Chapter 18
Collective bargaining and AI in Spain

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1. Introduction: the regulatory context for collective bargaining related to AI

1.1 The 'Riders' Law'

Law 12/2021 of 28 September, whereby Estatuto de los Trabajadores (ET; Workers' Rights Statute) was amended to guarantee the labour rights of people engaged in distribution and delivery through digital platforms, better known as the 'Riders' Law', is the epitome of Spanish legislation with respect to how the digital transition and its associated forms of employment are handled.

From the very outset, the Law's Explanatory Memorandum clearly highlights the interaction between the regulation of work on app-based delivery platforms and the advance of technology (coverage of the Law in this particular area relates specifically to 'persons who provide remunerated services consisting in the delivery or distribution of any consumer product or good'). The most significant points of this interaction are emphasised by the Law's insistence on the compatibility between technological progress and the protection of workers' rights and, at the same time, by its coverage also of the consequences of algorithmic management, in which area the Law extends to all kinds of companies and not just delivery platforms. Law 12/2021 therefore considers that making technological advance compatible with worker protection is: 'the formula (…) for ensuring that the positive effects from the technological revolution are distributed equitably and that this revolution is of benefit to the advancement of society'. In conjunction with this, the social partners and the legislature must pay special attention to algorithmic management, not only due 'to the changes that are being introduced to the management of business services and activities (and) to all aspects of working conditions', but also because 'such alterations are taking place aside of the traditional scheme of participation by the employees of a company'. Ultimately, the relationship between the digital transition and its impact on the world of work is what supports and gives overall meaning to the Law:

> … one of the other reflections shared at the social dialogue round table [is that] we cannot ignore the impact of new technologies in the labour environment or the need for labour legislation to take into account these repercussions, not only on the collective and individual rights of workers but also on competition between companies.

This shared understanding of the advance of technology and its consequences for work could be the reason why agreements have been reached as a result of social dialogue in Spain on the regulation of subjects as controversial as digital platform work and algorithmic management, unlike in other parts of the European Union (EU) and other countries which have taken initiatives on these issues.[1] And it is not insignificant that this all took place during the social dialogue on tackling the Covid-19 pandemic considering that, as the Explanatory Memorandum of Law 12/2021 states, 'despite the enormous difficulties represented by tackling this challenge, especially the technical difficulties, social dialogue has allowed our country to be a pioneer in advancing on this subject, which it does together with a diagnosis and a shared solution by the social partners.'

Consequently, the regulation of work on app-based delivery platforms or, rather, the presumption that work on app-based delivery platforms is employed work and not engaged in on a freelance basis, has been the product of social dialogue and of governance by the social partners in the digital transition. There is no official data but, according to the available estimates, Spain is the EU country with the highest percentage of platform workers (Urzí Brancati et al. 2020: 14-15) and it seems that the 'platformisation' of the Spanish economy shows no signs of stopping. That explains the particular relevance of why the social partners in Spain have taken charge of governing this phenomenon. But what is most notable, for the purposes of this chapter, is that Law 12/2021 also regulates algorithmic transparency and that, regarding this issue, there has also been agreement through the social dialogue.

In accordance with the revised Article 64(4)(d) ET, worker representatives have the right to be 'informed by the company about the parameters, rules and instructions that form the basis of the algorithms or artificial intelligence system that affect decision-making that could have an impact on working conditions and on access to and keeping a job, including profiling.' This algorithmic transparency rule opens up a whole realm of possibilities for the participation of workers in areas that were previously part of corporate prerogative and that, therefore, were essentially beyond their reach.

In truth, this rule affects the 'soft' part of the possible participation of worker representatives given that Article 64(4)(d) only makes mention of the right 'to be informed', meaning that a company should inform worker representatives of the main aspects of algorithmic decisions. And it is also true that this right is imprecisely set up regarding the form, time and actual content of the information: what those 'parameters, rules and instructions that form the basis of the algorithms or artificial intelligence system' actually consist of is something that, at the very least, is foreign to the traditional jargon of labour relations. Finally, it is likewise true that this right to information about algorithmic decisions is accompanied neither by the right of employees (other than worker representatives) to be informed about the algorithmic decisions that affect them (although this is already guaranteed by the application of Articles 13(2)(f), 15(1)(h) and 22 of the General Data Protection Regulation) nor by an assessment of the decisions adopted as a result of the application of algorithms in order to check if they are biased or causing discrimination (Ginés i Fabrellas 2021).

