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The Impact of New Forms of Self-Employment on Employment Law

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Abstract

Digitalization has not only brought new employment prospects for salaried workers; it has also led to the emergence of new forms of self-employed work that offer companies higher flexibility in the procurement of services. The European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) has identified nine systems of work – termed ‘new forms of employment’ – and has published several reports on the subject since 2015. This paper aims to analyse how these forms of work fit into the Spanish legal system, and to identify problems that may arise in relation to the adaptation of the regulatory system and its inherent weaknesses.

Keywords: Collaborative Employment, Crowd Employment, Interim Management, Portfolio work, Self-employment.

1. Introduction

Changes taking place in the structure of employment, mainly due to the digitalization and delocalization of business and commercial operations, have revealed that how people work is becoming increasingly

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heterogeneous. This diversity of forms of work is particularly evident in sectors that require skilled labour with a great degree of experience.

Starting in 2015, the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) began publishing reports on ‘new forms of employment,’ with general updates in 2018 and 2020.¹ In total, nine forms of employment are mentioned and analysed in the framework of the European Union (EU): employee sharing, job sharing, interim management, casual work, ICT-based mobile work, voucher-based work, portfolio work, platform work, and collaborative employment.

This paper discusses the four emerging forms of work that are typically performed by the self-employed. Based on an initial analysis of their primary characteristics, we aim to analyse how these emerging forms of work fit into the Spanish legal system and to explore the issues that they may pose concerning the adaptation of the regulatory system and the weaknesses inherent to it.

2. Emerging Forms of Self-employment

Increasingly frequent reliance on decentralized production, from specific aspects of the production cycle to broader phases, is making it easier for the self-employed to work with companies as external contractors utilizing innovative solutions that, in many cases, lack adequate legal architecture. New forms of work respond to a demand for greater flexibility. However, they may also lead to a decrease in the quality of employment by

¹ EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 2015; EUROFOUND, *Overview of new forms of employment: 2018 update*, Publications Office of the European Union, Luxembourg, 2018; EUROFOUND, *New forms of employment: 2020 update*, Publications Office of the European Union, Luxembourg, 2020.

The report is based on 67 individual case studies from across Europe that represent a variety of employment forms. Available at <https://www.EUROFOUND.europa.eu/es/publications/report/2015/working-conditions-labour-market/new-forms-of-employment#tab-05> (accessed 28 September 2021). Specific monographs have also been published for some of them. For example, EUROFOUND, *New forms of employment: Developing the potential of strategic employee sharing*, Publications Office of the European Union, Luxembourg, 2016; EUROFOUND, *Employment and working conditions of selected types of platform work*, Publications Office of the European Union, Luxembourg, 2018; EUROFOUND, *Cooperatives and social enterprises: Work and employment in selected countries*, Publications Office of the European Union, Luxembourg, 2019.

weakening contractual conditions with the primary aim of reducing operating costs.

The business reality tends to coordinate as a form of legal bond and, concerning previous stages, in the new scenarios identified by EUROFOUND, “the self-employed are not limited to providing outsourced services; they can also facilitate their own integration into and coordination within the business production chain”². In this way, the integration into the client company can be pointed out as identifying features of these new workers. They are external professionals who provide a very specific qualification (in the case of interim management), or time management adaptability not provided by salaried employees (platform work and crowd employment). Secondly, new self-employed workers are characterized by less independence and greater subordination. Faced with otherness, a distinctive aspect of classic self-employment, the new forms of employment identified lose part of that organic and functional independence to adapt to the client portfolio requirements (portfolio work). Finally, the trend toward the control of business risk should be highlighted, integrating itself into collaborative work formulas that seek to reduce their costs and increase their social protection (workers cooperatives, coworking, and umbrella organizations).

2.1. *Interim Management*

This is a new form of employment in which highly qualified experts are hired temporarily to execute specific projects or solve specific problems, thus integrating external management skills into the work organization. In general, these are supervisory staff who are temporarily vested with managerial and organizational powers in the company to execute projects or assignments.³

² Navarro Nieto points out that the decentralization of production and self-employment are two phenomena that loop back on one another. Navarro Nieto, F.: ‘El trabajo autónomo en las “zonas grises” del Derecho del Trabajo,’ in *International and Comparative Review of Labor Relations and Employment Law*, 2017, n.4, p. 60-61.

³ According to EUROFOUND, this practice has been gradually increasing in 18 EU countries. Figures are available for Austria, Bulgaria, the Czech Republic, Estonia, Italy, the Netherlands, Norway, Poland, and France. EUROFOUND, *New forms of employment*, *op. cit.*, pp. 40-52. Data is also available from the Institute of Interim Management (IIM) in the UK, *Interim Management Survey 2020*, 11th ed., 2020, <https://www.iim.org.uk/survey/> (accessed 28 September 2021). There is no specific legislation regulating this type of employment except for a collective agreement in the Netherlands. EUROFOUND: *New forms of employment: 2020...*, *op. cit.*, p. 52.

Although EUROFOUND does not provide data on this new form of employment in Spain, we were able to verify that this practice is also on the rise in Spain. Spanish companies, including Indal, Azkoyen, Levantina, and Spanair, have used these types of workers in their expansion and improvement processes.⁴ An association of more than 250 professionals and companies (Interim Management Association of Spain or Asociación Interim Management España, AIME⁵) was also formed in 2015. Interim management, however, is not a particularly well-known practice in Spain or one that is in demand by companies or public administrations or by professionals who might wish to engage in it⁶.

Although an interim manager can be hired as a salaried employee⁷, more commonly the interim manager is hired by the company receiving the services as a self-employed professional without an employment relationship, a relationship governed by private law. This is a form of employment consciously chosen by workers to give companies flexibility in the implementation and execution of projects without having to make permanent modifications to their company structure.

⁴ A. De Benito: *Una nueva herramienta para la gestión exitosa de la expansión internacional: el interim management*, in Muñiz Ferrer, Labrador Fernández and Arizkuren Eleta (ed.), *Internacionalización y capital humano*, Comillas Pontifical University, Madrid, 2012, p. 130.

⁵ <https://interimspain.org/>.

