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Platform work: protection through case law while the law is amended

**Peer Review on "Platform Work"
Germany, 12-14 October 2020**

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1 Introduction

This paper has been prepared for the Peer Review on "Platform Work" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country and the situation in Spain. For information on the host country policy example, please refer to the Host Country Discussion Paper.

2 Situation in Spain

Lately the platform work has been a topic of public debate. It sparked great interest from the media, university researchers, trade unions and policymakers.

The high interest in the topic is backed by the data. According to FFG survey, Spain has the highest percentage of workers involved in the platform economy (27%) among the EU-28 (FFG, 2019). Although this survey has been criticised for methodological inconsistency (Todoli-Signes, 2019b)¹, the prevalence of platform work in Spain compared to other countries has also been highlighted by other research carried out on behalf of the European Commission (COLLEM, 2018). Spain is also one of the European countries where platform work is used more often as main source of income. 73.2% of platform workers perform more than 10 hours per week in this form to earn income (CCOO, 2018). Whilst 21% of platform workers have it as the only source of income, 70% of them obtain less than 50% of their income from it (FFG, 2019).

The large share of platform work in Spain is not surprising since it seems that there is a correlation between unemployment level and the scale of the platform work (Todoli-Signes, 2019b). The platform work is considered as an alternative when there are no other options – long-term unemployment, inability to work due to lack of work permit, insufficient work experience to enter the job market, etc. Thus, 15% unemployment rate in Spain (as of February 2020, before COVID-19 outbreak) is consistent with the fact that it is also one of the countries with the highest share of work on platforms. It is also expected that, with the coronavirus outbreak, the number of workers who use this form of employment will increase to make ends meet.

3 National policies and measures

3.1 Legal status

3.1.1 Definition of an employee

Article 1.1 of the Spanish Statute of Labour defines a worker/employee as: "those who voluntarily provide their paid services for others and within the scope of an organisation and under the direction of another person, either physical or legal, called an employer".

Unlike in the host country, in Spain several judicial rulings have stated that the possibility to refuse an assignment is not enough to deny the employee status. The court relies more on other elements, e.g. who sets the price of the service, who choose the clients or who is the owner of the relevant means of production to perform the service (brand, infrastructure, machinery, clients, etc.) (STS 16 November 2018 (rec. 2806/2015)).

As in Germany, the Spanish Supreme Court argues that the real legal nature of a contract does not depend on the name given to it by the parties involved but on the real content of the obligation and what really happens in the relationship.

¹ FFG is a think tank that conducts studies and debates of general interest. In autor's view, the survey asked questions that were too broad that could cause an overestimation including, as platform workers, (e.g.) people who rent their house through an online Platform.

3.1.2 Presumption of employment contract

It is not clear whether there is a legal presumption of employment contract in Spain. Historically, the courts interpreted that Article 8.1 of the Statute of Labour guarantees it (García, 1983). However, recently this presumption has been used less often by the courts. The literature argues that the Article 8.1 only reiterates what an employment contract is – as in Article 1.1 of the Statute of Labour (Ramirez 2013). That is why this part of the literature supports the inexistence of a legal presumption of the employment contract. Nevertheless, today some courts still use the legal presumption when the judge wishes to make their justification of the ruling stronger.

Definition of self-employed

The first article of Law 20/2007 on the Self-employed Workers' Statute (*Ley del Estatuto del Trabajador Autónomo*) defines a self-employed as: "natural persons who habitually, personally, directly, on their own account and outside the scope of the direction and organisation of another person carry out an economic or professional activity for a lucrative purpose". This category has no labour rights and it is regulated by civil law. Nevertheless, self-employed have mandatory social protection, like: maternity leave, insurance against accidents at work, pension and since 2019 unemployment benefits. The social protection coverage is less extensive than of an employee.

3.1.3 A subcategory of self-employed: TRADEs

The Self-employed Workers' Statute, defines also the economically dependent self-employed worker ("*Trabajador autónomo económicamente dependiente*" – TRADE), inspired by the "employee-like" concept in the German law. TRADEs are defined as: "those who carry out an economic or professional activity on a lucrative basis and in a habitual, personal, direct and predominant manner for a natural or legal person, called a client, on whom they depend economically to receive at least 75 per cent of their income through income from work and from economic or professional activities" (Article 11 of Law 20/2007 on the Self-employed Workers' Statute). According to this definition, TRADEs are not a third category of workers nor an intermediate category between employees and self-employed, but rather a subcategory of self-employed workers.

However, those two requisites are difficult to find in practice. It is difficult to identify a real autonomous worker if they are economically dependent on one client. In this sense, usually if a service provider depends on just one client, this service provider is adapted to the client's main business, something that would mean that they are not really independent. Apart from that, the economically dependent service provider knows that they have to comply with the wishes/instructions of the client as their whole economic survival depends on that.

