DISPATCH NO. 36 – SPAIN

THE LEGAL FRAMEWORK OF PLATFORM WORK IN SPAIN: THE NEW SPANISH "RIDERS' LAW"[1]

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After passing the so called "Riders' Law" (*Ley Rider*), Spain has become the first European country to set a legal framework on platform work. In order to understand its importance in the debate on platform economy, it is necessary to frame it against the basic rules on the existence of the employment relationship, which are rather similar to ones which can be found in other countries.

The Spanish legal system distinguishes three types of professional status: employees, self-employed people and economically dependent self-employed. Whereas the distinction between the first two is similar to that in other countries, the existence of a third category is not so common.[2]

The economical dependent self-employed—TRADE as per the Spanish acronym (*Trabajador Autónomo Económicamente Dependiente*)—is defined as those who usually, personally and directly carry out an economic or professional activity for lucrative purposes and for one client, from whom they receive, at least, 75% of their income.[3] Taking into consideration this definition, the Spanish debate on the status of platform employees is focused on the dichotomy between employees and TRADEs rather than between

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1. This dispatch is part of the projects Collective Bargaining and Gig Economy: New Perspectives (COGENS -VS/2019/0084-) and Cambio tecnológico y transformación de las fuentes laborales: Ley y convenio colectivo ante la disrupción digital (RTI2018-094547-B-C21). The author appreciates the comment of prof. Marie-Cecile Escande-Varniol.

2. EUROFOUND, *Exploring self-employment in the European Union* 38–39 (2017).

3. They are in a sort of "grey area" between employees and self-employed. Among the measures, these self-employed have the right to enjoy 18 days of holiday per year, the right of affiliation to trade union or employer's associations or to create specific professional associations and a sort of collective bargaining, whose result, the named "agreements of professional interest", can benefit the associates of the signatory organizations.

employees and self-employed. Nevertheless, from a practical point of view, this distinction does not have an important impact, as working conditions of TRADEs are not especially better than common self-employed.[4]

Particularly, the protection granted to platform employees is those which have been traditionally assigned to each type of professional relationship. In the case of the classical employee, all rights set by law or collective agreement are guaranteed. For the self-employed, the Self-Employed Workers' Statute (the particular law which regulates this form of professional activity) includes some individual rights and the freedom of association. The economically dependent self-employed are in the middle, adding to the set of rights for self-employed an especial type of collective bargaining and, as a consequence, the rights included in its agreements (called "agreements of professional interest -*acuerdos de interés profesional*"). Whether protection related to the employment relationship must be extended to platform employees regardless of their status is the main point of judicial discussion.[5]

In this respect, the Spain's Supreme Court's judgment 25 September 2020 (ECLI: ES:TS:2020:2924) has opted for the existence of employment relationship for the platform called Glovo. This is a delivery platform, like Just-Eat, Deliveroo or Uber Eats. Although this determination is applicable to the Glovo's case only, its reasoning has been applied to other delivery platforms by lower judicial levels. So far, there has not been other resolutions from the Supreme Court applicable to other sectors within platform economy.

A number of factors were considered by the Court, such as the fact that riders are not completely free to decide when they work owing to the points system which conditions their activity; they are controlled by geolocation; their activity is determined by precise instructions on how to do the tasks; waiting time is paid; and the most important tool to develop the activity, the platform, belongs to the company. This last fact was, without a doubt, the most important one to consider riders as employees. As mentioned above,

4. Werner Eichhorst, Michela Braga, Ulrike Famira-Mühlberger, Maarten Gerard, Thomas Horvath, Martin Kahanec, Marta Kahancova, Michael Kendzia, Monika Martiškova, Paola Monti, Jakob Louis Pedersen, Julian Stanley, Barbara Vandeweghe, Caroline Wehner, Caroline White, *Social protection rights of economically dependent self-employed workers*, IZA, Report No. 54 (2013); Lionel Fulton, *Trade unions protecting self-employed workers*, ETUC (2018).

5. A quite complete list -including some of other countries- can be found here (list in English, texts in their own languages): Ignasi Beltrán de Heredia Ruiz, *Una mirada crítica a las relaciones laborales [A critical overview to employment relations], Employment status of platform workers: national courts decisions overview (Argentina, Australia, Belgium, Brazil, Canada, Chile, France, Germany, Italy, Nederland, New Zealand, Panama, Spain, Switzerland, United Kingdom, United States & Uruguay)*, BLOG DE DERECHO DE TRABAJO Y DE LA SEGURIDAD SOCIAL (2021), https://ignasibeltran.com/employment-status-of-platform-workers-national-courts-decisions-overview-argentina-australia-belgium-brazil-canada-chile-france-germany-italy-nederland-new-zealand-panama-spain-switzerl/ (last visited Mar. 26, 2021).

this judgment closes the judicial debate for the delivery sector, but not for others and even for other platforms.