⁶ This form of work is most often used in food (18%), industrial (12%), communications (11%), automotive (9%), services (7%), construction (7%), and energy (5%) sectors. In terms of company size, most interim managers have provided their services to companies with fewer than 100 employees (66%). Interim Management Association of Spain (Asociación Interim Management España, AIME), *Encuesta de 2021 sobre el mercado español de los Interim Managers*, 2021, <https://interimspain.org/encuesta-sobre-el-mercado-espanol-de-los-interim-managers/> (accessed 28 September 2021).

⁷ The employee can enter into an employment agreement with the company to provide services. This may involve a prior labor intermediation process in which a specialized business, called a recruitment agency or personnel service provider, or a head-hunter plays a key role. EUROFOUND, *New forms of employment*, *op. cit.*, p. 40. The worker may also be recruited by a personnel service provider and temporarily seconded to the company to provide services. This is possible because personnel service providers, as well as intermediaries, are temporary employment agencies specialising in this type of employment. In 2017, in Spain, 15% of these professionals provided services as employees [Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim Management en España 2017*, 2018, <https://interimspain.org/informe-sobre-el-estado-del-interim-management-en-espana-2017/> (accessed 28 September 2021)] and it has been estimated that personnel service providers were involved in 30% of the projects, although data from 2020 shows a decrease to 15%. [Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado español...*, *op. cit.*]

In 2020, the most common profile for these types of workers in Spain was men between 51 and 60 years old with 3 to 10 years of experience in the profession. The most common specialist posts were general manager, accountant, and financial controller⁸, which also seem to be in the greatest demand.⁹ These professionals took part in business restructuring, strategic growth, internationalization, innovation, and diversification and held temporary management positions pending the permanent coverage of the position.¹⁰

Businesses gain several advantages from using this form of employment, including increased competitiveness, sustainability, and growth, which also benefit the labour market.¹¹ From the perspective of the self-employed specialist engaged in this type of work, the primary drawback is the lack of year-round employment, as getting back-to-back projects without gaps can prove exceedingly difficult. In 2020, 40% of Spanish interim managers worked less than 20% of the time in interim management. Only 7% worked all year round.¹² In addition, projects are often part-time (62% in 2017)¹³, and psychosocial risks have been identified related to stress, professional isolation, and geographic mobility.¹⁴ As for compensation, just over one-third of people who have done this form of work received a daily rate of less than €300¹⁵, which would indicate that higher salaries may compensate for the lack of social protection, the job instability mentioned above, and international mobility required.¹⁶

⁸Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado...*, *op. cit.*

⁹ Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim...*, *op. cit.*

¹⁰ EUROFOUND, *New forms of employment*, *op. cit.*, p. 43.

¹¹ EUROFOUND, *New forms of employment*, *op. cit.*, p. 45.

¹² Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado...*, *op. cit.*

¹³ Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim...*, *op. cit.*

¹⁴ EUROFOUND, *New forms of employment*, *op. cit.*, p. 43.

¹⁵ The most common daily rates in Spain were as follows: less than 300 euros (32%), 300–400 euros (19%), 400–500 euros (15%), 500–600 euros (8%), 600–700 euros (7%), and 700–800 euros (5%). Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado...*, *op. cit.*

¹⁶ EUROFOUND, *New forms of employment*, *op. cit.*, p. 7.

2.2. Portfolio Work

EUROFOUND refers to this new form of employment as a self-employed or freelance worker with no employees who provide services to clients, undertaking small-scale assignments for them. This category includes professionals such as journalists, translators, communications specialists, artists, real estate agents, researchers and scientists, accountants, computer technicians, trainers, teachers, consultants, etc. However, traditional sectors such as construction, transport, commerce, agriculture, fishing, and forestry are also mentioned. Services are provided in the local or regional market, possibly in collaboration with other portfolio workers, with no physical workplace open to the public (most work at home). This group can include retired people who were formerly salaried workers and who have decided to extend their working life, as well as freelancers who have not yet been able to establish a larger business endeavour.¹⁷

The main characteristics of this form of work are that it is self-managed, independent work with an irregular income. In addition, the freelancer must constantly search for new clients, adapt his or her work to client requirements, and develop a business that is not reliant on a single company. Although being highly skilled is not explicitly mentioned, experience in the service offered, communication and sales skills, the ability to self-organize, and professional contacts are regarded as essential.¹⁸

In short, these are professionals who maintain ongoing connections with several companies. The broad definition for this group means that this new form of employment is also found in Spain¹⁹, especially regarding the phenomenon of individual self-employment and self-employed workers with no employees.

In 2020, Spain had an estimated 1,601,769 self-employed workers with no employees, of which 482,376 were in the service sector, a figure that should be viewed with caution and as a simple approximation to quantify

¹⁷ EUROFOUND, *New forms of employment, op. cit.*, p. 104-106.

¹⁸ EUROFOUND, *New forms of employment, op. cit.*, p. 103-105.

¹⁹ Between 2004 and 2013, the total number of portfolio workers in the EU is estimated to have increased by 45%, primarily in Cyprus, Denmark, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, and the United Kingdom. EUROFOUND, *New forms of employment, op. cit.*, p. 104.

this new form of self-employment.²⁰ Is it possible to know whether portfolio work is undertaken in Spain voluntarily or out of a need for self-employment? Data from the annual reports of the international observatory Global Entrepreneurship Monitor (GEM) may be able to shed some light here. Up to the 2018 edition, a distinction was made between necessity-driven and opportunity-driven self-employment²¹. The former includes people whose motivation to form a company is driven by a lack of better job alternatives or employment. The latter are motivated to form a company by the identification, development, and exploitation of a unique business opportunity. Although the GEM data shows that entrepreneurs tend to act more out of opportunity than necessity, it is concerning that those acting out of necessity increased from 14.5% (2005) to 22.6% (2018).²²

One of the disadvantages of this new form of employment, apart from professional isolation, is that income can be irregular, and clients can be scarce at times. But there can also be excess work that overwhelms the worker, prevents full recovery in the event of illness, reduces rest, and/or impinges upon holiday time.²³

2.3. Platform Work and Crowd Employment

Technological advances have allowed the traditional employer-employee relationship to be replaced with the provision of services via digital

²⁰The self-employed without employees are involved in the following business activities: information and communications (41,799); financial and insurance (41,706); real estate (23,377); professional, scientific, and technical (179,153); administrative and support services (80,381); education (64,961); and, lastly, artistic, recreational and entertainment (50,999). Note that part of this figure could include financially dependent self-employed workers who do not have a diverse portfolio of clients. See the Ministry of labor and Social Economy's report *Trabajadores autónomos, personas físicas, en alta en la Seguridad Social*, https://www.mites.gob.es/ficheros/ministerio/sec_trabajo/autonomos/economia-soc/autonomos/estadistica/2020/4TRIMESTRE/publicacion_principal_diciembre_2020.pdf (accessed 6 October 2021).

