



Recibido: 03.10.2019. Aceptado: 13.12.2019

**The necessary recovery of social dialogue to address
the regulation of the impact of new technologies on workers' rights**

**La necesaria recuperación del diálogo social para abordar
la regulación del impacto de las nuevas tecnologías
en los derechos de los trabajadores**

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ABSTRACT

The European Union has urged the European Commission, Member States and social partners to establish rules for an economic sphere which is either deregulated or has significant gaps in regulation: digitalisation and the platform economy. The European Parliament has made a series of recommendations which establish the social guidelines necessary to regulate labour relations on collaborative platforms. Accepting changes in the fundamental nature of labour law requires the overcoming of untouchable axioms which survive in contemporary economic thought, such as the one which links rigid labour regulations to the delay in recovery from the economic crisis, to rising unemployment, and more recently, to a lack of adaptation of labour regulation to technological changes. Once again, changes in labour legislation are required in order to adapt correctly to the digital economy, although it is emphasised that this “new regulation” cannot be made without the social partners.

KEY WORDS: platform economy, normative instruments, social partners.

RESUMEN

La Unión Europea ha instado a la Comisión Europea, a los Estados miembros y a los interlocutores a normar un ámbito económico desregularizado o con lagunas en la regulación: la digitalización y la economía de plataforma. El Parlamento Europeo ha dirigido una serie de recomendaciones con las directrices sociales necesarias para que se regulen las relaciones laborales en las plataformas colaborativas. Es preciso superar intocables axiomas que perviven en el pensamiento económico contemporáneo, como el que vincula la rigidez de la normativa laboral al retraso en la salida de la crisis económica y al incremento del número de desempleados, a lo que ahora quiere añadirse la falta de adaptación de la regulación laboral a las nuevas tecnologías. De nuevo se exigen cambios legislativos en el orden laboral para lograr una correcta adaptación a la economía digital; si bien, es preciso subrayar que esta “nueva regulación” no podrá hacerse al margen de los interlocutores sociales.

PALABRAS CLAVE: economía de plataformas, instrumentos normativos, interlocutores sociales.

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I. INTRODUCTION

As has been clearly observed in the European Union and in each of its Member States, both globalisation and new technologies bring pernicious changes to the traditional articulation of labour relations' regulatory sources. Long ago it was said that the chaos of globalisation had become a "factor of uncertainty" in the very concept of law, had "pulverised" legislative rights, provoking a marked "contractualisation of the contents of the law", as well as a progressive deterioration and technical deformation of legal forms within each of the internal systems¹.

The impact of Economy 4.0 on labour (the digitalisation of work) poses a problem of sources of law, in other words, the regulation of labour conditions. A detailed analysis of the regulatory spheres may become either obsolete or suitable for permanence, despite economic, social, political and legal changes. Permanence is what is presumed. At the end the key lies in the tempering of economic interests, catapulted precisely by the digital revolution, with the defense of workers' fundamental rights. Nevertheless, the "legal approach to labour digitalisation" is being carried out, to a large extent, by means of jurisdictional resolutions, and also by approaches that give prominence to the "digitising directive power" in disfavor of the basic and fundamental rights of workers². That being said, in this paper I will dwell mainly on how and, more particularly, on the necessary participation of social partners in the pathway to legislation, because legislative reasoning requires politics, but beforehand, it requires fundamental social reasoning.

II. THE REGULATION REQUIRED FOR DIGITAL WORK

The 4.0 economic benefit model is by no means unknown to labour law. It closely reproduces that which is used to outsource labour relations, with the addition that it allows for a maximum reduction in business risk, and the fact that it immediately achieves a legal invisibility of the employee, based on the apparent nonexistence of the business³. From here a multitude of regulatory possibilities opens up. In short, it seems non-confrontational enough to regard these new scenarios as being unable to operate within a framework of absolute freedom or lawlessness, and therefore require regulatory intervention. The difficulty lies in defining how far to go, or how to arrange these fields in order to achieve the necessary balance between the interests and expectations in play. Consequently, one must analyse whether or not there should be intervention, and if so, how to achieve it and how far reaching it should be⁴.

Nothing prevents work in the digital economy from being regulated -- be it at the legislative and/or conventional level -- with an aim to establishing those basic rights which make decent work possible. Furthermore, the "flight" from the workplace does not constitute an inevitable process, but can be contained and even regulated. It is a

¹ Mercader Uguina, J. R.: "Sistema de fuentes y globalización", *Nueva Revista Española de Derecho del Trabajo*, No. 119 (2003) 670-671.

