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The Presumption of the Employment Relationship of Platform Workers as an Opportunity to Eliminate Obstacles Arising from Competition Law in the Conclusion of a Collective Agreement: The Example of Spain

Abstract: Collective bargaining is the most appropriate tool to introduce detailed regulations specific to platform work. However, the status of platform workers (they are usually self-employed), combined with EU competition law, constitutes a significant restriction on their collective bargaining rights. Hence, the aim of this article is to prove the thesis that the presumption adopted in the Spanish regulation of recognising platform workers as workers in the strict sense would be a universal solution to the problem of ensuring proper labour protection for this group of workers.
Keywords: collective agreement, platform work, self-employed workers

Introduction

Working through digital platforms is a relatively new phenomenon, and a number of legal doubts are implied concerning the employment rights of people working through these platforms. While there are no relevant statistics, practice shows that platform workers are predominantly those who provide work outside of an employ-

ment relationship, although they are often actually in a situation comparable to that of employees.

The status of people working through digital platforms raises the question of ensuring a minimum level of rights for them.[1] There is a consensus in legal scholarship that collective bargaining is the most appropriate tool to introduce detailed regulations suitable for platform work. Collective bargaining can put in place appropriate measures to guard against an undue emphasis on employer-oriented flexibility and implies a more transparent and formal standard-setting process than individual bargaining.[2] In addition, certain issues, such as the regulation of algorithms, are specific to this sector. Thus, tailor-made solutions created by social partners for the digital platform market seem to be better than general regulations introduced by a legislature. However, the conclusion of a collective agreement regulating the working conditions of those employed through digital platforms faces obstacles under EU law.

1. Competition law as a restriction of collective agreements

Collective bargaining should be allowed and promoted in national legal systems so that its benefits can be enjoyed by the widest possible range of working people. The need to promote such a mechanism is highlighted by all international standards. However, European Union law is proving problematic. Although it emphasises the importance of collective bargaining, at the same time, due to competition law principles, it is an obstacle to its development. EU law promotes collective bargaining based on the concept of an employee. The Court of Justice, in its judgments in the *Albany* and *Laval* cases, emphasised the role of fundamental rights in the EU, such as freedom of assembly and the right to collective bargaining between employers and employees. The importance of collective bargaining is also indicated by EU primary law. According to Article 152 of the Treaty on the Functioning of the European Union (TFEU), the Union recognises and promotes the role of social partners and facilitates dialogue between them. Article 28 of the Charter of Fundamental Rights (CFR) provides for the right of workers and employers and their respective organisations to 'negotiate and conclude collective agreements'. Furthermore, according to the European Pillar of Social Rights, social partners should be 'encouraged to negotiate and conclude collective agreements on matters that concern them, while respecting their autonomy

1 J. Unterschütz, Praca w ramach platform i aplikacji cyfrowych – wyzwania dla zbiorowego prawa pracy, cz. 1 i 2, 'Monitor Prawa Pracy' 2017, no. 8, pp. 398–402 and no. 9, pp. 461–465; J. Unterschütz, Come Together Now! New Technologies and Collective Representation of Platform Workers, 'Acta Universitatis Lodziensis Folia Iuridica' 2021, no. 95.

2 T. Gyulavá, G. Kártyás, Dlaczego rokowania zbiorowe są dla pracowników platformowych koniecznością i jak do nich doprowadzić? (in:) Ł. Pisarczyk, E. Brameshuber, J. María Miranda Boto (eds.), Rokowania Zbiorowe a rynek platform cyfrowych. Tradycyjne narzędzie dla nowych modeli biznesowych, Warsaw 2022, p. 140.

of the right to take collective action'. All the legal acts mentioned refer to workers and their organisations. However, it does not follow from these provisions that the right to collective bargaining should be interpreted narrowly to cover only employees. Rather, it is accepted in EU labour law and the relevant case law of the Court of Justice that this right can extend beyond the national category of employees. However, it is unclear, and widely debated in EU labour law as well as in legal scholarship, where the boundary of the subjective scope of the right to collective bargaining lies. While the employment relationship has so far been defined in case law, a definition of the actual employer is lacking. Such a definition would lead to a clear demarcation of the limits of the right to conclude a collective agreement.

EU competition law, specifically Article 101 TFEU, prohibits agreements between undertakings which restrict competition on the internal market, in particular where those agreements consist in directly or indirectly fixing purchase or selling prices or other trading conditions. EU competition rules are based on Article 3(3) of the Treaty on European Union, which provides that the Union establishes an internal market, including a system ensuring that competition is not distorted. The cited Article 101 TFEU is based on a simplified subjective scope, divided into two groups: employees and entrepreneurs. The basis for such a distinction was to prevent genuine companies bearing financial risks from taking action that would have the object of preventing, restricting or distorting competition on the internal market. In recent years, however, the clear boundaries between hierarchical labour relations and the activities of economic entities (undertakings) supplying goods to meet consumer demand have become blurred. In light of this, whether it is permissible for trade unions to engage in collective bargaining to conclude an agreement on behalf of self-employed workers is questionable under EU law. As the following analysis shows, the case law in this area is evolving.