²¹ The GEM defines this category as people between 18 and 64 years of age who have begun a business within the past three and a half years.

²² Global Entrepreneurship Monitor (GEM), *Informe GEM España 2018-2019*, Editorial de la Universidad de Cantabria, Santander, 2019, p. 70. The opportunity-necessity dichotomy was abandoned in the 2019 edition and motivation was categorized into four types: making a difference in the world; creating wealth or generating high levels of income; continuing a family tradition; and earning a living due to lack of employment opportunities.

²³ EUROFOUND, *New forms of employment*, *op. cit.*, p. 106.

platforms, leading to a ‘Balkanisation of the market,’ where, in lieu of hiring workers, the model consists of putting those in need of services in contact with service providers.²⁴ Anyone with a computer can register on a platform that offers goods and services. As a result, digitization universalizes participation in the production market, which reduces costs and provides access to an unlimited number of customers. As Sierra Benítez points out, digital platforms do not have a workforce, but rather a service relationship. They do not hire people; they offer targets and results²⁵.

EUROFOUND defines up to ten types of paid work in which online platforms play a key role in bringing supply and demand together. These can be classified into four main groups:

a) Work determined by the platform and performed locally. This group includes services that do not require qualifications (on-location platform-determined routine work), such as personal transport services (Uber, Cabify), food delivery services (UberEats, Deliveroo, Glovo), and goods delivery services (Amazon Flex); on-location worker-initiated moderately skilled work, such as ListMinut, a platform providing services such as housework where workers choose from the tasks on the platform and do them in person; or on-location platform-determined higher-skilled work, such as Be My Eyes, a volunteering platform for assisting the visually impaired.

b) Work determined by the platform and performed online. This includes services that require moderately-skilled workers (online moderately skilled click-work), in which the platform assigns tasks that are performed online (for example, creative tasks on the Crowdfunder platform), or highly-skilled workers (online platform-determined higher-skilled work), for example, writing, translating or transcribing texts via the Clickworker platform.

c) Work determined by the client and performed locally. This group includes services that are specified by a client on a platform. These jobs may require lower qualifications (on-location client-determined routine work), such as the carsharing via the GoMore/Amovens platform; moderate skills (on-location client-determined moderately skilled work), in

²⁴ A. Todolí Signes, *El trabajo en la economía colaborativa*, Tirant lo Blanch, Valencia, 2016, p. 19.

²⁵ E.M. Sierra Benítez, *La protección social de los trabajadores ante el desafío del nuevo trabajo a distancia, del trabajo digital y la robótica*, in *Revista de derecho de la seguridad social. Laborum*, 2017, n. 11, p. 153.

which the client chooses people to perform tasks in person, such as domestic services (Oferia); or highly skilled workers (on-location client-determined higher-skilled work), such as, for example, quality control in supermarkets via the app Jobber platform.

d) Work determined by the client and performed online. Work determined by a client is performed online by a specialist (online client-determined specialist work), for example, the Freelancer platform, which charges a commission to intermediate for all kinds of specialized work. This group also includes online contestant specialist work, where workers compete online by performing a task or part of a task (e.g., graphic design on the 99designs platform) and the client selects a winner. An interesting aspect of this type of work is that the work done is usually not the main income-generating activity of the service providers.²⁶

Generally, these people are considered self-employed, although not all the services provided meet the criteria for self-employment. This is the case for the platform-determined services provided locally or online described in sections a) and b), which the different legal systems do not legally classify. In Spain, after a period of contradictory judicial decisions, the Supreme Court settled the issue by considering people who provide delivery services (called ‘riders’ in Spain) to be employees.²⁷

For the services classified as c) and d), some consider the digital platform merely a notice board or intermediary connecting client companies with service providers. Crowd employment platforms are typically global in scope, have a virtual workforce, and attract companies as end-consumers. Crowd employment tasks are not assigned to a specific provider, which weakens many of the arguments put forward to discredit the non-employment nature of the contractual relationships that they facilitate. Although these new forms of employment provide workers both flexibility and additional income, among other advantages, their disadvantages include the fact that these service providers are invisible, professionally isolated, and primarily home-workers and that these jobs

²⁶ EUROFOUND, *Employment and working conditions...*, *op. cit.*, p. 23.

²⁷ Supreme Court ruling of 25 September 2020, rec. no. 4746/2019. For a current update on judicial decisions regarding this matter, see I. Beltran de Heredia Ruiz, *Employment status of platform workers (national court decisions overview – Argentina, Australia, Belgium, Brazil, Canada, Chile, France, Germany, Italy, Nederland, New Zealand, Panama, Spain, Switzerland, United Kingdom, United States & Uruguay)*, in the blog *Una mirada crítica a las relaciones laborales*, 2021, <https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/#spa1> (accessed 28 September 2021).

have been largely deregulated. New emerging forms of work also raise important questions about how to combat tax fraud and unfair competition, protect privacy and personal data, and prevent regulatory fragmentation of the labor market.²⁸

2.4. Collaborative Employment

Although the analysis carried out below could be integrated into the scope of legal tools that favor the sustainability of self-employment, EUROFOUND refers to independent self-employed professionals and micro-enterprises that work together in some way to overcome their size limitations and professional isolation. For its study, this form of work is further divided into three forms of cooperation: worker cooperatives, umbrella organizations, and coworking.

All three are considered to provide flexibility, autonomy, a better work-life balance, less social and professional isolation, and increased productivity while fostering the development of skills, self-employment, entrepreneurship, and reducing business risk. However, the employment situation of workers is often unclear, which affects their level of social protection.²⁹

2.4.1. Worker Cooperatives

Although EUROFOUND considers worker cooperatives a new form of employment, they have been around since the mid-19th century. It is true, however, that in recent years new forms of cooperatives have been devised to foster entrepreneurship and employment. This stimulus came in the wake of the financial crisis of 2008 when cooperatives in the EU were seen to have similar or better survival rates than conventional companies. Cooperatives and social enterprises are seen as potential sources of innovative solutions to the socio-economic challenges identified as EU priorities: inclusive growth, aiding regional economic development, smart growth, combating poverty and social exclusion and creating sustainable growth.³⁰ Cooperatives generally have worker-member ownership, a democratic system, and close cooperation between

²⁸ P. Páramo Montero, *Las nuevas formas emergentes de trabajo. Especial referencia a la economía colaborativa*, in *Revista del Ministerio de Empleo y Seguridad Social*, 2017, n. 128, p. 197.