² Alemán Páez, F.: "El derecho a la desconexión digital", *Trabajo y Derecho*, No. 30 (2017) 3-4.

³ Trillo Párraga, F.: "Economía digitalizada y relaciones de trabajo", *Revista de Derecho Social*, No. 76 (2016) 68-69.

⁴ See Garrido Pérez, E.: "La representación de los trabajadores al servicio de plataformas colaborativas", *Revista de Derecho Social*, No. 80 (2017) 210-213.

decision of a political nature⁵. It is already accepted that the “digital law” sector is subject to general regulations, and the discussion has therefore moved to another level, whether or not they should be adapted to suit their particularities; or if it is necessary to elaborate others ad hoc⁶. Moreover, with the objective of preventing profit-oriented companies from abusing employment and work platforms, meanwhile engaging in illegal practices, regulation is deemed necessary, with respect to which we can discuss its form and content, but not the need for its existence⁷.

A. THE NORMATIVE INSTRUMENTS

The European Union has pressed to establish rules for production models that are deregulated or have gaps in regulation⁸, asking the European Commission (EC), Member States and social partners for the guidelines necessary to address the management of labour relations in collaborative platforms, and that the recommendations of the European Parliament be put into practice in order to guarantee greater legal security with respect to collaborative business models, and sufficient protection of the rights of workers who provide services through virtual platforms⁹. A clearer and more decisive opinion was shown by the European Economic and Social Committee. They placed special emphasis on the need to redefine the concept of legal subordination in the face of the economic dependence of workers, and guarantee labour rights regardless of the formats the activity adopts¹⁰.

The Commission had already affirmed that, in many cases, the transactions of the collaborative economy did not entail a change in ownership, and that they could be developed with or without the intention of obtaining benefits. And so it is, for the collaborative economy is prey to a strong intentional ambivalence. On the one hand, it is presented as a network among equals, and frees spaces for the commercialisation of the provision of certain services; but, on the other hand, it also includes business initiatives which make use of virtual platforms aiming for business benefit and equipped with a number of workers (freelancers / subordinates) to provide the service¹¹.

⁵ Serrano Olivares, R.: “Nuevas formas de organización empresarial: economía colaborativa –o mejor, economía digital a demanda-, trabajo 3.0 y laboralidad”, in Rodríguez-Piñero Royo, M. y Hernández Bejarano, M. (dirs.): *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Bomarzo, Albacete (2017) 34.

⁶ Rodríguez-Piñero Royo, M., in Rodríguez-Piñero Royo, M. y Hernández Bejarano, M. (dirs.): *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Bomarzo, Albacete (2017) 201.

⁷ Castellano Burguillo, E.: “Plataformas de empleo y plataformas de trabajo. Aspectos fundamentales”, in Rodríguez-Piñero Royo, M. y Hernández Bejarano, M. (dirs.): *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Bomarzo, Albacete (2017) 271.

⁸ Resolution of the European Parliament, of 15 June 2017 EU, on *A European Agenda for the Collaborative Economy*. P8_TA-PROV (2017) 0271. See also the Resolution of the European Parliament of 4 July 2017 on *Working conditions and precarious employment* (2016/2221 (INI)), where it asks the European Commission and the Member States to respond to the problems arising in the scope of the collaborative economy and seek the balance between the need for greater protection of workers and the promotion of entrepreneurship and cooperation in the sector.

⁹ López de la Fuente, G.: “La digitalización del trabajo y nuevas formas de control empresarial: a propósito de las plataformas virtuales”, in Todolí Signes, A. y Hernández Bejarano, M. (dirs.): *Trabajo en plataformas digitales: innovación, Derecho y mercado*, Thomson Reuters Aranzadi, Navarra (2018) 549.

¹⁰ EESC Opinion: *A European Agenda for the Collaborative Economy* (OJ 03-10-2017).

¹¹ Trillo Párraga, F.: “Trabajo decente y economía digitalizada”, in Mora Cabello de Alba, L. y Rodríguez Fernández, M.^a L. (coords.): *El futuro del trabajo que queremos*, Bomarzo, Albacete (2017) 76-77.

