



### **NEWEFIN Project**

New Employment Forms and Challenges to Industrial Relations – Reference:  
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### **COUNTRY REPORT: SPAIN**

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## I. Digital platforms in Spain

In Spain, the presence of digital platforms (Uber, Deliveroo, Glovo, etc.) is a tangible reality. It is clear that the context of economic crisis and austerity-driven policy has had a negative impact on the development of these new business models. From mid-2008 until the beginning of 2014 more than 3.6 million jobs were lost as a result of a double-dip recession, so that economic growth has only taken place since 2015. That is to say that the moment the gig economy takes off in other countries (around 2010) there were no favourable conditions in Spain <sup>(1)</sup>.

In addition, there have also been occasional, but real, legal obstacles to the development and expansion of these new platform activities. On the one hand, Competition Law has deterred the development of new businesses in regulated sectors; Uber's case is the best example. On the other hand, we might also consider that Labour Law could have in a way restrained the flourishing of 'gig economy' as a consequence of the actions (or threat of actions) taken by the Inspectorate of Labour and Social Security whereby the so-called 'collaborators' (acting as independent contractors) were classified as workers with the subsequent legal consequences: labour guarantees and Social Security obligations for the employer. All in all, the aforementioned circumstances decisively contribute to the (relatively) slow growth of 'gig economy' in Spain <sup>(2)</sup>.

However, the digital disruption has contributed to rethink traditional forms of employment very connected with the technology. Spain is the second country in Europe with the highest number of platform workers. In particular, more than two millions of workers in Spain obtain from digital platforms a significant amount of their incomes (25%) and digital platforms are the main job for around 700.000 workers in Spain <sup>(3)</sup>. The following graph permits to conclude that a significant part of platforms operate in traditional sectors such as transport.

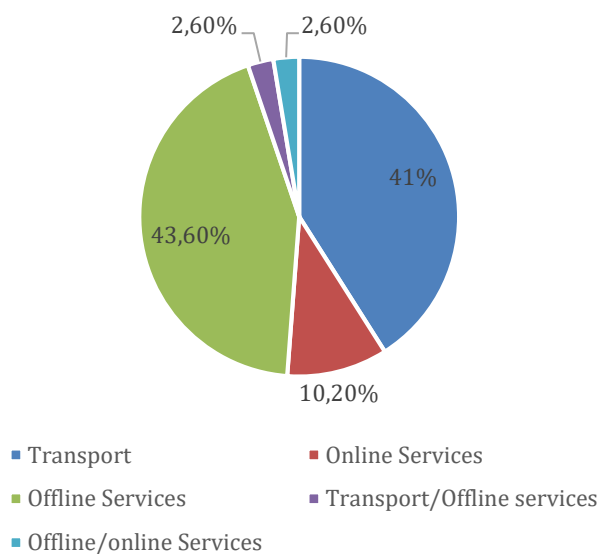
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<sup>1</sup> SUAREZ CORUJO, B., The sharing economy: the emerging debate in Spain, Spanish Labour Law and Employment Relations Journal. N.º 1-2, Vol. 6, 2017, p. 32.

<sup>2</sup> SUAREZ CORUJO, B., The sharing economy: the emerging debate in Spain, Spanish Labour Law and Employment Relations Journal. N.º 1-2, Vol. 6, 2017, p. 32.

<sup>3</sup> See: European Commission, Platform workers in Europe. Evidence from the Colleem Survey, 2018. In addition, it is estimated that 17% of employees in Spain are working for digital platforms at least one a week (Huella Digital: la plataformización del trabajo en Europa, 2019).

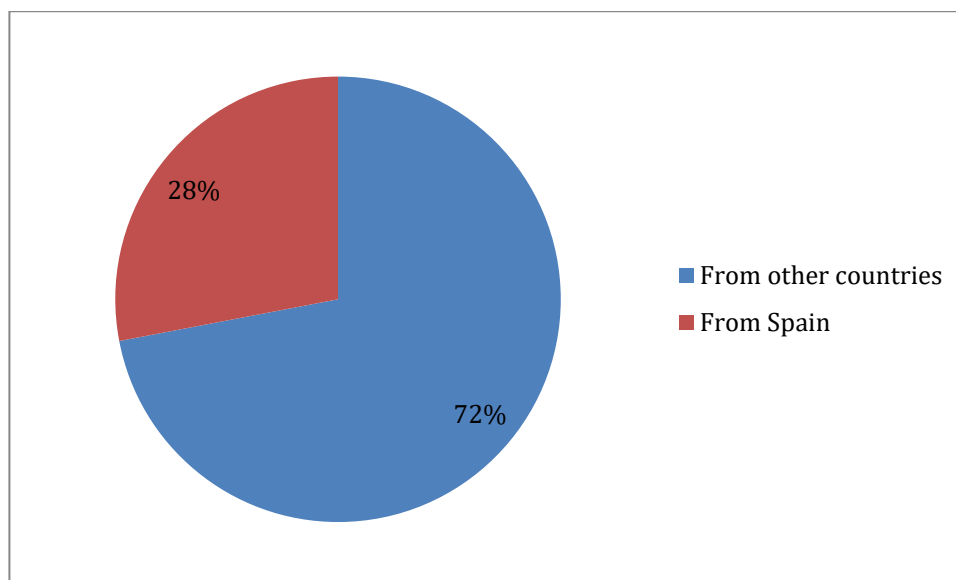
Figure 1: Digital platforms by sectors in Spain



Source: Own elaboration based on the Report "La intervención sindical en las plataformas digitales laborales. Retos y propuestas de actuación" (2018).

One relevant factor is the origin of digital platforms because the most of them (72%) are from other countries (US, UK, Netherlands, etc.). This data should be taken account when the digital platform tries to developm its business and find serious obstacles such as the labour framework or the rejection of other actors (taxi drivers, trade unions, etc.).

Figure 2: The origin of digital platforms



Source: Own elaboration based on the Report "La intervención sindical en las plataformas digitales laborales. Retos y propuestas de actuación" (2018).

One of most relevant characteristics of the digital platforms is that are located in different Autonomous Communities. For example, Deliveroo's riders work in twenty municipalities in Madrid, Barcelona, Valencia, Zaragoza, Alicante, A Coruña, Sevilla, Málaga, Granada and Bilbao.

In spite of the evolution of digital platforms, the political discussion has been focused on the serious economic crisis and the very high unemployment rate. So that the policymakers, unions and employer associations have discussed on the labour markets reforms not paying attention to the technological changes happened in the last years. It should be noted that the new technology has a relevant impact on the core of the Employment Law, that is, the scope of the Labour Law.

### 1.1. The Spanish labour law

There are two possible classifications in Spanish Labour Law according to the specific characteristics of the relationship between the platform and the 'collaborator', not to the name given by the parties. The first one is that of employees. According to section 1 of Workers' Statute (Royal Legislative-decree 2/2015), they are defined as those rendering services for another person within the scope of the organization 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 the practice the general definition of employee is vague, based on factors and aspects that are not formal, exact or mathematical <sup>(4)</sup>. It means that the factors that must be taken into consideration are, on the whole, substantial and real facts <sup>(5)</sup>. Therefore, the label, what the parties themselves say in the contract about their own relationship, is almost (not completely) irrelevant. In conclusion, legal classification will depend on the result of a multifactorial test that will be based on the facts emerging from the relationship between the platform and the service provider ('collaborator').

In addition, the Spanish Law recognizes two types of independent contracts. First of all, the one used in practice so far is to identify them as independent contractors, that is

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<sup>4</sup> GÓMEZ ABELLEIRA, F.J., Handbook of Spanish employment law, Tecnos, 2012, p. 84.

<sup>5</sup> Some of the most important factors regarded as indicate of employee status by labour courts are: i) Instructions are issued by the employer as to how the work is to be done; ii) Means of production (machinery, tools, instruments, etc.); iii) Working hours are not left to the worker's discretion; iv) Work location is not left to the worker's discretion; v) Minor changes in working hours, place of work or job duties forced by the employer must be accepted; vi) A similar amount of money is periodically (usually every month) paid by the employer to the worker; vii) The worker enjoys annual holidays, maternity or paternity leave, sick pay, etc.; viii) The worker wears the employer prescribed badge and uniform in the presence of customers; ix) The worker continuously Works for the same employer; x) The employer pays for the worker's expenses in carrying out the work.

to say self-employed who are in business on their own account. This implies the absence of any specific guarantees beyond the basic ones recognized by common private law between parties or contained in the Self-Employed Workers' Statute (Act 20/2007).

Secondly, service-providers could be classified as economically-dependent self-employed workers [trabajadores autónomos económicamente dependientes, TRADEs]. The institutionalisation of the TRADE figure is justified in the preamble of the Self-employed Workers' Statute as a result of the diversity of self-employed existing in Spain. By virtue of section 11 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-employed 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, a further requirement to obtain the status as economically-dependent self-employed workers is a formal recognition by the client (section 11 bis Act 20/2007), a major obstacle in practice.

Self-Employed Workers' Statute conferred TRADE status a higher social protection compared to genuine self-employment in relation to three aspects. Firstly, it established that TRADE relationships have to be always formalised by means of a written contract. This contract establishes working rights related to working time, rest periods, extra-work and interruption of activity (similar to holidays' rights). Moreover, contract extinction is also regulated and must be derived from a list of causes established in the Self-Employed Workers' Statute. In case the client decides to finish the contract without justified cause, Self-Employed Workers' Statute contemplates compensations to be paid to the TRADE. As opposed to severance payment regulated through labour law (Spanish Workers' Statute), the LETA does not establish an amount or level of compensations 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 (see next paragraph). The Self-Employed Workers' Statute only establishes some criteria to be taken into consideration when setting the compensation, in case it is not 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 TRADE, the so-called "professional interest agreements" (Art. 13) which, however, is being barely used. As opposed to collective agreements, professional interest agreements are not covered by the 'general efficiency principle'. Thus, they only cover self-employed affiliated to the TRADE organisations that conclude the agreement. Also, due to this, self-employed organisations signing the agreement do not have to meet and prove representativeness criteria, as it applies to

social partners. Professional interest agreements can regulate all the working conditions of TRADE. The only limitation to this regard is that they have to observe the law. In the practice, the number of these agreements is no very high. In this sense we may mention the examples of Bimbo (not include Canarias) (April, 2018) and Panrico (April, 2009). Both of them have been negotiated by ATA (Professional association of independent contractors), Trade Unions and the companies.