In the judgment of 21 September 1999 on the case of *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, the CJEU answered the question of whether a collective agreement concluded between representative employers' and workers' organisations, with a view to establishing a single pension fund responsible for the administration of a supplementary pension scheme, is subject to Article 85(1) of the EC Treaty (now Article 101 TFEU).[3] The Court of Justice found that the nature and subject matter of the agreement justified its exclusion from the scope of Article 101, Paragraph 61, TFEU. The Court reiterated that the activities of the Community include not only 'a system ensuring that competition in the internal market is not distorted', but also 'a policy in the social sphere'. Accordingly, the EU authorities should

3 Judgment of the Court of Justice of 21 September 1999 on the case of *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* C-67/96, ECR 1999/8–9B/I–5751; L. Gyselen, Glosa do wyroków TS z dnia 21 września 1999 r., C-67/96, C-115/97 C-117/97 i C-219/97, 'Common Market Law Review' 2000, no. 2, pp. 425–448.

promote close cooperation between Member States in social matters, in particular in the field of trade union law and collective agreements between workers and employees. These collective agreements support the achievement of social policy objectives such as, *inter alia*, the improvement of living and working conditions, adequate social protection, social dialogue, the development of human resources allowing for a high level of employment, and the fight against social exclusion. Consequently, the Court of Justice concluded that although certain effects in the form of a restriction of competition are inherent in collective agreements concluded between representative employers' and workers' organisations, the social policy objectives indicated would be jeopardised if the social partners were subject to Article 101 TFEU when concluding these agreements. It follows from the judgment in the *Albany* case that, in general, collective labour agreements are excluded from the scope of competition law if they are concluded by representatives of workers and employers.

In the judgment of 4 December 2014 on the case of *FNV Kunsten Informatic en Media v. Staat der Nederlanden*, the CJEU assessed the possibility of extending the right to collective bargaining to the self-employed from a competition law perspective. The ruling arose against the background of a case in which a collective agreement had been concluded setting minimum rates for substitute musicians in orchestras, dividing them into two categories: substitutes for employees and substitutes performing under a specific task contract (the minimum rates for substitutes for the self-employed were 16% higher, so that these persons would be able to contribute to pension insurance to make their future pension benefits comparable to those of employees). The Court assumed that the provision of a collective agreement, insofar as it was determined by a trade union acting on behalf of self-employed service providers, was not the result of collective bargaining between social partners and, by its nature, could not be excluded from the scope of Article 101(1) TFEU. The Court concluded that self-employed substitute musicians are, in principle, 'entrepreneurs' within the meaning of Article 101(1) and that the employees' organisation, when it enters into negotiations in the name of self-employed service providers, is not acting as a trade union and therefore as a social partner, but as an association of entrepreneurs (Paragraphs 27–28). The Court ruled that the provision of a collective agreement fixing minimum rates for self-employed service providers belonging to one of the trade unions which was a party to the collective agreement, who perform the same activities for an employer under a specific task contract as the employer's salaried employees, constitutes the outcome of a social dialogue and does not fall within the scope of Article 101(1) TFEU only if those service providers are 'false self-employed persons' and thus service providers in a situation comparable to that of employees. It is for the referring court to make that determination (Paragraphs 31 and 43). When considering the *FNV Kunsten* case, the CJEU referred to the concept of employee developed in its case law on individual labour law. The CJEU pointed out in Paragraph 36 of the judgment that an employee is a person who:

> acts under the direction of his or her employer as regards, in particular, his freedom to choose the hours and place of work and to carry out the tasks of his or her work, provided that he or she does not bear the economic risk of that employer and that he or she is integrated into that employer's undertaking during the employment relationship and forms an economic unit with that undertaking.

In this way, the CJEU highlighted those elements that appear to be relevant when attempting to distinguish between employment and self-employment. These are: (a) acting under the direction of the employer, (b) sharing risks, and (c) integration into the employer's undertaking. The CJEU, in the *FNV Kunsten* case, thus reiterated the distinction adopted under individual labour law between dependent employees (including false self-employed persons, who are to be treated as employees) and independent self-employed persons. There is no 'third category' between employees and self-employed persons.[4] However, the Court of Justice did not provide clear guidance on how to separate 'genuine self-employment' from 'false self-employment'.[5] According to EU case law, the question of whether a relationship of dependency exists must be answered on a case-by-case basis, taking into account all the factors and circumstances characterising the relationship between the parties.[6] It is noted in the literature that the casuistic approach of CJEU case law is insufficient to ensure legal certainty and may discourage collective bargaining by self-employed persons.[7]

With its decision in the *FNV Kunsten* case, the Court ruled out the possibility of exercising the right to collective bargaining and to conclude collective agreements by persons performing work that does not meet the 'test' used to establish the existence of an employment relationship for the purposes of EU law other than Article 28 CFR.[8] As a result, 'economically dependent self-employed persons' were excluded from the personal scope of Article 28 CFR. This approach is questionable in the context of the existence of an intermediate sphere between traditional employment and the employment of an independent service provider. The right to collective bargaining should be seen as a fundamental right and, at the same time, the social objec-

4 B. Surdykowska, Między samozatrudnieniem fałszywym a zależnym, 'PiZS' 2016, no. 2, pp. 18–23.

5 A. Aloisi, Negotiating the Digital Transformation of Work: Non-Standard Workers' Voice, Collective Rights and Mobilisation Practices in the Platform Economy, 'European University Institute Working Papers' 2019, p. 9.

