EMPLOYMENT LAW

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Aim

- Offer an approach to employment law from the perspective of the challenges it faces.

- Not exclusively based on Spanish employment law:
  - International and European regulations
  - Other countries

Contents

- **Challenges for employment regulation**
  - Globalisation and *flexicurity*
  - Outsourcing
  - New technologies
- **Some data about Spanish labour market**
  - Payment
  - Working time
  - Instability
- **Challenges due to flexibility**
  - External: Recruitment and dismissal/redundancies
  - Internal: management of workforce

CHALLENGES FOR EMPLOYMENT REGULATION

Summary

I. Globalisation and crisis

- From flexibility to *flexicurity*

II. Company organisation

- Outsourcing
- Platform work (the gig economy)

III. Technology

- Privacy

CHALLENGES

1) Globalisation and crisis

Need to increase competitiveness in a global market

How?

* By increasing the value of products.
* By worsening working conditions (social dumping).

Induced perception:

Employment law as a barrier to creating jobs

Solution:

From flexibility (1994) to *flexicurity* (2012).

GLOBALISATION: New requirements for employment law

- **Scope of employment law in its origins**
  - Worker's protection
  - Instrument: minimum legal standards

- **Characteristics of employment law in its origins**
  - Full-time work
  - Indefinite relationship (open-ended contracts)
  - Contract of employment regulating the activity
  - Only the employer held responsible for obligations related to the contract of employment

Globalisation: subordination of employment law to the economy and employment

- Need to protect the productivity of the activity undertaken
- Need to give protection before unemployment
- Requirement for flexibility:
    - 1. Flexibility inside employment law:
        - Different protection: special labour relations
        - Internal flexibility: management of employees
        - External flexibility:
            - Recruitment
            - Dismissal and redundancies
    - 2. Flexibility in the field of application of employment law

Flexisecurity

Common principles of *flexicurity* COM(2007) 359

- **Scope of flexicurity**
  - Meet the objectives of the European Employment Strategy.
  - Flexicurity aims at ensuring that EU citizens can enjoy a high level of employment.
- **What flexicurity is about**
  - ***Flexibility***
    - **Successful changes ("transitions") throughout life:**

      It is not just more freedom for companies to recruit or dismiss.

      It reinforces transitions to, in and from the labour market:

      Progress of workers into better jobs, "upward mobility" (included).

      Flexible work organisation. Good for both enterprises and workers.
  - ***Security***
    - More than just the security to keep your job: it is about equipping people with the skills that enable them to progress in their working lives. From the right to work (*dret al treball*) to right to employment (*dret a l'ocupació*).

Fostering entrepreneurship and independent work

How does it work?

a) Flexibility of employment protection legislation

Strict employment protection legislation against dismissal

- **Negative effects: segmentation**
  - Reduces the numbers of dismissals but also decreases the entry rate from unemployment into work.
  - Even if the impact on total unemployment is limited, there is a negative impact on disadvantaged groups.
  - Encourages recourse to temporary contracts with low protection: produces segmentation.
  - Segmentation
    - * Insiders/outsiders
    - * Temporary contracts/open-ended contracts
- **Positive effects**
  - Encourages enterprises to invest in training and promotes loyalty and higher productivity among employees.

b) Comprehensive life-long learning strategies

- To ensure the continual adaptability and employability of workers

c) Modern social security systems

- Negative effects of unemployment benefits: discourages job-hunting

d) Effective active labour market policies

- Strengthening public employment services in terms of staff and skills
- Cooperation with market partners, such as temporary work agencies

Common principles:

(1) Flexicurity means **new forms of flexibility and security** to increase adaptability, employment and social cohesion.

(2) Flexicurity implies a **balance between rights and responsibilities** for employers, workers, job seekers and public authorities.

(3) Flexicurity should be adapted to the specific circumstances of each country. Flexicurity **is not about one single labour market model** or a single policy strategy.

(4) Flexicurity **should reduce the divide between insiders and outsiders** in the labour market.

(5) Internal (within the enterprise) as well as external (from one enterprise to another) flexicurity should be promoted. Upward mobility needs to be facilitated, as well as between unemployment or inactivity and work. Social protection needs to support, not inhibit, mobility.

(6) Flexicurity should support **gender equality** by promoting equal access to quality employment for women and men, and by offering possibilities to reconcile work and family life as well as providing **equal opportunities** to migrants, young, disabled and older workers.

(7) Flexicurity requires a **climate of trust and dialogue** between public authorities and social partners, where all are prepared to take responsibility for change, and produce balanced policy packages.

(8) Flexicurity policies have budgetary costs and should be pursued also with a view to contribute to sound and **financially sustainable budgetary policies**.

4) Opinion of the European Economic and Social Committee on *Flexicurity* (DOUE 27.10.2007 C-256/108)

Examples of flexibility

External numerical flexibility	Adjustment of employment volume by way of an exchange with the external labour market; involving lay-offs, temporary work, and fixed term contracts.
Internal numerical flexibility	The temporal adjustment of the amount of work within the firm, involving practices as atypical working hours and time account schemes.
Internal functional flexibility	Organising flexibility within the firm by means of training, multi-tasking and job-rotation, based on the ability of employees to perform various tasks and activities.
Financial flexibility	The variation in base and additional pay according to the performance of the individual or firm.

Examples of security

Job security	Security deriving from employment protection legislation, etc., limiting the employer's ability to dismiss at will.
Employment security	Adequate employment opportunities through high levels of employability ensured by e.g. training and education.
Income security	The protection of adequate and stable levels of income.
Combination security	The security of a worker of being able to combine his or her job with other responsibilities or commitments than paid work.

CRISIS

Economic crises

- Legitimate change factor or excuse for change?
- What does job creation depend on?
- The social security crisis: is loss of rights the only possibility?

In any case: cycles of economic crises as instruments for dismantling labour rights

- More flexible employment options
- More internal flexibility favouring the entrepreneur
- More redundancy facilities

Consequences

- **Failings of labour or employment law**
  - Too rigid
  - Prevents job creation
  - The right to work only protects the employed

  From labour law to employment law

  From the guardianship of the worker against the employer...

  ... to the guardianship of the citizen in employment.
- **Reduction of guarantees provided by**
  - Reduction of legal standards (dispositivisation)
  - Pressure on the price of labour (salaries and social contributions)
- **Strengthening the power of the employer**
  - Management power
  - Control power
  - Disciplinary power

Reforms in Spanish labour regulations

- **1994 onwards: Flexibility**
  - Less legal minimum standards
  - More regulation of working conditions by collective agreements

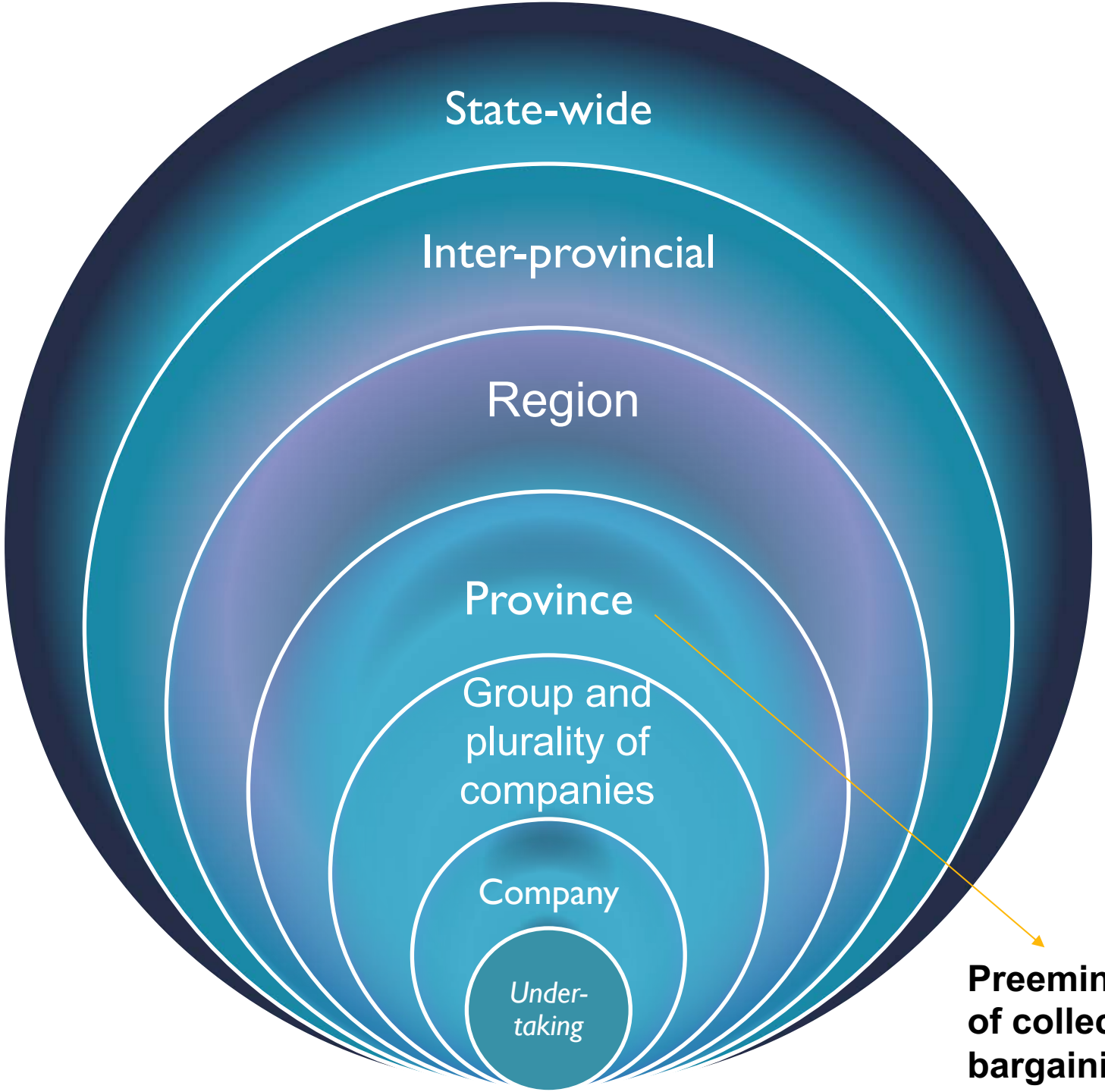
- **2010 onwards: Flexicurity**
  - Weakening collective bargaining: centralised at the company level
  - Weakening trade unionism: possibility of non-application
  - Reinforcement of managerial power: preference for employment contracts

