access to key labour rights such as collective labour rights for platform workers. Also, chapter 5 will discuss how EU institutions are willing to contest the power of platforms by modifying the legal structures to favour platform workers’ access to collective labour rights, challenging the Ersatz Self-Employment process.

Conclusion

This chapter aimed to provide an account of the platform economy and to capture the idea of platform work. Due to the many different visions of what is platform economy, and the many different typologies of platform work, both objectives were addressed from different fronts. First, by analysing the economic importance, definitions, trajectories, and core elements of the platform economy. Second, by discussing a workable typology and analysing the construction of the idea of platform work. The construction of the idea of platform work was further analysed by tracing the Californian ideology and outlining the Core Labour Elements of the platform economy.

This chapter also aimed to elucidate why platforms seem to be getting away with reclassifying platform work as self-employment. This chapter argued combining a narrative based on platform work as entrepreneurship and the Core Labour Elements might be a suitable answer. Platforms developed a narrative that the work produced on platforms does not fit the labour law moulds as platform workers tend to enjoy more freedom of choice than traditional work

\textsuperscript{147} See Chapter 2, S. III 7.
arrangements. Therefore, platform work is not work in the traditional sense but self-
employment. This section concluded that even if it is true that platform workers enjoy more
freedom of choice than traditional work arrangements, this freedom is apparent as it does not
alleviate the exacerbated control platforms exert against their workforce in the shadows. As
discussed through probing the Core Labour Elements, this indirect control can be even more
pervasive than in traditional work arrangements.

It also seems many platforms have embarked on a process of structuring and consolidating the
idea that platform work is not work but self-employment. This chapter flagged some of the
challenges of this process against platform workers. One of the main problems flagged in this
chapter was the displacement of platform workers from protective labour laws, exposing them
to competition law, an area typically reserved for undertakings, not people working.

Lastly, this chapter argued that the apparent success of platforms of excluding platform workers
from accessing labour rights such as collective labour rights could be better understood as an
exercise of power. Lukes’ three power dimensions help understand why platforms are
somewhat successful in excluding platform workers from accessing labour rights, helping to
consolidate the Ersatz Self-Employment process. Platforms have managed to secure the first
dimension of power but have mixed results concerning the second dimension of power. The
third dimension of power will be further scrutinised in the EU context in chapter 3. Suffice to
say here, the third dimension of power depends largely on whether social actors act mindfully
to challenge or reinforce social structures and institutions.

The second chapter delves into the importance of power concerning access to key labour rights
such as collective labour rights for platform workers by introducing the republican idea of
freedom as non-domination. Freedom as non-domination focuses on the ideas of power and
freedom to show the inadequacy of using a negative account of freedom in the construction of
platform work, which would explain the exclusion of platform workers from accessing labour
rights. The republican idea of freedom as non-domination will serve as the theoretical foundation of this thesis to assess the injustice behind the exclusion of platform workers from accessing collective labour rights in the EU context later in this thesis.
Chapter 2: Republicanism at Work

Introduction

This chapter introduces republicanism and the idea of freedom as non-domination as a theoretical framework to better understand how individual and structural forms of power concerning platform work lead to the exclusion of platform workers from accessing key labour rights such as collective labour rights. The structure of this chapter will be as follows.

The first section introduces republicanism and the idea of freedom as non-domination. This section begins by exploring how republicanism re-emerged from a longstanding tradition that other contemporary competing ideas about power and freedom had obscured. After explaining the origins of republicanism, this part introduces the republican idea of freedom as non-domination.

The second section explores the applicability of the idea of freedom as non-domination. It begins by explaining the applicability of the idea of freedom as non-domination in contemporary relationships. Later, this section focuses on analysing work relations through the lens of freedom as non-domination.

The third section discusses whether the idea of freedom as non-domination helps to understand what is problematic about the exclusion of platform workers from accessing key labour rights such as collective labour rights. This part discusses how platform work can be analysed through the idea of freedom as non-domination. From this analysis, it becomes clear there is a need to distinguish between dyadic and structural market domination. This distinction will be key for this thesis to identify the source of domination and understand its implications for ensuring access to collective labour rights for platform workers in the EU context. This section finishes by outlining how platform workers have found three main ways to challenge the dyadic and structural market domination of platforms.

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The fourth section outlines four republican strategies to achieve freedom as non-domination for platform workers: exit, workplace constitutionalism, workplace democracy and centralised participation. This section discusses how these strategies map onto the three ways platform workers are challenging dyadic and structural market domination. This section also discusses how the four republican strategies help ensure freedom from dyadic and structural market domination of platform workers.

I. Republicanism and freedom as non-domination

1. Republicanism

Republicanism began as a project of historical analysis of a forgotten tradition in the development of western political thought that started in ancient Greece and Rome. Republican traces can be found throughout medieval Europe, the Italian city-states, the works of John Milton, James Harrington and Algernon Sidney of seventeenth-century Britain, and the American and French revolutions. In the nineteenth century, the influence of republicanism shrank due to the emergence of nationalist, socialist, communitarian, but primarily liberal trends that absorbed some republican ideas. The republican project re-emerged in the mid-twentieth century, evolving to eventually move from an account of philosophical history to an endeavour

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2 Frank Lovett, A General Theory of Domination and Justice (Oxford University Press 2010) Introduction; Paul Craig, ‘Republicanism, Civic Virtue, and Participatory Democracy’, in Paul Craig (ed) Public Law and Democracy in the United Kingdom and the United States of America (Oxford University Press 1991); Laborde, Cecile and Maynor, John (n 1); Honohan (n 1); Pocock (n 1)
4 Honohan (n 1) 5.
of reconstruction and systematisation of longstanding ideas to provide answers to
contemporary challenges.\textsuperscript{5}

Common themes of republicanism throughout history are freedom, political participation, civic
virtue, and corruption.\textsuperscript{6} Also, at least from the eighteenth century, republicanism became
founded on three ideas. First, freedom as non-domination should be the primary concern of a
republic as this view of freedom secures equal freedom of people. Second, to achieve that kind
of freedom of people, a republic must have constitutional control mechanisms over the power
of the state and private parties. Third, there is a need for a virtuous citizenry to ‘... track and, if
necessary, contest public policies and initiatives.’\textsuperscript{7}

Beyond these common themes and foundational ideas, republicanism exhibits two distinctive
strands. The first strand is illustrated by Pocock,\textsuperscript{8} who identifies the notion of Athenian
democracy as the starting point of republicanism. This view of republicanism originating in
ancient Greece emphasises active political participation, civic virtue and participatory
democracy as central elements to achieve human flourishing. This strand of republicanism is
also identified as a ‘communitarian form of republicanism’\textsuperscript{9} or ‘civic humanism.’\textsuperscript{10} In the second
strand, Skinner\textsuperscript{11} traces the origins of republicanism back to ancient Rome. In this account,
special attention is paid to the ancient Roman idea that freedom is paramount and is best
achieved under the rule of law and not the rule of men.\textsuperscript{12} This thread of republicanism focuses

\textsuperscript{5} Philip Pettit, Republicanism: A Theory of Freedom and Government (Oxford 1999) 19 ff; Frank
\textsuperscript{6} Laborde, Cecile and Maynor, John (n 1) 3.
\textsuperscript{7} Philip Pettit, ‘Two Republican Traditions’, in Andreas Niederberger and Philipp Schink (eds)
\textsuperscript{8} Pocock (n 1).
\textsuperscript{9} Philip Pettit, On the People’s Terms: A Republican Theory and Model of Democracy (Cambridge
\textsuperscript{10} Lovett (n 2) 161 ff.
\textsuperscript{11} Skinner (n 1); Laborde, Cecile and Maynor, John (n 1) 3–4.
\textsuperscript{12} Pettit, Republicanism: A Theory of Freedom and Government (n 5) 20; Pettit, On the People’s
Terms: A Republican Theory and Model of Democracy (n 9) 12.
on notions of power and domination to achieve freedom as a central value in society. This second account of republicanism values the goods defended by Athenian-Republicans, but in a more instrumental form — meaning at the service of securing and maintaining freedom as the most important good in society. This strand of republicanism is known as Italian-Atlantic republicanism, neo-republicanism, civic republicanism, Roman, neo-roman republicanism, or simply republicanism.

Both strands of republicanism are grounded in historical periods where the republican values were narrowly applied. For instance, in ancient Athens, the goods of active political participation, civic virtue and participatory democracy to achieve human flourishing were reserved for those enjoying the status of ‘citizen’ excluding key groups such as women, migrants and enslaved people. In ancient Rome, enslaved people were not part of the republican project as they did not enjoy the status of citizen. Women in ancient Rome were also excluded from power in practice because, even though women were considered citizens, they enjoyed few rights. The contemporary agenda of Republicans aims to avoid the exclusion of people by focusing on how power is distributed.

This thesis uses republicanism as a theoretical framework to understand and assess the exclusion of platform workers from accessing labour rights in the EU context. Republicanism helps understand the injustice of such exclusion by focusing on power and how people and

13 Lovett (n 2) 8–9.
18 Laborde, Cecile and Maynor, John (n 1) 16.
structures can contest or reinforce the power of some over others to achieve human flourishing and freedom.

In particular, this thesis draws from the Italian-Atlantic version of republicanism. This version of republicanism helps better to understand and assess the problems of exclusion of platform workers from accessing key labour rights such as collective labour rights by focusing on how the power of platforms and norms constrain platform workers’ freedom from domination. As it will be shown throughout this thesis, the goods defended by Athenian-Republicans, such as the active political participation of platform workers to challenge the power of platforms, are important to achieve the idea of freedom as non-domination concerning platform work. In this way, these Athenian-Republican goods are instrumental in achieving freedom as non-domination. The centrality of the idea of freedom as non-domination in the Italian-Atlantic version of republicanism best helps to understand why platform workers deserve to be protected from the power of platforms and normative structures. Further references to republicanism in this work will refer to this second strand unless otherwise stated.

2. The republican revival

Contemporary republicans aim to develop ‘... an attractive public philosophy intended for contemporary purposes’\(^{19}\) with a practical focus to ‘... rethink issues of legitimacy and democracy, welfare and justice, public policy and institutional design.’\(^{20}\) Republicanism can be defined as a philosophical trend that points towards the development of a theory of justice aimed at achieving freedom by minimising domination in contemporary relationships. Republicanism aims to become an institutional and normative research programme readily applicable to contemporary pluralistic societies with political implications.\(^{21}\) To achieve this aim,


\(^{20}\) ibid.

\(^{21}\) ibid.
the republican project focuses on revisiting and adapting the three foundations of classic republicanism: freedom, in the form of freedom as non-domination; the idea of a free state through a mixed constitution; and the idea of virtuous citizenship.

Contemporary republicans consider freedom as non-domination as the central value, or primary good, in society.\textsuperscript{22} As said above in this section, without ignoring other relevant values that civic humanists defend,\textsuperscript{23} modern republicans see these other values as instrumental to the primary goal of achieving freedom as non-domination.\textsuperscript{24} The importance that republicanism places on freedom as a paramount value has the advantage of making republicanism readily understood and applicable in modern pluralistic societies. While acknowledging there are several meanings of freedom, republicanism draws from the positive and negative accounts of freedom to develop an idea of freedom aiming to align with the contemporary need to develop a pluralistic, practical, and normative theory of politics.\textsuperscript{25}

3. Freedom as non-domination

Under a republican account of freedom, people are free if they are not under domination. In turn, people are dominated when another party enjoys the capacity to exert arbitrary interference over their choices at any time. Domination is then a moral wrong that happens when a person is subject to the will of another.\textsuperscript{26}

Interference will not be arbitrary when the interfering agent is forced to consider (or ‘track’, using Philip Pettit’s terminology) the interests of those people subjected to interference.\textsuperscript{27}

\textsuperscript{22} Pettit, \textit{Republicanism: A Theory of Freedom and Government} (n 5) 91.
\textsuperscript{24} Lovett (n 2) 215–216.
\textsuperscript{25} Philip Pettit, ‘Political Realism Meets Civic Republicanism’ (2017) 20 Critical Review of International Social and Political Philosophy 331; Lovett and Pettit (n 19).
\textsuperscript{26} Pettit, \textit{Republicanism: A Theory of Freedom and Government} (n 5) 52.
\textsuperscript{27} ibid 55; F. Lovett (n 5) 145; Alan Bogg, \textit{The Democratic Aspects of Trade Union Recognition} (Hart 2009) 145.
determination of what interferences track the interests of the affected parties depends on what the stakeholders agree are their avowable interests. The avowed interests of agents are manifested by democratic deliberation that, in turn, are crystalised into laws. Thus, whether an act should be deemed as interference and whether an act of interference should be considered arbitrary are factual issues related to local democratic deliberative processes.

Freedom as non-domination draws from negative and positive accounts of freedom, as explained by Isaiah Berlin, to propose an alternative version of freedom apt to understand contemporary relations of power. Freedom as non-domination offers a more robust notion of freedom than liberal views of freedom based on negative accounts of freedom (or freedom as non-interference), which can be understood as giving rise to the entitlement to be left alone to do as one pleases. For defenders of the idea of freedom as non-interference, freedom as non-domination should be attractive as republicanism is concerned about people’s power of choice. In turn, freedom as non-domination should also be attractive to those preferring more positive accounts of freedom as the idea of freedom as non-domination aims to consider peoples’ interests. To be sure, republicanism does not aim to present the notion of freedom as non-domination as opposed to negative and positive accounts of freedom. Instead, republican freedom attempts to draw on different political and philosophical traditions and to build on an

28 Pettit, ‘Two Republican Traditions’ (n 7) 157.
29 Pettit, Republicanism: A Theory of Freedom and Government (n 5) 57.
31 For republicans like Pettit liberalism is a ‘broad church’ that admits various interpretations of what is freedom. However, over the last two hundred years, liberalism has been mostly associated with a negative conception of freedom. This negative conception of freedom is also called ‘freedom as non-interference.’ Under freedom as non-interference, persons are free if their choices are not interfered by others. This negative account of freedom emerged in the early stages of the first industrial revolution, and it is associated with the idea of freedom of contract. See Alan Ryan, ‘Liberalism’, A Companion to Contemporary Political Philosophy (Oxford: Blackwell 1993) (as cited in Pettit, Republicanism: A Theory of Freedom and Government (n 5) 9.); Pettit, On the People’s Terms: A Republican Theory and Model of Democracy (n 9) 10; Lovett and Pettit (n 19) 13–14. However, the claim that freedom as non-domination goes beyond liberal ideas of freedom has been criticised, see Charles Larmore, ‘A Critique of Philip Pettit’s Republicanism’ (2001) 11 Philosophical Issues 229.
improved understanding of freedom that might serve as a way to address issues of power in contemporary pluralistic societies.

To achieve freedom as non-domination, republicans also require a system of checks and balances and the capacity of people to contest public and private power.\textsuperscript{33} Controls over power play a key role in securing freedom from domination as they make arbitrary interferences difficult to achieve and also costly. These controls can stem from individuals themselves or external agents, such as the state. However, republicans also acknowledge the endeavour to control power does not pretend to achieve elimination of domination. Republicans recognise that ‘… no real-world regime will infallibly track all and only the common avowable interests of the citizens.’\textsuperscript{34} Even ‘… the best designed republic may perpetrate public domination or may fail to prevent private domination.’\textsuperscript{35}

4. The operation of freedom as non-domination

In ancient Rome, slavery was a legal status. Just like the ownership of other goods, enslaved people were attached to the property of the masters, and the masters were able to do as they pleased with the enslaved people. In analysing domination in the relationships between slaves and masters, contemporary republicans argue it was irrelevant whether slaves could win their masters’ benevolence, indulgence, friendship or remain out of sight of the masters’ eyes. It was irrelevant whether masters effectively interfered with enslaved people’s freedom or not. Enslaved people always remained under the domination of their masters. Masters owned the enslaved people supported by a legal structure that did not force masters to consider the

\textsuperscript{33} Cécile Laborde, ‘Republicanism’, in Michael Freeden and Marc Stears (eds) The Oxford Handbook of Political Ideologies (Oxford University Press 2013) 7; Costa (n 14) 413; David Watkins, ‘Republicanism at Work: Strategies for Supporting Resistance to Domination in the Workplace’ (2015) 52 PoliticalScience Faculty Publications.


\textsuperscript{35} ibid. There are ongoing debates among republican scholars regarding some aspects of domination. For instance, there are debates as to whether arbitrariness should be viewed in procedural or substantive terms. See F. Lovett (n 5); Lovett and Pettit (n 19).
enslaved people’s interests. This context shows enslaved people’s interests were not considered when designing the normative system of slavery. Also, the Roman system of slavery envisaged no systems to check the imbalance of power between masters and enslaved people. Enslaved people had little capacity to contest masters’ arbitrary interferences to their freedom. Enslaved people were at the mercy of the masters, regardless of the masters’ good, bad, or neutral behaviour.36

Skinner makes a good account of why enslaved people in ancient Rome were unfree: ‘A slave is one example ... of someone whose lack of freedom derives from the fact that they are “subject to the jurisdiction of someone else” and are consequently “within the power” of another person.’37 Under a republican view of freedom as non-domination, the focus was not on the positive or negative, good or bad actions or any interferences from the masters towards the enslaved people. What mattered was not just the actual but also the potential capacity of the masters to interfere with slaves’ freedom. The social implication of this sort of unfreedom is well explained by Skinner:

The inevitable effect of a system in which everything ‘is calculated to the humor or advantage of one man’, and in which his favour can be ‘gained only by a most obsequious respect, or a pretended affection for his person, together with a servile obedience to his commands’, is that ‘all application to virtuous actions will cease’ and any ability to pursue the public good will be lost.38

Enslaved peoples dominated by their masters were servile, obedient, afraid and submissive. These relationships of domination made enslaved peoples unfree regardless of the masters’ attitudes, affecting the core social good for republicans.

37 Skinner (n 1) 41.  
38 ibid 93.
A more sophisticated form of domination in ancient Rome happened against women. Unlike enslaved people, women enjoyed the status of citizens, which would have enabled them to participate equally in the public government. However, men still dominated women. For instance, there were women politicians, but women politicians could not attract votes to be elected. This form of exclusion places a similar problem of domination as with enslaved people. Men dominated politician women because women did not have the tools to contest males’ power to exclude them from the political race.

The idea of freedom as non-domination also helps understand the injustice behind contemporary social relationships with a considerable power imbalance. For instance, parents over children, men over women, creditors over debtors, bureaucrats and the police over people and employers over workers are potentially problematic relations of domination in contemporary pluralistic societies.

II. The applicability of the idea of freedom as non-domination

1. The contemporary application of the idea of freedom as non-domination

Republicans aim to identify and assess power dynamics through the notion of domination. Republicanism sees domination as a threat to the freedom of people in modern pluralistic societies. This broad aim has led republican ideas to be probed in different areas such as

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39 Bauman (n 17).
education, feminism, economy, international law and labour. These and other power relationships show some common themes for the contemporary applicability of the republican notion of freedom as non-domination.

First, republicans make a metaphorical transposition of the Roman legal status of slavery into contemporary forms of domination to assess the acceptable degree of unfreedom. For example, employers can act as masters when exercising domination over their workforce. Without a system of checks and balance and vigilant people capable of forcing employers to consider workers’ interests, even if employers are kind or let their workers do as they please, employers can change their minds and exercise arbitrary interference over their workers.

Second, freedom as non-domination is a common good that must be applied to everyone in modern societies, not just for an elite or a specific group. As this thesis claims, freedom as non-domination should be a social good readily applicable to all workers regardless of their social or legal status. This theme is key to understanding the problematic relationship between labour and competition law in the EU concerning platform work, as access to labour rights is largely circumscribed to accessing employment status.

44 Alex Gourevitch, ‘Labor Republicanism and the Transformation of Work’ (2013) 41 Political Theory 591.; Cabrelli and Zahn (n 3).; Bogg (n 27).
45 Lovett and Pettit (n 19).
46 ibid.
Third, freedom as non-domination is a communitarian good.\textsuperscript{47} In the case of work, a worker will not be free from domination until there is a shared awareness that all workers are not subjects of domination by employers. Because republican freedom is deemed universal, to achieve freedom as non-domination at work, it needs to be appreciated that all workers in society deserve to enjoy this kind of freedom to the best extent possible.\textsuperscript{48} The following sections in this chapter will explain the limits of extending the idea of freedom as non-domination at work. Also, further chapters of this thesis will show the need to extend labour rights to all platform workers subject to common forms of domination to achieve this theme.

Fourth, the idea of freedom as non-domination highlights the problems of applying the idea of freedom of contract concerning work. Freedom as non-domination challenges negative accounts of freedom as non-interference that deem people free as they can enter employment contracts without interference. Freedom as non-domination also supports positive accounts of freedom concerning active participation through accessing collective labour rights. Republicans argue the negative vision of freedom in the understanding of freedom of contract is insufficient to capture relationships of domination. The notion of freedom of contract admits that parties are free to enter and to determine the content of a contract, legitimising their obligations by doing so.\textsuperscript{49} For instance, customers and producers, and workers and employers both agree upon contracts. In both cases, the parties are \textit{prima facie} free to agree to enter the contract and defining its content on equal terms. Nevertheless, the idea of freedom of contract does not consider situations of domination as it ignores most of the asymmetries of power present before or after the parties reach an agreement. Chapters 3 and 4 of this thesis will show how the idea of freedom of contract becomes a problem concerning platform workers’ access to collective labour rights in the EU.

\begin{footnotes}
\item\textsuperscript{47} Pettit, \textit{Republicanism: A Theory of Freedom and Government} (n 5) ch 4.
\item\textsuperscript{48} ibid 145.
\item\textsuperscript{49} ibid 62.
\end{footnotes}
Fifth, republicans aim to secure the most extensive freedom from non-domination possible. However, attempting to secure freedom from domination does not mean conceiving social relationships where no domination is present. For republicans, domination in social relationships comes in degrees of intensity and extent. The acceptable degree of domination in contemporary democratic societies relates to determining what should be considered arbitrary. Chapter 5 of this thesis will delve on this idea by discussing the most recent initiatives concerning platform workers’ rights in the EU and their impact on the relationship between competition and labour law.

Sixth, republicans are concerned about all sources of domination in all kinds of social relations. Under a republican account of freedom as non-domination, domination can emanate from public and private sources. Concerns about private domination are of special interest for this thesis. The unfreedom from domination of platform workers in the EU is largely the product of the exercise of private power against platform workers underpinned by public norms.

2. Understanding work relations through the idea of freedom as non-domination

Briefly speaking, a market economy is a system based on exchange and self-regulation through laws of supply and demand that organise the production and distribution of goods and services by prices. There are markets for all the elements of the industry — including work — and they are in constant communication, forming a big intertwined market. In the labour market, workers sell their capacity to work, labour capacity, or labour power. Karl Marx defined labour power as ‘The aggregate of those mental and physical capabilities existing in a human being, which he exercises whenever he produces a use-value of any description.’ In modern work,

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50 ibid 2, 273.
labour became a commodity traded in the market in which the worker sells labour power in return for wages to an employer to meet basic needs.\textsuperscript{54}

This section probes the understanding of work relationships through the notion of freedom as non-domination by discussing two issues. First, whether there is domination against workers when selling work capacity. Second, if there is domination when workers sell work capacity, how do societies define a tolerable limit to this sort of unfreedom from domination?

3. Selling work capacity and domination

In capitalist societies, employers own the means of production. In turn, workers sell labour power to employers to meet workers’ needs through wages. Selling labour power for wages in the labour market implies the employer enjoys private authority over the worker for a period. During that time, workers’ freedom of choice is constrained by the private-temporary government of the employer.\textsuperscript{55} For example, workers cannot walk away from work or decide not to obey employers’ orders under penalty of a disciplinary measure or even dismissal. Under this account, workers selling work capacity and putting themselves under the employers’ private government can be deemed subject to private domination.\textsuperscript{56} Republicans worry about the unrestricted power that employers might enjoy over workers in private relationships. In other words, the capacity of employers to exercise their arbitrary will at any time over the workers’ choices, at least while working. In this context, why do modern societies seem to tolerate

\textsuperscript{54} Marx (n 53); Polanyi (n 52); Simon Deakin, ‘The Comparative Evolution of the Employment Relationship’ (2005) ESRC Centre for Business Research, Working Papers 317.


\textsuperscript{56} Because it is not possible to dissociate the goods workers sell to their corporality, it can be argued that selling labour power is different than selling goods and services in general. If a worker decided to sell labour power on its entirety, the worker would likely become a slave. This view is what makes labour law unique and different as a discipline, at least compared with the civil law of contracts and consumer law in continental traditions. Without discarding the importance of power dynamics in other private relationships, it is the dramatic implications of selling work capacities what makes a focus on the idea of freedom as non-domination interesting.
employers enjoying a high degree of private domination over a significant period of workers' lives? Also, why do contemporary societies seem to accept that workers must experience domination to satisfy their basic needs?

Again, republicans tolerate constraints to freedom from domination under certain circumstances, and to certain degrees. Freedom as non-domination is not an absolute ideal but a progressive goal. This theme is visible concerning work. For republicans like Lovett, reasonable people will sacrifice some freedom as non-domination to meet their basic needs ‘... even if we believe that the specific meaning of basic needs is dependent on the particular context.’

4. Where is the acceptable limit of work domination?

Modern societies accept — up to a certain degree — the constraint of peoples’ freedom by public and private powers through a complex system that includes mechanisms of democratic deliberation, checks and balances, and contestatory citizenship that aims to control excessive power concentration. However, it is still unclear why modern societies tolerate that some private agents sacrifice their freedom in exchange for wages to enhance other private agents’ wealth. Also, it is unclear how much of this constraint to peoples’ freedom from private domination should be tolerable.

Identifying a limit on what is objectionable and what is not concerning domination in private work arrangements can be carried out by mirroring the relationship between the state and their citizens. Workers sacrifice their freedom by selling labour capacity in return for wages. In exchange, workers also submit themselves to the private government of the employers. If there were no way of checking the private government of the employer against the workers, workers would be dominated by the employer as the employer would be able to exercise arbitrary

57 Lovett (n 2) 195.
interference over workers. However, workers in contemporary democracies have different tools to check employers’ domination. For instance, workers can rely on labour laws or exercise their collective voice to tackle the imbalance of power employers enjoy through monopsonies.\(^{59}\) Using a republican account of freedom as non-domination, workers will not be dominated if employers do not have the potential capacity to exercise arbitrary interference over workers as employers are forced to consider workers’ interests. For example, employers could be forced to co-govern with workers through state-imposed laws such as in the German codetermination system\(^{60}\) or engage in collective bargaining periodically to establish minimum wages and other terms and conditions of employment. Against this background, the following section discusses what is unjust about platform work from a republican view of freedom as non-domination.

III. Freedom as non-domination and platform work

This part analyses how the operation of platform work discussed in the previous chapter can be analysed through the idea of freedom as non-domination. This part draws from the work of Sabeel Rahman\(^{61}\) and discusses whether the idea of platform work discussed in chapter 1\(^{62}\) can be understood as forms of dyadic market domination against platform workers. Also, this section discusses how dyadic market domination is underpinned by structural market domination against platform workers.

\(59\) For an account of monopsony, see the introductory chapter of this thesis.  
\(62\) See Chapter 1, S. IV.
1. Dyadic market domination

Dyadic domination is a form of domination in which there is a ‘... discrete, cognizable actor who intentionally exerts arbitrary influence on another.’ In contemporary markets, dyadic market domination relates to the emergence of the significant cognisable power of corporations against the society. For instance, in early twentieth-century America, certain large corporations enjoyed some kind of ‘industrial absolutism’ against society at large. This enormous power enabled large companies to exercise market domination against society at large by controlling ‘... prices, supply, and distribution, and policymakers through their political influence.’

In contemporary markets, large market actors sometimes exhibit a similar amount of economic and political power, a situation of ‘state-like, unchecked power.’ Illustrations of their power in contemporary markets are the considerable amount of capital invested from certain market actors in foreign countries that influence local public policymaking, or the avoidance of taxation multinational market actors achieve by lobbying.

Dyadic market domination highlights the recognition of agents with enough power in markets to dominate others. Dyadic market domination occurs when actors accumulate enough market power to dominate others, a kind of power akin to State power, but with no accompanying accountability as would be expected of a democratic republic or international entity.

Throughout modern history, industrialised societies realised the social problems that dyadic market domination creates. In response, social movements alongside with normative and institutional structuring processes arose worldwide to diminish the risk of domination in markets.

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63 Rahman (n 61) 81.
64 ibid.
65 ibid.
by powerful market actors. Think, for example, of the emergence of competition, consumer, and of course, labour laws.

2. **Dyadic market domination and the Californian Ideology**

Platforms have spent significant resources to underpin the narrative that platform work is not work but entrepreneurship, thus self-employment, and that platforms are not employers but matchmakers between customers and self-employed. The fate of this narrative is significant for platform workers. For instance, this narrative affects how labour and competition laws impact platform workers. If platform workers are deemed entrepreneurs, they will be considered self-employed and subject to competition laws on cartels so that they cannot collectively bargain over wages or other terms and conditions of employment deemed anticompetitive. On the contrary, if platform workers are deemed workers, they will be covered by labour laws. There has been little legal middle ground to address domination of those who may be deemed by national labour laws to be self-employed. Such issues will be further considered in chapters 3 and 4 of this thesis.

The insertion of the Californian Ideology concerning the operation of platform work can be understood as a form of dyadic market domination. In this case, there is a cognisable actor (a platform) capable of imposing a narrative of entrepreneurship in the operation of platform work. This narrative aims to disengage traditional notions of worker from the operation of platform work, creating confusion about whether platform workers should be covered by labour law or other legal protections.

The power of platforms to insert a narrative around platform work can be compared to the context of big market actors around early twentieth-century America outlined above.Platforms have developed a form of industrial absolutism by arbitrarily inserting a narrative of

67 See Chapter 2, S. III 1.
entrepreneurialism in the operation of platform work. The interference is arbitrary because there are no formal mechanisms available to platform workers to contest the power of platforms to insert such a narrative. It could be argued platform workers can challenge the dyadic market power of platforms by reverting to courts or legislative intervention. However, as explained below and throughout this thesis, these tools to address dyadic market domination are difficult to implement.

The case of the Proposition 22 outlined above is a good example of how platforms exercise dyadic market domination against platform workers by imposing a narrative of entrepreneurialism concerning platform work. The AB5 Act and its ABC test should have placed platform workers outside the realm of entrepreneurialism and closer to labour law coverage by treating platform workers as workers. The ABC test is an exciting mechanism to contest the dyadic market power of platforms to consider platform workers as entrepreneurs. However, platforms had enough non-decision-making power to use democratic mechanisms in their favour, funding ballot initiatives to impose the idea platform work is entrepreneurship, not work. Through Proposition 22, platforms ensured there were no legal mechanisms to contest the idea that platform workers are self-employed, not workers.

Another example of the difficulties faced by platform workers to resist the dyadic market power of platforms can be seen in the Deliveroo case in the UK. In Deliveroo, the IWGB (Independent Workers’ Union of Great Britain) asked Deliveroo for union recognition in November 2016. The IWGB then applied to the Central Arbitration Committee (CAC) for a statutory certification for union bargaining representatives. In November 2017, and upon reviewing domestic law, the CAC concluded platform workers were not workers of Deliveroo. The CAC reasoned that because Deliveroo had (after application) introduced a new contractual clause that workers could hire substitutes — which was at least sometimes exercised on evidence presented to the CAC —

68 Ibid.
Deliveroo platform workers could not be deemed workers. The High Court upheld CAC’s original decision, and the Court of Appeal dismissed an appeal from the High Court decision in June 2021. Currently, permission has been granted to appeal to the United Kingdom Supreme Court (UKSC). However, the voluntary recognition by Deliveroo of another less representative trade union, the GMB, effectively renders the IWGB’s opportunity for statutory recognition defunct. There is also the chance to refer the matter to the European Court of Human Rights (ECtHR). However, according to the ECtHR annual report, a case of this kind would take five to six years to be processed. In any case, the UK Government is seeking to ‘change its relationship’ with the ECtHR, which may impact the potential for seeking redress through this path.