The inclusion in labour regulations of these atypical forms of work, their coverage by labour legislation, their 'typicality', in other words, is essential to avoid becoming precarious employment. New rules may be required so that these new forms of employment are covered and guarantee workers a decent job. The instrument to be used by States is none other than "a set of minimum standards" on: the maintenance of opportunities to enter the labour market; the assurance of minimum wage levels; access to training and promotion; and social protection. In addition, States must ensure that social security systems fulfill their functions in new forms of atypical employment¹². Furthermore, the fundamental importance of protecting workers' rights in the collaborative services sector, most importantly, the right of workers to organise themselves and the right to collective bargaining in accordance with the legislation and national practice, has been stressed (par. 39 of the Resolution of the European Parliament of 15 June, 2017 on a *European Agenda for the Collaborative Economy*).

In my opinion, social dialogue and consultation must regain their strength because they inform the political aspect and management of collective bargaining. The participation of social partners in normative processes ["social democracy"] is nothing new, neither does it entail a transcendental change in the European social model of lawmaking. In the words of the CJEU, compliance with the principle of democracy requires that the peoples' participation in the process be guaranteed, alternatively, through social partners that celebrated the Agreement to which the Council, deciding by qualified majority, at the proposal of the Commission, conferred legislative support at Community level (Judgment of the Court of First Instance of the European Communities of 17 June 1998, Case T-135/96, paragraph 89)¹³. This intervention of social partners turned collective bargaining into a mode of production of labour standards that favored the active participation of citizens via social partners. With this, business and union organisations, together with public powers, were attributed with carrying out a democratic role¹⁴.

III. POSITIONS OF THE EUROPEAN SOCIAL PARTNERS

The European Commission's promotion of the social dialogue forms part of a long, institutionalised process with clear "corporate features", because social partners have reached important quotas of political participation in the Union and have turned into true co-legislators. In 2016 the Commission launched a high-level conference with the social partners, which resulted in a declaration that speaks of a new beginning for social dialogue¹⁵. There they foresaw a strengthening of the capacity of social and economic agents at the national level, and a greater participation in the design of EU policies and

¹² See Casas Baamonde, M.^a E.: "Precariedad del trabajo y formas atípicas de empleo, viejas y nueva. ¿Hacia un trabajo digno?", *Derecho de las Relaciones Laborales*, No. 9 (2017) 872-875.

¹³ The social partners took a fundamental step through their agreement of October 31, 1991, which would be integrated into the Protocol on social policy of the Maastricht Treaty (1992). They declared their willingness to participate in the social governance of the EU, assuming a role of regulators through negotiation, as a complement to the legislative instruments (section 2.4 of the EESC *Opinion on The structure and organization of social dialogue in the context of an authentic Economic and Monetary Union*, 2014 / C 458/01, 19-12-2014). Social dialogue that "plays a fundamental role in strengthening social rights and sustainable and inclusive growth" (paragraph 20 of the preamble of the interinstitutional proclamation on the *European pillar of social rights*, OJ 13.12.2017).

¹⁴ Casas Baamonde, M.^a E.: "La negociación colectiva europea como institución democrática (y sobre la representatividad de los "interlocutores sociales europeos)", *Relaciones Laborales*, No. 21 (1998) 12-13.

¹⁵ *A New Start for Social Dialogue*, document signed by the European Commission, UEAPME, Business Europe, CEEP and ETUC, June 27, 2016.

regulations. Specifically, this declaration foresees three fundamental lines for the role of the European social dialogue: a more substantial participation of social partners in the European Semester; the reinforcement of the capacity of social partners at the national level; and, a greater participation of social partners in the design of EU policies and regulations¹⁶. Nevertheless, the problems of collective representation continue to affect all labour relationships, and especially those that are atypical and more precarious, thereby weakening social partners and collective bargaining¹⁷.

The unequal power that national interlocutors have in each of the States, plus the diversity of labour legislation which hardly permits their harmonisation has been made known, and now the experience of institutionalised negotiation -or European social dialogue- can be a meeting point where the European social partners negotiate working conditions for all, thanks to the intervention of community institutions. However, carried to its ultimate consequences, the informal search for “formulas of social consensus” or “prior social dialogue” can be, far from desirable, more a brake than an engine of the construction of social Europe, every time that community legislative action is subordinated to the eventual agreement of the social parties¹⁸. The truth is that the economic crisis has left social dialogue in a bad place, particularly at the inter-professional level, due to stagnation and paralysis, above all since 2010. At the sectoral level, however, European social dialogue and collective bargaining have shown greater dynamism and resilience and have continued to produce developments¹⁹. When the moment had come for consolidation of social dialogue practices in Eastern Europe, initially encouraged by the Commission and the ILO, it was abandoned when the doctrine of austerity began to dominate. The new processes of “macroeconomic governance” in the countries of the euro zone also led to the “progressive deterioration” of the tripartite social dialogue, being more marked the break with the past in countries exposed to the conditions imposed by the Troika²⁰.

