

SPAIN: THE 'RIDERS' LAW', NEW REGULATION ON DIGITAL PLATFORM WORK

This case study discusses the case of the so-called Riders' Law adopted on 11 May 2021 in Spain, which came into force on 12 August 2021. This case is particularly relevant since it has introduced a right to 'algorithmic transparency' at a national regulatory level for the first time. This forces every type of platform to inform the (platform) workers' legal representatives about the inner functioning of the algorithms 'that may affect working conditions, and access to and maintenance of employment, including profiling' (Article 64.4. of the Workers' Statute¹). Additionally, the law provides a legal presumption of a dependent employment relationship for digital platform workers in the delivery sector (Additional Provision 23 of the Workers' Statute). Both issues correspond directly to two of the most relevant underlying causes for the occupational safety and health (OSH) related challenges commonly identified in the literature (European Agency for Safety and Health at Work (EU-OSHA), 2021). The case study presented in this policy brief is based on a review of relevant documents and literature, and includes information gathered through semi-structured interviews with stakeholders directly concerned with the design, implementation, monitoring and/or enforcement of this regulatory initiative.

Employment status of platform workers in Spain

General context

Workers providing labour through platforms as their main form of employment² accounted for a relatively small share of the Spanish working age population in 2018 (2.6%), according to findings from the COLLEEM II survey³ (Brancati et al., 2020). Nonetheless, Spain holds the second highest share in Europe of platform workers after the Netherlands (2.7%).⁴ While the total number of platform workers remains rather low, platform work has captured public attention in recent years. The main issue discussed revolves around the employment status of platform workers. Spanish authorities have been especially active in identifying and exposing forms of abuse in platform workers' employment status. The Labour and Social Security Inspectorate and the Social Security Office are actively combating bogus self-employment among platform workers.^{5,6} From an OSH perspective, the National Institute for Safety and Health at Work (Instituto Nacional de Seguridad y Salud en el Trabajo, INSST) also organised an awareness campaign ('Make yourself visible') to improve road safety for motor and bike food couriers in Spain as the incidence of accidents is much higher in this group than in other sectors.⁷

Additionally, Spanish courts have ruled on several platform work cases, in particular those in the delivery sector and personal transportation. Again, the (legal) discussion is centred on the concept of employee in the Workers' Statute (*Estatuto de los Trabajadores*), which provides several criteria to differentiate dependent employment from self-employment. In essence, an employee is defined as someone who voluntarily provides

¹ The modified Workers' Statute was introduced by the *Real Decreto Legislativo 2/2015, de 23 de octubre* (Royal Decree Law 2/2015, of 23 October).

² Brancati et al. define **main platform workers** as those who provide labour services via platforms at least monthly, and work on platforms at least 20 hours a week or get at least 50% of their income through platforms.

³ COLLEEM is developed by the JRC and DG Employment, Social Affairs and Inclusion to investigate the extent and impact of the digital labour platforms phenomenon in Europe. See: <https://ec.europa.eu/jrc/en/colleem>

⁴ According to data collected by Huws et al. (2019), digital platform workers in Spain tend to be young (21.5% of platform workers between 16 and 24 years, 25.7% between 25 and 34, 22.7% between 35 and 44, 17.7% between 45 and 54 and just 12.5% between 55 and 65) and male (32.5% of men have ever worked for digital platforms compared with 22.4% of women).

⁵ In 2019 and 2020 alone, almost 30,000 workers from Uber Eats, Glovo, Amazon and Deliveroo were unilaterally re-classified as employees by the Labour Inspectorate. Nonetheless, interviewed representatives from the General Union of Workers (Unión General de Trabajadores, UGT) reported that many platform workers continue to work as self-employed, despite being recognised by the Labour Inspectorate as employees.

⁶ The 2018 National Plan for Decent Work (*Plan Director por un Trabajo Digno*)⁶ sets bogus self-employment in the context of platform work as one of the key priorities. See: <https://www.mites.gob.es/ficheros/ministerio/plandirector/plan-director-por-un-trabajo-digno.pdf>

⁷ See: <https://www.eurofound.europa.eu/data/platform-economy/initiatives/instituto-nacional-de-seguridad-salud-y-bienestar-en-el-trabajo-insst-national-institute-for-safety>

their services against remuneration and within the scope of organisation and direction of another physical person or legal entity called employer.⁸

Nevertheless, contradictory rulings have occurred around the re-classification of digital platform workers, despite similar factual circumstances.⁹ In September 2020, this uncertainty was somewhat resolved by an important ruling of the Supreme Court.¹⁰ The case involved a digital platform worker on the delivery platform Glovo, in which the Supreme Court ultimately ruled that the driver should be classified as an employee. The Supreme Court provided various legal reasons why the Glovo driver should be considered an employee¹¹:

- platform workers work under Glovo's trademark;
- the essential means of production in the activity are not the platform worker's cell phone or motorcycle, but the digital platform itself;
- the rating mechanism¹² acts as a form of surveillance and control of the platform workforce, thereby limiting platform workers' freedom of choice regarding work schedules;
- Glovo does not act as a mere intermediary but as a delivery company;
- Glovo makes all the commercial decisions of the business;
- the price, the method of payment and remuneration is fixed exclusively by Glovo;
- the platform worker had no involvement in the negotiations between Glovo and the companies whose products are delivered, nor in the relationship between Glovo and the customers to whom the orders are delivered.