Even if platform workers exhaust all the options in this case to challenge the dyadic market power of platforms that prevents them from being considered workers, nothing prevents platforms from slightly changing the narrative of entrepreneurship to circumvent a potential negative judgment. This is what happened in the Deliveroo case. After the CAC hearing, Deliveroo unilaterally changed platform workers’ terms and conditions of work, giving platform workers a broader power to use substitutes and loosening the requirement to use branded clothing to avoid considering Deliveroo platform workers as workers.

3. Dyadic market domination and algorithmic management

As was discussed in the previous chapter, platforms rely on customers’ feedback to implement rating systems to manage platform workers. By drawing on rating systems and other relevant performance metrics, platforms can also rank platform workers and exercise disciplinary

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70 Independent Workers Union of Great Britain v The Central Arbitration Committee [2021] EWCA Civ 952.
73 See Chapter 1, S. IV 2.
measures. Rating and ranking platform workers have become key elements of algorithmic management by platforms.74 It has also been reported that rating and reputation systems have been a very effective means of controlling platform workers.75

Rating systems create valuable human-made data by customers, representing one of the ‘... most trusted sources of consumer confidence in e-commerce decisions.’76 In other words, rating systems are key to boosting trust in the platform economy.77 In turn, rating the workforce is also central for managing the workforce in platforms. However, rating systems also create unfavourable work conditions for platform workers. For instance, rating systems are oversimplified in the form of 5-stars, thumbs up or down, impeding to refine the performance of a platform worker.78 Also, rating systems usually do not allow recourse to ‘... human interpretation [nor consider] the nuances of workplace behaviour.’79 It has also been reported that ratings are ‘... systematically biased and [are] easily manipulated,’80 leading to, for example, forms of algorithmic discrimination based on gender.81

Against this background, is the rating by customers a form of dyadic market domination? And if so, are the customers, the platforms or both sharing this form of decision-making dimension of power?82 to exercise domination?

77 See Chapter 1, S. II 5.
80 Aral (n 76). Parenthesis added.
82 On Lukes’ different power dimensions, see Chapter 1, S. V.
Platforms are cognisable agents that give customers the power to rate the performance of platform workers with little or no capacity to check or contest this power. At first glance, the vis-à-vis position between customers and platform workers resembles the idea of the customer as a de facto master. Moreover, the awareness that customers act as —apparently— a de facto boss through rating platform workers has ‘... turned customers into unwitting and sometimes unwittingly ruthless middle managers.’\(^83\) There is a constant threat to platform workers of a bad rating by customers, which may be converted into an automated punishment by platforms, including disconnection. If platform workers work to meet basic needs, it seems safe to assume platform workers will do all customers want for a good rating to get the next job. The fact that such a degree of power lies in the hands of customers without check or capacity to contest by platform workers, being this situation known by all the stakeholders, might lead to the conclusion that customers exercise dyadic market domination against platform workers.

This argument must be rejected, because ultimately this form of dyadic market domination belongs to platforms. The power of customers to rate platform workers relies on platforms’ capacity to design and run the platform the way they do. Platforms empower customers to rate platform workers to outsource some managerial functions.

Platforms also participate in the algorithmic management process by ranking the workforce and exercising disciplinary measures. The design of rankings where platform workers are sorted according to customers’ ratings and other parameters (i.e., the number of jobs completed) is an effective form of workforce control.\(^84\) It has been reported that ranking platform workers in this way also leads to disciplinary measures such as filter work away and deactivation of low rating platform workers.\(^85\)


\(^84\) International Labour Organization (n 73) 61 ff.

\(^85\) Wood and others (n 75) 64.
The exercise of disciplinary powers by platforms based on ratings and rankings usually does not include mechanisms for platform workers to check or contest this power. As Dzieza reports from an Uber driver: “We’re not just working for money,” an Uber driver told me. “We’re working for ratings, but ratings have no value. Ratings serve only to prevent you from getting fired. Only bad things can happen to you. We’re scurrying like rats after these things with no value.”

Platforms exercise dyadic market domination against platform workers by exercising the first dimension of power through imposing on them rating and ranking mechanisms. Through an architecture of participation of customers, platforms gather valuable data to discipline and even dismiss (or disconnect) through rating and ranking the workforce. The conflict of interests between platforms and platform workers is resolved in favour of platforms as all these mechanisms operate without the capacity of platform workers to know its functioning and to challenge platforms’ decisions. Algorithmic management would stop being a source of arbitrary interference by platforms against platform workers if platforms would be forced to consider platform workers’ interests, for example, through accessing collective labour rights to have their voices heard.

4. Dyadic market domination and new ways of control

The current widespread use of tracking technologies enables different solutions to specific problems of modern societies. Activities such as surveillance and tracking assets or law offenders are in frequent use. Also, extensive use of tracking technologies such as GPS allows platforms to track the actions of platform workers ‘... on the spot, face to face and in real-time.’

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86 Dzieza (n 83).
platform workers represents a function of constant surveillance and data collection\textsuperscript{88} by platforms of all the interactions of platform workers and customers.\textsuperscript{89}

Although tracking workers’ actions by employers is not new, the active incorporation of customers alongside enhanced monitoring technologies in this process concerning platform work is worth considering. Platforms ceded some of their enhanced tracking features to customers. This cession entails enabling customers to control some of the functions to monitor platform workers’ activities in real-time. Tracking is an important function for customers and platforms as they can supervise and evaluate whether platform workers are performing the work and how.\textsuperscript{90}

Customers can track in real-time the choices of platform workers while working. Typically, in on-site platform work, customers can follow the movements of platform workers around the city and measure the time platform workers take to perform a job. In online platform work, customers can supervise how platform workers complete the assigned tasks by monitoring screens, clicks, and mouse scrolling.\textsuperscript{91} Platform workers watched over by customers are workers under a constant threat to their privacy. An implication of this potential threat to their privacy is the continuous exposure of platform workers to monitoring and assessment of their choices in real-time without capacity for platform workers to challenge this power. Eventually, this form of invigilation might lead to sanctions at work through bad ratings by customers.\textsuperscript{92}

\textsuperscript{88} Data collection is also a lucrative business on itself, see WC. Li, Makoto; Nirei and Kazufumi Yamana, ‘Value of Data: There’s No Such Thing as a Free Lunch in the Digital Economy’ (2018) <https://www.oecdilibrary.org/docserver/9af823c8en.pdf?expires=1598023656&id=id&accname=guest&checksum=CB004D3E7E9B13F0F8F83C8FF9FECB2C>.

\textsuperscript{89} Schmidt (n 87).

\textsuperscript{90} Valerio De Stefano, “‘Negotiating the Algorithm”: Automation, Artificial Intelligence and Labour Protection’ (2019) 41 Comparative Labor Law & Policy Journal 32. Wood and others (n 75).

\textsuperscript{91} Wood and others (n 75).

\textsuperscript{92} ibid.
Tracking platform workers is another form of dyadic market domination that comes from the application of Lukes’ first dimension of power. The conflict of interests between platforms and platform workers will likely be favourable to the platforms as there are no contesting mechanisms against the way these forms of control are implemented. Under the digital environment platforms own and manage, it does not matter whether customers tracking platform workers' movements exercise interference over platform workers’ choices. The pervasive combination of tracking platform workers and empowering customers to evaluate them creates the awareness that platform workers are permanently under surveillance in their choices and consequently under a threat of a sanction by the platform through a bad rating by customers.

However, ultimately customers’ role in tracking platform workers leads to the conclusion that dyadic market domination originates from platforms. The capacity of customers to monitor platform workers relies on the ceding of monitoring that platforms make to customers. The relationships between customers and platform workers do not really grasp the true source of dyadic market domination. There might be many cognisable dominating individuals in the labour market in the platform economy. Still, the dominating power truly lies in the ways in which platforms design and implement these mechanisms of domination.

Real-time labour supply is the second feature behind new ways of controlling platform workers. Platforms have developed the capacity to maintain a large pool of platform workers always available to take the next job while considering them self-employed. Platforms rely on the permanent oversupply of platform workers to meet demand, enabling platforms to intermediate in the process of supply and demand of the workforce in an on-demand fashion.93 It has been reported that platforms will only sustain their network effects if they can manage to

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retain within their networks enough idle platform workers ready for the next job. Jabagi et al make this point in relation to Uber:

If the Uber platform cannot attract and retain a sufficient amount of drivers, clients will face longer wait times for a ride. This in turn will lead to higher platform abandonment by clients, and fewer ride requests. Finally, fewer ride requests will lead to higher platform abandonment by drivers.94

Real-time labour supply is not a new feature of labour markets. However, real-time labour supply in the platform economy is enhanced by an immediate response to demand with the possibility of transnational implications in the case of online platforms.95 Real-time labour supply in the platform economy provides opportunities for platforms and platform workers to access work and manage their idle time.96 Also, real-time labour supply in the platform economy provides entry jobs for historically marginalised groups. It has been reported that platform work provides opportunities to migrant workers to enter the labour market, although in less-than-ideal conditions.97

While it is positive that more people have job opportunities, the conditions of the labour market in the platform economy also push platform workers to bear the risk of a swing in demand. Platforms can control the supply of platform workers almost in real-time and with unprecedented precision. In this context, platform workers lack the legal capacity to contest platforms’ unilateral power to control the supply of platform workers. Platforms learned to save money by not assuming the costs of idleness at work while controlling the supply of platform

95 Wood and others (n 75).
workers on a large scale. In a survey to 7000 employers, 76 per cent of them declared they hire platform workers because ‘... they were less expensive.’³⁸⁸ Paying only for the time platform workers work and not for the idle time while being ready and willing to work imposes an unfair additional burden on platform workers.³⁹⁹ It has been reported that unpaid work of searching and applying for paid work in the platform economy is quite significant in some cases.¹⁰⁰ In this context, some platform workers work for many platforms simultaneously to avoid non-paid idleness. Having many employers also add to the idea that platform workers are self-employed. This point will become clearer when discussing the Yodel case below.¹⁰¹

Maintaining a large pool of platform workers ready and willing to work while not paying them for their idle time is another form of dyadic market domination that emerges from Lukes’ first dimension of power. Platforms dominate platform workers because platforms impose their conditions over platform workers, and platforms are not forced to consider the interests of platform workers in being paid for their idle time at work as platform workers have no legal tools to contest such power.¹⁰²

5. Common themes concerning dyadic market domination around the Californian Ideology and the Core Labour Elements of the platform economy

The Californian Ideology, algorithmic management and new ways of control reflect forms of dyadic market domination by platforms linked to Lukes’ first power dimension. The conflicts between platform workers and platforms are resolved in favour of platforms, creating domination because it does not matter whether a narrative on entrepreneurialism, algorithmic management and new ways of control benefit, affect or do nothing to platform workers.

¹⁰⁰ Wood and others (n 75).
¹⁰¹ See Chapter 3, S. II 2.
Platforms can impose their will against platform workers without a reliable legal recourse to contest this power.

The forms of dyadic market domination discussed in the previous sections are also the result of private governance structures. These private structures are supported by property rights, which are ultimately supported by public laws.103 The ownership and administration of platforms, in combination with corporate laws, enable the design of dominating private governance structures by platforms over the workforce. This form of private government becomes a form of dyadic market domination because the design and administration of a narrative of entrepreneurialism and key elements concerning platform work rest exclusively in the hands of the platforms as owners.

What lies behind the forms of dyadic market domination discussed in this section is an attempt to exclude platform workers from accessing key labour rights such as collective labour rights. Combining a narrative on entrepreneurialism and key elements concerning platform work enables platforms to exclude platform workers from accessing employment status, which would render labour laws applicable to them.

However, dyadic market domination alone falls short of capturing how platform workers are dominated. The following section will flag how structural market domination plays a key role in underpinning dyadic market domination of platforms against platform workers.

6. Structural market domination and the platform economy

Under dyadic market domination, there is a cognisable actor who exerts domination against others. In contrast, structural domination in markets is the product of the operation of social practices and the law, affecting social actors beyond transactions of private exchange104 and ‘...

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104 Rahman (n 61) 83.
for the most part within the limits of accepted rules and norms." Structural market domination results from existing laws and practices that produce or enable market domination.

Structural market domination is also present in labour markets. For example, workers subject to monopsonies, who have limited access to continuous education, or are subjects of social discrimination by race or class, will see their options to find or change jobs reduced by external factors. In other words, these workers would be dominated not because of the action of a single cognisable agent but by the operation of social practices and the law.

Structural market domination can also enhance the dyadic market domination against workers. Some agents can take advantage of situations of structural market domination against others to improve their position. For instance, monopsonist employers can unilaterally impose working conditions on workers as the options to find work elsewhere are limited. Also, employers can take advantage of structural forms of discrimination by class to offer less well-off workers less favourable work conditions than their more affluent counterparts. Further chapters of this thesis will explain the role of structural market domination in underpinning dyadic market domination against platform workers in the EU context.

The interaction between dyadic and structural market domination concerning platform work reinforces the power of platforms to exclude platform workers from accessing labour laws,

105 Iris Marion Young, Responsibility for Justice (New York: Oxford University Press, 2011), at 52 (as cited in ibid 84–85.)
106 ibid 84. Recently, Pettit distinguished two types of constraints on freedom: ‘vitiators’ and ‘invaders’ and attempts to develop a concept of ‘structural domination’: ‘we should recognize an indirect or structural form of domination as well as the direct or personal kind, willed or unwilled, that we have been describing... It is usually because of the ways a society is organized, culturally, economically or legally, that some people have such power in relation to others that they dominate them directly, and dominate them without necessarily wishing for domination or even approving of it. Thus, it is usually because of the way that marriage law or workplace law is structured that husbands or employers have a dominating power over their wives or workers. These modes of organization may vitiate, but not invade, choice, as when they emerge for example from customary practice, but they can indirectly facilitate the worst forms of invasion and domination in a society.’ See Pettit, On the People’s Terms: A Republican Theory and Model of Democracy (n 9) 63, 38 ff.
107 For an account of monopsony, see the introductory chapter of this thesis.
depriving them of a voice at work to tackle domination. In the words of Elizabeth Anderson: ‘Feudal and capitalist systems alike ground the private governance of persons in ownership of property and deny the governed a voice in their government.’108 The creation of private rules and hierarchies to manage the workforce in the platform economy by platforms is a form of dyadic market domination that creates a form of private government. There is dyadic market domination in this context because platforms are not forced to consider platform workers’ interests when exercising this power. In turn, platform workers usually have no formal recourse against the platforms to challenge their exclusion from the private government. This picture of exclusion also shows how dyadic market domination is reinforced by laws and rules, creating structural market domination. The interaction between dyadic and structural market domination will become clear in the following chapters of this thesis when discussing how platforms in the EU can reinforce their dyadic market domination against platform workers by invoking EU competition law. It will be argued that the current understanding of EU competition law goals creates fertile ground for platforms to invoke EU competition law to exclude platform workers’ access to collective labour rights and stifle other forms of collective voice.

So far, this chapter has attempted to argue there is enough power in the hands of a few in the platform economy — supported by legal structures — to exercise dyadic and take advantage of structural market domination against platform workers. However, the following section shows platform workers have found ways to challenge dyadic and structural market domination.

7. Resistance against dyadic and structural market domination

Platform workers across the globe are starting to realise platforms and legal structures enable domination against them. Many jurisdictions rely on employment status as a gateway for accessing labour rights.109 Platforms exercise their dyadic market domination by excluding

108 Anderson (n 103) 63.
109 International Labour Organization (n 74) ch 5.
platform workers from accessing employment status and thus from labour rights, excluding them from valuable tools to contest platforms’ power while submitting them to forms of structural market domination such as competition law as discussed in the Dutch musicians’ case above. In this context of exclusion, platform workers are starting to challenge both forms of market domination, even beyond existing legal limits.

Platform workers have learned to organise to resist dyadic and structural market power mainly through virtual spaces that remain outside traditional regulatory forms of social dialogue. In this context, the ways platform workers resist both forms of market power vary. For instance, it has been reported platform workers have organised wildcat strikes, walkouts, protests, digital picket lines, lobbied governments, formed cooperatives, and engaged in other forms of self-organisation and dialogue. Also, platform workers have exercised these forms of organisation and resistance through creating new or joining existing workers’ organisations such as trade unions.

This section contends platform workers have learned to resist dyadic and structural market domination in three main ways that sometimes overlap. First, platform workers have learned to alleviate the dyadic market domination of platforms through direct negotiations, ignoring the potential structural market domination by legal structures. This is the case of the Spanish

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110 See Introduction.
111 International Labour Organization (n 74) s 5.3. For instance, the ILO has found platform workers have joined already existing unions such as IG Metall in Germany; Unionen in Sweden; Canadian Union of Postal Workers and Uber Drivers United (part of the United Food and Commercial Workers), both in Canada; and Independent Drivers Guild in New York (part of the International Association of Machinists & Aerospace Workers, United States). Also, platform workers have created new organisations such as Asosiasi Driver Online (ADO) in Indonesia; Rider Union in Seoul; National Union of Professional e-hailing Driver partners (NUPEDP) in Nigeria; the Sindicato Independiente Repartidores por Aplicaciones (SIRA) in Mexico; the Asociación de Conductores Unidos de Aplicaciones in Chile; the Asociación de Conductores de Aplicaciones de Uruguay in Uruguay; Digital Taxi Forum in Kenya; United Private Hire Drivers in the United Kingdom; Rideshare Drivers United in California; Philadelphia Drivers in Pennsylvania; and NYC Taxi Workers Alliance in New York. Some of these associations participate in the International Alliance of App-Based Transport Workers.
platform workers’ organisation ‘RidersXDerechos’ (RidersForRights).112 RidersXDerechos is an organisation of platform workers not covered by labour laws. Labour laws do not protect RidersXDerechos because it does not meet the Spanish legal requirements to be recognised as workers’ representatives. Thus, this platform worker’s organisation has no formal way to challenge the power of platforms. Platforms have taken advantage of this form of legal exclusion of platform workers’ voices by refusing to engage in social dialogue with RidersXDerechos. The platforms argued they could not negotiate with RidersxDerechos because this form of social dialogue is not envisaged under Spanish law.

RidersXDerechos has organised and participated in several protests against the platforms despite this context. In July 2017, RidersXDerechos organised strikes against Deliveroo in Madrid and Barcelona, demanding a pay rise consisting of at least two deliveries per hour to reduce salary uncertainty and a minimum of 20 working hours per week.113 Also in Spain, platform workers have learned to organise with traditional unions. For instance, in August 2021, platform workers of Glovo (in this case, supermarket delivery workers) went on strike for nine days, supported by the Confederación Obrera (Workers’ Trade Union Confederation, CCOO),114 demanding to be directly hired by Glovo.115 The logistics provided by the CCOO were very effective, and the platform could not hold the strike for more than a weekend and agreed to negotiate with the striking workers, regardless of whether they were capable to engage in social dialogue under Spanish law.116

112 Own translation, https://www.ridersxderechos.org/
114 Own translation
Another example happened in Argentina. Here, platform workers organised through social media (WhatsApp) to resist the unilateral changing of the pricing algorithm by the employing platform Rappi (a popular food delivery platform founded in Colombia). When the platform arrived in Buenos Aires, platform workers could decide which drops to deliver. However, after the unilateral change, platform workers had no way of choosing which drops to deliver. Also, platform workers' accounts would be blocked if they rejected three drops.

As a response to Rappi's unilateral change of the pricing algorithm, in July 2018, platform workers organised the first digital strike by gathering in several squares in Buenos Aires. During the strike, platform workers logged in, took customers’ requests and immediately cancelled them, arguing they had an accident. After the strike, platform representatives and platform workers started informal forms of dialogue. However, Rappi also countered platform workers’ resistance by deactivating one of the accounts of an organising delivery worker, and other organised platform workers received fewer orders. Later, other platform workers’ accounts were deactivated by the platform, undermining the ongoing dialogue. Eventually, Rappi abandoned the negotiations arguing that they could not engage in formal dialogue with platform workers because the platform workers are hired directly by the consumers, whereas the platform only intermediates.

Alternatively, Rappi could have underpinned its dyadic market domination against platform workers by recalling platform workers’ organisation as a violation of competition law, invoking competition laws as a form of structural market domination. However, this strategy would have backfired. Ratified ILO conventions in Argentina ‘... have superior hierarchy than laws’. This is

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118 Article 75, inc 22, Constitucion Nacional de la Republica Argentina. Own translation. The original reads as: ‘Los tratados y concordatos tienen jerarquia superior a las leyes.’
the case of ILO Conventions No. 87 and 98. The Committee on Freedom of Association (CFA) and the Committee of Experts on the Application on Conventions and Recommendations (CEACR) have interpreted both Conventions as promoting access to collective labour rights for ‘self-employed workers’. This vision has been reaffirmed by the Argentinian Supreme Court and stems from the broader reception of the Inter-American Court of Human Rights developments.

After the first digital strike, Rappi workers regrouped under the Asociacion de Personal de Plataformas (Platform Workers’ Association, APP), a platform worker organisation that includes platform workers from Uber and Glovo. APP emphasises, among other things, the importance of accessing their data held by platforms to make personal and collective decisions and to ensure a sound social dialogue with the platforms concerning working conditions, payment and ways to contest disciplinary measures. This example shows the importance of accessing information to engage in meaningful social dialogue between platform workers and platforms.

Also, in 2018, across the UK, many platform workers began organising the Industrial Workers of the World (IWW) in response to Uber’s unilateral change in payment terms that went against platform workers’ economic interests. IWW called for a national strike that was coordinated to coincide with strikes at McDonald’s, TGI Fridays and Wetherspoons pubs in London, Cambridge and Brighton. This was an innovative form of organisation across the supply chain to address the

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120 Asociación de Trabajadores del Estado c/ Ministerio de Trabajo (Fallos: 331:2499).
121 C-121 Corte Interamericana de Derechos Humanos Caso Huilca Tecse Vs Perú [2005] (Fondo, Reparaciones y Costas), Serie C; C-72 Corte Interamericana de Derechos Humanos Caso Baena Ricardo y otros Vs Panamá [2001] (Fondo, Reparaciones y Costas), serie C.
122 Own Translation
dyadic market domination of platforms. Uber workers also formed the UPHD (United Private Hire Drivers, currently ADCU, App Drivers and Couriers Union). These workers called for a strike on 9 October 2018 for 24 hours to increase their fares, reduce Uber’s commission and end arbitrary deactivations. The strike was about creating a digital picket line starting at lunchtime. Platform workers were called to log off and stay home during that time. Allegedly, the platform responded by surging prices per drop to incentivise strikebreakers.

Cape Town, South Africa, has reported a harsher example of how platform workers resist dyadic market domination through direct negotiations with platforms. Platform workers organised and pitched through WhatsApp groups to strike against the platforms’ unilaterally-determined falling piece rates for deliveries. Most workers voted in favour of striking, which consisted of logging off from the app simultaneously during a specific timeframe. Like the UK example, platforms countered by surging prices to incentivise platform workers to log in, effectively breaking the digital picket line. However, platform workers’ response to such incentives was different in this case. If other drivers decided to break the digital picket line, one worker declared: ‘we smashed up their bikes, that’s democracy’. These strikes worked, and workers gained concessions from the platforms. In the meantime, the Fairwork Project in South Africa has created a ‘ranking scheme to evaluate the working conditions of digital platform workers’.

One of the objectives of this project is to promote fair representation of platform workers, for instance, by publicly recognising ‘an independent collective body of workers; as well as not having refused to participate in collective representation or bargaining’. This exciting

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124 Woodcock and Graham (n 102) ch 4.
126 Woodcock and Graham (n 102) ch 4.
128 Ibid.
development provides tools for platform workers to resist dyadic market domination, as outlined here.

Second, platform workers have learned to resist dyadic and structural market domination through mutual aid. Two examples are Turkopticon and SMart Belgium. Amazon Mechanical Turk (AMT) is a platform run by Amazon\(^\text{129}\) operating as a matchmaking place for employers (known as requesters) requesting high volumes of microtasks, and workers. The microtasks are varied and comprise activities such as audio file transcriptions, content moderation and photo identification. Requesters unilaterally define criteria to assign work. For instance, requesters filter workers based on their rating on AMT, workers’ self-reported country and their qualifications. Requesters also set up payment rates on a take-it-or-leave-it basis. Once platform workers submit the work, it’s the sole prerogative of requesters to accept or reject the work done through AMT. Also, requesters can pay or not pay for the work done, facilitating wage theft.\(^\text{130}\)

In case of discrepancies between a requester and a platform worker, AMT does little to address platform workers’ needs. There’s an interface for platform workers to contact requesters to address issues. However, requesters are not obliged to respond. It has been reported requesters experience a higher opportunity cost replying than by ignoring platform workers’ complaints.\(^\text{131}\)

AMT shows a context where resisting the power of platforms becomes more complicated, at least compared to the cases analysed in this section. Suppose platform workers resist by

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\(^{129}\) https://www.aboutamazon.com/about-us


\(^{131}\) As reported by Irani and Silberman (n 130) a requester declared: ‘You cannot spend time exchanging email. The time you spent looking at the email costs more than what you paid them. This has to function on autopilot as an algorithmic system…and integrated with your business processes.’
purposely failing to carry out tasks or reject them (or any similar strategy examined in the
previous case). In that case, platform workers will be automatically filtered away from the
platform, and since the works of AMT are online, there is no physical place for workers to meet
or protest. One option for platform workers is to leave the platform. The other option is to
organise, such as in the case of Turkopticon.

Turkopticon is an initiative that began in academia that ‘... has been designed to offer workers a
way to dissent, holding requesters accountable and offering one another mutual aid’.\textsuperscript{132}
Turkopticon works as a browser extension for Google Chrome and Firefox that shows how other
platform workers evaluate requesters. Turkopticon shows four standard ratings: Communicativeness (requesters’ response ratio), Generosity (amount of money per task), Fairness (reasons for rejecting work), Promptness (approval-payment timeframe), plus a box for open comments. It has been reported that Turkopticon has been utilised by workers willing to tackle the dyadic market power of requesters and AMT.

Another example of resisting dyadic and structural market domination by platform workers
through mutual help is SMart Belgium. SMart is a non-profit organisation that began functioning
as a cooperative of workers in the cultural sector. The main goal of SMart is to help self-
employed to be ‘reconverted’ to employees to access improved social security and other
benefits. Self-employed members of SMart negotiate the contractual terms and conditions with
their counterparties then the self-employed declare this contract through the SMart website.
This way, self-employed are officially employed by SMart for each contract (regardless of its
size), so self-employed can access the benefits of a salaried worker in Belgium, which
traditionally have been better than for the self-employed. SMart also covers the self-employed
for the administrative work they have to carry out after each contract for a fee.\textsuperscript{133} In 2016,

\textsuperscript{132} ibid 614.
\textsuperscript{133} Smart, ‘What Is SMart?’

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Deliveroo and Take Eat Easy (food delivery platforms) agreed to a protocol with SMart to improve platform workers’ working conditions, including pay. However, this agreement has been criticised as Deliveroo may have entered this agreement to enjoy a tax break for employing students without employing them directly as workers. Deliveroo left SMart when a tax incentive for self-employed workers working on platforms was introduced.\(^{134}\)

SMart represents an exciting but imperfect form of resistance through strengthening solidarity between workers deemed as self-employed (including platform workers) in a national context where no legislation to address the exclusion of the self-employed from labour rights and social systems has been implemented.\(^{135}\)

Turkopticon and SMart Belgium show that platform workers are willing to tackle the dyadic market power of platforms through organisation and not necessarily ask the platform to engage in forms of social dialogue. The case of SMart also shows how organised workers can take advantage of the law to improve their working conditions without negotiating with platforms. However, SMart also shows the risks of platforms taking advantage of laws to prevent platform workers from being considered workers.

Third, platform workers have also reverted to forms of social dialogue with governments and platforms organisations to address the dyadic market power of platforms and the structural market power created by laws without directly addressing a specific platform.

The so-called *Ley Rider*\(^{136}\) in Spain is a good example of how platform workers have engaged in social dialogue with the government and associations of platforms and employers to address

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\(^{136}\) See chapter 1, S IV.
dyadic and structural market domination. This form of social dialogue modified the Spanish labour law code to enable access to labour rights for drivers and food delivery platform workers.

The origins of the Ley Rider can be traced back to when platforms sought a judgment to establish that platform workers in the food delivery sector are self-employed workers. Such a request backfired. In 2020, the Spanish Supreme Court declared food delivery platform workers are workers under Spanish law.\textsuperscript{137} After that, some platforms decided to keep litigating, while others agreed to dialogue with platform workers, trade unions, employers’ associations and the government. Eventually, the parties reached an agreement on 10 March 2021.

The agreement has shown the capacity to tackle the power of platforms through broad democratic mechanisms of dialogue. This vision is explicitly recognised in the modifying Royal Decree: ‘A labour market with rights guarantees a modern society, with social cohesion and that advances democratically; a market centred in the persons, that makes its productive assets less volatile and more resistant to changes.’\textsuperscript{138} This vision is aligned with the Government’s position. Yolanda Diaz, the Spanish Ministry of Labour, declared platform workers: ‘... will be workers with full rights, social security payments will be made, and they will access the social protection they now lack. It is a norm that will change many peoples’ lives, essential workers who have been in the first line during the pandemic and that have given their lives for all of us’.\textsuperscript{139} Also, platform

\textsuperscript{137} Adrian Todoli-Signes, ‘Comentario a La Sentencia Del Tribunal Supremo Español Que Considera a Los Riders Empleados Laborales’ (2020) 6 Labour and Law Issues.

\textsuperscript{138} Own translation. The original says ‘Un mercado de trabajo con derechos es garantía de una sociedad moderna, asentada en la cohesión social, que avanza democráticamente; un mercado centrado en las personas, que convierte a su tejido productivo en menos volátil y más resiliente ante los cambios.’ Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

\textsuperscript{139} Own translation. The original says: ‘serán laborales con todos los derechos, se cotizará por ellos y tendrán la cadena de protección social que ahora no tienen. Es una norma que va a cambiar la vida de mucha gente, personas trabajadoras esenciales, que han estado en primera línea durante la pandemia, y que han dado la vida por todas y todos nosotros’ Trabajo y Economía Social, ‘El Último Acuerdo Social Sitúa a España En Cabeza de La Unión Europea En El
workers’ representatives and traditional trade unions showed their satisfaction with the 
agreement. The Unión General de Trabajadores (UGT, General Union of Workers) and the 
Confederación Sindical de Comisiones Obreras (CCOO, Trade Union Confederation of Workers’ 
Commissions) hailed the agreement and the way it was reached. However, both trade unions 
also warned of the capacity of platforms to circumvent this new law. This is an aspect that will 
be further discussed in the next chapter.

Another exciting aspect of this agreement is that it involved Spain’s most significant employers’ 
associations. The Confederación Española de Organizaciones Empresariales (CEOE, Spanish 
Confederation of Business Organisations) and the Confederación Española de Pequeña y 
Mediana Empresa (CEPYME, Spanish Confederation of Small and Mid-Size Companies). The 
CEOE and CEPYME agreed to prevent the emergence of false self-employment as it impairs the 
free and fair competition in the labour market. The attitude of the employers’ associations in 
this regard led Glovo to abandon the CEOE. Glovo claimed the CEOE rejected the platform

Reconocimiento de Los Derechos Laborales de Las Personas Que Trabajan En Reparto de 
140 Own translation.
141 Own translation.
143 Own translation.
144 Own translation.
economy and attempted to create a parallel employers’ confederation. However, other big platforms like Uber, Amazon, Deliveroo and Adigital remained in CEOE.146

Another case occurred in Bologna, Italy. The 2017 winter was particularly harsh in Bologna. Snow covered the city, and food delivery work became more dangerous. In this context, since platform workers were not considered workers, they could not demand protection and work insurance against accidents or unemployment benefits if they decided to stay home.

Platform workers in Bologna organised around ‘Riders Union Bologna’ an ‘... urban based coalition of workers, consumers, activists, students and scholars aiming to enhance mutualism in society.’147 Riders Union Bologna went on strike against Foodora, Deliveroo, Just Eat and Sgnam, all food delivery platforms, to demand safer and better work conditions and stable channels for social dialogue with the platforms. The platforms ignored platform workers and responded to the strike by hiring more platform workers to replace strikers. The strike became an ineffective means to address platforms’ dyadic market domination.