²⁹ EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 49.

³⁰ EUROFOUND, *Cooperatives and social enterprises: Work and employment in selected countries*, Publications Office of the European Union, Luxembourg, 2019, p. 3.

members in the different areas of production, strategic management, and marketing. They have become increasingly prevalent in Austria, France, Hungary, Germany, Greece, the Netherlands, Spain, and Sweden³¹. Most EU member states have specific legislation governing them, except for Croatia, Denmark, Ireland, Sweden, and the United Kingdom, where they are covered by general business regulations.³²

In Spain, worker cooperatives³³ are quite common. These collective businesses allow members to choose how their social security contributions are made, either as part of the workforce as salaried employees or as self-employed workers (art. 14 Royal Legislative Decree 8/2015, of 30 October, approving the revised text of the General Law on Social Security, LGSS). Cooperatives are expressly mentioned in Art. 129.2 of the Spanish Constitution³⁴ and are governed by state and regional regulations.³⁵

In Spain, worker cooperatives have been used in some sectors for grossly fraudulent practices. In one of the best-known examples, self-employed workers were falsely presented as worker-members of merely formal cooperatives. This was done in an ongoing and coordinated manner in the meat industry.³⁶ This deceit extends even to the worker cooperatives themselves because they are set up solely as front companies to decentralize production and cover up illegal transfers of phony self-employed workers. All of this was done to reduce staff and production costs for the companies they offer their services to, at the expense of eliminating the guarantees provided by labour legislation.³⁷ Another area in which activities are outsourced through cooperatives that erode the

³¹EUROFOUND, *New forms of employment*, *op. cit.*, p. 118.

³²EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 48.

³³ While it is difficult to estimate the number of worker cooperatives in the EU, EUROFOUND provides some figures in *EUROFOUND, New forms of employment: 2020...*, *op. cit.*, p. 47.

³⁴ ‘The public authorities (...) shall encourage cooperative societies by means of appropriate legislation,’ and, in keeping with this, several tax and employment incentives have been established.

³⁵ Law 27/1999 of 16 July on Cooperatives, Law 3/2011 of 4 March which regulates the European Cooperative Society based in Spain, Law 5/2011 of 29 March on Social Economy, and others.

³⁶ A. Baylos Grau, *Carne sin explotación: los falsos autónomos en las cooperativas cárnicas*, in the blog *Según Antonio Baylos...*, 2019, <https://baylos.blogspot.com/2019/05/carne-sin-explotacion-los-falsos.html> (accessed 28 September 2021).

³⁷ L.J. Dueñas Herrero, *Traiciones al cooperativismo en las industrias cárnicas*, in *NET21*, 2021, n. 2, <https://www.net21.org/wp-content/uploads/2021/05/Traiciones-al-cooperativismo-en-las-industrias-carnicas.pdf> (accessed 28 September 2021).

labour protections of their members is the transport of goods. Fraud occurs when the cooperative provides both the vehicle as well as the transport permit to the member. This allows drivers to work without a vehicle, without transport authorization, and without professional transport qualifications.³⁸

Meanwhile, in the sector of online-platform-managed product delivery, worker cooperatives have begun to be established precisely to avoid the violation of labour regulations these platforms commit concerning their deliverers.³⁹

Lastly, some types of entities set up as cooperatives fall under the definition of umbrella organizations (described below), whose operations in some cases border on legality or are even illegal. They have not been included under this heading because we believe they are not set up for collective self-employment in the social economy, but for individual self-employment or to help the self-employed overcome the shortcomings of the social security system, which does not benefit the self-employed who earn lower incomes.

2.4.2. Umbrella Organizations

Umbrella organizations can be found in Austria, France, Sweden,⁴⁰ and the United Kingdom⁴¹, but also in Spain (constituted as cooperatives). They offer self-employed workers certain administrative services such as invoicing or tax assistance. As their name suggests, they act as an ‘umbrella’ for business activities. The main advantage of belonging to an umbrella organization is that it allows the self-employed member to pay into the social security system and obtain a certain level of social protection.⁴²

Perhaps one of the most striking examples of this type of organization is that of the French wage portage companies, which were illegal in the 1980s but were definitively accepted in the Code du Travail in 2015. In the system, a qualified self-employed professional (economist, computer

³⁸ R. Alfonso Sánchez, *Formas jurídicas de trabajo asociado en la economía social*, in Fajardo García (dir.), Senent Vidal (coord.), *Cooperativas de Trabajo Asociado y Estatuto jurídico de sus socios trabajadores*, Tirant lo Blanch, Valencia, 2016, p. 90.

³⁹ For example, Mensakas (Barcelona), La Pájara (Madrid), Rodant (Valencia), Botxo Riders (Bilbao), etc.

⁴⁰EUROFOUND, *New forms of employment*, *op. cit.*, p. 118.

⁴¹ EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 46.

⁴²EUROFOUND, *New forms of employment*, *op. cit.*, p. 118.

scientist, consultant, etc.) offers their services to a company and agrees to provide those services for a given fee without becoming part of the company's hierarchy. At the same time, the employee finds a wage portage company and enters an employment contract. The wage portage company receives the fees invoiced for the provision of services to the client company. The wage portage company registers the employee with social security, handles social security contributions, and pays the employee's salary (minus a fee for management costs).⁴³ Wage portage is an innovative system that provides access to employment and social protection for self-employed professionals in a context of diversifying forms of work and the decreasing presence of workers of a certain age⁴⁴ in the labour market while reconciling what was once thought to be irreconcilable: autonomy and independence in the workplace with all the protections afforded salaried employees.⁴⁵

This type of company can only operate as a wage portage company and must have official authorization as well as a financial guarantee to be able to meet its financial obligations to the worker in the event of default.⁴⁶ In 2018, there were 326 wage portage companies in France with a turnover of approximately 1.3 million euros⁴⁷ and a collective agreement for the sector.⁴⁸

Another type of cooperative with a similar aim, supporting the self-employed, has also appeared in France. These are the *coopératives d'activité et d'emploi* (business and employment cooperatives), in which the entrepreneur signs a temporary contract with the cooperative (a 'salaried entrepreneur contract'), which is not an employment contract but allow

⁴³ P. Gómez Caballero, *Los aspectos individuales de las actividades fronterizas: en particular el trabajo autónomo*, in *Las fronteras del Derecho del Trabajo en el marco comparado europeo: autónomos y becarios*, Ediciones Cinca, Madrid, 2016, p. 52. UK umbrella companies work similarly.