In Spain a process of deconstitutionalisation of work has taken place, and one of the central areas of reference is that of political interlocution, and in this domain union efficacy is nil if it is interpreted as the ability to obtain appreciable results for labour relations. So developing that capacity for exchange with the government in a new political situation is important, but on the condition that it produces tangible results of trade union agreement²¹. Since 2008, social dialogue has been marked by the consequences of the economic and financial crisis, as well as by the resulting political and institutional problems of the EU, which have materialised amid difficulties in finding consensus among social partners, and between these and European institutions²².

¹⁶ García-Muñoz Alhambra, M. A.: *La negociación colectiva europea de sector*, Bomarzo, Albacete (2017) 19.

¹⁷ Casas Baamonde, M.ª E.: “Precariedad del trabajo...”, cit., 873.

¹⁸ Monereo Pérez, J. L.: “La participación de los agentes sociales en la construcción de la Comunidad Europea y el diálogo social”, *Actualidad Laboral*, No. 29 (1989) 380-381.

¹⁹ See García-Muñoz Alhambra, M. A.: *La negociación colectiva...*, cit., 88-94.

²⁰ See Guarriello, F.: “El diálogo social nacional en los países de la UE. Un panorama general”, *Gaceta Sindical. Reflexión y debate, Confederación Sindical de CC. OO.*, Nueva etapa, No. 25 (2015) 56-50.

²¹ Baylos Grau, A.: “Sindicato y crisis: conexiones y correspondencias”, *Derecho de las Relaciones Laborales*, No. 2 (2017) 129.

²² García Viña, J.: “Diálogo social y relaciones colectivas en el Derecho de la Unión Europea”, en *Balance y perspectivas de la política laboral y social europea, XXVII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social*, Ediciones CINCA, Madrid (2017) 250.

In EU law, the path to implementation of collective relations is proceeding in the direction opposite to what occurred in most of the member countries, where negotiations started at the lower levels, and then moved up to negotiations “in the shadow of the law”. What’s more, social dialogue at EU level should not be confused with the numerous autonomous collective bargaining systems that have been developed in European countries. These systems are based on freedom of association, which includes the right to strike and the negotiation of agreements between organizations representing workers and employers. Yet, the right of association and the right to strike or the right to lock-out are expressly excluded from the legislative competence of the EU, and European trade unions lack the membership and social power essential for effective collective bargaining. Although, the EU’s social dialogue is in line with the idea of the “democratic legitimacy of the Third Way”, and in this differs from the national collective bargaining²³.

The support of the social dialogue and the institutional power of the social partners does not mean that the representatives of political power - mainly the Commission and the European Parliament - should free themselves of the responsibility for social Europe, entrusting it to the aforementioned protagonists²⁴. And here we find a finished sample of democratic neo-corporativism and authentic social dialogue –the social pact or agreement. It is understood as a negotiation process, as a permanent forum for a three-way meeting between the Government, business and trade unions. Consequently, the “para-legislative” role that European social dialogue has reached in the decision-making process is still an uncomfortable social agreement, which is why some States remain on the lookout and distrust the power of social partners, which can diminish its normative power. The agreements derived from macro-concertation, whether they have a merely programmatic content or are binding, are nevertheless the product of a political exchange between social agents and the State, which implies a certain “exchanging of roles”²⁵, without implying a “substitution of parliamentary democracy, rather its completeness through those who also aspire to represent –by the expansive view of its original mandate– the interest of all”²⁶. The Luxembourg judges attributed to social dialogue the role of a substitute for the European Parliament in the legislative decision-making process because it serves to democratise the life of the Union²⁷: “The principle of democracy on which the Union is founded requires –in the absence of the participation of the European Parliament in the legislative process– that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative

²³ Bruun, N. and Heple, B.: “Economic Policy and Labour Law”, in *The Transformation of Labour Law in Europe. A comparative study of 15 countries 1945-2004*, Bob Heple & Bruno Veneziani (edited), Hart Publishing, Oxford and Portland, Oregon (2009) 53.