Riders Union Bologna responded by sensitising Italian public opinion to platform workers’ working conditions to gain sympathy and reach regional and national authorities. The idea was to name and shame platforms. This strategy of resistance worked as it led to platform workers sitting at the table with the regional government of Bologna and platforms to improve platform workers’ working conditions. The reason for the city of Bologna to intervene was simple. Since food delivery platform workers operate on the streets, the city was responsible for what happened there.

These negotiations led to the signing of the *Carta dei diritti fondamentali del lavoro digitale nel contesto urbano* (Charter of Fundamental Rights of Digital Labour Workers in the Urban Context) in 2018 by Riders Union Bologna, traditional Italian Trade Unions, the city of Bologna and the digital platforms Mymenu, Winelivery and Domino’s Pizza.\(^\text{148}\) This is a voluntary document that covers platform workers’ access to information and protection rights — including fair wages, health and safety, protection of personal data, the right to disconnect and protection from public authorities. However, this agreement did not go as far as to address issues such as the employment status of platform workers or their access to individual and collective labour rights. Despite its shortcomings, this agreement caught the national government’s attention. The negotiations between platform workers, the national government and the platforms lasted from June until November 2018. After that, platforms decided not to keep negotiating at this level. Despite this walkout, the Italian government passed the Legislative Decree No 101/2019, recognising some labour rights for self-employed workers, including platform workers, providing them forms of protection from accidents and financial aid.\(^\text{149}\)

In an attempt to institutionalise social dialogue in the platform economy, initiatives such as the Frankfurt Paper are promising as they call for transnational cooperation between different stakeholders of the platform economy.\(^\text{150}\) The Frankfurt Paper aims directly to ensure ‘fair

\(^\text{148}\) Willem Waeyaert and others, ‘Italy: A National and Local Answer to the Challenges of the Platform Economy’ (European Agency for Safety and Health at Work 2022).


\(^\text{150}\) According to this declaration, the stakeholders are workers, workers organisations, platform clients, platform operators, and regulators.
working conditions’ and ‘... worker participation in governance in the growing world of digital labour platforms’. This picture shows the capacity of platform workers to organise beyond institutional frameworks to challenge platforms’ power, engaging in forms of social dialogue.

These different strategies show how platform workers, and sometimes local and national governments, are willing — and at times successful — to tackle the dyadic and structural market domination of platform workers. The ways to address both forms of market domination are varied, and their conceptualisation becomes highly contextual. Also, this section has shown platform workers are willing to challenge dyadic market domination even outside regulated means of social dialogue. Chapter 5 explores how different EU initiatives aim to recognise the legal entitlements of platform workers to resist dyadic and structural market domination.

The ways in which platform workers are resisting the power of platforms can also be understood within the republican idea of freedom as non-domination. The following section outlines four republican strategies to address dyadic and structural market domination for platform workers.

IV. Republican strategies to achieve freedom as non-domination

Republican concerns to ensure freedom from domination of people have inspired different strategies. The following section introduces and probes the strategies of exit, workplace democracy and workplace constitutionalism to alleviate dyadic and structural market domination against platform workers. Also, this section proposes the strategy of centralised participation at work as an alternative strategy to tackle dyadic and structural market domination.

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1. Exit

The exit strategy aims to alleviate domination at work by enabling the destruction of the source of domination for the dominated: the relationship of work. The ability to exit work would be a preferred alternative to diminish domination against workers because workers would have a key to terminate the dominating capacity of employers by leaving. Concerning platform work, exit would extinguish the whole work relationship between platform workers and the platforms, including the managerial prerogatives of platforms, a fundamental feature to exercise domination at work.

Exit relies on the periodic destruction and reconstruction of private work relationships to improve work conditions, this way, exit is symbiotic with the functioning of the labour market. Workers leaving or threatening to leave employment relationships pressure employers to retain or attract other workers by offering them better working conditions. In the long run, exit should diminish dyadic market domination by employers because of supply pressures on labour markets.

An example of how exit might alleviate dyadic market domination can be seen in the labour shortage the US is experiencing. There is currently a lack of interest for US workers in taking low-paid jobs. Some workers are exiting low-paid jobs to take better ones, while other workers leave the labour market. Although the reasons for this phenomenon are still debated, the US has been experiencing a labour shortage that may lead to salary raises, improved benefits, more training opportunities or the use of workers more productively as was experienced during previous periods of labour scarcity. However, such a beneficial outcome for US workers has

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been recently challenged.\textsuperscript{154} It remains to be seen whether the exit strategy would improve workers’ conditions in the US labour market.

Republicans like Taylor,\textsuperscript{155} Lovett\textsuperscript{156} and Pettit\textsuperscript{157} also advocate for an unconditional basic income to reinforce the exit strategy. An unconditional basic income would support exit by alleviating workers’ transitions between jobs. Supported by an unconditional basic income, workers under dominating work relationships would transition between jobs without falling into poverty. This reinforced exit strategy should put more pressure on employers to improve the overall conditions of workers. Employers’ power would be undercut by making workers capable of ending employment relationships in a financially secure way while keeping risks of public domination through regulation at bay. However, there are significant shortcomings for the exit strategy that will be discussed below concerning platform work.\textsuperscript{158}

2. Workplace democracy

Gonzalez-Ricoy defines the strategy of workplace democracy as a ‘... form of managerial organization in which workers have control rights over the management of the firm.’\textsuperscript{159} The strategy of workplace democracy finds inspiration in the idea of a ‘parallel case’ between the private government of the employer and the public government of the state. The objective is to transpose the ideas of democracy and political participation from the public into private

\begin{flushleft}
\textsuperscript{154} ‘America’s Labour Shortages Have Done Little to Boost Perks for Workers’ (\textit{The Economist}, 2022) \texttt{<https://www.economist.com/finance-and-economics/2022/01/22/americas-labour-shortages-have-done-little-to-boost-perks-for-workers>}. \\
\textsuperscript{155} Robert S Taylor, \textit{Exit Left: Markets and Mobility in Republican Thought} (Oxford University Press 2017). \\
\textsuperscript{156} Frank Lovett, ‘Domination and Distributive Justice.’ (2009) 71 Journal of Politics 817. \\
\textsuperscript{157} Philip Pettit, ‘Republican Right to a Basic Income?’ (2007) 2 Basic Income Studies 8. \\
\textsuperscript{158} See this this section in 5 a) ‘Testing exit’. \\
\end{flushleft}
governance. Workplace democracy aims to alleviate employers’ power at work by extending
the virtue of democracy through the political participation of workers at the workplace level. In
this regard, Gonzalez-Ricoy states: ‘Political participation: X enjoys immunity against arbitrary
interference only if she is granted and regularly exercises a set of political rights that allow her
to influence and contest the decisions affecting her.’

An example of workplace democracy can be found in some areas of the German labour market.
Beginning in 1951 with a system of board-level representation in coal, iron and steel companies,
Germany started a route to provide greater democratic control by workers in big companies.
This aim is mainly translated as a right to a seat on the supervisory board of a company. Workers
have one-third of representation in companies with 500 to 2000 employees. Workers’
representation is enhanced to half in companies with more than 2000 employees. Having a seat
on the supervisory board is relevant in several ways. The supervisory board can appoint or
dismiss the main management board of a company. Also, workers on the supervisory board can
make workers’ voices heard at the highest hierarchy of the company and steer the company
strategy. Workers’ representatives in the supervisory board are elected directly or indirectly
through workplace delegates. Other examples of workplace democracy can be seen in the
previous section. Platform workers learned to alleviate dyadic market domination of platforms
through direct negotiations (first way) and mutual aid (second way). In the cases of
RidersXDerechos in Spain, Rappi in Argentina, IWW and ADCU in the UK and South Africa (first
way), platform workers extended the virtue of democracy at work by ensuring some form of
participation at the workplace level. In the cases of Turkopticon and SMart Belgium (second

160 Cohen (n 58) 27 ff.
161 González-Ricoy (n 159) 244.
162 Silvia (n 60) ch 2; ‘Industrial Relations in Germany - Background Summary’ (n 60); Fulton (n
60).
way), platform workers aimed to ensure their workplace participation by building parallel structures.

Workplace democracy diminishes employers’ domination at work by incorporating the interests of workers as stakeholders in the private government of the platform, forcing employers to consider the interests of workers. Also, accessing labour rights such as collective labour rights fits into the strategy of workplace democracy. When workers exercise collective labour rights, they exercise their voice at work, which can be translated into a form of political participation able to challenge the power of employers. The importance of accessing collective labour rights under a republican account of freedom based on workplace democracy will be tested in the EU context in the following chapters of this thesis.

The strategy of workplace democracy relates to Pettit’s strategy of reciprocal power to alleviate domination. The reciprocal power strategy aims to equalise the power of dominators and dominated by enabling the dominated to check the arbitrary power of the dominators. Reciprocal power partially overlaps with the strategy of workplace democracy. Both strategies recall the idea of collective contestation of power by workers, something familiar to collective organisation and action at work. However, republicans like Pettit are wary of reciprocal power as it might create an unstable loophole of continuous interference from both sides, creating a constant source of new and fluctuating domination. This critique apparently affecting workplace democracy must be discarded. Workplace democracy goes beyond a mere strategy of reciprocal power by aiming to create a more stable democratic governance at the workplace through dialogue, with collective labour rights as another set of dialoguing tools for workers. Following Gourevitch, when discussing the role of the right to strike as part of collective labour

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164 ibid 67, 95. ‘The strategy of reciprocal power holds out the prospect of too many problems to be taken seriously. The lesson is that we should explore the alternative and more promising strategy of relying on constitutional provision, and the remainder of the book is given to that pursuit.’
rights, the right to strike is both a way to resist domination by exercising it and a way to have a more democratic workplace by organising the dominated, aiming to equalise power in doing so.  

3. Workplace constitutionalism

The strategy of constitutional provision, as discussed by Pettit, seeks to address issues of domination by appointing an agent or an authority. The agent or authority has the mission to deprive the dominators of their power and to punish interferences stemming from the dominators or those dominated. At the same time, there must be mechanisms to prevent the appointed agent from becoming dominant by forcing the appointed agent to consider the interests of the others.

In work relationships, the strategy of constitutional provision could be assimilated into the strategy of workplace constitutionalism. Workplace constitutionalism aims to prevent the arbitrary discretion of the employers by withdrawing some of the employers’ powers and centralising such withdrawn powers through public norms and institutions. For instance, working time regulations extract from employers their capacity to unilaterally fix schedules and give this capacity back to employers in the form of a publicly known restricted set of options to be exercised, reducing domination against workers. The cases of the so-called Ley Rider in Spain and the signing of the Charter of Fundamental Rights of Digital Labour Workers in the Urban Context in Bologna, Italy (third way) are good examples of how some of the platforms’ powers

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167 González-Ricoy (n 159); Watkins (n 33); Keith Breen, ‘Non-Domination, Workplace Republicanism, and the Justification of Worker Voice and Control’ (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 419.
can be withdrawn through public norms and institutions, diminishing domination against platform workers.

However, considering the strategy of workplace constitutionalism alone leads to an odd place concerning the exercise of public power. Suppose societies aim to achieve freedom as non-domination at work through workplace constitutionalism. In that case, stakeholders need to be heard and enjoy the capacity to influence all state- or public-oriented work regulations to avoid regulatory domination. This reasoning should lead to revising all the already enacted public regulations to force the regulator to consider stakeholders’ interests. Not doing this revision risks not considering the interests of the affected parties, threatening domination of workers not only by employers but also by the state. This critique will become apparent in chapter 5 when discussing the EU initiatives to address domination against platform workers.

4. Centralised participation at work

This subsection proposes an alternative and original approach to alleviate domination at work. This approach integrates some of the features of workplace democracy and workplace constitutionalism and calls to revise already existing rules in light of the idea of freedom as non-domination. This alternative strategy is labelled ‘centralised participation at work’.

First, centralised participation at work seeks to avoid domination by encouraging the participation of stakeholders such as platform workers at two levels: at the workplace level and at the making of state-regulated rules. This approach means platform workers should have a voice against the dominating power of platforms and in the making of rules affecting their freedom as non-domination. Centralised participation approach also aims to revise existing rules affecting stakeholders such as platform workers. This vision claims that domination can also be present in existing rules against platform workers and thus stakeholders such as platform workers should also have a voice to revise such rules. Subsequent chapters of this thesis explores this claim concerning access to labour rights and the operation of competition law in the EU.
Centralised participation is at an early stage and part of a broader process towards alleviating domination. This strategy is ambitious as it includes revising existing normative and institutional frameworks to enable the participation of stakeholders within to diminish domination. The following section will test this strategy in the platform work context.

5. Testing republican strategies to address market domination against platform workers

Having outlined the main (and discussed an alternative) republican strategies to address market domination of workers, this section discusses the extent to which these strategies would help to address market domination of platform workers.

a) Testing exit

Even backed up with a universal basic income, the exit strategy does not significantly help overcome the problems of domination of platform workers. Two connected reasons underpin this claim.

First, platform workers have the chance to eliminate platforms’ dyadic market domination by terminating the relationship with a platform. However, this claim is only valid for an individual relationship between one platform worker and one platform. Exit does not guarantee platforms would improve working conditions of other platform workers threatening to leave the platform or future platform workers, even if backed up with a universal basic income. The fact that platforms rely on a large pool of workers ready to take the next job underpins this conclusion. In other words, if one platform worker leaves the pool, someone else will take the next job in real-time.

Second, leaving the platform can be costly for platform workers in ways beyond what can be envisaged by a universal basic income system. For example, platform workers make significant investments in building a virtual reputation in the platform. However, platform workers have little capacity to own and transfer such virtual reputation to another platform. Also, like more
traditional work arrangements, platform workers spend time, effort and capital training and acquiring assets to join a platform.\textsuperscript{168} Lastly, platform workers take unemployment’s social and psychological risks if not properly backed by a universal basic income.\textsuperscript{169}

Exit (or reinforced exit) does little to address domination beyond the dyadic market domination between one platform worker and the platform. Platform workers might exit one platform just to become subject to dyadic market domination again in another platform. What really changes under an exit strategy concerning platform work is who takes the economic burden of transitioning jobs while exiting, usually the workers as outlined in the previous paragraph. The taxpayers also absorb the economic burden by paying a universal basic income in the case of reinforced exit to enable platform workers to safely exit the platform.

The exit strategy (including a reinforced exit strategy) fails to see that the problem for platform workers is that the dyadic market power of platforms is underpinned by a dominating structure of private government supported by corporate law.\textsuperscript{170} Exit dissolves contractual relationships to destroy a single dominating relationship, but managerial prerogatives remain the same. This situation is exacerbated in times of high unemployment.\textsuperscript{171}

Exit might be a successful strategy to alleviate the dyadic market domination of platforms if platform workers exert extraordinary efforts to organise. Organised platform workers can bargain with platforms under the threat of leaving the platform at the same time. However, coordinating hundreds or thousands of platform workers to ‘drain’ the ample supply of workers on which the platform economy relies seems complicated. Platform workers would have to

\textsuperscript{170} Anderson (n 103) 59–60.
overcome the capacity of platforms to monitor in real-time the demand of workers and design incentives (e.g. raising the price of work) to attract new platform workers into the pool to avoid the draining. Lastly, platform workers would have to come out on top of the chilling effect produced by the capacity of platforms to invoke laws (such as competition laws) to crush platform workers’ organisation.

b) Testing workplace democracy

The strategy of workplace democracy requires the participation of platform workers at the workplace level, understood as platform workers’ participation in a single or multiple platforms and in local and transnational levels. In the platform economy, however, platform workers’ participation at this level is almost absent. As outlined above, the lack of forums of participation at the workplace level for platform workers has led to the emergence of alternative ways to challenge platforms’ power. For instance, platform workers are organising through WhatsApp groups, massive disconnection from the platforms, wild strikes, and digital picket lines. However, these forms of organisation require a high degree of active participation and coordination. Like the exit strategy, a successful strategy of workplace democracy concerning platform work requires active workers willing to challenge the power of platforms through coordination with other platform workers.

Workplace democracy is one of the strategies with the most potential to protect platform workers from dyadic and structural market domination of platforms. Workplace democracy enables platform workers to exercise their voice to contest power from a more local and tailored place than a workplace constitutional strategy with the potential to expand to broader levels of coordination. Chapter 5 of this thesis will further discuss the importance and challenges of

172 See this chapter S. III 7.
workplace democracy in addressing the market domination of platform workers in the EU context.

c) Testing workplace constitutionalism

To alleviate dyadic and structural market domination against platform workers, the strategy of workplace constitutionalism requires answering two questions: First, whether existing norms taming managerial power at work apply to platform workers. Platform workers are usually framed as self-employed\(^\text{174}\) and therefore usually out of the realm of more protective norms such as labour regulations. This scenario raises questions over the applicability of labour laws for platform workers, including access to collective labour rights. Second, whether there is a need for specific regulation to alleviate dyadic and structural market domination against platform workers. Under this second question, what kind of regulation would be needed?

These questions reflect two main strategies outlined in different jurisdictions to alleviate market domination against platform workers by clarifying who should be covered by labour rights.\(^\text{175}\) The first strategy aims to bring platform workers into labour provisions already in place, usually by considering platform workers as workers protected by labour laws. The second strategy aims to create new regulations to ensure all (or at least some) labour rights for platform workers or to address peculiar forms of exploitation on platforms.\(^\text{176}\)

One of the main challenges of the strategy of workplace constitutionalism concerning platform work relates to the capacity of the rule-makers to create regulation capable of being clear and flexible enough to alleviate market domination of platform workers. A successful workplace constitutional strategy requires ensuring platforms cannot circumvent regulation by exploiting


\(^\text{175}\) International Labour Organization (n 74).

its definitional uncertainties while aiming to encompass the heterogeneity of platform workers observed in chapter 1. Also, a strategy of workplace constitutionalism requires rule-makers to consider platform workers’ interests to avoid dyadic and structural market domination against them. Chapter 5 in this thesis discusses how the EU has envisaged different workplace constitutional strategies to clarify whether platform workers should access labour rights, including collective labour rights.

d) Testing centralised participation at work

The strategy of centralised participation at work demands blending the features of workplace democracy and workplace constitutionalism. First, the strategy of centralised participation at work concerning platform work requires the presence of a normative framework to alleviate dyadic and structural market domination against platform workers. Such a normative framework should hold the potential to regulate the terms and conditions of contracts and work conditions concerning platform work. Such a normative framework (e.g., a national labour code) could impose safety and health measures, setting minimum wages and recognising the interests of platform workers which are in opposition to platforms’ objectives.

The strategy of centralised participation at work also demands considering the interests of stakeholders such as platform workers in the creation of this normative framework. Excluding platform workers from this process risks the normative framework itself dominating platform workers. Freedom as non-domination requires public and private power to be controlled through forcing public and private powers to consider the interests of other agents, in this case, platform workers.

Centralised participation at work is ambitious because it requires revising the current or new normative structures that impact the freedom from domination of platform workers to ensure their interests are considered. Suppose platform workers effectively participate by making their interests to be taken into consideration in the revision or creation of norms concerning platform work.
work. In that case, the rules should not become sources of domination as the other stakeholders participating in creating such rules would be forced to consider platform workers’ interests. Chapters 3-5 will show the potential role of labour and EU competition laws in ensuring platform workers’ freedom from domination in the EU context and what a strategy of centralised participation at work can add in this respect.

Second, the strategy of centralised participation at work also requires the political participation of platform workers at the workplace level. Platform workers’ participation at this level complements the concerns observed in the first point by forcing platforms to consider platform workers’ interests at the workplace level, alleviating domination.

Centralised participation at work should provide valuable tools to address dyadic and structural market domination against platform workers at different levels. The consideration of platform workers as stakeholders in the design of public norms and at the workplace level is in line with tackling domination in the platform economy to the best extent possible. This strategy is ambitious as it requires the active participation and coordination of platform workers at different governance levels.

Conclusion

This chapter aimed to introduce republicanism as a theoretical framework to assess the injustice behind the unbalanced relationship between platforms and platform workers that leads to domination and consequently to platform workers’ exclusion from accessing key labour rights such as collective labour rights. To fully capture the power imbalance concerning platform work, this chapter identified dyadic and structural market domination as overlapping forms of domination against platform workers.

Dyadic market domination helps to clarify how platforms dominate platform workers through the unilateral setting of contractual and work conditions. However, dyadic market domination
fails to fully capture the unfreedom of platform workers within the private government created by platforms. Corporate and competition laws ultimately support the private government of platforms, creating forms of structural market domination. This chapter discussed how platforms reinforce dyadic market domination against platform workers by recalling forms of structural market domination.

This chapter also outlined how platform workers have found varied ways to challenge platforms’ domination. Platform workers are organising through wildcat strikes, walkouts, protests, digital picket lines, lobbying governments, forming cooperatives and other forms of self-organisation, alternative forms of social dialogue and through new or existing workers’ organisations. This section argued platform workers’ resistance could be summarised into three main categories: direct negotiations with platforms, mutual aid, and social dialogue with governments and platforms’ organisations.

Also, this chapter outlined how republican strategies help achieve freedom as non-domination for platform workers. The strategies of exit, workplace constitutionalism and workplace democracy offer valuable inputs for platform workers to secure freedom from dyadic and structural market domination. After discussing the merits and shortcomings of all the options, this chapter proposed an alternative strategy termed centralised participation at work. This strategy is ambitious as it requires the active participation of platform workers to review existing and new regulations concerning platform work and at the workplace level. This strategy promises to offer a more comprehensive strategy to achieve freedom as non-domination concerning platform work at different levels.

The next chapter will show how the EU has prevented the exclusion of workers from accessing key labour rights such as collective labour rights and discusses why it is unlikely for platform workers to fit into such prevention. It then assesses the problems of domination of platform workers by excluding them from accessing collective labour rights in the EU context. Platforms
exercise dyadic market domination against platform workers. Platforms also take advantage of the operation of EU competition law to reinforce dyadic market domination against platform workers, leaving few options for platform workers to challenge such domination.
Chapter 3: Platform Work and Republican Freedom in EU Law

Introduction

This chapter aims to assess the legal provisions in the EU for securing platform workers’ freedom from domination. It analyses the importance of accessing collective labour rights to alleviate dyadic and structural market domination of platform workers in the EU. However, there are tensions between labour and EU competition law that may exclude platform workers from accessing collective labour rights. So far, EU law has managed to alleviate the tensions between workers’ collective agreements that run counter to EU competition law’s rationale by exempting workers’ collective agreements from EU competition law through the so-called Albany\(^1\) exemption. The Albany exemption can be understood as a workplace democracy strategy that has the potential to protect platform workers’ collective agreements from the operation of EU competition law, alleviating structural market domination and enabling platform workers to counteract dyadic market domination by platforms. However, it is unclear whether platform workers can access the Albany exemption. The structure of the chapter will be as follows.

The first part shows that access to collective labour rights is subject to frictions with the operation of EU competition law. Two points of friction are identified: (i) their different governance levels and (ii) their divergent objectives.

The second part introduces the Albany exemption as the technique adopted by the CJEU to ease the tensions between workers’ access to collective labour rights and EU competition law. This section highlights the importance of the EU definition of worker to access the Albany exemption through analysing the Yodel case. Yodel also shows what is problematic about using a negative definition.

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\(^1\) C-67/96 Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie [1999] ECRI-5751.
account of freedom (or freedom as non-interference) to determine platform workers’ access to the EU definition of worker to access the Albany exemption.

The third part discusses how platform workers in the EU are subject to dyadic and structural market domination. It is argued platform workers in the EU are subject to an overlapping account of dyadic and structural market domination. In this context, the Albany exemption would be pivotal in addressing such overlapping forms of domination. However, the Albany exemption fails to incorporate platform workers because it uses a negative account of freedom (or freedom as non-interference) in one of its constitutive elements.

The fourth part discusses the potential of the republican strategies discussed in chapter 2 to counter dyadic and structural market domination against platform workers in the EU. This section outlines how exit, workplace constitutionalism, workplace democracy and centralised participation at work help alleviate dyadic and structural market domination against platform workers in the EU.

I. Tensions between workers’ collective voice and EU competition law

Since the inception of the EU project, different aims and values have cohabited. An important early distinction was the one between economic and social policies. This distinction and the scope of each species of policy have been extensively discussed elsewhere. Suffice to say here that the reasons behind the distinction between economic and social EU policies can be traced back to the strategy of ‘embedded liberalism’. Embedded liberalism was a strategy to combat...
economic nationalism by guiding the global economy towards multilateralism at the end of World War II. In the EU, embedded liberalism meant support for securing external and internal free trade while the EU Member States retained control over welfare administration. In this context, EU economic policies have been traditionally linked to the transnational security of property and market freedoms. In turn, social policies in the EU have mostly remained under Member State competence.\(^4\)

The Ohlin report (1956)\(^5\) was a highly influential document in the adoption of the Treaty of Rome.\(^6\) This report seems to apply the idea of embedded liberalism in the distinction between the economic and the social European common market. This report was grounded on the belief that the economic growth of the European Economic Community (EEC) should benefit all Member States.\(^7\) Apart from regulating equal pay between women and men, Member States saw no need and arguably had no political leverage\(^8\) to regulate social policy at a supranational level. Instead, it was hoped economic development through securing economic freedoms should lead to a progressive improvement of the social. The embedded liberalism strategy should have led to a progressive ease of the frictions between the economic and the social.

A great deal of water has flowed under the bridge since. The strategy of embedded liberalism now coexists with greater intervention in the social field to provide the Union with a more human face.\(^9\) However, EU social policy interventions cannot be said to be comprehensive in

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5 Brian Tew, ‘Social Aspects of European Economic Co-Operation’ (1957) 67 The Economic Journal
6 Dukes (n 2) 134–135.
8 Anderson (n 2) ch 1.
their coverage nor their rationale. This vision becomes apparent when looking at the tensions between workers’ collective voice and the applicability of EU competition laws.

There is a tense relationship in EU law between, on the one hand, workers’ collective voice, and on the other hand, competition law. The tensions arise for two main reasons. First, workers’ collective voice is mainly regulated at the national level through collective labour rights. In contrast, EU competition law is supranational. Second, the objectives of workers’ collective voice and EU competition law seem to differ.

1. Tensions based on different levels of governance

Articles 3(3) of the Treaty on European Union (TEU) and 3(1)(b) of the Treaty on the Functioning of the European Union (TFEU) envisage establishing an internal market of shared competence for the EU to secure the free movement of goods, capital, services and people, and with exclusive competence concerning competition law. Protocol 27 ‘On the Internal Market and Competition’ and CJEU case-law make explicit the internal market includes a system to secure free competition, which forms an integral part of the Treaties according to Article 51 TEU, and where the Commission plays an extensive role in the making and the enforcement of EU competition law.

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10 Barnard (n 2) ch Introduction.
12 Article 3 TFEU: ‘The Union shall have exclusive competence in the following areas: (b) the establishing of the competition rules necessary for the functioning of the internal market;’ European Union, Consolidated version of the Treaty on the Functioning of the European Union [2012] C326/47
13 ‘… the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted’. European Union, Consolidated version of the Treaty on European Union [2012] OJ C326/13
14 See C-52/09 Konkurrensverket v Tele Sonera Sverige ECR I-00527. Para 20 ‘Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon ... is to include a system ensuring that competition is not distorted.’
15 ‘The Protocols and Annexes to the Treaties shall form an integral part thereof.’
competition law together with national competition authorities.\textsuperscript{16} EU competition rules can be found in Articles 101-109 TFEU.

Articles 151-156 TFEU require the Union and the Member States to promote — among other things — the dialogue between management and labour. The problems for protecting workers’ collective labour rights in the EU arise under Article 153 TFEU. Under this Article, the Union ‘… shall support and complement the activities of the Member States …’ in a series of labour matters. Article 153(5) TFEU establishes ‘The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.’ This context leaves the Member States to regulate how workers exercise collective voice in ways that can avoid a conflict with EU competition law.

2. Tensions based on objectives

The second set of reasons for the tensions between workers’ collective voice and competition law in the EU is based on their divergent objectives. The divergences begin to be observed at the constitutional level. Article 2 TEU points out common values of the Member States on which the Union is built. In particular, the Union:

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\ldots \text{is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.}
\]

Also, Article 6 TEU states that the Charter of Fundamental Rights of the European Union (CFR) has ‘… the same legal value as the Treaties.’ This interpretation means Articles 12 and 28 of the CFR, which regulate freedom of association and the right of collective bargaining and action

should have the same value as EU provisions such as Article 3(3) TEU, ensuring a ‘highly competitive social market economy’.\textsuperscript{17}

According to the TFEU’s Economic and Monetary Policy Title (VIII), the EU’s objectives must be achieved following the principles of an open market economy and free competition (Article 119 TFEU). Further, the Social Policy Title (X) requires the EU to consider the objectives of the European Social Charter (ESC, 1961),\textsuperscript{18} the Community Charter of Fundamental Social Rights of Workers (CFSRW, 1989)\textsuperscript{19} and the promotion of the dialogue between management and labour (Article 151 TFEU). Both the ESC and the CFSRW aim to promote and ensure freedom of association and collective bargaining.

The combination of social and economic norms and objectives in the EU outlined so far shows the divergent objectives of workers’ collective voice and EU competition laws. On the one hand, EU competition law aims to harmonise and promote Member States’ free markets to reach an optimal economic outcome.\textsuperscript{20} On the other hand, protecting workers’ collective voice helps alleviate the imbalance of market power favouring the employers, promotes social dialogue between workers and employers, and underpins democracy and voice at work.\textsuperscript{21} Using Lukes’ power dimensions, protecting workers’ collective voice challenges the decision-making (first power dimension) and ideological power dimensions (third power dimension) in favour of employers. In turn, protecting workers’ collective voice provides valuable tools to challenge employers’ dyadic market power and shields them from more structural forms of domination.

\begin{footnotesize}
\begin{enumerate}
\item Catherine Barnard and Simon Deakin, ‘Social Policy and Labor Market Regulation’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), \textit{The Oxford Handbook of the European Union} (Oxford University Press 2012)
\item Council of Europe, European Social Charter. Collected Texts (7th Edition).
\item European Commission, Community Charter of the Fundamental Social Rights of Workers 1990.
\item Gerber (n 16).
\end{enumerate}
\end{footnotesize}
Such divergent objectives create tensions concerning the exercise of workers’ collective voice and the operation of labour markets in the EU. Worker associations seek to limit employers’ capacity to freely compete on labour terms and conditions, affecting free-market goals and — at least in principle — optimal economic outcomes. Under EU competition law, in the absence of any exemption, collective action by workers can be seen as anticompetitive if, for example, workers agree to set their labour price. It seems the objective of labour not being a commodity, and the tools of collective bargaining and strikes are inherently opposed to the labour market’s free operation.

II. The Albany exemption and domination of platform workers in the EU

The case in which the CJEU managed the tensions between workers’ collective voice and EU competition law is Albany. This section introduces the Albany exemption and the EU definition of a worker as one of its key constitutive elements. Lastly, this section explores the Yodel case to discuss what is problematic about the interpretation of the EU definition of worker to access the Albany exemption for platform workers.

In Albany, Dutch law mandated employers of given productive sectors to join collectively agreed supplementary pension funds favouring their workers. Albany International, a Dutch company of the textile sector, sought an exemption from contributing to the pension fund to which it was otherwise bound to contribute by virtue of a collective agreement between employers and workers. Upon rejection of its request, Albany International complained that compulsory affiliation to a pension scheme violated EU competition rules.

The Albany case’s key aspect is how the CJEU resolved the frictions between free competition in the pensions market and securing workers’ collective voice in sectoral negotiations with the

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22 See Article 101(1)[a] of the TFEU
employers. In this case, the CJEU recognised that certain collective agreements between workers and employers are inherently anticompetitive.\textsuperscript{24} However, the CJEU also recognised the value of ensuring dialogue between management and labour.\textsuperscript{25} The CJEU reasoned that if EU competition law objectives prevail in this case, EU social policy would be seriously undermined as workers' collective voice would be silenced as illegal under Article 101 TFEU.\textsuperscript{26} The CJEU concluded that negotiations between workers and employers towards improving work conditions must fall outside Article 101 TFEU.\textsuperscript{27} This outcome has been colloquially termed 'Albany exemption'.