The law regulated that conflicts affecting TRADE are treated by Labour Court instead of Civil Court, as occurs with genuine Self-employment. An aspect generally positively assessed by trade unions self-employed organisation, bearing in mind the most protective character associated to the Labour Court.

According to Spanish Social Security data (second quarter of 2018), the number of employees is 15.505.871. If we consider the category of self-contractor we should distinguish between self-contractors (1.991.601) self-contractor without employees (1.550.271) and TRADES (9.531).

	Self-employed	Self employed without employees		TRADE	% in relation to total self employed without employees
		Total	% in relation to total self		
2018	2.006.785	1,559,636	78	9,874	0.6
2017	1,973,028	1,539,803	78	10,530	0.7
2016	1.984.268	1,549,871	78	10,250	0.7
2015	1.977.277	1,555,602	79	9,725	0.6
2014	1.945.572	1,531,305	79	8,274	0.5
2013	1.920.387	1,509,869	79	7,153	0.5
2012	1.945.371	1,537,022	79	6,263	0.4
2011	1.978.131	1,575,297	80	4,935	0.3
2010	2.011.986	1,605,629	80	3,729	0.2
2009	2.076.600	1,666,113	80	2,461	0.1
2008	2.221.166	1772,700	80	1,136	0,1

Table 1: Number of self-employed in Spain. Social Security. Self- Employed Workers 'RETA scheme. Data 2nd quarter. Updated data from European Commission, Case study-gaps in access to social protection for economically dependent self-employed in Spain, 2018.

The first alternative –economically-dependent self-employed workers– does not seem to be fully satisfactory. On the one hand, given the poor numbers registered so far, a legal amendment making it easier to attribute is indispensable.

There are still two additional and closely-related remarks to be made regarding this triple-fold classification. One is that section 8 of the Workers' Statute contains a 'labour presumption': a contractual relationship whereby someone personally works for the benefit and under the direction of someone else in exchange of remuneration is, in principle, considered as an employment contract; so unless it is proven that one or more

of those defining characteristics are not present in certain cases, the appearance leads to the recognition of labour status. This also implies, as a second remark, that in Spanish Law contractual classification is not dispositive. That is to say that a “primacy of fact” principle rules, in the sense that it is facts, and not labels, which determines the attribution of employee status or, on the contrary, the existence of a commercial relationship.

## **1.2. The litigation on the classification of the new collaborators**

The labor and Social Security implications of the new business models based on software in this country are still in an embryonic phase. Thus, the first debates have focused their attention on whether Uber drivers or Deliveroo/Glovo riders are employed workers since the virtual platforms have been assuming that they are self-employed. However, the most famous cases are the tip of the iceberg because it is very likely that there are many hidden collaborators behind the other platforms including high-and medium skilled jobs.

The starting point is undoubtedly that new work features fit poorly in the traditional category of worker, since it was established in a socio-economic and technological context very different from the current one. It should be remembered at this point that until 2007, Spanish Labor Law was based on the figure of the dependent worker as determined by the labor test (voluntary, paid, dependent and employed and the self-employed <sup>(6)</sup>). In 2007, the intermediate figure of the economically dependent worker (Trade) who carries out a profitable economic or professional activity was introduced and who does so in a habitual, personal, direct and predominant manner for a natural or legal person, called the client, on whom they depend economically for receiving at least 75% of their income from work and from economic or professional activities <sup>(7)</sup>. So far there are some judgments that have been pronounced on the work of the collaborators of these professional platforms in the period 2018-2019. The first one concluded that Deliveroo’s riders should be considered such as employees (the Spanish court in Valencia, June 2018). However, the second one took the opposite view regarding the situation of Glovo’s riders (The Spanish court in Madrid, September 2018; January 2019). In the last months, new judgments have been made concluding that Glovos’ riders should be considered such as employees (The Spanish court in Madrid, February and April 2019).

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<sup>6</sup> See Article 1.1 of the Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Law of the Workers' Statute.

<sup>7</sup> See Law 20/2007, of July 11, of the Statute of Self-Employed Work.



### **A.The wide freedom of the collaborator such as the strongest argument in favour of the independent contractors' category**

In Spain some judgments have concluded that the collaborators should be considered independent-contractor. The main argument is the wide freedom of the collaborator what is opposite to the condition of the employee. According to the judgements the collaborator is not subject to working time because he may choose the time slot to do the service as well as he may refuse other services. The rider decides how, where and when works, has the control of his activity and he may refuse a service what he had accepted previously without penalty. In addition, the company has not disciplinary faculties beyond the termination of the contract in the case the services were not done or a small penalty on this assessment. The GPS is not a monitoring instrument of the company but the tool in order to count the kilometres and take the quantity in account in the following invoices. The collaborator has not a duty of justify his absences from the work but he should inform company on them. The company has not the option to choose the rest days of the collaborator.

Concerning 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 the mentioned factors are contrary to subordination, risk of the business what are the most characteristics of the employment contract.

### **B.The emerging indicators of the employees' category: the brand and the digital platform**

There is a group of indicators what show the labour link. The first one is that the rider does not participate in the draft of the contract signed by the parties. The rider has not power in order to set or negotiate his wage what depends on parameters set by the digital company. The digital company pay the service to the rider. In addition, the customer and the rider do not negotiate on the price what is set by the digital company. The rider only accepts the conditions set by the digital company. Then, there is an inequality between the parties.

Secondly, the contract shows that the rider should comply the instructions given by the digital company: i) duration of the working time (40 hours); ii) Criteria to comply in order to buy products and relationships with the final customer; iii) Limit of 40 minutes for ordering a service-prohibition not to use own corporate badges or different to the digital company; iv) Prohibition of the use of corporate image different to the digital company and neither use it on social media; v) To be careful when post coments on social media; vi) To should communicate with the company preferably by email; vii) some conditions are set into the contract such as the business interruptions which are justified, the duty of inform in advace by termination and grounds of termination-there are a list of thirteen grounds of resolutions of the contract with the digital company related to breaches of the rider; viii) Prohibition pre-contract and post-contract of

disclose commercial secrets or confidential information with the compensation by damages; ix) it is allowed that personal data of rider were consulted by third parties. To be clear, there is a great difference between the work of the twentieth century and the twenty-first century. In the new century the collaborator is available in order to do a micro-tasks. Then there is a hidden employment relationship what works when a micro-task is ordered. It means an high reduction of labour costs for the employer what only pays the working time of the micro-task not the time of availability. Although the rider has some areas of freedom, the assessment of these should be done taking account not the work of the twentieth century but not how is the work with the digital platforms and other electronic devices in the twenty-first century. The relevance of the freedom is lower than the rest of indicators. The freedom of the rider in order to choose every micro-task is the logical consequence of the atomization of the working time. If the employer may always employ the services of the rider, it would mean that the rider offers a continuous availability. The mentioned situation is contrary to the meaning of work such as a right.

The rider is part of the platform in order to do the service and receive the orders from the platform. The company monitors all activity of the rider in a complete manner (the app may inform customers and suppliers in any time where is the rider; it is mandatory an specific behaviour of the rider; the activity is assessed creating profiles what are taken in account for the following deliveries; the digital company has powers for take disciplinary actions including the termination of the relationship and the price of every assigned task. In this context, the areas of freedom in order to choose the days and hours of work and acceptance of specific services do not mean any power what may 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 dissociated from the digital platform. His possibilities such as self-contractor would be very low because the successful of those platforms depends on technical support of the technology as well as the brand what is advertised through searches of google. It is clear to conclude 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.

Since the end of 2017 there have been actions by the Labor Inspectorate (specifically, Valencia and Madrid) who have concluded that Deliveroo riders are employed workers. This is so because, according to the Labor Inspectorate, all labor features, including

dependence<sup>(8)</sup> and employment<sup>(9)</sup> coincide. In our country, the labour Inspection has prepared an strategic plan (2018-2020) what includes specific measures for digital platforms: i) To draft a procedure for digital platforms; ii) To provide training for Inspectors on digital platforms; iii) To implement pilot programmes in different Autonomous Communities.

### **1.3. Position and role of the social partners on new forms of employment**

It seems clear that the phenomenon of digital platforms has found some negative restrictions in matter of Labour 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 of sharing economy are not considered such employees as well as the role of trade unions in Spain.

According to one of the most representative Union in Spain (CCOO), the regulation of TRADE not provide an adequate answer to needs of this specific collective nor to the needs of employers. In the practice, the TRADE operates as a strategy in order to avoid the application of the Labour Law because the most of TRADES should be reclassified as employees. The most representative trade unions have taken the following measures in the last period:

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<sup>8</sup> The platform unilaterally determines, as has been proven, the way of working, the days, zones, and schedules and sets the prices. In this way, the company retains the power it considers appropriate and dictates the instructions it desires, that is, the worker is really subordinate even if the company decides (because it—and only it—decides) to exercise—presumably—less control. But this circumstance of apparent less control is not real either, given that the company knows at all times where each rider is, the time that each delivery takes and notifies the rider and sends them instructions on the matter, especially in case of delay, controlling at all times through geolocation where each rider happens to be. Deliveroo does not offer, therefore, any possibility for the service provider to choose their clients or to charge them directly, and establish their own prices for the service they perform. The price of the service to be charged from the customer is established directly by Deliveroo and, in fact, is charged by them. Furthermore, the company imposes style rules, such as removing helmets and backpacks when entering restaurants or going to a home, and gives advice on the way to address a client.

<sup>9</sup> On the other hand, the means of production that are provided, motorcycle or bicycle and a mobile phone—of certain characteristics and in which, in addition, they must download the application developed by the company, updating it periodically according to the company's instructions, updates without which they can not provide services—are not the relevant ones for the activity; these are actually the investments in the technology that creates the platform. However, nowadays, a vehicle or a cleaning cart can be acquired by any person and this should not be a determinant for their exclusion from the scope of protection. In fact, in the companies described in this paper, the true means of production are the technological ones. The investment in the technology that creates the virtual platform is really the most expensive part of the means of production and, therefore, the materials contributed by the worker are insignificant in comparison.

Trade Unions	Type of measures			
	To provide services (information, etc.)	To create specific trade union structures into the platforms	To promote judicial actions against the platforms	To modify the scope of sectoral collective agreements
UGT	X	X	X	X
CCOO	X	X	X	X

In our point of view, one of the more interesting strategies is to modify the scope of some sectoral collective agreements in order to cover the digital employees and offer a legal argument for the judges. One example is the catering sector, which mentions the digital employees (<sup>10</sup>).