Main aspects of Spanish reforms

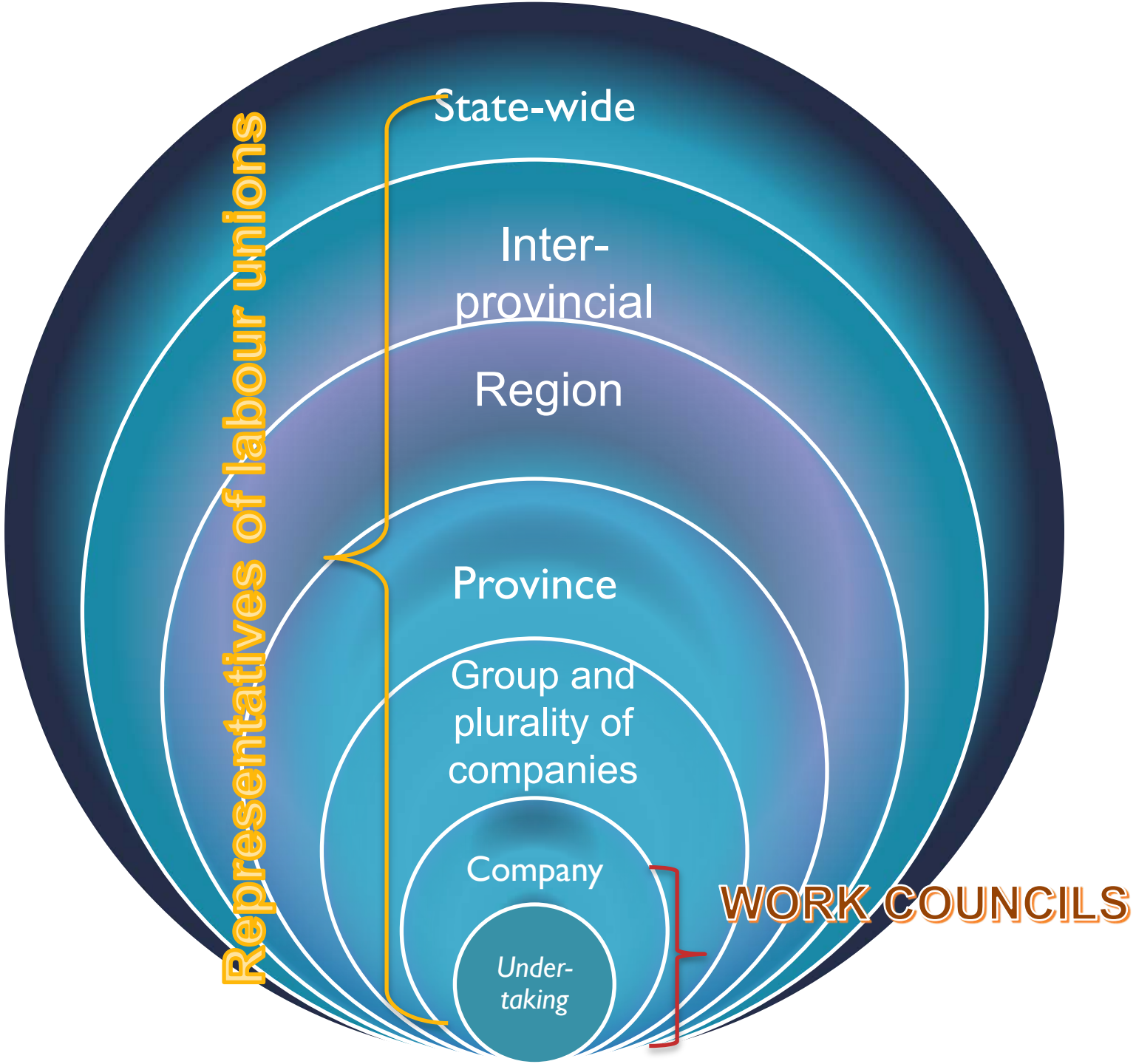
- **Setting working conditions**
  - Collective agreements central at company level.
  - Weakening of trade unionism (social dialogue?).
  - Minimum standards are more flexible:

    wages working hours functions
  - Employer's power is increased because of economic context.

- **Changing working conditions**
  - Settled in the contract of employment
  - Settled in the collective agreement



Preeminent sphere of collective bargaining


State-wide
Inter-provincial
Region
Province
Group and plurality of companies
Company
Under-taking
Representatives of labour unions
WORK COUNCILS

Dismissal

- Individual dismissal: cheaper

- Compensation
- Abolition of *salaris de tramitació* (*lucrum cesans*)

- Easier collective redundancies?

- Abolition of administrative authorisation
- Need to inform and consult workers' representatives

- Probationary period

- *Contracte de suport a emprenedors*

Employment

- Increasing instability

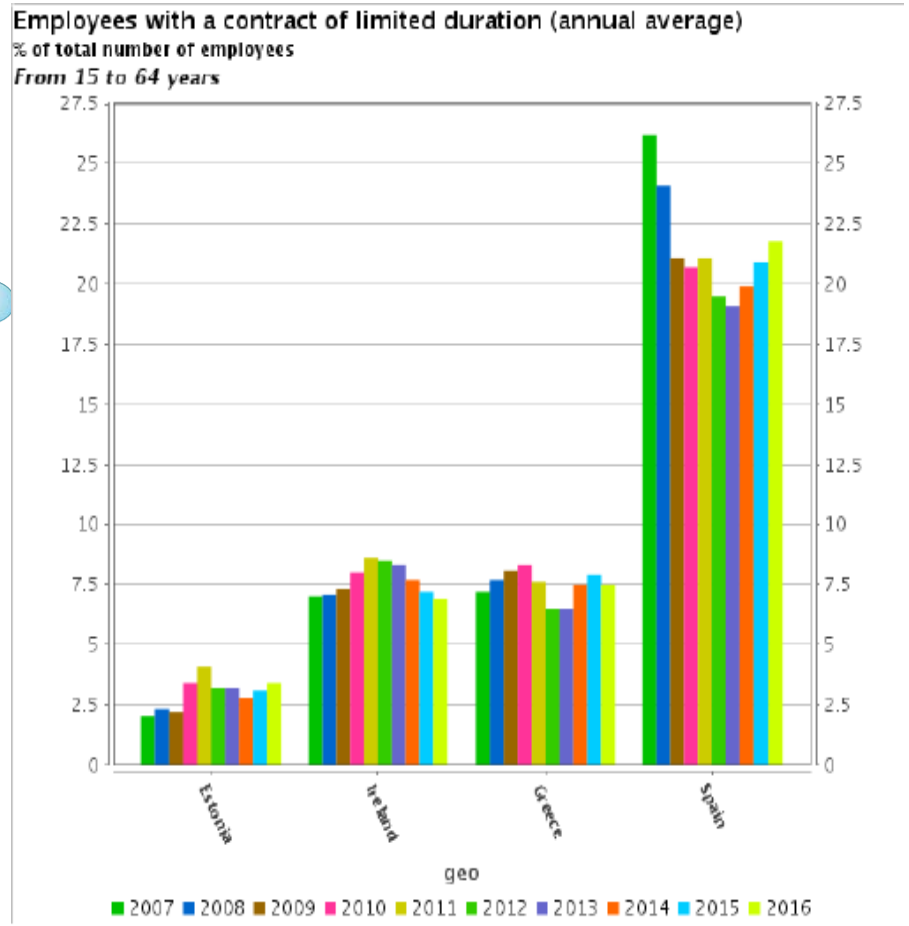
- Better any job than no job
- Temporary contracts of employment as a tool for fostering employment
- Segmentation of the Spanish labour market

Culture of instability:

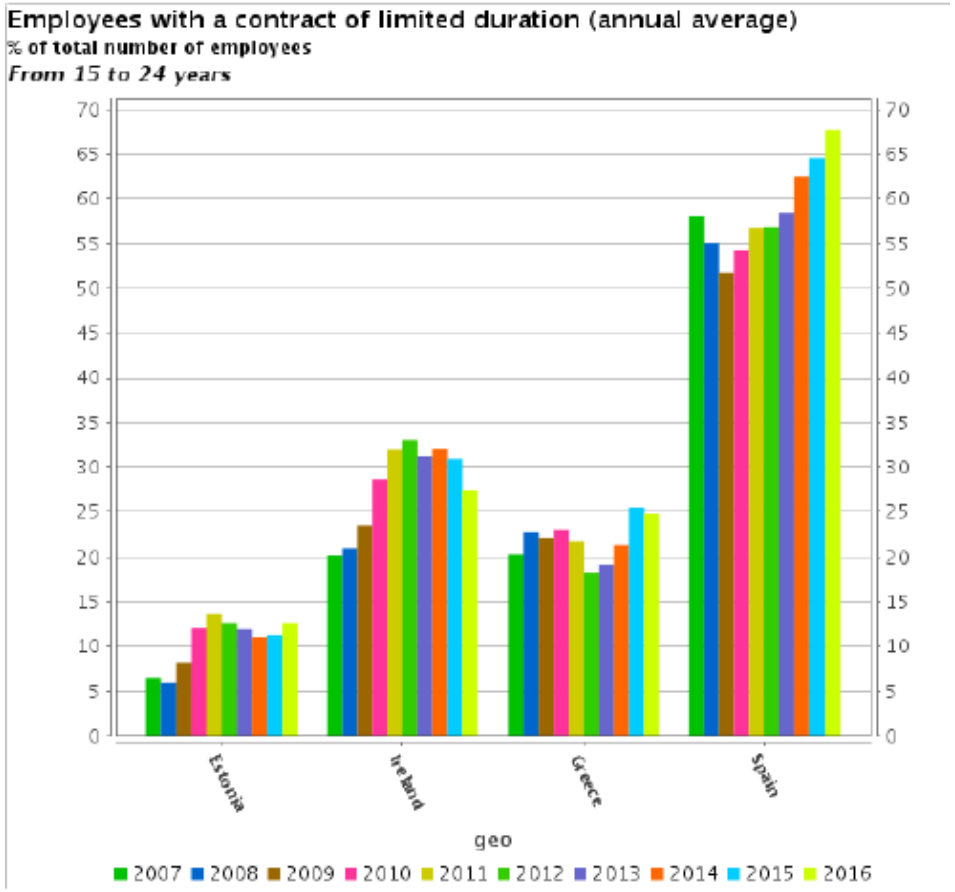
- low transition rates from temporary to permanent contracts,
- high transition rates from temporary employment into unemployment and
- low transition rates from unemployment into employment, although for a significant proportion of those making the latter transition, the move is to temporary contracts.

This points to the existence of a significant number of temporary employees who are trapped, because they fail to move to permanent contracts and experience unemployment spells which risk being relatively long – with consequent scarring effects on their career paths.

Eurofound (2019), *Labour market segmentation: Piloting new empirical and policy analyses*, Publications Office of the European Union, Luxembourg.