To invoke the Albany exemption, the determination of the agreement's 'nature and purpose' between the parties must be clarified. First, the nature of the agreement relates to the determination of legal categories of contracts and actors. The Albany exemption only covers labour agreements between organisations of workers and employers. Second, the purpose of the agreement must be a direct contribution to the improvement of working conditions, '… namely their remuneration'.\textsuperscript{28} Both the nature and purpose of the agreement are the Albany exemption's constitutive elements.

Against this background, the question of who is a worker becomes one of the key elements to clarify who can access the Albany exemption. As outlined by AG Jacobs:

\begin{quote}
... the system of Community competition law is not tailored to be applicable to employees (because EU competition laws) are clearly drafted with regard to economic actors engaged in the supply of goods or services ... Employees, on the contrary, are concerned with 'wages' and 'working conditions.' ... employees would therefore
\end{quote}

\begin{footnotes}
\item[24] ibid 59.
\item[25] ibid 54,56,57.
\item[26] ibid 59.
\item[27] ibid 59–60.
\item[28] ibid 59, 63.
\end{footnotes}
necessitate the use of uneasy analogies between the markets for goods and services and labour markets.\textsuperscript{29}

Also, AG Jacobs correctly anticipated the difficulty in determining employment status in the case of contemporary work arrangements — including platform work — to access the \textit{Albany} exemption: ‘The future will probably show whether that principle [the \textit{Albany} exemption] applies also in certain borderline areas ...’\textsuperscript{30}

It must be borne in mind that the \textit{Albany} case was about Albany International’s refusal to pay for the 1989 period of contributions. The CJEU received the case in 1996 and decided upon it in 1999. Against this background, it seems uncontroversial to say that the labour market has changed in the intervening years. In the context of the emergence of platform work and other non-standard labour agreements that blur the lines between work and self-employment, there is space for revisiting who is a worker for the \textit{Albany} exemption. Thus, the immediate task is to revisit the EU definition of a ‘worker’ on which the \textit{Albany} exemption relies.

\textbf{1. An EU definition of worker for the \textit{Albany} exemption}

The CJEU regularly points out there is no single definition of worker in EU law and that such definition varies according to the area of EU law to be applicable.\textsuperscript{31} Also, different definitions of worker appear in primary and secondary EU law.\textsuperscript{32} This section aims to clarify the EU definition of worker applicable in the \textit{Albany} exemption.

\textsuperscript{29} \textit{Opinion of AG Jacobs in Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie} [216]. Parenthesis added

\textsuperscript{30} ibid 217. Parenthesis added

\textsuperscript{31} For example, see the judgments of the CJEU in \textit{C-85/96 María Martínez Sala v Freistaat Bayern} [1998] I-02691 [31]; \textit{C-256/01 Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment} [2004] ECLI:EU:C:2004:18 [63].

\textsuperscript{32} For a full account, see Martin Risak and Thomas Dullinger, ‘The Concept of “Worker” in EU Law’ (ETUI 2018).
The most significant development of an EU definition of worker emerges from CJEU's interpretation of Article 45 TFEU on workers' free movement. At its core, Article 45 TFEU guarantees one of the four fundamental freedoms in the EU: freedom of movement for workers within the Union.

Against this background, in 1985, the CJEU issued the key *Lawrie-Blum* judgment. In this case, Deborah Lawrie-Blum, a British national, was denied entry to becoming a teacher in the German educational system. The CJEU had the chance to clarify — among other things — who is a worker. The CJEU developed an EU definition of worker in the following terms: ‘The essential feature of an employment relationship ... is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’.

The CJEU ruled Lawrie-Blum performed services as a trainee for and under the direction of school authorities of the German educational system for a certain period upon remuneration. For the first time, the CJEU provided a comprehensive (or say EU, or EU-wide) community definition of worker through interpreting Article 45 TFEU. The definition of worker handed out in this case has been known as the ‘*Lawrie-Blum* formula’.

Through subsequent case law, the *Lawrie-Blum* formula has been refined. Inspired by Member States’ developments in designing personal work relations, the CJEU routinely examines the

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34 ibid 17.
35 ibid 18.
36 The existence of a ‘community meaning’ was previously handed out by the CJEU in C-53/81 Levin v Staatssecretaris van Justitie [1982] ECLI:EU:C:1982:105.
contracting parties' rights and duties in context to find 'objective criteria’\textsuperscript{38} to identify a working relationship.\textsuperscript{39} So far, three main groups of 'objective criteria’ can be identified.

First, the services performed should be genuine and effective — not marginal or ancillary — and part of the labour market. For instance, the CJEU made clear the work carried out as part of a rehabilitation programme is not work within the EU meaning as these work arrangements depart from the labour market.\textsuperscript{40} On the other hand, a temporary work arrangement for two and a half months can suffice for the Court to consider a person as a worker within EU law.\textsuperscript{41} Also, the Court considers as workers within EU law on-call workers with no guaranteed schedule and no obligation to show.\textsuperscript{42}

Second, work must be part of an economic activity. According to this interpretation, the payment of remuneration is key to set employment status. The Court has understood payment of remuneration broadly. For instance, the Court is willing to consider as workers within the EU meaning persons that are paid with shares,\textsuperscript{43} must complement their salary with public funds,\textsuperscript{44} receive their payments in kind,\textsuperscript{45} are not currently working,\textsuperscript{46} or are trainees or PhD students.\textsuperscript{47}

\begin{flushright}
\textsuperscript{39} Risak and Dullinger (n 32).
\textsuperscript{40} C-344/87 Bettray v Staatssecretaris van Justitie [1989] 01621 [17].
\textsuperscript{41} C-413/01 Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst [2003] I-13187 [32].
\textsuperscript{43} C-3/87 The Queen v Ministry of Agriculture, Fisheries and Food, exparte Agegate Ltd [1989] I-4493 [36].
\textsuperscript{44} C-53/81 Levin v Staatsssecretaris van Justitie [1982] ECLI:EU:C:1982:105 (n 36).
\textsuperscript{45} C-196/87 Udo Steymann v Staatsssecretaris van Justitie [1988] I-06159.
\textsuperscript{47} See the cases of people, trainees, and PhD students. See C-415/93, Union Royale Belge des Sociétés de Football Association ASBL (and others) v Jean-Marc Bosman [1995] I - 5040. 66/85; Deborah Lawrie-Blum v Land Baden-Wurttemberg [1986] CLI:EU:C:1986:284 (n 33); C-94/07 Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV [2008] I-05939.
\end{flushright}
Third, the services must be performed for and under the direction of another person. This idea is closely related to the idea of subordination and control present in many EU jurisdictions. Over time, the Court has refined the contours of this puzzling idea through four key judgments. In *Lawrie-Blum*, the CJEU explored the notions of direction, supervision, obedience, and the contractual partner’s determination of services and working hours. In *Allonby*, the Court related subordination with the degree of freedom of the alleged worker to set the place, content, and acceptance of their work. The freer workers are, the less they need protection from labour law. In *Danosa*, the CJEU explored the ideas of control and consent in relation to the managerial role of the alleged worker. Lastly, in *Haralambidis*, the Court also considered the presence of disciplinary sanctioning powers of the hirer of work and the freedom of choosing of the alleged worker of their work conditions, for example, to hire assistants. The implications of using this version of freedom by the CJEU to determine subordination will be further discussed in the analysis of the *Yodel* case below.

These three main groups of ‘objective criteria’ concerning the *Lawrie-Blum* formula flag a trajectory in which the CJEU is willing to broaden the EU definition of worker stemming from the

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51 In Danosa, the Court was willing to accept that a member of the Board of Directors of a company was a worker. Ms Danosa was deemed a worker because she was removed from associates’ general meeting by the Board of Directors, an organ she did not control and which proceeded without her consent. The margin of discretion Ms Danosa enjoyed because of her managerial role did not change this impression, as Ms Danosa had to work and cooperate with the supervisory board. See C-232/09 Dita Danosa v LKB Lizings SIA [2010] ECLI:EU:C:2010:674 [38–42].
free movement of workers. Perhaps the best summary of the evolution of the Court in this area can be observed in the 2002 Kurz case:

... neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law. 53

The breadth of the EU definition of worker described so far may help bring platform workers within its definition, enabling them access to the Albany exemption. However, two considerations must be borne in mind.

First, the EU definition of a worker discussed stems from the idea of workers' free movement, which has been historically designed to underpin the economic Union. 54 This EU definition of worker is better understood as the result of a process of ‘functionalist harmonisation’. 55 This process aims to harmonise the reading of EU law among Member States for securing the common market and avoid distortions of competition. 56 Thus, this EU definition of worker is broad primarily to secure mobility within the internal labour market. It remains to be seen whether this EU definition of worker may restrict the inclusion of platform workers if that inclusion is seen to contravene free market objectives.

Second, the EU definition of worker is constructed in terms of a binary divide between workers and self-employed. Through several cases 57 it has become clear that, for the CJEU, persons

53 C-188/00 Bülent Kurz, né Yüce v Land Baden-Württemberg [2002] I-10691 [32].
54 This is the vision that stems from the context and the reading of Article 45 TFEU. Further discussion, see Catherine Barnard, ‘Free Movement of Workers and the Self-Employed’, The Substantive Law of the EU (Sixth edn, Oxford University Press 2019). Garben (n 2).
56 Ibid.
57 For instance, see cases C-216/15 Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH [2016] ECLI:EU:C:2016:883. C-393/10 Dermod Patrick O’Brien v Ministry of Justice,
providing services in the EU labour market can only be workers or self-employed. In this context, there seems to be no room for intermediate categories such as ‘workers’ in the UK,58 ‘self-employed workers’ and ‘economically dependent self-employed’ workers in Spain,59 or ‘parasubordinate’ work in Italy.60 While not advocating for such intermediate categories, it is important to bear in mind that platform workers might not necessarily meet the EU definition of worker discussed here to access the Albany exemption. Also, the CJEU and the Commission have equated the self-employed to undertakings subject to EU competition law,61 which has significant implications for the operation of EU competition law concerning platform workers deemed self-employed.

Also, as will be discussed when analysing the FNV Kunsten case,62 the CJEU recognises some forms of self-employment do not reflect the reality of the work relationship. The CJEU acknowledges that in the modern labour market it is not ‘... always easy to establish the status of some self-employed contractors as “undertakings” ...’63 In this case, the CJEU is willing to


62 C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden [2014] ECLI:EU:C:2014:2411. For further analysis, see the introductory chapter of this thesis and chapter 4 S II 2.

63 ibid 32.
accept that there can be false self-employment in the labour market, meaning ‘... service providers in a situation comparable to that of employees.’ That approach is supported by the AG of the case (AG Wahl):

... it is common ground between the parties that such persons (falsely self-employed) fulfil the definition of ‘worker’ under EU law and, as such, any collective agreement regulating their position would in principle be able to benefit from the Albany exception.

Despite these developments, platforms can still exercise dyadic market domination to create the conditions to ensure that platform workers are deemed to be self-employed and thus unable to access the Albany exemption, leaving them also subject to structural market domination through the operation of EU competition law. The following section discusses how platforms exercise this sort of dyadic market domination against platform workers in the Yodel case.

2. The CJEU judgment in Yodel: platform work and the problems of using a negative account of freedom to determine the EU definition of worker

One of the only cases where the CJEU has ruled on platform work and the EU definition of worker is Yodel. The analysis of this case demonstrates the problems of trying to fit platform workers within the EU definition of worker. This section also illustrates how a republican account of freedom as non-domination can help to understand what is problematic about using a negative account of freedom in the construction of the EU definition of worker for platform workers and explore the advantages of using the idea of freedom as non-domination instead.

64 ibid 31.
65 Opinion of AG Wahl in FNV Kunsten Informatie en Media v Staat der Nederlanden [61]. Parenthesis added
66 Dyadic and structural market domination were discussed in chapter 2 S III.
67 See Chapter 2, S. II. In the EU context, see this chapter in S. III 1.
68 C-692/19 B v Yodel Delivery Network Ltd [2020] ECLI:EU:C:2020:288 (n 57)
In *Yodel*, ‘B’ was — at least formally — a self-employed contractor for the courier company ‘Yodel Delivery Network Ltd’ (Yodel). Yodel’s business model operated in accordance with many of the features of platform work identified in chapter 1. B argued they should be deemed to be a worker, at least for the applicability of the EU ‘Working Time Directive’ (WTD).

Among other things, the parties of this case agreed in the contract of services that B could: (i) hire substitutes or subcontract under Yodel’s power of veto. In any case, damages incurred by a replacement was under B’s liability, (ii) work for third parties, including Yodel’s direct competitors, and (iii) choose not to deliver parcels for Yodel. On the facts, B was paid per parcel delivered, had to use their vehicle and phone to deliver, and could set their schedule for deliveries.

In addressing whether B should be deemed a worker for EU law purposes, the CJEU seemed to equate employment status with the lack of freedom of choice over a set of labour features, namely flexibility, type of work, schedule, methods, tasks, place, and hiring collaborators or subcontractors. The greater the freedom of B to choose the type and place of work, the schedule, the methods, tasks, and hiring of collaborators, the less likely B was a worker within the EU meaning. The Court concluded B was not a worker as they appeared to have a ‘… great deal of latitude in relation to his putative employer’.

This judgment shows two problems for fitting platform workers within the EU definition of worker. First, this judgment is at odds with the objectives of EU labour law provisions such as the EU Directive on Transparent and Predictable Working Conditions (TWCD). The TWCD aims

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70 See Chapter 1.
72 In a similar fashion to the Haralambidis case. See C-270/13 *Iraklis Haralambidis v Calogero Casilli* [2014] ECLI:EU:C:2014:2185 (n 52).
73 C-692/19 *B v Yodel Delivery Network Ltd* [2020] ECLI:EU:C:2020:288 (n 57) para 35.
to set new rights for all workers, especially those in precarious labour markets.\textsuperscript{75} Some of these new rights shield workers from the adverse consequences of rejecting unpredictable work.\textsuperscript{76} Conversely, the judgment in \textit{Yodel} considers the capacity of B to reject unpredictable work not to protect B from Yodel’s potential retaliation but to consider B as self-employed. Further contradictions between TWCD and the judgment in \textit{Yodel} can be found in the capacity of B to work for others. Article 9 TWCD enables workers to work for other employers under certain conditions. Again, the Court sees the capacity of B to work for other employers as an indication of B’s self-employment.

Second, the Court seems to determine labour status using a negative account of freedom.\textsuperscript{77} For the Court, B is freer (or less interfered in their choices) than a traditional worker as B enjoys greater latitude to choose work conditions. In this sense, if B is freer in their choices, then B must be considered self-employed, not a worker.

As discussed in the previous chapters, platforms’ business model provides an apparent freedom to platform workers from the direct intervention of platforms.\textsuperscript{78} Platforms retreat from direct management of the workforce while retaining control in the shadows through algorithmic management and new ways of control. The negative account of freedom in \textit{Yodel} cannot fully grasp why B is still unfree if B has more control of the working conditions than an ‘average’ worker. This account of freedom fails to clarify why B might deserve to be protected against the power of Yodel.

Using a republican account of freedom as non-domination, B’s capacity to exercise more choice over working conditions than an average worker would not be sufficient to determine B’s


\textsuperscript{76} Articles 10.1 and 10.2 of the Directive.

\textsuperscript{77} For an account of negative freedom, see Chapter 2, S I.

\textsuperscript{78} See Chapter 2, S III.
freedom. B may be freer from the interference of Yodel concerning certain working conditions. However, B will not be free from domination as B has no recourse to tools to challenge the power of Yodel to set other working conditions, including the capacity to deem B self-employed. In other words, despite B’s apparent freedom, Yodel can modify the working conditions at any time without B having any access to formal mechanisms to contest such power apart from exiting the job. More will be discussed in the last section of this chapter about platform workers’ options to challenge such power.

The Yodel case shows the problems of fitting platform work within the EU definition of worker affecting platform workers’ access to the Albany exemption. This outcome is a consequence of the nature of platform work, the construction of the EU definition of worker and a negative account of freedom to determine labour status. Against this background, the following section will analyse how platform workers are subject to dyadic and structural market domination in the EU.

III. How platform workers in the EU are subject to dyadic and structural market domination.

As explained in chapter 2, the problems of exclusion of platform workers from accessing labour rights such as collective labour rights can be understood using a republican account of freedom that distinguishes between forms of dyadic and structural market domination.79 This section discusses how platform workers are subject to dyadic and structural market domination in the EU.

Dyadic market domination occurs when a cognisable actor exerts interference at will over other actors’ choices in a market. Using a republican account of freedom as non-domination, the question is whether platform workers have the tools to challenge the power of platforms. There

79 Ibid.
will be domination if platforms are not forced to consider platform workers’ interests.\textsuperscript{80} To avoid dyadic market domination, platform workers need tools such as collective labour rights to challenge the power of platforms.

Platforms have the power to exercise dyadic market domination by using algorithmic management and new ways of control to create a narrative that platform workers are self-employed,\textsuperscript{81} circumventing the test to identify a worker, impairing platform workers’ access to the \textit{Albany} exemption. Because platform workers are considered self-employed and thus not workers, platforms are not forced to consider platform workers’ interests through labour laws. Accessing employment status is the gateway for many labour laws, including collective labour rights.\textsuperscript{82} Consequently, platform workers have little or no capacity to contest the power of platforms by exercising their collective voice due to their incapacity of accessing collective labour rights.

Structural market domination relates to relationships of domination beyond a cognisable actor. It concerns the aggregate of laws and practices that create domination against an agent.\textsuperscript{83} In this case, the operation of EU competition law against platform workers’ collective organisation can be understood as a form of structural market domination. The following section furthers how an overlapping account of dyadic and structural market domination best explains the problems of unfreedom of platform workers in the EU and the role of the \textit{Albany} exemption to prevent it.

\begin{footnotesize}
\begin{itemize}
  \item See Chapter 2, S I 3.
  \item See Chapter 1, S IV.
  \item K Sabeel Rahman, \textit{Democracy against Domination} (Oxford University Press 2017) 83.
\end{itemize}
\end{footnotesize}
1. **An overlapping account of dyadic and structural market domination to explain the domination of platform workers in the EU and the role of the *Albany* exemption**

Domination against platform workers in the EU ultimately rests on the capacity of platforms to exercise dyadic market domination and invoke EU competition law against platform workers deemed undertakings to underpin its position. In other words, dyadic market domination against platform workers is enhanced because EU competition law creates the conditions to deprive platform workers not deemed workers of access to forms of collective voice to counteract dyadic market domination.

The overlapping operation of both forms of market domination against platform workers in the EU can be better explained using a fictitious example. Suppose platform workers of a multinational ride-hailing platform operating in the EU agree to organise against the platform to ask for a pay raise. One problem for platform workers’ interests here is that the platform has sufficient financial and managerial capacity to exert dyadic market domination and suffocate worker’s organisation. However, the ultimate problem for platform workers is that the platform has the power to appeal to EU competition laws on cartels to underpin its position, denouncing platform worker’s request as a price-fixing agreement.

In this fictitious example, the platform can potentially use the EU’s conditions of structural market domination against platform workers to further dyadic market domination. Domination happens here because it does not matter whether the platform accepts, rejects or ignores negotiating with platform workers. The platform can use its private power to craft contracts and manage the workforce without formal contestation mechanisms. Suppose platform workers organise regardless to force the platform to track their interests. In that case, the platform can recall EU competition law to stifle the collective organisation of platform workers. Here, platform workers have little or no capacity to contest the operation of EU competition law apart from claiming they should be considered workers to access the *Albany* exemption.
Beyond this example, the use of competition laws to underpin exercising dyadic market domination against the workforce is not new. Before the emergence of labour law, employers appealed to public authorities to impede the organisation of workers concerning wage-fixing.\textsuperscript{84} EU Member States have been well aware of this overlapping between dyadic and structural market domination in the labour market for a long time and have created and equipped labour law with tools to diminish dyadic market domination and prevent structural market domination against the workforce.\textsuperscript{85} However, platform work has not been made the express subject of such protections in the EU, leaving them exposed to structural and dyadic market domination. Chapter 5 will explore recent initiatives aiming to address both overlapping forms of market domination against platform workers.

This section has shown how the \textit{Albany} exemption plays a key role in EU law to prevent structural and diminish dyadic market domination against workers, including platform workers. However, the problems concerning using a negative account of freedom to determine employment status for platform workers impairs their access to the \textit{Albany} exemption. This section has also shown how using a republican approach of freedom as non-domination helps overcome the problems of using a negative account of freedom. Republicanism shows how using a negative account of freedom concerning platform work justifies platform workers’ exclusion from accessing key legal concepts such as the EU worker definition. A negative account of freedom does not grasp the dominating power platforms exercise over platform workers as the idea of freedom as non-domination does. The following section explores alternative solutions to address the overlapping operation between dyadic and structural market domination.


IV. Republican strategies to counter dyadic and structural market domination against platform workers in the EU

The last section of this chapter probes the republican strategies to counter domination explored in chapter 2 in the context of platform work in the EU.

1. Exit

The destruction of the relationship of work by platform workers by exiting the platform might seem to give platform workers equal power against platforms. Disconnection by platform workers ends (or indefinitely suspends) the contract of services, apparently freeing platform workers from dyadic and structural market domination. Exit should, in theory, force platforms to consider the interests of platform workers to avoid platform workers leaving the platform.

The exit strategy is aligned with the labour market’s rationale behind platform work in the EU. As discussed in the previous chapters, the platform economy relies on the periodic destruction and reconstruction of small jobs or ‘gigs’ by people joining and leaving the platform. Thus, it could be said the exit strategy is already in motion in platform work in the EU.86

Some scholars argue the exit strategy would work better if workers could count on some form of income or social protection that enhances the exit process.87 In the EU context, an enhanced exit strategy may underpin the capacity of platform workers to leave work relationships that entail domination. For instance, Member States may provide financial security while helping

platform workers find another job, diminishing the costs of switching jobs or falling into unemployment.

However, the exit strategy has two shortcomings, which prevent its efficacy in resistance against the market domination of platform workers by platforms in the EU. Exit focuses only on individual relationships between agents. Also, exit does not fully address the cost and risks of transitioning jobs.

First, the exit strategy fails to secure freedom from domination of platform workers in the EU because exit only looks at the power relationships between a single worker and the platform. Exit helps platform workers to leave a bad platform to join another one, leaving the power structures of domination of platform workers untouched. In republican terms, exit may help alleviate dyadic market domination against one platform worker by one platform. However, exit does not address the problems of keeping private structures of governance that support dyadic market domination. Exit does not address Lukes’ ideological dimension of power. It does not address the structural market domination against platform workers through the operation of EU competition law, for example, by ensuring access to collective labour rights as a counterbalance to the power wielded by platforms.

Second, exit does not fully address the cost and risks of transitioning jobs. Exit relies on the ability and time of platform workers to find a better job to address dyadic market domination. This vision supposes a perfect scenario where more stable forms of work are abundant and fulfilling, making exit very difficult to achieve in times of high unemployment. For instance, it has been reported that the high unemployment rate in Spain incentivised workers to take every job opportunity available regardless of the quality, including platform work.\textsuperscript{88}

Also, exit does not consider who pays the financial cost of job transitioning. Even if platform workers have the ability, time, and resources to look for jobs, the cost of the transition and unemployment will be paid by the taxpayers of each Member State by putting pressure on labour offices to assist in finding employment or paying more in unemployment benefits.

The only feasible solution for the exit (or enhanced exit) strategy to successfully address at least dyadic market domination by platforms in the EU would be massive coordination of platform workers to leave — or threaten to leave — the platform to negotiate better work conditions. Such a degree of coordination could create enough collective power for platform workers to push for better work conditions against platforms, contesting platforms’ dyadic market domination. However, even if platform workers manage such an extraordinary degree of coordination, platforms can still take advantage of structural forms or market domination by appealing to EU competition authorities to suffocate potential anticompetitive coordination of platform workers. The only alternative for platform workers to circumvent such structural market power would be to access the Albany exemption. However, platform workers would have to meet the EU definition of worker discussed above.

2. **Workplace democracy**

Workplace democracy demands EU platform workers to have the capacity to exercise their collective voice to contest dyadic market domination by platforms through the organisation at the workplace level while also being protected from structural forms of domination such as EU competition law. However, the doubts as to whether platform workers can access the *Albany* exemption leaves platform workers without valuable tools to do so. Suppose platform workers access the *Albany* exemption, in this case workplace democracy also requires a significant degree of coordination between platform workers to exercise their collective voice at the workplace level.
Such a degree of coordination between platform workers shows how the strategy of workplace democracy demands the active participation of key stakeholders such as platform workers, which may impair its efficacy. However, there are reasons to be optimistic in the EU context. As explored in the previous chapter,⁸⁹ there is evidence that platform workers are willing to discuss and share their interests in the EU context through mechanisms of social dialogue regardless of whether they can access the *Albany* exemption.⁹⁰

### 3. Workplace constitutionalism

The strategy of workplace constitutionalism promises to tackle dyadic and structural market domination against platform workers by withdrawing some of the power of platforms. In this case, workplace constitutionalism could withdraw the power of platforms to recall EU competition law against platform workers. Workplace constitutionalism could also tame dyadic market domination of platforms against platforms by enacting centralised norms that reduce the capacity of platforms to create the conditions to consider platform workers as self-employed.

Apart from the *Albany* exemption, the EU has not yet created rules protecting platform workers’ collective voice from dyadic and structural market domination. However, as will be discussed in chapter 5, the Parliament, the Commission and other stakeholders have recently proposed initiatives to ensure access to labour rights such as collective labour rights for platform workers. Such initiatives focus on clarifying who should access labour rights (including collective labour rights) or to determine the degree of retraction of EU competition law to enable access to

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⁸⁹ See Chapter 2, S. III 7.
collective bargaining for platform workers. All these initiatives can be understood as workplace constitutional strategies.

However, workplace constitutional strategies alleviating dyadic and structural market domination against platform workers must be carefully drafted to avoid their circumvention by platforms. This critique will become more apparent in chapter 5 when discussing how the proposed initiatives contain definitional uncertainties that risk being exploited by platforms to circumvent the initiatives altogether. This scenario shows the difficulties of the strategy of workplace constitutionalism to encompass a highly heterogeneous and widespread workforce such as platform workers in the EU to protect them from dyadic and structural market domination.

4. Centralised participation at work

As discussed at the end of chapter two, centralised participation at work furthers the features of workplace constitutionalism and workplace democracy to provide a comprehensive strategy to address domination of platform workers.

Centralised participation in the context of platform work in the EU requires EU norms or judicial decisions such as the Albany exemption to provide a general framework to constrain the dyadic market power of platforms and avoid structural market domination in a similar way to workplace constitutionalism. Centralised participation at work also demands enabling platform workers’ collective voice in current and future regulation to force platforms to consider platform workers’ interests at the workplace. Centralised participation at work also needs platform workers willing to organise to force the platforms to track their interests at the workplace.

Under this strategy, the Albany exemption could be revised to ensure platform workers’ interests are considered, ensuring platform workers are not subject to EU competition laws

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91 See Chapter 2, S. IV.
when organising. Such a vision could imply revising the EU definition of worker as a constitutive element of the *Albany* exemption to include platform workers or by replacing the negative account of freedom used to build the EU definition of worker for the idea of freedom as non-domination. Including platform workers in the EU definition of worker has the benefit of shielding platform workers from structural market domination while enabling them to organise to tackle dyadic market domination by platforms.

The strategy of centralised participation at work also demands the inclusion of platform workers’ voices in the private government of the platforms to address dyadic market domination. This second part of the strategy draws lessons from workplace democracy to ensure platform workers have different degrees of voice at the workplace, for example, through the exercise of collective bargaining and strike or forms of co-government.92

To conclude, centralised participation at work is demanding but promises to provide valuable tools to address both structural and dyadic market domination against platform workers in the EU. This strategy could be achieved by considering platform workers as stakeholders in creating, revising and managing public rules while including them in the private government of platforms in the EU.

**Conclusion**

This chapter discussed how the republican idea of freedom as non-domination helps to make sense of what is problematic about the exclusion of platform workers from accessing key labour rights such as collective labour rights in the EU. The main legal problem for platform workers in the EU outlined in this chapter is that it is questionable whether they can access the EU definition

of worker, questioning their access to the Albany exemption to secure access to their collective labour rights.

This scenario creates the conditions for platforms to exercise dyadic market domination against platform workers. Also, this scenario creates the conditions for structural market domination through the operation of EU competition law when the Albany exemption does not cover platform workers. But why are platform workers being excluded from the EU definition of worker in the first place?

The analysis of the Yodel case shows how the reliance on a negative account of freedom to clarify a work relationship excludes platform workers from accessing the EU definition of worker. Such a narrow vision of freedom fails to grasp the imbalances of power between platform workers and platforms when negotiating contracting conditions and while at work.

A republican account of freedom as non-domination looks at power relationships beyond what the parties agreed when negotiating contracting conditions and while at work. Freedom as non-domination requires looking at the power imbalances between platform workers and platforms to assess whether platform workers are under dyadic and structural market domination. The idea of freedom as non-domination clarifies the problems behind platforms’ retreat from the direct management of the workforce while still creating conditions of dyadic market domination. Also, freedom as non-domination reveals how EU competition law creates structural market domination while enhancing the power of platforms to exercise dyadic market domination. The overlapping between dyadic and structural market domination is worrisome, not just because EU law constrains platform workers’ voices but also because it enhances the private power of platforms.

Also, this chapter explored how the strategies of exit, workplace constitutionalism and workplace democracy help to alleviate dyadic and structural market domination of platform workers in the EU. Upon discussing such republican strategies, this chapter argued the best
strategy to address dyadic and structural market domination against platform workers would be to further workplace constitutionalism and workplace democracy into a strategy of centralised participation at work. Centralised participation at work aims to reassess current and future public norms and the private government of platforms to secure platform workers’ access to collective labour rights to force platforms to consider their interests. Such an approach is ambitious but promises to force key stakeholders such as platforms and EU institutions to consider platform workers’ interests, diminishing dyadic and structural market domination.

The next chapter explores the implications of considering platform workers as self-employed from the point of view of EU competition law. It will become apparent the EU treats self-employed people and undertakings interchangeably. Thus, EU competition law considers platform workers deemed self-employed as undertakings subject to EU competition law. Against this background, the chapter explores whether platform workers as undertakings can form a single undertaking with the platforms to prevent the applicability of EU competition law when exercising their collective labour rights. Also, the chapter discusses whether platform workers can exercise collective labour rights despite being considered undertakings by looking at particular exemptions developed by the CJEU for some self-employed people to organise. It will become apparent it is unlikely platform workers deemed undertakings can access collective labour rights to challenge dyadic and structural market domination. In this context, the chapter also explores whether EU competition law goals and their underlying ideological construction can be adjusted to ensure access to collective labour rights for platform workers to address domination.
Chapter 4: Platform Workers Deemed Undertakings, Collective Labour Rights and EU Competition Law

Introduction

This chapter explores the implications of considering platform workers not as workers but as self-employed undertakings in EU law. Throughout this chapter, it will become clear that workers and undertakings are two separate categories and that the concept of ‘an undertaking’ has long been used interchangeably with the concept of ‘the self-employed’. As discussed in chapter 3, workers meeting the EU definition of worker are covered by the Albany exemption. On the contrary, self-employed persons as ‘undertakings’ are not protected by the Albany exemption and are thus subject to EU competition law. This chapter explores why platform workers are deemed self-employed undertakings. Also, this chapter discusses the implications of considering platform workers as self-employed undertakings in accessing their collective labour rights as a tool to address dyadic and structural market domination in the EU context.

This chapter also explores whether the role that EU competition law has in shaping platform workers’ access to collective labour rights depends on the prominence of different EU competition law goals. This chapter explains such goals and argues that the current organisation of EU competition law goals is indicative of an institutional departure from an Ordoliberal vision of EU competition law that focuses on individual economic freedom and a move towards a more Neoliberal vision that focuses on consumer welfare. This chapter explains how focusing on consumer welfare does not benefit platform workers’ access to collective labour rights. However, this chapter also explains that the other EU competition law goals also do not necessarily ensure access to collective labour rights for platform workers. Also, this chapter explores whether a rebalancing of EU competition law goals may help secure platform workers’ access to collective labour rights. The structure of this chapter will be as follows:
The first section outlines the EU definition of an undertaking and discusses how this definition departs from the EU definition of worker addressed in chapter 3. Also, this section discusses the extent to which the EU definition of an undertaking applies to platform workers.

