
PRESENTATION

This thematic briefing analyzes the ***Ley Rider***, a Spanish decree-law that regulates work on digital platforms, focusing on delivery services. Its provisions bring the presumption of employment relationship between delivery drivers and platforms and innovate by guaranteeing the worker, regardless of the sector, the right to information regarding the rules and decisions made based on algorithmic systems. Seeking to understand the process of social dialogue that gave rise to this decree-law and its repercussions, the antecedents of the agreement resulting from the process and the provisions of the legal text were analyzed. Enjoy your reading!

Key findings

- 1) The *Real Decreto-ley 9/2021* (Spanish Royal Decree 9/2021), popularly known as *Ley Rider*, was edited at the initiative of the Spanish Ministry of Labor, after a process of tripartite social dialogue, with the participation of the Government, workers' unions and business 'unions;
- 2) The decree-law was approved by the Council of Ministers on May 11, 2021, with a period of entry into force of three months, during which the platforms shall adapt to its provisions;
- 3) *Ley Rider* assumes employment relationship only in relation to app delivery drivers; and
- 4) *Ley Rider* innovates by bringing a provision on the algorithmic management of work, not restricted to the economy of platforms, guaranteeing workers the right to information and the review of automated decisions.

CONTEXTUALIZATION

The discussion about labor regulation on digital platforms has gained new contours in Spain. After a decision by the Supreme Court that recognized the employment relationship between a delivery driver and the Glovo company, and the establishment of a process of social dialogue between the Government, workers' unions and employers, the *Real Decreto-ley 9/2021*, popularly known as *Ley Rider*, was approved by the Council of Ministers in May 2021 and validated by the Chamber of Deputies in June 2021. *Ley Rider* has **two main provisions: (i) the presumption of employment relationship for digital platform delivery drivers; and (ii) the right to**

information about the algorithmic system used in work management.

While the presumption of employment relationship applies only to the category of delivery drivers, guaranteeing them rights such as rest and paid vacations, the provision on algorithmic transparency extends to all companies that manage work through algorithms.

The *Ley Rider* will affect about 15 thousand to 18 thousand workers, according to estimates by the Ministry of Labor, **which will represent a financial impact of approximately 29 million euros for local platforms** (CINCODÍAS, 2021)

METHODOLOGY

This thematic briefing (TB) integrates a series of studies carried out by CEPI FGV Direito SP within the scope of the Future of Work and Gig Economy project. The *Ley Rider* (*Real Decreto-ley 9/2021*) was chosen as the object of analysis, as it encompasses several elements relevant to the regulatory debate around work on digital platforms.

The first one is social dialogue, which involved multiple actors. In this regard, it is intended to analyze the antecedents of this dialogue, how the negotiation process took place, the representativeness of the parties, the result of the agreement and its possible repercussions. Another noteworthy element is the innovation brought about by the incorporation of a provision that addresses transparency around algorithmic management, a topic widely discussed in the literature, but absent from the

bills mapped in [TB1](#) and [TB2](#) (on the proposals of the Brazilian Congress) and in [TB3](#) (on the proposals being debated in Argentina, Colombia, Chile and Mexico). It is interesting to understand how this issue was addressed by the legal text, as well as its possible repercussions for the gig economy ecosystem

In order to understand these central elements of the Spanish debate around the regulation of work on digital platforms, we analyzed: (i) the court decision that triggered the opening of the tripartite social dialogue; (ii) the decree-law document with its justifications, as approved by the Council of Ministers on May 11, 2021; (iii) news related to the topic, in order to verify the repercussions and controversies; and (iv) bibliographic review, to complement the analyses.

FACTS PRIOR TO *LEY RIDER*

The Rider vs. Glovo case

Globo is a delivery services platform based in Barcelona, Spain. The consumer can request, for example, the purchase of products in supermarkets, and Glovo makes available a delivery person, through a mandate to a third party registered on the platform, who collects the product at the merchant and takes it to the destination, upon payment of the cost of the product and transportation. It is also possible to request only the transportation of goods from one point to another.

A Spanish delivery man filed a lawsuit against Glovo in 2017, after his activities in the app

were shut down. Although the contract signed with the platform classified him as TRADE (economically dependent self-employed worker)¹, the plaintiff claimed that the legal nature of his relationship with Glovo was labor and not commercial or civil, which is why he claimed the benefits arising from the "tacit dismissal".