Source of Data: Eurostat



Source of Data: Eurostat

2017
OCDE

ESP: 26.1

2010

EUR 15: 15.7

ESPAÑA: 24.9

FRANCIA: 15.0

ALEMANIA: 14.7

POLONIA: 27.3

2009

EUR 15: 15.4

ESPAÑA: 25.4

FRANCIA: 14.3

ALEMANIA: 14.5

POLONIA: 26.5

2008

EUR 15: 16.3

ESPAÑA: 29.3

FRANCIA: 14.9

ALEMANIA: 14.7

POLONIA: 27.0

2007

EUR 15: 16.7

ESPAÑA: 31.7

FRANCIA: 15.1

ALEMANIA: 14.6

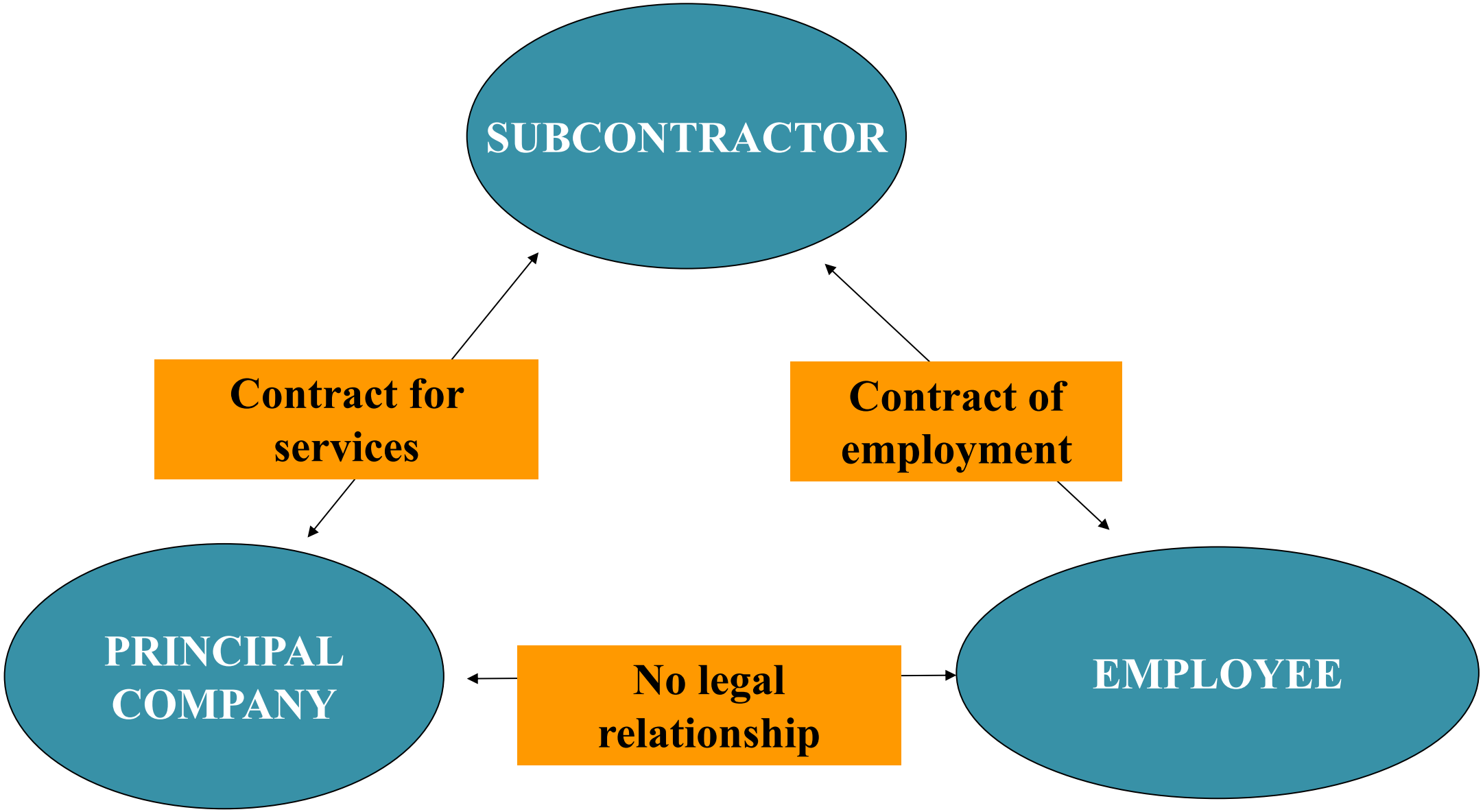
POLONIA: 28.2

CHALLENGES

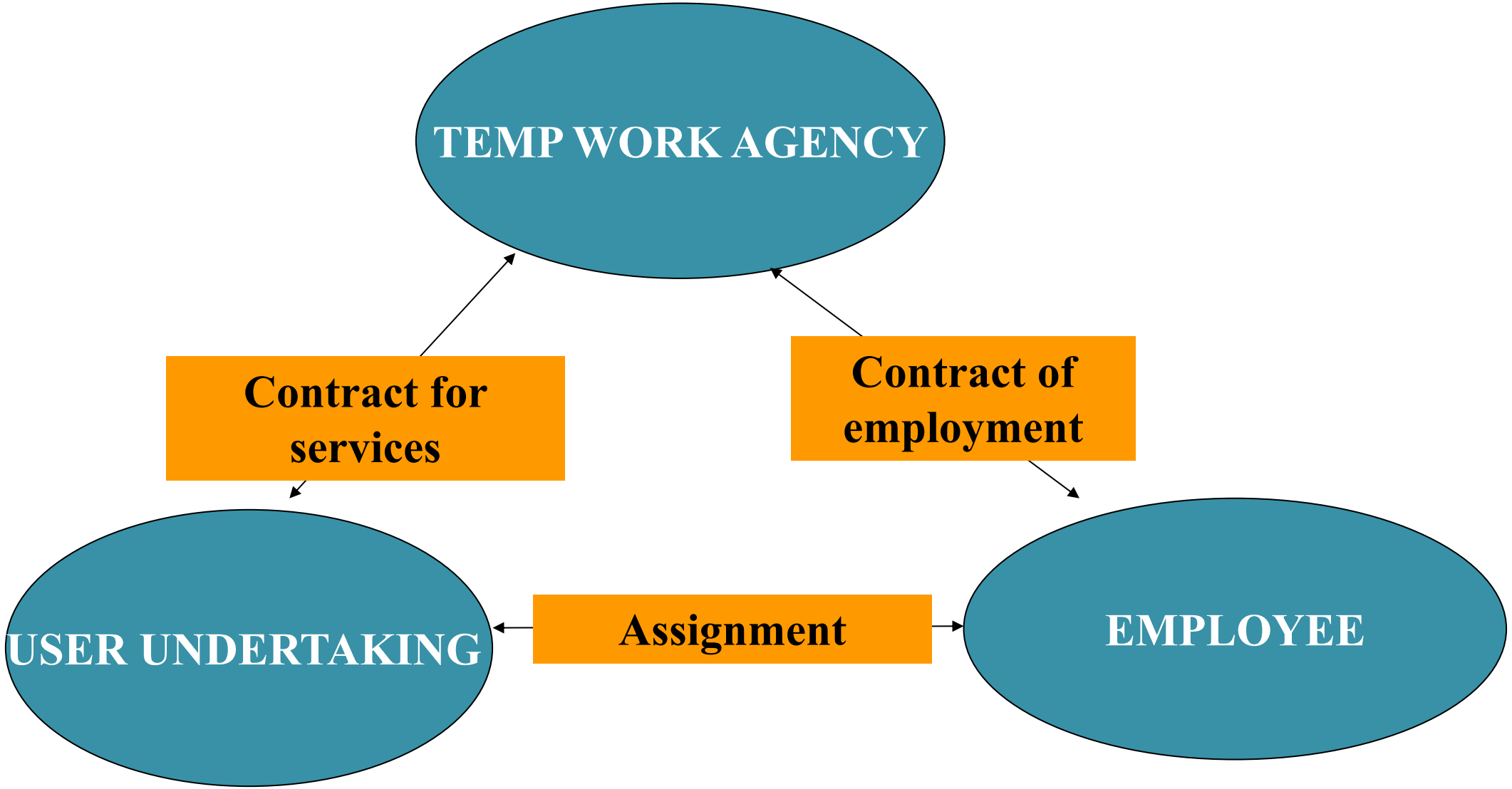
2) Company organisation

- Outsourcing
- Platform work
- Company internationalisation

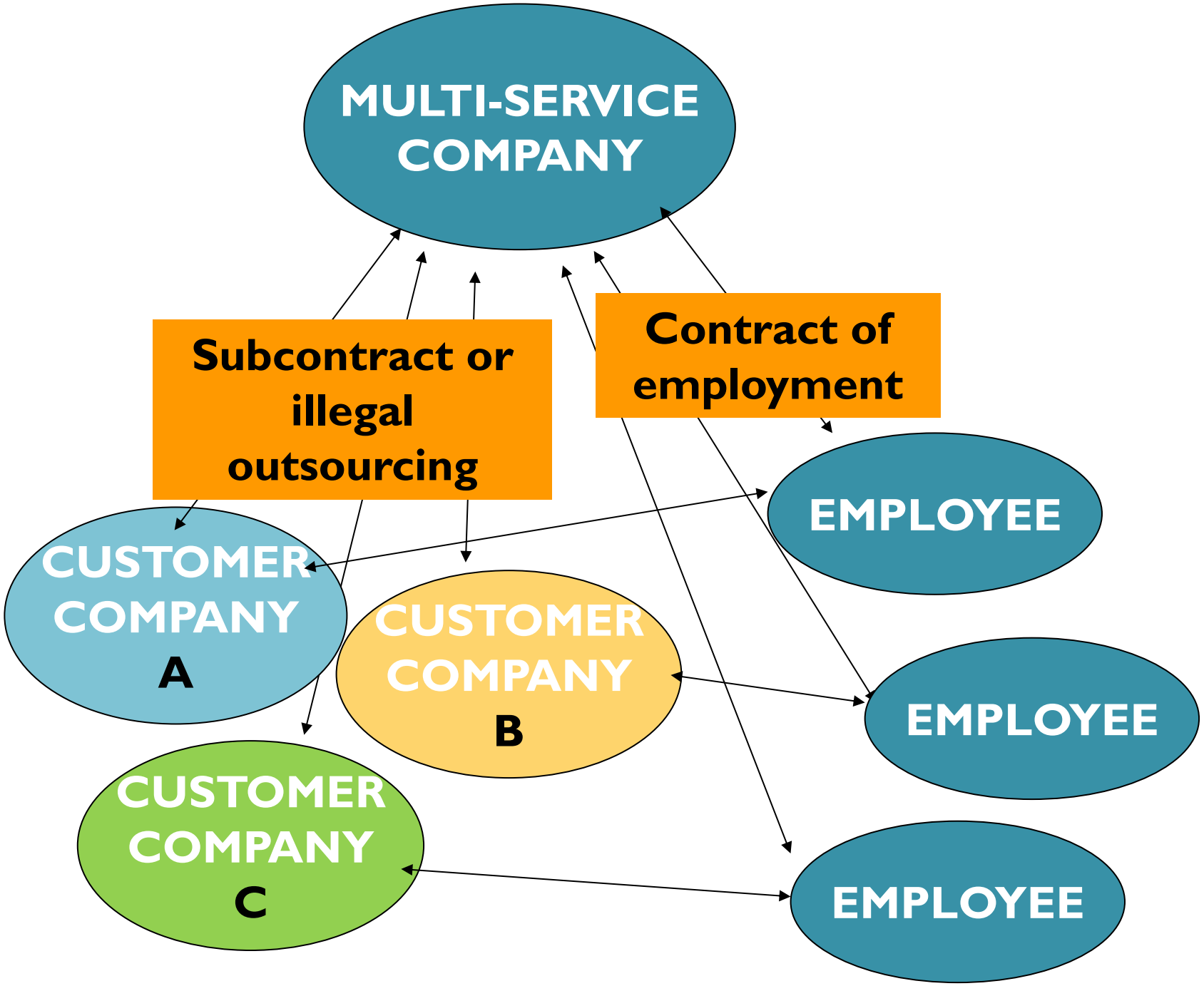
Outsourcing



Temporary agency



Multi-service companies



DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 19 November 2008
on temporary agency work