In July 2017 Deliveroo's riders called for a strike. The riders asked that they had at least 20 hours and received the wage of two orders per hour. In July 2018 it was entered in force the Agreement negotiated between Deliveroo and TRADES (riders). The main advantages of that agreement are: i) Increase the scope of accident insurance. The riders will receive the 75% of his/her incomes (with a maximum daily amount of 50 €) for 60 days instead of 30 days; ii) Discount codes for the acquisition of material; iii) Preferential access to job after an inactivity period; Access to training given by thirds. The training may be connected to the job of riders or a different area what is interesting for the rider. Iv). Compensation in the case of termination of the job. The agreement recognices a compensation of 25 days salary per year of service taking account the average of incomes received in the last 12 monts previous to the termination.

Finally, it should be mentioned that it has been created a new professional association very connected with the Digital Economy. It has been called "Asociación Española de la Economía Digital" (BOE nº 96, 21 April 2010). More than 500 companies are member of the association such as El Corte Inglés, Campofrío, Telepizza, Google, Venca, Telefónica, Buyvip, Vodafone, Coca Cola, Nokia, Cepsa, Repsol and Seat (<sup>11</sup>).

#### 1.4. Proposals to improve their legal status

Up to the present, the Spanish Government has not proposed new reforms in order to regulate the labour conditions of collaborators. It seems clear that it is difficult to regulate the new business due to two arguments. Firstly, the legislator should draft a legal framework for so many different digital platforms. Secondly, the situation of the digital platforms is changing in order to avoid the application of those judgments what concluded that collaborators should be considered such as employees. However, de lege ferenda, three main solutions may be mentioned.

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<sup>10</sup> BOE 29 March 2019.

<sup>11</sup> Inicially the association was called "Asociación Española de Comercio Electrónico y Marketing Relacional" BOE» nº. 235, 28 September 2010.

Some authors have suggested that the most appropriate option would be the formulation of a new special employment relationship. This means that, without being excluded from Labour Law, the aforementioned contractual relationship would be subject to a specific regulation purposely designed to reflect the singularity of certain circumstances typical of the new economic activities (<sup>12</sup>). The paper has mentioned that the relationship between the digital company and the collaborator is based on the freedom of the collaborator in order to accept or refuse a service. So that some working conditions should be different to the Workers' Statute for all employees. In our opinion the service of the riders is very similar to on call job what is prohibited for employees. Perhaps, the Spanish Government should regulate on call job for digital employees setting some labour rights for them.

The second way is to classify platform 'collaborators' as ordinary employees. That is compatible with adapting the Workers' Statute to the singular working conditions, which characterize this type of activity, by following the example of the current remote working clause (section 13 Workers' Statute): a new section regulating its singularities (working time, salary, surveillance, etc.), within the general legal framework applied to common employment relationships (<sup>13</sup>).

The problem emerges to a large extent in terms of Social Security. When labor budgets are given, the professionals who provide services through these virtual platforms will be employed workers who must be registered in the General Social Security Scheme. What happens is that this scheme does not fit with the collaborative economy. It is a business model whose key to success lies, among other things, in the subdivision of work in micro-tasks, in the provision of the service on demand (so that the offer of work is made after the client has requested it) and in the freedom of the employee to determine their working day and set their schedule. This form of management does not allow the number of hours worked to be known in advance. It would be appropriate to study the possibility of creating a special regime that falls within the General Scheme. In this regard, Article 11 of Royal Legislative Decree 8/2015, of October 30, approving the revised text of the General Law of Social Security, recognizes the possibility of creating special regimes in terms of framing, affiliation, and form of contribution or collection.

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<sup>12</sup> TODOLI SIGNES, A., *El trabajo en la era de la economía colaborativa*, Tirant lo Blanch, Valencia, 2017. However, some authors consider that this solution have some difficulties. On the one hand, it is foreseeable that an ad hoc regulation would imply –following most of the special employment relationships– certain sacrifices for employees in favour of employer interests. And, on the other, in the long (possibly even medium) term this new sort of business model will probably represent a major proportion of economic activity, not a minor part as it does today. Therefore a special regulation could turn to be a way of undermining labour rights, SUAREZ CORUJO, B., *The sharing economy: the emerging debate in Spain*, Spanish Labour Law and Employment Relations Journal. N.º 1-2, Vol. 6, 2017, p. 38.

<sup>13</sup> SUAREZ CORUJO, B., *The sharing economy: the emerging debate in Spain*, Spanish Labour Law and Employment Relations Journal. N.º 1-2, Vol. 6, 2017, p. 38.

The third one consists in reformulate the regulation of TRADES in order to introduce some improvements <sup>(14)</sup>. The authors of the paper pointed out that mid category does not work in the practice. Then, it seems clear that the legislator may rethink a new legal framework for TRADES. In this sense some digital companies have proposed the creation of the digital TRADE. According to this proposal, the digital TRADE would receive more protection than the current regulation. For example, a minimum wage, the increase of holidays or professional training. In addition, the legislator should take account some issues connecting with the social security. If in the rendering of services labor budgets are not given, doubts arise regarding the inclusion of these professionals in the self-employed workers' regime. At what point does that individual become a professional in their own right and contribute to the Special Regime for Self-Employed Workers? When should an economic activity be considered to be carried out personally and directly? When is there profit and when do labor features coincide? Where to draw the line of separation between a self-employed professional and a private individual? With reduced fees, the amount of Social Security to be paid can absorb a very large percentage of the self-employed professional's turnover, or even its total amount. And to this is added that the tax burden is concentrated on the self-employed and that the contribution to the Special Regime for Self-Employed Workers must be made for full months, regardless of the days and hours in which services have been provided in that particular period. This regulation represents a clear disincentive to joining the Special Regime for Self-Employed Workers and is ignorant of the conditions in which, at present, many professional activities are developed, favoring a flight from the system to the underground economy. In our opinion it would be useful very study those measures that contribute to correcting the deficiencies identified.

## **II. Non-regular forms of employment: part time and temporary employment in the new economy**

### **2.1.Introduction and background**

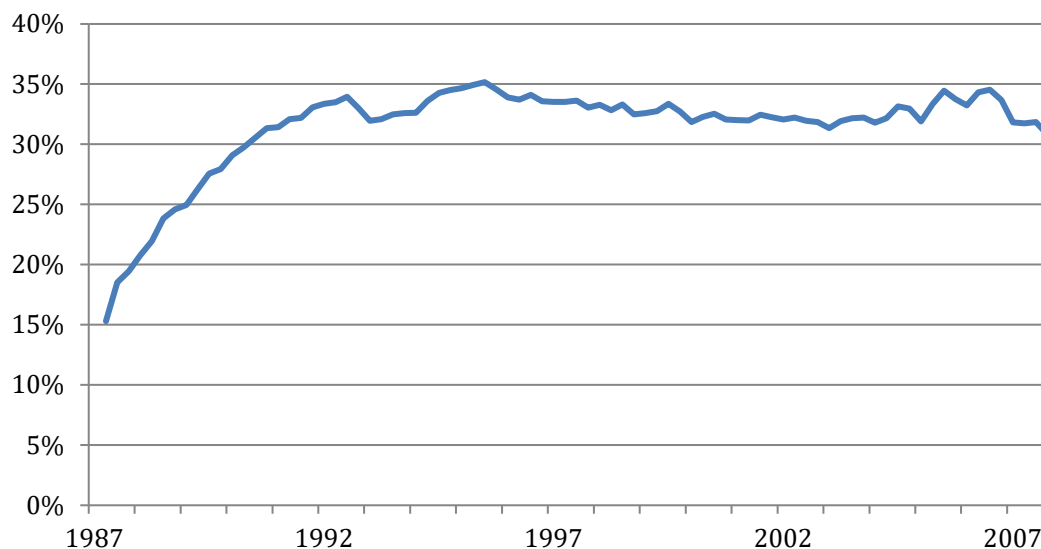
The extensive use of fixed-term employment contracts in the Spanish labour market is a well-documented and well-known fact. In Spain, since the 1980s, the preferred way for employers to obtain flexibility in the management of their workforce has always been fixed-term contracts. The origin of this situation was the legalisation of non-

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<sup>14</sup>MERCADER UGUINA, J.R., El futuro del trabajo en la era de la digitalización y la robótica, Tirant Lo Blanch, 2017.

causal-temporary contracts in 1981<sup>15</sup>, and the “new activity contract” (with a duration up to three years) created in 1984<sup>16</sup>, which caused an unprecedented increase in temporary contracts. The Labour Force Survey data for this variable begins in 1987, so we cannot quantify precisely the number, but the figure below shows clearly this reality.

*Figure 3: Temporary employees as percentage of the total number of employees. Spain. 1987-2007*



*Data source: Spanish Labour Force Survey. National Institute of Statistics.*

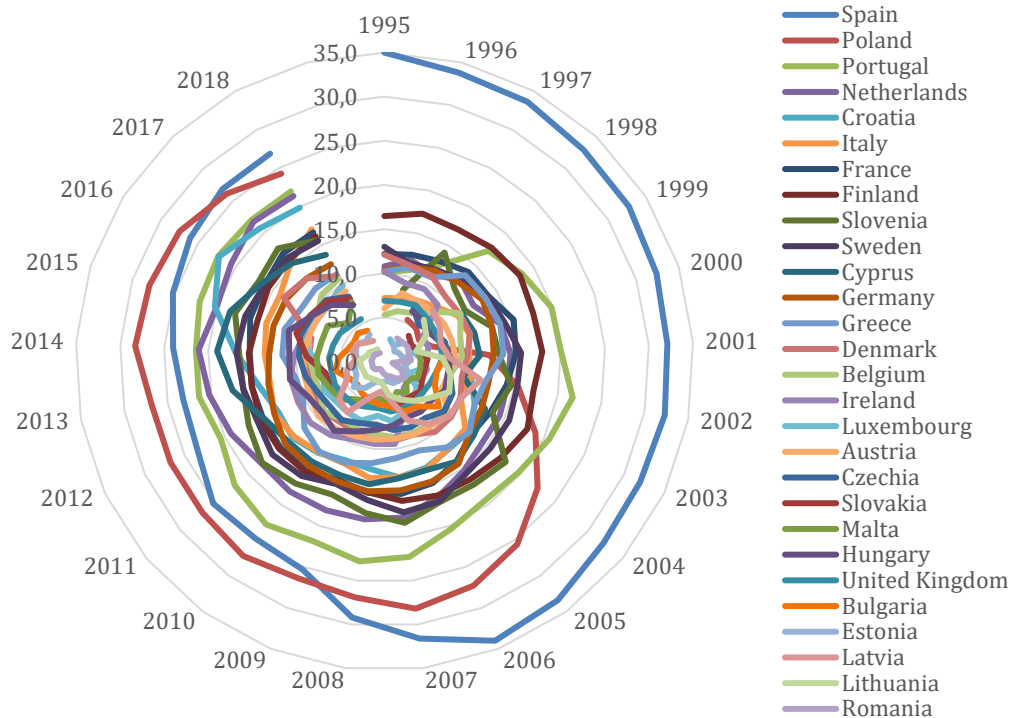
As a result of this and other labour market policies, between 1987 and 1992 –the year when employment stability appears as an objective in Spanish legislations– almost two million of temporary jobs were created, while more than 600,000 permanent jobs disappeared. Since then, temporary work has been a distinguishing feature of Spanish labour market, and until the start of the financial crisis in 2008, it has been the only economy in the European Union with a temporary employment rate over 30%.