6 See the judgment of the Court of Justice of 12 January 2004 on the case of *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, Trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, ECLI:EU:C:2004:18.

7 N. Countouris, V. De Stefano, I. Lianos, The EU, Competition and Workers' Rights, 'CELS Research Paper Series' 2021, no. 2, p. 291.

8 P. Grzebyk, Od rządów siły do rządów prawa. Polski model prawa do strajku na tle standardów unijnego i międzynarodowego prawa pracy, Warsaw 2019, pp. 157–158; A. Aloisi, Negotiating…, *op. cit.*, p. 9.

tives indicated in the Treaty on European Union (Article 3(3) indicates, *inter alia*, social progress) should not only apply to those in subordinate employment.[9]

2. Agreements and decisions of professional associations as a point of reference

It follows from the CJEU's case law on professional association agreements that there is no breach of Article 101(1) TFEU if the objectives of the agreement are legal. It is worth pointing to the judgment of 19 February 2002 on the case of *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, in which attorneys-at-law listed in Amsterdam engaged in professional cooperation by forming an association with a tax consultancy company and a company of tax consultants and chartered accountants.[10] The relevant bodies of the Dutch Council of Attorneys decided that this cooperation was in conflict with the 1993 Samenwerkingsverordening Act, concerning cooperation between attorneys and practitioners of other professions, passed by the College of Delegates of the Supreme Council of Attorneys. Specifically at issue was the rule laid down in this act prohibiting attorneys from forming partnerships with persons who are not attorneys. The decisions of the governing bodies of the Dutch Council of Attorneys were challenged because, it was argued, they were in conflict with the Treaty provisions on competition as well as the right of entrepreneurship and the unrestricted provision of services. The Court of Justice held that an act of cooperation between attorneys-at-law and members of other professions should be regarded as a decision of an association of undertakings within the meaning of Article 85(1) of the EC Treaty (now Article 101(1) TFEU). However, as noted by the Court of Justice, not every agreement or decision of an association of undertakings which restricts the freedom of action of the parties or of one of them falls within the prohibition laid down in Article 85(1). According to the Court of Justice, the legislation enacted by the Dutch Council of Attorneys does not infringe Article 85(1), since that legislation, despite entailing restrictive effects on competition, is necessary for the proper practice of the profession of attorney under the conditions under which it operates in the Member State concerned. The prohibition on any kind of integrated cooperation between attorneys and chartered accountants is objectively justified by the need to ensure that an attorney acts with complete independence, loyalty, profes-

9 B. Surdykowska, Między…, *op. cit.*, pp. 18, 20–22.

10 Judgment of the Court of Justice of 19 February 2002 on the case of *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, with the participation of Raad van de Balies van de Europese Gemeenschap*, C-309/99, ECLI:EU:C:2002:98; A.J. Vossestein, Gloss on the judgments of 19 February 2000, C-35/99 and of 19 February 2002, C-309/99, 'Common Market Law Review' 2002, no. 4, pp. 841–863.

sional secrecy and respect for the rules relating to the avoidance of conflicts of interest.

Similar reasoning was adopted in the judgment of 23 November 2017 on the joined cases C-427/16 and C-428/16, concerning the setting of minimum rates by the professional association of attorneys-at-law.[11] The Court of Justice ruled that national regulation prohibiting going below those minimum rates may affect competition in the internal market within the meaning of Article 101(1) TFEU (Paragraph 46 of the judgment), unless it can be ensured that the rates are fair and justified in accordance with the general interest (Paragraph 53 of the judgment). Therefore, an infringement of Article 101(1) does not necessarily occur, as the objectives pursued by such regulation must be taken into account and it must be verified whether the conditions restricting competition are necessarily linked to the pursuit of those objectives. On the other hand, the Court did not specify which objectives may be legal.

The CJEU also assessed the decision of a trade association from a competition law perspective in its judgment of 12 September 2000 on the case of *Pavel Pavlov et al. v. Stichting Pensioenfonds Medische Specialisten*.[12] The case concerned self-employed doctors in a hospital, covered by a compulsory supplementary occupational pension scheme introduced at the request of the representative body of the professions concerned following collective bargaining. The CJEU considered that the Treaty did not contain any provisions encouraging professionals to conclude collective agreements to improve their employment and working conditions (Paragraph 69). However, according to the CJEU, a decision taken by the representative body of a profession to introduce such a supplementary pension fund serves a specific social objective, namely to guarantee a certain level of old-age pension to all members of the profession. The payment of contributions to the supplementary occupational pension scheme is closely linked to the doctor's exercise of the profession. The Court of Justice held that the decision to establish a supplementary pension does not infringe competition law.

It follows from the judgments presented that agreements and decisions of professional associations that restrict competition can only be exempted from the application of Article 101(1) TFEU if they pursue a justified objective and do not go beyond what is necessary. The literature highlights that these conclusions may serve to advance theories in which additional restrictions on competition arising from the inclusion of self-employed persons in existing collective agreements may be considered justified if they are required to protect the ability to engage in collective barga-

11 Judgment of the Court of Justice of 23 November 2017 on the case "CHEZ Elektro Bulgaria" AD v. Yordan Kotsev i "FrontEx International" EAD v. Emil Yanakiev, C-427/16 and C-428/16, ECLI:EU:C:2017:890.