⁴⁴ C. Lenoir – F. Schechter, *Le portage salarial doit sortir de ses ambiguïtés*, in *Droit Social*, 2012, n. 9, p. 772. The authors point out that by applying a task-based approach and transforming fees into wages, wage portage seems to offer double protection: for clients, who can adapt resource allocation to meet their needs more efficiently, and for workers, who can apply a strategy of returning to employment while ensuring the continuity of their rights.

⁴⁵ L. Casaux-Labrunée, *Le portage salarial: travail salarié ou travail indépendant?* in *Droit Social*, 2007, n. 1, p. 58.

⁴⁶ P. Gómez Caballero, *op. cit.*, p. 53.

⁴⁷ Data provided by the Fédération des Entreprises de Portage Salarial (FEPS). Disponible en <https://syndicatportagesalarial.fr/branche/chiffres-portage-salarial/> (accessed 11 October 2021)

⁴⁸ Convention collective de branche des salariés en portage salarial du 22 mars 2017. Arrêt du 28 avril 2017 JORF 30 avril 2017. Available at <https://www.legifrance.gouv.fr>

allows the person to receive the social security benefits of an employee. When the contract ends, the signee can become a member or work outside the cooperative. The cooperative assumes fiscal, social, and accounting obligations related to a salaried entrepreneur's business activities, and provides support, training, etc.⁴⁹ So, these companies act more like umbrellas than cooperatives, since the workers do not become members until the initial period of salaried entrepreneurship is completed.⁵⁰

Attempts have been made to imitate this practice in Spain, in the form of business development cooperatives, a form created by regional regulation in some areas, but also used in other communities as another type of cooperative. These organizations aim to promote entrepreneurship by providing assistance and support. However, the regulations governing them allow for them to serve merely as an 'umbrella' to help launch their members' business projects and minimize risks. There is a tendency to equate them with worker cooperatives to include tax and social security benefits⁵¹, but they are not true worker cooperatives since the worker-members do not work together. The worker-members do not contribute to the company; they receive its services. They are therefore users⁵², which makes these entities a hybrid or intermediate between worker cooperatives and service cooperatives.⁵³ This formula provides members with a legal framework that allows them to undertake an entrepreneurial endeavour while also facilitating management procedures related to their

⁴⁹ G. Fajardo García, I. Alzola Berriozabalgoitia, *Las cooperativas de emprendedores y su contribución al emprendimiento en economía social*, in CIRIEC – España. *Revista jurídica de economía social y cooperativa*, 2018, n. 33, pp. 10-11.

⁵⁰ G. Fajardo García, I. Alzola Berriozabalgoitia, *op. cit.*, p. 30.

⁵¹ J.A. Altés Tárrega, *Análisis legal de las cooperativas de facturación y las cooperativas de impulso empresarial*, in A. Todolí Signes, M. Hernández Bejarano (coord.), *Trabajo en Plataformas Digitales: innovación, Derecho y mercado*, Thomson-Reuters Aranzadi, Cizur Menor (Navarra), 2018, pp. 394-406.

⁵² A. Lozano Manor, *Cooperativas de trabajadores autónomos-cooperativas de impulso empresarial in Cooperativas de Trabajo Asociado y Estatuto jurídico de sus socios trabajadores*, *op. cit.* p. 715.

⁵³ M. Hernández Bejarano citing Sánchez Bárcenas. The author is opposed to classifying this type of company as a worker cooperative because the work is not pooled, not cooperative, but rather the company merely provides support for the business activities of individuals. Therefore, "special cooperative" is considered the most fitting classification for their corporate purpose. M. Hernández Bejarano, *Nuevos modelos de cooperativas de trabajadores autónomos: un análisis de las cooperativas de impulso empresarial y las cooperativas de facturación*" in *Economía colaborativa y trabajo en plataforma: realidades y desafíos*, Rodríguez-Piñero Royo and Hernández Bejarano (dir.), Bomarzo, Albacete, 2017, pp. 161-162.

business activity as self-employed persons. The practice is provided for in some regional regulation, which states that ‘invoicing must be performed by the cooperative in all cases.’⁵⁴ This stipulation allows these companies to issue invoices to clients for specific services, and the member is paid as a salaried employee for the actual time worked.

Lastly, the number of freelance billing cooperatives has been on the rise in Spain in recent years. These companies are formally established as worker cooperatives that provide members (false worker-members) with invoicing services and social security enrolment (part-time under the general system under Art. 14 of the Spanish General Social Security Act) in exchange for a percentage of their income.⁵⁵ They sell themselves as a solution for self-employed people with low incomes or who do not provide services regularly, to avoid paying the minimum monthly social security contribution, mentioned above in the section on portfolio work as a major concern for any self-employed person. All this activity is fraudulent.

2.4.3. Coworking

Coworking involves sharing a workspace (which can be virtual, as in Germany), back office, and support. This form of work promotes cooperation and exchange between self-employed workers not necessarily related to tech start-ups (business incubators have been created for this sector)⁵⁶, although the profile of these workers is sometimes similar to that of the portfolio workers discussed previously (creatives, consultants, artists, journalists, etc.).⁵⁷

With the coworking system, not only are facilities and services shared to increase efficiency but synergies are also generated among the freelancer participants, which can lead to joint projects and the acquisition of a more diverse portfolio of clients. Each member pays rent for their workspace and for the right to use meeting rooms, the internet, printer service, courier services, the canteen, etc. as well as for training and networking activities. Other advantages include a guarantee that the facilities will

⁵⁴ Art. 84.3 of Decree 123/2014 of 2 September, approving the provisions of Law 14/2011 of 23 December on Andalusian Cooperatives (amended by Law 5/2018 of 19 June).