Figure 4 shows how the differences among European countries are remarkable, but Spain has always been (in competition with Poland, in the last decade) the “champion” of temporary employment. Despite the decrease of this rate in the last decade, one out of five Spanish employees are working in a temporary job.

<sup>15</sup> Royal Decree 1363/1981, 3 of July, authorizing temporary hiring as an employment enhancement measure (Real Decreto 1363/1981, de 3 de julio, por el que se autoriza la contratación temporal como medida de fomento del empleo)

<sup>16</sup> Law 32/1984, of 2 of August, modifying Workers’ Statute (Ley 32/1984, de 2 de agosto, sobre modificación de determinados artículos de la Ley 8/1980, de 10 de marzo, del Estatuto de los Trabajadores)

Figure 4: Temporary employees as percentage of the total number of employees in Europe. 16-64 years employees.



Data source: Eurostat's Labour Force Survey.

The persistency of this high temporary employment has been related in economic literature with organisational manpower structures, where Fixed-term contracts are used for less qualified jobs with lower content of firm-specific human capital<sup>17</sup>. In this sense, the big number of temporary workers is used as a mechanism to absorb the impact of economic shocks without facing (higher) severance payments nor discussing collective dismissals or consulting employees' representatives in order to introduce structural changes in working conditions. This effect has been central to understand the evolution of the employment and unemployment levels during the last crisis. When unemployment rate shot up to 26.9% of active population (2013Q1), the share of employees with a temporary contract dropped back to the lowest rate since 1988 (21,9%), which by the way still was almost the highest (just behind Poland); when the economic recovery showed its effects, temporary employments arose again and with the last data available (2019Q1) one out of each four employees has no permanent contract.

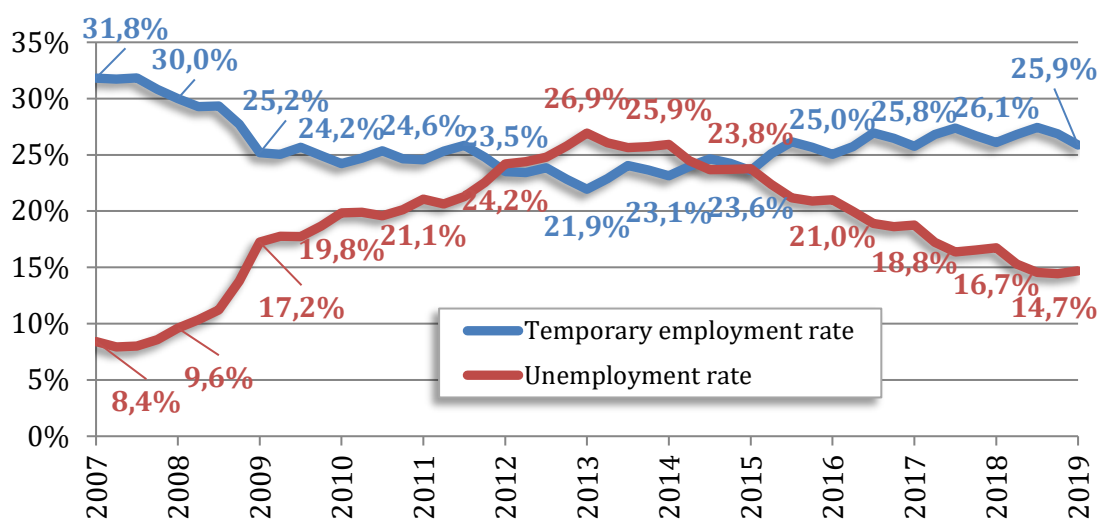
The next two figures show clearly not only the link between unemployment and temporary work in Spain, but also that it is a specific problem of Spanish labour market. In the first of those, it can be seen the two lines seem to be reflected in an imaginary

<sup>17</sup> Dhyne, E.; Mahy, B., "Work organization, labour contracts and employment", *International Journal of Manpower*, vol. 33, 3, 2012, p. 254.



mirror; each increase in unemployment comes with a decrease in temporary employment (and back). Mathematically, this is called a negative correlation, and can be measured by the so called “correlation index”, that can be any number between one and minus one. Those numbers mean that there is a precise relation between two variables, and a correlation index of zero would mean that they are independent (so a change in the one won't make us expect a specific change in the other)<sup>18</sup>. Anyway, it is essential to remark that correlation does not (necessarily) imply causality, so a high correlation between unemployment and temporary work do not mean one is caused by the other, but just that they change together in the same (positive correlation) or the opposite (negative correlation) direction.

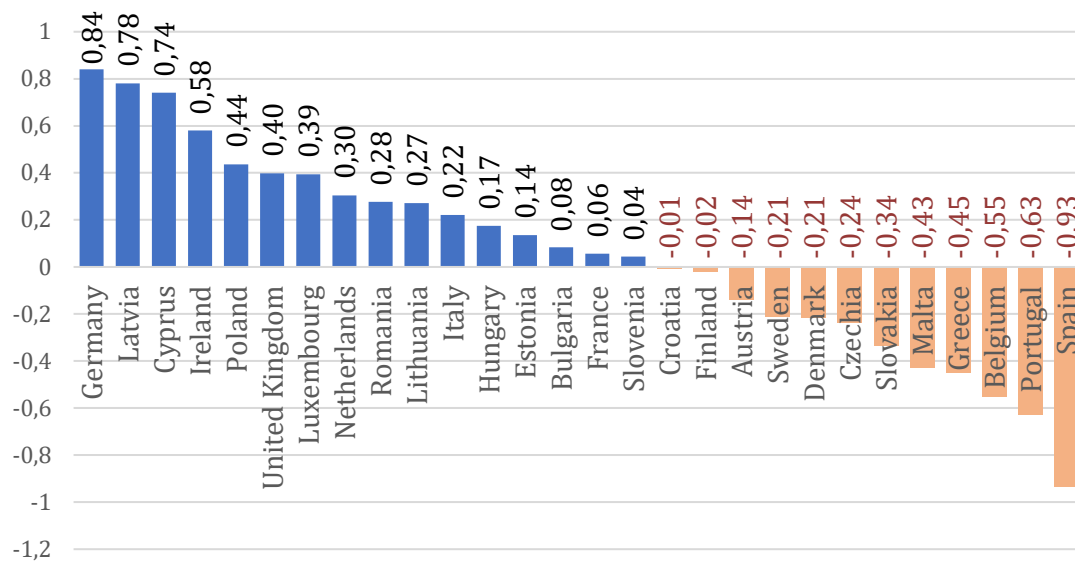
Figure 5: Unemployment and temporary employment rates for Spain (2007-2019Q1)



Data source: Spanish Labour Force Survey. National Institute of Statistics.

<sup>18</sup> At least, there is no lineal correlation. There could be other relations as quadratic or logarithmic, amongst others.

Figure 6: Correlation index between unemployment rate and temporary employment rate (2007-2018)



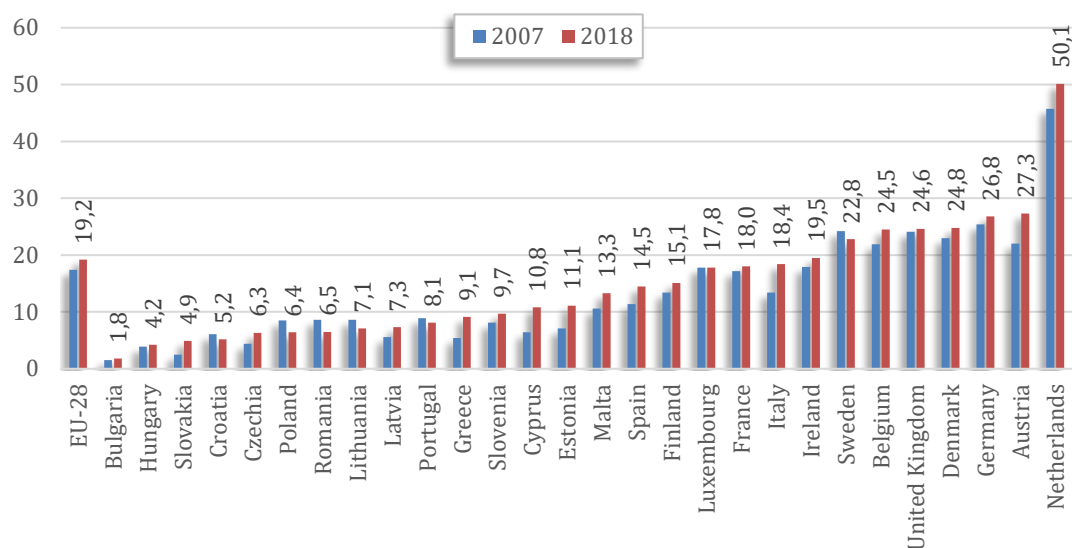
Data source: Eurostat's Labour Force Survey.

On that basis, it seems clear that, once again, as the old advertising slogan said, “Spain is different”. Not only because the correlation is negative, which reflects that jobs creation and destruction is mostly non-permanent, but because it is clearly the country where this correlation is stronger. There is almost an automatic reaction to positive and economic shocks: hiring or dismissing temporary workers is the first (and most significant) reaction of Spanish employers.

