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Workers' representation and union rights in the fourth industrial revolution: the Spanish case*

Summary: **1.** The resilience of the Spanish Trade Union System: adaptation and transformation in a context of change. **2.** "Libertad de sindicación": a milestone. **3.** Structural conditions and open points of the workers' representation in Spain. **4.** The collective bargaining: a weakened right for digital unions. **5.** Union rights within the undertaking. The link with a "material workplace". **6.** Right to strike. Current challenges. **7.** Collective rights of self-employed. **8.** Collective rights of economically dependent self-employed (TRADE). **9.** Some comparative conclusions.

1. *The resilience of the Spanish Trade Union System: adaptation and transformation in a context of change*

The digital revolution imposes new reflections on the role of Collective Labour Law and relaunches the debate over the need of an adequate regulation in the field of the collective bargaining[1].

While in Italy this debate leads right back to the lack of implementation of Arts. 39 and 40 Italian Constitution[2], on the contrary, in other jurisdiction – such as the Spanish system – the issue is linked to the need to reform an over-regulated workers' representation system[3].

* This Article is part of the Research Project PRIN 2017EC9CPX "Dis/Connection: Labor and Rights in the Internet Revolution", of the Universities of Bologna, Napoli Federico II, Udine, Venezia Ca' Foscari.

[1] ILO, *Social Dialogue Report*, *Collective bargaining for an inclusive, sustainable and resilient recovery*, 5 May 2022.

[2] Gottardi, *I perimetri contrattuali e la rappresentatività datoriale*, in *DLRI*, 2021, 4, p. 627; Poggi, *Lavoro, persona e tecnologia: riflessioni attorno alle garanzie e ai diritti costituzionali nella rivoluzione digitale*, in *Federalismi.it*, 2022, 9.

[3] Garrido Pérez, *La representación de los trabajadores al servicio de plataformas colaborativas*,

From this perspective, Spanish legal system provides opportunities for a wider reflection on the pros and cons of the introduction of a legislative framework in this field. Analysing that system, with its peculiarities, will also provide an opportunity to reflect on the "state of the art" of the Italian system. Indeed, one of the peculiarities of the Spanish unionism is the integration of different level of sources governing union rights (i.e., Constitution, legislation and case law). The problem is that this framework is very strict, and it is linked to an old model of union democracy, which is difficult to adapt to modern society without some reforms. It is enough to think that the main feature of Spanish trade union system is the link between their action and a "material" place to exercise their activity. Obviously, digital work has questioned this principle, undermining the legislative framework.

As it is well known, new employment relationships lead to a deterritorialization, which makes the exercise of freedom of association more difficult, because the concentration of workers in the same place is a key element for unionisation[4]. Practically, technological transformations intensify the risk of processed-unionisation, spreading mistrust and individualism[5]. Deterritorialization revolutionizes the structure of Spanish Collective Labour Law, unions activity and their rights, which are formally linked with the element of the territoriality.

in *Der. Soc.*, 2017, 80, p. 221; Esteban Legarreta, *Cuestiones sobre la articulación de la representación del personal al servicio de las plataformas colaborativas*, in Asociación Española de Derecho del Trabajo y de la Seguridad Social (eds.), *Descentralización productiva: nuevas formas de trabajo y organización empresarial*, Cinca, 2018, p. 377; Nieto Rojas, *Acción colectiva en las plataformas digitales. ¿Sindicatos tradicionales y movimientos de base para representar idénticos intereses?*, in Ministerio de Trabajo (ed.), *El futuro del trabajo: 100 años de la OIT*, 2019, p. 1502.

[4] Borelli *et al.*, *Lavoro e tecnologie. Dizionario che cambia, "Digital Workplace"*, Giappichelli, 2022, p. 81; Baylos Grau, Valdés de La Vega, *El efecto de las nuevas tecnologías en las relaciones colectivas de trabajo*, in Alarcón Caracuel, Esteban Legarreta (eds.), *Nuevas Tecnologías de la información y la comunicación u Derecho del Trabajo*, Ed. Bomarzo, 2004; Cruz Villalón, *25 años de relaciones laborales colectivas. Regulación del derecho de huelga: balance y propuestas normativas*, in *Rel. Lab.*, 2010, 23; Monda, *Lo Statuto alla prova di "Industria 4.0": brevi riflessioni sulla c.d. disintermediazione sindacale*, in Rusciano, Gaeta, Zoppoli (eds.), *Mezzo secolo dallo Statuto dei lavoratori*, *QDLM*, 2020, p. 345; Montoya Media, *Nuevas relaciones de trabajo, disrupción tecnólogica y su impacto en las condiciones de trabajo y de empleo*, in *RDTES*, 2019, p. 92; Pinto, *Los derechos de libertad sindical de los trabajadores de plataformas digitales*, in *Der. Lab.*, 2021, 284, p. 755.

[5] Guindo Morales, *Libertad sindical. El sindicalismo ante las nuevas realidades productivas en el marco de la revolución tecnólogica*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *Innovación tecnólogica, cambio social y sistema de relaciones laborales*, Editorial Comares, 2021, p. 57.

For example, the *Real Decreto Legislativo* 23 October 2015 No. 2 (ET), "*por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores and the Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical* (LOLS)" continually refer to the belonging of a worker to a material workplace to constitute representations (Arts. 62, 63 and 66 ET). It is the same for the representations electoral processes, as well as for the exercise of union rights. The difficulty to establish a representation without a material place, obviously, impacts on the effectiveness of collective bargaining directly. Furthermore, as it will be seen, digital market makes more difficult to enforce the prohibition to replace workers on strike, considering both the wide diffusion of self-employed – which are not entitled to this right – and the legitimate practice of "*esquirolaje tecnólogico*": the strikebreaking through electronic devices (technological strikebreaking).

Finally, digital work enhances the debate regarding the difficulties to access union rights for precarious workers and self-employed, despite any formal acknowledgements (self-employed are entitled to freedom of association, s.c. "*derechos sindicales basicos*")[6].

The latest reforms did not intervene in this matter. They have only introduced a presumption of subordination for food delivery riders, a strengthening of the right of information in case of use of algorithm and a wider competence of collective bargaining on the disconnection right[7].

Despite those difficulties, there is a trend of Spanish unions to create "union platforms". Dynamic organizational tools have been introduced, using platforms and digital technology itself, organizing digital movement,

[6] Baylos Grau, *Gobernanza laboral, crisis y cambio tecnológico en la acción colectiva*, in *Doc. Lab.*, 2019, 117, p. 95; San Manrtín Mazzucconi, *Tecnología de la información y la comunicación en las relaciones de trabajo: nuevas dimensiones del conflicto jurídico*, ed. EOLAS, 2014; Ferradans Caramés, *Los derechos colectivos de los trabajadores al servicio de plataformas colaborativas*, in Gómez Muñoz (ed.), *El trabajo autónomo en España tras la crisis: Perspectivas y propuestas*, Bomarzo, 2019, p. 323; Fernández Villazón, *Canales de representación del personal en los nuevos modelos de gestión empresarial*, in Moreno-Gené, Torres-Coronas, Belzunegui Eraso (eds.), *Finding solutions to societal problems*, URV, 2018, p. 122; Goerlich Peset, *Economía digital y acción sindical*, in Piñero Miguel, Todolí Signes (eds.), *Trabajo en plataformas digitales: innovación, derecho y mercado*, Thomson Reuters Aranzadi, 2018, p. 592; Tormos Pérez, *Digitalización y derechos colectivos: retos y propuestas*, in *Arias Domínguez et al.*, *Nuevas tecnologías y trabajo sostenible*, Laborum, 2020, p. 293.