12 Judgment of the Court of Justice of 12 September 2000 on the case of *Pavel Pavlov et al. v. Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, ECLI:EU:C:2000:428.

ining, which is a fundamental right guaranteed by the EU Charter of Fundamental Rights.[13]

3. Guidelines of the Commission on collective bargaining for solo self-employed persons

Collective bargaining between platforms and those who perform work through them, at both the company and sector levels, faces legal restrictions at the EU level. Anti-trust legislation requires the exclusion of entrepreneurs from the right to conclude collective agreements and the coverage of such agreements. As the demarcation line between an employee and an entrepreneur is not clear, current practice in competition law is to exclude all non-employees from collective bargaining. As a result, self-employed workers working through platforms do not enjoy the right to collective bargaining.

As the dividing line between employees and the self-employed, as outlined by the CJEU, is still unclear, the issue undoubtedly requires further work, as recognised by EU bodies. In September 2022, a communication from the Commission entitled 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C-374/02)' was published.[14] These guidelines acknowledge that self-employed persons are categorised as entrepreneurs within the meaning of Article 101 TFEU, leading to a possible infringement of competition law when collective agreements are concluded for their benefit. At the same time, it was noted that some self-employed persons find it difficult to influence their working conditions. This is particularly the case for solo self-employed persons, who work on their own and make their living primarily from work carried out personally. Even if solo self-employed workers are not fully integrated into their principal employer's business in the same way as employees, some of them may not be completely independent of their principal employer or may not have sufficient bargaining power. Recent changes in the labour market have contributed to this situation, especially the trend towards subcontracting and outsourcing of business and personal services, as well as the digitisation of production processes and the development of the online platform economy. Collective bargaining can be an important tool to improve the working conditions of those solo workers without employees (Points 1(6) and 1(8) of the Guidelines).

In light of the above, the aim of the Commission's guidelines is to ensure that self-employed workers can bargain collectively without the risk of breaching EU com-

13 M.J. Schmidt-Kessen, C. Bergqvist, C. Jacqueson, Y. Lind, M. Huffman, 'I'll call my union', Said the Driver: Collective Bargaining of Gig Workers under EU Competition Rules, 'Copenhagen Business School Law Research Paper Series' 2021, p. 17.

14 O.J. EU C-374/2, 30.09.2022.

petition law. The guidelines indicate that they refer to a 'collective labour agreement' as defined under letter (c) and all forms of collective bargaining conducted in accordance with national law and practice, ranging from bargaining conducted through social partners or other associations to direct bargaining by a group of solo self-employed workers or their representatives with their counterparties or associations of those counterparties.[15] They also include cases where solo self-employed persons – either individually or as a group – wish to be covered by an existing collective agreement concluded between their counterparty and a group of workers/solo self-employed persons.

Collective labour agreements concluded for the benefit of the self-employed would be excluded from EU competition law. According to the guidelines, the exemption should apply to those collective agreements aimed at improving working conditions, including remuneration, and not to agreements concerning commercial conditions (e.g. applicable prices). The guidelines indicate that they apply to all forms of collective bargaining for the self-employed on issues such as 'remuneration, rewards and bonuses, working time and working patterns, leave, dismissal, place of work, health and safety at work, insurance and social security, and the conditions under which solo self-employed workers have the right to stop providing their services or under which the counterparty has the right to stop using their services' (Point 15 of the Guidelines).

The guidelines focus on the exemption from competition law of collective agreements for those self-employed persons who do not employ other persons (Point 1(1) of the Guidelines). The term 'solo self-employed persons' refers to persons 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 (Point 1(2a) of the Guidelines).

The guidelines clarify the subjective scope of collective bargaining, which is outside the scope of Article 101 TFEU. A key element is the similarity of situations. According to the guidelines, 'in instances where solo self-employed persons are in a situation comparable to that of workers, their collective agreements will be considered to fall outside the scope of Article 101, regardless of whether the persons would also fulfil the criteria for being false self-employed persons' (Point 20 of the Guidelines).

According to the Commission, the following solo self-employed persons are in a situation similar to employees:

15 According to Point 2(c) of the Commission's guidelines, 'collective labour agreement' means an agreement negotiated and concluded between the solo self-employed or their representatives and their counterparties insofar as, by its nature and purpose, it concerns the working conditions of such solo self-employed workers.

- Persons who provide work (services) exclusively or primarily to a single counterparty and who, as a result, are economically dependent on that counterparty. In general, such persons do not determine their conduct on the market independently and are highly dependent on their counterparty and are integrated into their business, forming an economic unit with that counterparty. In addition, such solo self-employed workers are more likely to receive instructions on how they should perform their work. The Commission believes that a solo self-employed worker is in a situation of economic dependence when he or she receives, on average, at least 50% of his or her total work-related income from a single counterparty, over a period of either one or two years.
- Persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty, who do not bear the economic risk of the undertaking and who are dependent in terms of their activity. It is for national courts to decide whether the contractual relationship of self-employed persons who perform the same or similar tasks as workers is to be classified as an employment relationship. However, solo self-employed workers should still be able to conclude collective agreements to improve their working conditions in cases where their status has not been changed to that of employees.
- Solo self-employed workers who provide work through digital platforms, who are often dependent on the platforms, especially as regards reaching clients, and who deal with job offers that are non-negotiable in terms of working conditions, including remuneration. Digital labour platforms are usually able to unilaterally impose working conditions, without informing or consulting solo self-employed workers in advance.

