



## **NEW EMPLOYMENT FORMS AND CHALLENGES TO INDUSTRIAL RELATIONS – NEWEFIN**

### **Policy brief Spain**

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*Amsterdam, June 2020*

This policy brief was written for the NEW EMPLOYMENT FORMS AND CHALLENGES TO INDUSTRIAL RELATIONS - NEWEFIN project, financed by the European Commission, (DG Employment, Social Affairs and Inclusion, Employment and Social Governance - Social Dialogue - Agreement number VS/2018/0046) This paper reflects only the author's view. The Commission is not responsible for any use that may be made of the information it contains.



## 1. Introduction/relevance

The new forms of employment in the gig economy emerge into a labour market in which the presence of non-standard forms of employment was already an important characteristic. The Spanish labour market has been characterised by a high rate of fixed-term employment since the late 1980s. Part-time employment, quite often accompanied by the employer's power to temporarily increase the hours unilaterally at its own discretion (“horas complementarias”), has been on the rise of late. Employment in the context of tripartite arrangements is abundant, especially subcontracting rather than agency work. Bogus self-employment is relatively common in many sectors (health, press, etc.) and for many type of jobs (sales, distribution, etc.). The resulting picture is that an important part of the labour force has a precarious employment status, in terms of employment security, economic security, etc.

The weakening of sectoral collective bargaining as a result of the priority given to company-level collective agreements (by the 2012 Labour Reform) has exacerbated the precarious legal and economic situation of many employees in low-pay, labour-intensive activities, such as cleaning, janitorial, maintenance and the like. In these activities, the norm is temporary employment, part-time employment and subcontracting, with the subcontracted company actively seeking to avoid the application of the sectoral collective bargaining agreement by reaching a company-level agreement with weakened employee representatives.

The forms of employment designed by the digital companies go a step further and seek to avoid the application of employment law by classifying the workers as self-employed or independent workers or contractors. There are many reasons for actively avoiding the application of employment law. Some of them have to do with the continuity of employment (protection against unlawful termination), while others are related to the social security costs (higher cost if an employee compared to self-employed status), but probably the main reason has to do with the overall flexibility that management gets from managing pay rates and hours in a free and unrestricted manner - unrestricted at least from the legal point of view.

Over the last few years, the Labour Inspectorate has been especially active in this area. Some litigation has also taken place, leading to a number of judicial decisions, most of them favourable to classifying the delivery workers of digital platforms such as Deliveroo and the like as employees rather than as independent contractors.

Recently, the Government has announced a public consultation with a view to legislating for the specific case of digital platform work.

In light of the research done, whose results are available in the Country Report, the main policy orientations or guidelines are as follows.

## 2. Digital Platform Workers

The main debate has focused on whether Deliveroo/Glovo riders should be considered as employees, since the virtual platforms have been assuming that they are self-employed. The Spanish Employment Law is designed to protect the employees. According to section 1 of Workers Statute (Royal Legislative decree 2/2015), employees are defined as those rendering services for another person within the scope of the organisation and management of that person, the employer. In a general sense, an employee is someone who, in exchange for remuneration, personally works for the benefit and under the direction of someone else (the employer). The notion of employee means that he/she has right to the labour protection set by the Workers' Statute as well as the collective agreements.

In addition, the Spanish Law recognises two types of independent contracts. First of all, the one used in practice so far is to identify them as independent contractors, that is to say self-employed who are in business on their own account. Secondly, service-providers could be classified as economically-dependent self-employed workers [“trabajadores autónomos económicamente dependientes”, TRADEs]. By virtue of section 11 of the Self-Employed Workers' Statute, this category refers to those who usually, personally and directly carry out an economic or professional activity for income purposes receiving 75% (or more) of their income from one single client. Even though the analysis of this peculiar type of self-employment is not one of the purposes of this article 18, it is nevertheless important to underline two aspects with respect to its legal regulation. On the one hand, certain guarantees are (partly) secured by the law regarding conditions on contract termination, working time limitations, coverage against work-related accidents and cessation of activities, and the recognition of collective agreements. On the other hand, a further requirement for obtaining the status of economically-dependent self-employed workers is a formal recognition by the client (section 11 bis of Act 20/2007), a major obstacle in practice.