The second section discusses whether platform workers deemed undertakings can exercise their collective labour rights without violating EU competition law. According to key case-law, EU competition law is willing to allow some self-employed deemed undertakings to exercise their collective voice. However, it will become apparent that platform workers’ goals are not aligned with those of EU competition law, impairing the exercise of their collective labour rights as a form of voice.

The third section delves into the reasons for EU competition law not to allow the collective labour rights of platform workers deemed undertakings. This section outlines the most relevant EU competition law goals and discusses whether the current organisation of EU competition law goals may help explain the exclusion of platform workers deemed undertakings from exercising their collective labour rights.

The fourth section discusses the extent to which the EU competition law goals discussed represent a Neoliberal or an Ordoliberal vision of EU economics that help explain the exclusion of collective labour rights for platform workers deemed undertakings. It is argued the primacy of a Neoliberal vision of consumer welfare represents an obstacle to securing access to the collective labour rights of platform workers. However, an Ordoliberal framework also has shortcomings. There is a need for a new vision of EU competition law goals and their underlying ideological foundations that focuses on addressing the monopsony power platforms enjoy over platform workers to respond to dyadic and structural market domination in the EU.
I. The EU definition of an undertaking

As discussed in chapter 3, excluding platform workers from the EU definition of worker leads them into the default EU competition law category of a self-employed undertaking.¹ This section explores the EU definition of an undertaking and discusses how platform workers fall into this definition. It will become apparent that the EU definition of worker might seem broad, but the EU definition of an undertaking is broader. This context has significant implications for platform workers when exercising their collective labour rights in the EU to secure their freedom from market domination.

The TFEU does not clarify what is an undertaking. However, CJEU case-law has developed a broad definition of an undertaking.² For the CJEU, an undertaking can be ‘... any entity (including individuals, legal persons such as companies and partnerships, state and public bodies) engaged in an economic activity, regardless of its legal status and the way in which it is financed’.³ The EU definition of an undertaking developed by the CJEU is also autonomous from national definitions.⁴

The EU definition of an undertaking is extensive as it covers ‘any entity’ engaged in an economic activity. In practice, this broad definition of an undertaking means entities deemed undertakings range from a single natural person engaged in a self-employed economic activity (meaning, not workers) to a conglomerate of companies forming a multinational holding selling goods and services.

The extensive coverage of the EU definition of an undertaking leads to odd results when analysing the relationships between platform workers deemed undertakings and platforms. For instance, a self-employed driver working for Uber and Uber—the platform—are both undertakings. In other words, platform workers and platforms fall under the same category of ‘undertaking’ for EU competition law purposes.

Including platform workers and platforms under the same term becomes confusing. As observed in the previous chapters, there is a substantial power difference between platform workers and platforms that, supported by an unfavourable normative structure in the EU, creates market domination by platforms against platform workers.

1. Identifying a single undertaking

Undertakings can act in markets in concertation with other undertakings and alone. This distinction is relevant as EU competition law addresses concerted practices and agreements of undertakings, not their unilateral conduct unless it amounts to an abuse of a dominant position.

So how are undertakings distinguished?

According to the CJEU, a single undertaking ‘... must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal.’ For the Commission, Article 101 TFEU ‘... is not concerned with agreements between undertakings ... if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market.’ The EU definition of an undertaking is not necessarily associated with the idea of natural or legal personality. Many persons can act together without violating EU competition law if forming an economic unit because they are seen as a single undertaking.

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7 Whish and Bailey (n 2).
The following section explores how the notion of an economic unit may help distinguish platform workers deemed undertakings from platforms.

2. An economic unit, control and decisive influence between undertakings

The CJEU has unpacked the concept of an economic unit to identify an undertaking. An economic unit consists of intangible and tangible elements (including people) that contribute to a specific economic aim on a long-term basis. Under this vision, if platform workers form an economic unit with the platforms, their collective labour rights would be shielded from EU competition law as they form a single undertaking.

However, CJEU case-law refining the meaning of an economic unit has mostly evolved around the establishment of liability of a parent company for the actions of a subsidiary. The question here is whether a parent company exercises a decisive influence over the conduct of the subsidiary to the extent the subsidiary is unable to determine its own conduct on the market. In the affirmative, the parent and the subsidiary form an economic unit and thus form a single undertaking. The meaning of decisive influence is mainly focused on the factual evidence of

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10 Jones (n 9).
power exercise by the parent company over the subsidiary. For example, by analysing the actions of managers of the parent company over the subsidiary.\textsuperscript{11}

Further analysis in the determination of an economic unit between undertakings can be observed in the area of mergers. Here, the idea of control becomes key to understanding whether two or more undertakings form a single economic unit. Two accounts of control have been identified: positive and negative. Positive control refers to the acquisition of rights in another undertaking to control their strategic decisions. Negative control relates to the ‘... rights acquired [that] allow the rights holder to block important strategic decisions to be followed by the subsidiary but not actually to decide strategic direction’.\textsuperscript{12} Negative control might be helpful to elucidate whether platform workers deemed undertakings may form an economic unit with platforms. A platform acting as a principal undertaking might block platform workers’ (acting as the subsidiary undertaking) strategic decisions at work at any time (for instance, by changing the terms and conditions of work) but not to decide on platform workers’ strategic directions such as if, when or where to work, forming an economic unit.

The ideas of decisive influence and control have not yet been used by EU institutions to identify an economic unit between platform workers deemed undertakings and platforms. Still, they have the potential to be applied. But why exactly does clarifying an economic unit between platform workers deemed undertakings and platforms become important to ensure access to collective bargaining for the former?

As outlined in the beginning of this section, the main implication of an economic unit between platform workers deemed undertakings and platforms would be that competition between

\textsuperscript{11} T-132/07 Fuji Electric System Co Ltd v Commission [2011] ECLI:EU:T:2011:344 [181]: ‘it is, as a rule, for the Commission to demonstrate that the parent company or companies actually exercised a decisive influence on the market conduct of their subsidiary, on the basis of a body of factual evidence, including, in particular, any management power exercised by the parent company or companies over their subsidiary’.

\textsuperscript{12} Jones (n 9) 311. Parenthesis added.
them becomes impossible.\textsuperscript{13} Agreements between platform workers and platforms would not be subject to EU competition law because they form a joint economic unit and thus a ‘single’ undertaking.\textsuperscript{14} An economic unit between platform workers deemed undertakings and a platform resembles more the relationship between workers and employers than a free market operation of undertakings. However, there has not been a decision from EU institutions to declare platform workers deemed undertakings may constitute a single economic unit with platforms.

3. Working people deemed undertakings

This chapter so far has attempted to provide a general outline of what is an undertaking under EU law, how two or more undertakings can be regarded as a single economic unit and discussed some implications of the declaration of an economic unit to secure access to collective labour rights for platform workers deemed undertakings. This section focuses on the conditions EU institutions consider sufficient to deem self-employed workers as undertakings, including platform workers deemed undertakings.

Liberal professions such as medics, lawyers, architects or accountants have been traditionally considered as freelancers or self-employed undertakings. In addition to liberal professions, occupations concerning small business owners such as fishermen, hairdressers, farmers, craftsmen and people running their business without employees add to the list of traditional self-employed undertakings.\textsuperscript{15}

\textsuperscript{13} Case 170/83 Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas [1984] ECR 2999 (n 5) paras 11, 24.
\textsuperscript{14} C-73/95 P Viho Europe BV v Commission of the European Communities [1996] I-05457.
The CJEU has elaborated on how the self-employed offering their services in the market are deemed undertakings. In Wouters, the Court ruled that self-employed members of the Dutch Bar are to be deemed undertakings because they offer legal services for a fee while bearing the financial risk of such endeavours in the market. Similar reasoning can be found in Pavlov, where the Court considered medical specialists as undertakings since they ‘... are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.’ Conversely, in Becu, the Court ruled that, since dock workers do not bear financial risks, they are to be deemed workers incorporated into ‘... the undertakings for which they perform dock work.’

These developments show the self-employed are deemed undertakings as the self-employed offer their services in the market as part of their economic activity and take the financial risk of such activities. If these conditions are not met, a self-employed person will not be regarded as a discrete undertaking. The Court made this point clearer when deciding on the relationship between agents and their principal: ‘Representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal’s undertaking...’

The determination of whether a self-employed person bears financial risks depends on the analysis of each case and must consider ‘... the real economic situation rather than the legal categorisation of the contractual relationship ...’ Thus, self-employed are deemed discrete

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17 ibid 48–49.  
19 ibid 76.  
21 ibid 26.  
23 C-279/06 CEPSA v LV Tobar e Hijos SL [2008] ECR I-6681 [36].
undertakings if they do not form an economic unit with another undertaking. On the contrary, the self-employed will no longer be regarded as a discrete undertaking when forming an economic unit with another undertaking.

Identifying self-employed persons as undertakings by allocating economic and financial risks creates problems for platform workers. As discussed in chapter 1, one of the key ways platforms exercise dyadic market domination against platform workers is by displacing the risks of the service from the platform to the platform worker through carefully crafted contracts.24

4. Comparing workers and self-employed undertakings under EU law

At this point, two distinguishing elements between the EU definition of worker and the EU definition of an undertaking for the self-employed can be identified.

The first distinguishing element lies in the extension of the economic activity. When the economic activities of a self-employed person are marginal or ancillary, the EU definition of worker does not apply.25 On the contrary, marginal or ancillary economic activities also fit the EU definition of an undertaking. This feature shows the EU definition of an undertaking is broader than the EU definition of worker.

Second, determining who bears the commercial risks of economic activities becomes crucial to elucidate whether an undertaking forms an economic unit with another undertaking or stays as a discrete undertaking.26 Such a distinction is also relevant to the EU definition of worker. A worker does not bear the economic risks of the employer,27 and if it does, this person is probably a self-employed undertaking, not a worker. Now, since it has become standard for platforms to

24 See Chapter 1, S. IV.
25 See Chapter 3, S II 1.
27 See Chapter 3, S II 1.
displace economic and financial risks to platform workers, it seems most likely platform workers will qualify as self-employed undertakings subject to EU competition law.

In this context, the breadth of the EU definition of an undertaking sustains the claim of labour scholars that protecting workers from EU competition law under the Albany exemption represents ‘... an implicit restatement that EU competition law was to be regarded as the general rule.’ Indeed, the EU definition of an undertaking operates as the default alternative if the EU definition of worker does not apply. Now, since EU institutions equalise self-employed with undertakings, platform workers not meeting the EU definition of worker would be deemed self-employed undertakings.

As discussed concerning the Yodel case, using the idea of freedom as non-domination instead of a negative account of freedom as non-interference platform workers may access the EU definition of worker and thus the Albany exemption, diminishing domination against platform workers. However, the idea of freedom as non-domination also calls to consider the domination of working people not meeting the EU definition of worker. More on the application of the idea of freedom as non-domination beyond accessing employment status to ensure access to collective labour rights will be discussed in chapter 5.

Having established how platform workers are deemed undertakings under EU law, the second section of this chapter explores whether platform workers, despite being deemed undertakings, can exercise their collective labour rights.

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30 See Chapter 3, S II 1.
31 See Chapter 3, S II 2.
II. Can platform workers deemed undertakings organise without violating EU competition law?

In most CJEU cases concerning EU competition law, self-employed people have been prevented from organising collectively to set prices. In *Bureau national interprofessionnel du cognac v Guy Clair* the Court decided that agreements made by the National Inter-Trade Board for Cognac setting minimum selling prices of products were in breach of EU competition law. The Board was an undertaking composed of — among others — workers in cognac cellars and vineyards. The Court noted price-fixing agreements were in breach of EU competition law, even if such agreements happened inside an organisation governed by public law. The Court added there was no need to look at the ‘actual effects of an agreement’ because the agreements had the object to ‘restrict, prevent or distort competition’.

In another case, the CJEU ruled the Italian National Council of Custom Agents (CNSD) was in breach of EU competition law when setting minimum and maximum tariffs that custom agents could apply for their services in Italy. The Court dismissed the Italian government’s claim that undertakings governed by public law and composed of ‘independent workers’ should be exempted from the application of EU competition law. Instead, the Court noted that custom agents perform an economic activity and assume the financial risks of their activities.

Years later, the CJEU ruled agreements of undertakings to apply an entry price scale for culled cows in the French market due to the bovine crisis (caused by the so-called ‘mad cow disease’)

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32 *C-123/83 Bureau national interprofessionnel du cognac v Guy Clair* [1985] 00391.
33 ibid 20,22.
34 ibid.
35 *C-35/96 Commission of the European Communities v Italian Republic* [1998] I-03851 (n 26).
36 ibid 34–35.
37 ibid 37.
was in breach of EU competition law.\textsuperscript{38} The agreements in breach concerned 300 cooperatives of self-employed meat and farming producers, including four federations of trade unions governed by French law.

In another case, the Commission concluded that the Belgian Architects Association was in breach of EU competition law rules when designing a scale of recommended minimum fees for the services provided by their associates. For the Commission, the recommendation of minimum prices amounts to price fixing, reducing architects’ competition through price coordination in an unjustified way. The Commission’s vision is that fees should reflect an architect’s skills, efficiency, costs and perhaps reputation, not solely the value of the works. In any case, an architect should be independent in setting their fees.\textsuperscript{39}

These decisions show a trajectory in which self-employed undertakings are forbidden to exercise their collective voice to set (or even recommend) fees for their work. This scenario has potentially negative implications for platform workers deemed undertakings when organising to voice, or attempt to voice, traditional collective labour concerns such as setting prices for their services. EU institutions have not yet dealt with collective attempts to fix wages or other collective labour measures by platform workers deemed undertakings. However, the scenario described above exhibits a potential chilling effect for platform workers deemed undertakings to exercise their collective voice.

This context also shows the importance of the CJEU and the Commission in setting the boundaries between work and self-employment, thus between EU labour and competition law. The strength and expansive applicability of EU competition law by the CJEU and the Commission over the collective voice of solo self-employed deemed undertakings are also visible from a

\textsuperscript{38} Joined cases C-101/07 P and C-110/07 P Coop de France bétail et viande and Fédération nationale des syndicats d’exploitants agricoles (FNSEA) and Others v Commission of the European Communities [2008] I-10193.

political perspective. For instance, Mario Monti (former EU Competition Commissioner) declared that using EU competition law instruments ‘... is always possible where necessary’. Monti also declared that if an EU Member State restrains competition without justification, the Commission has the power to quash such restriction of competition. Under this vision, the primary aim of EU competition policies should not be other than ‘... to improve the conditions of competition, while duly safeguarding the interests of consumers’.

1. Situations where self-employed deemed undertakings can organise without violating EU competition law

However, in a few cases, the CJEU accepted that self-employed deemed undertakings could organise without violating EU competition law.

In Wouters, the CJEU analysed a decision by the Dutch Bar Association (Dutch Bar), an undertaking composed primarily of lawyers and governed by public law. The Dutch Bar prohibited multidisciplinary partnerships between lawyers and accountants based on Article 2 of the ‘Cooperation Regulation’, a self-regulation statute aiming to protect the ‘... free and independent exercise of their profession ...’. The CJEU ruled lawyers of the Dutch Bar are self-employed undertakings because they offer legal services as part of their economic activity. The Dutch Bar is also an undertaking composed of several self-employed undertakings (lawyers).

Against this background, the Court decided the Cooperation Regulation may harm EU competition as it is ‘... liable to limit production and technical development within the meaning of Article 85(1)(b) [now Article 101 (1)(b)] of the Treaty’. However, the CJEU also recognised

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41 ibid.
42 ibid 14.
44 ibid.
45 ibid 49.
46 ibid 90.
not every agreement between undertakings necessarily breaches EU competition law. In this case, the CJEU also considered whether the Cooperation Regulation had the capacity to ‘... ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience’. The CJEU concluded the Cooperation Regulation restricts competition in the EU, but it was necessary to secure the practice of the legal profession in the Netherlands.

In Arduino, the CJEU had to decide whether an Italian Royal-Decree providing criteria for determining maximum and minimum fees payable to lawyers of the Italian Bar Association (Italian Bar) was in breach of EU competition law. The fee setting was part of a legal process where members of the Italian Bar and the Italian Ministry of Justice were involved. In case of a fee dispute, the Italian judicial system was called to decide and could even grant exemptions to the minimum and maximum fees to be charged for their services by members of the Italian Bar.

In this case, the CJEU concluded that EU competition law does not preclude the setting of maximum and minimum tariffs for the services of members of the Italian Bar, provided such system ‘... forms part of a procedure as that laid down in the Italian legislation’.

This section does not aim to show a trajectory or set general criteria by which the CJEU enabled some self-employed undertakings to exercise their collective voice without violating EU competition law. As discussed elsewhere, on many occasions, CJEU case-law trajectories are not very clear and, at times, contradictory. Instead, this section aims to show EU institutions are willing to accept — although on rare occasions — that associations of self-employed

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47 ibid 97.
48 ibid 110.
50 ibid 1–9.
51 ibid 44.
undertakings may pursue objectives that run against EU competition law goals, provided there are other valuable objectives worth protecting from the operation of EU competition law as in these cases. The rationale of this outcome is similar to *Albany* and other case law\(^{53}\) where the Court accepts EU competition law objectives can be restricted to secure other valuable objectives.

However, these cases also show the reasons used by the CJEU to exempt some self-employed from the operation of EU competition law are not aligned with ensuring access to collective labour rights for people deemed self-employed undertakings. In these cases, the CJEU considers reasons of public service to grant exemptions from the operation of EU competition law. In republican terms, the CJEU does not examine whether the self-employed have the tools to challenge the potential arbitrary power of the employers. This is a problematic scenario to ensure access to collective labour rights for platform workers based on the idea of freedom as non-domination.

Could platform workers deemed undertakings exercise their collective voice to counter market domination in the EU without violating EU competition law? The following section considers one way to answer this question by examining the *FNV Kunsten*\(^{54}\) case.

### 2. FNV Kunsten

As outlined at the beginning of this thesis,\(^{55}\) *FNV Kunsten* challenged NMa’s view that the self-employed substitute musicians in the Netherlands cannot be included in the collective agreements between management and labour by appealing to The Hague Court of Appeal. *FNV Kunsten* asked The Hague Court of Appeal whether Dutch competition law applies to the

\(^{53}\) For instance, see *C-519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities [2006]* I-06991.

\(^{54}\) *C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden [2014]* ECLI:EU:C:2014:2411 (n 9).

\(^{55}\) See the introductory chapter of this thesis.
collective agreements between workers and self-employed performing the same activity for an employer. In this context, the Dutch Court of Appeal raised two questions to the CJEU for a preliminary ruling.\footnote{56}{The two referred questions were: '(1) Must the competition rules of EU law be interpreted as meaning that a provision in a collective labour agreement concluded between associations of employers and associations of employees, which provides that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the employees who come within the scope of that collective labour agreement must receive a specific minimum fee, falls outside the scope of Article 101 TFEU, specifically on the ground that that provision occurs in a collective labour agreement? (2) If the answer to the first question is in the negative, does that provision then fall outside the scope of Article 101 TFEU in the case where that provision is (also) intended to improve the working conditions of the employees who come within the scope of the collective labour agreement, and is it also relevant in that regard whether those working conditions are thereby improved directly or only indirectly?'}

The CJEU in \textit{FNV Kunsten} had to decide whether Dutch law establishing the right for self-employed undertakings to join trade unions to advance their labour interests was in breach of EU competition law. As outlined in the introduction of this thesis, during 2006-7, the Dutch trade unions representing employed and self-employed orchestra musicians \textit{FNV Kunsten} and \textit{NTB} ‘\textit{Nederlandse toonkunstenaarsbond}’ concluded a collective agreement with the employers’ association \textit{Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten}. The parties agreed that the employers could hire replacing self-employed musicians provided they receive the same payment as employed musicians plus a sixteen per cent increase. In 2007, the NMa declared the collective agreement in breach of Dutch and EU competition law. Upon appeal by \textit{FNV Kunsten}, the CJEU was asked by a Dutch court to clarify — among other things — whether collective agreements including self-employed musicians performing the same job as employed musicians fell outside EU competition law.

In this case, the CJEU considered the substitute musicians as self-employed undertakings because they offered services in a market and performed their activities as independent
contractors to the principal. Similar to the NMa, the CJEU concluded that trade unions acting together with self-employed undertakings operate as an association of undertakings between the trade union, its members, and the self-employed. Since there is no EU law protecting the social dialogue between self-employed undertakings and employers, the collective agreement including self-employed undertakings falls within the scope of EU competition law.

The CJEU also acknowledged the substitute musicians deemed self-employed undertakings in this case might be better understood as false self-employed. False self-employed perform the same or comparable tasks as employed workers and do not act independently of the principal undertaking. For the CJEU, false self-employed ‘... do not bear any of the financial or commercial risks ... and operates as an auxiliary within the principal’s undertaking’, a situation that was up to the Dutch courts to clarify. The main implication of this argument is that the false self-employed lose their status of undertakings and are thus not subject to EU competition law.

The conclusions of the CJEU in the FNV Kunsten case are disappointing for ensuring access to collective labour rights for platform workers to address domination. Similar to the Yodel case, the CJEU still relies on a negative account of freedom to identify a working relationship, neglecting the potential power of the employer arbitrarily to interfere in the self-employed musicians’ choices. The problems of using a negative account of freedom to build the definition of false self-employed for platform workers’ access to collective labour rights are clear. Platform workers usually do bear financial and commercial risks because platforms impose these and other work terms on them. Thus, following the definition of a self-employed, platform workers would be truly self-employed, unable to access the EU definition of worker and therefore not exempted from the operation of EU competition law. As discussed in the following section, the

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57 ibid 27.
58 ibid 28.
59 ibid 29–30.
60 ibid 33, 42.
61 ibid 31–32.
idea of freedom as non-domination departs from this view as it requires considering false self-employed those workers who do not have the tools to contest the arbitrary interference of employers.

Against this background, the current interpretation of the extension of EU competition law and the use of a negative account of freedom by EU institutions do not enable platform workers deemed undertakings to organise to exercise their collective labour rights. The binary divide between workers and self-employed plays an important role in defining who can exercise their collective labour rights under EU law. If platform workers are deemed workers, they enjoy access to their collective labour rights. If platform workers are deemed self-employed undertakings, they cannot formally exercise their collective labour rights as they are subject to EU competition law. The following section discusses the potential of the republican idea of freedom as non-domination to overcome the binary divide workers/self-employed undertakings, ensuring access to collective labour rights for platform workers.

3. Beyond the binary divide: focus on freedom

When applying the FNV Kunsten judgment back in the Netherlands, the Dutch state argued self-employed musicians were ‘truly’ self-employed because they had the freedom to choose and accept assignments. The Hague Court of Appeal replied that self-employed musicians certainly had the freedom to reject assigned tasks. However, it was also conceivable that, after rejecting tasks, self-employed musicians will not be hired for future gigs. Thus, for the Dutch court, in this case ‘real freedom … does not exist.’ A vision much closer to the idea of freedom as non-domination than to a negative account of freedom.

The claim that freedom of choice is not an absolute concept should not be controversial for labour scholars. Indeed, labour law is built on the protection of workers by restricting the choices

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62 FNV Kunsten Informatie en Media v The State of the Netherlands [2015] Hague Court Appeal, 343076/HA ZA 09-2395. 2.8
of workers and employers. As in the *Yodel* and *FNV Kunsten* cases, the exclusion of platform workers from accessing collective labour rights depend on which idea of freedom is used.

From the case law and decisions by EU institutions discussed in this chapter, the binary divide between workers and self-employed is constructed using a negative account of freedom. Such use of a negative account of freedom is problematic for ensuring access to collective labour rights for platform workers. In theory, platform workers are free to agree with the platforms the conditions that help determine their employment status. In other words, platform workers would be free to choose to be deemed as workers or self-employed undertakings when signing a contract for the delivery of services. This claim may be valid in some few cases. After all, some platform workers may have more relative market power than others vis-à-vis platforms, for example, if owning an expensive asset. However, for most platform workers, a negative account of freedom fails to show that the power of platforms arbitrarily to interfere in platform workers’ choices at any time creates dyadic market power, which is in turn supported by structural market domination through the operation of EU competition law. Platform workers accept terms and conditions not necessarily because they want to but because they know they have no credible legal recourse to contest such power.

To what extent has the design of EU competition law contributed to the current borders of access to collective labour rights for platform workers? The following sections aim to answer this question by examining EU competition law goals and discussing the role of the CJEU and the Commission in its shaping vis-à-vis labour law.

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III. EU Competition law goals and its organisation to enable access to collective labour rights for platform workers deemed self-employed undertakings

Should access to collective labour rights for platform workers deemed undertakings be an issue for EU competition law to tackle? To begin answering this question, the third section of this chapter unpacks the normative justifications underlying EU competition law by considering its goals.

The primary normative foundations of EU competition law can be found in the TEU and TFEU. Apart from the most immediate objective of securing a competitive single internal market for the sustainable development of the EU, EU competition law must also consider other objectives of both the TEU and TFEU, including the respect for democracy, human rights, fundamental freedoms and social rights at work. The Commission and the CJEU have played a key role in shaping EU competition policy and law by refining and sorting these broad normative justifications within specific EU competition law goals.

This section examines three EU competition law goals: consumer welfare, the protection of the competition structure and fairness, and discusses how the Commission and the CJEU have shaped them. Also, this section examines the impact the interpretation of these goals has in securing the collective labour rights of platform workers deemed undertakings.

1. Consumer welfare

The first and most prominent EU competition law goal is consumer welfare. This goal requires EU competition law to secure the interests of consumers when buying goods or services. The CJEU made this point clear in Österreichische Postsparkasse:65

64 See Articles 2 and 3 TEU.
... the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers ... Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services. 66

A similar vision of consumer welfare can be seen in the Commission’s guidelines on the application of Article 81(3) [now Article 101(3) TFEU]. For the Commission, the objective of EU competition law ‘... is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’ 67 The Commission delves into the analysis of consumer welfare in the Commission’s guidelines on the application of Article 82 [now Article 102 TFEU], which regulate abuses of dominant position. The Commission holds that Article 102 TFEU aims to prevent ‘... an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting the quality or reducing consumer choice’. 68 This mainstream interpretation of consumer welfare places consumers 69 as the primary beneficiaries of EU competition law and is closely aligned with prices, quality, choice of products and services and attaining efficiency. 70

This understanding of consumer welfare becomes problematic for securing access to collective labour rights for platform workers deemed undertakings. It seems complicated to conceive of

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66 ibid 115.
69 The Commission has interpreted the concept of consumer broadly. In this regard, for the European Commission, Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97 (n 67) para 84. Consumer ‘... encompasses all direct and indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers ...’
an organisation of platform workers deemed undertakings capable of demonstrating that exercising their collective labour rights can provide better prices, quality of products, more options to consumers or more efficiency to avoid EU competition law disciplinary powers.

Consumer welfare also remains silent about situations of monopsony in labour markets (where there are one or few platforms buying services from many workers)\(^71\) provided that monopsony does not harm consumers. More about monopsony and its importance to understanding the scope of EU competition law will be discussed at the end of this chapter.\(^72\)

2. Protection of the competition structure

Another EU competition law goal is the protection of the competition structure. In *British Airways PLC*,\(^73\) the CJEU held that Article 102 TFEU ‘... is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure ...’\(^74\) The CJEU went further on *GlaxoSmithKline Services Unlimited*,\(^75\) holding that the protection of the competition structure is not necessarily connected with consumer welfare. In this regard, Article 101 TFEU:

... aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price ... \(^76\)

\(^71\) See Introduction.

\(^72\) See this chapter in S. IV.

\(^73\) C-95/04 P British Airways plc v Commission of the European Communities [2007] I-02331.

\(^74\) ibid 106. See also 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission [1973] 00495 para 26. See also C-8/08 T-Mobile Netherlands and Others [2009] I-04529 [38].

\(^75\) C-501/06 P GlaxoSmithKline Services Unlimited v Commission and Others [2009] I-09291.

\(^76\) ibid 63.
These and other cases\textsuperscript{77} show that protecting an effective market structure by preventing competition from ‘... being distorted to the detriment of the public interest ... ensuring the well-being of the European Union’\textsuperscript{78} is another EU competition law goal.

It seems challenging to align the EU competition goal of protecting an effective market structure with securing access to collective labour rights for platform workers deemed undertakings. For instance, platform workers deemed undertakings may collectively push to raise the price for their services, establish market quotas or agree on another condition with the potential to disrupt the effective market structure, which may also create harmful economic effects on consumers. However, protecting the competition structure may also help challenge the monopsonist behaviour exhibited by some platforms.\textsuperscript{79} EU competition law may help break down powerful platforms to protect an effective competition structure, helping alleviate dyadic and structural market domination against platform workers deemed undertakings.

3. Fairness

Fairness is a more abstract EU competition law goal than consumer welfare and the protection of the competition structure as fairness aims to establish a sort of standard of justice in the EU market. In the Annual Competition Report 2016, Margrethe Vestager, Commissioner for Competition at that time, held that ‘... competition policy contributes to a fairer society, where all economic players — large and small — abide by the same rules ...’\textsuperscript{80} and have the same chance to compete.\textsuperscript{81} Also, Johannes Laitenberger, former Director-General for Competition, positioned


\textsuperscript{78} C-52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-00527 [22].

\textsuperscript{79} International Labour Organization (n 28).


\textsuperscript{81} ibid.
fairness as a key ingredient for EU competition authorities to maintain confidence, credibility and trust of ‘... courts, counterparts, businesses and consumers ...’

The idea of fairness in EU competition law can be found in Articles 101 (3) and 102 TFEU. Article 101(3) aims to secure a fair share to compensate consumers for a violation of competition law.

When interpreting Article 101(3), for the Commission, fairness implies that the anticompetitive behaviour of an undertaking is permitted if such anticompetitive behaviour leads to ‘... efficiencies [that] lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.’ Under this vision, if an agreement of undertakings (such as platform workers deemed self-employed undertakings) restricts competition, consumers must be ‘... fully compensated through increased quality or other benefits.’ This vision of fairness is closely linked with the EU competition goal of consumer welfare.

Fairness is also present under Article 102 TFEU when regulating abuses of dominant position. Abuses of dominant position occur when there is an unfair imposition of terms and prices of selling and buying products and services from one undertaking to another undertaking or consumers due to an imbalance of market power. This vision of fairness focuses on ensuring

83 Article 101(3) establishes the infractions under Article 101(1) does not apply if the anticompetitive behaviour ‘... contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit ...’
85 ibid 86. Parenthesis added
86 Article 102 TFEU: ‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ... (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;’
equal opportunities for other undertakings to compete in markets, and in doing so it may benefit consumers.\textsuperscript{87} This vision of fairness can be seen in the British Airways\textsuperscript{88} case. For the CJEU in this case, Article 102 TFEU:

\ldots refers to conduct which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\textsuperscript{89}

Also, in United Brands,\textsuperscript{90} the CJEU argued that a dominating undertaking is allowed to protect its own commercial interests, but such behaviour cannot affect the independence of small and medium undertakings in their commercial relations with the dominant undertaking.\textsuperscript{91}

A similar vision has been argued for by the Commission in the DSD\textsuperscript{92} case: \ldots small competitors should not be the victims of behaviour by a dominant firm, facilitated by that firm’s market power, which is designed to exclude those competitors from the market or which has such exclusionary effect.\textsuperscript{93}

The reasoning behind the interpretation of fairness under Article 102 TFEU may help secure access to collective labour rights for platform workers deemed undertakings to challenge dyadic and structural market domination in two ways.

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\textsuperscript{87} Laitenberger (n 82).
\textsuperscript{88} C-95/04 P British Airways plc v Commission of the European Communities [2007] I-02331 (n 73).
\textsuperscript{89} ibid 66.
\textsuperscript{91} ibid 192–194.
\textsuperscript{93} ibid 114.
First, fairness can serve as an EU competition law standard to assess the imbalances of power in the relationships between platforms and platform workers deemed undertakings. By exercising dyadic market domination, platforms impose terms and conditions, prices and hold the grip on the daily management of the workforce. Under this vision of fairness, these practices can be understood as unfair, justifying access to collective labour rights for platform workers.