The use of partial time, on the other hand it has not been particularly intense, despite a small but consistent increase in the last decade. Last available Eurostat data show that the incidence of part time-work it is still slightly below the European Unión average (14,6% in Spain Vs 19.2 in EU-28). By the way, it shall be remarked that the main economies of the Union have higher rates than Spain: every country with higher GDP or GDP than Spain have also a greater share of part-time work.

Regarding the evolution of this kind of employment, data show that the maximum in Spain was reached in 2014 (a rate of 15.8%) and since then it is slowly going down, but it seems to stabilize, and it is still three points over the pre-crisis situation.

Figure 7: Part time work in Europe as percentage of total work (2007 vs 2018)



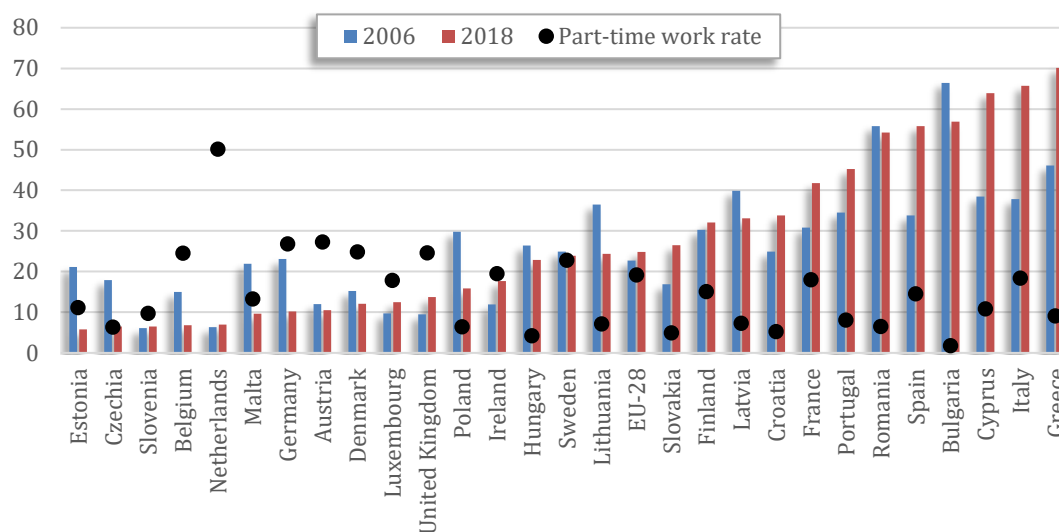
Data source: Eurostat's Labour Force Survey.

The main issue at this point, from workers point of view, is the reason why they have accepted this kind of work; it is obvious that for personal or familiar issues someone could prefer not to have fewer working hours, but at the same time some part-time workers would like to have a full-time job (or more precisely a full-time level of earnings).

The official data show us that this kind of non-voluntary part-time employment has increased in Spain in an alarming manner during the financial and economic crisis. Last data available (2018) quantifies this situation in 55.8% of part time employment in the country analysed in this report, which doubles the union average. It is true, by the way, that in this issue Spain is not alone. In other five European economies most of part-time workers would like to work a regular number of hours.

It is necessary to say that, even if this figure almost doubles the data registered in 2006, it cannot be related with the level of part-time work in the economy; Figure 8 shows clearly that countries with higher levels of this kind of employment do not show similar situations. Other interesting point is that unemployment rates neither seem to cause this malfunctioning of the labour market. Despite of the reduction of people that cannot find a job to 2009 levels, involuntary part-time is now eleven points higher than then. This fact can lead to the conclusion of an effective change of jobs in the Spanish economy; employers are offering (proportionally) more part-time jobs than ten years ago.

Figure 8: Part-time workers share that could not find a full-time job



Data source: Eurostat's Labour Force Survey.

## 2.2. Legal framework and position of social partners

### A. Non-permanent contracts

Spanish Workers' Statute formally assumes that the general rule is that every employment relationship should be permanent unless a legitimate cause for temporary contract can be justified.

It is a common critic to the Spanish legal system that there are too many different types of contracts. However, even if theoretically it is true, data show that only three types of contracts cover above 97% of the total amount of temporary contracts officially registered each year.

The first reason that allows an employer to hire a worker temporarily is the contract for a work or service. The task should be precisely established in the contract, and it must be autonomous among the normal activity on the business. That should not be understood as an interdiction of hiring somebody to do the same kind of work as other employees, but the tasks assigned must be related to a specific project. The legal definition is quite wide, so the law establishes that collective agreements (at any bargaining level) can identify which kind of jobs can be covered under this kind of contract. In the practice, social partners have not showed a major concern in this issue, and most collective bargaining agreements do not reflect regulation to the application in the sector or firm. In the cases that the pay attention to this matter, social partners have sometimes widened the scope of application. It is the case, of the so called "contrato fijo de obra" (that could be translated as "permanent construction job

contract”) created in the construction sector and which has had a legal recognition<sup>19</sup>; in this case, the “job” for which the worker is hired can be not only one construction project but several of them in the same province. Even the objective of this rule is said to give job-stability to the workers, it denatures the idea of “specific work” as cause to avoid permanent contracts.

Social partners seem to be aware of this problem, as once and again have agreed on solve this problem. In the General agreements on collective bargaining and Employment (signed on 2010,<sup>20</sup> 2012<sup>21</sup>, 2015<sup>22</sup>) they have repeated the same idea: negotiators should make an effort to enhance an adequate use of temporary and permanent employment contracts, strengthening the concept of “cause”. Only in the last one published (forth agreement, 2018<sup>23</sup>), which is shorter than the previous ones, they have no repeated the same formulas.

The good will has been apparently no more than that: a laudable desire. Not only because of the official data show no changes in the structure of employment contracts, but because social partners themselves not only repeat the need of enhancing contractual stability, but they precise more and more the terms of the agreement on this point. Thus, in the third general agreement on employment and collective bargaining (2015), they order negotiators not only to use rightfully the different kind of temporary contracts, but to avoid successive temporary hiring and analyse the possibility of establishing maximum rates of not permanent employees.

The second type of temporary contract is the “eventual” hiring, to face requirements due to market circumstances, task accumulation or a high number of orders. In this case, employers can hire for a fixed term-period not longer than six months (that could be extended to a year by collective agreement). This hiring can take place at any time since the beginning of the situation that justifies the workforce needing, but it cannot be hold more than one year from that date (18 months if the collective bargaining agreement allows it).

The third hiring figure that has quantitative relevance in Spanish labour market is the one allowed to replace a worker that has the right to return to their job, such as maternity/paternity leaves or leaves related with political o workers’ representation. In this case, fraud is less frequent, as the employee replaced has to be expressly identified and the rule has been understood in a flexible way. Therefore, employer is allowed to

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<sup>19</sup> First, it was the third additional disposition of Lay 32/2006, about subcontracting in construction sector, and more recently the workers statute specifically refers to (and allows this contract).

<sup>20</sup> BOE of 22 February 2010 (<https://www.boe.es/buscar/doc.php?id=BOE-A-2010-2844>)

<sup>21</sup> BOE of 6 February 2012 (<https://www.boe.es/buscar/doc.php?id=BOE-A-2012-1778>)

<sup>22</sup> BOE of 20 of June 2015 (<https://boe.es/buscar/doc.php?id=BOE-A-2015-6865>)

<sup>23</sup> BOE of 18 July 2018 ([https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2018-10096](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10096))

reconfigure tasks among workers in order to a better organization of its activity. The main problem in this case is that the employment relation can last for many years, and when the worker returns (because they are no longer worker representative or they do not continue the public duties) the temporary employee is dismissed without any severance payment right; which has caused several prejudicial questions to the European Court of Justice<sup>24</sup>.

As other temporary contracts (basically related with formative periods of younger workers, to improve employability of disabled worker or to easy transitions to retirement) have a minor quantitative relevance, it has no point to explain its juridical regimen and reforms in this report.

The abuse of these contractual types that are still leading to an outrageous temporary employment rate has leaded Spanish government (followed by the parliament) to several reforms. In 2006 it was established that any worker hired (at least twice) for 24 months in a period of 30 months to do the same job for the same employer would be automatically transformed in a permanent worker. This rule was toughened in 2010, as it included employment contracts for the same or different job and not only for the same employer but for any company of the same group, even if the hiring was made by a Temporary Employment Agency. It also allowed collective bargaining agreements to introduce measures to prevent the same job post for being covered successively by different workers; unfortunately, workers' and employers' representatives haven't been able to find a solution to this problem that the government itself did not know how to solve. Surprisingly, this anti-fraud mechanism was suspended in 2011 to encourage employment creation, under the premise of "better a bad employment than no employment", but finally it went back in force in 2013.

In order to avoid long non-permanent employment contracts, the government established a maximum period of three year for determined work or services contracts, that could be extended up to one more year by collective agreement.

Other measure to fight against temporary employment abuses was the increase of severance payments on contract termination. In case of the first two contract types analysed in this report (not in substitutions) a payment calculated on the basis of eight salary days for each year worked (proportionally adjusted to shorter or longer contract durations) was due to the temporary employee.

This payment was significantly lower than the severance payment due in case of lawful termination of a permanent contract (20 days of salary per year worked) and even more if the dismissal was found unlawful (45 days of salary per year worked). To encourage employer to hire permanent workers, several reforms were accomplished to reduce the breach of costs between the two situations. In 2010 a progressive increase from the mentioned 8 days to 12 days of salary was passed, while reasons for lawful dismissal were loosened up. Two years after, in 2012 the new conservative government deepened

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<sup>24</sup> Cases Diego Porras I (C-596/14) y II (C-619/17) , Montero Mateos (C-677/16), amongst others.

in this reform, making easier to dismiss rightful, and reducing the unlawful dismissal payment from 45 to 33 days of salary for each year worked.

## **B. Part-time work**

The legal framework in this issue has tried to balance two conflicting objectives; on the one hand, part time work is conceived as a mechanism of flexibility, which allows both employer and employee to adapt the working time to their productive or personal/familiar needing respectively. On the other hand, there is a well-founded fear about the abuses the employee could suffer if they must be permanently available to the employer requests: there is an extended prevention against zero hours contracts.