The criterion of 'comparable situation' contained in the guidelines draws on the previous case law of the Court of Justice. Although the proposal refers to the Court's position, the guidelines explicitly mention a new criterion for determining the subordination of employees, i.e. the economic dependence of the person performing the work on the entity employing him or her. In addition, the Commission for the first time explicitly mentions the criterion according to which economic dependence is to be distinguished from independence – that is, the receipt of at least 50% of annual remuneration from a single counterparty. Hence, the Commission's guidelines should be regarded as major progress.

At the same time, critical voices can be found in legal scholarship questioning whether the income criterion can (or should) replace all other criteria characterising the relationship in question. First, different criteria are used in internal legal systems. Second, these other criteria may also be relevant (indicative of the actual position of workers). In Germany, as an alternative to the income criterion, the criterion of working mainly for one recipient (counterparty) is used. In Italy, on the other hand, the

key point is that the worker does not organise the work process him- or herself but works within an organisational framework created by another entity.[16]

It is also argued that a detailed analysis of the guidelines shows a lack of clarity in the Commission's approach. On the one hand, the Commission argues that collective bargaining for economically dependent self-employed persons should be excluded from the scope of Article 101 TFEU. In this way, the Commission clarifies the position of the Court, as if expecting that the Court itself will also follow this path. On the other hand, the proposal reflects legal solutions adopted in internal legal systems or at the EU level. According to the Commission, at least some of these solutions do not fall within the permissible exemptions of Article 101 TFEU. Nevertheless, this too can be seen as leaving some room for social partners to act. The Commission does not intend to intervene against collective agreements concluded for economically dependent self-employed workers in order to alleviate a clear imbalance in bargaining power, or if the agreement has been concluded in pursuit of (other?) social objectives implemented by national legislation. However, a doubt arises as to how to define the social objectives to which the Commission refers.[17]

There is also criticism as to why the guidelines focus exclusively on solo self-employed persons – in other words, why the criterion of 'not employing another person' is decisive. In this context, it is argued that it follows from the Court's rulings in the *Albany* and *FNV Kunsten* cases that an approach that primarily takes into account the bargaining position as a consequence of economic dependence should rather have been considered. As is clear from the CJEU's case law, that dependence arises from the fact that the service provider does not bear any financial or commercial risk arising from the principal employer's activity and acts as an auxiliary entity within the latter's undertaking.[18] While, indeed, the solutions of individual Member States show that other criteria can also be used, none of them is perfect either. In addition, the criterion of 'not employing workers' is easily applied in practice.

Despite the critical remarks which have been made, the Commission's guidelines are an important step to ensuring that EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for self-employed workers. The guidelines refer to market participants who perform work in a personal capacity.

16 E. Brameshuber, Prawo do rokowań zbiorowych ekonomicznie zależnych podobnych do pracowników (employee-like), (in:) Ł. Pisarczyk, E. Brameshuber, J. María Miranda Boto (eds.), Rokowania…, *op. cit.*, pp. 310–311.

17 *Ibidem*, p. 311.

18 *Ibidem*.

4. The recognition of platform workers as sensu stricto employees as a step to enhancing the role of collective bargaining: The example of Spain

Since the emergence of work through digital platforms, political and dogmatic positions have changed, from defence of the advantages of such a business model, to the need for a third status, to the recognition of platform workers as employees. Currently, the most progressive example in terms of the employment status of platform workers is a Spanish legal act called *Ley Rider*, under which the application of labour law is assumed to apply to supply and distribution activities organised through digital platforms. The *Ley Rider* is a first step towards including platform workers in the general framework of statutory labour regulation and represents great progress. The recognition of such persons as employees in the strict sense will certainly lead to an increased role for collective bargaining in the future.

4.1. The path towards the approval of a state protection standard

Work through digital platforms is a phenomenon related to the globalisation and digitalisation of the current labour market, which allows services to be provided in a very different way than the traditional one. As is known, the increase in this type of work has been accompanied by multiple social conflicts related to job insecurity in the provision of a service by platform workers. Indeed, throughout the world, from the moment of its appearance (in 2015), the legal nature of this work has been discussed and different positions have been considered to qualify it, either within labour law (as a common or special labour relationship) or in the field of self-employment (as ordinary or economically dependent self-employment). Of course, the digital platforms are characterised by the denial, for the most part, of their status as 'entrepreneurs' and, therefore, also the denial of the status of 'workers' for the subjects with whom they establish a professional relationship for the provision of services (they are called 'partners' or 'collaborators'). For their part, the workers, together with traditional trade union organisations, have been demanding the recognition of their status as true workers within the meaning of labour law and, consequently, the application of the labour rights and guarantees inherent to this legal discipline.

In Spain, this social and legal conflict was at first (between 2017 and 2020) resolved by the Labour Inspectorate, which, in many cases, understood that the workers of the delivery platforms were true workers within the meaning of labour law. Therefore, when they provide services as a self-employed person, their contractual situation was that of 'false self-employed' persons. This situation determined infractions by the company and the imposition of corresponding fines, as well as claims for the payment of contributions of social security by the General Treasury.