Second, fairness is broader than previous EU competition law goals as it aims to ‘... prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.’ This broad vision of fairness shows that the consumer welfare standard is insufficient to assess the relationship between platform workers deemed undertakings and platforms. The unequal relationships between platform workers and platforms should be addressed as they hold the potential to threaten the foundations of democracy and the ‘confidence in the system’.

However, fairness does not necessarily lead to securing access to collective labour rights for platform workers deemed undertakings. Fairness calls for individual intervention by the Commission or the CJEU to dismantle the dominating position of platforms, not to encourage less powerful undertakings (such as platform workers deemed undertakings) to organise to resist domination.

So far, this section has discussed whether EU competition law goals may help secure access to collective labour rights for platform workers deemed undertakings. A preliminary answer would be that, despite the protection of the competition structure and developments relating to attention to ‘fairness’, there are powerful ideological and methodological reasons behind the construction of EU competition law that make difficult to find a clear justification to ensure

95 Laitenberger (n 82).
access to collective labour rights of platform workers deemed undertakings. These reasons do not help free platform workers deemed undertakings from dyadic and structural market domination. On the contrary, they provide justifications for dominating platform workers by prioritising consumer welfare, the protection of competition structure and fairness over ensuring freedom from domination by addressing inequalities of power in the labour market.

The following section aims to understand this outcome by exploring how EU competition law goals can be explained under two major economic traditions: Ordoliberalism and Neoliberalism. Both economic traditions influence the construction of EU competition policy.

IV. Ordoliberalism, Neoliberalism, Republicanism and access to collective labour rights for platform workers deemed undertakings

This section analyses whether the primacy of a Neoliberal rationale in the construction of consumer welfare over more Ordoliberal reasons for building EU competition law, visible in the goals of protection of the competition structure or fairness, may help explain the exclusion of platform workers deemed undertakings from accessing collective labour rights.

1. Ordoliberalism and individual economic freedom

Ordoliberalism appeared in the aftermath of the Second World War as a comprehensive economic theory. In the area of competition law, Ordoliberalism emerged to avoid the turn of highly concentrated economic power into political power, which was viewed as one of the causes of the emergence of the Nazi regime. For Ordoliberals, the protection of individual economic freedom of people in markets becomes crucial to avoid the concentration of private

market power and protect civil liberties, securing democracy in the long run. Ordoliberalism places EU competition law in a broader socio-political perspective to limit private power ‘... in the interest of a fair and political social order’. 98

Traces of Ordoliberalism can be seen in recent EU competition law decisions. For instance, in the British Airways case, 99 the CJEU held that anticompetitive behaviour by powerful undertakings should be punished because they have ‘... the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’. 100 Further, in France v Commission, 101 the CJEU held that ‘... a system of undistorted competition ... can be guaranteed only if equality of opportunity is secured as between the various economic operators.’ 102 For the CJEU, the exercise of market power at will by controlling access to a market and its conditions by powerful undertakings attempts against EU competition law.

Also, in Microsoft v Commission, 103 the CJEU acknowledged that Article 102 TFEU ‘... covers not only practices which may prejudice consumers directly but also those which inherently prejudice them by impairing an effective competitive structure.’ 104 Further CJEU case-law and Commissions’ decisions have found the restriction of opportunities for competitors by powerful undertakings represents a breach of EU competition law. 105

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99 C-95/04 P British Airways plc v Commission of the European Communities [2007] I-02331 (n 73).
100 ibid 66.
102 ibid 51–52.
104 ibid 664.
105 Gormsen (n 98) 339.
Ordoliberalism helps addressing some of the problems of domination platform workers face when selling their work to monopsonist platform labour buyers. Ordoliberalism may justify the atomisation of platforms to diminish some of their market power to diminish dyadic market domination. However, as discussed concerning the EU competition law goal of fairness, Ordoliberalism does not necessarily ensure access to collective labour rights for platform workers deemed undertakings.

2. Neoliberalism

Neoliberalism is another comprehensive economic theory. In relation to competition law, the central concern of Neoliberals is how to achieve and sustain the best possible prices, quality and options of goods and services for consumers while achieving more market efficiency. Consumer welfare is thus central to the Neoliberal vision of competition law and is ‘... specifically concerned with gains to consumers as opposed to society at large ...’ For Neoliberals, protecting the Ordoliberal idea of individual economic freedom may harm consumer welfare as it may lead to shield inefficient undertakings.

Neoliberals support the idea that consumer welfare should prevail among other goals and become the standard to assess anticompetitive behaviours. The prevalence of Neoliberal ideas has placed consumer welfare as the central standard under EU competition policy.

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106 See this Chapter in S. III 3.
108 Whish and Bailey (n 2) 4.
leaving Ordoliberal ideas of individual market freedom on the backseat. Using the words of Philip Lowe, former Directorate-General for Competition, back in 2007:

Ladies and gentlemen, my overall message is short and simple. Yes, consumer welfare and efficiency are the new guiding principles of EU competition policy. Whilst the competitive process is important as an instrument, and whilst in many instances the distortion of this process leads to consumer harm, its protection is not an aim in itself. The ultimate aim is the protection of consumer welfare, as an outcome of the competitive process.\textsuperscript{112}

Despite the CJEU having not been explicit in recognising the primacy of the EU competition law goal of consumer welfare over other EU competition law goals, overall, the modern construction of the EU competition policy has been more concerned with securing consumer welfare than with protecting Ordoliberal ideas of individual market freedom.\textsuperscript{113} The following section discusses how a vision of EU competition law goals focused on consumer welfare has implications for ensuring access to collective labour rights for platform workers when deemed undertakings.

3. Would a reformulation of EU competition law goals enable access to collective labour rights for platform workers deemed undertakings?

As it stands, EU competition law prohibits platform workers deemed self-employed undertakings from accessing collective labour rights because this is considered to harm consumer welfare.\textsuperscript{114} This vision has long been assumed to be correct in the labour market of


\textsuperscript{113} Whish and Bailey (n 2) 700.

liberal professionals and other traditionally considered self-employed jobs.\textsuperscript{115} EU competition law assumes self-employed workers have more bargaining power to set prices and more favourable conditions for their labour than non-qualified workers.\textsuperscript{116}

Under this vision, self-employed workers such as platform workers deemed self-employed undertakings would have more power than employed workers to collectively alter the normal functioning of markets, potentially harming consumers. In other words, labour law emerged to — among other things — shield workers with low bargaining power from the operation of competition law. Labour law enables workers to tackle monopsonies of labour buyers who hold market power as they can exercise dyadic market domination by controlling the price and other key work conditions.\textsuperscript{117}

This context explains why the binary divide between workers and self-employed is key to ensure access to collective labour rights for platform workers deemed self-employed undertakings. Workers are shielded from the operation of EU competition law because it is assumed they are subjected to monopsony. The self-employed are undertakings because it is believed they are not subject to monopsony.\textsuperscript{118} Workers seem unlikely to harm consumer welfare significantly and are thus shielded from the operation of EU competition law, whereas the self-employed seem more likely to do so.

But what happens when platform workers deemed undertakings are subjected to monopsony power? As reported,\textsuperscript{119} a few platforms maintain labour buying power over a large pool of


\textsuperscript{118} Posner (n 115) 158.

platform workers willing to work. So why should the collective labour rights of platform workers deemed undertakings be subject to competition law if there is a monopsony? Provided platform workers work for monopsonistic platforms, cannot influence the terms of the labour market or set up other key working conditions because they lack bargaining power, they should enjoy access to collective labour rights.120

These developments show EU competition law is poorly equipped to ensure access to collective labour rights for platform workers deemed undertakings because the primacy of the consumer welfare obscures monopsony concerns. In other words, under a Neoliberal paradigm of EU competition law where consumer welfare takes the front seat, monopsony operating with respect to platform workers is not an EU competition law problem. The alternative for platform workers deemed undertakings, if they wish to organise and thereby to exercise their collective labour rights, would be to prove that the monopsony of platforms harms consumers and that the exercise of their collective labour rights does not. Alternatively, platform workers may prove the exercise of their collective labour rights is unlikely to harm consumers in the same way as workers and thus should be shielded from the operation of EU competition law.

Also, even if considering the EU competition law goals protecting the competition structure and fairness on an equal footing to consumer welfare, EU competition law fails to secure the collective labour rights of platform workers deemed undertakings for the reasons outlined above121 as dispersing platforms’ market power does not directly secure platform workers’ access to collective labour rights.

As it stands, EU competition law seems unable to justify access to the collective labour rights of platform workers deemed undertakings. EU competition law is built over objectives that do not match the idea of freedom as non-domination. The EU competition law goals of consumer


121 See this Chapter in S. III 2-3.
welfare and the protection of the market structure do not focus on the arbitrary power of platforms over platform workers, leading to structural and dyadic market domination by denying access to collective labour rights for platform workers deemed undertakings. On the other hand, a focus on fairness, and market inequalities, opens the door to addressing the arbitrary power of platforms. However, fairness does not concern the provision of tools for platform workers to force platforms to consider their interests. Fairness concerns more about the size of platforms than providing access to collective labour rights for platform workers deemed undertakings to challenge domination.

There is a need for EU competition law goals to incorporate the idea of freedom as non-domination in their justifications. For instance, consumer welfare could also mean providing tools for the same consumers who happen to be self-employed to challenge the power of the employer. Also, the protection of the competition structure and fairness could mean providing platform workers with tools to challenge the power of platforms to ensure the competing structure in this labour market by distributing market power. Alternatively, freedom as non-domination could be an EU competition law goal. All these options would justify access to collective labour rights for platform workers as a valuable tool to ensure EU competition law goals, challenging dyadic and structural market domination.

**Conclusion**

This chapter has explored the impact of considering platform workers as self-employed undertakings (thus, not workers) to access collective labour rights. Through examining what is an undertaking, it became clear the EU definition of an undertaking is broader than the EU definition of a worker. The main implication of having a broader EU definition of an undertaking for platform workers is that platform workers not meeting the EU definition of worker are deemed self-employed, falling by default into the EU definition of an undertaking.
If platform workers are not deemed workers but self-employed undertakings, it must be clarified how platform workers are considered a single undertaking. Identifying a self-employed platform worker as a single undertaking is important. If platform workers are not deemed an independent undertaking, they will form a single economic unit with the main undertaking, such as the hiring platform. This unity of undertakings makes competition between them impossible and thus not subject to EU competition law. This context shows the potential for platform workers to exercise their collective labour rights if forming a single undertaking with a platform. However, this possibility has not been explored by EU institutions.

Another question was whether platform workers deemed as single undertakings could access to collective labour rights without violating EU competition law. Apart from a few exceptions, the CJEU and the Commission are reluctant to enable self-employed undertakings to exercise their collective labour rights. Also, through the analysis of the FNV Kunsten case, it became clear platform workers deemed self-employed undertakings cannot access collective labour rights without violating EU competition law unless deemed false self-employed.

This chapter also examined whether the incapacity of platform workers deemed self-employed undertakings to access collective labour rights should concern EU competition law. Through examining the EU competition law goals and its ideological justifications, it became clear that EU competition law is not prepared to enable platform workers deemed self-employed undertakings to access their collective labour rights. This analysis also made clear why the binary divide between workers and self-employed becomes so central to the relationship between EU competition law and labour law. This chapter also briefly explored what the idea of freedom as non-domination can do in this context to ensure access to collective labour rights for platform workers. The following chapter discusses recent initiatives by EU institutions and key stakeholders to ensure access to collective labour rights for platform workers, particularly the right to collective bargaining. It explores how reforms based on clarifying who should access
labour rights or by retracting the applicability of EU competition law may ensure access to collective labour rights such as collective bargaining. It will become apparent the initiatives have different degrees of success in addressing dyadic and structural market domination against platform workers by ensuring access to collective labour rights for platform workers. It will also become clear the emphasis on the inequality of bargaining power to retract EU competition law is the most powerful way to address dyadic and structural market domination against platform workers in the EU.
Chapter 5: EU Initiatives to Enable Access to Collective Labour Rights for Platform Workers to Prevent Market Domination

Introduction

This chapter examines the initiatives taken by the Commission, the Parliament and key stakeholders to enable access to collective labour rights such as collective bargaining for platform workers to prevent market domination. This chapter argues that these initiatives aim to rebalance access to collective labour rights such as collective bargaining for platform workers or the solo self-employed (who also include platform workers) with the objectives of EU competition law in different ways and to different degrees. Such initiatives can be categorised into two groups: First, a group of initiatives that focus on clarifying who should be covered by labour rights, including collective labour rights. Second, a group of initiatives that focus on limiting the ambit of EU competition law so that it does not prevent certain groups of the self-employed, such as some platform workers, from accessing and exercising their collective labour rights. This chapter explores how these initiatives can be understood in terms of republican strategies to alleviate market domination against platform workers. The structure of the chapter will be as follows:

The first section examines the initiatives that focus on clarifying who should be covered by labour rights. This section explains how these initiatives are centred on drawing the boundaries of who should be covered by labour rights and discusses whether these initiatives help advance platform workers' freedom from market domination.

1 The arguments presented in this chapter will also appear in Ricardo Buendia, ‘Examining Recent Initiatives to Ensure Labour Rights for Platform Workers in the European Union Using a Republican Approach of Freedom as non-Domination’ (2022) Transfer 4 [forthcoming]
This section begins by outlining the Commission consultation process on 'Inception Impact Assessment Collective bargaining agreements for self-employed — scope of application of EU competition rules' (IIA) launched on 30 June 2020. This section discusses how a piece of feedback submitted to the IIA provided by the European Trade Union Confederation, ETUC (First Feedback) connects to the initiatives that focus on clarifying who should be covered by labour rights.

This section also outlines the Parliament proposal for an EU directive 'on Digital Platform Workers' (Parliament Proposal) and the Parliament resolution 'on fair working conditions, rights and social protection for platform workers — New forms of employment linked to digital development' (Parliament Resolution). Lastly, this section scrutinises the Commission 'proposal for a Directive of the European Parliament and of the Council on improving conditions in platform work' (Commission Directive Proposal).

The second section examines the initiatives that focus on limiting the ambit of EU competition law so that it does not prevent platform workers (even if they are not to be recognised as 'workers') from accessing and exercising their collective labour rights. This section also discusses how these initiatives help advance platform workers' freedom from market domination.

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4 Feedback F1567643 Provided by the European Trade Union Confederation.
This section begins by discussing how the four policy options envisaged under the IIA — outlined in the first section — focus on limiting the ambit of EU competition law. This section also assesses a second piece of feedback submitted in the IIA process by a group of law students and a professor from The Netherlands (Second Feedback) focused on limiting the ambit of EU competition law. Lastly, this section probes whether the draft guidelines 'on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons' (Proposed Commission Guidelines) also focus on limiting the ambit of EU competition law to enable access to collective labour rights for platform workers.

This chapter concludes by arguing the best way to tackle market domination against platform workers would be to expand the acknowledgement of the significance of an imbalance of bargaining power between the parties observed in the Proposed Commission Guidelines.

I. Initiatives focusing on clarifying who should be covered by labour rights

1. The First Feedback from the IIA

The Commission launched the IIA on 6 January 2021 to examine the potential for collective bargaining for the solo self-employed based on different policy options. The IIA resulted from the Commission’s process to address collective bargaining for the self-employed launched on 30 June 2020, motivated by concerns relating to the working conditions of platform workers in the EU. This Commission initiative is part of the Digital Services Act Package — a broad

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8 Feedback F1604242 Provided by Pepijn van Der Lans.
10 European Commission (n 2).
11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Strong Social Europe for Just Transitions. COM(2020) 14 Final.
Commission initiative to regulate online digital platforms, including the operation of platforms mediating work in the EU.\textsuperscript{12}

Through the IIA, the Commission acknowledged platform workers usually cannot determine the price of their work and lack the individual bargaining power to negotiate contractual and working conditions. The Commission demonstrated particular concern over the treatment of the so-called ‘solo self-employed’. Under the IIA, solo self-employed were defined as ‘self-employed without employees’\textsuperscript{13} (in other words, who do not sub-contract their own labour) and were the target of the IIA as the solo self-employed are considered at a higher risk of precariousness than self-employed with employees.\textsuperscript{14} Platform workers would fit the notion of solo self-employed because platform workers are usually deemed self-employed undertakings and — in principle — do not employ others.\textsuperscript{15} Also, the Commission made explicit the IIA aimed to ensure access to collective bargaining for platform workers.\textsuperscript{16}

The IIA envisaged four policy options to enable collective bargaining agreements for the solo self-employed with their counterparties, ranging from ensuring access to collective bargaining for all solo self-employed providing their own labour through digital labour platforms to ensuring access to collective bargaining for all solo self-employed providing their own labour through digital labour platforms or to professional customers of any size. The IIA also included a mechanism for stakeholders to voice their views about the four policy options and propose alternatives. This section analyses a piece of feedback from the ETUC (the First Feedback) as an


\textsuperscript{13} Commission (n 2).


\textsuperscript{15} See this Chapter in S. II 1.

\textsuperscript{16} Commission (n 2).
alternative policy option stemming from the IIA focused on elucidating whether platform workers should be covered by labour rights, including collective labour rights.

The First Feedback argued that labour rights, including the right to collective bargaining, are fundamental human rights. Thus, all types of workers should enjoy access to labour rights, avoiding the creation of ‘... second-class workers, additional or intermediate employment categories or collective bargaining actors.’ Relying on EU and ILO labour standards, the First Feedback criticised the prominent role of EU competition law in drawing the contours of which workers can enjoy access to collective labour rights, displacing fundamental human rights. For the ETUC:

Ensuring the fundamental right to collective bargaining in any other way than through its full exclusion from the scope of competition policy would be unacceptable, as it would make collective bargaining conditional upon competition rules [subordinating] collective bargaining and other fundamental labour rights to internal market rules. Such consequences would inevitably result in a breach of the EU Charter of Fundamental Rights, the European Convention on Human Rights, the European Social Charter and applicable ILO Conventions.\footnote{18}

The First Feedback relied on a fundamental human rights approach, expanding who can engage in collective bargaining using a highly influential set of norms and doctrines.\footnote{19} The First Feedback supposed that, in the case of a clash between labour rights such as collective bargaining and

\footnote{17 Feedback F1567643 Provided by the European Trade Union Confederation (n 4).}
\footnote{18 Ibid. Parenthesis added.}
other objectives (such as EU competition law objectives), labour rights should, in principle, prevail. The First Feedback focused on elucidating who should enjoy access to labour rights by expanding the personal scope of the *Albany* exemption discussed in chapter 3.\(^{20}\) Such expansion through a fundamental human rights approach would entail a shift from the binary divide worker/self-employed determined in *Albany* to a scenario pointing toward protecting people who work regardless of employment status.\(^{21}\)

The First Feedback can be understood as a strategy of workplace constitutionalism that aims to expand who should be covered by labour rights, including access to collective labour rights. The First Feedback seeks to diminish the dyadic market power of platforms to design and enforce one-sided contractual agreements by ensuring labour rights, including collective labour rights, for everyone. The First Feedback also seeks to restrict the applicability of EU competition law by placing fundamental human rights at work upfront, diminishing structural market domination.

However, the First Feedback does not provide guidelines on balancing the EU competition law goals\(^{22}\) with access to collective bargaining for workers using a fundamental human rights approach. EU competition law goals are discarded in favour of fundamental human rights without further analysis. This approach leaves open questions about whether fundamental human rights should prevail over consumer welfare or the protection of competition if that hurts other people's welfare or even workers as consumers, for example, by paying higher prices for goods and services. In other words, where should societies draw the line between workers' rights to collective voice and the rights and freedoms of others?\(^{23}\)

\(^{20}\) See Chapter 3, S II.
\(^{22}\) See chapter 4, S. III.
\(^{23}\) See chapter 4, S III-IV.
2. The Parliament Proposal and the Parliament Resolution

The Parliament also aimed to influence the Commission to introduce regulatory measures enabling access to collective bargaining for platform workers through two initiatives centred on elucidating whether platform workers should be covered by labour rights: the Parliament Proposal and the Parliament Resolution.

In November 2020, Leila Chaibi, a member of the Left group of the Parliament, presented the Parliament Proposal to the Commission. The Parliament Proposal aimed to align labour and social rights for platform workers with those of 'standard' workers.24 The Parliament Proposal sought to enable platform workers’ labour and social rights to be regulated by contracts, arbitration awards, or collective agreements. Such regulation would cover issues like working time, remuneration, algorithms, personal data and collective labour rights.25 The Parliament Proposal also contained a non-regression clause under Article 6 that aimed to harmonise the developments of the Parliament Proposal with national labour developments that may be more favourable to platform workers.26

Under Article 2, the Parliament Proposal refined its scope by defining a digital platform and a platform worker.27 However, the definition of a digital platform in the Proposal only included

25 ibid. Article 3 ‘Member States shall ensure that digital platforms within the meaning of Article 2 guarantee digital platform workers that the terms and conditions of employment governing the fields set out below are laid down in collective agreements, contracts or arbitration awards which have been declared to be universally applicable.’
26 However, the capacity of non-regression clauses may have been subverted in some cases under national law. See Steve Peers, ‘Non-Regression Clauses: The Fig Leaf Has Fallen’ (2010) 39 Industrial Law Journal 436.
27 “‘Digital platform’ means a service platform organised offline, operative in particular in the licensed-driver passenger transport and meal-delivery sectors, whose purpose is to offer its customers a workforce, electronically and by means of algorithms, which it organises with a view to performing the service which it offers them. It establishes or influences to a significant degree the conditions and remuneration for the exchange. “worker” means any person who enters into a contract with a digital platform concerning the hiring of his or her labour, whether of an intellectual or manual nature, with a view to rendering a service offered and organised by the platform, in return for remuneration.”
'offline' services organised around transport and meal delivery services whose objective is to provide customers with a workforce. This narrow proposal risked exclusion from access to collective bargaining for several kinds of platform workers outside these sectors, such as crowdworkers working for Amazon Turk or freelancers working in platforms.\textsuperscript{28}

The Parliament Proposal was based on EU developments relating to fundamental human rights. In the Preamble of the Parliament Proposal, there is a reference to the Charter of Fundamental Rights of the European Union,\textsuperscript{29} the Community Charter of the Fundamental Social Rights of Workers\textsuperscript{30} and the European Pillar of Social Rights.\textsuperscript{31} Under Article 1, the Parliament Proposal recognised fundamental human rights for all workers as applicable at the EU and the national level.\textsuperscript{32} However, in practice, the Parliament Proposal linked access to individual and collective labour rights to the presence of a contract between platform workers and platforms.\textsuperscript{33} Having


\textsuperscript{29} ‘Fair and just working conditions: 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.’

\textsuperscript{30} ‘The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organization of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.’

\textsuperscript{31} ‘Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training.’

\textsuperscript{32} Chaibi (n 5). Article 1 ‘This Directive is entirely without prejudice to the exercise of the fundamental rights recognised in Member States and at Union level, including the right or freedom to strike or to take other forms of employment-related action specific to the Member States, in accordance with national law and/or practices. It is also without prejudice to the right to negotiate, conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practices.’

\textsuperscript{33} ibid 4. ‘Without employment contracts, platform workers cannot avail of the rights and benefits enshrined in employment law. This is the case for both their individual rights, in particular rules on remuneration, working time, leave and training, to name but a few, and their collective rights, such as freedom of association, the right to collective bargaining and the right
established a contractual relationship, and if the definitions under Article 2 are met, the Parliament Proposal set out the obligations of platforms in relation to platform workers.\textsuperscript{34}

The Parliament Proposal was complemented by the Parliament Resolution of 16 September 2021. The Parliament Resolution's general aim was to equalise the labour rights of platform workers and non-platform workers ‘of the same category’.\textsuperscript{35} However, the Parliament resolution did not provide guidance on how to compare these two categories of workers. The Parliament Resolution also aimed to ensure the right to collective bargaining for all platform workers,\textsuperscript{36} leaving the EU Member States to decide who is a platform worker and what is a platform.\textsuperscript{37} To ease potential harmonisation problems of having different national definitions of workers and platforms while ensuring access to labour rights for platform workers, the Parliament Resolution sought to establish two generally applicable rules. First, to follow ILO developments\textsuperscript{38} it relied to take collective action, in so far as they may encounter insurmountable difficulties in exercising such rights.’

\textsuperscript{34} Article 3 of the Parliament Directive Proposal states: ‘Member States shall ensure that digital platforms within the meaning of Article 2 guarantee digital platform workers that the terms and conditions of employment governing the fields set out below are laid down in collective agreements, contracts or arbitration awards which have been declared to be universally applicable.’


\textsuperscript{36} ibid 12, 15, 18, 20. In the words of the Member of the European Parliament leader of the Resolution, Sylvie Brunet: ‘Collective bargaining is absolutely key when it comes to improving the conditions of these workers. Platform workers, even if they are independent or self-employed, should be able to organise themselves collectively as well ...’ Ben Wray, ‘Gig Economy Project – European Parliament Demands EU Commission Delivers Rights for Platform Workers’ (Brave New Europe, 2021) <https://braveneweurope.com/gig-economy-project-european-parliament-demands-eu-commission-delivers-rights-for-platform-workers>.


\textsuperscript{38} International Labour Organization Recommendation R198: Employment Relationship Recommendation (95 session, Geneva, 31 May 2006). For further analysis, see Novitz (n 21).
on the genuine work relationship and not on what the parties formally agree.\textsuperscript{39} Second, it aimed to ensure that platform workers can join trade unions and engage in collective bargaining.\textsuperscript{40}

The Parliament Resolution was also based on a fundamental human rights approach. In addressing collective voice at work, the Parliament Resolution recognised that freedom of association and collective bargaining are fundamental human rights for all workers, including platform workers.\textsuperscript{41} To ensure the fundamental human rights to freedom of association and collective bargaining for platform workers, the Parliament Resolution called on the Commission to establish a rebuttable presumption of an employment relationship. The rebuttable presumption was to reverse the burden of proof to determine a working relationship, forcing the party signalled as the employer to prove there is no working relationship.\textsuperscript{42}

Both Parliament initiatives can be understood as strategies of workplace constitutionalism that focus on clarifying whether platform workers should be covered by labour rights, including collective labour rights. The Parliament Proposal aims to alleviate the dyadic market domination of platforms against transport and food delivery platform workers by identifying them and regulating several issues concerning platform work to align labour and social rights with standard workers. However, the Parliament Proposal fails to alleviate dyadic market domination of platforms because the protection it offers only covers a narrow portion of platform workers — namely transport and food delivery platform workers, excluding all the other types of


\textsuperscript{40} ibid.

\textsuperscript{41} ibid Representation and collective bargaining rights 18.

\textsuperscript{42} ibid S. ‘whereas platform workers should either be classified as workers or genuinely self-employed persons depending on their actual situation and should enjoy their respective rights and conditions; whereas a rebuttable presumption of an employment relationship would facilitate the correct classification of platform workers in combination with the reversal of the burden of proof, which means that where workers dispute the classification of their employment status in legal or administrative proceedings, it is for the party who is claimed to be the employer to prove that there is no employment relationship in accordance with national definitions as set out in the legislation or collective agreements of the respective Member State;’
platform workers.\(^{43}\) Also, platforms can easily circumvent the definitions under Article 2.\(^{44}\) Platforms can challenge the employment status of transport and food delivery platform workers by contesting the applicability of the definitions of a digital platform and a worker outlined under Article 2. For example, platforms may argue they are not ‘digital platforms’ under Article 2 as they do not organise the workforce or argue the platform does not provide the working service, but they are simply a matchmaking platform. Also, platforms may argue they are not ‘digital platforms’ as they do not influence to a significant degree ‘the conditions and remuneration for the exchange’.\(^{45}\) In turn, platforms can claim platform workers do not meet the definition of a worker under Article 2. For example, platforms can claim they do not intend to enter into a contract with the platform workers to hire their labour, much less to render a service ‘... offered and organised by the platform, in return for remuneration’.\(^{46}\)

The Parliament Resolution reinforced the Parliament Proposal’s goal of aligning platform workers’ labour rights with ‘standard’ workers by implementing a rebuttable presumption. Through the rebuttable presumption, the dyadic market domination of platforms would be diminished as platforms would have less room for manoeuvre to unilaterally set contracting and working conditions to exclude platform workers from accessing collective labour rights.

However, platforms would still be able to challenge the employment status of platform workers by circumventing the labour rules and definitions of an EU Member State.\(^{47}\) The Parliament

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\(^{43}\) Schmidt (n 28). International Labour Organization (n 28).

\(^{44}\) Chaibi (n 5). Article 2: “‘Digital platform’ means a service company organised offline, operative in particular in the licensed-driver passenger transport and meal-delivery sec- tors, whose purpose is to offer its customers a workforce, electronically and by means of algorithms, which it organises with a view to performing the service which it offers them. It establishes or influences to a significant degree the conditions and remuneration for the exchange.’

\(^{45}\) ibid.

\(^{46}\) ibid. Article 2: “‘worker’ means any person who enters into a contract with a digital platform concerning the hiring of his or her labour, whether of an intellectual or manual nature, with a view to rendering a service offered and organised by the platform, in return for remuneration.’

\(^{47}\) European Parliament Resolution of 16 September 2021 “Fair Working Conditions, Rights and Social Protection for Platform Workers - New Forms of Employment Linked to Digital Development.” (2019/2186(INI)) (n 6) para S. ‘... it is for the party who is claimed to be the
Resolution would leave platform workers exposed to the power of platforms to circumvent the rebuttable presumption by navigating national developments around who is a worker and what is a platform. This scenario invites platforms to analyse where the line between employment and self-employment will be placed under each EU jurisdiction to recast their relationships with platform workers to rebut the presumption. The recent Spanish law regulating certain areas of platform work, the so-called ‘Ley Rider’, is a good example of the capacity of platforms to recast their relationships with platform workers to circumvent a rebuttable presumption. Since the enactment of the Ley Rider in August 2021, food delivery platforms like Glovo changed the terms and conditions of their contracts with platform workers, while Uber Eats started using agency workers in both cases to circumvent the presumption.

Also, under the Parliament Resolution, there would not be uniformity as to where EU competition law operates in the labour market of platform workers across national borders, maintaining the chilling effect against platform workers when exercising their collective labour rights. The Parliament Resolution fails to offer normative harmonisation in the EU or could not give certainty to key stakeholders such as platform workers to organise to tackle structural and dyadic market domination without EU or national sanctions.

Lastly, both Parliament initiatives do not fulfil their self-declared mission of ensuring labour rights for platform workers — including access to collective labour rights — based on a fundamental human rights approach. Fundamental human rights at the workplace should be

employer to prove that there is no employment relationship in accordance with national definitions as set out in the legislation or collective agreements of the respective Member State;’

48 See Chapter 1, S IV 3, and Chapter 2, S. III 7.

ensured for all workers regardless of their employment status. However, both Parliament initiatives focus on identifying who should be covered by labour rights by determining employment status, whether through developing definitions or a rebuttable presumption that relies on national developments concerning who is a platform worker and platform. Ensuring fundamental human rights at the workplace is important to ensure a sound dialogue between platform workers and platforms when employment status is in doubt. The inevitable balancing of fundamental human rights of voice with other desirable objectives in the EU, such as the EU competition law objectives discussed above, should not be built based on employment status. As it will be further discussed at the end of this chapter and in the conclusion, the limit of an approach such as a human rights approach should be established where the interference is no longer arbitrary. In other words, where there is no domination.