The equilibrium between these two objectives has changed in the different reforms passed in the last years. The starting point was a well-defined working time, as the contract should contemplate “the number of ordinary working hours in a day, week, month or year and its distribution”. Working more hours (complementary hours) was only allowed if it was previous and expressly agreed. The extension of working time via complementary hours couldn't be too high, as it was limited to 15% of the ordinary working time agreed. Only by collective agreement this limit could be widened to 60% of ordinary hours. If the employer needed the worker and wanted them to work some of the complementary hours agreed, notice should be given on no less than seven days.

In 2012, trying to increase the possibilities of a flexible use of this contract, after a failed attempt to combine overtime hours with complementary hours, the conservative government created a new kind of the latter. Thus, nowadays there are two ways of (lawfully) working more than the ordinary hours agreed:

1. **Compulsory Complementary hours:** Those are the traditional way of stablishing more time (and salary) for part-time workers. There is a previous and express agreement where employer and employee agree on a number of additional working hours (up to 30% of ordinary hours or 60% if the collective agreement allows it) that could be used or not (depending on productive needing) by the employer, and are only paid (as ordinary hours, at least) if actually worked. The notice was reduced to three days, period that can be reduced (but not extended) by collective agreements.
2. **Voluntary Complementary hours:** Since 2012 the employer can offer up to a 15% of ordinary working hours (up to 30 by collective agreement) to the employee with at least 10 ordinary working hours per week (computed in a natural year period), who can accept or reject them without any negative consequences.

In this framework the possibilities of expanding working hours could allow virtually doubling ordinary working hours agreed ( $60\%+30\%=90\%$  of initial worktime), and the notice period is quite short, so if both parts are interested the flexibility is quite high. Nevertheless, this regulation does not adapt well to some of the jobs of the new economy, where both employer and employee participate on the election of the working time. Specifically in delivery (Glovo, Delivero, Uber Eats...) or people transport (Uber, Cabify) sectors, the workers decide some frames of availability on which the platform

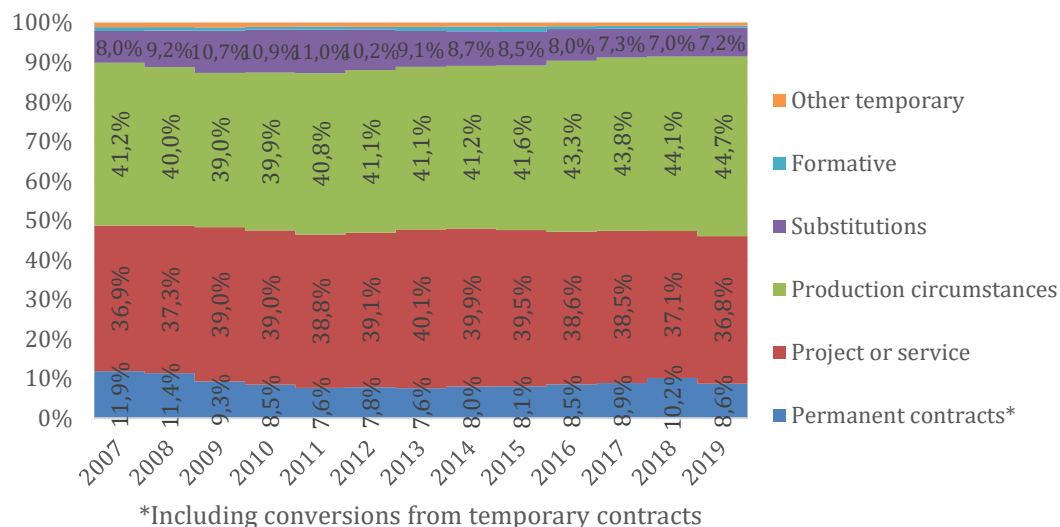
could use or not their services; even considering that all the time the worker is ready to deliver services is working time (which will be in conformity with working time directive), the lack of previous definition is apparently opposed to Spanish regulations, unless each “working frame” is considered a different part-time contract. In this case, the problem would be related precisely with the causality of non-permanent contracts.

### 3.Effects of the reforms

The impact of the reforms (and collective agreements) has been very limited. It has been previously shown that the procyclical performance of temporary contracts is still the same, and the decrease of temporary employment rate stopped as soon as Spanish economy began to create employment.

In the issue of adjusting the kind of temporary contracts to the causes established by law, both legislator and social partner seem to have failed. As it can be clearly seen in the next figure, most of the hiring registered is made using non-permanent contracts, without any significant change during the period analysed.

Figure 9: Employment contracts registered in Spain (2007-2019)



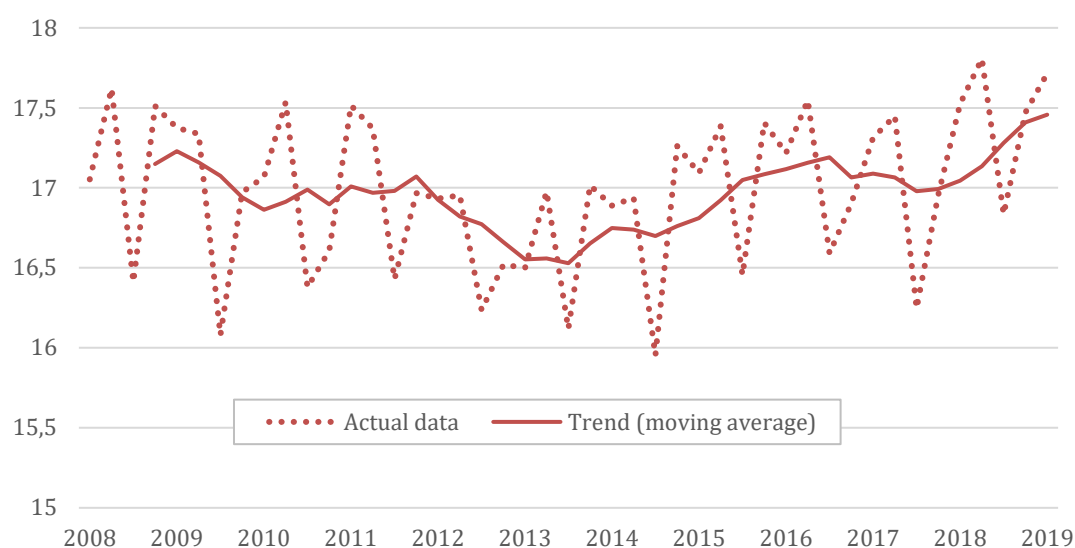
Data Source: National Public Service of Employment. Ministry of Work, Migrations and Social Security

About part-time jobs, there aren't neither significant changes in the direction addressed by the reforms. The increase of part time employment has stopped and working hours have risen only 4.6% in seven years (first quarter of 2012 and 2019). During this period, furthermore, Spanish economy (and its labour market) has recovered, so the increase of working time cannot be explained (only) by the reform. As shown in the figure, the average working hours (including both ordinary and complementary hours) are now 17,7 per week, higher than the 16.97 per week on the moment the reform was passed, but in levels registered in 2008 and 2009.



Those data could be partially explained by the scarce interest of social partners on the mechanism of additional working time offered by the law. The most recent definitive data available, for agreements with economic effects on 2016 show that only 4.88% (91 out of 1866) of registered collective bargaining agreements have included clauses increasing the limit of complementary hours.

Figure 10: Average worked hours per week by part-time employees in the private sector:



Data source: Spanish Labour Force Survey. National Institute of Statistics.

### III. Subcontracting in the context of new forms of employment: fighting against precarious and low-paid work

Employment in triangular arrangements is far from new. However, subcontracting and outsourcing have gained considerable extension in the current technological and economic context, dominated by the multiplication of competencies and the development of new activities and new forms of organizing those activities.

In Spain, these practices are clearly connected to precarious work and are an important contributor to the accelerated process of fragmentation of the labor market. There is a unifying thread between subcontracting, platform work and atypical employment contracts, which is the fragmentation of work *and* workers.

The triangular employment arrangement where a subcontractor provides services to a user-firm by assigning employees to the latter poses a fundamental question: who is the employer (the user-firm?, the subcontractor?, both?). And if the answer to this question is that the employer is the subcontractor, another question arises: does the regulation of the employment relationship have to be adapted to this particular instance? (for instance, by way of imposing on the employer the obligation to respect the employment

conditions enjoyed by the employees of the user-firm, or by way of holding both companies jointly and severally liable).

Subcontracting is a widespread practice; for instance, in the transportation and logistics sector, the rate of subcontracting within the sector is 34.4 percent, higher than in France (29.1 percent) and much higher than in United Kingdom (23.7 percent)<sup>25</sup>. The pattern of subcontracting in the transportation and logistics sector is paradigmatic, because it involves many self-employed workers (transportation workers with their own vehicles) and very small companies. Subcontracting is a rampant practice in both manufacturing and service industries. More than in the past, and as a result of new technologies, a growing number of business models are relying to a greater extent on outsourcing.

There are many reasons to subcontract production and outsource services and not all have a direct bearing on labor-related issues: technical specialization and expertise are good reasons to subcontract in many instances. There are, though, labor-related reasons to subcontract: fewer employment commitments and lower labor costs.

Subcontracting is one of the main causes of precariousness and low-paid work in the Spanish labor market. This is so because, on one hand, it boosts the usage of fixed term contracts and, on the other hand, it entails the application of working conditions which are usually worse than those applicable to the main contractor or outsourcing business. The Spanish law approach to the matter of subcontracting focuses on three issues: health and safety, protection of employee and Social Security entitlements, and information rights. None of these issues touches on the central question of the temporary or permanent nature of the employment relationship of the employees assigned to the tasks of the outsourced activity; nor do they touch on the important question of the derogation of the labor standards applicable in the prime or outsourcing company. This lack of regulation provokes a situation in which precarious work thrive in the outskirts of the outsourced activities.