⁵⁵ J.A. Altés Tárrega, *op. cit.*, pp. 390-394. The same author states that business development cooperatives sometimes act in a similar manner to billing cooperatives.

⁵⁶ EUROFOUND, *New forms of employment, op. cit.*, p. 118.

⁵⁷ EUROFOUND, *New forms of employment, op. cit.*, p. 124.

comply with occupational risk prevention regulations, reduced professional isolation (often found in some forms of self-employment like portfolio work), greater productivity, and improved professional skills and employability.⁵⁸

Most coworking systems are found in Germany, Spain, the UK, France, and Italy. Spain is among the top 20 largest markets, with 939 coworking spaces,⁵⁹ although this figure is expected to decrease due to the need to maintain physical distance⁶⁰ and the possibility of remote work from home.

3. Legal Analysis and Weaknesses: Reflections on the Need to Revise Traditional Models

The different emerging forms of employment analysed here share a common trait: they are legally classified as self-employment. As with salaried work, there is no EU-wide concept of self-employment, and so its legal status is determined by the laws of each Member State.

In Spain, under Law 20/2007 of 11 July regulating the Self-Employed Workers' Statute (LETA, or *Ley Estatuto del Trabajo Autónomo*), a self-employed worker is someone who habitually and independently performs an economic or professional activity for profit. One initial noteworthy weakness of this is that the regulation fails to define the requirement of habitually performing an activity. This lack of definition creates a certain degree of legal uncertainty, especially considering that many of the forms of employment contemplated may not be performed continuously. This is the case with work done in the context of legal interim management (LIM), lawyers who are hired to execute specific temporary projects in the legal departments of companies and law firms; and the micro-tasks performed by professionals translating texts (smartling.com) or doing graphic design (upwork.com). 'Habitual' can be understood as a) work performed periodically; b) work performed that constitutes the central core of the subject's work life, or c) work from which sufficient income is obtained. Depending on which interpretation is applied to the term, the subjective scope of self-employment is either broadened or restricted. In practice, case law has adopted a quantitative criterion based on the

⁵⁸ EUROFOUND, *New forms of employment*, *op. cit.*, p. 120, 121 and 126.

⁵⁹ Estudio global de crecimiento del coworking 2020, available at <https://coworkinglafabrica.es/pronostico-del-coworking-2020-2021/> (accessed 21 november 2021).

⁶⁰ EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 46.

minimum wage. This criterion is not exempt from criticism from the most authoritative opinion⁶¹: the social security administration itself has departed from it, applying a much stricter criterion in which workers must register as self-employed and pay social security contributions even if their level of income is low unless they can prove that their business activity is sporadic or limited in scope. A more concise definition of the concept of self-employed is needed to prevent rigid regulation from stimulating the underground economy.

The regulation of self-employment is subject to civil, commercial, and administrative legislation under the legal classification of the business established and individual agreements entered into by the client and the worker. Here, in our opinion, is where the second weakness is to be found: the regulations assume that the self-employed are professionals who can negotiate when in most cases they are obligated to accept the contract conditions offered to them. This is the case for portfolio workers, platform workers, and even some forms of collaborative employment. The result of their ‘membership’ can only be degradation of these groups’ employment conditions that underscores the precariousness of self-employment: long working hours to guarantee the delivery of contracted services; unpaid unproductive time; greater exposure to occupational hazards; and fierce competition among service providers resulting in lower rates of compensation. In this regard, a suitable minimum wage⁶² for self-employed workers is becoming increasingly necessary, because they do not enjoy the same contractual base salary as minimum-wage salaried employees do. This is an issue that has already been raised by some entities⁶³, along with the need for intervention by social agencies.

⁶¹ The Spanish Supreme Court, in its ruling of 29 October 1997 (rcud. 406/1997) stipulated that the amount of remuneration received by the self-employed is an appropriate criterion for measuring regularity of work and that exceeding the minimum wage received in one calendar year (currently €13,510) can serve as a suitable indicator of regular self-employment, even though the figure was established in association with the remuneration of salaried work. However, the opinion proposes going beyond this quantitative requirement and states that what is important is that the work is merely productive.

⁶²The International Labor Organisation's Centenary Declaration for the Future of Work states that ‘all workers, irrespective of their employment status or contractual status, should be guaranteed [...]’, p. 7. Available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf (accessed 13 October 2021).

⁶³ The European Economic and Social Committee in its opinion on the ‘Abuse of the status of self-employed,’ 2013/C161/03 (OJEU, 6 June 2013) proposed setting

It is in this context of collective representation that the third of the weaknesses of the legal system governing self-employment is found. Recognizing the right to association restricted only to membership in a trade union and excluding all that collective action entails promotes the under-protection of self-employed workers. The emergence of these new forms of work does not always translate into situations of socioeconomic predominance, which is why these workers should be provided with a modern and flexible collective response that can only come from trade unionism⁶⁴ and collective bargaining. Classification as self-employed should not be an obstacle to the advocacy of trade unions⁶⁵ and the promotion of the collective negotiation of certain aspects working conditions. However, in the opinion of the EU Court of Justice, this approach goes against rules on competition. The court has stated this in several rulings, finding that EU law has no provisions whereby members of the liberal professions are encouraged to seek collective agreements to improve their employment and working conditions⁶⁶, thereby misidentifying the concepts of ‘undertaking’ and ‘self-employed.’ The result is the inclusion of self-employed persons without employees under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), and possible inclusion in collective agreements of the ‘false self-employed’, a classification that cannot be attributed to the forms of employment examined here.

The existence of nomadic groups who work individually and independently for different clients in different sectors requires coordination of collective defense of their professional interests, not abandoning them to undertake on their own the individual negotiation of

minimum hourly rates through social dialogue that may vary even within the same Member State within regions.

⁶⁴ The author points out that trade unionism will provide a collective voice and response as well as social integration and governability. A. Ojeda Avilés, *La sindicación de los trabajadores autónomos y semiautónomos*, in *Revista Aranzadi Social*, 2000, n. 100, p. 5.

⁶⁵ The CJEU of 4 December 2014 (Case C-413/13 FNV Kunsten Informatie en Media) establishes that when a trade union acts as a representative of the self-employed persons affiliated with it, it loses its status as social partner and becomes an association of undertakings.