The intermediate category (TRADEs) includes working rights related to working time, rest periods, extra work and interruption of activity (similar to holiday rights). Moreover, contract extinction is also regulated and must be based on a list of causes established in the Self-Employed Workers' Statute. In case the client decides to finish the contract without justified cause, the Self-Employed Workers' Statute contemplates compensation to be paid to the TRADE. As opposed to a severance payment regulated through labour law (Spanish Workers' Statute), the LETA does not establish an amount or level of compensation that employers must observe. Instead, compensation relies on the conditions agreed between the TRADE and the client in the written contract or in the ‘professional interest agreements’, a sort of collective agreement. The Self-Employed Workers' Statute only establishes some criteria to be taken into consideration when setting the compensation, in case nothing is specified in the contract with the client. They are related to the initial foreseen time of the contract, the seriousness of the contract breach by the client or the investment and expenses anticipated by the TRADE to develop the work. However, the Labour Court has even considered as legal those contracts that did not contain any compensation.

Furthermore, the law recognised a specific form of collective agreement specially and exclusively addressed to TRADEs, the so-called “professional interest agreements” which, however, is barely used at all. As opposed to collective agreements, professional interest agreements are not covered by the ‘general efficiency principle’. Thus, they only cover the self-employed who are affiliated to the TRADEs organisations that conclude the agreement. Also, due to this, self-employed organisations signing the agreement do not have to meet and prove representative criteria, as they apply to social partners. Professional interest agreements can regulate all the working conditions of TRADEs. The only limitation in this regard is that they have to observe the law. The Agreement negotiated

between Deliveroo and TRADEs (riders) has come into force. The main advantages of that agreement are: i) increasing the scope of accident insurance. The riders will receive the 75% of their income (subject to a maximum daily amount of EUR 50 for 60 days instead of 30 days; ii) discount codes for the acquisition of material; iii) preferential access to a job after an inactivity period; access to training given by third parties. The training may be connected to the job of riders or a different area that is of interest to the rider; and iv) compensation in the case of termination of the job. The agreement recognises compensation of 25 days' salary per year of service, taking into account the average income received in the last 12 months previous to the termination.

According to the most representative trade unions in Spain, the regulation of TRADEs does not provide an adequate answer to needs of this specific collective nor to the needs of employers. In practice, the TRADE is a strategy for avoiding the application of the Labour Law because most TRADEs should be reclassified as employees.

In Spain, some judgments (Appeal Tribunals, "Tribunales Superiores de Justicia") have concluded that the collaborators shall be deemed to be independent contractors. The main argument is the wide freedom of the collaborator, which is opposite to the situation of the employee. According to the judgments, the collaborator is not subject to working time because he may choose the time slot to do the service and may also refuse other services. The rider decides how, where and when he works, has control over his activity and may refuse a service that he had accepted previously without penalty. In addition, the company has no disciplinary powers beyond the termination of the contract if the services were not performed or a small penalty on the fee. GPS is not a monitoring instrument for the company but a tool to count the kilometres and take the numbers into account in the following invoices. The collaborator has no duty of justify his absences from work but he should inform the company about them. The company does not have the option to choose the rest days of the collaborator. As regards the risk of the business, the interpretation given by the courts is that the main production resources (the bike and the mobile phone) are owned by the riders and the wage is dependent on the numbers of services. All of these factors are incompatible with subordination, risk of the business being the most characteristic feature of the employment contract.

However, most of the judgments (Appeal Tribunals) have decided that the riders should be considered to be employees. It is very probably that in the next months the Spanish Supreme Court will provide a unified answer on this issue. According to the arguments given by the Appeal Tribunals, there is a great difference between work in the twentieth century and in the twenty-first century. In the new century, the collaborator is available in order to do micro-tasks. Then there is a hidden employment relationship what works when a micro-task is ordered. It means a marked reduction in labour costs for the employer, which only pays the working time for the micro-task rather than the time of availability. Although the rider has some areas of freedom, the assessment of these should take into account not the work of the twentieth century but how work is done with the digital platforms and other electronic devices in the twenty-first century. The relevance of the freedom is less than the other indicators. The freedom of the rider to choose every micro-task is the logical consequence of the subdivision of working time. If the employer is always able to employ the services of the rider, it would mean that the rider is offering continuous availability. That situation is contrary to the meaning of work as a right.