1. These initiatives can be consulted in the summary provided by the International Labour Office (ILO 2022: 31-33).

Despite previous, well-founded objections in the specialist literature, the reality is that the recognition of this right opens up an unprecedented check on corporate prerogative. Reviewing the ET and other labour laws shows that the lawfulness of any business decisions that are made can be subject to control, but always after the fact. Furthermore, up to now, the reasons upon which such decisions were based were a kind of 'black box' rooted in corporate prerogative. Now, if the business decisions in question affect working conditions, access to employment or keeping a job, including profiling, and those decisions have been adopted using algorithms or AI systems, then, as required by Article 64(4)(d) ET, worker representatives have the right to know the ultimate reasons for them, not just whether they comply with the law. This right to algorithmic transparency opens up the black box to a certain extent, allowing worker representatives to see inside and, most importantly, to utilise what they see to guarantee that the business decisions in question do not cause bias or differentiated treatment without justification. This cannot be done regarding business decisions that are made without using algorithms (there is no way to look inside the heads of people who make the corresponding decisions), which will therefore create differences regarding the control of business decisions by worker representatives depending on whether or not such decisions are automated (Rodríguez Cardo 2022: 167).

This is what is meant by knowing 'the parameters, rules and instructions' that form the basis of algorithmic decisions. It does not mean access to the source code of an algorithm, which could even be protected by industrial confidentiality, while knowledge of that code would require worker representatives to have programming-related skills that they often do not possess. However, the algorithmic transparency referenced in Article 64(4)(d) ET does, first of all, allow having the knowledge that a company, through the use of algorithms, is making decisions that affect 'working conditions and on access to and keeping a job, including profiling.'

It should be clarified that the use of an algorithm does not relieve a company of its accountability related to such decisions. An algorithm is nothing more than a tool used by a company to make those decisions, but it does not substitute a company's will or power. Some expressions that are very much in vogue, such as 'your boss is an algorithm' (Aloisi and De Stefano 2022), could lead to confusion in this regard. The 'boss' continues to be the company that is making the decisions that affect its employees, while the algorithm is nothing more than a software tool it uses as part of the process.

Algorithmic transparency encompasses the parameters, rules and instructions or, in other words, the knowledge of an algorithm's operating logic, characteristics and consequences. More specifically, worker representatives have the right to know the following: (a) the variables used by an algorithm and whether or not they include personal data; (b) the weight of each variable in the decisions that are made; and (c) the rules and instructions (programming rules) used by the algorithm (Galdón Clavell et al. 2022: 13).

Worker representatives should have this information at a timely moment. All the aforementioned is useless if worker representatives are kept on the sidelines and only learn it after algorithmic decisions have already being made. If this happens, then the

purpose of algorithmic transparency cannot be met. It is not about knowing for the sake of knowing; rather, it is about avoiding the certain risks caused by algorithmic decisions. Algorithms have substantial potential to perpetuate discrimination in terms of the selection of the data with which they are fed and/or through the programming rules that are followed (Bernal Santamaría 2020). Therefore, only by knowing, in advance, how those data are selected and processed can such discrimination be prevented (Gómez Gordillo 2021: 179). Moreover, this would be in accordance with the mandate of Article 64(6) ET which requires that information be provided 'at a time, in a manner and with the content [...] such that worker representatives can examine it adequately', and in accordance with the content of Article 64(5)(f) ET which gives worker representatives the right to issue a report prior to the execution of decisions by a company regarding 'the implementation and review of work organisation and control systems' if they are operated using algorithms.

1.2 The Charter of Digital Rights

On 14 July 2021, the Charter of Digital Rights was presented in Spain, laying out citizens' fundamental digital rights. Regarding the use of algorithms and AI systems in the workplace, the Charter sets down several provisions. Section XIX.6, which establishes the guarantees related to the use of algorithms, states that:

> ... the development and use of algorithms and any other equivalent procedures in the work environment will require an impact assessment related to data protection. The analysis thereof will include the risks related to the ethical principles and rights pertaining to artificial intelligence contained in this Charter, and it will particularly include the gender perspective and the prohibition of any discrimination, both direct and indirect (...).

The ethical principles and rights pertaining to artificial intelligence are defined in Section XXV.1 which states that 'artificial intelligence must ensure a human-centric vision and the inalienable dignity of people; it will pursue the common good and it will comply with the do no harm principle.' In addition to this are the provisions of Section XXV.2.b, which sets out that 'during the development and lifecycle of artificial intelligence systems (...), the conditions of transparency, auditability, explainability, traceability, human supervision and governance will be established.'