⁶⁶ CJEU OF 12 September 2000 (Paulov, C-180/98 a C-184/98). In the opinion of Cabeza Pereiro ‘When all is said and done, the underlying argument that the European Union has not provided for social dialogue mechanisms for self-employment similar to those in place for wage labour since the Maastricht Treaty is very unconvincing from a fundamental rights perspective.’ J. Cabeza Pereiro, *Derecho de la competencia, libertad de establecimiento y de-colectivización de las relaciones de trabajo*, in *Revista Trabajo y Derecho*, 2015, n. 3, p. 7.

contractual conditions, which in actual practice does not occur.⁶⁷ To address this issue, the European Commission has launched a public inquiry to define the scope of application of EU competition law which, in certain circumstances, would allow the self-employed to improve their working conditions through collective agreements.⁶⁸ The draft Guidelines about collective agreements regarding the working conditions of solo self-employed people was presented on December 9, although some trade union organizations had already revealed its content⁶⁹, and opened the door to collective bargaining to certain categories of self-employed people who are in a situation comparable to that of workers⁷⁰.

The fourth and final weakness we would like to address is social protection. The forms of self-employment we have analysed allow companies to satisfy their specific needs, whether of a technical nature, such as in interim management or of an economic nature, such as in platform work in which the primary goal is clearly to reduce costs.

The general dissatisfaction with the Spanish social security system for the self-employed is no secret; contributions are not linked to the worker's actual income and are viewed as excessively high. Therefore, most self-employed workers currently pay contributions at the minimum rate (85.5% in the fourth quarter of 2020), to maintain the lowest possible costs, even if it means sacrificing future social benefits. Moreover, this social protection is not comparable with that of employed workers, even though Spain's Self-Employed Workers' Statute (LETA) recognizes the need to establish a level of protection similar to that of employed workers

⁶⁷ In September 2018, The European Committee of Social Rights took an important decision on recognising self-employed workers' right to collective bargaining, taking the view that an absolute prohibition of this right would be excessive considering the object and purpose of Article 6.2 of the European Social Charter. Available at <https://rm.coe.int/cc-123-2016-dmerits-fr/1680902967> (accessed 13 October 2021).

⁶⁸ Comments available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en (accessed 13 October 2021).

⁶⁹ For example, the International Federation of Musicians (FIM) <https://www.fim-musicians.org/es/eu-collective-bargaining-for-self-employed-workers/> or the European Trade Union Institute (ETUI) <https://www.etui.org/publications/collective-bargaining-and-self-employed-workers> (accessed 13 October 2021).

⁷⁰ European Commission. Draft for a Communication from the Commission "Guidelines on the application of EU competition law to collective agreements regarding the working condition of solo self-employed persons. Brussels, 9.12.2021 C (2021) 8838 final. An impact assessment report will be published in the second quarter of 2022 together with the final version of the Guidelines.

in its preamble, as most self-employed workers have no employees to help them.⁷¹

This lesser social protection seems, to a certain extent, to be caused by reducing social security contributions as a way of promoting self-employment. We are referring to the so-called ‘flat rate’ contribution, which aims to encourage self-employment by reducing the amount of social security to be paid to €60⁷² for 1–2 years, followed by reductions of variable percentages in the 12, 24, or 36 months following registration with the Special Regime for Self-Employed Workers (RETA) when certain requirements are met. In our opinion, the lower social security payment encourages the phenomena of false self-employment, which has two adverse impacts on workers: firstly, they are deprived of their labour rights, and secondly, they are left with reduced social protection due to the under-contribution this self-employment incentive entails. So, contribution formulas must be promoted that do away with the distinction between self-employment without employees and employed work. Sweden offers a good example of this. Swedish employers pay the same social security contributions for all forms of employees (whether they are salaried employees or self-employed) and are responsible for making these contributions on behalf of their workers. This is because contributions in Sweden are linked to income, not to the category of work⁷³, a demand of the self-employed in Spain that has not been met so far and which could resolve some of the issues regarding the social protection of workers engaged in emerging forms of employment.

Social protection depends on contributions to the social security system, which is set as the amount resulting from applying a rate of 30.6% to a base ranging from a minimum (944.40 €) to a maximum (4,070.10 €).

⁷¹ Art. 23.1 of the LETA states that self-employed workers are entitled to the maintenance of a public social security system that guarantees them sufficient social assistance and benefits in situations of need, while Art. 26.5 and the second final provision of the LETA insist that the rights and benefits of the self-employed should converge with those in force for employed workers.

⁷² If self-employed workers choose the minimum social security contribution, they must pay €286 per month, regardless of their actual income or whether they work full or part-time. It is important to remember that some of the forms of employment analyzed herein (platform work, crowd employment) are generally complementary sources of income.

⁷³ A. Milanez – B. Bratta, *Taxation and the future of work: how tax systems influence choice of employment form*, in *OECD Taxation Working Papers*, 2019, n. 41. <https://doi.org/10.1787/20f7164a-en>.

These bases are not related to the self-employed worker's real income, which means that even in cases where no income is generated, the self-employed worker must pay the due amount.

The rigidity of social security contributions, disconnected as they are from the worker's real income, together with the tendency to pay contributions based on the minimum base rate to reduce costs, drives many self-employed persons to turn to systems like umbrella organizations and worker cooperatives to transform their freelance provision of services into a salaried provision of services for tax purposes. One might consider the possibility of these workers—using the same triangular relationship wage portage is based on—autonomously reaching agreements on the conditions of the provision of their services with their clients, and being subject to a protective system equivalent to that of salaried workers employing a contract with an intermediary company. This arrangement would be parallel with the current system for temporary employment agencies, which would mean supporting the employment of self-employed workers with the same instrument used to support the employment of salaried workers. This would give labour intermediation a wider scope of action, promote access to independent and flexible work better suited to the needs of both parties, and help to overcome the rigid separation between self-employment and salaried employment.