At the same time, in the judicial field, most of the courts understood that, in the specific factual cases submitted to their consideration, this was a type of work activity that met all the typical requirements of work that is protected by labour law. Howe-

ver, some judgments ruled against this criterion, which forced the Supreme Court to make a final ruling. Thus, the Supreme Court judgment of 25 September 2020 put an end to the discussion, declaring the plaintiff who provided services for the Glovo platform to have the nature of a true worker.[19]

The social significance of this Supreme Court ruling promoted the social dialogue that the government had been maintaining with social partners (the UGT and COO unions and the CEOE and CEPYME employers' associations) on different labour matters. Thus, on 28 October 2020, the so-called 'Social Dialogue Committee for the Regulation of Digital Platforms' was established and on 10 March 2021 reached a pioneering agreement with the name 'Laborisation of Riders and Monitoring of Digital Platforms in the Workplace'. The content of this agreement was published, first as an emergency rule, as 'Royal Decree Law 9/2021, of May 11, which modifies the revised text of the Workers' Statute Law, approved by Legislative Royal Decree 2/2015, of October 23, to guarantee the labour rights of people dedicated to delivery in the field of digital platforms', and was later replaced by Law 12/2021 of 28 September, with the same name and content. This regulation is one of the measures committed by the Spanish government to the European Union, since it is part of the so-called 'Recovery, Transformation and Resilience Plan' (27 April 2021), and seeks to guarantee decent work for this type of worker, ending the job insecurity that characterised them up until then.

The two major measures reached in the aforementioned social agreement, later embodied in Royal Decree (RD) Law 9/2021 and the subsequent Law 12/2021, are the inclusion of a presumption of employment for workers who provide services for the platforms, and the recognition of the right of access by the workers' representatives to the information (parameters, rules and instructions) of the algorithms or artificial intelligence systems used by the company to exercise its managerial and organisational power in the production process. These two measures are of extraordinary importance, since they seek to end job insecurity for platform workers quickly, efficiently and definitively. In fact, the Spanish legislature resorted to the emergency legislative route – the RD Law – and justified the concurrence of 'the extraordinary and urgent need' (required by article 86.1 of the Constitution to use the aforementioned norm) in the previous serious conflict and the doctrine established by the Supreme Court, which imposes, *de lege ferenda*, 'the adoption of a legislative solution that seeks a necessary panorama of normalization and legal certainty for workers and companies'.[20]

On the one hand, it is necessary to establish a balance between the organisation of this 'new economic reality' and the protection of workers, who, 'although they provide services in a way that deviates from the traditional one, are subject to control in

19 Cassation Appeal for Doctrine Unification, No. 4746/2019.

20 Statement of Reasons, III, para. 2.

its performance'.[21] So the protection of these people cannot be left to the fate of the decisions of the Labour Inspectorate and the judges; it is necessary to approve a general regulation for them. On the other hand, a guarantee of equal treatment between traditional companies and those that use digital control means based on algorithmic data management is urgent, to ensure transparent and fair competition between them.[22] In fact, this equal treatment was a claim of the few platforms (such as Just Eat) that, respecting current labour regulations, already hired workers, since by assuming more labour costs, they were in a worse situation when competing with the platforms that did not observe those regulations.

Undoubtedly, the measures adopted by the Spanish legislature are interesting, positive and of the greatest interest to other countries. In fact, there are already regulatory initiatives in some of them that also favour its implementation. In addition, the draft EU Platforms Directive follows the solution given by the Spanish standard.

4.2. The presumption of employment of delivery riders

One article of the RD Law 9/2021 adds a new provision to the text of the main Spanish labour law: the Workers' Statute (WS) (Article 2(23)). The title of this provision is 'Presumption of Employment in the Field of Digital Delivery Platforms' and its content reads as follows:

> By applying the provisions of article 8.1 (WS), it is presumed included in the scope of this law (the WS) the activity of people who provide paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise the business powers of organization, management and control directly, indirectly or implicitly, through the algorithmic management of the service or working conditions, through a digital platform.

The legal solution adopted by the legislature consists of presuming that the provision of services for these delivery platform workers is of the nature of labour, protecting them through their inclusion within the scope of the WS, which is the simplest solution. Thus, the legislature is spared the risks and inconveniences of exploring other legislative possibilities, such as the creation of specific ad hoc regulations or even the recognition of a special employment relationship for these workers. Likewise, it rules out the option of regulating a new figure halfway between the subordinate worker and the self-employed worker, known as the economically dependent self-employed worker in the digital field , which would take as an example the regulation already existing in Spain of the economically dependent self-employed worker. The legislation's choice is clear: it is presumed that these delivery drivers are ordinary workers, with a common (not special) employment relationship, included in the field of labour law.

21 *Ibidem*, para. 3.
22 *Ibidem*, para. 7.

The current WS already contains a general presumption of employment (applicable to any worker) in Article 8.1, according to which an employment contract 'shall be presumed to exist between everyone who provides a service on behalf of and within the scope of organisation and direction of another person (the employer), who receives it in exchange for compensation' to the employee. The newly introduced additional provision of the WS begins by stating that 'by application of the provisions of article 8.1, it is presumed that the activity of delivery riders is included within the scope of this law'. As can be seen, the legislation wants to expressly link both presumptions, making it clear that it is based on the general presumption of Article 8.1, and a new presumption is thereby now created for this specific case ('by application' thereof). This is necessary and useful, and has its own meaning to resolve the conflict with the riders, which could not be resolved with the general presumption of Article 8.1.