²⁴ Pochet, P. and Degryse, C.: “Diálogo social europeo: los instrumentos y los actores”, *XIV Jornadas de Estudio sobre la Negociación Colectiva*, Comisión Consultiva Nacional de Convenios Colectivos, Madrid (2001) 25.

²⁵ Martín Valverde, A.: “Concertación social y tripartismo: modelos de concertación social en Europa”, in *El diálogo social y su institucionalización en España e Iberoamérica*, Durán López, F. (coord.), Consejo Económico y Social España, Madrid (1998) 106.

²⁶ Fernández Domínguez, J. J.: “Legitimación y protagonistas de la negociación colectiva”, in *Perspectivas de evolución de la negociación colectiva en el marco comparado europeo*, XXV Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Asociación Española de Derecho del Trabajo y de la Seguridad Social, Ediciones CINCA, Madrid (2015) 21.

²⁷ Veneziani, B.: “L’art. 152 del Trattato di Lisbona: Quale futuro per i social partners?”, *Revista giuridica del lavoro e della provvidenza sociale*, Vol. 62, No. 1 (2011) 258.

foundation at Community level” (Judgment of the Court of the European Communities of 17 June 1998).

The permeability of the labour market to technological advances raises important legal challenges that must be faced by the entire labour community and, although in Spain we are in a phase of incipient reaction, “the rapid technological progress contrasts with a legal framework that remains anchored in the classic”²⁸. The fact is that Spanish law suffers from an insufficient system that distorts legal security. Indeed, our regulatory presence appears to be a dispersed, tangential and incorrect system where normative, a-normative, conventional and jurisprudential sources are intermingled²⁹. Faced with this deregulated online labour market, it is up to the Labor law to create and maintain the necessary balance between the Digital Economy of Market and Politics, which should be adequately and dialogically oriented under the principles of the Social Dialogue³⁰.

IV. HOW CAN THE ADVENT OF A PRODUCTIVE MODEL BE REGULATED?

The Spanish lawmaker can intervene through various legal instruments, for example, regulating the use of communication technologies outside working hours, or developing a plan for the use of communication technologies. Legislative development can take references from other countries (such as: an amendment of the Labour Code in France by LOI n° 2016-1088, of 8 August, 2016 which introduces a new article dedicated to the protection of workers of virtual platforms, establishing a liability regime for these platforms in the field of work accidents, contributions, professional training, certificates of professionalism and freedom of association; the State of Florida plans to approve a law (CS / HB 221: Transportation Network Companies) to regulate the provision of services of online transport companies, providing conditions for the driver to be considered a self-employed worker and an anti-discrimination protocol; the contract called “zero-hours contract” in English; or the “agile” contract introduced in Italy by Law 81/2017, of May 22)³¹. Thus, in Title X of Organic Law 3/2018, of December 5, on the Protection of personal data and guarantee of digital rights, the recognition of the right to digital disconnection is regulated in the framework of the right to intimacy in the use of digital devices in the workplace. It can also continue to use the classic protective parameters of labour law aimed at guaranteeing the rights of workers subjected to intense precariousness as a result of labour digitalisation. In conclusion, it is necessary to regulate all or some of the working conditions and personal rights inherent to workers in digital fields. In this case, what should the procedure be, and who should intervene?

²⁸ San Martín Mazzucconi, C.: “Generalización tecnológica: efectos sobre las condiciones de trabajo y empleo”, in *Conferencia Nacional Tripartita. El futuro del trabajo que queremos*, Volumen II, OIT y MESS, Madrid (2017) 302.

²⁹ Alemán Páez, F.: “El derecho a la desconexión digital”, *Trabajo y Derecho*, No. 30 (2017) 8.

³⁰ Molina Navarrete, C.: “Derecho y trabajo en la era digital: ¿“Revolución industrial 4.0” o “Economía sumergida 3.0”?”, in *Conferencia Nacional Tripartita. El futuro del trabajo que queremos*, Volumen II, OIT y MESS, Madrid (2017) 421-422.

³¹ Otero Gurruchaga, C.: “El complicado encaje de los trabajadores de la economía colaborativa en el Derecho Laboral: nuevos retos para las fronteras de la laboralidad”, *Derecho de las Relaciones Laborales*, No. 1 (2018) 74.