4. Conclusions

EUROFOUND's reports on new forms of employment indicate that ICT-based mobile work, platform work, cooperatives, and coworking (the last two understood as collaborative employment) all exist in Spain. However, these reports should be approached with caution, as we have shown that interim management, portfolio work, and other practices associated with umbrella organizations included within the framework of collaborative employment are also found in Spain. Some of these new forms of self-employment are related to the activities of temporary employment agencies (interim management, wage portage), and as such, the legislation governing them should be adapted accordingly to encourage their expansion, especially at the EU level, given that globalization has blurred national borders. There are very few formal harmonized definitions of these phenomena, which would be an

important precondition for establishing European Community regulatory frameworks and for quantifying and measuring them.⁷⁴

In the Spanish legal system, the flexibility demanded by companies coexists poorly with the protectionism arising from labour law, which is why the self-employed are filling positions previously held by salaried workers. The point of departure is a body of regulation that views the self-employed as subjects with contractual power in their legal relationships. However, the economic reality reveals workers who change their professional career paths to become self-employed, who have no relevant infrastructure or subordinate employees and are not able to determine contractual conditions for the provision of their services. This is, therefore, a form of employment subject to precariousness similar to that of salaried employment.

This change in the profile of self-employed workers means the legal system for them will also have to be redefined to include provisions better suited to the peculiarities of the new services provided and the changing landscape of working conditions (because there is a risk that these new forms of work will increase the number of poor workers⁷⁵) and to ensure an optimal level of social protection. Since new business models driven by digitalization are turning many self-employed workers into digital nomads characterized by professional isolation, individualism, and the collective lack of protection of their interests, there should be a push for quality self-employment in line with the European Pillar of Social Rights, with legislation that provides for the establishment of a suitable minimum wage, that strikes a better balance between the workers' contributions to the social security system and their real income, and that promote collective bargaining and standardize employment conditions for those providing services in a given sector.

However, this horizon is very distant from the Spanish legislative response, which is characterized by inertia and a tendency toward clustering new forms of employment within the existing formal employment system as a response to the proliferation of self-employment. The rising rate of self-employment and the fact that its regulation does not always keep pace in terms of social protection have increasingly given rise to fraudulent practices and practices that border on illegality to assist

⁷⁴ EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p.5, p. 53.

⁷⁵ J.C. García Quiñones, *Nuevas tecnologías y nuevas maneras de trabajar colectivamente*, in L. Mella Méndez, P. Núñez-Cortés Contreras (Dir.), *Nuevas tecnologías y nuevas maneras de trabajar: estudios desde el Derecho Español y comparado (Alemania, Reino Unido, Polonia, Portugal y Argentina)*, Dykinson, Madrid, 2017, p. 88.

self-employed people with low or irregular incomes. It is therefore imperative to prevent the devaluation of the rights of these workers and to re-examine the social security system to guarantee self-employed workers the same protections afforded to salaried workers. This is the only way to prevent social dumping.

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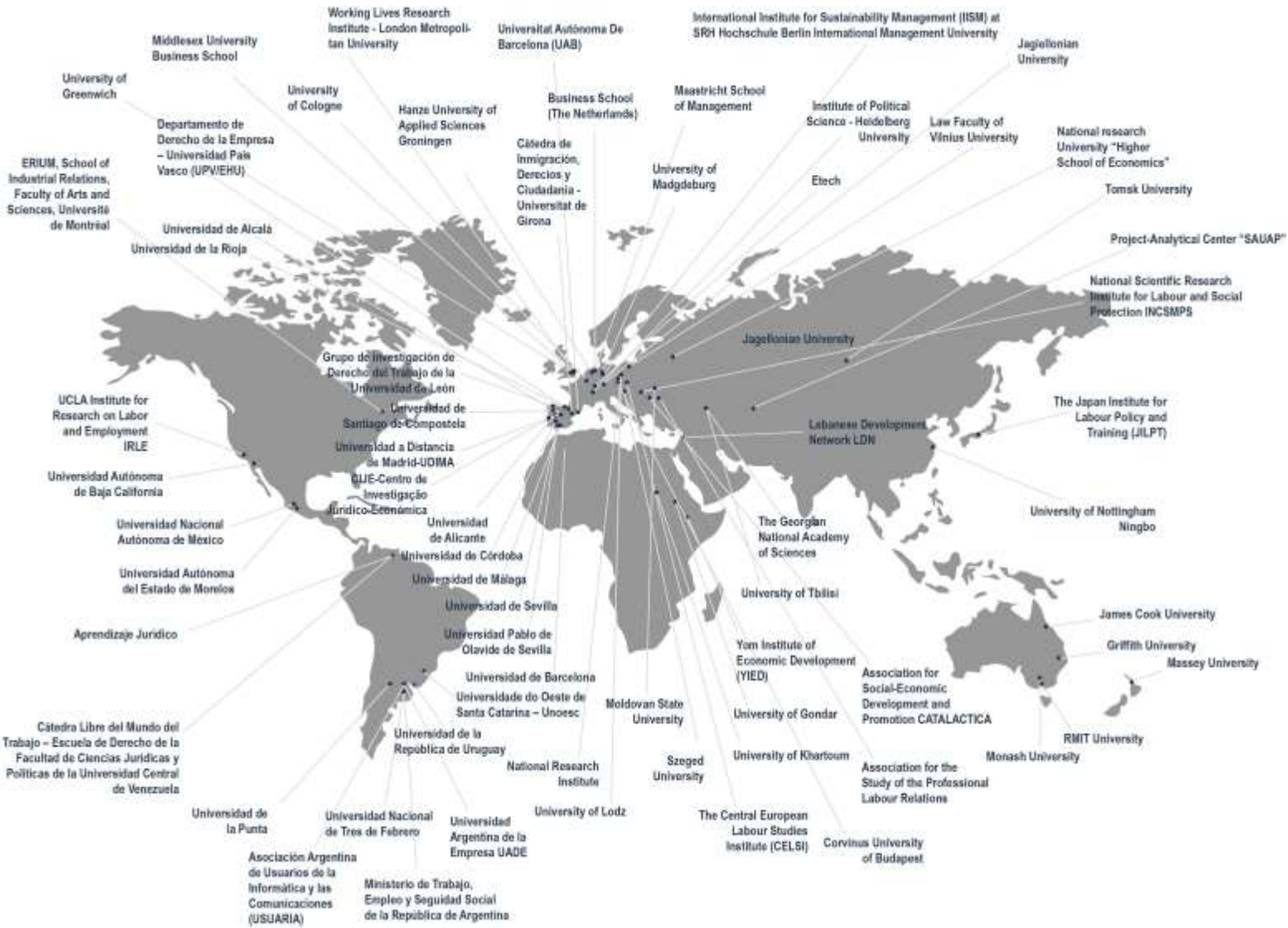
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