[7] *Decreto-Ley 9/2021, de 11 de mayo*; *Ley 12/2021, de 28 de septiembre*; *Real Decreto-ley 32/2021, de 28 December 2021*; *Real Decreto-ley 28/2020, de 22 de septiembre.*

as opposed to the traditional union, by promoting for example the s.c. "net-strike" or the "virtual strike" and by creating collective platforms and cyber unions[8]. It is possible to make reference to the "*RidersXDerechos platform*", created in May 2017, within of the union *Intersindical Alternativa de Cataluña*, or the platform "*turespuestasindical.es*". However, there are problems of representativeness feedback and on their democratic nature, due to their introduction outside the ordinary channels. It is also true that association through networks or applications does not imply the same level of commitment as the classic organizational links. On the other hand, these techniques are not adequate to solve all the problems arising from the diversification of digital workers' interests: considering the high prevalence of autonomous workers, in direct competition with each other, and the risk of workers isolation, in very wide geographical spaces potentially[9].

2. "Libertad de sindicación": *a milestone*

To understand if the Spanish trade union system can be applied to the gig economy, it is necessary to investigate the concept of "*Libertad de sindicación*"[10]. Indeed, this concept is so wide as to guarantee any form of unionisation, even if it is digital. Art. 28.1 of Spanish Constitution (SC) states that "Everyone has the right to freedom of association. The law may limit the exercise of this right or introduce exceptions for the Armed Forces or Institutes or other bodies subject to military discipline and it shall regulate the special conditions of its exercise by civil servants.

Union freedom includes the right to set up unions and to association, as well as the union right to form confederations and to found international union organisations, or to become members. No one may be compelled to associate".

[8] Borelli *et al., cit.,* pp. 65 and 216; Rota, *Il web come luogo e veicolo del conflitto collettivo: nuove frontiere della lotta sindacale*, in Tullini (ed.), *Web e Lavoro. Profili evolutivi e di tutela*, Giappichelli, 2017, p. 197.

[9] Valle Muñoz, *Las representaciones colectivas de trabajadores en las plataformas digitales*, in *TL*, 2021, 157, p. 59.

[10] Freedom of association plays a crucial role in all unions system. In a comparative view Ales, *The Collective Dimensions of the Employment Relationship: Ways Beyond Traditional Views*, in Addabbo et al., *The Collective Dimensions of Employment Relations*, Palgrave, 2021, p. 63.

This Article should be read in conjunction with Art. 7 SC according to "Unions and employers associations contribute to the defence and promotion of the economic and social interests which they represent. Their creation and the exercise of their activities shall be unrestricted in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic".

In other terms, similarly to the Italian system, the "positive" and "negative" freedom of association is ensured, both in a collective and individual perspective. Unlike the Italian system, the LOLS gives full implementation to these constitutional articles. This Act specifies: the content and the scope of freedom union; the union registration system; the representativeness criteria.

The LOLS clarifies that all workers have the right to association to defend their economic and social interests. The concept is broad, and it also includes unemployed workers, although they cannot set up unions (Art. 3 LOLS). Nevertheless, self-employed are entitled to minimal union's right (*derechos sindicales basìcos*), as it will be seen shortly.

According to the LOLS freedom of association includes: a) The right to set up, suspend or extinguish unions, without prior authorization and with democratic procedures; b) The right to join or leave the union, freely and without constraint; c) The right to freely elect their union representatives; d) The right to exercise union activity.

Furthermore, unions and organizations have the right to: a) Draft its statutes, organize their internal administration and their activities, and formulate their program of action; b) Establish federations, confederations and international organizations, as well as join or leave them; c) Not to be suspended or dissolved except by means of a definitive resolution of the Judicial Authority, based on serious non-compliance with the legislations; d) Exercise union activity within the undertaking or outside it, which shall include, in any case, the right to collective bargaining, the right to strike, to raise individual and collective disputes and to submit candidatures for the election of *Comités de Empresa* and *Delegados de Personal* and corresponding bodies in the Public Administrations (Art. 2 LOLS).

The exercise of these rights is affected by digital challenges, due to the "material production unit" (or establishment) requirement.

3. *Structural conditions and open points of the workers' representation in Spain*

It is difficult to identify new representativeness criteria for unions' constitution, without the existence of a material workplace.

According to Arts. 7 and 28 SC unions and employers' associations contribute to the defence and promotion of economic and social interests. Their setting up and their activities shall be unrestricted in so far as they respect the Constitution and the law. Their internal structure and their activity must be democratic. However, public authorities shall efficiently promote this kind of workers' participation within companies, according to Art. 129.2 SC[11].

So, the Constitution does not regulate any procedure to constitute unions. It is regulated by the Law.

The ET and the LOLS provide a double channel of workers representation, identifying the most representative unions and giving voice to elected workers representation bodies within the companies. So, there is an emphasis on the unions at "establishment level". Title II of the ET regulates the *Delegados de personal* (workers' delegate, in companies or work centres with less than fifty and more than ten workers) and the *Comité de empresa* (works committees, in companies employed more than fifty worker), which oversees defending collective interest[12]. Representativeness criteria are directly linked with the "unit production". Even unions electoral process is conditional on workers' belonging to a material workplace.

In other terms, the ET provides for a union constitution procedure built around the concept of workplace. Thus, a systematic interpretation leads to consider the workplace as the unit of reference (see also Art. 63.2 ET)[13]. Indeed, this is the main criterion to determine the existence of unitary representations, the number of representatives and their configuration, the type of union to be constituted (Arts. 62, 63 and 66 ET).

The notion of establishment provided for by the law and by the Spanish

[11] The translation is the official one. On this issue see Judgment Const. Court. No. 74/1983; No. 118/1983; No. 98/1985; No. 189/1993. Monereo Pérez, *El futuro de la representación y participación de los trabajadores ante el cambio tecnológico y las nuevas formas de empresa*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *cit.*, p. 115.

[12] See Articles 61-76 ET and the LOLS. Article 63.2 ET provides for the cases in which it is possible elect a joint works council in the same administrative geographical division.

[13] Pastor Martínez, *Una aproximación a la problemática de la representación de los trabajadores de las plataformas colabroativas y en entornos virtuales*, in *IUSLab*, 2018, 2.

Courts is that of "production unit"[14]. According to Art. 1.5 ET the workplace is a production unit with a specific organization that is registered as such by the labour authority. This concept is mandatory. Obviously, also platform workers, if employees, could set up unions or associate or participate in elections. Thanks to the subordination presumption introduced by the *Real Decreto-Ley* 11 May 2021 No. 9 for the digital cycle couriers[15], riders are entitled to the rights provided by ET and LOLS[16].