As can be seen, the provisions of the Charter of Digital Rights go beyond the provisions of Law 12/2021 with respect to algorithmic transparency. The Charter of Digital Rights requires there to be an 'impact assessment' of the use of algorithms which must take into account the gender perspective which is not included in Article 64(4)(d) ET. At the same time, the impact assessment must likewise take into account the ethical principles and rights related to artificial intelligence that are established in the Charter including, among others, some that are as crucial as the human-centric vision and the 'do no harm' principle, as well as the auditability of algorithms. This is also not present in Article 64(4)(d) ET; if it were, it would serve to define more accurately the duty of algorithmic transparency contained in that Article.

The problem, however, is that the Charter's provisions lack legal effect. The Charter itself acknowledges this point:

> Prior Considerations: the nature of the Charter is not regulatory, rather its objective is not only to acknowledge the very recent application and interpretation challenges represented by the adaptation of rights to the digital environment, but also to suggest principles and policies that refer to this new context.

The only thing that the Charter seeks to do is describe a scenario that facilitates the adoption of public policies whose purpose is to protect fundamental rights from the onslaughts they face from the progress of digitalisation (De la Sierra 2022: 49-50). Without such public policies, the Charter has no legal effectiveness whatsoever. As such, in accordance with the provisions of Section XXVIII of the Charter, the government has to adopt 'the appropriate measures, within the scope of its jurisdiction, to guarantee the effectiveness of this Charter'. Even so, the symbolic value of the rights included in the Charter should be noted, as well as the possibility that they could serve as guiding principles for a better interpretation of existing rights and institutions, particularly the right to algorithmic transparency.

2. Collective bargaining experiences related to AI in Spain

While the subject of AI is not covered in the first collective agreements in the world related to platform workers (Rodríguez Fernández 2022), two pioneering experiences can be identified in collective bargaining in Spain related to the consequences of AI at work. The number of collective agreements that include this subject can only increase, however. Currently, just 9.6% of Spanish companies use AI (INE 2023), but in Spain's 2025 Digital Plan, the government has set the goal of 25% of companies using AI by that year. As the number of companies that use AI increase, the number of collective agreements that deal with its regulation will also certainly rise.

2.1 Sectoral negotiation on AI: collective agreement in the banking sector

On 29 January 2021, the XXIV Convenio colectivo del sector de la banca (24th collective agreement of the banking sector) was signed between Asociación Española de la Banca (the Spanish Banking Association) and the unions Comisiones Obreras (CCOO; Workers' Commissions), Unión General de Trabajadores (UGT; General Union of Workers) and Federación de Banca de FINE (FINE Banking Federation).[2] This collective agreement runs from 1 January 2019 to 31 December 2023 (the agreement entered into force retroactively, a fairly frequent practice in Spain).

2. Accessible as registered in Agencia Estatal Boletín Oficial del Estado (BOE) at: https://www.boe.es/eli/es/res/2021/03/17/(1).

In general, this collective agreement acknowledges that collective bargaining must play a leading role in the digital transformation processes of companies. Article 79 of the agreement states as follows:

> Given that the digital transformation is an element of company restructuring, with potential effects not only on employment but also on job characteristics and working conditions, the parties acknowledge that collective bargaining, due to its very nature and functions, is the instrument for facilitating adequate and fair governance of the impact of the digital transformation of (companies) on employment in the sector.

Note that the use of collective bargaining as a tool for tackling the consequences of the digital transformation of the banking sector is considered to be the formula for 'governing' such consequences 'fairly', meaning by taking into account the necessary balance between the interests of the company and those of workers, which do not always coincide.

Under this guiding principle, the collective agreement first regulates the framework within which teleworking in the sector takes place (Article 27). Subsequently, Article 80 regulates the digital rights of employees, setting down: (a) the right to digital disconnection; (b) the right to privacy with regard to the use of digital devices owned by the company; (c) the right to privacy regarding the use of video surveillance, sound recording and geolocation devices; (d) the right to digital education, which encompasses actions to eradicate digital gaps; and (e) a 'right regarding artificial intelligence'. This latter right has two facets. From the perspective of employees, they have the right not to be the object of decisions based 'solely and exclusively on automated variables' and not to be discriminated against by decisions that might be based exclusively on algorithms. In both cases, an employee could request the intervention of a human. From the perspective of worker representatives, there is a right to receive information about the use of algorithms or AI which, as required by Article 64(4)(d) ET, includes not only the data that are fed to algorithms and their operating logic, but also an assessment of the outcomes in order to see if algorithmic decisions are resulting in discrimination.