The debate around the employment status is also crucial from an OSH perspective. This was confirmed during interviews with the General Union of Workers (Unión General de Trabajadores, UGT) and the riders' association *RidersXDerechos*, where it was stressed repeatedly that OSH challenges in platform work can be best addressed by focusing on the employment status of platform workers. This follows from Article 4 of the Workers' Statute which stipulates basic labour rights to employees, including the right to their physical integrity and to an adequate policy for prevention of occupational risks (Article 4.2. d)). These rights and obligations are further specified in Law No 31/1995 on Prevention of Occupational Risks. Law No 31/1995 sets the minimum safety and health at work standards for employees in Spain, while leaving room for collective agreements to specify these standards in detail and the possibility to improve them. The main responsibility in developing an effective prevention policy is on the employer. Self-employed workers are not subject to Law No 31/1995. However, some exceptions apply (see Article 24 Law No 31/1995; Royal Decree 171/2004 and Article 8 Law No 20/2007). The first exception concerns situations where two or more companies are engaged in activities at the same workplace. In those situations, the duty of cooperation and information from the employers regarding occupational safety and health are extended to self-employed workers who are engaged in those activities at the same workplace as the employees. Second, companies that employ self-employed workers to carry out work at their premises must monitor compliance with OSH legislation. Finally, when self-employed workers are required to make use of machinery, equipment or tools provided by the company to carry out their professional activity, the company will assume the obligations of Article 41.1. of Law No 31/1995 (such as appropriate instructions)¹³.

⁸ See Article 1 and Article 8.1. Workers' Statute.

⁹ For example, Judgment of Labour Court No 1 Gijón (Juzgado de lo Social núm. 1 de Gijón) (20.02.2019), Judgment of Labour Court No 33 Madrid (Juzgado de lo Social núm. 33 de Madrid) (11.02.2019), Judgment of Labour Court No 6 Valencia (Juzgado de lo Social núm. 6 de Valencia) (1.06.2018), Judgment of Labour Court No 11 Barcelona (Juzgado de lo Social núm. 11 de Barcelona) (29.05.2018); Judgment of Labour Court No 4 Oviedo (Juzgado de lo Social núm. 4 de Oviedo) (24.02.2019), Judgment of Labour Court No 17 Madrid (Juzgado de lo Social núm. 17 de Madrid) (11.01.2019), Judgment of Labour Court No 39 Madrid (Juzgado de lo Social núm. 39 de Madrid) (3.09.2018).

¹⁰ Supreme Court 805/2020, of September 25; TODOLI, A. (2020), 'Comentario a la Sentencia del Tribunal Supremo español que considera a los Riders empleados laborales'. Labour & Law Issues, Vol. 6, No 2.

¹¹ See also: TODOLI, A. (2020), 'Comentario a la Sentencia del Tribunal Supremo español que considera a los Riders empleados laborales'. Labour & Law Issues, Vol. 6, No 2.

¹² With rating systems, clients can evaluate workers' performance by giving a score (for example, one to five stars) based on the speed or accuracy of the work performed. By implementing rating systems, platforms delegate managerial tasks to clients (Bérestégui, 2021). According to the Supreme Court 'the highest scoring deliverers are given preference in access to incoming services or rides' which acts as a form of control over the delivery riders.

¹³ This last exception may be especially relevant for platform workers when using machinery, equipment or tools that are provided by the platform (such as helmets, bikes and so on).

Legal presumption of dependent employment - Additional Provision 23 Workers' Statute

The so-called Riders' Law (Royal Decree Law 9/2021, of May 11, 2021, ratified by Law 12/21 of September 28, 2021)¹⁴ is the outcome of negotiations among the Spanish Government (that is, the Ministry of Labour and Social Economy), trade unions (CCOO¹⁵ and UGT) and business associations (CEOE¹⁶ and CEPYME¹⁷), within the framework of social dialogue. On the one hand, the new law aims to provide a legal presumption of a dependent employment relationship for digital platform workers in the delivery sector (but not limited to food delivery). On the other hand, the law establishes a right to algorithmic transparency, forcing every type of platform to inform the Works Council¹⁸ about the inner functioning of the algorithms 'that may affect working conditions, and access to and maintenance of employment, including profiling'.

The second provision adds a new article into the Workers' Statute (Additional Provision 23), which reads as follows:

'By application of the provisions of Article 8.1., the activity of persons who provide paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise business powers of organisation, management and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform, is presumed to be included within the scope of this law.