However, digital workers do not belong formally to any workplace as defined by article 1.5 ET, especially if they are contingent workers. Virtual place, typical of platform work, is not contemplated. So, it is also difficult to consider them in the threshold values on which the type of union to be formed depends. Consequently, in a concrete perspective, just the emphasis on the production unit makes it difficult to create digital unions.

Despite this, the technological development could potentially implement a virtual and remote electoral process, facilitating the participation of all workers.

In this perspective, the Spanish legal system does not prohibit electronic vote, if it is personal, direct, free and secret. Despite this, it is not always possible. Even in the case of teleworking, formally Art. 19.4 *Ley* 9 June 2021 No. 10 "*de trabajo a distancia*" provides for the effective participation of the

[14] Ysàs Molinero, *Is the Structure of Employee Representation Institutions in Europe Adapted to the Economic Transformations? Analysis and Proposals from the Spanish Case*, Addabbo et al., *cit*., p. 160.

[15] Baylos Grau, *Una breve nota sobre la ley española de la laboralidad de los riders*, in *LLI,* 2021, 1; Cruz Villalón, *Una presunción plena de laboralidad para los 'rider*s', https://elpais.com/economia/2021-05-12/una-presuncion-plena-de-laboralidadpara-los-riders.html; Rojo Torrecilla, *Y llegó la norma que declara la relación laboral de 'las personas dedicadas al reparto en el ámbito de las plataformas digitales'. Primeras notas y comentarios al RDL 9/2021 de 11 de mayo*, http://www.eduardorojotorrecilla.es/2021/05/y-llego-la-norma-quedeclarala.html).

[16] It is now presumed that an employment relationship exists in the delivery or distribution of any kind of product or good where the service or the working conditions are managed algorithmically over a digital platform. That presumption is subject to: (i) organisation, (ii) management, and (iii) control by the corporate entity concerned using a digital platform. The criteria of the Spanish Supreme Court's ruling in Judgment 25 September 2020 No. 805 have also been included; that ruling recognises the need to adapt the features of any employment relationship (dependence and working for a third party) to digital platforms services sector. Gil Otero, *Plataformas digitales y la dimensión colectiva de la presunta relación laboral*, in Ministerio de Trabajo (ed.), *El futuro del trabajo: 100 años de la OIT*, 2019, p. 1381; Pastor Martínez, *La representación de los trabajadores en la empresa digital*, in *Anuario IET de trabajo y relaciones laborales*, 2018, 5, p. 112.

remote workers in all activities organized or convened by their legal representation or by the other workers, in defence of their work interests.

However, their participation in representatives' bodies elections should be "in person". In other words, this rule imposes the physical presence. Nevertheless, it must be interpreted as meaning that the teleworker is entitled to choose to vote at his workplace. Interpreting in a different way, the legal provision would be totally anachronistic and in conflict with the possibility of the worker to vote by mail, introduced by Arts. 10 *Real Decreto* of 9 September 1994, No. 1844 and 69 ET.

All these aspects require finding new representative structures.

To find a solution, scientific doctrine focuses on the similarities between digital work and remote work. To identify collective representation, in the case of remote work, workers are assigned to a workplace, and they have the same collective rights of other workers within the undertaking[17]. Naturally, for digital workers, there are issues on the form and criteria to carry out this assignment. Different solutions have also been pointed out. A first theory identifies the formal workplace with the place where the activity is carried out. Consequently, factors such as the orders' place, the employers' instructions and the service recipients must be enhanced. However, this theory could generate some problems. It could extend the territorial area to the whole national – or even international – territory. Obviously, again, the representative system could be difficult to implement.

Another solution consists of moving from the concept of workplace to the concept of undertaking. But this interpretation does not hide the issues to identify the national or international material headquarter.

The third solution, to be favoured, recognises a primary role to collective bargaining, allowing it to introduce specific rules in this area[18]. Even in the case of teleworking the *Real Decreto-ley* 22 September 2020 No. 28, Art. 19.1, provides for collective bargaining guarantees remote workers' collective rights, considering its peculiarity and ensuring equal treatment.

[17] See *Marco Europeo sobre el teletrabajo del 16 de julio de 2002* and Art. 13 ET, which regulates collective rights of teleworking. Art. 19 *Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia*, amended this article. Mercader Uguina, *Ejercicio de los derechos colectivos/sindicales en el trabajo a distancia*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 755. Ron Latas, *Los derechos colectivos de las personas que trabajan a distancia*, in *DSE*, 2021, 15.

[18] About the theories described see Pastor Martínez, *La representación de los trabajadores…* cit.

Naturally, in order to have legitimacy and qualified representation also in the digital market, this option is as well conditional on the revision of union's constitution criteria. It is a vicious circle.

4. *The collective bargaining: a weakened right for digital unions*

As mentioned, also the sign of a collective agreement by platform workers' union representations will be more complicated, due to the lack of formal recognition of representativeness. Essentially, in a pathological perspective, this lack could represent a license for establishing the so-called "yellow unions". Furthermore, this is a central point because collective agreements in Spain are legally binding on all employees in their scope if the negotiating parties are entitled to sign the agreement. The right to collective bargaining is recognized to unions and to representatives elected according to Artt. 4.1 c) and 82 ET. At the plant level the appropriate negotiating bodies are the *Comité de empresa*. The *Delegados de Personal* at plant level can sign agreements, if they hold a majority of seats in the *Comitè de empresa*. At a higher level, only unions affiliated to the "most representative unions" at national or regional level (if it is a regional or provincial agreement), or other unions with a specific level of support in the negotiations scope, can sign the agreement on behalf of all the employees in the concerned trade. In other words, the status of "most representative union" depends on support in the *Comité de empresa* elections. Indeed, Art. 6 LOLS provides for unions considered as the most representative ones at national level are those: (a) accrediting a special audience of 10% or more of the total number of *Delegados de Personal de los miembros de los Comité de empresa* and of the corresponding bodies of the Public Administrations; (b) unions or trade union bodies, affiliated, federated or confederated to a national level union considered the most representative in accordance with point (a).

Nationally only the CCOO and UGT are most representative unions. So, once again, everything revolves around the undertaking and unit production concepts. This is even more true after the introduction of the *Ley* 6 July 2012, No. 3, which gave a greater role to collective bargaining within the undertaking.

Obviously, in this perspective, the difficulties to identify the workplace of digital platforms impact directly on the (in)effectiveness of collective bar-

gaining right, introduced by Art. 37 SC: "The law shall guarantee the right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements. The right of workers and employers to adopt collective labour dispute measures is hereby recognised. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may establish, include the safeguards necessary to ensure the operation of essential community services"[19].

Nevertheless, the latest reform[20] does not make steps to solve these problems, albeit was aimed to modernize collective bargaining. The reform focuses on collective bargaining "ultra-activity", after the expiration term[21], and on the relationship between collective agreements at the industry level and at plant level. Therefore, agreements at plant level must behave as regulatory instruments for organizational aspects (such as schedules or professional classification), while collective bargaining at industry level regulates salary, remuneration and working-time.

There are no adequate measures for digital work[22]. In this perspective, appropriate measures aimed at including digital union representativeness and at ensuring collective agreements effectiveness are required.