In the era of solid law, legal control belonged to the State, which exercised it through its classic instrument: the peremptory norm. In the era of liquid law, this function has been delegated, and strong market players are opposed to the peremptory norm, they do not need it, which causes a notable increase in legal insecurity³². What is certain is that the current transformations require legal devices suited to these systemic transformations and legislative consecrations of new rights, such as digital disconnection. These legal devices would take on the imbalances produced by the technological revolution combined with the implicit explosion of “informationalised psychosocial risks”³³. To this we must add instability and lack of employment. The new forms of business organisation and economic action promoted by technological change and globalisation seek an ideological context which subordinates labour law and employment to the economy, observing a new relationship in which labour standards must serve as economic management instruments³⁴. Immediate protection of workers' rights is essential, and while these protections are becoming law, they can be reflected in collective agreements or other pacts that make collective bargaining the means of protection in the face of these new realities³⁵.

The spaces where labour law is produced have changed. For example, the Nation-State has been passed over as a central piece in lawmaking (by the cession of sovereignty in regional areas such as Europe), but what that brings to those in the interior of the Nation-State are “important shifts of the public regulatory power to social partners”; in turn, incidences of State self-containment are more frequently moving in the opposite direction, that is, in legal provisions that cancel state or collective regulation on important aspects of work, in what is known as deregulation initiatives³⁶. However, no European country has adopted a model for flexibilisation not governed by the State, by labour law, and social partners³⁷. Looking internally at member countries of the European Union, for example in Spain, one observes that “the preponderant figure” in the processes of social agreement is State action, which monopolises the agreed upon regulative processes with social partners. And in this sought-after connection with collective bargaining, we see that another hallmark of identity is the subsidiary role that the system of collective bargaining always occupies in these processes for those considered autonomous³⁸.

When labour law is analysed, it is often conditioned by an ideological bias that views this branch of the legal system as a burden on economic modernization. When the analysis results are on the table, the ideology of technique prevails upon the work,

³² Mercader Uguina, J. R.: *El futuro del trabajo en la era de la digitalización y la robótica*, Tirant Lo Blanch, Valencia (2017) 56.

³³ Alemán Páez, F.: “El derecho a la desconexión digital”, *Trabajo y Derecho*, No. 30 (2017) 8.

³⁴ See Casas Baamonde, M.^a E.: “La eficacia y la eficiencia del derecho del trabajo: reflexiones sobre un derecho cuestionado por la economía y el desempleo”, in *Derecho del Trabajo, Constitución y crisis económica. Estudios en Homenaje al Profesor Fernando Valdés Dal-Ré*, *Revista Universitaria de Ciencias del Trabajo*, No. 15 (2014) 69-88.

³⁵ Moreno Díaz, J. M.: “La negociación colectiva como medio fundamental de reconocimiento y defensa de las nuevas realidades derivadas de la industria 4.0”, *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, No. 1 (2018) 229 and 233.

³⁶ Baylos Grau, A.: “El futuro de las normas del trabajo que queremos”, en *Conferencia Nacional Tripartita. El futuro del trabajo que queremos*, Vol. II, OIT and MESS, Madrid (2017) 490.

³⁷ Casas Baamonde, M.^a E.: “El Derecho del trabajo ante las nuevas formas de trabajo”, *Derecho de las Relaciones Laborales*, No. 7 (2015) 712.

³⁸ Baylos Grau, A.: “Diálogo social y negociación colectiva: una narración”, *Revista de Derecho Social*, No. 17 (2002) 204-205.

trying to make it invisible, hiding it behind production relations that, according to this interpretation, would be based on the freedom of workers (self-employed workers)³⁹. The labour test must adapt to the new digital environment, which weakens, alters or distorts the classic marks of labour (especially subordination) and –in the not too distant future –will allow increasingly independent forms of work. They should not necessarily be excluded from the scope of Labour Law when they could not qualify as self-employed either. That is, when these forms of work, although not subordinated in the current sense, maintain the element of alienation –alienated in the sense of taking business risk and not in the sense of mere proportion between work and retribution. As we understand it, these jobs should maintain labour qualification⁴⁰.

Given the important legal challenges posed by technological advances in the workplace, why not continue using the classic protective parameters of the labour law aimed at guaranteeing the rights of workers subjected to intense precarisation as a result of labour digitalisation? Or aren't these the parameters that have been under consideration by the CJEU to point out a series of anomalies that have put many professional platforms under the suspicion of labour? (O'Connor v. Uber Technologies case of March 11, 2015 / Cotter v. Lyft case, of March 11, 2015 / Aslam v. Uber case, of October 26, 2016 / Case Professional Association Elite Taxi v. Uber Systems Spain, SL, of December 20, 2017)⁴¹. In reality, it is about breaking with that kind of “technological determinism” that invades us, because it is likely that many of the labour definitions and institutions that we have been using can continue to be useful with an appropriate calibration⁴².