In September 2020, **the Supreme Court² of Spain issued a decision recognizing the employment relationship between the delivery person ("rider") and the platform.**

TRADE: economically dependent self-employment

TRADE is a model of Spanish employment contract, established by *Ley 20/2007*, applicable to self-employed people who carry out their economic or professional activities for a company or client from whom they earn at least 75% of their income. Although he is a controversial figure, associated with the "false self-employed", Adrián Todolí explains that this is not an intermediate category (like the "workers" in the United Kingdom), but rather a subcategory of self-employed work. "TRADE is not a third category of workers or an intermediate category between employees and the self-employed. On the contrary, first TRADEs must be fully autonomous workers and then, if they meet another additional requirement - 75% of their income comes from a single client - they will be TRADEs" (TODOLÍ-SIGNES, 2019, p. 258, our translation).

TRADE contracts must be registered in a [virtual system](#) of the Ministry of Labor and Social Economy of Spain. Registration can be done by the worker, the client/company and/or a legal representative. The TRADE must have its own organization and means of work, being prohibited from subcontracting a third party to carry out the contracted service. TRADEs are entitled to coverage for temporary disability and to take out insurance against accidents and occupational diseases. Like any other self-employed, TRADEs are responsible for collecting their tax contributions (Income tax and IVA)

¹ Contractually, the plaintiff acted as an "Economically Dependent Self-Employed Worker - TRADE", an autonomous subcategory of the Spanish law.

² Highest instance of the Spanish Judicial System. The Constitutional Court of Spain is not part of the ordinary justice system.

In the Court's understanding, the facts proved the presence not only of economic dependence, but also of alterity and³ forms of control, which, together, would characterize the employment relationship. **The main fundamentals of decision-making:**

- **Absence of the worker's own organization** and evidence of his/her integration into the organization structure of the platform-company
- **Alterity of the gains**, that is, price for the service fixed by the platform and payment made by customers (end users) made directly to the platform, which withdraws his/her commission and transfers the remainder to the service provider (*rider*)⁴;
- **Service execution managed through algorithms** of the platform⁴;
- **Geographic tracking through GPS**, through which the platform extracted real-time information on the provider's performance in the execution of the service and the mileage traveled;
- **Evaluation as a management tool by the platform**, based on three factors: (i) score attributed by customers according to their satisfaction; (ii) points awarded by the platform based on the efficiency

shown in providing the most recent orders; and (iii) points awarded by the platform based on the performance of services at times of greatest demand;

- **Penalty in case of extended inactivity or in the absence of the delivery person within the interval previously indicated** by him/her to fulfill orders, thus affecting the reservation of operators programmed by the platform; and
- **No denaturation of the employment relationship due to the provision of services on other platforms.**

Although the TRADE contract (subcategory of self-employed work), to which the plaintiff was bound, already presupposes economic dependence, **confirming alterity⁵ was essential for the recognition of the relationship⁶**, as it is the maximum expression of "work for others", as opposed to "self-employment", an intrinsic characteristic of self-employment. According to Adrian Todolí, the Spanish Court has recognized autonomy only in cases where it is observed: (i) that the service provider has its own infrastructure, verified through material elements (machines, buildings, etc.) or intangible elements (brand, data, goodwill⁷, specific software etc.); and (ii) that the provider has its own organization,

³ Translation for the term "*ajenidad*", also translated by the doctrine as "alterity" or "alterability". According to the classic definition, the concept of "*ajenidad*" would be: "(...) the relationship of others, as the definition and essence of the employment contract, it is an original form of acquisition of goods by someone other than the one who works" (OLEA apud JUNIOR, 2021, p. 43, our translation).

⁴Unlike the case analyzed in BT5 (Uber vs. Aslam), in the case judged by the Spanish Court, it was proven that the delivery person could refuse a call without being penalized at the time of the facts, as well as had direct communication with the customer during the delivery transportation, which was not enough to rule out subordination in the Court's understanding.

⁵ The only form of alterity expressly ruled out by the Court was that of "risks", since the provider assumed the risks of any damage or loss to which the transported goods would be subject, as well as in relation to their own means of work (smartphone and motorcycle).

⁶As explained in note 3, the term "alterity" is the most common translation for the Spanish legal concept "*ajenidad*", which derives from "*trabajo por cuenta ajena*" (in English, "work on behalf of others").