Nevertheless, the most representative unions (among others, U.G.T. and *Comisiones Obreras*, CC.OO.) do not renounce to represent the platform workers, promoting union activity through digital tools, especially to protect precarious workers. Indeed, the sum of robotics, digitalization and artificial

[19] The translate is the official one.

[20] *Real Decreto-ley 28 December 2021 No. 32, de medidas urgentes para la reforma laboral, la garantía de la estabilidad en el empleo y la transformación del mercado de trabajo*.

[21] The ultra-activity, previously limited to one year, is now of indefinite duration.

[22] Fita Ortega, *I diritti sindacali dei lavoratori delle piattaforme digitali in Spagna*, in Ludovico, Fita Ortega, Naha (eds.), *Nuove tecnologie e diritto del lavoro. Un'analisi comparata degli ordinamenti italiano, spagnolo e brasiliano*, Milano University Press, 2021, p. 144 ff. A Spanish collective agreement in the field of platforms work is the *V Acuerdo Laboral* for the hotel and restaurant, approved by resolution of 19 March 2019 of the *Dirección General de Trabajo* (B.O.E. 29 March 2019). This agreement is only an integration of an original agreement and extends its scope, including the activity of distribution of food and beverages through digital platforms. In practice, it is a framework agreement, negotiated pursuant to Art. 83.2 ET aimed at establishing the collective bargaining structure. The agreement was signed by the unions CC.OO., U.G.T. and C.I.G. (*Central Sindical Galega*), by the *Confederación Empresarial de Hostelería de España*) and the *Confederación Española de Hoteles y Alojamientos Turísticos* (CEHAT). In this case, problems do not arise because the signatories are considered representative unions. Considering their most representativeness, they have the right to sign collective agreement (Art. 87.2 ET).

intelligence could cause significant job losses or indecent working conditions and unions must face the workers' fear of losing their jobs[23].

Collective bargaining could regulate these new phenomena. Even in the field of teleworking[24] collective agreements could ensure health security and all the other individual rights[25]. Until now, priority is given to the right to privacy or the right to digital disconnection, thanks to the *Real Decreto-ley 29/2020*[26]. Regarding this right the collective agreements have certainly a primary role. As an integration of individual contract, collective bargaining has a specifical competence in the field of workers' rights: specially in the matter of supplying and maintaining equipment and digital devices, or of expense reimbursements[27].

Furthermore, rights of information and consultation before introducing teleworking have been introduced[28]. Clearly, in the absence of collective bargaining every right would be left to an individual agreement. In this way, there is a high risk that the consent given by the worker is the result of a "mere adherence to conditions arranged unilaterally by the entrepreneur", as assumed several times in Judgement of *Audiencia Nacional*, *Madrid, Sala de lo Social* 22 March 2022 No. 44.

[23] Rodrìguez Fernàndez, *Sindicalismo y negociación colectiva 4.0*, in *TL*, 2018, 144, p. 27.

[24] Art. 5 Ley 10/2021. See Monereo Pérez, López Vico, *El Teletrabajo tras la pandemia del Covid-19. Una reflexión sobre su ordenación y normalización jurìdica*, Ediciones Laborum, 2022.

[25] See Art. 88, *Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales* and Art. 20.*bis* ET; Art. 18 *Ley* 10/2021. Barrio Andrés, *Garantía de los derechos digitales en la LOPDGDD*, in López Calvo, *La adaptación al nuevo marco de protección de datos tras el RGPD y la LOPDGDD*, Wolters Kluwer, 2019, p. 217; Barrios Baudor, *El derecho a la desconexión digital en el ámbito laboral español: primeras aproximaciones*, in *Rev. Ar. Doc.*, 2019, 1, p. 16; Sànchez Castro, *El derecho de desconexión digital, el revés de la aplicación de nuevas tecnologías sobre la relación laboral*, in *Noticias Cielo*, 2019, 3; Sierra Hernaiz, *El papel de la negociación colectiva en el tratamiento de los datos personales de los trabajadores*, in *TL*, 2020, 152, p. 115; Vega Ruiz, *Revolución digital, trabajo y derechos: el gran reto para el futuro del trabajo*, in *IUSLab*, 2019, 2.

[26] *Decreto ley* 22 September 2020 No. 28, *de trabajo a distancia*; *Real Decreto ley* 29 September 2020 No. 29, *de medidas urgentes en materia de teletrabajo en las Administraciones Públicas y de recursos humanos en el Sistema Nacional de Salud para hacer frente a la crisis sanitaria ocasionada por la COVID-19*. See also *Real Decreto-ley* 11 May 2021 No. 9, *por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales*; *Ley* 9 July 2021 No. 10.

[27] Arts. 11 and 12 *Ley* 10/2021.

[28] Art. 19 *Ley* 10/2021.

5. *Union rights within the undertaking. The link with a "material workplace"*

Unions have the right to hold periodic meetings; the right of assembly or to provide advice in some situations; information rights in certain subject and, finally, consultation rights[29]. Material workplace is also required to ensure these union rights within the undertaking. For this reason, the information and consultation rights (Art. 64 ET), the rights to hold a meeting (Arts. 77-80) and to a notice board (Art. 81 ET), as well as the guarantees in the representative activities (Art. 68 ET) will require adaptation to digital platforms characteristics.

The exercise of these rights could be ensured through a digital space; by replacing in this way material workplace. In this regard, Spanish Courts have several times addressed the issue of the possibility of using digital devices. For example, in the Judgement 13 December 2005 No. 281 the Constitutional Court recognized the right to use these communication tools and ruled that "it would be constitutionally legitimate that the company predetermines the conditions of use of electronic communications for unions purposes". This ruling also supports the thesis according to which the company digital tools used for unions purposes cannot entail additional burdens for the employer and cannot significantly aggravate the costs.

The issue also emerged in the field of remote working, where the legislator introduced a reform aimed at ensuring all collective rights, especially information rights. Indeed, Art. 19.2 RDL 28/2020 provides that remote workers are entitled to access to all collective rights. The company must provide the necessary means, including access to communications and electronic addresses, and the implementation of a virtual notice board. However, the "compatibility with the provision of remote work" is the limit.

In this field, the *Real Decreto-Ley 9/2021* and the *Ley* 12/2021 made progress, modifying Art. 64 ET and introducing an information right for the workers representation in the field of employee's algorithm. Indeed, a new paragraph is introduced in Art. 64.4 ET[30]. According to the current article 64.4 ET, the *Comité de empresa* will have the right to: "d) Be informed of algorithms or artificial intelligence systems affecting working conditions or the access to employment, or the continued work, including profile building.

[29] Arts. 64 and 77 ff. ET; Art. 8 LOLS.

[30] See Baylos Grau, *L'accidentato viaggio dei riders in Spagna. Analisi della legge 12/2021*, in *LLI*, 2022, 1.

So, the reform is aimed at regulating workers' representatives right to information in a digitised working environment[31]. It is important to point out that the new Art. 64.4 scope includes all digital platforms. The legislator directs his attention to the algorithms, especially because alterations and evasion of labour rights through digital mechanisms are taking place outside the traditional scheme of workers participation within the undertaking.