This presumption does not affect the provisions of Article 1.3. of this regulation [that is, the Workers' Statute]'

Article 8.1. of the Workers' Statute already introduced a rebuttable presumption of a dependent employment relationship for persons who provide services in exchange for remuneration at the risk of, and under the management and within the organisational sphere of, another person who is the beneficiary of that.¹⁹ In essence, this means that the 'burden of proof' (presumption) falls on the employer to prove that the worker is self-employed and not an employee. The added value of the so-called Riders' Law lies in the fact that the Additional Provision 23 establishes that the presumption²⁰ also applies to platform workers active in the delivery sector (such as the delivery or distribution of any consumer product or merchandise, such as food delivery or parcel delivery). Once a series of requirements are met (see below), it will imply that platform workers active in the delivery sector are employees, unless the platform manages to prove that it falls under one of the exclusions listed in Article 1.3.²¹ (which in turn means that its workers can be classified as self-employed).²²

¹⁴ See also: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-7840 and <https://www.boe.es/buscar/act.php?id=BOE-A-2021-15767>

¹⁵ Confederación Sindical de Comisiones Obreras

¹⁶ Confederación Española de Organizaciones Empresariales

¹⁷ Confederación Española de la Pequeña y Mediana Empresa

¹⁸ Works Councils are the main channel of (formal) workplace representation for employees in Spain. It does not depend on union involvement necessarily, but, in practice, the unions do play a central role (the majority of elected representatives are proposed by the unions and around three quarters of them come from the CCOO and the UGT). See <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Spain/Workplace-Representation>. Legally, if platform workers are deemed employees, they *should* have the possibility to be represented by a Works Council. However, as the platform economy is not conducive to workers' representation, its application is hindered in practice. Some of the reasons for this are identified in the literature: platform resistance (see for example, the resisting response from Glovo to the introduction of the Riders' Law), the fact that platform work deals with a dispersed workforce (such as operating in a digital space), the fact that the platform workforce is very heterogeneous in profile (for example, migrants, students and so on) which hinders effective collective representation.

¹⁹ See also: ILO (2013), 'Regulating the employment relationship in Europe: a guide to Recommendation No 198'. *Governance and Tripartism Department*. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_209280.pdf

²⁰ Noted, there is still some uncertainty among legal commentators whether we are dealing with a presumption *iuris tantum* (rebuttable) or a presumption *iuris et de iure* (irrebuttable). See in this regard also: A. Todoli (2021), 'Cambios normativos en la digitalización del trabajo: comentario a la 'Ley Rider' y los derechos de información sobre los algoritmos'. *IUSLabor* 2/2021; J. Cruz Villalón (2021), 'Una presunción plena de laboralidad de los riders'; R. Rodríguez-Pinero (2021), 'Por Fin, La Ley Rider'. Available at: <http://grupo.us.es/iwpr/2021/05/13/por-fin-la-ley-rider/>; Molina Naverette, C. (2021), 'La "Ley" de personas repartidoras en plataformas online ("riders"): ¿pequeño paso legal, gran paso para humanizar el precariado digital?', *Transformaework*.

²¹ These exclusions are: a) civil servants; b) obligatory personal services; c) activities that are purely and simply limited to the mere performance of the functions of a director or member of the administrative organs in companies taking the legal form of corporations, provided that such activities in the company only involve the performance of tasks inherent to such a position; d) activities done on account of friendship, benevolence or good-neighbour relationships; e) family tasks; f) activities of persons intervening in trading operations on behalf of one or more entrepreneurs, provided that these are personally obliged to respond for the good conduct of the operation, assuming the full risk for it; g) any job performed in compliance with a relationship other than that defined in Article 1.1. of the Workers' Statute.

²² A. Todoli (2021), 'Nueva "Ley Rider". Texto y un pequeño comentario a la norma'. Available at: <https://adriantodoli.com/2021/05/12/nueva-ley-rider-texto-y-un-pequeno-comentario-a-la-norma/>

Three different requirements can be observed when applying the rebuttable presumption (Todoli, 2021; Baylos Grau, 2021):

- the activities consist of the delivery or distribution of any consumer product or merchandise
- employers who exercise directly, indirectly or implicitly business powers of organisation, management and control through a digital platform or tool;
- through the use of algorithms to manage the service or to determine the working conditions.

Interestingly, the so-called Riders' Law seems to soften the requirement of power, management and control ('legal dependence') needed for the classification of a platform worker as an employee (Todoli, 2021, Sanguinetti, 2021). Although it remains to be seen how these provisions will be interpreted in courts, it seems as though the requirement of legal dependence is met whenever the conditions of service and the working conditions are determined by algorithmic management ('exercise directly, indirectly or implicitly powers of organisation, management and control'), which is not offset by situations where a certain flexibility or freedom on the part of the digital platform worker in the execution of their work is apparent.²³ In that sense, it puts the issue of algorithmic management at the centre of the debate on digital platform work (Molina Naverette, 2021; Toledo, 2021). The recitals attached to the so-called Riders' Law (as published in the Official State Journal of Spain) acknowledge this view by stating that 'the business powers [...] can be exercised in numerous ways and, among them, by means of algorithmic management of the service or of the working conditions through a digital platform, which are, therefore, the key and essential assets of the activity'.²⁴ This change in thinking was also somewhat reflected in the Supreme Court decision (Judgment 805/2020, 25 September 2020), in which the court stated the following:

'[...] In the post-industrial society, the notion of dependence has become more flexible. Technological innovations have led to the introduction of digitalized control systems for the provision of services. The existence of a new productive reality makes it necessary to adapt the notions of dependence and subordination to the social reality of the time in which the rules must be applied'.²⁵

Spain has become the first EU Member State to explicitly oblige platforms active in the delivery sector (such as food delivery or parcel delivery) to recognise digital platform workers as employees (be it through a presumption).²⁶ This is consistent with other initiatives in Europe which seem predominantly focused on this particular subset of platform work, albeit the material scope of the so-called Riders' Law is often of different nature than other initiatives (such as those related to competition law, fiscal law, and so on).²⁷ Additionally, other Member States (for example, France²⁸ and Italy²⁹) that have focused on improving the working conditions of platform workers have circumvented the classification problem to a certain extent, by adopting national legislation that provides (additional) social rights specifically for self-employed platform workers.