⁷ It consists of intangible assets, which are part of the "brand value" (e.g., reputation).

which guarantees his autonomy in decision-making and management of his businesses (TODOLÍ-SIGNES, 2020, P. 7).

In view of these facts, **the Court concluded that Glovo would not be a mere**

intermediary in the contracting of services between merchants/consumers and delivery drivers, as it would also coordinate and organize the productive service, in addition to setting prices and conditions for payment

Alterity and work in the 4.0 era

There are Brazilian indoctrinators who defend the adoption of the idea of alterity as a key element to characterize the employment relationship at work on digital platforms. In this regard, José Eduardo de Resende Chaves Júnior defends that the concept of alterity would be more appropriate than that of subordination (beacon in the national legislation) in the analysis of the existence of the bond, as the latter was legally constructed under a logic of organizational rigidity that is not compatible with the new reality of the productive organization of networking. He explains that the focus of subordination is the power of discipline, while the concept of alterity encompasses the expressions of command, control and supervision, which are usually present in computer and telematic work (CHAVES JÚNIOR, p. 47 and 48).

The Spanish doctrine has three opinions on this legal concept: "The first and most traditional is that of Olea, in which alterity is seen from the alienation of the results of labor (*ajenidad en los frutos*). A second, in which alterity is measured as a function of not taking on the risks of economic activity, defended by Bayón Chacón and Perez Botija (*ajenidad en los riesgos*) and a third, of alterity due to the disconnection of the worker's individual from the patrimonial utility of the work (*ajenidad en la utilidad patrimonial*), presented by Montoya Melgar" (idem, p. 45).

Opening and unfolding social dialogue

In June 2020, the Spanish Ministry of Labor, under the leadership of Minister Yolanda Díaz (PCE/Unidas Podemos), began articulation to propose a draft bill with the purpose of regulating activities on digital platforms. The first moves were timid, due to the Covid-19 pandemic and pressure from various actors, including the Ministry of Economy, which was against the proposal. The Supreme Court decision in *Rider vs. Glovo*, recognizing the employment relationship between a delivery driver and the platform, set an important legal precedent, contributing to the process of building an agreement with the interested parties.

On October 28, 2020, the Dialogue Table was formed between the Ministry of Labor, the UGT (*Unión General de Trabajadores*) and CC OO (*Confederación Sindical de Comisiones Obreras*) workers unions, and the CEOE (*Confederación Española de Organizaciones Empresariales*) and CEPYME (*Confederación Española de la Pequeña y Mediana Empresa*), starting the process of social dialogue.

The actors who participated in the dialogue with the Ministry of Labor were not direct and/or exclusive representatives of the segments involved, considering that workers in the gig economy and companies in the digital

economy are not organized according to the traditional union model. However, UGT and CC OO are consolidated and long-lived unions, representing workers from the most diverse sectors in Spain. The same can be said in relation to the CEOE and CEPYME employers entities, which have existed since the 1970s and represent cross-sector interests with wide operations throughout the country.

The Ministry of Labor's initial plan was to reach an agreement before the end of 2020. However, due to strong divergences between the actors, it was only on March 10, 2021 that a conclusion was reached. **The agreement established in March was only possible because the employer's entity CEOE, contrary to the agreement, gave up its position.** After great pressure from the workers' unions, **it accepted the provision on the presumption of employment relationship, demanding, in return, that such presumption be applied exclusively to the delivery drivers' sector** (GÓMEZ, 2021A; GÓMEZ, 2021B; RODRÍGUEZ, 2021).

The text agreed upon in the social dialogue was approved by the Council of Ministers, an agency of the Executive Branch, on May 11, 2021, the last step necessary to acquire the force of a decree-law. According to the Spanish constitutional rite, the decree-law must be validated by the Chamber of Deputies within a period of 30 days, which occurred on June 10, 2021. The platforms will have a period of three months, counted from the approval of the decree-law by the Council of Ministers, to adapt to the new law.

It should be noted that, throughout the negotiation and approval process of *Ley Rider*, **some actors in the ecosystem were dissatisfied with the new legal framework and raised criticism, mainly to the legitimacy and representativeness of the entities involved in the negotiations.** In this regard,

there were demonstrations against the immobilization of the legislation, which ended up limiting the freedom and flexibility of delivery drivers (LARA, 2021; CINCODÍAS, 2021); on the other hand, there were those who criticized the fact that the presumption reached a single category of workers, ignoring other segments of application workers (UGT, 2021).