It is an innovative approach because this Article allows a "democratic" interference in management decisions. However, this right is collocated at the "weakest" level of participation, referring to the information rights, rather than the most incisive duty of consultation.

6. *Right to strike. Current Challenges*

The right to strike is guaranteed by Art. 28.2 SC[32] and it is regulated by *Real Decreto Ley* No. 17 of 4 March 1977. The latter is a pre-constitutional Act, and it was interpreted in accordance with constitutional principles by the Constitutional Court in Judgement 8 April 1981 No. 11. The latter rules that "strike is a disturbance which occurs during the normal course of social life and in the process of production of rights and services, carried out in a peaceful and non-violent manner, by a group of workers. In this wider sense strikes may be designed to claim improvements in the financial or general working conditions and may presuppose a protest with repercussions in other spheres or areas"[33]. In Spanish legal system the strike is qualified as an individual subjective right, which can be performed only collectively by an association, group, or organisation[34]. According to Art. 28.2 SC only employees are entitled to it, and this is closely linked to union freedom and collective bargaining right. From a practical point of view, unions could achieve effective collective bargaining just through the exercise of their right to strike[35].

[31] On the information right Monereo Pérez; Ortega Lozano, *Libertad de información y nuevas tecnologias*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 377. See Const. Court 21 January 1988 No. 6; 15 December 1983 No. 120; 9 July 1986 No. 88.

[32] Art. 28.2 Const. states that the law regulating the exercise of this right shall establish the guarantees necessary to ensure the maintenance of essential community services.

[33] The translate is the official one, available in tribunalconstitucional.es.

[34] Const. Court 28 September 1992 No. 92.

[35] Monereo Pérez, Ortega Lonzano, *El derecho de huelga. Configuración y régimen juridico*, Aranzadi, 2019.

At constitutional level there is a distinction between the ownership of the right, belonging to workers, and the entitlement to exercise it. Only unions are entitled to exercise the right to collective action. In this perspective, we are dealing with an instrumental right to the safeguard of collective interests. For this reasons, members of organisations not recognised as unions or workers who are not members of any organisation have no legal right to take collective action[36].

Some problems for the exercise of this right by platform workers are evident. There are difficulties in convening and holding an assembly to submit the decision to strike: considering the lack of a material space shared by the workers to debate and to vote on this relevant decision. Indeed, there is not a legal possibility of holding the meeting in a virtual way.

Additionally, only the *Delegados de Personal* or *Comité de empresa* can convene assembly, or no less than thirty-three percent of workers (Article 77 ET); in the case of digital platforms, it is very difficult to know the number of workers to consider, as everyone moves individually. Furthermore, the problem of the bogus self-employed could lead to exclude some workers.

Moreover, the simple majority on secret vote is required to proclaim the strike (Art. 3.2.b RDL 17/1977). So, it is required a virtual assembly that guarantees the anonymous vote and workers' rights in the field of protection data (in accordance with Arts. 6 and 9 of Regulation (EU) 2016/679 of 27 April 2016). Therefore, if a strike is declared through a mobile application, such as Whatsapp, without any prior agreement, it must be declared illegal, with the consequence that the dismissal of a worker who actively participates in it cannot be declared null[37].

Another important issue concerns the chance, for the employer, to avoid the limits on the strikebreaking, using self-employed or even electronic devices[38]. Indeed, on the one hand, the strike effectiveness is compromised due to digital work characteristics. It is easy to replace the striking workers in a context where workers provide their service on a competitive basis, with an

[36] Perán Quesada, *Cuestiones crìticas del ejercicio del derecho a huelga en el contexto de la economìa digitalizada*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *cit.*, p. 89.

[37] Fita Ortega, *cit.*, p. 161.

[38] Perán Quesada, *Cuestiones crìticas del ejercicio del derecho a huelga en el contexto de la economìa digitalizada*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 89.

individualistic spirit. In other terms, the entrepreneur could rely on many workers willing to accept a temporary provision of services[39].

On the other hand, practically, technological devices use allows to continue an economic activity without directly occupy other workers, avoiding the strikebreaking prohibition and at the same time cancelling or reducing the effects of the strike[40].

Consequently, in a context where humans and machines are closely intertwined this right is weakened. Digital platforms help to continue economic activity promoting the use of technology during the strike[41]. This problem could not be solved from the strikebreaking prohibition introduced by Art. 6.5 RDL 17/1977, because the latter is obsolete.

Constitutional jurisprudence ruled on the strikebreaking limits several times. Originally, only the "external" strikebreaking was forbidden; that is to say the replacement with workers not hired by the company during the strike. This principle was extended to the procurement and subcontracting cases (s.c. "*esquirolaje impropio*")[42]. Moreover, the prohibition of functional and geographical mobility[43] during the strike is debated[44]. Nevertheless, according to the Constitutional Court, "primacy of the right to strike produces, during its exercise, the effect of reducing and in a certain way anesthetizing, paralyzing, or maintaining in a vegetative, latent life, other rights that in normal situations can and should display their full potential capacity (s.a. the s.c. '*jus variandi*')"[45]. In a broad sense, the Constitutional

[39] Fita Ortega, *cit.*, p. 139.

[40] See also Rota, *Il crumiraggio tecnologico: una lettura comparata*, in *LLI*, 2018, 4.

[41] Aguilar Del Castillo, *El uso de la tecnología y el derecho de huelga: realidades en conflict*, in *LLI*, 2018, 1; Perez Rey, *El Tribunal Constitucional, ante el esquirolaje tecnológico (o que la huelga no impida el futbol)*, in *Der. Soc.*, 2017, 77, p. 151; Tascon Lopez, *El esquirolaje tecnologico*, Aranzadi, 2018; Sala Franco, *Los mecanismos empresariales de defensa frente a una huelga*, in Borrajo Dacruz (ed.), *Controversias vivas del nuevo Derecho del Trabajo*, La Ley, 2015.

[42] Const. Court 18 November 2010 No. 75.

[43] Const. Court 28 March 2011 No. 33; 28 September 1992 No. 92.

[44] Alzaga Ruíz, *La sustitución interna de los trabajadores huelguistas: un supuesto de vulneración del derecho de huelga*, in *Comentario a la STSJ Cataluña 16 de Abril de 2002 (AS 2002, 1847)*, in *ASoc*, 2002, 2; Pérez Rey, *El esquirolaje tecnológico: un importante cambio de rumbo de la doctrina del Tribunal Supremo (STS de 5 de diciembre de 2012)*, in *Der. Soc.*, 2013, n. 61; Pérez Rey J., *El Tribunal Constitucional, ante el esquirolaje tecnológico*, cit., in *Der. Soc.*, 2017, n. 77; Todolí Signes, *El esquirolaje tecnológico como método de defensa ante una huelga (1)*, in *AL*, 2014, 7-8; Toscani Giménez, *La prohibición de esquirolaje durante la huelga con especial mención al esquirolaje tecnológico*, in *Tr. Der.*, 2017, 30, p. 1.

[45] Const. Court 28 September 1992 No. 123; 21 March 2002 No. 66; 19 June 2006 No. 183.