Even though the category exists in the law, this type of worker is scarce in reality. In February 2020, the official data indicate that there are only 10,000 TRADEs registered in Spain. This accounts for less than 0.33% of all the self-employed and less than 0.05% of the total number of workers in Spain. The reasons for this are the following: i) As explained above, the definition contradicts its own terms. ii) The difference in rights between a TRADE and a self-employed worker are not sufficiently higher in order to make it interesting for the workers. iii) TRADEs may fear that they could lose their client if they exercise the TRADEs' rights.

3.1.4 TRADEs and collective bargaining

The major differences between the regulations of the self-employed and TRADEs are to be found in the legal regime of collective bargaining (Todoli-Signes, 2019). In this sense, while the Self-employed Workers' Statute does not explicitly recognise the right to

collective bargaining of associations of self-employed workers, it does for TRADEs, through the figure of Agreements of Professional Interest².

Associations of self-employed workers can negotiate Agreements of Professional Interest for economically dependent self-employed workers who are affiliated or associated with them (Article 13 of the Law of the Self-employed Workers' Statute).

The regulation makes clear references to the antitrust legislation as a limit for this kind of collective bargaining of TRADEs. In Spain there is no judgment or administrative decision made by the Spanish competition authority in order to establish these limits. However, that probably means that this law is not giving a right to collective bargaining above the competition law or it is making an exception to the applicability of the antitrust law in favour of TRADEs. In this end, the collective bargaining for TRADEs would depend on how narrowly or extensively we apply competition law by the CJEU.

3.2 The judicial fight

Approximately 18 judicial rulings have been issued in Spain on the food delivery 'riders'. Most of them consider the riders as bogus self-employed and real employees of the platform company (Todoli-Signes, 2018). The reasons behind these judgments are as follows.

First, the rulings deemed it to be proven that the platform companies give specific instructions to the 'riders' concerning how food deliveries must be carried out, timing and behavioural guidelines. Furthermore, the platform companies use geo-location monitoring (GPS) on workers, who may be asked for explanations concerning their services at any moment, thereby constituting supervision of every delivery performed.

Second, the courts understood that any subcontracting performed by a 'rider', even when allowed by the agreement between the parties, is irrelevant to the case. According to Spanish case-law (STS 20 July 2010 (rec. 3344/2009)), subcontracting or sporadic substitution/replacement does not preclude an employment relationship because it is done in the firm's interest.

Third, it is underlined that even if a 'rider' uses their own bicycle and phone, they have no control over the organisation of work. It is the firm, the owner of the online platform and of the commercial brand that, through the online application manages the business activity. That is, the main or essential means of production is the online platform, rather than the bicycle.

Forth, online food delivery company is in charge of setting prices for the services and the payment mechanism through its application plays a major role in the classification of 'riders' as workers.

Final, the most important feature pointed out by the courts relate to the fact that 'riders' are the public face of the brand towards its customers. In fact, as has been pointed out in the literature (Todoli-Signes, 2018b), customers do not choose specific riders; they trust them (open doors to their homes) because they are part of the platform company. They are not the 'riders' customers, but the platform company's. 'Riders' are only agents on behalf of the platform company which is a distinguishing feature of the 'gig economy'. Courts in other countries are currently considering the fact that workers perform their duties under the umbrella of a third-party brand as a key element in classifying them as workers. Thus the brand becomes the most important means of production in the 21st century because clients are crucial to services (on-demand economy).

² Regarding whether these agreements can set a minimum wage, this is a question that has not been clarified. However, the rule makes it clear that professional interest agreements "shall observe the limits and conditions established in the antitrust legislation".

3.3 Public enforcement: the role of the labour inspectorate

Spain has developed actions targeted at bogus self-employment in platform economy as part of the Labour and Social Security Inspection Strategic Plan 2018-2020. These included developing a dedicated operative procedure, providing specialised training to inspectors and implementing regional pilot programmes (ITSS, 2018) –mainly suing platform companies in court for misclassification. The labour inspectorate interest is not only justified because of the precarious working conditions of the platform workers but also because of the fraud to the social security funds. Indeed, self-employed pay considerably less contributions to the public funds in Spain.

3.4 Unions and new associations

In Spain the main intersectoral trade unions (UGT³ and CCOO⁴ but also others like Intersindical⁵) have developed targeted campaigns to help platform workers⁶. Each union have run their own national campaign to raise awareness of platform workers' rights, collaboration to answer questions from workers, and have also initiated, on behalf of workers, lawsuits for job reclassification in courts. Unlike Germany, in Spain the trade unions can sue on behalf of their affiliates. Apart from that, new associations have been launched. For instance, "Ridersxderechos"⁷ a new organisation, joined by riders, which main objective is to lobby the legislator in order to reclassify the platform work as employees. In July 2020 they meet the Labour Minister in order to amend the law in the context of the public consultation (see below)⁸.