An indirect and important change following the adoption of the so-called Riders' Law is that Law No 31/1995 on Prevention of Occupational Risks now applies to platform workers in the delivery sector. This includes platforms' obligations such as conducting a risk assessment and implementing prevention measures (giving priority to collective measures over individual measures) (Article 14-17) as well as consulting and informing platform workers on all questions concerning the safety and health at work (Article 18). Nonetheless, stakeholders consulted for this case study revealed that they had already encountered some difficulties in the application of the so-called Riders' Law (and the already mentioned Law No 31/1995 on Prevention of Occupational Risks), as the platforms are likely to resort to subcontracting or temporary employment agencies to avoid any OSH responsibilities (see Article 42-43 Workers' Statute). Indeed, Uber Eats has already announced that it will continue using delivery riders from (third-party) logistics companies to fulfil their orders,

²³ See also: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-7840

²⁴ This argument is mentioned explicitly in the recitals of the so-called Riders' Law. Available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-7840

²⁵ See Par. 7.2. of Judgment 805/2020, 25 September 2021. Translated from Spanish: '*En la sociedad postindustrial la nota de dependencia se ha flexibilizado. Las innovaciones tecnológicas han propiciado la instauración de sistemas de control digitalizados de la prestación de servicios. La existencia de una nueva realidad productiva obliga a adaptar las notas de dependencia y ajenidad a la realidad social del tiempo en que deben aplicarse las normas*'.

²⁶ ETUC (2021), 'EU must follow Spain's riders law'. Press release available at: <https://www.etuc.org/fr/node/20352>

²⁷ The focus on platform workers working in the delivery sector can partly be explained by their strong visibility as compared to other forms of platform work which are more hidden (such as *online* platform work), as well as their strong disruption to traditional economic models in the sector. This group of platform workers also constitutes one of the most typical examples of jobs that by its characteristics may fall within the domain of dependent work.

²⁸ Law No 2016-1088 of 8 August 2016 [*El Khomri Law*]. See also EU-OSHA (2021a).

²⁹ Cape V-bis to the Legislative Decree No 81/2015 [*Tutela del lavoro tramite piattaforme digitali*].

thereby avoiding employers' obligations (including OSH obligations).³⁰ However, it is doubtful whether this strategy is in line with a previous judgment of the Supreme Court, which ended the possibility of deploying temporary contracts by subcontracting for work or service of indefinite duration.³¹ Additionally, legal commentators have argued that this practice is likely to be contested in courts as fraudulent since the subcontracting company has a very minimal role, with Uber Eats assuming most of the management decisions (such as connecting clients and riders; assigning tasks through algorithm; price-setting) (Aranguiz, 2021).

Overall, the so-called Riders' Law has been criticised by both trade unions and platforms, regarding the presumption of employment. The CCOO and UGT (the most representative Spanish trade unions) find that the law is too soft because it only applies to workers in the delivery sector.³² CCOO stated that the text was not as ambitious as they would have liked as the initiative could have included other types of platform work as well.³³ Similarly, the representative of *RidersXDerechos* stressed that the issue of bogus self-employment in digital platform work goes far beyond this sector.³⁴ According to the interviewee, extending labour and social rights to all platforms workers in all sectors was the right way forward.

The regulatory initiative has also received strong criticism from the platforms. In the context of this case study, an interview was also conducted with Adigital³⁵. In their view, the interests of the delivery platforms were not adequately represented by CEOE during the negotiations of the so-called Riders' Law. According to the platforms, the so-called Riders' Law goes against the wishes of their riders, who prefer flexibility and independent work. Glovo asserted that 'the position of the labour ministry is rather radical and is not in line with the actions taken by other EU Member States, such as Italy and France, to address similar issues.'³⁶ The *Asociación Autónoma de Riders* (a riders' collective) also strongly opposes the law. In a letter sent to European Commissioner Schmit, they voiced their concern on the introduction of a labour presumption, arguing that they want to remain self-employed.³⁷

In the meantime, several platforms have refused to sign their entire fleet as employees. Glovo has announced that it will hire only 2,000 riders between now and the end of 2021, which is far from the 12,000 riders estimated to be operating on the platform in Spain.³⁸ Glovo justified their refusal by introducing some minor changes to the work organisation (for example, more flexibility and autonomy in organising their schedules and the option to reject orders). However, this argument seems hardly in line with the reasoning of the Supreme Court and the Riders' Law which established that situations where a certain flexibility or freedom on the part of the digital platform worker is present, does not necessarily offset a qualification as employee. The key component in the classification exercise is the fact that the digital platform exercises control directly, indirectly or implicitly through the digital tool or algorithmic management. Additionally, Deliveroo announced in July 2021 that it will leave Spain, with the adoption of the so-called Riders' Law as one of the main reasons why.³⁹

At the same time, JustEats welcomed the new regulation, claiming it 'builds the necessary legal security to operate according to two fundamental principles: to guarantee the rights of delivery workers giving them a work contract and to ensure all operators in the sector carry out their activity under the same rules'. In that respect, JustEats started negotiating a collective agreement with UGT and CCOO, a first of its kind in Spain. The right of algorithmic transparency (see below) is essential for unions in this process, enabling them to use their access to the algorithm to inform those collective bargaining negotiations (for example, price-setting, task allocation, rating mechanisms) (Aranguiz, 2021). Similarly, StuartDelivery has also promised to negotiate a collective agreement in the future (Aranguiz, 2021).⁴⁰

³⁰ See: <https://pledgetimes.com/the-riders-law-starts-amid-the-refusal-of-companies-to-hire-their-entire-fleet/>

³¹ Judgment of Supreme Court No 240/2018, of 29 December 2020.