Court prohibits any behaviour undermining strike effectiveness. Nevertheless, there are opposite Court rulings that create ambiguity, interpreting in a restrictive sense the internal strikebreaking[46], even in the matter of technological strikebreaking. The Constitutional Court ruling 2 February 2017 No. 17 states that strikebreaking prohibition does not includes companies' technological devices use[47]. The Court focuses exclusively on the legitimacy of this behaviour, ignoring the perspective adopted in Judgement No. 123/92. According to the Constitutional Court, the use of technical instruments available in the company is legitimate: the right to strike is not aimed at prohibiting to carry out a productive activity that could potentially compromise the achievement of the strike objectives; as well as it does not oblige the other workers to contribute to the success of the protest. "The Constitution guarantees the right to carry out the strike, not the result or the success of it"[48].

However, the analysis does not consider the effects on the essential content of the right to strike. That Judgement, basing only on the existence or the absence of a legal precept, risks to nullify the enjoyment of the strike.

7. *Collective rights of self-employed*

Until now attention has been paid to employers. However, it is important to say that digital work is often provided by self-employed (or bogus self-employed) and by economically dependents self-employers (s.c. *TRADE*). The legislator introduced the subordinate presumption for delivery workers, and then faces in some ways the problem of bogus self-employed.

The issue of collective rights of genuine self-employed remains open,

[46] The analysis of national case law in Alzaga Ruíz, *cit.*, p. 2261.

[47] This ruling closes an open debate between the Constitutional Court and the *Tribunal Supremo*. See *Tribunal Supremo* 27 September 1999 No. 7304; 4 July 2000 No. 75; Const. Court. 19 June 2006 No. 183 and No. 191; *Tribunal Supremo* 11 June 2012 (*Rec.* 110/2011) and 5 December 2012 (*Rec.* 265/2011); *Tribunal Supremo* 30 April 2013 (*Rec.* 2465/2012). See Lopez Lluch, *El derecho de huelga: nueva doctrina sobre el "esquirolaje tecnológico" en la STS de fecha 5 de diciembre de 2012*, in *AD*, 2013, p. 15; Pérez Rey, *Tertulias, reportajes de actualidad y esquirolaje tecnológico en la huelga general (a propósito de la STS de 11 de junio de 2012)*, in *Der. Soc.*, 2012, 59, p. 195; Pérez Rey, *El esquirolaje tecnológico*, cit., p. 163; Pérez Rey, *El Tribunal Constitucional*, cit., p. 15.

[48] Const. Court No. 11/1981; No. 72/1982; No. 41/1984; No. 189/1993; No. 41/2006.

especially if they are economically dependents. These rights are regulated by Art. 19 ff. of *Estatuto del Trabajo Autónomo* (*Ley* No. 20 of 11 July 2007, LETA). This Article covers the fundamental collective rights of self-employed (*derechos colectivos básicos*). It includes the right to establish a federation, confederation or union. By contrast, according to an individual perspective, the self-employed who has not employees has: the right to join a union or business association under conditions laid down by the law; the right to set up professional associations of self-employed (*asociaciones profesionales específicas de trabajadores autónomos*), without prior authorisation[49]; the right to take collective action to defend their professional interests.

Regarding the procedures for setting up the associations and their functioning, the *Ley Organica* No. 1 of 22 March 2002 requires the respect of the Constitution and of the laws. Their internal organization and their functioning must therefore be inspired by democratic principles, in full respect of pluralism (Art. 2, par. 4 and 5), avoiding that the status of association member makes a reason of discrimination.

However, Art. 3.1 LOLS provides that self-employed without employees may associate but cannot set up unions whose goal is to protect their singular interests. Nevertheless, they could set up specific professional associations under special legislation[50].

Despite these legal provisions, there are structural difficulties for the exercise of union action. Indeed, self-employed are considered as entrepreneurs from the perspective of Competition Law, and this will hinder the exercise of their union rights[51].

Indeed, the right to defend self-employed interests derives from Article 22 SC[52], rather than from the freedom of association. In other terms, it is a collective protection with a conflictual resonance, different from the union representation and which, although it cannot be legally considered as the

[49] See Arts. 2 LO 1/2002 ff.

[50] Lousada Arochena, *Derechos colectivos en el trabajo autónomo*, Ed. Bomarzo, 2010, p. 31; Moreno Vida, *Los instrumentos de «presión colectiva» y su singularidad en el trabajo autónomo*, in Monereo Pérez, Vila Tierno (eds.), *El trabajo autónomo en el marco del Derecho del Trabajo y de la Seguridad Social: Estudio de su régimen jurídico. Actualizado a la Ley 6/2017, de 24 de octubre de Reformas Urgentes del Trabajo Autónomo*, Editorial Comares, 2017, p. 633; Todolí-Signes, *Workers, the Self-employed and TRADEs: Conceptualisation and Collective Rights in Spain*, in *ELLJ*, 2019, 10, 3, p. 254.

[51] García Murcia, *Los derechos colectivos del trabajador autónomo*, in *AL*, 2009, 9, p. 3.

[52] Todolí-Signes, *Workers, the Self-employed and TRADEs*, cit., p. 260.

strike, excludes contractual liability for non-compliance with the contractual commitments undertaken towards its customers.

That right and the strike are on a different constitutional level[53]. In Judgement No. 11/1981, the Spanish Constitutional Court clarifies that: "the right to strike is ensured to workers who provide remunerated work if its exercise is aimed at renegotiating working condition. The Art. 28 SC makes a very clear connection between constitutional recognition and the idea of obtaining financial and social equality. We are not facing the strike as protected by Art. 28 SC in case of disruptions to the production of goods and services or in the normal operation of the latter, aimed at pressurising the Public Authorities to ensure governmental measures or to introduce new measures, more favourable, for the interests of a category (for example, employers, services concessionaries etc.). A strike is characterised by the strikers deliberate wish to suspend their work obligations. The constitutional right to strike is granted so that workers may temporarily suspend their legal and contractual obligations. Here there is an important difference between the strike constitutionally protected under Art. 28 and the right to suspend other activities. In the case of business or professional activity there is the freedom to suspend it, but there is no guarantee against the consequences of the disruptions"[54].

Based on the same logic, the Spanish system recognizes the right to negotiate to self-employed, if they are employers, but it is not considered as a tool to improve or regulate their working conditions. The right to negotiate is an employer prerogative, opposed to the collective bargaining right.

Regarding self-employed, no employers, the right to collective bargaining is not ensured[55]. Self-employed associations are not qualified as unions. Their collective action instruments (negotiation, conflict) are not protected by the fundamental right of freedom of association recognized by Art. 28.1 SC. Obviously, different negotiation right scope is justified by the inexistence of a counterparty, against which it is possible to exercise collective rights (collective bargaining, strike and conflict)[56].

[53] Self-employed have not the right to strike and so they have no guarantee in case of retaliatory behaviour, except in the case of judicial assessment of employment relationship. See for example *Tribunal Supremo* 25 September 2020 No. 805.

[54] The translate is the official one.

[55] Rodríguez Rodríguez, *The Right to Collective Bargaining of the Self-Employed at New Digital Economy*, in *HLL*, 2020, 2, p. 41.

[56] Const. Court 29 July 1985 No. 98.