Collective bargaining systems were swept away with the crisis, and the advantages of the sectoral collective agreement have been lost. This occurred in Europe since the approval of the Lisbon Treaty, changing an earlier trend that considered social dialogue and collective bargaining essential. And this is happening in our country, with legislative interventions of such importance that can only be explained from a perception of collective bargaining as a mere management tool at the service of business interests. Labour law cannot respond to the challenges of digitalisation and globalisation, nor to the necessity to secure constitutional social rights from the national, state and collective dimensions, without first adapting the instruments, including those of collective self-rule at the supra-national level, raising the level at which national labour law policies are designed. This issue has been raised over a long period of time at community level. What is needed is a “relocation” of labour law and its rules through the creation of levels of supranational decision. In short, some “international standards” of labour rights and rules are required that condition and protect national labour rights,

³⁹ Trillo Párraga, F.: “Trabajo decente y economía digitalizada”, in Mora Cabello de Alba, L. y Rodríguez Fernández, M.^a L. (coords.): *El futuro del trabajo que queremos*, Bomarzo, Albacete (2017) 81.

⁴⁰ Ginès i Fabrellas, A. y Gálvez Duran, S.: “Sharing economy vs. Uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital”, *Indret*, No. 1 (2016) 37.

⁴¹ In Spain, in the absence of clear regulation, the courts of first instance are deciding on labor in different directions. See: Judgment of June 1, 2018, Social Court No. 6 of Valencia (Deliveroo); Judgment of September 3, 2018, Social Court No. 39 of Madrid (Glovo); Judgment of January 11, 2019, Social Court No. 17 of Madrid (Glovo); Judgment of February 13, 2019, Social Court No. 33 of Madrid (Glovo); Judgment of February 23, 2019, Social Court No. 1 of Gijón (Glovo); Judgment of May 21, 2019, Social Court No. 24 of Barcelona (Glovo).

⁴² Rodríguez Fernández, M.^a L.: “Plataformas, microworkers y otros desafíos del trabajo en la era digital”, in Mora Cabello de Alba, L. y Rodríguez Fernández, M.^a L. (coords.): *El futuro del trabajo que queremos*, Bomarzo, Albacete (2017) 107.

avoiding their backward movement in the face of insatiable demands for deregulation of labour markets⁴³.

It is true that industrial relations are increasingly “Europeanised”, although the different national systems still preserve their own traits⁴⁴. Therefore, with caution and without pressure, the European Parliament encourages the Commission to regulate new forms of employment in collaboration with social partners “when appropriate”. For example, once the question of Uber drivers’ qualification as employees was resolved, the European Parliament implicitly considers a Directive resulting from social dialogue as the adequate instrument for the regulation of these new forms of employment. The proposal takes an example from the “atypical” Directives and asks the Commission to review different Directives, a revision already partially obliged by the Commission itself in its political guidelines and in the Communication on the European pillar of social rights⁴⁵.

V. CONCLUSIONS

In the case of the digitalisation of the economy, productive reality is so hidden as to leave existing labour relations totally in the shadows, the objective being to eliminate fringe businesses by means of a false sharing economy, leaving legal relations covered with a magical layer of technological-collaborative innovation, and keeping conflict away from the surface. Herein resides the danger of this revolution –more pernicious than fictitious– where the shop window doesn’t let you see the back room, a place where the work of both the employed and the self-employed is stored, hidden from the law. It seems as though we are up against an ethereal establishment-locus, but that implies the existence of a business organisation. There is no strictly defined workplace, but there are people who produce within the scope of an organisation that places its product on the market. So the classic triad repeats itself: intermediary entrepreneur, service provider worker, and consumer, client or user⁴⁶. Is the world of the collaborative economy really so well hidden and so well camouflaged that it becomes inaccessible to existing laws and to future laws? I do not think so. Surely, through a Directive, the rights and obligations of workers in digital work can be regulated.