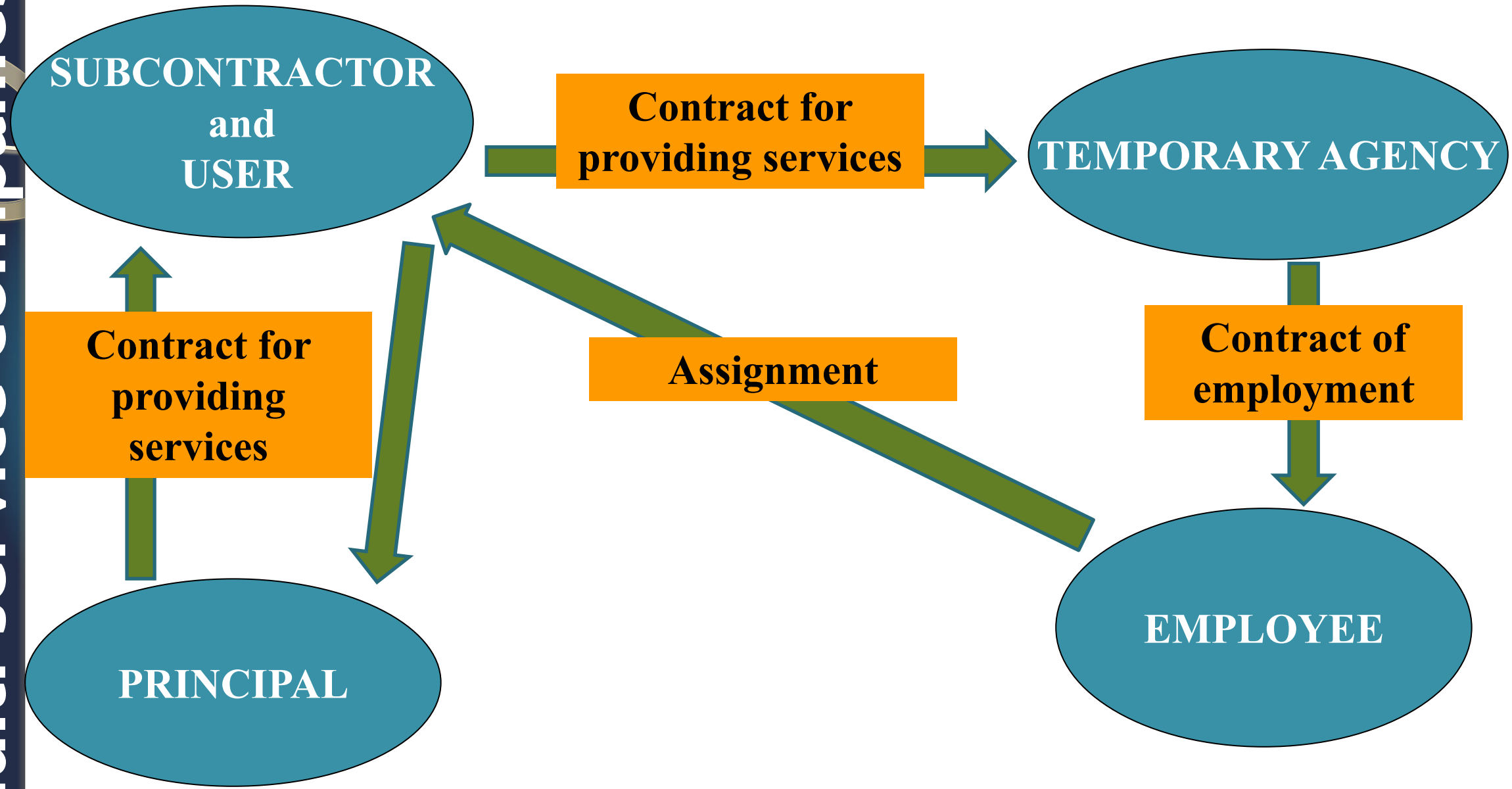
EMPLOYMENT AND WORKING CONDITIONS

Article 5

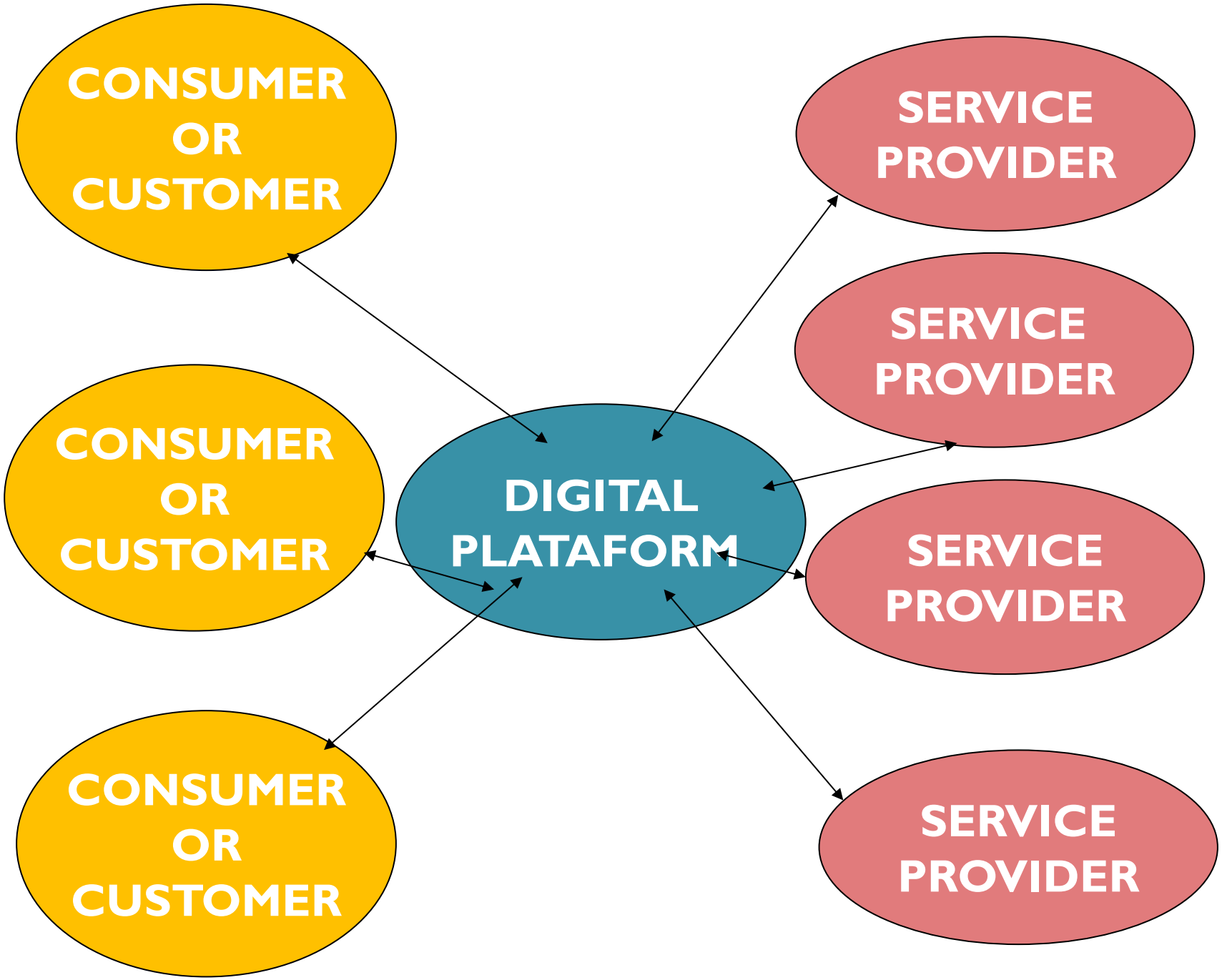
The principle of equal treatment

1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

Temporary agencies as multi-service companies



Digital platforms



Decentralisation

- Ineffective legal response (bilateral view of industrial relationship)
  - Deals with extension of responsibilities
  - Does not contemplate equal working conditions
  - Does not contemplate either strikes or collective bargaining
- Weak action against fraud: multi-services companies

CONSEQUENCES

Employment law no longer relevant for the situation it is designed to regulate:

- Employment is no-longer a bilateral relationship.
- National law is not enough to establish effective limits on capital.
  - Social clauses in international agreements
  - International framework agreements
  - Corporate responsibility (codes of conduct)

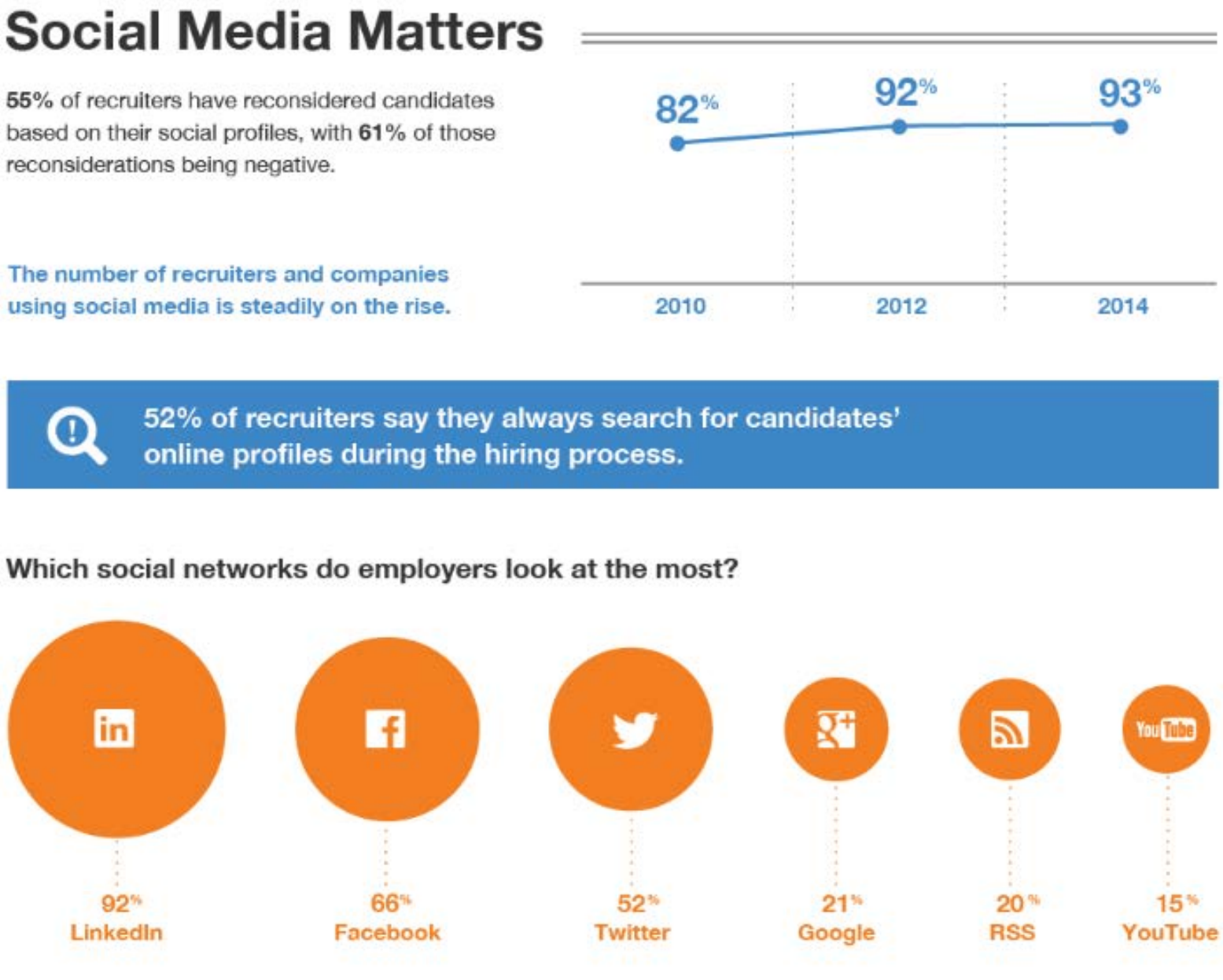
CHALLENGES

3) Technology

Las redes sociales en el ámbito laboral.