8. *Collective rights of economically dependent self-employed (TRADE)*

According to the LETA, economically dependent self-employed workers (TRADE, *trabajadores autónomos económicamente dependientes*)[57] could be members of a union and they could be in the scope of Art. 28.1 SC and of the LOLS. Furthermore, according to Art. 22 SC, on the right of association, and to the *Ley Orgánica* No. 1/2002, their right to be a member of a professional organisation is also granted. This is confirmed by Art. 3.2 LETA, which states – with regard to professional interests agreements (*acuerdos de interés profesional*) – that "any clause in the individual contract of a TRADE affiliated to a 'union' or to a 'self-employed association' will be null and void if it infringes the terms of the professional interest agreement or professional association to which he belongs".

However, the LETA did not introduce any TRADE's unitary representation. For this reason, the possibility of joining to workers unions cannot be ignored[58]. Nevertheless, it would not imply their total equality with employed workers.

Obviously, it could imply their right to participate in their meetings, their right to information or to use the bulletin board. It is a set of essential instruments to effectively exercise the collective activity for defending their professional interests.

Even the right to collective bargaining has been extended to that group, but with substantial specificities. Professional agreements, signed between the associations or unions that represent TRADEs and the companies for which they carry out their activity, are the regulation source of TRADE's working conditions (Article 13.1 LETA). Unlike self-employed, TRADEs have a counterpart against which to exert pressure to enforce their claims. Indeed, economic dependence of these workers places them in a position of weakness with their contractual partner. As indicated in the LETA, negotiation rights also operate between these workers and their customers. Nev-

[57] The TRADE is regulated by the *Ley* 20/2007. It is considered as a self-employed who generates most of his or her income from a single client, specifically, at least 75% of that income. This circumstance creates a situation of dependence on this client aimed to protect by establishing basic rights.

[58] Trillo, *Derechos colectivos del trabajador autonomo dependiente economicamente*, in *Doc. Lab.*, 2009, 85, p. 89 ff.

ertheless, the recognition of the value of the professional interest agreements does not transfers the characteristics of collective bargaining to this area. Indeed, it is recognized the possibility of concluding agreements, but with a limited subjective efficacy. These agreements bind only the signatory parties. The most important problems arise from the provision: "Professional interest agreements shall be concluded under the provisions of the Civil Code. The personal effectiveness of said agreements 'shall be limited to the signatory parties and, if appropriate, to those affiliated to self-employed associations or signatory unions' that have expressly given their consent to do so" (Art. 13.4 LETA). This paragraph shows the real nature of professional agreements. Indeed, it is a hybrid negotiation characterised by the convergence of labour, civil, and union regulations. A special scheme is introduced. The issue seems to be complicated, because there is an essential difference from the *erga omnes* effectiveness of the collective agreements[59].

Furthermore, unlike the collective agreements' content (under Art. 85 ET), Art. 13 LETA limits the negotiation exclusively to the field of TRADEs' professional conditions, within the limits of Competition Law. These limits, which does not appear in labour legislation, are justified by the TRADE's autonomous position.

Even the levels of professional agreement are different from that of collective bargaining. It is not clear if it is possible to contract a national agreement, in the absence of jurisprudential criteria[60].

Lastly, the right to strike is still to be investigated. As for the "classic" self-employed, the right to strike has been excluded for the TRADEs[61].

However, the economic dependence imposes a wider reflection on the dualistically approach focused only on autonomous and subordinate work. In this line, the theoretical approach already adopted by the Constitutional Court in Judgment No. 11/1981 is justified because the self-employed is in a position of parity with its client. It is not the same for the TRADEs. In this perspective, it is useful to analyse an old and less-known Judgement of the Court for the defence of competition[62]. That Judgement excluded the

[59] Tyc, *Collective labour rights of self-employed persons on the example of Spain: is there any lesson for Poland?*, *Acta Universitatis Lodziensis Folia Iuridica*, 2021, 95, p. 135.

[60] Fita Ortega, cit., p. 147. See also Nieto Rojas, *Los acuerdos de interés profesional. Balance tras diez años del estatuto del trabajo autónomo*, in *RIL*, 2018, 3, p. 6.

[61] Moreno Vida, cit., p. 647.

[62] RTDC 18 February 1999, 434/98, Prensa Segovia.

sanction for a group of freelancers, newspaper boys, who refrained from carrying out their activity to force the distribution company, dominant in the market[63]. Competition authority assessed that the case presented an "asymmetrical and highly unbalanced relationship between the only provider (the Distributor) and the many small sellers that operate in it". It is logical, and not contrary to competition, that these newspaper boys are able to negotiate and to change certain working conditions unilaterally imposed. Indeed, these conditions produces frictional effects on the activity, characterized by a very strong personal involvement. It is admissible, regardless of the abusive or not behaviour of the Distributor, because "market efficiency" requires "in this case a moderation of the existing imbalance in the relations between the only one provider and the multiple small freelancers"[64]. Projected into modern times, these reflections could undoubtedly be made for all digital freelancers.

For this reason, it is necessary to review the considerations on the strike of independent, self-employed or professional workers, developed by the Constitutional Court Judgement No. 11/1981 of 8 April: in particular in the statement that "Here there is an important difference which separates the strike constitutionally protected by Art. 28 and the self-employed workers' strike. The self-employed in a broad sense are workers, but they are not employed workers with a salaried work contract". If it is true for "classic" autonomous workers, it is not the same for the TRADEs. It is no longer possible to argue that for this category the "strike" is simply tolerated. It must be recognized and protected as a right. For this reason, it is necessary to recognise entirely and effectively all measures referred to in Art. 19 LETA, as well as the right to strike[65].

9. *Some comparative conclusions*

As seen to date, digital work brings up old and new problems in the trade unions system. After reconstructing the problems of Spanish Collective Labour Law, it is interesting to conclude with some suggestions, considering the Italian debate on the highlighted issues.

[63] Göerlich Peset, *Digitalización y derecho de huelga*, in *TL*, 2020, 155, p. 93 ff.
[64] RTDC 434/98, Prensa Segovia.
[65] Fita Ortega, *cit.*, p. 166 ff.

Indeed, the Spanish case helps to reflect on a different way, in comparison to the Italian way, of regulating all union rights.

A comparison between the Italian system and the Spanish one helps to perceive that the lack of implementation of Art. 39 Italian Constitution makes it a more resilient union system, despite the continuous challenges of labour market. It is confirmed by the collective agreement on industrial relations reached by Amazon and the unions in Italy on 15 September 2021, and by the other collective agreements containing digital union rights also at plant level[66]. In a system still characterized by a low level of rules, the unions consolidated their activity in a dynamic way[67]. Nevertheless, in practice, this dynamism does not exclude a high risk of yellow unions[68] or a difficulty to introduce adequate representativeness criteria. On the contrary, Spanish legislative framework risks paralysing union activity, especially as regard representativeness criteria and collective rights ownership. It even risks frustrating the right to collective bargaining in the absence of an adequate and democratic digital representative model, entirely independent of a material workplace. However, it is not simple to introduce a new representative system, because Spanish model is inspired by a proximity criterion: starting from the plant level and projecting itself to the national level. On the other hand, for part of literature this is a structure also desirable in the Italian system[69].