³² See also: <https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/>

³³ See also: https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html

³⁴ See also: <https://www.politico.eu/article/spain-approved-a-law-protecting-delivery-workers-heres-what-you-need-to-know/>; <https://www.ridersxderechos.org/?p=3253>

³⁵ Adigital is a business association (about 500 associates). It gathers different kinds of companies that operate on the Internet, from technology providers to telecommunications companies, consultants and online platforms, including major food delivery platforms (mainly platforms such as Glovo, Deliveroo, Stuart and Uber Eats) and platforms of other sectors such as Airbnb and Uber.

³⁶ See also: <https://techcrunch.com/2021/03/11/spain-agrees-on-labor-reform-that-will-recognize-delivery-platform-riders-as-employees/>

³⁷ See: <https://www.politico.eu/wp-content/uploads/2021/04/22/Letter-to-EU-Commissioner-Dr-Schmit.pdf>

³⁸ See: <https://pledgetimes.com/the-riders-law-starts-amid-the-refusal-of-companies-to-hire-their-entire-fleet/>

³⁹ See: https://cincodias.elpais.com/cincodias/2021/07/30/companias/1627633668_891613.html

⁴⁰ See also: <https://www.eldiarioalerta.com/articulo/agencias/economia-empresa-mensajeria-stuart-reivindica-repartidores-independientes-llegada-ley-rider/20210812131421230964.html>

Algorithmic management in the context of platform work

General context

One of the main OSH challenges in the context of platform work relates to the use of algorithmic management (see European Parliament, 2020; Bérastégui, 2021). Möhlmann and Zalmanson (2017) define algorithmic management as the oversight, governance and control practices conducted by software algorithms over many remote workers. In other words, algorithmic management is crucial in the management, coordination and control of the platform workforce (Lee, 2015; Ivanova, 2018; Mateescu, 2019; De Stefano 2019; European Commission, 2020) through the implementation of just-in-time work practices that align the number of platform workers with the expected business demand (De Stefano, 2019). Although it can describe a variety of systems with mixed degrees of complexity (Maatescu, 2019), algorithmic management typically includes among others: far-reaching data collection and digital surveillance; reliance on (customer) rating mechanisms; and the use of nudges, penalties and information asymmetry to (indirectly) incentivise digital platform workers' behaviours (Scheiber, 2017; Moore, 2018; De Stefano, 2019). Management decisions are implemented by (semi-) automated processes with little to no human involvement. In particular, digital platforms that intermediate lower-skilled online or on-location platform work tend to have a high level of control ('managerial prerogatives') over their platform workers. This raises questions about the extent to which platform workers work under the direction of or in subordination of the platform, which is a key legal criterion used to determine one's employment status in Spain.

From an OSH perspective, algorithmic management is associated with a myriad of physical and mental health and safety risks (see Lee, 2015; Huws, 2015; Samant, 2019; Bérastégui, 2021). First, the use of algorithmic management shifts the power balance that exists between the platform, the client and the platform workers in favour of the platform (or, in some cases, in favour of the client) (Bérastégui, 2021). For instance, the reliance on rating mechanisms as a crucial component in the allocation of (high rewarding) tasks can become an important source of stress and raises the emotional demands of digital platform work (EU-OSHA, 2017; Aloisi, 2017; European Commission, 2020). Ratings put individual digital platform workers in direct competition with each other. Consequently, digital platform workers with lower ratings have fewer chances to book tasks (on their preferred hours) or may even face suspension. At the same time, they typically have few opportunities for recourse or conflict resolution when this happens (Möhlmann and Zalmanson, 2017). Moreover, rating mechanisms encourage a rapid pace of work. Digital platform workers continuously work on tight deadlines to maintain high ratings, which further increases the likelihood of accidents (Möhlmann and Zalmanson, 2017). Essentially, algorithmic management is used to coordinate and maximise the workload and can lead to occupational overload, with workers being assigned too many tasks (quantitative overload) or tasks that are not in line with their skills (qualitative overload), which in turn causes stress and anxiety (Cedefop, 2020; Bérastégui, 2021). In general, algorithmic management can decrease platform workers' autonomy, job control and flexibility. This causes exhaustion, anxiety and stress, and a negative impact on platform workers' health and well-being.

This observation was echoed in an interview with the Coordinator of the Occupational Health Secretariat of the Spanish trade union UGT. For example, in Spain, Glovo deploys a so-called evaluation system ('*excellence system*') that is based on certain parameters, including efficiency (such as the time spent on delivering an order). According to the interviewee, this may increase speed and thus the risks of accidents. Additionally, the algorithms reward long hours of availability, which leads to cases of riders who work more than 60 hours a week, feeling obliged to be available at all times. Finally, the continuous evaluation systems of the platforms predominantly rely on clients' evaluation instead of middle management, leading to an exhausting control (and generating stress which may result in strokes or heart attacks) which is not comparable to jobs in the traditional economy.