On 9 December 2021, the Commission issued a Directive Proposal to regulate access to collective bargaining for platform workers. The main goal of the Commission Directive Proposal is to ensure minimum labour rights for platform workers working under labour-intensive platforms throughout the EU. The Commission Directive Proposal is justified by showing recent evidence of the realities of platform work in the EU. Platforms in the EU are increasingly attracting workers and capital. However, the labour market of the platform economy shows high levels of labour misclassification. 92 per cent of active platforms in the EU are estimated to classify workers as

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50 Mantouvalou (n 19); Novitz (n 21).
51 See Chapter 1, S. III.
52 The Commission argues the revenues around platform economy have grown 500 per cent during the last 5 years, ‘... from an estimated of EUR 3.4 billion in 2016 to about EUR 14 billion in 2020’. See Willem Pieter De Groen and others, ‘Digital Labour Platforms in the EU Mapping and Business Models’ (2021) 8. Also, the Commission mentions in 2025 the number of people working in the platform economy is expected to reach 43 million. See PPMI, ‘Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work’ (2021) 96.
self-employed, and 5.51 million platform workers are at risk of misclassification. The Commission Directive Proposal is normatively justified by recalling Article 3 TEU, the Charter of Fundamental Rights of the European Union, the European Pillar of Social Rights and Articles 153(1-2)(b) and 16 TFEU.

Building on the main goal of ensuring minimum labour rights for platform workers, the Commission Directive Proposal aims to achieve three objectives: (a) determine the correct employment status of platform workers, (b) ensure fairness and transparency concerning algorithmic management, and (c) improve enforcement and transparency of the applicable rules for people working through platforms. This section focuses on the first sub-objective as clarifying employment status is central for the Commission Directive Proposal to ensure access to labour rights for platform workers, including collective bargaining.

The focus of the Commission Directive Proposal on determining the correct employment status of platform workers relies on some definitions. Article 2 of the Commission Directive Proposal

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53 De Groen and others (n 52) 8.
54 PPMI (n 52) 5.
55 ‘One of the objectives of the Union is the promotion of the well-being of its peoples and sustainable development of Europe based on a highly competitive social market economy, aiming at full employment and social progress’. See European Commission Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final (n 7) Explanatory Memorandum, (1).
56 ‘The right of every worker to working conditions which respect their health, safety and dignity, and workers’ right to information and consultation are enshrined in the Charter of Fundamental Rights of the European Union.’ ibid Explanatory Memorandum, (2).
57 ‘The European Pillar of Social Rights states that “regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection.”’ ibid Explanatory Memorandum, (3).
58 ibid Legal Basis. ‘The proposed Directive is based on Article 153(1)(b) of Treaty on the Functioning of the European Union (TFEU), which empowers the Union to support and complement the activities of the Member States with the objective to improve working conditions. In this area, Article 153(2)(b) TFEU enables the European Parliament and the Council to adopt – in accordance with the ordinary legislative procedure – directives setting minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.’ In turn, Article 16 TFEU: ‘1. Everyone has the right to the protection of personal data concerning them.’
59 ibid Article 1.1.
outlines the definitions of a platform (digital labour platform) and a platform worker. Under Article 2.1(1), a “digital labour platform” means any natural or legal person providing a commercial service which operates digitally, on-demand, and organises work. In turn, under Article 2.1(4), a platform worker is any person working in a platform subject to a contract or employment relationship according to national law and based on a factual assessment, with attention to the CJEU case-law.

Like the Parliament Resolution, the Commission Directive Proposal relies on a presumption of an employment relationship between platforms and platform workers to determine employment status. This presumption establishes operational criteria, a rebuttal procedure and a reference to CJEU case-law. The Commission Directive Proposal presumption applies if at least two criteria related to subordination and control are met. The criteria range from the capacity of platforms to determine remunerations, performance levels and supervise the work carried out by platform workers, to the platform workers’ capacity to control their schedules, use substitutes, or build a client database. Also, Article 5 of the Commission Directive Proposal

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60 Article 2 also defines what is platform work and who are persons performing platform work. However, these two concepts are too broad for elucidating access to collective voice for platform workers in the EU and seem more appropriate to discuss the issues of personal data envisaged under the Commission Directive Proposal. See Article 2.1(2) ‘platform work’ means any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service; Article 2.1(3) ‘person performing platform work’ means any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved;’


62 See this section in 2.

63 Article 4.2 ’Controlling the performance of work within the meaning of paragraph 1 shall be understood as fulfilling at least two of the following: (a) effectively determining, or setting upper limits for the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (c) supervising the performance of work or verifying the
enables the possibility to rebut the presumption by platforms when the criteria are not met, or the work agreement is not an employment relationship according to the laws of a Member State, with consideration to the CJEU case-law.

The Commission Directive Proposal relies on Article 153(1-2)(b) TFEU as its legal base. Article 153 (1)(b) TFEU empowers the EU to support and complement the activities of Member States to improve working conditions. In turn, Article 153(2)(b) TFEU empowers the Parliament and the Commission to issue Directives to set up minimum requirements for gradual implementation concerning work conditions. To do so, Article 153(2)(b) TFEU requires ‘... having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.’ Article 153(1-2)(b) TFEU may be helpful to clarify the employment status of platform workers at the EU level, provided the normative measures are justified, Member States’ normative realities are considered, and there are no excessive financial and legal constraints. However, using Article 153(1-2)(b) TFEU as a normative basis seems more burdensome than restricting the applicability of EU competition law to ensure access to collective bargaining for platform workers through Article 103(2)(c) TFEU. This issue will be discussed further in the following section.64

The Commission Directive Proposal represents a strategy of workplace constitutionalism focusing on clarifying who should enjoy labour rights by making it easier for platform workers to access employment status. Through the presumption, the Commission Directive Proposal makes it easier for platform workers to dispute their employment status and harder for platforms to

64 See this chapter in S. II 1.
misclassify workers through crafted contracts or work conditions. If the presumption is successful, platform workers will be considered workers and thus covered against the structural market domination caused by the operation of EU competition law. The limit of this presumption lays under Article 4.3 of the Commission Directive Proposal, which explicitly requires the Member States to ‘avoid capturing the genuine self-employed’, a vision that goes in line with the reliance on Article 153(1-2)(b) TFEU as the basis for normative intervention. Interestingly, under the Commission Directive Proposal, the only exceptions to the focus on employment status are in the areas of Algorithmic Management under Article 6, Human Monitoring and Automated Systems under Articles 7(1) and (3) and Human Review of Significant Decisions under Article 8. These articles ensure rights in these specific areas for ‘... persons performing platform work who do not have an employment contract or employment relationship’.\textsuperscript{65} The extension of these rights beyond employment status is significant because it shows the Commission is willing to extend some rights beyond an identifiable employment status.

Despite these developments, the Commission Directive Proposal shows significant flaws as platforms can still circumvent the criteria to make the presumption work. It should not be hard for platforms to fulfil just one (or none) of the criteria under Article 4 and cut loose all the others, effectively circumventing the presumption. Platforms may, for example, suggest a certain fare to customers, evading the first criterion. Also, it is not essential for a platform to directly check the appearance or the conduct (second criterion), the quality of the work (third criterion), the organisation (fourth criterion), or restrict the construction of a parallel client database (fifth criterion) of platform workers. Second, third, fourth and fifth criteria can be indirectly controlled by platforms through clients, evading the applicability of the presumption because one or none of the requirements are met.

Also, the Commission Directive Proposal requires considering CJEU developments to better understand which platform workers fall into the Commission Directive proposal. By recalling the analysis of *Yodel* and *FNV Kunsten* already discussed in this thesis concerning the problems of using a negative account of freedom to build the EU definition of worker, it becomes clear that it is difficult to overcome the problems of exclusion of platform workers by building the divide worker/self-employed on a set of criteria. The difficulties of ensuring this strategy of workplace constitutionalism based on employment status arise from the difficulties of building criteria broad and flexible enough to cover all the diversity of platform workers and from the capacity of platforms to swiftly change terms and conditions.

II. Initiatives focusing on the role EU competition law should play concerning platform work

1. The IIA’s four policy options

As outlined above, the IIA was launched by the Commission to examine the potential for accessing collective bargaining for the solo self-employed. To do so, the IIA envisaged four policy options. This section contends the four policy options focus on how the solo self-employed should have access to collective bargaining through the retraction of EU competition law — although in different degrees of intensity.

The IIA aimed to ‘... clarify that EU competition law would not stand in the way of agreements ...’ concerning solo self-employed and their counterparties. The IIA does so by outlining four policy options aimed to secure access to collective bargaining for (a) all solo self-employed providing their own labour through digital labour platforms; (b) all solo self-employed providing

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66 ibid Article 1.
67 See Chapter 3, S II 2, and Chapter 4, S II 2, respectively.
68 See this Chapter in S. I 1.
69 Commission (n 2) Parenthesis added.
their own labour through digital labour platforms or to professional customers of a certain minimum size; (c) all solo self-employed providing their own labour through digital platforms or to professional customers of any size with the exception of regulated/liberal professions; (d) all solo self-employed providing their own labour through digital labour platforms or to professional customers of any size. As will be further discussed, the different policy options have divergent degrees of success in alleviating dyadic and structural market domination against platform workers.

Policy option 1 was the narrowest of the four policy options. This policy option protects the solo self-employed working on a platform from the operation of EU competition law. However, policy option 1 did not define what a platform is. Still, policy option 1 would have diminished dyadic and structural market domination by expanding the scope of the Albany exemption by using the definition of solo self-employed, retracting the applicability of EU competition law against platform workers.

Policy option 2 expanded policy option 1 by also shielding from the operation of EU competition law the solo self-employed working with professional customers of a certain minimum size, provided professional customers are not covered by specific competition law provisions included in sectoral instruments. Policy option 2 added the idea of a professional customer but the relevant term was not defined. The definitional uncertainties observed under policy options 1 and 2 raised concerns as to whether platforms can disguise themselves as something other than a platform or a professional customer to avoid the retraction of EU competition law. Policy option 2 also established a minimum threshold for coverage of the platforms and professional customers who engage in collective bargaining with the solo self-employed. However, that minimum is not defined.

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70 European Commission, ‘Inception Impact Assessment New Competition Tool Ref. Ares (2020) 2877634’ 1, s B.
During the feedback process, Giorgio Monti, professor of competition law, commented favourably on policy option 2. For Monti, establishing a threshold based on the company size can be a ‘reasonable proxy’ as this approach is not likely to harm competition unless a wide agreement, including big and small companies, is reached. Such wide agreement may harm competition because small companies may find the collective agreement too costly.\footnote{Feedback F1574948 Provided by Giorgio Monti.} Policy option 2 included a flexible tool to balance all the EU objectives at stake, tailoring solutions on a more casuistic base.

Policy option 3 broadened previous policy options by enabling collective bargaining for all solo self-employed who provide their own labour through digital platforms or professional customers of any size except for regulated (liberal) professions. The exclusion of regulated (liberal) professions marked the limit of this policy option, in line with CJEU developments concerning the exclusion of liberal professions from accessing collective agreements to improve their working conditions.\footnote{C-180-184/98 Pavlov v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-06451; C-413/13 FNV Kunst Informatie en Media v Staat der Nederlanden [2014] ECLI:EU:C:2014:2411. For a further analysis, see Nicola Kountouris, “The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope” (2018) 47 Industrial Law Journal 192.} Policy option 3 promised to diminish dyadic and structural market domination against platform workers by further expanding with whom platform workers can engage in collective bargaining, forcing the retraction of EU competition law.

The European Confederation of Independent Trade Unions\footnote{Feedback F1567676 Provided by The European Confederation of Independent Trade Unions.} supported policy option 3 provided there would be a clear list of excluded regulated (liberal) professions that do not face precarious employment.\footnote{ibid. The European Confederation of Independent Trade Unions provides examples of heads of notary, auditor and tax advising practices, architecture firms, pharmacies and dental practices as professionals not facing precarious employment. However, this formula is not backed up by a clear mechanism or empirical evidence.} The Confederation also highlighted the importance of labour inspectorates to control the application of the Commission initiative to tackle issues such as bogus self-
employment detected in regulated liberal professions such as lawyers in a law firm or dentists in dental practices. However, the Confederation did not offer advice on how to create and manage the list of excluded (liberal) professions that do not face precarious employment.

Policy option 3 maintained the definitional uncertainties of what is a platform and a professional customer. Moreover, policy option 3 did not define who are regulated (liberal) professionals. These definitional uncertainties could enable platforms to potentially exclude platform workers from accessing collective bargaining through the exercise of dyadic market domination. Platforms' capacity to successfully argue platform workers are regulated (liberal) professionals is not too far from reality. For example, a transport platform might deem their workers as professional workers regulated under specific rules in the transport sector, excluding them from accessing collective bargaining. Another example might be lawyers working in digital platforms such as Keystone Law. This platform may argue that their platform workers cannot engage in collective bargaining since the lawyers are liberal professionals subject to specific regulations to practise law.

Policy option 3 also demonstrated the problems of assuming that regulated (liberal) professionals have more bargaining power to set prices and harness better work conditions than the non-qualified workforce. The assumption that regulated (liberal) professionals are not subject to a work monopsony and thus must be excluded from valuable tools of voice such as collective bargaining was criticised during the feedback process. Uni Europa, alongside the European Arts and Entertainment Alliance (both trade unions), rejected policy option 3, arguing that EU policies cannot be designed based on assumptions or perceptions. As discussed

75 https://www.keystonelaw.com/
77 Feedback F1567749 Provided by UNI Europa.
78 Feedback F1567621 Provided by European Arts and Entertainment Alliance.
in chapter 4, the exclusion of regulated (liberal) professionals from accessing collective bargaining must be reconsidered concerning platform work. Platform workers, including professionals or regulated sectors, exhibit low bargaining power before (or ‘relative to’) platforms. In other words, platforms have the power to pay wages lower than the marginal revenue product to all their workers, regardless of their qualifications or professional regulations.

Lastly, policy option 4 sought to enable the solo self-employed to engage in collective bargaining with platforms or professional customers of any size, forcing the retraction of EU competition law to the extreme of the tolerable options for the Commission under the IIA. During the feedback process, policy option 4 was the most preferred option by workers and trade unions. Also, ETUC and UNI Europa backed policy option 4 as the least worst option. Also, the European Grouping of Societies of Authors and Composers (GESAC) argued that policy option 4 would be preferable because this policy option addresses ‘... the changing structures of the market without being obsolete ... especially in online environments ...’

The four policy options under the IIA can be understood as strategies of workplace constitutionalism. All policy options aimed to diminish the dyadic market domination of platforms and other counterparties to dictate terms and conditions of hiring of platform workers deemed solo self-employed. The difference between the four policy options reveals uncertainty regarding the extent to which EU competition law should be retracted to enable collective bargaining for the solo self-employed, diminishing structural market domination. Policy options 1 and 4 represented the minimum and maximum limits —respectively— to which the

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79 See Chapter 4, S I and II.
80 Feedback F1567643 Provided by the European Trade Union Confederation (n 4).
81 Feedback F1567749 Provided by UNI Europa (n 77).
82 Feedback F1567742 Provided by GESAC - European Grouping of Societies of Authors and Composers.
Commission was willing to contemplate rebalancing EU competition law goals and access to collective bargaining for the solo self-employed.

However, there were several definitional uncertainties behind all policy options that limited the capacity of the IIA to tackle dyadic and structural market domination against platform workers. For example, it has been argued above in this section that platform workers may meet the definition of solo self-employed because platform workers are usually deemed self-employed undertakings and because the Commission made an explicit reference to platform work in the IIA. However, the presence of substitution clauses in platform workers’ contracts of service cast doubts on whether platform workers are ‘solo’ self-employed. Platform workers may find difficulties defining themselves as solo self-employed because the platforms exercise dyadic market domination, setting the work conditions. Substitution clauses carefully crafted by platforms in platform workers’ contracts of services have helped to distance platform workers from being considered workers.\(^83\) The same substitution clauses can now prevent platform workers from being considered ‘solo’ self-employed, placing platform workers with substitution clauses outside all policy options of the IIA. Recent CJEU developments also back this claim. In Yodel, the capacity of B to hire others, regardless of this capacity being exercised, was seen as indicia of ‘truly’ independent self-employed work.\(^84\) The capacity of self-employed to hire others through substitution clauses may prevent the Court to deem self-employed workers as a ‘solo’ self-employed.

Also, none of the policy options defines a platform. The failure to define what is ‘a platform’ enables platforms to exercise dyadic market domination by defining themselves as something other than a platform to circumvent the new boundaries for the protection of solo self-

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\(^84\) See Chapter 3, S II 2.
employed and their access to collective bargaining. A similar concern arises from using the term ‘professional customer’ without a definition. Moreover, policy option 2 used the concept of a professional customer associated with a minimum threshold. Platforms could take advantage of such definitional uncertainty and circumvent the minimum threshold that defines a professional customer, further fissuring the workplace environment under platform work.85

Lastly, it was unclear under all four policy options when platform workers deemed solo self-employed would negotiate for improving working conditions and when they would negotiate for establishing trading conditions for private consumers or fixing prices. The IIA does not provide guidance on how to distinguish these apparently diverging negotiation objectives.86 This definitional uncertainty seems to be linked with whether platform workers meet the definition of solo self-employed. If platform workers are deemed solo self-employed, negotiations between them and the platforms would be about working conditions and thus covered by the policy options. On the contrary, if platform workers are deemed self-employed more generally, negotiations between them and the platforms would be negotiations about trading conditions between undertakings and excluded from the policy options as harmful to consumers or price-fixing.

These definitional uncertainties show that a workplace constitutional strategy aiming to retract EU competition law also needs clear (or less avoidable) definitions to diminish dyadic and structural market domination against platform workers.

As part of its normative basis, the IIA invoked Article 103(2)c TFEU. Article 103(2)c TFEU enables the Commission to define the scope of Articles 101 and 102 TFEU. Here, the Commission showed its willingness to ensure access to collective bargaining for the solo self-employed (including

85 On the idea of ‘fissuring’ the workplace, see David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (Harvard University Press 2014) pt II.
86 Commission (n 2) s B.
platform workers deemed solo self-employed) by restricting the applicability of EU competition law. In other words, to ensure EU competition law will ‘... not stand in the way of collective bargaining by those who need it...’. This normative approach diverges from the reliance on Article 153 TFEU in the Commission Directive Proposal discussed above.

Unlike Article 153(1-2)(b) TFEU, under Article 103(2)(c) TFEU there is no need to regard conditions and technical rules in each of the Member States developments and consider whether the initiative would hold back the development and creation of small and medium-sized undertakings. Also, there is more latitude in justifying a restriction of EU competition law to favour access to collective bargaining based on Article 103(2)(c) TFEU as Article 153(1-2)(b) must deal with the restrictions under 153(5).

Trade unions have criticised the IIA normative basis for intervention during the feedback process. The European Confederation of Independent Trade Unions and the IndustriAll European Trade Union stress that the Commission must aim to secure collective labour rights as fundamental rights, not as the by-product of the retraction of EU competition law. These voices add to the ETUC’s vision outlined in the First Feedback: the IIA must ensure access to ‘... collective bargaining as a fundamental right of all workers regardless of working status.’

Assessing the IIA through a fundamental human rights approach entails giving primacy to labour rights over EU competition law goals to comply with European and international labour standards. This vision supposes a new — and stronger — rebalancing process to favour access to collective voice.

87 Commission (n 2).
88 See this chapter in S. I 3.
89 Article 153 (5) TFEU: 'The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.'
90 Feedback F1567676 Provided by The European Confederation of Independent Trade Unions (n 73).
91 Feedback F2665155 Provided by IndustriAll European Trade Union.
92 Feedback F1567643 Provided by the European Trade Union Confederation (n 4).
2. The Second Feedback from the IIA

The Second Feedback of interest here, which was submitted during the IIA related to a proposal to regulate access to collective bargaining from a group of law students and a professor from the Netherlands.\(^3\) The Second Feedback suggested a two tier-system to identify to which point EU competition law should retract. The first tier consisted of a non-rebuttable presumption of unequal bargaining power if wages of the solo self-employed are below the marginal revenue product compared to the wages of workers on a comparable task.\(^4\) The second tier consisted of a rebuttable presumption of unequal bargaining power if wages of the solo self-employed are above the marginal revenue product compared to the wages of workers on a comparable task. The marginal revenue product would be determined based on ‘... scientific evidence and set by democratically legitimised bodies.’\(^5\) This initiative is also interesting because it brings ‘democratically legitimised bodies’ to determine the marginal revenue product of wages.

The Second Feedback can be understood as a strategy of workplace constitutionalism that also includes elements of the strategy of centralised participation at work. The Second Feedback aimed to diminish dyadic market domination by focusing on the inequality of bargaining power between people providing services (such as solo self-employed) and their counterparties. The determination of an intolerable inequality of bargaining power between workers and employers defined the level of retraction of EU competition law. Also, the Second Feedback brought a democratic approach to set up applicable standards to this initiative, potentially enabling the participation of different types of stakeholders in this process.

\(^3\) Feedback F1604242 Provided by Pepijn van Der Lans (n 8).

\(^4\) The original idea states ‘In both tiers the threshold could be set as a minimum percentage of the costs borne by an operator to workers with whom that operator has a labour contract. This means that we measure the costs of SSE [solo self-employed] services to a certain operator to the costs that this operator would bear had a worker performed a comparable task. If the costs arising from SSE services are below a certain percentage of the costs that operator would bear had the tasks been performed by a worker with a labour contract, inequality in bargaining power can be presumed.’ ibid. Parenthesis added.

\(^5\) ibid.
The Second Feedback sought to diminish platforms’ power to determine access to collective bargaining for platform workers through crafting hiring conditions. This scenario forces the retraction of EU competition law to remedy the inequality of bargaining power, ensuring access to collective bargaining and thus alleviating structural market domination. Also, the Second Feedback forces counterparties (such as platforms) to reveal valuable information to people providing services (such as platform workers) to determine the wage thresholds using scientific evidence and through ‘democratically legitimised bodies’ to establish the limits of the presumptions. Access to information and the inclusion of people such as platform workers in the calculation process might be an exciting space for alleviating domination by forcing platforms to consider platform workers’ interests.

However, the Second Feedback also demanded a high degree of coordination and active participation of platform workers. Also, this second initiative did not address what happens if solo self-employed such as platform workers cannot be compared with other workers, nor does it define who is a solo self-employed, creating similar definitional uncertainties as observed in previous initiatives. It is also unclear whether solo self-employed such as platform workers could access collective labour rights just because it was established there was an unequal bargaining power.

The Second Feedback arguably influenced the Proposed Commission Guidelines examined below. Both initiatives focus on the retraction of EU competition law through identifying where the unequal bargaining power between solo self-employed and platforms would be intolerable. Both initiatives assume that an unacceptable degree of inequality of bargaining power between solo self-employed and platforms should be based on their independence to act in markets. The difference between the two initiatives lies in the techniques used. In the Second Feedback, the intolerable breach of independence to act in the labour market of solo self-employed is defined by wage levels through ‘democratically legitimised bodies.’ In the case of the Proposed
Commission Guidelines discussed below, the intolerable breach of market independence will depend on whether collective agreements fall within Article 101 TFEU according to certain criteria and, if so, whether the Commission considers it needs to act to safeguard EU competition law goals.

3. The Proposed Commission Guidelines

At the same time as the Commission launched its Directive Proposal, the Commission proposed Guidelines to regulate access to collective bargaining of solo self-employed. The Proposed Commission Guidelines acknowledge a grey area of solo self-employed with little or no bargaining power working not entirely under control and subordination to be deemed a worker and not entirely independent to be deemed an undertaking.\(^\text{96}\) In other words, some solo self-employed are excluded from the Commission Directive Proposal but may still be able to exercise their collective labour rights to address the imbalance of bargaining power to improve their working conditions.

For the Proposed Commission Guidelines, solo self-employed persons are those ‘… who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned.’\(^\text{97}\) This broad definition promises to encompass many types of platform workers. However, the definitional uncertainties remain concerning the use of substitution clauses examined when analysing the IIA.\(^\text{98}\)

The Proposed Commission Guidelines assume that the solo self-employed have little bargaining power as solo self-employed generally do not independently determine their market conduct.

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\(^{96}\) European Commission Draft for a Communication from the Commission Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons COM(2021) 8838 final (n 9) para 7.

\(^{97}\) Ibid 1.

\(^{98}\) See this section in 1.
Solo self-employed must be shielded from the operation of Article 101 TFEU regardless of national developments, employment status or the identification of bogus self-employment.\(^9\) Against this background, the Proposed Commission Guidelines makes a key distinction: ‘i) that certain categories of collective agreements [which may include solo self-employed] fall outside the scope of Article 101 TFEU, and ii) that the Commission will not intervene against certain other categories of collective agreements [which may include the solo self-employed].’\(^1\) In other words, the Proposed Commission Guidelines distinguish two different ways to protect the collective agreements of solo self-employed from the operation of EU competition law. First, situations where collective agreements of solo self-employed are not subject to EU competition law. Second, situations where collective agreements of solo self-employed are subject to EU competition law, but the Commission will not intervene.

In the first case, collective agreements of the solo self-employed would not be subject to Article 101 TFEU if the solo self-employed are in a situation comparable to that of workers. The Proposed Commission Guidelines establish three categories to equalise the solo self-employed with workers. The first are economically dependent solo self-employed persons, meaning solo self-employed who earn at least 50 per cent of their total annual work-related income from a single counterparty.\(^1\) The second category consists of solo self-employed persons working ‘side-by-side’ with workers for the same employer. Solo self-employed work ‘side-by-side’ with workers when solo self-employed and workers share the same labour direction, do not bear commercial or financial risk or any independence concerning the performance of the activity from their counterparties.\(^1\) The third category is the solo self-employed working through digital

\(^{9}\) European Commission Draft for a Communication from the Commission Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons COM(2021) 8838 final (n 9) para 24.

\(^{10}\) ibid 10, parenthesis added.

\(^{11}\) ibid 25.

\(^{12}\) ibid 26.
labour platforms. The Proposed Commission Guidelines acknowledge the little bargaining power of a single platform worker against the platform, shielding collective agreements over working conditions for the whole category of platform workers from Article 101 TFEU. In other words, under the Proposed Commission Guidelines, EU competition law will not stand in the way of platform workers deemed undertakings to engage in collective agreements over work conditions with the platforms.

In the second case, solo self-employed may be subject to Article 101 TFEU, but the Commission will not intervene. Such restraint from intervention by the Commission is justified in terms of correcting an imbalance in the bargaining power of the parties under certain conditions. Such power imbalance is represented in three cases: first, solo self-employed negotiating over working conditions with counterparties representing the whole industry; second, solo self-employed negotiating over working conditions with counterparties whose annual aggregate turnover exceeds EUR 2 million or whose staff headcount is more than ten persons; and third, agreements concluded by solo self-employed persons under national rules aiming to address the imbalance of power operating against the solo self-employed.

The Proposed Commission Guidelines centre on retracting the applicability of EU competition law to ensure solo self-employed can access collective bargaining. Thus, workers meeting the broad definition of a solo self-employed outlined above can access collective bargaining, and provided the parties are negotiating over work conditions, the negotiations will either not be

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103 The Proposed Commission Guidelines uses takes the definition of platform from Article 2 of the Commission Directive Proposal: “digital labour platform” means any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location; See ibid 30.

104 ibid 28.

105 ibid 31.

106 ibid 32.

107 ibid 35.
subject to Article 101 TFEU, or the Commission will decide not to intervene. Anything beyond this point would be subject to EU competition law.

The Proposed Commission Guidelines can also be understood as a strategy of workplace constitutionalism. In this case, the strategy of workplace constitutionalism diminishes dyadic and structural market domination against platform workers in two cumulative ways. First, this strategy diminishes dyadic market domination by using a broad definition of a solo self-employed that promises to encompass many platform workers. Such a broad definition of the solo self-employed leaves fewer options for platforms to exclude platform workers from accessing collective bargaining by exploiting the definitional uncertainties concerning who is a solo self-employed. Second, this strategy diminishes structural market domination by retracting the applicability of EU competition law by considering solo self-employed collective agreements either as excluded from Article 101 or as non-punishable provided there is an imbalance of bargaining power worth addressing.

However, this initiative has some limitations that are worth examining. First, collective bargaining for the solo self-employed under the Proposed Commission Guidelines is circumscribed to ‘work conditions’. However, such term is not defined.

Second, as outlined above, despite the Proposed Commission Guidelines definition of solo self-employed is broader than the definition of solo self-employed proposed by the IIA, it is still unclear whether the definition of solo self-employed under the Proposed Commission Guidelines would help overcome the use (and abuse) of substitution clauses to deem platform workers as independent self-employed.\textsuperscript{109}

\textsuperscript{108} The IIA defines solo self-employed as self-employed without employees. In contrast, the Proposed Commission Guidelines refer to solo self-employees as those ‘... who rely primarily on their own personal labour ....’ ibid 1.

\textsuperscript{109} See this section in 1.
Third, solo self-employed counterparties (such as platforms) can still exercise dyadic market domination, circumventing the exclusion of collective agreements of solo self-employed from Articles 101 and 102 TFEU. For example, a company might push solo self-employed to make less than 50 per cent of their total annual work-related income by using algorithmic management techniques or by establishing it on the terms and conditions of the contract. Solo self-employed counterparties can also prevent solo self-employed working ‘side-by-side’ their workers using arguments such as freedom of choosing schedules, absence of direct orders and rejection of work as observed in FNV Kunsten and Yodel. Alternatively, solo self-employed counterparties can disguise themselves as non-digital labour platforms by taking advantage of the definitional uncertainty of the term. For example, platforms may claim they do not organise the work performed by platform workers, a specific feature to meet the definition of a digital labour platform used by the Proposed Commission Guidelines.

Suppose platforms are effective in exercising dyadic market domination, circumventing the scenarios where Article 101 TFEU does not apply. In that case, the Proposed Commission Guidelines may still protect collective agreements of platform workers deemed solo self-employed by ensuring the non-intervention of the Commission. Platform workers deemed solo self-employed may attempt to engage in collective bargaining with counterparties representing the whole industry. Depending on what ‘the whole industry’ means, it should not be difficult for

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110 A thorough explanation of the techniques of algorithmic management can be found in International Labour Organization (n 28).
113 European Commission Draft for a Communication from the Commission Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons COM(2021) 8838 final (n 9) para 30. ‘For the purposes of these Guidelines, the term digital labour platform means any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location.’
platform workers deemed solo self-employed to meet this scenario as the market concentration of platforms is high.\textsuperscript{114} Also, platform workers deemed solo self-employed may also engage in collective bargaining with counterparties whose aggregate turnover exceeds EUR 2 million or whose staff headcount is more than ten people. This second option shows a low monetary and staff threshold, making the disintegration of platforms to avoid this option more difficult. Lastly, the Commission may not act provided Member States restrict EU competition law to address an imbalance of bargaining power against the solo self-employed.

Fourth, there is the legal risk the Commission is reinterpreting the applicability of Article 101 TFEU, potentially creating tensions with the CJEU in its interpretive role of EU law. This problem is visible when the Proposed Commission Guidelines exempt collective agreements of the solo self-employed from the applicability of EU competition law by assuming the solo self-employed are in a weak market position and without a significant effect on competition.\textsuperscript{115} In this sense, the Proposed Commission Guidelines are not very different from the application of the rebuttable presumption enabled by the Proposed Commission Directives. Both initiatives are ‘simpler bright-line rules’\textsuperscript{116} to identify and protect anticompetitive agreements of solo self-employed when selling their labour in the EU market because it is assumed solo self-employed are in a weak market position.

Against this background, the Proposed Commission Guidelines do not seem to be creating new rules through interpretation but clarifying the applicable limits of Article 101 TFEU, avoiding potential tensions with the CJEU.\textsuperscript{117} This claim is indirectly supported by the CJEU developments

\textsuperscript{114} International Labour Organization (n 28).


\textsuperscript{116} Jones, Sufrin and Dunne (n 115) 215.


To conclude this section, through the Commission Directive Proposal and the Proposed Commission Guidelines, the Commission has created three paths to protect access to collective labour rights of platform workers deemed solo self-employed. The first path (the Commission Directive Proposal) is based on clarifying the employment status of solo self-employed. The second path is based on identifying solo self-employed in comparable situations to ‘workers’ to protect access to collective bargaining of solo self-employed from EU competition law. The third path is grounded on protecting access to collective bargaining for the solo self-employed by identifying a problematic imbalance of bargaining power between solo self-employed and their counterparties. If such an imbalance of bargaining power is detected, then the Commission will not enforce EU competition law by not intervening when the solo self-employed engage in collective bargaining.