According to the judgments, the rider is part of the platform in order to do the service and receive the orders from the platform. The company monitors all of the rider's activity in a complete manner (the app may inform customers and suppliers at any time where the rider is; a specific behaviour by the rider is mandatory; the activity is assessed creating profiles that are taken in account for subsequent deliveries; the digital company has power to take disciplinary action, including the termination of the relationship and the price of every assigned task. In this context, the areas of freedom to choose the days and hours of work and acceptance of specific services does not amount

to any power that might affect the development of the business because the company has a wide number of riders available to work.

In addition, the rider could not do the service without the digital platform. His possibilities as a self-contractor would be very low because the success of these platforms depends on technical support from the technology as well as the brand that is advertised through searches on Google. It is clear to see the low value of the bike and the mobile provided by the rider in comparison with the application and the brand provided by the digital company.

It seems clear that the phenomenon of digital platforms has strongly affected Employment Law and Social Security. However, it is very relevant not to ignore their possible effects on the collective dimension. In this sense, it is obvious that the scope of collective agreements may be reduced if the collaborators in a sharing economy are not considered as employees. The role of trade unions in Spain is also important. In this sense, the trade unions have practised different strategies. Firstly, trade unions have provided useful information to riders in order to defend their labour rights and have brought legal actions asking the judges to clarify the relationship with the riders. Secondly, the trade unions have built specific trade union structures into the digital platforms. However, one of the more interesting strategies has been to modify the scope of some sectoral collective agreements in order to cover the digital employees and offer a legal argument for the judges.

The research has pointed out the emergence of new forms of representation for the riders. The more interesting examples are “Riders x Derechos” as well as “Asociación Autónoma de Riders”. From the point of view of the business side, the “Asociación Española de la Economía Digital” should be mentioned .

### **3. Proposals for the future of the gig economy**

The main problem of the current situation related to gig economy is the lack of legal certainty. Even the majority of court rulings in Appeal Tribunals on riders are determining the employee status of these workers (at least in the Glovo and Deliveroo cases). The fact is that there are no rulings yet in the Supreme Court.

The main objective declared in the legislative proposal recently published by the Ministry of Employment and Social Economy is to provide adequate answers to the definition of 'employee' in this context; however, in our opinion, the law cannot regulate every different detail stipulated in every possible employment agreement. Therefore, the declared goal of “distinguishing the accessory or instrumental - the use of technological means - from the essential - the existence of genuine subordinate and dependent relationships provided within the governing and organisational circle of the company” is probably unattainable. The task of differentiating between employed and self-employed workers must always be done on a case-by-case basis, which can only be done in a court of law. In any case, for any effort to clarify the limits between the one and the other, lower court decisions can be useful but will not be definitive.

The real problem in our legal system begins once the relationship is classed as subordinate employment, as this kind of job could not be developed within Spanish part-time employment regulations.

The essence of the contract lies in an “on-call” or “zero-hours” logic, which is not possible today in Spain. The possibility of increasing or reducing the amount of time when the worker is available to accept micro-jobs is regulated now through the “complementary working hours”, which may not exceed 30% of the agreed working day, unless collective bargaining extends this limit to a maximum

of 60%. The classification of the time when the worker agrees to be available for being given tasks is another aspect that must be clearly regulated.

Both aspects must find a place in the special rule governing the "special working days" (*jornadas especiales de trabajo*). The application of the land transport regulation (valid for cases such as Uber, Deliveroo and Glovo) answers the last question, but not the first one. Even in that case, current regulations should be revised from the perspective of protecting workers' rights, since the times of availability in a specific place, although they must be paid, are not counted for the purposes of maximum working hours. This is contrary to the case law of the Court of Justice of the European Union, as "concepts of 'working time' and of 'rest period' are mutually exclusive" and "the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need" (Case of Matzak, ECLI:EU:C:2018:82).

In the matter of extending working hours, we strongly recommend a guarantee of a minimum amount of time when the employee is allowed to be available to accept tasks, which should be considered as working time. Beyond this point, there should be no general limits on the mutually agreed extension of hours.

At this point, social dialogue should be allowed to establish limits and determine the conditions of minimum predictability of work, in the sense of art. 10 of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

Therefore, sectoral (or at least at firm-level) collective bargaining should determine the conditions for fixing working hours, the compensation for waiting time and the consequences of not accepting tasks proposed by the app. In the way, these agreements will become specific to this sector and specifically refer to on-call work, and will not be included in sectoral collective agreements for related economic activities (such as the hotel and catering industry versus home delivery)