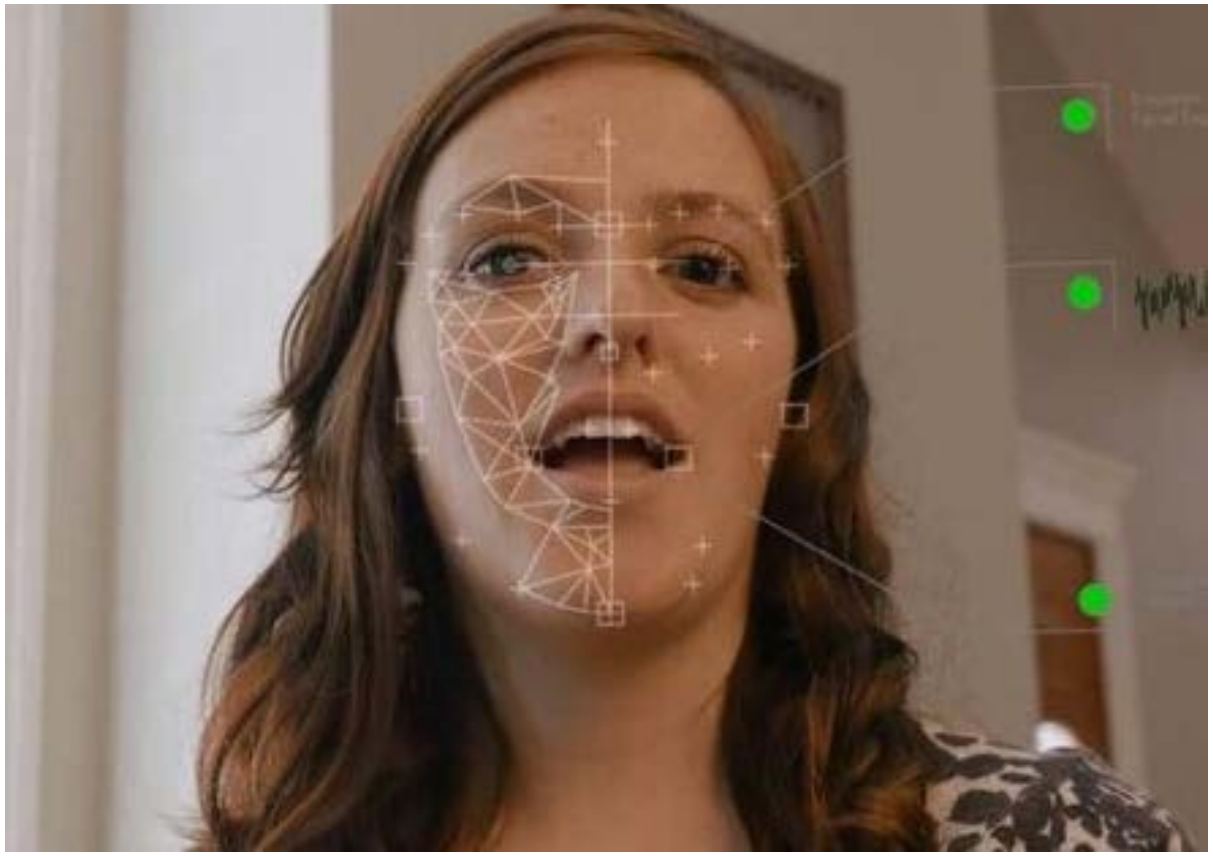
Juan Reyes e Inés Ríos

Fuente: Jobvite, julio 2015, Estados Unidos



a) A.I. in recruitment proceedings

A.I. is used in recruitment procedures



Risk for personal data

Risk of discrimination

(intentional or not)

- Rejecting some people for characteristics drawn from biometric data.

- Using algorithms that lead to a discriminatory result (because candidates are disregarded on grounds of age, race, sex, etc., taking into account the existing standards in the company, sector of activity, or country).

Artificial intelligence allows us to capture and evaluate much more information than what the applicant says or replies at recruitment interviews. Gestures and facial micro-expressions, bodily movements, direct gaze or evasive glances during a relevant question; emotions, nuances of the voice… All these non-verbal clues can lead to a **physiological profile** of the candidate that can lead to them being disregarded for the job.

Further, it can give relevant information about health problems that might be present, or are likely to occur in the near future, so that a **profile of health status** of the applicant can be provided.

ANSWERS

From a practical point of view

- Companies that help to "clean up" social media profiles
- Specific courses for candidates to improve their social media profile

From a legal point of view, there is no specific regulation on the use of social media in the workplace in terms of access to employment.

In 2010, a specific regulation on the risk of the use of information on social networks was rejected as the current legal framework was sufficient (response 184/090219):

> *In conclusion, our legal system already guarantees the privacy of employees' personal information, in a broad and general way and not only in relation to social networks like Facebook. The General Regulation on Data Protection is applicable.*

- **Spanish Data Protection Act**

  Does not provide for specific data protection at the time of hiring.

- **REGULATION (EU) 2016/679**

  The data subject should have **the right not to be subject to a decision**, which may include a measure, evaluating personal aspects relating to him or her which is **based solely on automated processing and which produces legal effects** concerning him or her or similarly significantly affects him or her, **such as** automatic refusal of an online credit application or **e-recruiting practices without any human intervention**. Such processing includes 'profiling' that consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her. (whereas 71)

- **REGULATION (EU) 2016/679**

***Biometric data*:** Personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopy data. (art. 4.14)

> The processing of photographs should not systematically be considered to be processing of special categories of personal data as they are covered by the definition of biometric data only when processed through a specific technical means allowing the unique identification or authentication of a natural person. (51 whereas)

Member States may maintain or introduce further conditions, **including limitations**, with regard to the processing of genetic data, biometric data or data concerning health. (9.4)

- AEPD resolution 01599/2010

Candidates who have participated in recruitment processes have the right to access (and delete) the information collected by the company (test results, etc.) under the terms recognised in the Spanish Data Protection Act (LOPD).

Responses from employment tribunals:

- Right to be forgotten

STJUE 14 may 2014: C-131/12 - Google Spain and Google:

Directive 95/46 are to be interpreted as meaning that...the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

- Use of lie detector in job interviews: the right to lie

  Brazilian case: Tribunal Superior do Trabalho (Process No. TST-RR-1897-76.2011.5.10.0001, 27 February 2019)

  Spanish case: only admitted in cases of:

  Sexual harassment

  STSJ of Catalonia, 26 May 2014 (rec. no. 1205/2014)

  Appropriation of money

  STSJ of Andalusia/Seville, 20 February 2007 (rec. no. 4218/2005) STSJ of Catalonia, 20 April 2004 (judgment no. 3073/2004)

  - Right to lie?

Maria, who knows she is pregnant, decided to apply for a job in order to work as a nurse in a hospital, in the x-ray department, which is incompatible with pregnancy. At the recruitment interview she was asked expressly if she was pregnant. She lied and said no. On the first day of work, she reported for the first time that she is pregnant and cannot work with x-ray machines.

b) Technology and power of control

ANSWERS From a legal point of view

- **REGULATION (EU) 2016/679**

- Principles relating to processing of personal data (art. 5)

‘lawfulness, fairness and transparency’

processed lawfully, fairly and in a transparent manner in relation to the data subject

‘purpose limitation’

collected for specified, explicit and legitimate purposes

‘data minimisation’

adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed

‘accuracy’

accurate and, where necessary, kept up to date

‘storage limitation’

for no longer than is necessary for the purposes

‘integrity and confidentiality’

processed in a manner that ensures appropriate security of the personal data

- Lawfulness of processing (art. 6)

  I. Processing shall be lawful only if and to the extent that **at least one** of the following applies:

     a) The data subject has given consent to the processing of his or her personal data for one or more specific purposes;

     b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract

  […]

- **Art 18 Spanish Constitution (CE)**

  1. The right to honour, to personal and **family privacy** and to one's own image is guaranteed

  3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order.

  4. The law shall **restrict the use of data processing** in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.

- **Organic Law 3/2018**, of 5 December and **art. 20.bis Statute of Employment**
  - Right to privacy using company equipment
  - Right to disconnect
  - Right to privacy in geo-localisation and video surveillance

- **20.3 Statute of Employment (ET)**
  - The employer may adopt the measures of supervision and control that she/he deems most fitting in order to verify compliance by the employee of her/his working obligations and duties, observing, in such adoption and application, the due consideration for her/his human dignity [...]

- **How has the Spanish Constitutional Court tackled the problem of video surveillance?**

Proportionality test:

- Accuracy
- Necessity
- Proportionality *strictu sensu*

Video surveillance and privacy

STC 98/2000 (casino)

STC 186/2000 (Cashier)

STC 29/2013 (University of Seville): Difference art. 18.1 and 18.4 (fj 6)

Awareness of employees of the existence of the video surveillance system is not enough. A prior, express and unambiguous information that the purpose of such a system in to control their working activity is necessary.

STC 39/2016: back to STC 186/2000. INDITEX

Lack of previous information is only unlawful if the measure does not pass the proportionality test

- **How has the ECHR tackled the problem of video surveillance?**
  - purpose,
  - transparency,
  - legitimacy,
  - proportionality,
  - accuracy,
  - security
  - and staff awareness.

STEDH LOPEZ RIBALDA 9-1-2018

General information but some hidden cameras

Violation of privacy

STEDH LOPEZ RIBALDA 17-10-2019

Despite not informing employees, the measure does not infringe art. 8 ECHR

New regulation: Article 89 Spanish Data Protection Act (LOPD): Right to privacy regarding the use of video surveillance devices and sound recording in the workplace.

1. Employers [...] shall inform employees and, where appropriate, their representatives, of this measure, in advance, and expressly, clearly and concisely.

In the event of flagrant commission of an unlawful act by employees, the duty to inform is accomplished where there is general information about the video surveillance.

2. In no case shall the installation of sound recording or video surveillance systems in places intended for the rest or recreation of workers or public employees, such as changing rooms, toilets, dining rooms and similar persons, be allowed.

3. The use of systems similar to those referred to in the preceding paragraphs for the recording of sounds in the workplace shall be accepted only where there are risks to the safety of installations, goods and persons arising from the activity that takes place in the workplace and always respecting the principle of proportionality and minimum intervention.

Art. 88 Regulation (EU) 2016/679

Member States may, by law or by collective agreements, provide **for more specific rules to ensure the protection of the rights and freedoms in respect** of the processing of employees' personal data in the employment context, in particular for the purposes of the **recruitment,** the **performance of the contract of employment**, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, **protection of employer's or customer's property** and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

- **Monitoring computer equipment (computer/e-mail)**

The internal rules of the company warn that the internet at the workplace must remain a tool at the employee's disposal only for professional use, and so forbids the use of computers, photocopiers, telephones, telex and fax machines for personal purposes. These rules also prohibit the installation of any unauthorised application on company computers.

In spite of this warning, Javier installed a messaging program and used it both for professional and private purposes.

The employer performed checks as it considered it necessary because through use of the internet, employees might damage the company's IT systems, or engage in illicit activities in the company's name, or reveal the company's commercial secrets.