The general presumption of Article 8.1 WS limits itself to referring to the provision of a service 'on behalf of and within the scope of [the] organisation and direction of another' person, without further ado, without going into qualifying how or in what way that organisational power is specified. However, the new presumption does dwell on the details of the exercise of the power of direction and organisation by the employing companies. Undoubtedly, it is at this level of specificity that the true usefulness of this presumption is found. The legislation starts from the classic characteristics of the employment relationship (voluntariness, remuneration, employment and dependency) and specifies them for the case of work on digital delivery platforms, paying special attention to the description of the parties to that relationship (workers and platforms), the object of the contract (activity to be carried out by the worker) and the way of working, which is determined by the specific exercise of the power of organisation, direction and control of the employing companies.

The base fact of the new additional provision of the WS is made up of three elements that must concur, cumulatively, in any real case so that the mandate of this provision can be applied. In the first place, it must be a work activity in which the person who performs it provides services of 'delivery or distribution of any consumer product or merchandise'. Therefore, only a very specific sector of platforms and workers is taken into consideration, excluding all those linked to other platforms. Second, the distribution activity must be carried out for another subject (the employer) voluntarily and in exchange for remuneration, since, as is known, without free consent and without salary, no work is subject to labour law. Third, the delivery activity must be carried out for a particular company, which exercises its typical labour powers in a specific way. Thus, it is specified that the provision of services is done for 'employers that exercise the business powers of organization, direction and control directly, indirectly or implicitly'.

As is easy to appreciate, the wording of the new additional provision could be improved, since, on the one hand, the faculties of organisation and management refer

to the same field of action, that is, the management of a business project (the production process and the workforce), for which orders and instructions are given (Article 20.2 WS). On the other hand, the control faculties are already different, being clearly focused on the supervision of production and surveillance of the staff, in order to be able to verify if the orders and instructions received are observed. The omission of any mention of disciplinary power (Article 58 WS), which is complementary to the other two powers (while making them truly effective), is striking, because if, after orders and instructions are given, it is verified that the workers do not comply with them properly, the company can exercise its disciplinary power to correct the situation. There is no doubt that if the platforms see conduct on the part of the riders that they wish to reprimand, they will do so without hesitation, and in the same way that they exercise the other two powers.

The wording of the provision could also be more exact with respect to the description of the exercise of the business faculties of organisation, direction and control, which, according to the legislation, can be 'direct, indirect or implicit'. A priori, it seems that there are three ways to develop these faculties, when there are in fact only two: the direct and the indirect (which admits, as a synonym, the implicit). The exercise of these powers indirectly occurs 'through the algorithmic management of the service or working conditions', the main element of the digital platform (mentioned in the new additional provision). It is worth insisting that this clarification on the indirect management of corporate powers is the real novelty and the real contribution of the new provision of the WS.

According to the new additional provision of the WS, when a person provides services according to the circumstances described in the base fact, 'it is presumed included in the scope of this law' (the WS), and this 'by application of what is established in article 8.1' of the same text. Following the dynamics of the ordinary presumption, a legal consequence is presumed from the base fact: the inclusion of the rider in the subjective scope of Article 1.1 WS – in other words, the consideration that a person who works in accordance with the indicated requirements is a typical worker who voluntarily provides his or her paid services 'for someone else and within the scope of organization and management of another person, physical or legal, called [the] employer'. Consequently, this implies that this worker must provide services for the employer through an employment contract, to which the labour regulations will be applied (the WS and other applicable labour regulations).

As a worker included in labour law, the delivery person works for someone else (the employer) and it is taken into account (1) in decision-making, since the price of the services provided, the form of payment and the remuneration of the delivery people is fixed, unilaterally, by the platform, and it is the latter that pays the fees to the riders, not the final client; (2) in the in the company profits, since the platform directly appropriates the work of the riders; and (3) in the tools and infrastructure, since the fundamental element to carry out the economic activity is the digital platform

and, more specifically, the intelligent computer program (algorithm) developed by it. Indeed, this algorithm is the nerve centre of the business, as it allows all the parties involved to be in contact (platform, customer businesses, delivery drivers and end consumers), as well as managing the different orders and operations of all kinds. In this way, since this tool is essential to the provision of the service, the infrastructure that the riders contribute to the job (for example, their mobile phone or vehicle) does not allow them to operate on their own or be autonomous (at least, not automatically).

Similarly, a delivery person is a worker subject to legal dependence on or subordination to the company, which is the fundamental requirement for the existence of an employment relationship to be appreciated. As can be seen, the legislation takes a further step in the process of making dependency more flexible, since a new dose of legal flexibility is now added to the previous flexible interpretation of this requisite made by the judges, by accepting the indirect or implicit exercise of the powers of the employer through new technologies (algorithms).