The preceding is in line with what was provided for in the 2020 European Social Partners Framework Agreement on Digitalisation which, regarding AI, set down that in 'situations where AI systems are used in human-resource procedures (…) transparency needs to be safeguarded through the provision of information. In addition, an affected worker can make a request for human intervention and/or contest the decision along with testing of the AI outcomes.' But the collective agreement of the banking sector goes even further and beyond the provisions of Article 64(4)(d) ET given that, together with information about data and about the operating logic of an algorithm, it requires an impact assessment of the decisions adopted through the use of AI as a means of preventing possible bias.

CCOO, UGT and FINE acknowledge that, after initiating and then defining a legal framework for exercising the right of algorithmic transparency, there has been barely any progress as regards implementation. The reason is that the substantial rises in

the cost of living that occurred shortly after the agreement was signed have diverted the priority of unions towards calling for wage increases in accordance with the rise in inflation, thereby placing algorithmic transparency and digital rights on the back burner.

Drawing on its experiences with the banking sector agreement, CCOO has been able to make general progress on this subject through two routes.[3] The first refers to the drafting of a procedure for requesting information from companies about algorithms and AI, and then a subsequent one for reporting to Inspección de Trabajo y Seguridad Social (ITSS; the Labour and Social Security Inspectorate) any breach of the duty to provide that information. There is some confusion among companies about what algorithmic transparency means, in the sense that the majority of enterprises regard that they do not have to volunteer information about the algorithms they use; rather that the information must be requested by worker representatives. No such understanding is inferred from the wording of Article 64(4)(d) ET, however – and rather the opposite: companies must provide that information without having to be prompted.

The CCOO procedure[4] includes the information that worker representatives in a company should request regarding algorithmic decisions. In particular, this information includes the following: (a) 'the preliminary design specifications, including the criteria and parameters and/or variables that have been determined for managing data'; (b) 'the final technical specifications (the pseudocode) that explain what the artificial intelligence system-algorithm does'; and (c) 'the impact assessment regarding data protection and if there is a risk related to the rights and freedoms of people, as well as the periodic assessments that are conducted regarding outcomes'. In cases when a company refuses to provide the described information, despite a request having been made, the second protocol concerns the reporting of that situation to the ITSS, causing the latter to contact the company and insist on compliance with its obligations regarding algorithmic transparency.

The second route through which CCOO is seeking to advance is via the training of company employees who are engaged in programming or the acquisition of algorithms. With this in view, it is seeking to include a standard clause in all collective agreements warning of the risks of using algorithms and how these can be dealt with:

> Any person who programs or acquires algorithms must receive training by a company to gain proper knowledge of the risks of partiality and discrimination, as well as training on adopting possible measures for reducing those risks. Algorithms must be periodically audited by independent third parties, chosen together between the company and unions, to verify that those algorithms are not

3. I would like to thank Raúl Olmos and Raquel Boto, of the CCOO Secretary's Office for Union Action and Employment, for the information they have provided in the writing of this section.

4. The history behind this is that, in October 2022, CCOO of Catalonia requested that the Glovo delivery platform provide information about the algorithms and/or AI system it used, and subsequently provided worker representatives with a procedure for requesting information on this subject from all companies (https://www.ccoo.cat/noticies/ccoo-de-catalunya-exigeix-coneixer-com-funcionen-els-algoritmes-de-glovo/). As of January 2024, however, Glovo had not delivered the information requested.

subject to partiality or discriminatory outcomes. The results of these audits will be made available to all persons who are affected by algorithmic decisions, including union representation.

For now, this clause has not been included in any collective agreement, but it will be called for in the next rounds of negotiations.

2.2 Company-level bargaining related to AI: agreement between Just Eat and CCOO and UGT

On 17 December 2021, a collective agreement was signed between Takeway Express (Just Eat) and CCOO and UGT. The term of the agreement began on the date it was signed and extended to 31 December 2023. This delivery platform, unlike others, has followed a strategy of acknowledging the existence of an employment relationship between couriers and the platform, and has negotiated collective agreements with traditional unions in various European countries (Denmark, Germany, Italy and Spain) (Hadwiger 2022).

As with the collective agreement in the banking sector, the Just Eat agreement contains a chapter dedicated to the digital rights of employees. Article 67 regulates data protection (specifically, the principles of data minimisation, limitation of purpose, and transparency and accuracy in processing), while Article 68 regulates all other digital rights: (a) the right to disconnection; (b) the right to privacy in the use of digital devices owned by the company; (c) the right to privacy in the use of video surveillance and sound recording devices in the workplace; (d) the right to privacy in the use of geolocation systems, which includes employees' right to know the characteristics of these systems and information about how they can exercise rights of access, rectification, restriction of processing and erasure; (e) the right to information about algorithms and AI; and (f) the right to information about digital work tools, especially the use of chatbots or humans for responding to communications between employees and the platform.