The European social dialogue is one of the distinctive features of the European social model, which refers as much to the practice of dialogue and bilateral exchange as to a three-way exchange which includes institutions –from early consultation to the final agreements on pacts– passing through the various forms of negotiated legislation. According to the European Economic and Social Council: “social dialogue is bipartite,

⁴³ Rodríguez-Piñero y Bravo-Ferrer, M.: “La nueva dimensión del Derecho del Trabajo”, *Relaciones Laborales*, No. 2 (2002) 4.

⁴⁴ See in Biagi, M.: “The ‘Quality’ Factor in Community Industrial Relations: Building on the First Report of the European Commission”, en BIAGI, M. (Ed.), *Towards a European Model of Industrial Relations? Building on the First Report of the European Commission*, Kluwer Law International, The Hague (2001) 3-14.

⁴⁵ See the Directives in Casas Baamonde, M.^a E.: “Precariedad del trabajo y formas atípicas de empleo, viejas y nuevas. ¿Hacia un trabajo digno?”, *Derecho de las Relaciones Laborales*, No. 9 (2017) 875-876.

⁴⁶ There is no other business model that arises in collaborative platforms that create an open market for the temporary use of goods or services often offered by individuals (Communication of the European Commission *A European agenda for the collaborative economy*, COM (2016) 356 final, Brussels, 06-06-2016, pp. 60-61.

between social partners, and is completed by tripartite agreement with European institutions and political bodies, and by various forms of consultation at European and national level”⁴⁷. The protagonism of social dialogue, in which governments and representative organisations of employers and workers are participating, is being reclaimed at precisely this moment. It returns to play a key role in the governance of work, accompanied by political agreement⁴⁸.

Accepting changes in the fundamental nature of labour law requires overcoming untouchable axioms that survive in contemporary economic thought, such as the one that links rigid labour regulations to the delay in recovery from the economic crisis, to rising unemployment, and more currently, to a lack of adaptation of labour regulation to technological changes. Once again, changes in labour legislation are required in order to adapt correctly to the digital economy, although it must be emphasised that this “new regulation” cannot be made without the social partners. It is essential to begin a consensual regulatory process between State actions and the social partners, over such aspects as: a) the new “gray areas” in labour law; b) the use of traditional parameters when facing new legal challenges (the need to maintain guaranteed rights for workers), and; c) the representation of workers, and the collective rights of workers in the digital economy.

The social partners can help create a new regulatory framework through social dialogue, as stated in the proposal presented by ETUC *Resolution on tackling new digital challenges to the world of labor, in particular crowdwork*, 6 November 2017⁴⁹; or on its own initiative, in the way that was done after the German Metalworkers' Union (IG Metall), which gave rise to the Frankfurt Paper on Platform-Based Work. Proposals for platform operators, clients, policy makers, workers, and worker organizations, signed by various unions in Copenhagen, Frankfurt, Seattle, Stockholm, Vienna and Washington, 6 December 2016.

⁴⁷ Section 1.2 of the exploratory opinion of the European Economic and Social Committee on *The structure and organization of social dialogue in the context of an authentic Economic and Monetary Union*, OJ 19-12-2014. In this same opinion, with regard to the challenge of a new governance, precise definitions are adopted, as a reminder of the contribution of the social partners to the Laeken Summit (December 2001): “UNICE / UEAPME, CEEP and the CES stress the importance of distinguishing three types of different activities in which the social partners are involved: 1. the tripartite agreement, which designates exchanges between the social partners and European public authorities; 2. the consultation of the social partners, in order to determine the activities of the advisory committees and the official consultations, in the spirit of Article 137 of the Treaty; 3. the social dialogue that determines the bipartite work of the social partners that derive or not from the official consultations of the Commission based on Articles 137 and 138 of the Treaty» (Section 4.1.1).

⁴⁸ See the Reference Report for the ILO-AICESIS-OKE Conference, November 23 and 24, 2017, on *Social Dialogue and the Future of Work*.

⁴⁹ It expressly states that, “Related to social dialogue, the ETUC adopted a mandate for the next social partners work programme in which we propose to launch a negotiation on digitalisation with European employers organisations. The ball is now in their camp. For online platforms, the ETUC and the ETUI are willing to create a framework of (social) dialogue between unions and online platforms through the upcoming “Sharers and workers” initiative. It is also of utmost importance for EU institutions to launch a European debate on the policy framework for digitalisation with all relevant stakeholders, in particular social partners. Setting up a European digital agency as a pluralist expert and stakeholder capacity to shape fair digitalisation with social partners involvement would be a step in the right direction”.