Following the checks, the employer informed Javier that his messenger communications had been monitored for one week and that the records showed that he had used the internet for personal purposes, contrary to internal regulations. The employer presented a forty-five-page transcript of his communications containing transcripts of all the messages that Javier had exchanged with his fiancée and his brother during the period when his communications had been monitored; they related to personal matters involving the applicant. These messages did not disclose any intimate information.

- **Monitoring computer equipment (computer/e-mail)**

European Convention on Human Rights

Right to respect for private and family life (art. 8): Everyone has the right to respect for his private and family life, his domicile and his correspondence.

Possibility to create privacy space in company equipment?

STEDH COPLAND (2007) **Tolerance.** Fundamental rights do not disappear in the company. Power to control means of production does not justify infringement of fundamental rights

STEDH BARBULESCU (2016) and (2017) **Prior ban but no warning.**

Introduction of the company's computer messaging system.

Reasonable expectation for privacy? – Previous notification of monitoring?

– Legitimate reason for monitoring?

STC 241/2012 (18.1 and 18.3 EC) **Prohibition to install any program on computers**

STC 170/2013 (18.1 and 18.3 EC) **Prohibition to use e-mail for non-professional matters** (warning made in the collective agreement)

- **Fingerprint (biometric data)**

STS 2/07/2007: FUNDAMENTAL RIGHTS AND PUBLIC FREEDOMS:

Right to personal and family privacy: no violation of privacy: establishment of a time control system that identifies staff by reading the hand using infrared sensors; right to physical integrity: no violation.

Safety: no health outcome or harm to physical or moral integrity.

AEPD Report 0324/2009: Admitted

STJS 29/05/2012: FUNDAMENTAL RIGHT TO PERSONAL INTIMACY AND PHYSICAL INTEGRITY:

Establishment of a time control system that identifies staff by reading the hand using infrared sensors.

In any case: rulings prior to new Spanish Data Protection Act (LOPD)

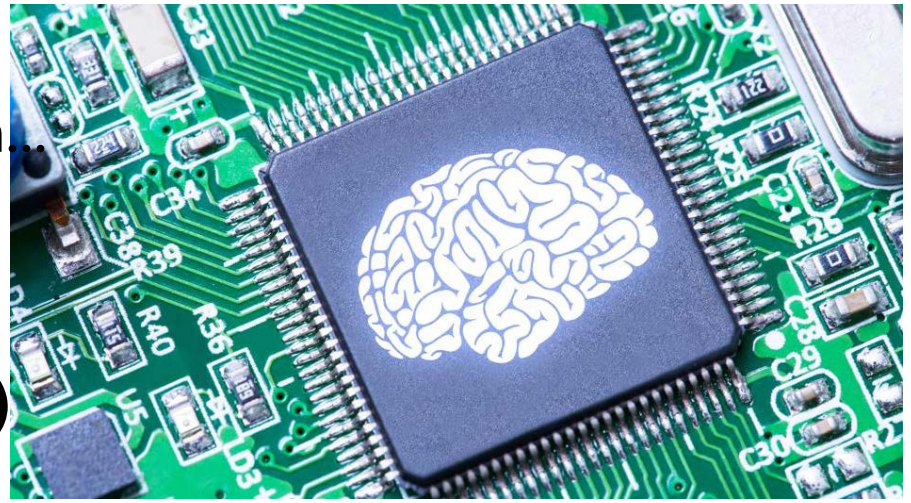
Subsequently: analysis of the existence **of less intrusive** alternatives, and establishment of the appropriate guarantees. ACPD Opinion CNS 63/2018, of 14 February 2019

- **Traceability of work**

Implantation of microchips, bracelets, geolocation...

Audiencia Nacional. Sentencia n. 13/2019 06/02/2019

Refusal of worker to install GPS (telepizza)



Article 90 Spanish Data Protection Act (LOPD). Right to privacy as regards the use of geolocation systems at work

2. As a preliminary point, employers shall expressly, clearly and unequivocally **inform** workers or public employees and, where appropriate, their representatives, of the existence and characteristics of these devices. They should also inform them about the possible exercise of the rights of access, rectification, limitation of treatment and deletion.

- **Nullity of the obligation to give telephone/e-mail to the entrepreneur**

STS 21-09-2015 rec. 259/2014:

Collective conflict. It is an abusive clause in the contract/type to indicate that the worker voluntarily provides the company with their mobile phone number or e-mail address, as well as to establish a commitment to immediately communicate any change in such data, so that any incident relating to the contract, employment relationship or work can be communicated by such means. The clause is contrary to the Spanish Data Protection Act (LOPD).

- **Possibility to prohibit the use of networks, calls, etc.**
  - Important about the entrepreneur's equipment
  - Of doubtful legality with regard to employees' equipment: internet access as a fundamental right.
  - Article 30.n Collective agreement for the office work sector in the province of Zamora: prohibits the use of WhatsApp during the working day, either from company or personal cellular phones.

Problem: time control and working hours

- **Right to disconnect**

Art. 88 Spanish Data Protection Act (LOPD): Right to Digital Disconnection in the Workplace

1. Workers and public employees shall have the right to digital disconnection in order to ensure, when they are off duty, their free time as well as their personal privacy (work-life balance).

2. The arrangements for exercising this right shall take into account the nature and object of the employment relationship, strengthening the **right to work-life balance**. They shall be subject to the **provisions of collective bargaining** or agreement between the company and the employees' representatives.

3. The employer shall, after consulting the employees' representatives, develop an **internal policy** for defining the modalities by which to exercise the right to disconnect. In particular, the right to digital disconnection shall be preserved in cases of full or partial teleworking.

Some data

- Wages
- Working time
- Employment contracts
- Unemployment
- People at risk of poverty and social exclusion
- Income distribution

Wages

Minimum wages

- **Spain (40 hours)**
  - SMI 2012: 641.40€
  - SMI 2013: 645.30€
  - SMI 2014: 645.30€
  - SMI 2015: 648.60€
  - SMI 2016: 655.20€
  - SMI 2018: 735.90€
  - SMI 2019: 900€
  - SMI 2020: 950€
  - 2 extraordinary payments:

  Total: 1,108.33€ per month

- **France (35 hours)**
  - SMIC 2012: 1,398.37€
  - SMIC 2013: 1,430.22€
  - SMIC 2014: 1,445.38€
  - SMIC 2015: 1,457.52€
  - SMIC 2016: 1,466.62€
  - SMIC 2018: 1,498.47€
  - SMIC 2019: 1,521.22€
  - SMIC 2020: 1.539.42€
  - No extraordinary payments

Expansión: LINK 2

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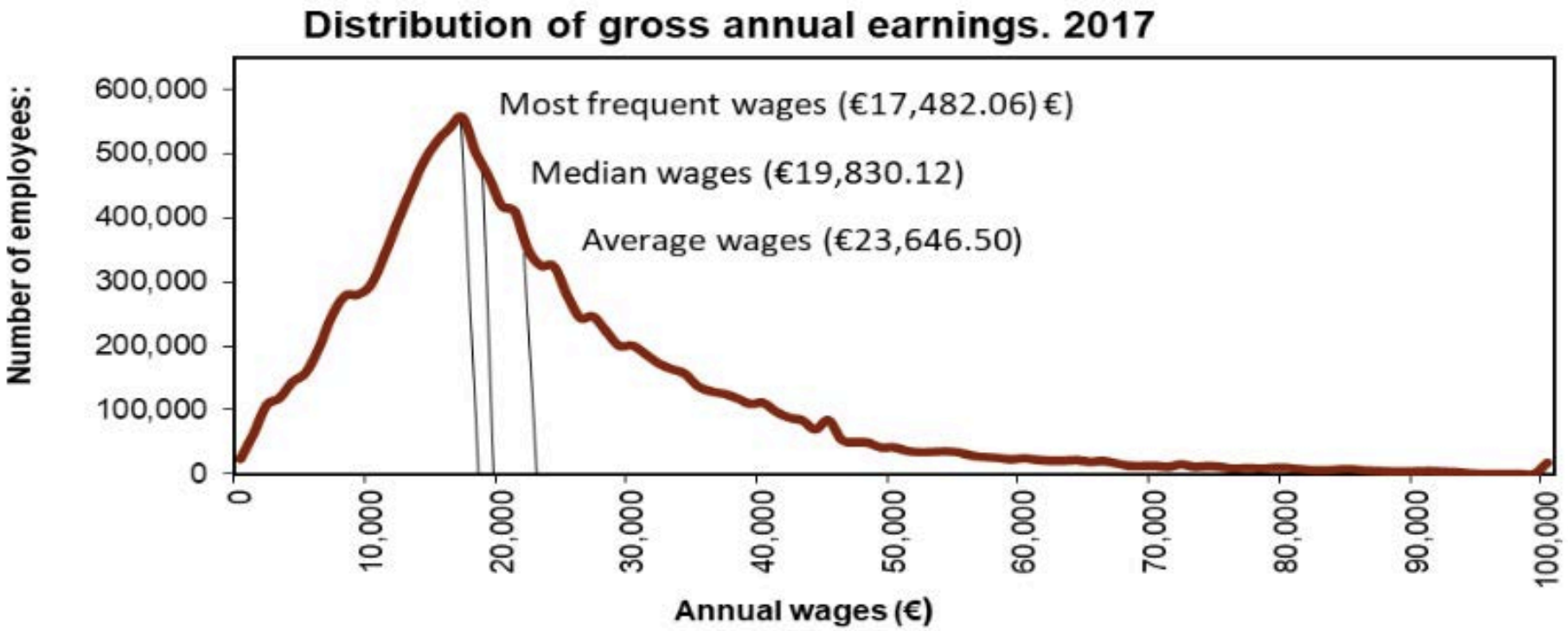
Wage Structure Survey 2017

Mean, median, and the most frequent wages



-Average (mean) annual earnings per worker were 23,646.50 euros in 2017, which is 2.1% higher as compared with the previous year. One feature of the functions of wage distribution is that **many more workers were registered in the lowest values than in the highest salaries**. This fact causes the mean wages to be higher than both the median wages and the most frequent wages.