Regarding the right to information about algorithms and AI, the agreement includes provisions that go far beyond what is required by Article 64(4)(d) ET. First of all, the agreement specifies that the platform must provide worker representatives with 'the relevant information used by the algorithm and/or artificial intelligence systems' for organising delivery activity, such as the type of contract that employees have, the number of hours during which they have provided their services or the days off that they have taken. Second, the data that cannot be used by the platform in its algorithm is also specified: 'the company will guarantee that (…) data that could give rise to a violation of fundamental rights must not be considered, such as (…) the sex or nationality of employees.' The agreement thereby determines not only the data to which worker representatives must have access – those used by the algorithm for organising its delivery activity – but also those that cannot be used by the algorithm because they could give rise to discrimination against employees.

In order to be able to learn about and manage information related to algorithms and AI, the agreement provides for the creation of a joint committee, called the 'algorithm committee'. This is composed of two people representing Just Eat and two others representing each of CCOO and UGT. In addition to receiving the information required by the agreement, the representatives of both unions may request that the person responsible for supervising the algorithm and/or AI system appears before the committee.

Finally, the agreement sets out two restrictions on the information related to algorithms and AI to which worker representatives have a right. The first is that the platform will not provide information 'that is protected by regulations in force'. Protection could come from legislation on data protection (related to employee data) or legislation on industrial secrecy (related to the algorithm and/or AI system). The second restriction refers to the confidentiality with which worker representatives must treat the information they receive. Worker representatives may not use information related to algorithms and AI 'for purposes other than those that were the reason for handing it over or [use that information] for functions that exceed their scope of competency'.

Both provisions are in line with what was already established under Article 65 ET, paragraph 4 of which states that a company will not be bound to provide worker representatives with information related to 'industrial, financial or commercial secrets whose disclosure could (…) hinder the functioning of the company [or] cause serious harm to its financial stability'. Similarly, Article 65(3) ET specifies that 'no document delivered by the company may be used beyond the strict scope thereof or for purposes other than those that were the reason for handing it over'. The collective agreement between Just Eat and CCOO and UGT thus substantially recalls the already existing legal obligations.

More than two years have passed since this collective agreement was signed but, as of January 2024, it had yet to be implemented.[5] All the players involved indicate, however, that the algorithm committee will 'soon' begin its tasks and that the outcomes of its actions, as well as the legal disputes to which it will almost certainly give rise, will be able to be analysed.

For now, however, what does exist is a certainly sophisticated legal framework on algorithmic transparency at a platform delivery company: a legal framework that was created through collective bargaining and that could very well serve as an example or guide for other collective agreements.

5. The slowness in getting the algorithm committee running was due to the election processes of worker representatives in the company having not yet ended. Until those results were known, the committee could not begin functioning. I would like to thank Rubén Ranz of UGT for the information he provided in writing this section.

3. Conclusions

Spain has pioneered legislation on algorithmic transparency in companies. Resulting from a social dialogue agreement, Article 64(4)(d) ET makes it mandatory for companies to provide information to worker representatives about the 'parameters, rules and instructions' that form the basis of the algorithms or artificial intelligence systems that are used for making decisions that 'have an impact on working conditions and on access to and keeping a job, including profiling'. The provisions of this legislation have been supplemented by those of the Charter of Digital Rights, which include not only the requirement to assess the impact of decisions adopted through algorithms or AI systems, but which also outline respect for the principles of auditability, a human-centric approach and the 'do no harm' principle. However, the provisions of the Charter of Digital Rights have no legal effectiveness; they are merely recommendations and not obligations for companies regarding how they handle algorithms and AI.

Spain also has collective bargaining experiences related to algorithmic transparency: the collective agreement in the banking sector; and the collective agreement between Just Eat and CCOO and UGT. That one of the collective agreements was negotiated for a sector and the other agreement at company level tells us that collective bargaining on algorithmic transparency can occur at both levels of negotiation (sector and company). Furthermore, both these experiences in collective bargaining on algorithmic transparency have been conducted by traditional unions: CCOO and UGT. This proves that, in collective bargaining, traditional unions are able to include content related to the digital transformation of both the economy and companies, and that they can represent new groups of workers arising out of the heat of the technological revolution. Finally, even though both these collective bargaining experiences have defined the rules of the game for companies in the exercise of algorithmic transparency, the implementation of the agreed provisions is taking longer than expected.

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