But, certainly, some issues of the Spanish system need to be emphasized, because they are very innovative, and they respond to European demands. First, it is important to pay attention on the primary role given to unions through the information right in case of algorithm use impacting on working conditions[70]. As it is known, algorithmic work management is one of

[66] See Italian *CCNL "Lavanderie, tintorie, industria, artigianato*" of 28 February 2022.

[67] Regalia, *Note sul Protocollo Amazon per la definizione di un sistema condiviso di relazioni industriali,* in *LLI*, 2022, 2. See also Centamore, *I Protocolli Amazon e la "moderna" concertazione sociale*, in *LLI*, 2022, 2.

[68] See, among others, *Tribunale Firenze* 24 November 2021 No. 781; *C. App. Palermo* 23 September 2021; *Tribunale Bologna* 30 June 2021; *Tribunale Milano* 28 March 2021; *Tribunale Firenze* 9 February 2021. Among other, Cordella, *Le relazioni sindacali nel settore del food delivery: la prospettiva interna*, in *LDE,* 2022, 1; Donini, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto*, in *LLI*, 2021, 1, p. 1; Ferraresi, *Qual è la categoria contrattuale relativa al "food delivery"?*, in *Labor*, 2022, 1; Martelloni, *Riders: la repressione della condotta antisindacale allarga il suo raggio*, in *LLI*, 2021, 2.

[69] Carrieri, *Primo di tutto le relazioni industriali*, in *DLRI*, 2021, 4, p. 585.

[70] Borelli *et al.*, cit., *Contrattazione dell'algoritmo*, p. 44.

the most sensitive matters, because raises the issue of balancing between the economic freedom and the high risk of discrimination or damaging privacy. It determines the essential conditions of the employment relationship in a way not necessarily transparent. In this perspective, Spanish legislative framework already pursues one of the aims of European Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work: that is to say the objective of ensuring fairness, transparency, and accountability in algorithmic management by introducing new material rights for people performing platform work[71].

It is appreciable that in this area the legislator tries to strengthen worker participation, albeit only through the information, rather than the consultation. Indeed, digital changes require a general rethinking of the unions' role[72] and Spanish legislator takes an important first step in this direction. Italian legal system could be inspired by this model, given that now the main way for Italian unions to claim rights and to protect workers in these areas is to apply to the courts[73], with all the limitations that this involves. In Italy the right to information and the participation of workers are still undervalued, except for certain topics[74]. For this reason, a theory that emphasises the role

[71] COM(2021) 762 final. See also *European Pillar of social rights Action Plan* and Directive (EU) 2019/1152, on transparent and predictable working conditions and *European Framework Agreement on the digitalization of work* of 22 June 2020 signed by BusinessEurope, ETUC, CEEP and SME united to support the successful digital transformation of Europe's economy and to manage its large implications for labour markets, the world of work and society at large. This topic cannot be discussed here, but see among the most recent, Bronzini, *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell'"umanesimo digitale"*, in *LDE*, 2022, 1; Gaudio, *Alghoritmic Management, sindacato e tutela giurisdizionale*, in *DRI*, 2022, 1, p. 30 and the references referred to therein; Isceri, Luppi, *L'impatto dell'intelligenza artificiale nella sostituzione dei lavoratori: riflessioni a margine di una ricerca*, in *LDE*, 2022, 1.

[72] See Treu, *Diritto del lavoro e transizione digitale: politiche europee e attori sindacali*, in *DRI*, 2022, 1, p. 18.

[73] An example is given by the "class action" promoted by CGIL before the Milan Court: https://www.cgil.it/la-cgil/aree-politiche/contrattazione-e-mercato-del-lavoro/2021/08/17/news/rider_cgil_presentata_la_prima_class_action_in_materia_di_lavoro-1409744/. On the legal action as collective self-defence see Lassandari, *L'azione giudiziale come forma di autotutela collettiva*, in *LD*, 2014, 2-3, p. 309.

[74] On worker's participation D'Antona, *Partecipazione dei lavoratori alla gestione delle imprese*, in *EGT*, vol. XXII, 1990, 2; Mengoni, *I limiti ai poteri dell'imprenditore: confronto tra il modello dello Statuto dei Lavoratori e il modello dell'art. 46 Costituzione*, in mazzoni et al., *La posizione dei lavoratori nell'impresa. Conflittualità o partecipazione responsabile?*, Franco Angeli, 1977, p. 152; Pedrazzoli, *Partecipazione, costituzione economica e art. 46 della Costituzione. Chiose e distinzioni sul*

of company-based trade unions in Italy must be supported. In other terms, the Law, relying on Art. 19 and Art. 35 of Law No. 300 of 20 May 1970, should support both a more specific unions negotiating function and an information and consultation procedure in this field[75].

The second, no less important, issue concerns the TRADEs collective rights. Their entitlement of collective rights, also at the plant level, is an important first step: especially in a digital system, characterised by a wide spread of self-employed and precarious workers. This acknowledgement is even more important than the recent introduction of the subordination presumption for the riders. Unlike Art. 2 of Italian Legislative Decree No. 81 of 15 June 2015, Spanish legislative framework gives dignity to a specific category of workers, without drawing them into the area of subordination to provide minimum protection.

It would be very important starting from these principles to guarantee a uniform minimum protection and to overcome the traditional problem of digital workers qualification.

However, it cannot be overlooked that in Spain the problem relating to the relationship between Labour Law and Competition Law for the self-employed – already known at European level[76] – is also significant: impacting on the right to strike and especially on the subjective effectiveness of professional agreements. As seen, to avoid competition distortion, the strike is only tolerated, and the effectiveness of the agreements is limited to the signatory parties. It is evident that there is a strong weakening of the right, considering that Spanish system is characterized by collective agreements "*erga omnes*".

declino di un'idea, in *RIDL*, 2005, I, p. 427; Zoppoli L., *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, in *DLRI*, 2005, p. 347. Most recently, Ales, *La partecipazione (bilanciata) nello Statuto dei Lavoratori: riflessioni sulle rappresentanze ex art. 9*, in *DLM*, 2020, 1, p. 15; Bavaro, *Appunti sul diritto del potere collettivo del lavoro*, in *LD*, 2021, 3-4, pp. 563-582; Guarriello, *La concertazione: prospettive euro-unitarie*, in *DLRI*, 2021, 4, p. 703; Lunardon (eds.), *Conflitto, concertazione e partecipazione*, Cedam, 2011, p. 780.

[75] Faioli, *Data Analytics, robot intelligenti e regolazione del lavoro*, in *Federalismi.it*, 2022, 9, p. 164.

[76] On this topic Monda, *Tutele collettive e riders: quali vincoli dal diritto euro-unitario?*, in *LDE*, 2022, 1.

Abstract

The Article deals with the Spanish trade union system in a critical perspective. The A. describes the legislative framework on unions' freedom, right to strike, union rights within the undertaking, and collective bargaining rights, with reference also to the minimum trade union rights granted to self-employed. After the regulatory reconstruction, the A. identifies its strengths and weaknesses. Analysing that system, with its peculiarities, provides an opportunity to reflect on the "state of the art" of the Italian system.

Keywords

Technological revolution, platform economy, unions, collective bargaining, right to strike, technological strikebreaking.