In order to fight the approval of *Ley Rider*, associations of platform delivery driver's contrary to the new text called for demonstrations and organized marches with the support of the delivery platforms themselves (LARA, 2021). According to local newspapers, such acts would have mobilized hundreds of delivery drivers on the streets of several cities. The motto of these demonstrations was the right of delivery drivers to remain autonomous. The fact that some delivery drivers did not feel represented by the unions that participated in the Social Dialogue Table (LARA, 2021) was also raised.

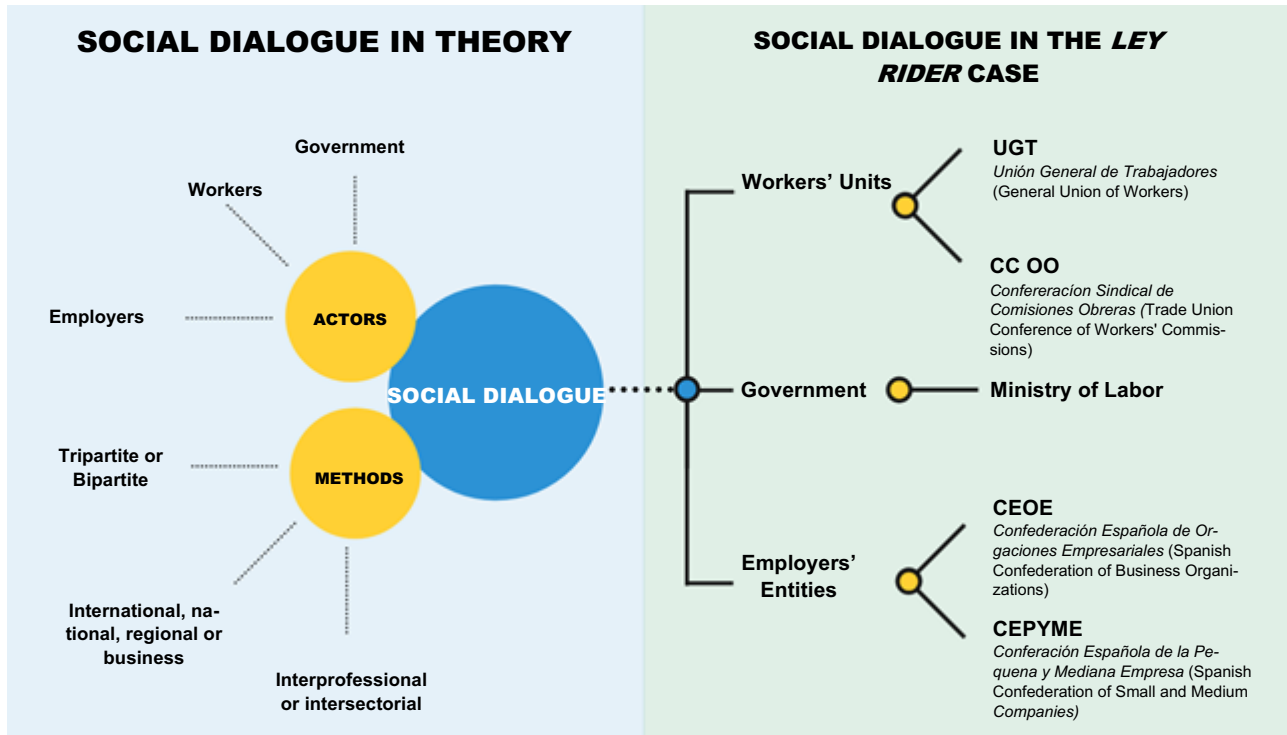
On the platform side, Glovo announced its break with the CEOE and the creation of the APS (*Asociación de Plataformas de Servicios bajo Demanda*), which now brings together the main food delivery platforms in Spain (Deliveroo, Stuart and Uber Eats, in addition to Glovo) (EL DIARIO, 2021). APS published a press release pointing out that the law puts at risk the development of a sector that contributes with around 700 million euros to the Spanish GDP, in addition to having been prepared without considering the main actors in this scenario, such as restaurants, platforms and the delivery drivers themselves (CINCODÍAS, 2021).

Finally, there were also criticisms from actors in favor of the approval of *Ley Rider*. According to a note published by UGT, one of the unions that participated in the social dialogue representing the workers, the law was "a

missed opportunity to regulate the digital economy, since the presumption of

employment was restricted to the platform delivery drivers' sector" (UGT, 2021).