Against this background, it could be argued the three paths can coexist to ensure access to collective bargaining for platform workers. The first path is narrow in its personal scope as most of the rights envisaged under this path depend on accessing employment status. However, the first path provides the highest protection against dyadic market domination of platforms by ensuring access to more labour rights than collective bargaining for platform workers and by
implementing a rebuttable presumption. The second path ensures access to collective bargaining for platform workers deemed solo self-employed who do not meet the criteria to fall into the first path but are in a situation comparable to that of workers. The second path is wider in its personal scope than the first path, as the second path uses a broader definition of solo self-employed. However, the second path only aims to ensure access to collective labour rights and does not envisage a rebuttable presumption. The third path may serve as a closure rule. Suppose paths one and two fail, provided there is an imbalance of bargaining power worth correcting between platform workers deemed solo self-employed and their counterparties, the Commission will not enforce EU competition law. Such inaction by the Commission indirectly ensures access to collective labour rights for platform workers deemed solo self-employed. The third path shows the Commission is willing to retract EU competition law to correct an imbalance of bargaining power against platform workers deemed solo self-employed.

However, considering these three paths as complementary bears the risk of providing different sets of tools to address market domination for platform workers, creating different levels of protection from domination. The first path offers more tools to address dyadic and structural market domination than the second and third paths by ensuring access to more labour rights than just collective bargaining for platform workers. Creating different levels of protection for platform workers raises questions concerning the design of the three paths examined here. Why were all the labour rights in the Commission Directive Proposal not extended to all platform workers? Another question is why the Commission uses the idea of inequality of bargaining power only to ensure access to collective bargaining for the solo self-employed (including platform workers deemed solo self-employed). This structuring of the Commission initiatives has significant implications for platform workers’ freedom, which will be discussed in the concluding chapter of this thesis.
Conclusion

The Commission, Parliament and stakeholders’ initiatives examined in this chapter show the willingness of EU institutions and key stakeholders to go beyond the binary divide worker/self-employed to ensure — at least — access to collective bargaining for platform workers, including platform workers deemed solo self-employed. This willingness leads to a rebalancing process in the current relationship between the operation of EU competition law and access to collective bargaining for platform workers. It seems the Albany exemption would no longer be the sole gateway to enjoy collective labour rights such as collective bargaining for platform workers. All these initiatives diminish the dyadic — and sometimes structural — market domination of platforms against platform workers to different degrees.

This chapter has also shown that the new boundary in the relationship between EU competition law and access to collective bargaining for workers beyond the Albany exemption is marked by the applicability of two strategies. First, the First Feedback from the IIA, the Parliament Proposal, the Parliament Resolution and the Commission Directive Proposal. All these initiatives aim to ensure access to collective bargaining for platform workers and platform workers deemed solo self-employed by focusing on who should be covered by labour rights. This chapter has questioned the effectiveness of focusing the debate on who should access labour rights or determine employment status to protect platform workers’ rights. Second, the IIA, the Second Feedback from the IIA and the Proposed Commission Guidelines focus on retracting EU competition law to enable access to collective bargaining for platform workers deemed solo self-employed. This chapter also showed that a focus on the retraction of EU competition law in line with the refinement of who is a solo self-employed or a platform worker can be a more significant alternative to address market domination.

This chapter has also shown how the Commission is willing to extend labour rights beyond the Albany exemption to reach platform workers and retract the applicability of EU competition law
to ensure access to collective bargaining for them. The challenge now is to clarify which labour rights should be extended, to which platform workers, and how EU competition law should be retracted to address dyadic and structural market domination against platform workers.

The Second Feedback and the third path of the Proposed Commission Guidelines show that a way forward to address dyadic and structural market domination against platform workers in the EU would be to place the idea of inequality of bargaining power in the centre of the analysis. Such a vision would make policy initiatives less dependent on providing clear and flexible definitions such as who is self-employed, solo self-employed, or a platform worker to ensure access to labour rights, including collective bargaining. However, the Second Feedback and the third path of the Proposed Commission Guidelines still require the determination ‘solo self-employed’ status. A focus on the inequality of bargaining power would demand abandoning the need to meet ‘solo self-employed’ status to reach every person who works.120 Every person who works and is subject to a form of inequality of bargaining power, including platform workers deemed undertakings, should have access to labour rights such as collective labour rights to address dyadic and structural market domination regardless of whether they meet the requirements of the first, second or third path outlined above. The idea of freedom as non-dominination can help justify the focus on the inequality of bargaining power for every person who works.

Also, placing the idea of inequality of bargaining power in the centre of the analysis helps to clarify the point in which EU competition law should recede to address dyadic and structural market domination against platform workers. EU competition law should recede to the point where platforms cannot exercise arbitrary interference over platform workers’ choices. This point could be the inequality of bargaining power between platform workers and platforms. The retraction of EU competition to this point should ensure access to collective labour rights

120 Novitz (n 21).
for all people who work, including platform workers deemed undertakings. More on this idea will be discussed in the concluding chapter of this thesis.
Conclusion

As outlined throughout this thesis, scholars and institutions addressing the exclusion of platform workers from accessing labour rights, such as collective labour rights, have focused mainly on addressing such exclusion by expanding the tests and definitions to identify a platform worker as a worker accessing employment status. Others have aimed to tackle the exclusion of platform workers from accessing labour rights using a human rights approach that ensures labour rights to everyone working regardless of tests and definitions to clarify their employment status. These approaches are also reflected in the different initiatives discussed throughout this thesis to tackle the exclusion of platform workers from accessing labour rights. Some legislative proposals and judgments point towards enabling platform workers to claim employment status to ensure their access to labour rights. In contrast, others focus on a broader human-rights approach to expand the coverage of labour law for those people not satisfying tests for employment status.

In this context, this thesis has made an original and valuable contribution to the field by arguing that, even though there is value in the two main strategies outlined to address the exclusion of platform workers from accessing labour rights, there is a more profound need to reflect on the idea of freedom used in the construction of labour policies to tackle platform workers’ exclusion from labour law. The idea of freedom as non-domination emerges to show the problems of using a negative account of freedom to address the exclusion of platform workers from accessing key labour rights such as collective labour rights and offers an alternative vision based on understandings of domination to improve current initiatives. In this way, this thesis utilises the work of scholars exploring the theoretical foundations of labour law to make better sense of current and future policy interventions in the field.¹

The rapid emergence of the platform economy has brought in its wake new challenges for labour law and labour lawyers. Platforms own and manage the digital environment where all sorts of exchanges occur, controlling and disciplining both users and people offering their work through the platforms. Under monopsonistic market conditions, platforms have taken advantage of technological developments to unilaterally build an idea of platform work based on self-employment.

source of power and authority for platform workers. Technological developments concerning platform work are acting as a political tool in favour of platforms in designing the idea of platform work as self-employment.

In this context, platform workers usually do not have the tools to contest the operation of digital environments owned and managed by platforms, leaving platform workers powerless before a process that labels them as self-employed. Most platforms have resisted initiatives to address their power over platform workers, treating these initiatives as attacks on the technological and business breakthrough they allegedly represent. Platforms have threatened to leave jurisdictions where such initiatives to address their power have been implemented or attempted, putting platform workers’ jobs at stake.

In this context, the operation of platform work has created confusion among governments, workers and other stakeholders as to whether platform workers are workers or self-employed. After all, how could platform workers be considered workers protected under labour laws if they can, for example, choose schedules, reject work or hire substitutes? Access to employment status is key for platform workers to ensure access to key labour laws such as collective labour rights because employment status acts as a gateway for accessing labour rights. In this regard, platforms exercise their power to create the conditions to consider platform workers as self-

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employed. Supported by the idea of freedom of contract, platforms impose their terms and conditions of work on platform workers in different ways. Drawing on Lukes’ identification of three dimensions of power, this thesis has argued that platforms exercise decision-making power over platform workers by setting the contractual conditions to consider platform workers as self-employed. Platforms have also attempted to control the public discussion concerning the employment status of platform workers but have had mixed results. Platforms have also taken advantage of social structures and institutions to underpin their decision-making power. In this context, platform workers have little formal recourse to challenge the various forms of power platforms can exercise, enabling platform workers’ exclusion from accessing key labour rights such as collective labour rights.

Why should the power exercise behind the operation of platform work by platforms be a problem for labour law if platform workers have more choices at work, at least compared with more traditional work arrangements? The problems of injustice behind the power exercise by platforms against platform workers could be better understood using the republican idea of freedom as non-domination. Under this account of freedom, a person is unfree when dominated. In turn, domination occurs when a person is subject to the arbitrary interference of another. The interference is arbitrary when the interfering agent is not forced to consider the interests of the interfered agents. Freedom as non-domination aims to clarify what is problematic about contemporary relationships with a considerable power imbalance. Freedom as non-domination shows why there is a problem of domination even when the dominating agent exercises its power benevolently or does not actually interfere with the choices of the interfered agent.

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The usefulness of using the republican idea of freedom as non-domination as an alternative to a negative account of freedom becomes apparent when testing access to key labour rights such as collective labour rights for platform workers in the EU. In the EU, platform workers are subject to the overlapping operation of dyadic and structural market domination. There is dyadic market domination because platform workers act as cognisable agents capable of creating the conditions to consider platform workers as self-employed. In turn, there is structural market domination because EU competition law prohibits the exercise of collective labour rights of platform workers deemed self-employed undertakings. Both forms of domination overlap since platforms can underpin their dyadic market domination to exclude platform workers from accessing collective labour rights by invoking EU competition law to prevent platform workers' collective action, leaving platform workers without valuable tools such as collective labour rights to challenge this overlapping form of domination.

To avoid the problems of labelling as anticompetitive the collective agreements between management and work, the CJEU developed the Albany exemption. The Albany exemption diminishes dyadic and structural market domination between workers and employers by retracting the applicability of EU competition law over workers' exercise of collective labour rights. Such retraction is helpful as it enables workers to access valuable tools such as collective labour rights to challenge the power of the employers, forcing them to consider their interests. However, it is uncertain whether platform workers can access the Albany exemption because it is unclear whether platform workers meet the EU definition of worker, which is one of its key elements. As a result, it is doubtful whether platform workers can access collective labour rights as a tool to address dyadic and structural market domination. There is domination in this context because platform workers cannot access key tools to challenge the power of platforms to force the platforms to consider their interests.
The republican idea of freedom as non-domination also helps to explain the exclusion of platform workers from accessing the EU definition of worker. The EU definition of worker is built on a negative account of freedom as non-interference. As a result, the applicability of the EU definition of worker depends on whether there is actual interference over workers’ choices by the employer, for example, by setting a working schedule, wearing a uniform and following orders. This approach overlooks how employers’ potential capacity to interfere also impacts workers’ choices. The *Yodel* case illustrates how using a negative account of freedom to clarify the EU definition of worker led the CJEU to conclude that the freer B (the complaining worker) was from actual interference in their choices by the employer to choose, for example, schedules or hire others, the closer B was to self-employment than to traditional employment. Thus — for the Court, B was self-employed, not a worker.  

The idea of freedom as non-domination claims that such a negative account of freedom does not fully capture the problems of unfreedom of platform workers such as B. Platform workers can, for example, choose schedules or hire substitutes. However, such freedom of choice does not mean platform workers are freer than in more traditional work arrangements. Freedom as non-domination requires looking beyond the freedom of platform workers in their choices and considering how platforms’ capacity to exercise arbitrary power shapes platform workers’ choices. Under an account of freedom as non-domination, platform workers will not be free from domination unless they have the tools to challenge the platforms’ power to, among other things, set the conditions to deem platform workers as self-employed, forcing them to consider their interests.

The idea of freedom as non-domination does not mean, however, that employers would lack managerial prerogatives. Concerning platform work, provided platform workers have the tools to challenge the power of platforms, forcing them to consider their interests, platforms’

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6See chapter 3, S II 2.
interferences will not be arbitrary. Thus, there will not be domination. Platforms could, for example, discipline platform workers or change the terms and conditions of work without dominating platform workers, provided platform workers have access to the tools to challenge such decisions, forcing the platforms to consider their interests.

Using an approach based on the idea of freedom as non-domination in Yodel would have led to a different outcome concerning whether B was a worker. The CJEU would have ruled that B was a worker of the platform because B’s freedom to choose, for example, schedules or hire others ultimately depends on the unilateral will of the platform that designs and owns the platform. B is unfree as B lacks mechanisms to tackle the power of the platform to decide how platform work should operate. Using the idea of freedom as non-domination, this interpretation is regardless of Yodel’s favourable or unfavourable policies over B. Thus, if B is unfree in the republican sense, then B should be considered a worker.

In a context of rising resistance by platform workers to domination, this thesis explored strategies to address the dyadic and structural market domination platform workers’ are experiencing in the EU. The strategies of exit, workplace democracy and workplace constitutionalism offered advantages and challenges to addressing dyadic and structural market domination. The workplace constitutional strategy features in many national jurisdictions and the most recent EU initiatives discussed in chapter 5. However, workplace constitutionalism requires carefully designed rules to avoid platforms circumventing them and falls short of the advantages of workplace democracy.

This thesis also showed the need to further the republican strategies to address domination through centralised participation at work. Centralised participation at work invites us to rethink the existing and new regulations to ensure platform workers have the tools to challenge the power of platforms at the workplace and the making of the law. Iconic platforms like Uber are
already attempting to lobby Member States and EU officials\textsuperscript{7} to control the legislative agenda concerning platform work. A republican approach of freedom as non-domination would require platform workers as stakeholders to have the tools to challenge such power, forcing platforms and legislators to consider platform workers' interests at the workplace and the EU levels. Centralised participation at work is an ambitious strategy but firmly aligned with the idea of providing tools for platform workers to tackle domination at every level. However, centralised participation at work also requires the active participation of platform workers at different levels.

This thesis also discussed whether platform workers could access collective labour rights to challenge dyadic and structural market domination in the EU despite being considered self-employed and thus unable to access the \textit{Albany} exemption. It became clear the EU treats self-employed people as undertakings subject to EU competition law, and, since the EU concept of an undertaking is broader than the EU definition of worker, if platform workers do not meet the EU definition of a worker, they will fall into the definition of a self-employed undertaking and thus become subject to EU competition law. It also became clear that the few exemptions that the EU competition law system has conceded for the self-employed to organise, none apply to ensure access to collective labour rights for platform workers deemed self-employed undertakings.

Through analysis of the EU competition law goals of consumer welfare, the protection of the competition structure and fairness, it became clear that EU competition law goals do not aim to ensure access to collective labour rights for working people like platform workers deemed self-employed. It is difficult to align the EU competition law goals of consumer welfare and the protection of the competition structure with ensuring access to collective labour rights for platform workers and EU officials\textsuperscript{7} to control the legislative agenda concerning platform work. A republican approach of freedom as non-domination would require platform workers as stakeholders to have the tools to challenge such power, forcing platforms and legislators to consider platform workers' interests at the workplace and the EU levels. Centralised participation at work is an ambitious strategy but firmly aligned with the idea of providing tools for platform workers to tackle domination at every level. However, centralised participation at work also requires the active participation of platform workers at different levels.

Through analysis of the EU competition law goals of consumer welfare, the protection of the competition structure and fairness, it became clear that EU competition law goals do not aim to ensure access to collective labour rights for working people like platform workers deemed self-employed. It is difficult to align the EU competition law goals of consumer welfare and the protection of the competition structure with ensuring access to collective labour rights for

platform workers. Difficulties emerge because it is hard for platform workers to prove to EU and national competition authorities that access to collective labour rights for platform workers can fulfil the objectives of consumer welfare of providing cheaper or better products and services for consumers and the protection of the competition structure. Fairness could have been a more promising goal. However, fairness is more concerned with the disintegration of powerful platforms to distribute market power rather than ensuring access to collective labour rights for platform workers to address such power.

Thus, EU competition law goals do not help ensure access to collective labour rights for platform workers deemed undertakings. Quite the contrary, EU competition law goals justify EU competition law becoming a source of structural market domination against platform workers. The aggregate of norms and practices concerning EU competition law prohibits platform workers from exercising their collective labour rights if deemed self-employed undertakings to protect consumer welfare, the protection of the competition structure and fairness.

A further question is whether the goals of EU competition law can be modified to ensure access to collective labour rights for platform workers deemed self-employed undertakings. This thesis claimed the underlying ideological foundations of the EU competition law goals of consumer welfare, the protection of the competition structure and fairness could be subsumed within Neoliberal and Ordoliberal approaches. Ordoliberalism reflects concerns with protection of individual economic freedom to avoid the concentration of private power and securing democracy in the long run and relates to the EU competition law goals of protecting the competition structure and fairness.

The problem with using an Ordoliberal approach to ensure access to collective labour rights for platform workers deemed self-employed undertakings is that it takes the backseat compared to the Neoliberal vision of consumer welfare. A way forward would be to have EU legislation in place to put Ordoliberalism in the front seat to ensure access to collective labour rights for
platform workers to protect the individual economic freedom of platform workers to avoid the concentration of platforms’ market power to secure democracy in the long run. This context shows the need to expand EU competition law goals to incorporate the idea of freedom as non-domination or to consider idea of freedom as non-domination to become an EU competition law goal. It could be argued that consumer welfare, the protection and the competition structure and fairness could be balanced with the objective of ensuring market actors are not dominated by others. There will be no market domination if market actors subject to the arbitrary interference of more prominent market actors can be organised to challenge such power.

Against this picture of exclusion of platform workers from accessing collective labour rights in the EU, this thesis explored how the recent initiatives by the Commission, Parliament and key stakeholders enable access to collective labour rights for platform workers to challenge dyadic and structural market domination. It was argued such initiatives could be divided into initiatives aiming to clarify who should be covered by labour rights and initiatives aiming to retract the applicability of EU competition law to ensure access to collective labour rights. All these initiatives help to ensure access to collective labour rights for platform workers in the EU as the initiatives expand the Albany exemption in different degrees. All these initiatives can be framed as workplace constitutional strategies as they aim to withdraw platforms’ powers by clarifying who can access labour rights and by retracting the applicability of EU competition law, withdrawing the power of platforms to take advantage of structural market domination.

This thesis argued the most promising initiative to achieve freedom as non-domination for platform workers would be to expand the third Commission path, which ensures the retraction of EU competition law to access to collective labour rights for solo self-employed concerning work conditions, provided there is an imbalance of power worth addressing.
Using an account of freedom as non-domination, the third Commission path requires to be expanded to reach platform workers beyond the solo self-employed and concerning work conditions. The third path should thus retract the applicability of EU competition law to ensure access to collective labour rights for every working person subject to an imbalance of bargaining power as a manifestation of domination.

Freedom as non-domination also signals the limits of this expanded initiative. Platforms can still provide the benefits they claim to platform workers, for instance, by enabling them to choose their schedules or hire substitutes. What matters for republicans is that platform workers have access to mechanisms to challenge the arbitrary interferences of platforms in a context of an imbalance of bargaining power, forcing platforms to consider platform workers’ interests. Platform workers need access to collective labour rights to challenge the potential or actual interferences by the platforms they do not value, for instance, by rejecting the unilateral change in the pricing algorithm or by rejecting the creation of the conditions to deem platform workers as self-employed. Also, ensuring access to collective labour rights for platform workers might serve to legitimise the operation of platform work. For instance, platform workers might agree with the platforms on the value of the freedom to choose their schedules or to hire others. In other words, if access to collective labour rights such as collective bargaining and strike are available for platform workers, the interference by platforms in platform workers’ choices would not be arbitrary, and thus there will be no domination. Following the centralised participation at work strategy, this expanded third Commission path should also enable the active participation of every working person (including platform workers) in creating or revising mechanisms to address the power of platforms, diminishing domination at the legislative and workplace level.

This expanded initiative based on freedom as non-domination also signals how future regulations should aim beyond subcategories of workers, such as platform workers, and
employment status. This expansive strategy is aligned with the steady departure of work from stable and full-time to insecure and short-term arrangements. The emergence of jobs sitting at the border between work and self-employment calls for adopting an expansive policy approach based on the idea of freedom as non-domination, impacting the boundaries of labour law.

Using the developments of this thesis, the idea of freedom as non-domination may also help understand the problems of injustice behind other forms of atypical working conditions. Forms of agency, temporary, contracting out, casual or ‘on-call’ work, seasonal work, home-work, part-time and self-employment would benefit from using the idea of freedom as non-domination to ensure access to collective labour rights and to design policy initiatives as tools to address domination by forcing their employing counterparties to consider their interests.

The idea of freedom as non-domination also shows why the idea of freedom of contract fails to legitimise the justice behind the agreements between workers and their counterparties in these other atypical work arrangements. Like platforms, atypical workers’ counterparties hold the power to interfere over atypical workers’ choices at any time based on what the parties agreed in the contract, usually leaving these atypical workers with no tools to contest such arbitrary interference. For example, similar to the realities of platform work discussed in this thesis, many atypical workers are forced to bear the business risks as they agreed by contract that their services could be terminated immediately when they are no longer needed by their employers. Freedom as non-domination would require ensuring access to collective bargaining and strike as valuable tools for such atypical workers to force their employing counterparties to consider their interests when negotiating contracting terms, diminishing employers’ capacity to exercise arbitrary interference over precarious workers’ choices, alleviating domination.

An example of the value of the republican approach of freedom as non-domination to assess the problems of the idea of freedom of contract behind atypical work arrangements can be seen
in the 2021 labour reform in Spain. This labour reform is the product of longstanding social dialogue between trade unions, the government and employers’ associations to combat the high labour casualisation that emerged with atypical work arrangements in Spain, which spiked during the 2008 crisis. Under this legal reform, minimum wages will no longer depend on company-level agreements but instead on sectoral-level agreements to avoid price competition over minimum wages between companies. Also, work contracts are now presumed of indefinite duration, and there is only one type of temporary contract that can be subscribed for strict ‘production circumstances’ and no longer than six months or to replace someone on temporary leave. Another exciting reform is that the reasons for the temporary hiring must be carefully explained in the work contract, diminishing the risk for indiscriminate temporary hiring and forcing the employing counterparties to provide reasoned publicity for the decision of temporary hiring. This and other ways to constrain the employing counterparties’ powers under this reform were accompanied by more work inspections and higher fines, ranging from 1,000 to 10,000 EUR. This legislative reform can be understood as a strategy of workplace constitutionalism that withdraws some of the powers of the employing counterparties to unilaterally design atypical work arrangements to be imposed on working people based on the idea of freedom of contract. The withdrawal of such power leads to centralised norms that aim to consider atypical workers as workers enjoying employing status, which includes access to collective labour rights as tools to address the domination of such employing counterparties.

As a result, it has been reported that indefinite contracts are again on the rise while temporary contracts are in retreat without affecting Spanish employment figures. Employment in Spain rose 22.71 per cent in April 2022 with respect to April 2021. New indefinite contracts rose from ten per cent of the total (as of December 2021 when the reform applied) to 48 per cent in April

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8 Real Decreto-ley 32/2021, de 28 de diciembre, de medidas urgentes para la reforma laboral, la garantía de la estabilidad en el empleo y la transformación del mercado de trabajo.
9 Ibid.
2022. These figures equal 534,566 more indefinite contracts and 441,318 fewer temporary contracts from April 2021 to April 2022, meaning 116.11 per cent more indefinite contracts between January-April 2022 compared to January-April 2021.\textsuperscript{10} This scenario means more workers in Spain can access collective labour rights as tools to address domination by their employing counterparties.

This thesis also invites us to consider the implications for labour law as a discipline to expand access to labour rights, such as collective labour rights for people beyond specific groups, such as workers accessing employing status, platform workers and other atypical workers based on the idea of freedom as non-domination. In a way, the idea of freedom as non-domination in the context of this thesis would mean turning back to think about the justifications for labour law interventions. In other words, to ask why and where labour law should intervene. A starting point for the reasons for intervention in labour law concerning the idea of freedom as non-domination could be to consider what Brian Langille has called the ‘constituting narrative’ of labour law:

\begin{quote}
Wealth and power are asymmetrically distributed in our society; since workers possess less of both than employers, they are inherently disadvantaged; disadvantage generates injustice, injustice resistance, and resistance social unrest. Hence, states must intervene in the employment relation.\textsuperscript{11}
\end{quote}

The idea of freedom as non-domination invites the critique of the construction of modern labour law based on conceptions such as the workplace as the place of conflict between trade unions,

\textsuperscript{10} La Moncloa, ‘Uno de cada dos contratos firmados en abril es indefinido, en un mes en el que el paro desciende en 86.260 personas’ <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/trabajo14/Paginas/2022/040522-paroabril.aspx>

workers and employers as increasingly inadequate to grasp contemporary labour market
dynamics. Following Harry Arthurs, this is a narrow way of conceptualising the boundaries of
labour law, curtailing its ‘... explanatory power, practical efficacy and moral force...’\textsuperscript{12} Drawing
from the ‘constitutive narrative’ the idea of freedom as non-domination may help to redesign
current and future labour policies, reshaping the boundaries of labour law.

Freedom as non-domination requires stepping out of traditional definitions behind the
construction of labour law, such as workers and employers engaging in dialogue and conflict in
the workplace, to focus on who needs to be protected from domination and how. This vision
focuses on tangible manifestations of vulnerability due to domination created by an
asymmetrical distribution of wealth and power, which creates an imbalance of bargaining power
worth correcting between working people and their employing counterparties. This approach
would mean considering a broader vision of labour law capable of encompassing all sorts of
workers, provided there is domination due to an imbalance of bargaining power. Workers
should have access to collective labour rights before their employing counterparties not because
they meet a particular definition but because there is domination caused by an asymmetrical
distribution of wealth and power.

In the context of increasing atypical forms of work that blur the boundaries between work and
self-employment, the construction of labour law based on identifying who is a worker and
employer becomes increasingly ineffective in protecting such atypical workers. As discussed in
chapter 5, developing the definitions of worker, employer, platform worker, solo self-employed
or platform to apply labour law provides certainty to such workers regarding their labour rights.
The problem is that such certainty comes at the cost of those at the borders of these definitions
— usually the people in most need of labour law. Working people at the edges of such definitions

\textsuperscript{12} Ibid. 18
can become victims of the capacity of the employing counterparties to circumvent such definitions and legitimise a dominating relationship through the idea of freedom of contract.

Freedom as non-domination proposes to address power asymmetries to protect people from domination. In the world of work, this should mean every working person — including all types of workers, platform workers and atypical workers in general — should have the right to access collective labour rights as tools to address domination. The utility of this approach can be seen throughout this thesis. Using the idea of freedom as non-domination, there will be no need for platform workers in the EU to meet the EU definition of worker to access the Albany exemption (and no need to access the Albany exemption at all). Also, it would not be necessary to prove platform workers’ organisation is aligned with the EU competition law goals of consumer welfare, the protection of the competition structure or fairness. Provided platform workers of all types are subject to unequal bargaining power against the platforms, which causes domination, then EU competition law should recede to enable platform workers to access collective labour rights.

Such a broad approach will certainly raise concerns about where the new boundaries of labour law should be placed. For instance, most EU Member States build labour laws based on the binary divide worker/self-employed to ensure access to labour rights for workers. If such distinction disappears using the idea of freedom as non-domination, does this mean the end of labour law as we know it? Not entirely. A freedom as non-domination approach should open the door for every working person in a situation of domination, regardless of employment status, to join trade unions and other workers’ organisations to exercise collective labour rights. This claim is not entirely new, and it can be argued that it is already in motion. Going back to the Dutch orchestra musicians’ case,\textsuperscript{13} it can be argued self-employed Dutch orchestra musicians were engaged in trade unions to challenge the imbalance of market power capable of creating

\textsuperscript{13}See the introductory chapter of this thesis.
domination by the employers before the NMa stepped in. An approach based on freedom as non-dominination justifies the incorporation of, for example, the Dutch orchestra musicians into Dutch trade unions. Provided there is an imbalance of market power that enables employers to exercise arbitrary interference, Dutch orchestra musicians should have the right to join trade unions to exercise their collective labour rights, and competition authorities such as the NMa should step back.

A way to further clarify the new boundaries of the applicability of labour law that an approach based on freedom as non-dominination brings could be to find inspiration in the mechanisms put in place in the Second Feedback explored in chapter 5. EU and national competition law systems could be retracted to the point where the unequal bargaining power between the parties is no longer dominating. The point where the employing counterparties exercise domination could be clarified based on a non-rebuttable presumption of domination if the marginal revenue product of working people is lower than the marginal revenue product of other working people on a comparable task and whose access to collective labour rights is not questioned.

Such new boundaries based on freedom as non-dominination could take the legal form of an EU regulation or an EU directive. An EU regulation or directive could ensure access to collective labour rights for every working person in the EU who is dominated based on an unequal bargaining relationship by retracting the applicability of EU competition law to the point where working people would no longer be subject to the arbitrary interference by their employing counterparties.

Similar to the case of the IIA discussed in chapter 5, the retraction of EU competition law to enable the exercise of collective labour rights could be justified under Article 103 (2)(c) TFEU.

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14 See chapter 5, S II 2.
15 See chapter 5, S II 1.
Under this Article, there is no need to consider the conditions, technical rules of each Member State and whether this initiative would hold back the development of small and medium-sized undertakings as Article 153(1-2)(b) TFEU does. Article 103 (2)(c) TFEU helps to ensure access to collective labour rights for working people to the point they no longer experience domination by retracting the applicability of EU competition law. Such legislative initiative can provide a more certain, structured and democratically legitimised protection of access to collective labour rights for platform workers than similar judicial initiatives such as the Albany exemption. Also, such EU regulation or directive could be seen as expanding the underlying idea behind CJEU’s development concerning the Albany exemption: that if the operation of EU competition law prevails, workers’ collective voice would be silenced as illegal under Article 101 TFEU. This initiative would also suppose the CJEU recognises the value of secondary legislation to inform EU law, calling for CJEU’s self-restraint before political judgment.

Having such an EU regulation or directive in place is also important to provide tools for working people, such as platform workers, to challenge the domination of their counterparties on a transnational level. As discussed in chapter 1, the platform economy tends to operate transnationally, and some kinds of work it creates operate based on a transnational business model. For instance, online platforms can control the supply of work in real-time and beyond the boundaries of a country. In these cases, ensuring access to collective labour rights for all platform workers and at all levels in the EU ensures that such platform workers would have the tools to contest the power of platforms by organising beyond national borders. Also, an EU-level

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16 See chapter 3, S II.  
17 Phil Syrpis, ‘Theorising the relationship between the judiciary and the legislature in the EU internal market’ in Phil Syrpis (ed) The Judiciary, the Legislature and the EU Internal Market (Cambridge University Press 2012).  
18 See chapter 1, S II and IV.  
19 See chapter 1, S IV 2.
regulation or directive ensuring access to collective labour rights for working people like platform workers promises to institutionalise social dialogue at a transnational level.

This approach would provide initiatives such as the Frankfurt Paper outlined in chapter 2 a new strength to ensure platform workers and other atypical workers’ participation in social dialogue at a transnational level, preventing structural forms of market domination such as the operation of EU competition law and diminishing the dyadic market domination of transnational employing counterparties. Going back to the Dutch musicians' case, these Dutch musicians could have joined *FNV Kunsten* to engage in collective bargaining in the Netherlands. Also, these Dutch musicians could have joined a transnational trade union to discuss better working conditions for orchestra musicians in the EU. Similarly, in the case of Yodel, B could have joined a trade union in the UK (Brexit aside) and then joined a transnational union of couriers to improve their working conditions in the EU.

The main difference between implementing such an initiative through an EU regulation or an EU directive for platform workers is that an EU regulation would help prevent the emergence of different national standards concerning the constitutive elements of this initiative. For instance, Member States could develop different standards of what counts as domination or which jobs to compare to implement the non-rebuttable presumption of domination outlined above. Despite the advantages of having an EU regulation in place, it is also true that the EU has been more willing to enact directives to address labour issues at the EU level.

Rethinking power and freedom to understand the modern labour law problems through the lenses of the idea of freedom as non-domination could be an exciting and effective way to address the exclusion of atypical workers like platform workers in the EU. Despite desirable further doctrinal and empirical research concerning the implications of such an expansive

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20 See chapter 2, S III 7.
21 See the introductory chapter and chapter 4, S II 2.
approach, this thesis has flagged that an expansive approach to protecting working people like platform workers is possible without prescinding labour law’s historical and practical value.
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