3.5 Amending the law

The Ministry of Employment has launched a public consultation to amend the Statute of Labour in order to clarify that platform workers are employees. The scope of the new regulation is still not clear. The documents accompanying the public consultation, indicate that the Ministry aims at including a reversal of the burden of proof for the platform companies if a certain number of criteria are met. The criteria, yet to be developed, might be similar to those of the California AB5 Act (Todolí-Signes, 2020). The Ministry said that they will send the law to the congress in August 2020, if the proposition passes congress, it could be approved by the end of 2021.

4 Considerations for future policies and initiatives

4.1 TRADEs, not such a useful regulation

The Spanish National Institute of Statistics in 2019 estimated that more than 1,200,000 workers receive the majority or all of their income from a single client, while the Official Register of Economically Dependent Workers includes only 10,000 TRADEs. This means that over 1 million workers in Spain, despite being economically dependent, are not applying the TRADE legal status.

Undoubtedly, the reason behind this discrepancy lays in insufficient social and work rights protection. This includes TRADEs' lack of a legal maximum number of working hours, absence of a minimum wage, no special health and safety protection, etc. As a result, the self-employed workers have no incentive to identify themselves as TRADEs.

³ See <http://www.turespuestasindical.es/>

⁴ See https://www.ccoo.es/noticia:392052--CCOO_exige_a_las_plataformas_digitales_que_respeten_los_derechos_laborales_de_los_trabajadores

⁵ See <https://www.lavanguardia.com/vida/20200806/482691360972/riders-e-intersindical-recurriran-para-que-se-reconozca-su-vinculo-laboral.html>

⁶ A summary at Todolí-Signes, A., (2018b).

⁷ See <https://www.facebook.com/ridersxderechos/>

⁸ See <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/trabajo14/Paginas/2020/010620-riders.aspx>

Apart from that, there is no tradition of association in TRADEs, which means that there is no collective bargaining even when the law allows for this possibility.

This calls for the need to rework the entire concept of TRADEs to make it more relevant in current economic world.

4.2 Personal work relationship as a concept of workers: the recent Spanish Supreme Court interpretation

Since 2010, the Spanish Supreme Court has been carrying out a deep reinterpretation of the concept of workers. The High Court seems to have abandoned – or at least reduced to the minimum – the use of "control test" as a way to identify an employee⁹.

In a multitude of judgments, the Supreme Court has claimed that an employment contract exists even though the employee has freedom to choose his or her own schedule or working hours (STS of 8 February 2018, rec. 3205/2015). In the same sense, it has been understood that there can be an employment contract even if there are no instructions from the employer (STS of 19 July 2010, rec. 1623/2009 and 2233/2009). The highest court also agrees that the worker's ability to reject assignments from the employer do not automatically exclude the possibility of being an employee (STS 16 November 2018, rec. 2806/2015).

On the other hand, the control test has been used to confirm an employment relationship (STS of 7 October 2009, rec. 4169/2008). Here, the Supreme Court said that any instruction from the employer in order to achieve a better execution of the services by a freelancer is an illegitimate invasion in the freedom of a true self-employed, thereby making them an employee (STS of 24 June 2015, rec. 1433/2014).

Thus, the classic "control test" – schedule, working hours, control, instructions and so on – seems a way to confirm the employee status but failing the control test do not eliminate the possibility of being an employee.

At the same time, the Spanish Supreme Court said that the ownership of some working tools or means of production – the value of which is not high – does not exclude the employment contract (STS of 20 January 2015, rec. 587/2014). Not even the fact that the workers assume some of the business risks is a reason not to consider them as employees (STS of 9 March 2010, rec. 1443/2009) or the fact that it has been proven that the workers provided services for more than one company – a non-exclusivity agreement (STS of 22 January 2008, rec. 626/2007).

The Spanish Supreme Court is progressively abandoning, in author's view, a rigid interpretation of subordination in which only those who "pass" the control test are employees. In contrast, it seems that the Court is supporting a broad interpretation in which workers are all those who do personal work.

In this sense, the Court defines the concept of personal work as opposed to the services provided within an enterprise (STS 16 November 2018, rec. 2806/2015). The Spanish Supreme Court relies on the interpretation in which the scope of labour law must not be limited by the dependent employment contract, but to all personal services while they are not a genuine company. In line with Freedland and Kountouris (2011), it is necessary to distinguish between services provided by companies and services provided by personal work. Thus, in the world of services, they are divided into subordinate work, self-employed work and companies. With this purposive interpretation of the concept of workers (Davidov, 2016) the first two fall within the scope of the Statute of Labour, excluding only the companies (Todoli-Signes, 2017).