Although the body of research is growing, the risks of algorithmic management are still underestimated and insufficiently researched. This is also due to the fact that algorithmic management in digital platform work is characterised by a lack of transparency (the so-called 'black box of intermediation') (Burrell, 2016; European Commission, 2020). Digital platform workers affected by the output of the algorithms are usually unaware as to how or why a specific decision has been reached (Burrell, 2016, European Commission, 2020). They are often left to collect information in a piecemeal way and may have little or no opportunity to redress certain decisions (Möhlmann and Zalmanson, 2017; Maatescu, 2019). In that respect, a crucial role can be played by regulation and/or collective bargaining in mitigating occupational safety and health risks, specifically addressing the use of algorithms to monitor, direct and discipline the digital platform workforce (see e.g., De Stefano, 2019, Aloisi, 2019). It is exactly here where the so-called Riders' Law in Spain marks an important steppingstone. The European Commission's proposed directive (10/12/2021) on improving working conditions

of platform workers could also be a further step in that direction at the EU level as it addresses (among other) fairness, transparency and accountability in algorithmic management⁴¹.

Algorithmic transparency - Article 64.4. of the Workers' Statute Law

The first provision of the new law amends Article 64.4. of the Workers' Statute Law, by adding a new paragraph d):

'The Works Council of any company shall have the right, periodically, as may be appropriate, to:

Be informed by the company of the parameters, rules, and instructions on which algorithms or artificial intelligence systems that affect any decision-making that may have an impact on working conditions, access to and maintenance of employment are based, including profiling.'

In what could set a precedent for other EU Member States, the new provision forces platforms to open up to some extent their algorithmic 'black boxes'.⁴² Importantly, the provision applies to all types of platforms (but not limited to digital platforms active in the delivery sector). More concretely, digital platforms are compelled to inform the Works Council⁴³ on the inner workings of the algorithms that lead to (semi-) automated decisions 'influencing working conditions and work allocation'. In that sense, it seems that the additional information rights granted by the so-called Riders' Law are limited to a passive, general and *ex ante* (that is, before the use of the algorithm for specific cases) explanation of the parameters, rules and instructions with which algorithm is designed to make decisions relevant to the working conditions and work allocation.⁴⁴ However, before the adoption of the so-called Riders' Law, Article 64.5. of the Workers' Statute Law did already establish that the Works Council 'shall have the right to be informed and consulted on all decisions of the company that could lead to relevant changes in the organisation of work'⁴⁵. In that sense, one can assume that this provision now implicitly includes changes to the algorithm which affect the organisation of work, entitling the Works Council to be consulted before its implementation (Todoli, 2021). Nonetheless, at the moment there exists uncertainty and confusion as to the scope and/or application of this provision in practice (Ginès Fabrellas, 2021). First, the law itself does not clearly indicate the exact boundaries of what needs to be disclosed. Depending on the interpretation, the scope of what exactly falls into that space ('may have an impact on working conditions, access to and maintenance of employment [...] including profiling') has the potential to differ widely. A more detailed and technical regulation, setting out precise conditions on how and what needs to be shared, would certainly help in this regard. Along those lines, the representative from Adigital consulted for this case study pointed out that an algorithm consists of thousands of parameters, and that it might prove difficult to isolate the code lines necessary for the fulfilment of the platforms' obligations.

To some extent, Europe's General Data Protection Regulation (GDPR) already provided (individual) information rights for platform workers regarding the algorithms. Articles 13, 14 and 15 GDPR state that in 'the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject'. In that respect, the GDPR does seem to support a right to an explanation for platform workers. Platforms will need to provide digital platform workers with (general) information which is useful for him or her to challenge a particular decision (European Commission, 2020).⁴⁶ In line with the guidelines provided by the Article 29 Data Protection Working Party⁴⁷, platform workers will only be able to challenge these decisions or express their views if they fully understand how it has been made and on what basis. Nonetheless, no mention is made of any collective rights in this respect, making the

⁴¹ The new instrument proposal addresses three main concerns: employment status misclassification; fairness, transparency and accountability in algorithmic management; and enforcement of the applicable rules. See <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10120&furtherNews=yes>

⁴² See also: <https://www.wired.co.uk/article/spain-gig-economy-algorithms>

⁴³ See footnote 19. As mentioned in footnote 19, Works Councils are the main channel of (formal) workplace representation for employees in Spain.

⁴⁴ A.Todoli (2021), 'Cambios normativos en la digitalización del trabajo: comentario a la 'Ley Rider' y los derechos de información sobre los algoritmos'. IUSLabor 2/2021.

⁴⁵ Translated from Spanish: '*tendrá derecho a ser informado y consultado sobre todas las decisiones de la empresa que pudieran provocar cambios relevantes en cuanto a la organización del trabajo*'.