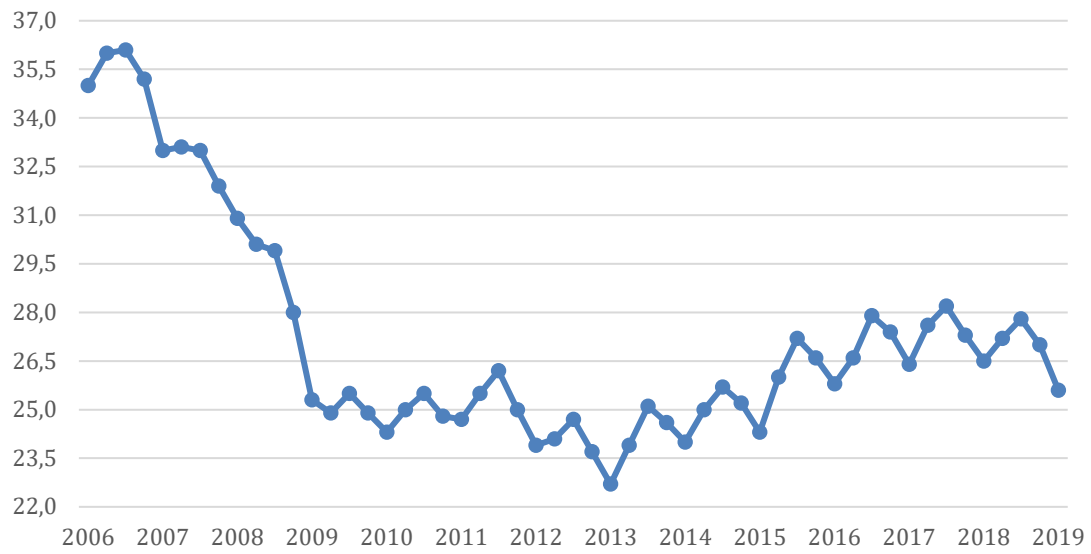
### **3.1.Subcontracting and fixed term contracts**

One of the main characteristics of the Spanish labour market is the high incidence of fixed-term employment. As of 2019, Q1, the proportion of employees on a fixed-term employment relationship in Spain is 25.6 percent. In the last 15 years, the proportion of fixed-term employees has always been relatively high, with a peak of 34.5 percent back in 2005 and 2006 and a low of 21.5 percent in 2013. The recovery of employment levels since 2013 is being accompanied by a rise in the incidence of fixed-term employment. The following figure shows the evolution of fixed-term employment in Spain since 2006.

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<sup>25</sup> Data from “Estudio de caracterización del sector del transporte y la logística en España”, 2016, Everis – UNO – CEL.

Figure 11: Proportion of fixed term employment in Spain (2006-2019)

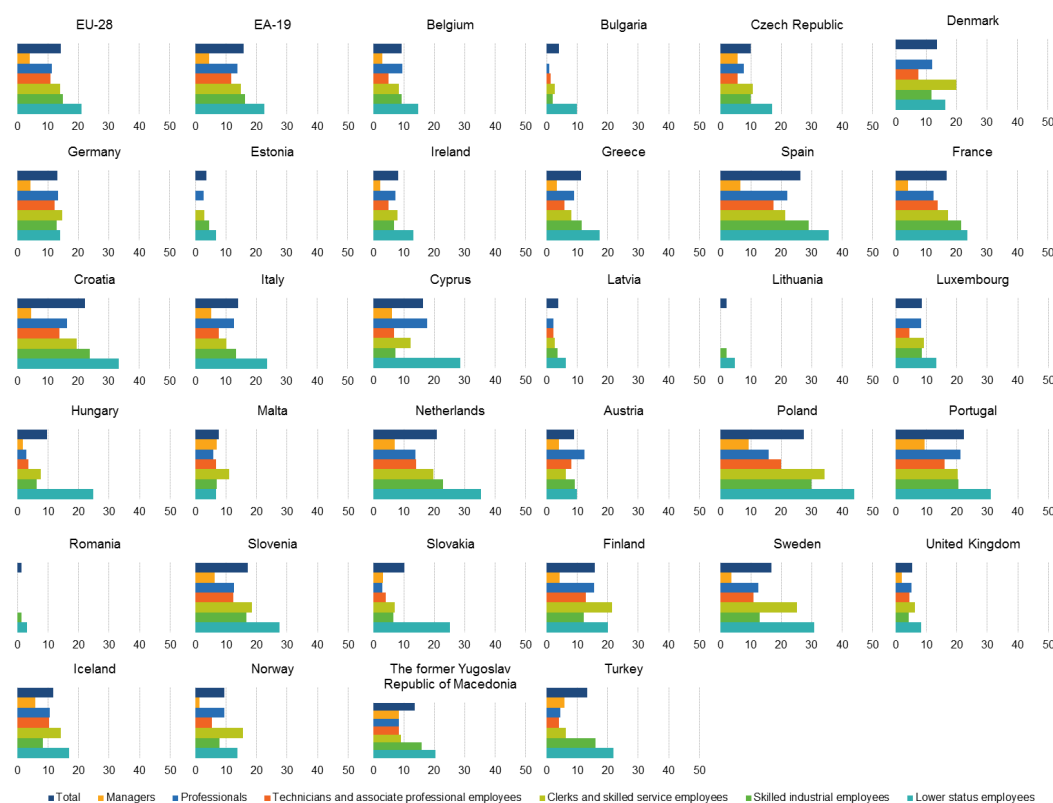


Data source: Spanish Labour Force Survey. National Institute of Statistics.

When comparing Spain with other European countries, it is clear that the incidence of fixed-term employment is much higher than the average of both EU-28 and EA-19. The

incidence of fixed-term employment in Spain is strikingly high among lower status employees, as shown in the following figure.

Figure 12: Proportion of employees who have limited duration contracts, by occupational group, age group 15-74, 2016 (% of occupational group)



Source: Eurostat

- 1) One of the main drivers of the usage of fixed-term employment contracts is subcontracting. Under Spanish law, fixed-term contracts can be used only in certain circumstances, which are clearly determined in article 15 of the Labor Act (“*Estatuto de los Trabajadores*”; Royal Legislative Decree 2/2015). Article 15 sets out three reasons which justify using a fixed-term contract instead of the default alternative (permanent, open-ended contract):
- 2) The completion of a specific task *with a limited duration*. The fixed-term contract for a specific task with a limited duration (“*contrato de obra o servicio determinado*”) has a maximum duration of three years.
- 3) The productive needs arising from an extraordinary increase in the workload. The maximum duration of this second type of fixed-term contract (“*contrato eventual*”) is generally 6 months. A sectoral collective agreement may establish a maximum duration of 12 months for this type of contract.
- 4) The replacement of an employee on leave whose job has to be legally reserved for her/him. This replacement contract (“*contrato de interinidad*”) does not have a maximum duration set by the law; its duration must be the same as the duration of the leave of the person being replaced.

What results from this regulation is that -setting aside the replacement contract, which is not problematic in the private sector- a company's permanent, regular activity cannot justify by itself a fixed-term contract: the company needs a special justification, be it a "specific task with a limited duration", be it an exceptional increase in the workload. Take the case of a company A providing IT support services; anytime it provides a service for a client it just performs its permanent, regular activity. But let us suppose that the client -an insurance company called B- wants company A to render those services for one, two or three years; then, company A may use fixed-term contracts for a "specific task", which is the service to be performed for B during that particular period of time. If seen from the perspective of company B, the IT support service is a permanent need of that company: it needs that service in its daily and regular work. Hence, if company B itself were to hire IT support workers without resorting to the services of an external company, it would not have any legal reason to use fixed-term workers. Company B's own staff for IT support work would have to be permanent employees with open-ended contracts. The conclusion is clear: the mere fact of contracting out a service brings about the possibility of transforming permanent work into fixed-term work.

This possibility of "making" temporary work is one of the main reasons explaining the high incidence of outsourcing and subcontracting. Another one is the legal rigidities under which temporary work agencies ("ETT" or "Empresa de Trabajo Temporal") must operate. If the insurance company B wanted to use the services of a temporary work agency for the regular IT support work, it would simply be impossible under current Spanish law: the temporary work agency cannot provide workers where there is not any temporary need of work (let us set aside the exceptional situation with contracts combining work and training: apprenticeship and on-the-job practical training). Thus, except for these training-work situations, temporary work agencies can be used only in the same circumstances under which the user undertaking is allowed to conclude fixed-term contracts. Though such limitation on temporary work agencies is not exclusive of Spain<sup>26</sup>, it is definitely one which clearly puts an important restriction on the practical usefulness of these agencies. In sum, while subcontracting a service "creates" fixed-term work, using a temporary work agency does not.

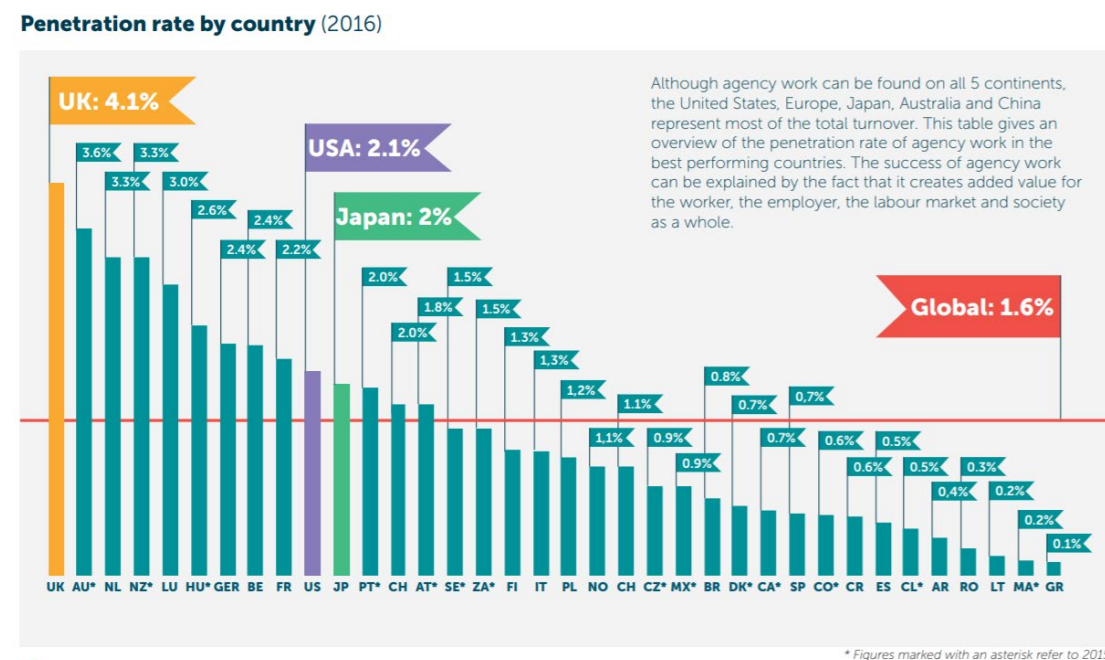
There is another legal rigidity taxing temporary work agencies: as a result of the transposition of Directive 2008/104, Spanish legislation provides that temporary agency workers assigned to a user undertaking are entitled to the basic working and employment conditions that would apply to such workers if they were recruited by the user undertaking to occupy the same job. Working and employment conditions include remuneration, the duration of working time, overtime, rest periods, night work, annual leave and public holidays. This legal right to equal basic conditions granted to agency workers stands in sharp contrast with the situation of workers employed by a subcontractor.