Nevertheless, it is expected that other resolutions concerning this type of platforms and others of other activities or sectors will continue to appear. Additionally, another interesting debate has been opened up, concerning the use of algorithms.[6] The Spanish Supreme Court's resolution of 8 February 2021 (ECLI:ES:TS:2021:518) concluded, among other things, that the company did not respect the right to information of employees representation concerning an app to geolocate deliverers; its resolution of 3 February 2021 (ECLI:ES:TS:2021:643) states that an algorithm produced an internal strike-break by substituting employees in strike with others of the same company; in the resolution of 25 September 2018 (ECLI:ES:TS:2018:3463), the algorithm did not discriminate when choosing the employees which were going to be terminated in a collective dismissal.

THE ARRIVAL OF THE NEW "RIDERS' LAW"

In this context, the recent agreement between the social partners and the Government to regulate the delivery sector (the so-called "Riders' Law") seems to go beyond these limits. The agreement, as proposed legislation, is yet to be debated in the Parliament; this dispatch considers the draft law, focusing on two main issues. On the one hand, it sets a rebuttable presumption of the existence of an employment relationship for riders. On the other hand, it regulates the use of algorithms for all kinds of employees. This is another type of protection which emerges in the platform work debate but extends its influence on all employees.

Several factors have been involved in initiating social dialogue with a view to regulating platform work. First was a compromise of both political parties in the coalition Government (Socialist Party and Podemos). Secondly, poor working conditions of these employees have been at the core of both political and social debate, putting pressure on political agents and social partners to find a solution. Thirdly, the intense judicial debate also impelled the legislative path. Despite of the fact that negotiations were initiated before the Supreme Court's judgement, the different resolutions delivered by lower courts highlighted the necessity of having an explicit legal framework. The

6. A complete list and summary (in Spanish) can be found here: Eduardo Rojo Torrecilla, *Análisis jurídico de las sentencias que abordan el uso de algoritmos por las empresas de la economía de plataformas para regular las condiciones de trabajo*., EL BLOG DE EDUARDO ROJO. EL NUEVO Y CAMBIANTE MUNDO DEL TRABAJO. UNA MIRADA ABIERTA Y CRÍTICA A LAS NUEVAS REALIDADES LABORALES (Mar. 8, 2021), http://www.eduardorojotorrecilla.es/2021/03/analisis-juridico-de-las-sentencias-que.html (last visited Mar. 26, 2021).

Supreme Court's judgment gives the final support in favour of the employment relationship solution.

In any case, according to the text of the proposed legislation, the new law will include the following reform:

First of all, it presumes, unless proven otherwise, the existence of employment relationship for those who provide, in exchange of remuneration, the services of delivering and distributing products for employers who exercise the business powers of organization, direction and control indirectly or implicitly through a digital platform, or through the algorithmic management of the service or the conditions of work. This means the explicit translation of the general presumption of Spanish Employment Law to this activity.

Secondly, article 64 of Workers' Statute (the Spanish Employment Law) provides that employees' representatives have the right, among others, "to issue a report, prior to the execution by the employer of the decisions adopted by them, on [. . .] the implementation and review of work organization and control systems, time studies, the establishment of bonuses and incentive systems and job evaluation." The new proposed wording adds a brief paragraph of special relevance at the end, which is "including when they derive from mathematical calculations or algorithms." As a consequence, employees' representatives will have the right, not only to be informed, but consulted concerning this issue, as they can deliver a report on it.

This was a quite controversial issue which was included and excluded from the negotiations owing to the strong opposition of the employers' representatives to regulating it. Despite the fact that trade unions' proposals were more detailed[7], the final wording concerning algorithms is a great advance, as it does not only extend information and consultation rights, but enables collective bargaining to negotiate the details. In other words, it makes algorithms a subject of negotiations.

The next step is that the proposed legislation will be sent to the parliament to be discussed. As it is based on social dialogue, there will not be major political obstacles to its passage. Additionally, as mentioned above, once it is passed, collective bargaining should start to regulate platform work as well, empowered by the new law. Although this is going to be the first law on platform work in Europe, it may be not the last one, especially if the proposal of a directive on platform work succeeds. This directive would be

7. For example, «all the information related to the parameters and decision-making rules used by the algorithms used by the company that may directly or indirectly affect the conditions of work and access and maintenance of employment.» Their proposal also included the creation of a platform register, in which it must be included the « g. Algorithm applied to the organization of the activity, which will include, as a minimum, the pseudo-code or flow diagram used, as well as the reputation systems used, if any, and to whom they apply».

of broader scope, so it would require the Spanish legislature to expand both the scope and regulated fields of the current reform.