⁴⁶ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and profiling for the purposes of Regulation 2016/679,' 3 October 2017 (as last revised and adopted on 6 February 2018). Available at: <https://ec.europa.eu/newsroom/article29/items/612053>

⁴⁷ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and profiling for the purposes of Regulation 2016/679', 3 October 2017 (as last revised and adopted on 6 February 2018), 27. Available at: <https://ec.europa.eu/newsroom/article29/items/612053>

effective application of said rights very difficult in practice. The new 'Riders' Law' (partly) responds to these concerns, as the information rights are of collective nature. Additionally, the rights conferred in line with Article 22 (1) GDPR depend on decisions which are based 'solely' on automated processing.⁴⁸ According to the Article 29 Data Protection Working Party, this means that there is no human involvement in the decision process.⁴⁹ The so-called Riders' Law does not contain such a restriction when granting information rights to the workers' legal representatives. In that way, it applies to more cases which might influence the working conditions of platform workers.

The leading association of food-delivery platforms (La Asociación de Plataformas de Servicios bajo demanda (APS)), which represent Deliveroo, Stuart, Glovo and Uber Eats expressed strong concerns regarding the provision on algorithmic transparency, highlighting that the Spanish legal framework is the only one in Europe that includes the obligation for technological businesses to reveal their algorithms.⁵⁰ APS claimed that the disclosure of algorithms 'would without doubt very negatively affect the development of the digital economy in Spain, in addition to infringing on the most basic principles of freedom of enterprise and industrial property'.⁵¹ The same sentiment was echoed during the interview with Adigital. Conversely, the trade union CCOO celebrated the inclusion of algorithmic transparency into the new law, saying 'it strengthens the working relationship between riders and forces businesses to offer transparency on the new ways of managing workforces, like the use of algorithms'.⁵² An initial aspiration of the Spanish trade unions concerned establishing an algorithm registry to facilitate access to the algorithms in the event that a platform refuses to provide information about it. This was not adopted in the final text of the so-called Riders' Law.

As elaborated on in Section 1.1. of this case study report, the features of algorithmic management constitute major aggravating factors to OSH-related challenges in digital platform work. One barrier in effectively addressing these issues stems from the lack of transparency of platforms in disclosing the functioning of the algorithms. This seems to be partly resolved by the new provision in the so-called Riders' Law, bringing workers' legal representatives and therefore workers' participation into the process. According to the trade union UGT, this accessibility may also increase productivity since an inclusive approach will facilitate co-responsibility and workers' participation in decision-making and organisation of work. Additionally, this provision is a first and vital step in the process of implementing the Human-In-Command approach (HIC), as promoted by the European Economic and Social Committee the ILO, and ETUC among others.⁵³ The High-Level Expert Group on AI defines HIC as 'the capability to oversee the overall activity of the AI system (including its broader economic, societal, legal and ethical impact) and the ability to decide when and how to use the system in any particular situation'.⁵⁴ Similarly, the European Economic and Social Committee calls for a HIC approach to AI, including 'the precondition that the development of AI be responsible, safe and useful, where machines remain machines and people retain control over these machines at all times'.⁵⁵

Applied to the context of platform work, this would ensure that platform workers are actively participating and/or negotiating in the design of the algorithms, while also ensuring that the final decisions affecting working conditions are taken by human beings. As De Stefano (2019) puts it, 'negotiating the algorithm should, therefore, become a central objective of social dialogue, and action for employers' and workers' organisations'.

⁴⁸ Article 22 (1) GDPR: 'The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679>

⁴⁹ Article 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and profiling for the purposes of Regulation 2016/679', 3 October 2017 (as last revised and adopted on 6 February 2018), 20. Available at: <https://ec.europa.eu/newsroom/article29/items/612053>

⁵⁰ See also: https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html

⁵¹ See also: <https://www.wired.co.uk/article/spain-gig-economy-algorithms>

⁵² See also: https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html

⁵³ European Economic and Social Committee (2017), 'Artificial intelligence –The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society'. Opinion No 7; ILO (2019), 'Global Commission on the Future of Work. Work for a Brighter Future'. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf; ETUC (2020), 'AI – Human must be in command'. Available at: <https://www.etuc.org/en/document/ai-humans-must-be-command>

⁵⁴ AI HLEG (2019), 'Ethics Guidelines for Trustworthy AI'. Available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>

⁵⁵ European Economic and Social Committee (2017), 'Artificial intelligence –The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society'. Opinion No 7, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/artificial-intelligence-consequences-artificial-intelligence-digital-single-market-production-consumption-employment-and>.

However, it must be recognised that the essential features of the platform economy are not conducive to representation structures (see Lenaerts, 2018; Aloisi, 2019), which also potentially hinders the implementation of worker participation in negotiating the algorithm and limiting its impact on occupational safety and health, and more generally on the establishment of effective OSH measures. The triangular nature of the relationship, the 'virtualisation' of work, the high labour turnover, the temporariness of the working relationships, the solitary nature of platform work, the absence of a common workplace, and the inherent competitiveness between digital platform workers all constitute major barriers to effective collective action (Lenaerts, 2018; Aloisi, 2019; Nekhoda, 2020; European Commission, 2020; European Parliament, 2020). Nonetheless, the collective organisation of platform workers in Spain has been pursued through different means (Arasanz, 2019).