In order to clarify the matter, the Supreme Court seems to see two main characteristics as being the most relevant:

⁹ The control test is a test used by courts in order to identify a false self-employed worker. In this test, mainly the court try to find out if the "client" decided the schedule, working hours of the self-employed or exercises control / gives instructions to the worker.

- a genuine company has to have a business structure, meaning that it owns – or manages – relevant material (buildings, machines, etc.) or immaterial (brand, data, clients, specific software) elements (Todoli-Signes, 2017b). Also genuine business has to have sufficient organisation, which means having elements to provide the services but also elements to manage the business (such as a marketing policy, business administration, making the significant decisions, etc.).
- a genuine enterprise hires workers and they are the ones doing the work from which the entrepreneur gains her profits/compensation.

Therefore, it is possible that even if in Spain the law is not amended, at the end, the Supreme Court interpretation could make, most of the platform workers, fall within the labour law scope. Which probably will solve most of the precarious working conditions and will grant labour rights, collective bargaining right and social protection to the platform workers. This may be the path to be followed by the CJUE to solve the platform work issue.

5 Questions

- About the policy proposed in Germany, which criteria should be met to apply a reversal of the burden of proof?

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Annex 1 Summary table

The main points covered by the paper are summarised below.

Situation in the peer country

- 27% of Spanish workers have carried out work on platforms, well above the share in other countries.
- Platform work has sparked great interest from the media, university researchers, trade unions and policymakers.
- 73.2% of platform workers dedicate more than 10 hours a week to this way of working to earn income.
- It is expected that, with the Covid-19 pandemic, the number of workers who use this form of employment will increase to make ends meet.

National policies and measures

- Unlike in the host country, in Spain several judicial rulings have stated that the possibility to refuse an assignment is not enough to deny the employee status.
- The court relies more in other elements, e.g. who sets the price of the service, who choose the clients or who is the owner of the relevant means of production to perform the service (brand, infrastructure, machinery, clients, etc.).
- Associations of self-employed workers can negotiate Agreements of Professional Interest for economically dependent self-employed workers who are affiliated or associated with them.
- Approximately 18 judicial rulings have been issued in Spain on the food delivery 'riders'. Most of them consider the riders as bogus self-employed and real employees of the platform company.
- Spain has developed actions targeted at bogus self-employment in platform economy as part of the Labour and Social Security Inspection Strategic Plan 2018-2020.

Considerations for future policies and initiatives

- For economically dependent workers (TRADE) there is a lack of a legal maximum number of hours, absence of a minimum wage, no special health and safety protection. As a result, the self-employed workers have no incentive to identify themselves as TRADEs. Economically dependent workers' regulation needs to be amended or abandoned.
- The Spanish Supreme Court has been carrying out a deep reinterpretation of the concept of workers. Indeed, the High Court seems to have abandoned – or at least reduced to the minimum – the use of "control test" as a way to identify an employee.
- The Court is supporting a broad interpretation in which workers are all those who do personal work.
- This may be the path to be followed by the CJUE to solve the platform work problem.

Questions

- About the policy proposed in Germany, which criteria should be met to apply a reversal of the burden of proof?

Annex 2 Example of relevant practice

Name of the practice:	Labour and Social Security Inspection Strategic Plan
Year of implementation:	2018-2020
Coordinating authority:	Ministry of Labour
Objectives:	Eliminate the misclassification of fraud in platform work
Main activities:	Spain has developed campaigns targeted at bogus self-employment in platform economy. This included: <ul style="list-style-type: none"> • developing a dedicated operative procedure, • providing specialised training to inspectors and • implementing regional pilot programmes
Results so far:	The courts are declaring in all cases pursued by the labour inspectorate that the riders in platform work are employees.

Name of the practice:	A promised amendment to the law
Year of implementation:	2020
Coordinating authority:	Ministry of Labour
Objectives:	Introducing a reversal of burden of proof into the law for platform workers.
Main activities:	A new Act from the national parliament.
Results so far:	It is still a proposal

Name of the practice:	Your union response now (" <i>Tu respuesta sindical ya</i> ")
Year of implementation:	2018-2020
Coordinating authority:	UGT (Union)
Objectives:	Help platform workers to improve their working conditions
Main activities:	Answer questions from the platform workers about their rights. Sue the platform companies for the correct classification under the labour law.
Results so far:	More than 3,000 questions asked by platform workers.