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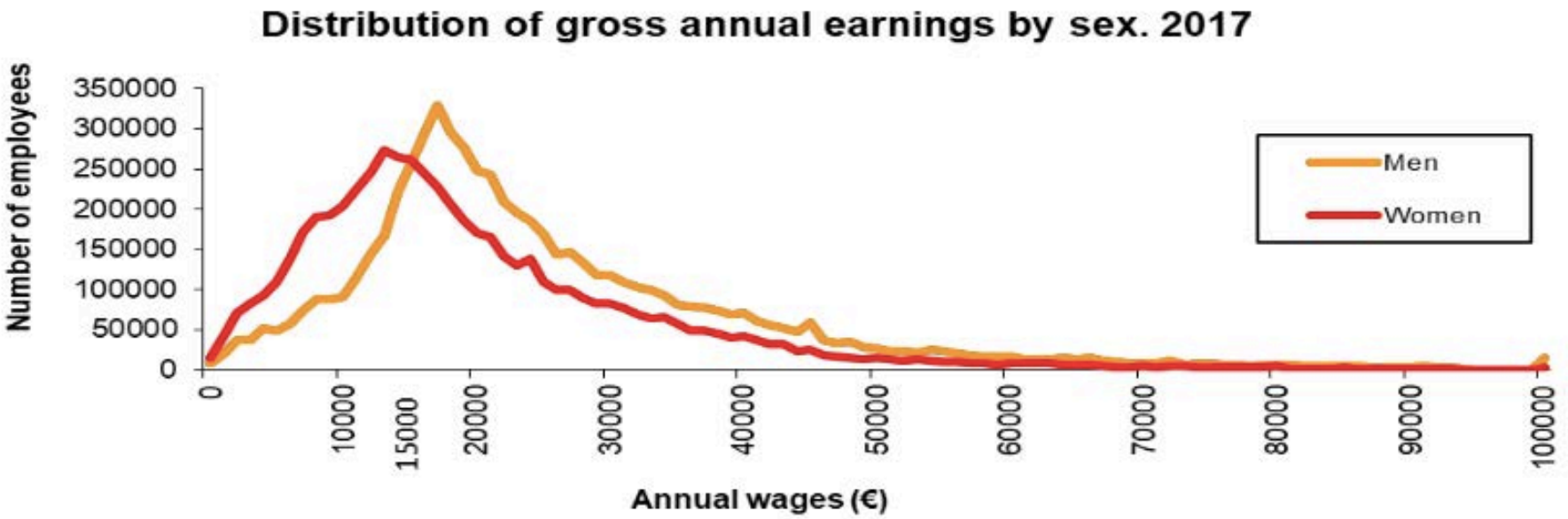
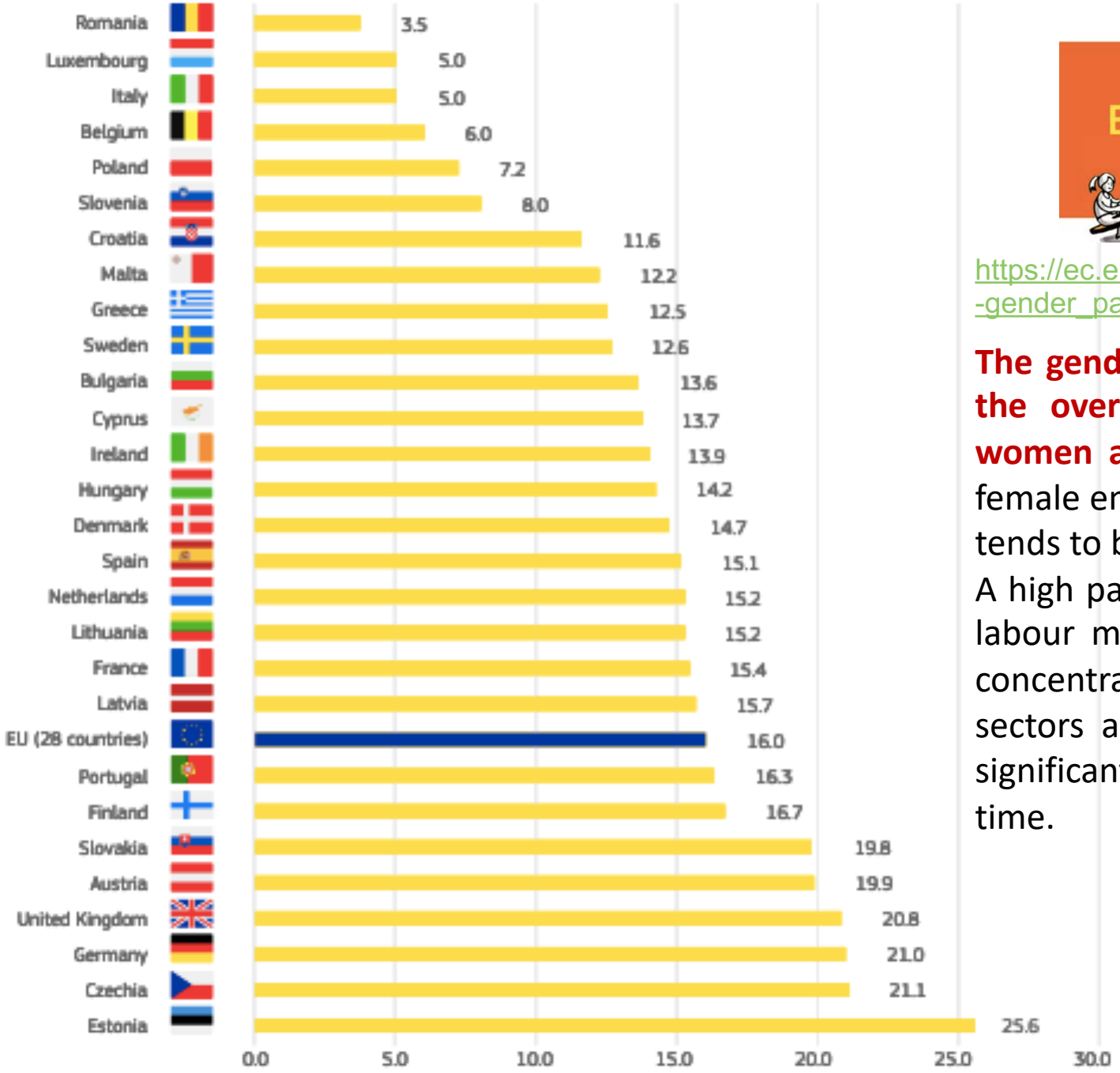
Wage Structure Survey 2017

Mean, median, and the most frequent wages



The average (mean) annual earnings were 26,391.84 euros for men and 20,607.85 euros for women. Therefore, the female average annual earnings represented 78.1% of male earnings. **This difference between the salaries of men and women decreases when considering similar jobs (same occupation, and type of working day or contract, etc.).**

In all occupations, women earned lower wages than men.

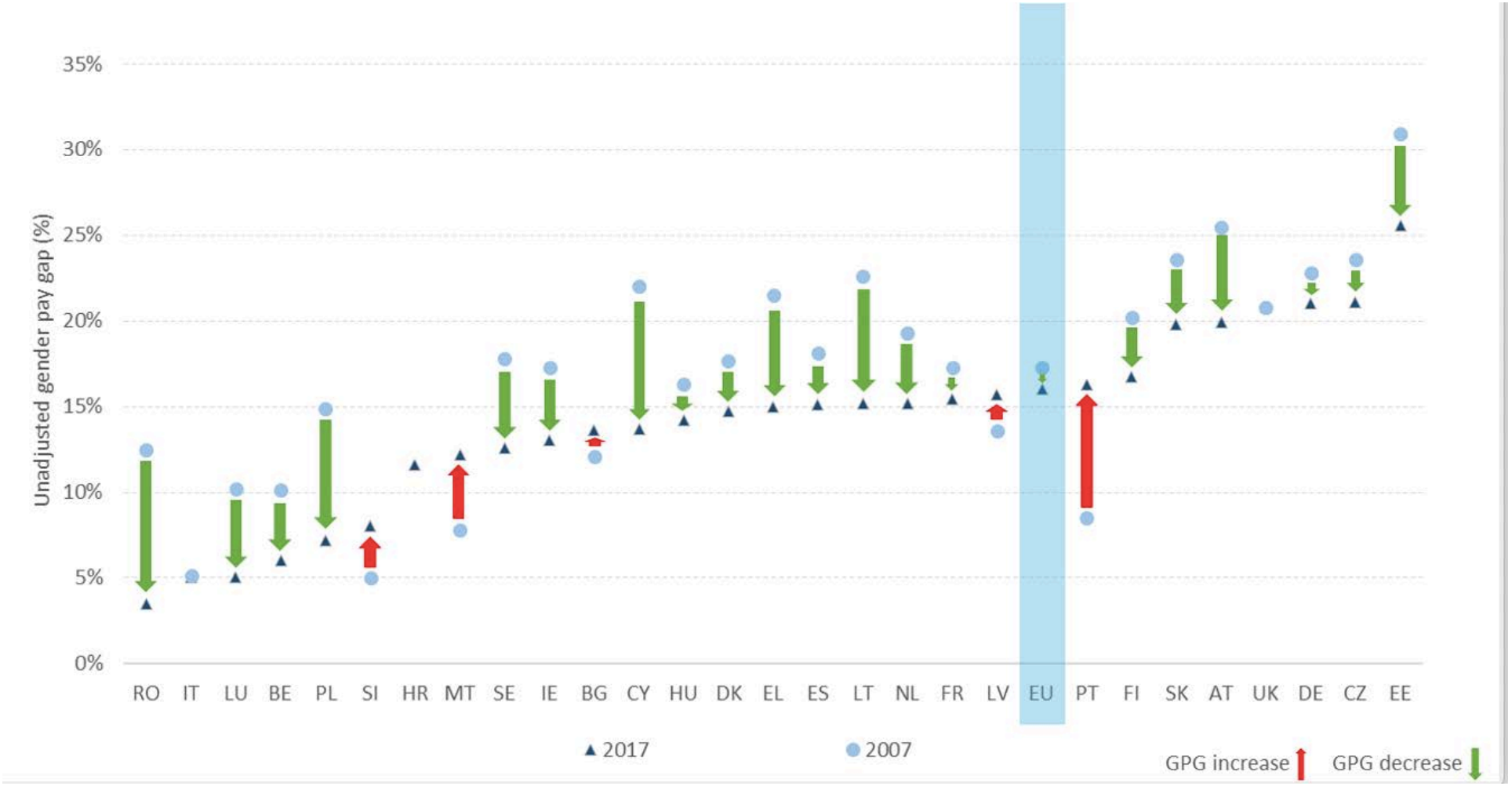


https://ec.europa.eu/info/sites/info/files/factsheet-gender_pay_gap-2019.pdf

The gender pay gap is not an indicator of the overall labour inequalities between women and men. In countries where the female employment rate is low, the pay gap tends to be lower than average.

A high pay gap is usually characteristic of a labour market in which women are more concentrated in a restricted number of sectors and/or professions, or in which a significant proportion of women work part-time.

Gender gap in Europe



https://eige.europa.eu/gender-statistics/dgs/data-talks/what-lies-behind-gender-pay-gap

Equal Pay?

Time to close the gap!

THE GENDER PAY GAP PER EU COUNTRY

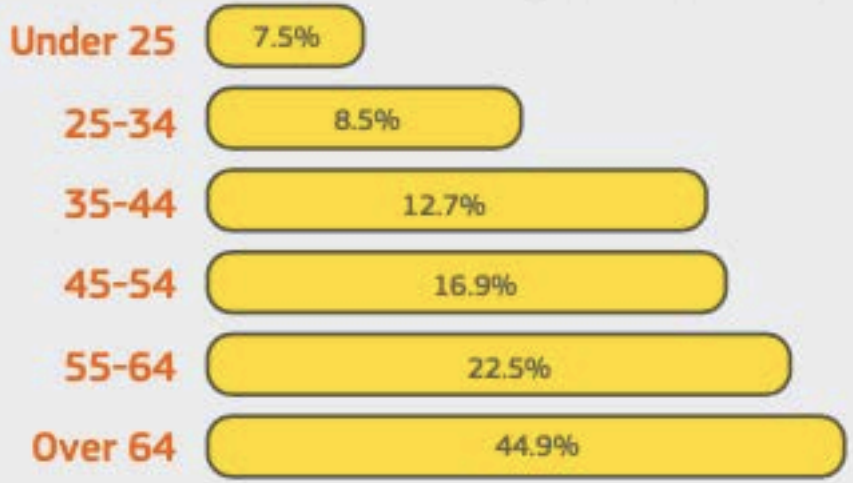
Even though the situation is improving, progress is extremely slow in the European Union with the gap only decreasing by 1% over the last 7 years.

Equal Pay?