On the one hand, self-organisation strategies by platform workers led to the establishment of numerous grassroots organisations, albeit predominantly in the food delivery sector (Arasanz, 2019). *Riders X Derechos* (Riders for Rights) is a prime example in this regard, organising strikes, public campaigns and launching complaints to inspectorates, predominantly focused on the misclassification of platform workers. For instance, in June 2020, *Riders X Derechos* promoted a manifesto in support of the claim of effective recognition of the status of false self-employed platform workers, which was signed by several trade unions and grassroots organisations (Eurofound, 2021).⁵⁶ Representatives of *Riders X Derechos* were also invited to the Ministry of Labour to voice their position regarding the so-called Riders' Law.⁵⁷ Besides these initiatives, Spanish trade unions have also shown a growing interest in the platform economy in recent years, as evidenced by numerous lawsuits brought before the Spanish courts, again mainly focused on the employment status of offline low-skilled platform workers. According to the stakeholders consulted for this case study, one of their main goals is to extend the scope of the existing sectoral collective agreements to include platform work as well. In that respect, trade unions are working towards an exhaustive mapping of the digital platforms, and the sectors in which they are active, to identify which collective agreements should be applied.

In conclusion, a combination of platform workers' strengthened collective organisation, and applying the HIC approach as their guiding principle in collective bargaining structures, would possibly minimise the detrimental effects of algorithmic management on the working conditions of platform workers, including in the area of occupational safety and health. The new law forms a positive step in that direction, obligating platforms to inform the workers' legal representatives (through the Works Council) of the parameters, rules, and instructions on which algorithms or artificial intelligence systems affect any decision-making. A logical next step would be that the functioning of the algorithm itself will form the subject of collective bargaining between trade unions and platforms in the near future.

Conclusions

The so-called Riders' Law addresses some of the most pertinent challenges identified in the platform economy, including issues related to occupational safety and health:

- Spain has become the first EU Member State to explicitly oblige platforms active in the delivery sector to recognise digital platform workers as employees by way of presumption.⁵⁸ In that way, it takes an approach that is different from other Member States. For instance, France⁵⁹ and Italy⁶⁰ have circumvented the classification problem to a certain extent, by adopting national legislation that provides additional social rights specifically for self-employed platform workers (*El Khomri Law*).
- Additionally, the so-called Riders' Law forces platforms to open up their algorithmic 'black boxes' to an extent, compelling every type of platform to inform the workers' legal representatives on the inner workings of the algorithms that lead to decisions related to the working conditions and work allocation of platform workers. The provision has the potential to alleviate some of the main concerns regarding algorithmic management and its relation to occupational safety and health. At the very least, it constitutes a first step in applying the Human-In-Command approach in practice.

⁵⁶ See link for the complete text: <https://www.ridersxderechos.org/?p=3182>

⁵⁷ Among others, Riders X Derechos insisted that the second provision of the so-called so-called Riders' Law should apply to all types of digital platforms. Additionally, they argued in favour of the establishment of a registry of platforms active in Spain, as well as their algorithms, which eventually did not make it into the final text.

⁵⁸ In that way, it takes a route that is different compared to other Member States. For instance, France has adopted national legislation providing social rights specifically to self-employed platform workers (*El Khomri Law*)⁵⁸.

⁵⁹ Law No 2016-1088 of 8 August 2016 [*El Khomri Law*]

⁶⁰ Cape V-bis to the Legislative Decree No 81/2015 [*Tutela del lavoro tramite piattaforme digitali*]

- Finally, the so-called Riders' Law also serves as a prime example of the continuing relevancy of social dialogue in modern times, even when faced with new forms of work such as platform work. The tripartite agreement undoubtedly increases the legitimacy of the final text, which should assist in effectively enforcing the rights granted.

Nonetheless, the so-called Riders' Law is far from perfect and reflects conflicting interests, which policy-makers should be aware of when interpreting the value of this legislative initiative:

- First, the presumption of employment only applies to platform workers active in the delivery sector. This can be explained by the fact that platform workers in the delivery sector are among the most visible examples of workers active in the platform economy, as well as the fact that the characteristics of this type of platform work largely resemble the features of dependent employment as opposed to other forms of platform work (such as highly-skilled online platform workers). However, overall, this subset only constitutes a fraction of the wide, heterogeneous landscape of platforms operating in Spain. Trade unions and riders' associations were keen on broadening the scope of the so-called Riders' Law, but they did not succeed in their endeavors.
- Second, uncertainty in the classification exercise is likely to persist in the platform economy, which was also pointed out repeatedly by several stakeholders consulted for this case study. Platforms are expected to resort to subcontracting between two parties to avoid any responsibilities (see Article 43-43 Workers' Statute), as already evidenced by the practices of Glovo in recent months. As a general observation, questions can be asked whether the singular focus on the divide between employees and self-employed as the gateway to labour protections (including occupational safety and health) for platform workers is the right way forward for policy-makers across Europe, if the desired end result is the improvement of working conditions and occupational safety and health for *all* platform workers.
- Third, the technical and practical scope and/or application of the provision on algorithmic transparency is not entirely clear. Platforms have already voiced their concerns strongly in this regard. At the same time, the implementation of this provision also depends on the technical capabilities of the stakeholders concerned (for example, trade unions, judges, inspection services) to fully understand the inner workings of the algorithms, which is by no means an easy task.
- Finally, questions can be asked whether the recognition of a passive, general and ex ante (that is, before the use of the algorithm for specific cases) right to information on the algorithms shifts the balance enough in favour of potentially easing the detrimental effects of algorithmic management on the working conditions (and occupational safety and health) of platform workers.

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