Figure 01: Social dialogue in the case of Ley Rider



Source: own preparation

The social dialogue concept

Social dialogue was the mechanism adopted by the Spanish authorities to prepare the first European framework to regulate work on digital platforms. It consists of the "participation of workers, employers and governments in decision-making on employment and workplaces", which "includes all types of negotiation, consultation and exchange of information between representatives of these groups on common interests in economic, labor and social policies" (ILO, 2013, p. 5). It can be bipartite, when it involves only workers and employers, or tripartite, in which case there is government involvement. In the bipartite modality, collective negotiations, cooperation and conflict resolutions take place, as a rule, conducted by the workers' and employers' unions. In the tripartite modality, the government joins the other parties to discuss public policies, laws and other decisions of interest to workers and employers. In Spain, the tripartite model was adopted, through the intervention of the local Ministry of Labor.

THE LEY RIDER

What does the Spanish decree-law say?

The *Ley Rider* (Real Decreto-ley 9/2021) presents two main provisions that modify the Workers' Statute (Real Decreto Legislativo 2/2015), a legal diploma that governs labor and employment relations in Spain: (i) establishes the presumption of employment relationship for the delivery drivers of digital platforms; and (ii) imposes the employer's obligation to provide information about algorithms or artificial intelligence systems that operate to manage the work. The presumption of employment relationship only applies to delivery platforms, while the provisions on algorithmic transparency apply to any and all employing company that manages work through algorithms or artificial intelligence, not limited to platform economics.

Presumption of employment relationship

Ley Rider introduces a change to the Workers' Statute on the presumption of employment in the activities of delivery or distribution of any type of product or merchandise:

Twenty-third additional provision. *Presumption of employment within the scope of digital delivery platforms.*

Pursuant to the provisions of article 8.1, the scope of this law is presumed to include the activity of individuals providing paid services, which consist of the delivery or distribution of

any consumer product or merchandise, by employers who exercise business activities to organize, direct and control, directly, indirectly or implicitly, based on the algorithmic management of the service or working conditions, through a digital platform. This presumption is without prejudice to the provisions of article 1.3 of these regulations. (Our translation)

Thus, we highlight the **four requirements**⁹ brought by the decree-law **for the employment relationship to be presumed**:

- (i) that the activity is; **remunerated and provided by an individual**;
- (ii) that the activity is **the delivery or distribution** of any type of product or merchandise;
- (iii) that the employer exercises the business faculty of **organization, direction and direct, indirect or implicit control**; and
- (iv) that this organization, direction and control over the services or working conditions are **carried out through algorithmic management**, through a **digital platform**. The presumption benefits the delivery drivers, with the platforms having the burden of proving that their business model does not fit the legal provision.

With the new change, the digital platforms will have to fit their delivery drivers into the employment regime. Thus, on the one hand, they will be entitled to a series of provisions included in the Workers' Statute, such as, for example, breaks, paid vacations and benefits

⁸ In Spanish legislation, the terminology "trabajo por cuenta ajena" (in English, "work on behalf of others") is used to refer to employment relationships. For the purposes of this TB, we will use the expressions "work" and "employment", which are more common in Brazil.

⁹ Article 8.1 of the Statute assumes an employment relationship whenever the provision of the service takes place within the scope of organization and direction of another, for remuneration. The provision brought by *Ley Rider* establishes additional requirements for the presumption of the existing bond between delivery drivers and digital platforms, in order to encompass the new forms of direction caused by the technological organization of work.

for temporary incapacity or disability. On the other hand, however, such delivery drivers are no longer autonomous and, as a result, are subordinate to the direction of the platforms,

for example, in relation to the day and time when they must deliver. Thus, the decree-law restricts work on platforms to those who depend on or seek greater flexibility in them.

Ley Rider and outsourcing

In view of the new provisions brought by *Ley Rider*, it was reported that the platforms are already assessing possible legal alternatives in this new scenario (TOMASI, 2021). One of these options, which is already being implemented by some platforms, would be the sub-contracting of delivery drivers through third-party companies.

As reported by press vehicles (MARTIN, 2021), many Uber Eats delivery drivers are receiving emails from the platform asking them to authorize sharing their data with third-party companies. By doing so, such companies can contact the delivery drivers to hire them in their own fleet.