In short, whenever one is faced with the factual situation described in the new additional provision of the WS, the legal mandate of employment for platform riders plays a role. This mandate is equivalent to a *iuris et de iure* presumption, for which reason no proof to the contrary is admitted; that is, if the facts are as described, no proof can be provided against the presumed legal consequence (the employment of the delivery person). However, it may be that this person is not able to prove all the requirements indicated in the aforementioned situation of fact, even flexibly, and therefore it can be appreciated that the situation is a different one. Thus, although evidence to the contrary is not admitted in relation to the legal consequence, counterevidence is accepted by anyone interested in demonstrating that, despite the indications of employment, this is not a true provision of services of the nature of labour, but rather is autonomous (of a civil or commercial nature). The existence of a general labour rule with the possibility of counterproof, denying the assumption of fact, may favour those distributors or riders who, despite external indications, want to continue providing services as true self-employed workers.

In any case, the legal mandate favours the majority of precarious workers who wish to be protected by labour law and who, until now, were forced to accept the imposition of a self-employed contract (rather, the false self-employed). As a result of the legal reform mentioned above, their initial position has improved, since they are already protected as employees, and whoever has an interest in destroying this legal statement will have to provide the corresponding counterproof, denying the existence of the basic factual situation to which the legislation ties the legal consequence of employment.

4.3. The right to information on the composition of the algorithm as a subject of collective bargaining and protection of platform workers

The RD Law 9/2021 also introduces another important new idea in relation to the improvement of working conditions. Thus, a new clause is introduced to Article 64.4 WS to add that a works council has the right to '(d) be informed by the company of the parameters, rules and instructions on which algorithms or artificial intelligence systems are based, and which affect decision-making about working conditions, access to and maintenance of employment, including profiling'. This new right of representatives to information is a real novelty at the national and international level, and is characterised by the following features.

First, its purpose is to be able to know, in detail, the composition of the algorithm and, where appropriate, to avoid fraudulent or discriminatory business decisions ('algorithmic discrimination') based on sex, race, age, beliefs or any other personal or social condition. The mathematical formulas that make up the algorithm are made by people and can reproduce – even unintentionally – discriminatory biases when applied. The RD Law's own explanatory statement points out that the incidence of new technologies in the workplace and the impact of algorithms cannot be ignored. In fact, the effectiveness of the new presumption of employment, that is, the assessment of the real nature of the relation between the parties, depends on verifiable information about the activity of the platform.

It should be noted that in Spain there is already a general duty of the employer to inform representatives about 'those issues that may affect the workers, as well as about the situation of the company and the evolution of employment' (Article 64.1 WS); the duty to report on the algorithms could already be understood as included here. However, the new specific mention reinforces the importance of this obligation, which is useful to promote compliance.

Second, the holders of the right to be informed are all unitary representatives (works council and personnel delegates) and trade union representatives (union delegates). Indeed, although the legislation only expressly recognises the right of the works council, by analogy, it is also applicable to other types of representatives, both unitary (by election in the company every four years) and unions, which mainly represent worker members. For their part, the entities obliged to provide this information are all companies (not only platforms) that use these technologies (from any functional sector), directly or indirectly, as happens when a main company subcontracts other companies specialising in algorithms to carry out certain functions, such as the selection of a candidate for a position.

Third, regarding the content of the information, it is evident that the Spanish legislation expresses itself in broad terms, since the company has to provide information about all kinds of technologies, both the algorithms (automated mathematical formula) and the other 'systems of artificial intelligence' that it uses (a wider

expression that includes all kinds of intelligent technology). This broad vision is very important. More specifically, the information content that must be detailed is related to the internal composition of the algorithm or intelligent system, indicating the 'parameters, rules and instructions' which the decisions that the employer makes are based on in the exercise of managerial, control and disciplinary powers. The business decisions which must be reported are those taken both during the term of the contract and in the phases prior to it, which frequently includes the preparation of job offers to hire candidates for a position.

Fourth, a company cannot claim an exception to the duty to provide information about these algorithms or intelligent systems based on the need to protect its commercial interests. Indeed, although Article 65.4 WS protects 'industrial, financial or commercial secrets', whose disclosure could, according to objective criteria, hinder 'the operation of the company or the workplace or cause serious damage to its economic stability', it is clear that the content of the new informative duty does not violate the industrial and commercial secrets of companies. These are not affected by information about the work elements of algorithms or other mathematical operations. Thus, a balance is established between the conflicting interests, as it is not necessary to report all aspects of the algorithm or intelligent system, but only the rules with labour significance.

Fifth, collective bargaining can specify and improve different aspects of this duty of information. Thus, for example, a collective agreement may require clear and transparent information, which is carried out at a time, in an appropriate manner and with an appropriate content, to allow the workers' representatives to proceed to its proper examination (Article 64.6 WS), or the agreement can improve the holders of this duty, extending the informative obligation to the affected workers themselves (not only to their representatives). Besides, the objective scope of the aforementioned duty can also be expanded, and the responsibility to report on the evaluations or results of the studies or statistics made by the company on the operation of the algorithms can be established. In the same way, the need to consult representatives prior to the composition of these systems can be foreseen, going beyond the duty to be informed about them.

In short, the use of algorithms and intelligent systems in a company has a lot of potential, and it will be necessary to pay attention to their results in order to protect workers from misuse of these technologies.

Conclusions

The non-employee status of those working through platforms constitutes one of the main obstacles to collective bargaining. The most progressive example of the employment status of platform workers is the Spanish *Ley Rider* legal act, under which

the application of labour law is assumed to apply to supply and distribution activities organised through digital platforms. The recognition of such persons as employees in the strict sense will certainly lead to an increased role for collective bargaining in the future.

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