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<sup>26</sup> See A. Sartori, "Temporary agency work in Europe. Degree of convergence following Directive 2008/104/EU", *European Labour Law Journal*, Volume 7, No. 1, 2016, 122.

It is not surprising, then, that Spain shows one of the lowest levels of usage of temporary work agencies. As of 2016, the penetration rate of agency work in Spain was 0.5 percent, much lower than in UK (4.1 percent), Germany (2.4 percent), France (2.2 percent) or Italy (1.3 percent)<sup>27</sup>. The main explanation of this low usage is that companies clearly prefer subcontracting over agency work: the former “creates” fixed-term employment, while the latter can be resorted to only where there is a previous need of temporary work; the former does not require equal treatment, while the latter requires that the employer ensures the same basic conditions as those in force in the user undertaking for the same job.

Figure 13: Agency work penetration rate



12 WEC Economic Report 2017

Source: World Employment Confederation, Economic Report, 2018 edition, page 12.

### 3.2. Subcontracting, working conditions, and collective bargaining

The lack of a legal provision requiring that the employees of the subcontractor enjoy the same conditions as those in force in the subcontracting company has been a major driver for the excessive use of subcontracting and for the worsening of working conditions in the lower steps of the subcontracting chains. The worsening of working conditions has been accelerated in many instances as a result of the 2012 Labour Reform decentralizing collective bargaining.

<sup>27</sup> See World Employment Confederation, Economic Report. 2018 edition.

The 2012 Labour Reform allowed company-level collective agreements to derogate from certain minimum conditions established by sectoral collective agreements. Among the conditions that are susceptible of derogation after the 2012 Reform are the pay amount and the distribution of working hours. This decentralization provokes that some small and medium-sized companies negotiate their own collective bargaining agreement with the chief objective of gaining competitiveness by means of lowering the minimum wage established by the sectoral agreement. Especially in low-skilled activities that are labour-intensive (building cleaning services, janitorial services, gardening services, facility management services, maintenance services, security services, etc.), this strategy has accelerated the subcontracting trend, as clearly shown by the well-known case of the hotel chamber maids, whose main association, known as “Las Kellys” (<https://laskellys.wordpress.com/quienes-somos/>) has gained ample popularity in Spain and has been received by the Spanish Prime Minister. Unsurprisingly, one of the leading claims of “Las Kellys” is to put an end to subcontracting.

The labor courts have been the main obstacle to a business strategy based on the negotiation of company-level collective agreements with the main purpose of lowering salary conditions below the ones established by the sectoral collective agreement. The courts have declared void a number of company-level collective agreements because the employee representatives did not have the proper standing to negotiate such agreements. But this solution is based on a technicality that the companies may quickly learn and eventually surmount. For this reason, given the current legal framework, the solution cannot be granted by the courts, but only through a reform of the regulation.

### **3.3.Legal changes ahead?**

During the last legislative period, the Socialist group intended to introduce a labor reform affecting subcontracting, fixed term contracts and collective bargaining. After the general elections in 2019, the reform will probably be a matter for discussion in the new legislative period.

Leaving aside the health and safety aspects of subcontracting, this business practice is currently regulated with a view to ensuring that the employees working for the subcontractor may demand salaries not only from their employer but also from the contracting company. This is the main content of article 42 of the Labor Act (“Estatuto de los Trabajadores”): both the contracting company and the subcontractor are held jointly and severally liable for any outstanding remuneration owed to the employees assigned to the subcontracted work. The joint and several liabilities also apply to social security debts.

The joint and several liabilities only occur where the service or work contracted out relates to the core activity of the contracting company. This legal prerequisite leaves out of the scope of the joint and several liabilities the subcontracting situations where the work contracted out is of an ancillary or supplementary nature, such as cleaning, security, building maintenance, etc.

The reform that the new Government intends to introduce might affect the regulatory framework in a number of ways:

1. The company contracting out work or services might be held liable for any employment or labour debt (not only wages). Any business obligation towards the employee, which has not been fulfilled by the employer-subcontractor, might be assigned to the contracting company.
2. The fact that the work or service contracted out relates to the core activity of the contracting company will not be a prerequisite for holding it liable. Admittedly, if the work or service contracted out relates to the contracting company's core activity, this company and the employer (the subcontractor) will be held jointly and severally liable; if the work or service contracted out does not relate to the contracting company's core activity (it is of an ancillary or supplementary nature), the contracting company can be held vicariously liable.
3. Where the work or service contracted out relates to the contracting company's core activity, the employees assigned to such work or service will be entitled to the same basic conditions of employment as those applicable to the contracting company's own employees. The contracting company must ensure that the subcontractor applies those conditions, being both companies jointly and severally liable for any breach of employment rights.
4. The basic conditions of employment include: pay; duration and distribution of working hours; rest periods; maternity, breastfeeding and paternity rights; and health and safety.
5. The proposed legislation strengthens the role of employee representatives by emphasizing their information rights. Of particular importance is the provision establishing a presumption of illegal loan of employees if the companies sharing the same workplace do not fulfill their obligations of information towards the employee representatives. An illegal loan of employees entails a monetary sanction by the Labour Authority.

It is not difficult to foresee that the introduction of such reforms would make subcontracting much less attractive: in the first place, because the principle of equal employment conditions will raise the business costs of the subcontractor, thus causing that the price of the work or services contracted out will be higher; and in the second place, because the exposure to liability (joint or vicarious) for all employment-related debts increases the risk of doing business for the party subcontracting the work or the services. The lower attractiveness of subcontracting will be stressed by two concurrent reforms, one affecting fixed-term contracts and the other affecting decentralization of collective bargaining agreements.

The reform of employment contracts is likely to focus on the contract for a definite task or service of limited duration. Since 1997 the case law of the Supreme Court has established that such contract can be linked to a subcontracting situation, meaning that the subcontractor may enter into fixed term contracts with the workers assigned to the work or service contracted out. As explained, this case law makes it possible to "create" fixed-term employment in situations where the underlying need of work is not of a temporary but of a permanent nature.



The intended prohibition of the contract for a definite task or service of limited duration in subcontracting situations will definitely reduce the attractiveness of subcontracting. If the reform goes ahead, the subcontractor will have to employ its staff under permanent, open-ended employment contracts; if it loses an important client and has to reduce its staff, it can do it through the procedure of collective redundancies or through individual redundancies; both procedures entail the payment of a severance compensation to the employee calculated on the basis of 20 days of salary per year of service.

The other important reform projected by the Government affects collective bargaining. Here the important issue is the recovery of the rule of prevalence of sectoral collective agreements over company-level collective agreements. If such reform is eventually approved, the attractiveness of subcontracting based on salaries below the sectoral minimum wage will be completely removed.

#### **IV. Conclusions**

In the past, the previous changes (technological, economics, etc.) have created new kind of employment such as the teleworking or increase the flexibility as well as the powers for the companies (fixed-term employment contracts, outsourcing, etc.). However, the new forms of employment have affected the core of the labour law, that is, the meaning of employee. It means a new high risk of segmentation between the insiders and outsiders and the loss of identity of the labour law.

The digital disruption have demonstrated that there is space for new business what have been very welcomed by the digital companies and the riders. In this sense, it is necessary a new legal framework that provides a balance between the labour rights for the new collaborators and the freedom of the digital companies.

Following this change, the collective issues are very relevant such as the applicable collective agreement or the right to strike for the new collaborators. In particular, it should be useful to clarify the sectoral collective applicable for the riders or negotiate own collective agreements for them. It will depend on the legal solution given by the legislator.

The trends on collective bargaining agreements contents and in labor market data show that new forms of employment are not having a major impact on the employers hiring policies. The temporary employment rate is extremely procyclical. Despite the recommendations and guidance of different international and European institutions that have inspired legal reforms, data show that, during the expansive periods, Spanish business are hiring temporary workers that can be easily dismissed in case of economic recessions.

The working time length, however, has changed its patterns in the last decade, as there are a bigger share of active population employed in part-time employments than it used to be. That change has happened, precisely, in the business side, as most of the part-time employees would like a full-time job.

Interviews with different business organizations show that they do not find a great problem in having fixed employees or other issues related with hiring workers, but in a flexibility that –in their opinion– should not be limited by law but only by the will of employer and employee, at least in growing firms of the new economy.

Both trends in hiring policies show a growing precarity of employment relations, where being employed in fixed-full-time job is harder and harder. Social partners seem to be worried about this facts, but the truth is that collective agreements are not incorporating clauses that really face this problem. Even general and intersectorial agreements say that the reduction of temporary employment should guide negotiations in other bargaining levels, the truth is that the effect of these clauses is, at its best, moderate.

Subcontracting is important in a modern, complex and diversified economy. No company can do it all by itself and many things can be done more effectively by buying the work or services from specialized companies. As projects become more and more complex, the array of the required capabilities for completing them are ever more demanding. Safeguarding subcontracting practices is, therefore, vital for keeping businesses competitive and healthy.

However, subcontracting may be a way to making work more precarious and to circumventing many guarantees established by employment law. Clearly, subcontracting should not be promoted where its only aim is to make labor cheaper. The guarantee of minimum wages must be ensured, either by means of a national minimum wage or, as is the customary practice in the Spanish industrial relations system, by means of a minimum wage set by the sectoral collective agreement, which has *erga omnes* efficacy. Decentralization of collective bargaining may be useful for a number of goals (flexibility of working hours, tasks, etc.), but not for a negative competition based on lowering salaries. Subcontracting has been at the center of labor relations dynamics aimed at making labor cheaper and more precarious.

Both issues, precariousness and low salaries in subcontractors, are dealt with in the legislative proposals that the Government is currently discussing with the social partners. If they are finally approved, subcontracting will no longer be attractive for the mere fact of making employment precarious or for the mere fact of lowering salaries and worsening other employment conditions. While the triangular relationship resulting from the contract between a user undertaking and a temporary work agency is heavily regulated and governed by the principle of equal treatment of agency workers, the triangular relationship resulting from subcontracting is not substantively addressed in the current legislation.

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