According to the testimony of a delivery driver published in an article about the case (SIERRA, 2021), he has already received a proposal to work at a Temporary Employment Company (ETT), in which he would be hired as a salaried worker, with a workload of 40 hours weekly and fixed hourly remuneration, in addition to a small increase per kilometer traveled, providing services to platforms such as Glovo and AliExpress. In the proposal, the delivery driver would have to use his own motorcycle or car and the contract would have a duration of 15 days, with the possibility of renewal.

Management Transparency Algorithmic

The other provision by *Ley Rider* deals with the right to information about algorithmic management, whose application is not restricted to Platform Economy, becoming a right of any and all workers submitted to this type of management system. In this regard, the decree-law introduces a new provision to article 64.4 of the Workers' Statute, including an item "d", with the following wording:

D) Be informed by the company of the parameters, rules and instructions on which the algorithms or artificial intelligence systems that affect decision-making that may affect working conditions, access to and maintenance of

employment, including the definition of profiles are based. (Our translation)

Item "d" added by law is within an article dealing with the rights of the Works Committee. Provided for by the Workers' Statute, the Committee is a representative body of workers within a company, with the objective of defending their interests.

In this context, **the provision recognizes the right of the Works Committee to be informed by the employing company about the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based, when these can**

affect decision-making on working conditions, accessing and maintaining employment, including profiling.

In the general provisions of the decree-law, it is also argued that the adoption of algorithmic transparency is essential to more precisely assess what the employment relationship between the platform and workers could be, respecting industrial and commercial secrecy.

The decree-law recognizes for the first time in the legal and labor order in Spain the figure of algorithms as essential elements of work management, so that the right to informational self-determination guaranteed by it aims to create a more transparent environment, to mitigate the risks of discriminatory

biases and arbitrary penalties (SEMPERE & JIMÉNEZ, 2021).

Another highlight was the announcement, made by the Ministry of Labor, of the creation of a group of specialists to carry out studies on the impact of the use of artificial intelligence in the management of work. The function of this group is to assess the instruments used and ensure good practices, avoiding discrimination and abuse arising from the use of algorithms (CINCODÍAS, 2021). The main challenge to be faced by these specialists will be the intangibility and opacity of algorithmic systems, especially in cases of machine learning, in which decisions are not programmed by an individual.

Algorithmic governance and the world of work

The regulation of algorithms used by digital platforms is an issue highlighted recently in the ILO publication entitled "Perspectivas Sociales y del Empleo en Mundo" (World Employment and Social Outlook), which states that the algorithmic management of workers is a key element for the business model of platforms and reinforce that this mechanism streamlines work supervision and articulates communication between workers and clients. Furthermore, the algorithms assess and classify the performance or behavior of two workers on the platform using a series of parameters, such as analyzes and customer opinions (ILO, 2021).

In this regard, it is understood that big data, algorithms and artificial intelligence now allow entrepreneurs to process information from their workers in a much more efficient and cheaper way compared to the past (TODOLÍ-SIGNES, 2019). More and more workers are using instruments that allow them to record their movements and location in real time, which measure their work pace and breaks. Collected data is often analyzed using artificial intelligence to assess productivity and ability to perform specific tasks. This process can be exemplified through the monitoring of GPS systems, in which the positioning of drivers and delivery drivers during the service is mapped (STEFANO, 2019).

KEY FINDINGS

- The presumption of employment relationship reverses the burden of proof for the benefit of the delivery drivers, with the platforms having to prove that their business model does not affect the legal hypotheses;
- The provision on informational law innovates and incorporates an important instrument of governance and transparency, although its effectiveness collides with the opacity of the algorithms;
- By assuming the employment relationship, without any exception, *Ley Rider* makes the business model of delivery platforms for freelance work unfeasible;
- The social dialogue process and the legitimacy of the representatives of the interested parties were highly criticized, given that workers and companies in the sector are not engaged or directly linked to the unions that were present at the dialogue table, which indicates the need for sector actors to organize themselves, with a view to new dialogues and future collective negotiations around agendas such as working hours, salary, etc.;
- Despite the scarcity of official statistical data in relation to occupation in the gig economy, the information obtained from the virtual register of TRADE contracts allows the Spanish Ministry of Labor to estimate the impacts of the measure, since they enable the measurement of the contingent of workers who work under this contractual modality and to which organizations they are bound.

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