Time to close the gap!

The older you are, the bigger the gap

For example: the gender pay gap in Spain by age



Why do women earn less?

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en

a) Sectoral segregation (occupation)

b) The glass ceiling

c) Work-life balance

d) Discrimination

Why do women earn less?

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en

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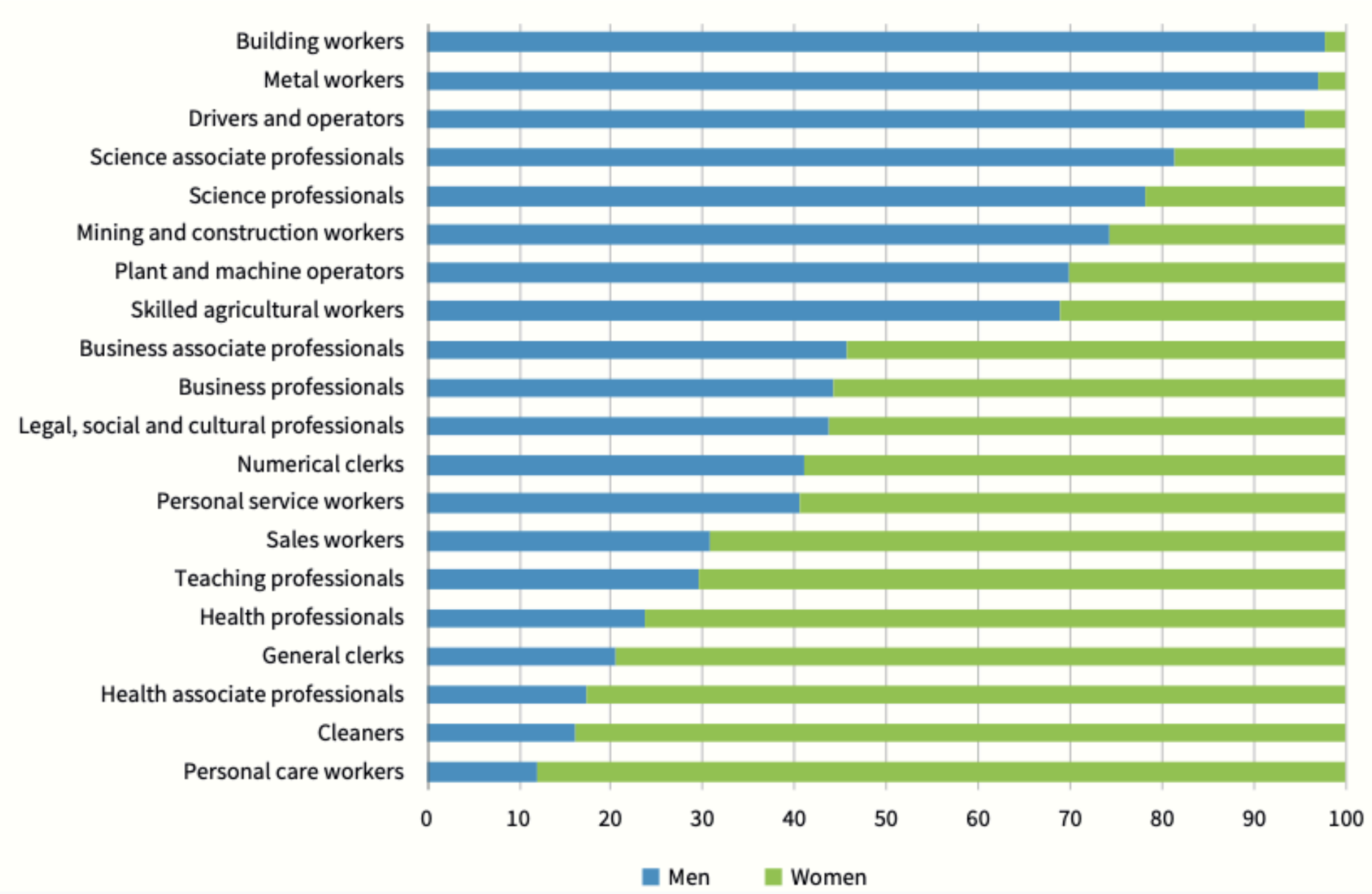
a) Sectoral segregation (occupation): Around 30% of the total gender pay gap is explained by the over-representation of women in relatively low-paying sectors, such as care and education. On the other hand, the proportion of male employees is very high (over 80%) in better-paid sectors, such as science, technology, engineering and mathematics (STEM).

Wages by economic sector in Spain. The economic activity with the highest average annual wage in 2017 was electricity, gas, steam and air conditioning supply, with 52,014.79 euros per worker on average. The next activity with the highest wage corresponded to financial and insurance activities, with 43,773.58 euros.

Conversely, accommodation and other services received the lowest average annual wages, with 14,540.14 and 16,202.92 euros, respectively.

Women earned lower wages than men in almost all economic activities.

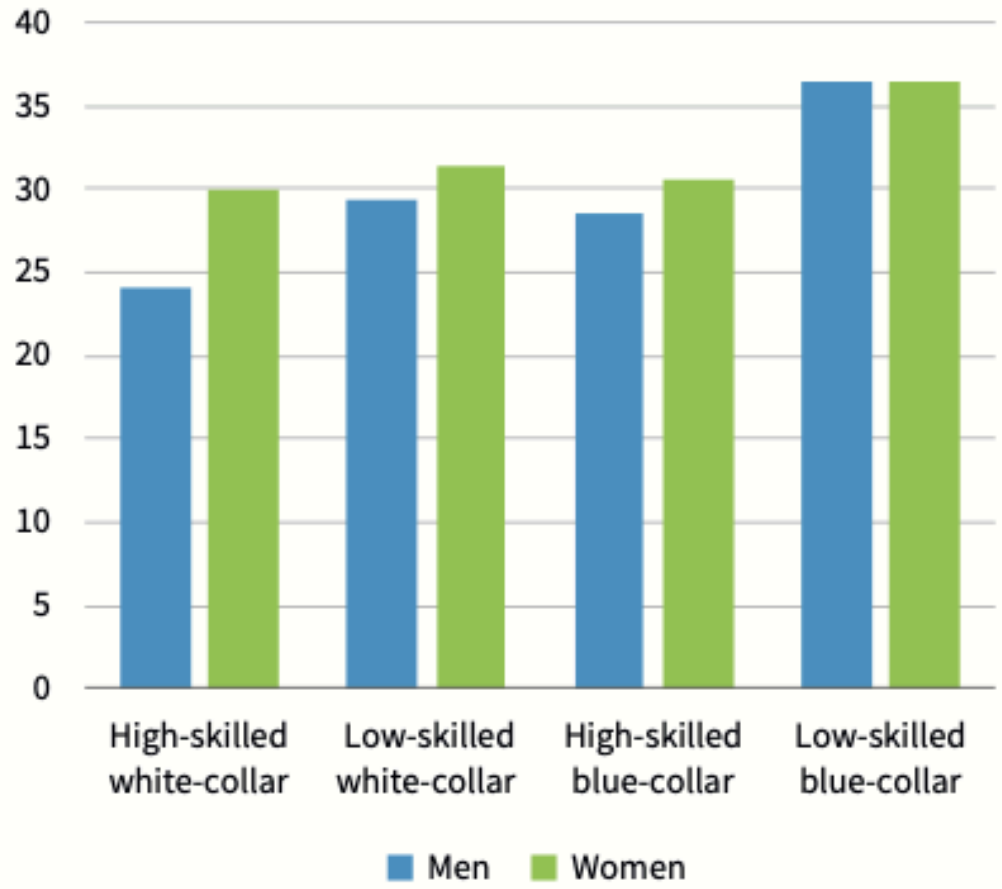
Figure 11: Share of men and women in the 20 largest occupations, 2015 (%)



Eurofound (2020), *Gender equality at work*, European Working Conditions Survey 2015 series, Publications Office of the European Union, Luxembourg.

Figure 89: Share of employees reporting unfair pay according to predominant gender in occupation, by gender, 2015 (%)

Figure 90: Share of employees reporting unfair pay according to occupation type, by gender, 2015 (%)



Eurofound (2020), *Gender equality at work*, European Working Conditions Survey 2015 series, Publications Office of the European Union, Luxembourg.

Annual average earnings per worker by activity sections. 2017

	Total	Mujeres	Hombres
D. Supply of electrical ...	52,014.79	*44.656,93	54,199.45
K. Financial and insurance ...	43,773.58	38,521.06	50,049.17
J. Information and communications	33,664.26	30,015.53	35,768.78
B. Extractive industries	32,555.75	*32,259,06	32,127.49
O. Public Administration ...	29,015.05	27,391.38	30,581.96
M. Professional, scientific ...	27,450.26	22,708.98	33,020.51
C. Manufacturing industry	27,214.30	22,857.78	28,741.18
E. Water supply, ...	26,937.32	24,010.74	27,628.19
Q. Health and social ...	26,076.47	23,839.44	33,735.05
H. Transport and storage	24,079.84	22,210.81	24,618.80
Total activities	**23,646.50**	**20,607.85**	**26,391.84**
P. Education	23,559.77	22,784.01	25,093.05
F. Construction	22,607.96	20,588.67	22,927.30
L. Real estate activities	21,299.08	18,488.32	25,392.77
G. Wholesale ...	20,608.77	17,377.72	23,829.70
R. Arts, recreation, ...	17,703.25	15,526.43	19,406.65
N. Administrative and support ...	16,519.76	13,604.08	20,174.91
S. Other services	16,202.92	14,000.99	20,752.34
I. Accommodation	14,540.14	13,161.33	16,138.88

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A Union of Equality: Gender Equality Strategy 2020-2025
COM(2020) 152 final

A Union of Equality: Gender Equality Strategy 2020-2025
COM(2020) 152 final

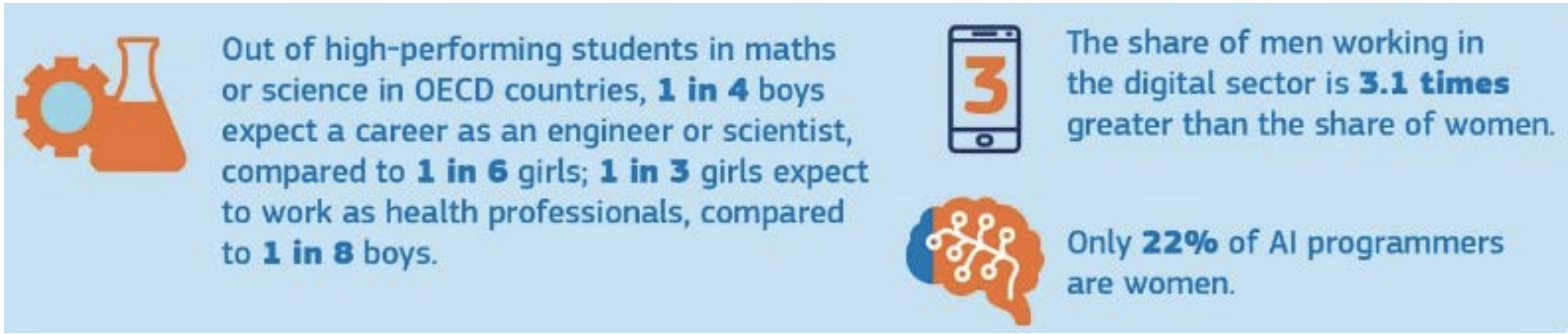
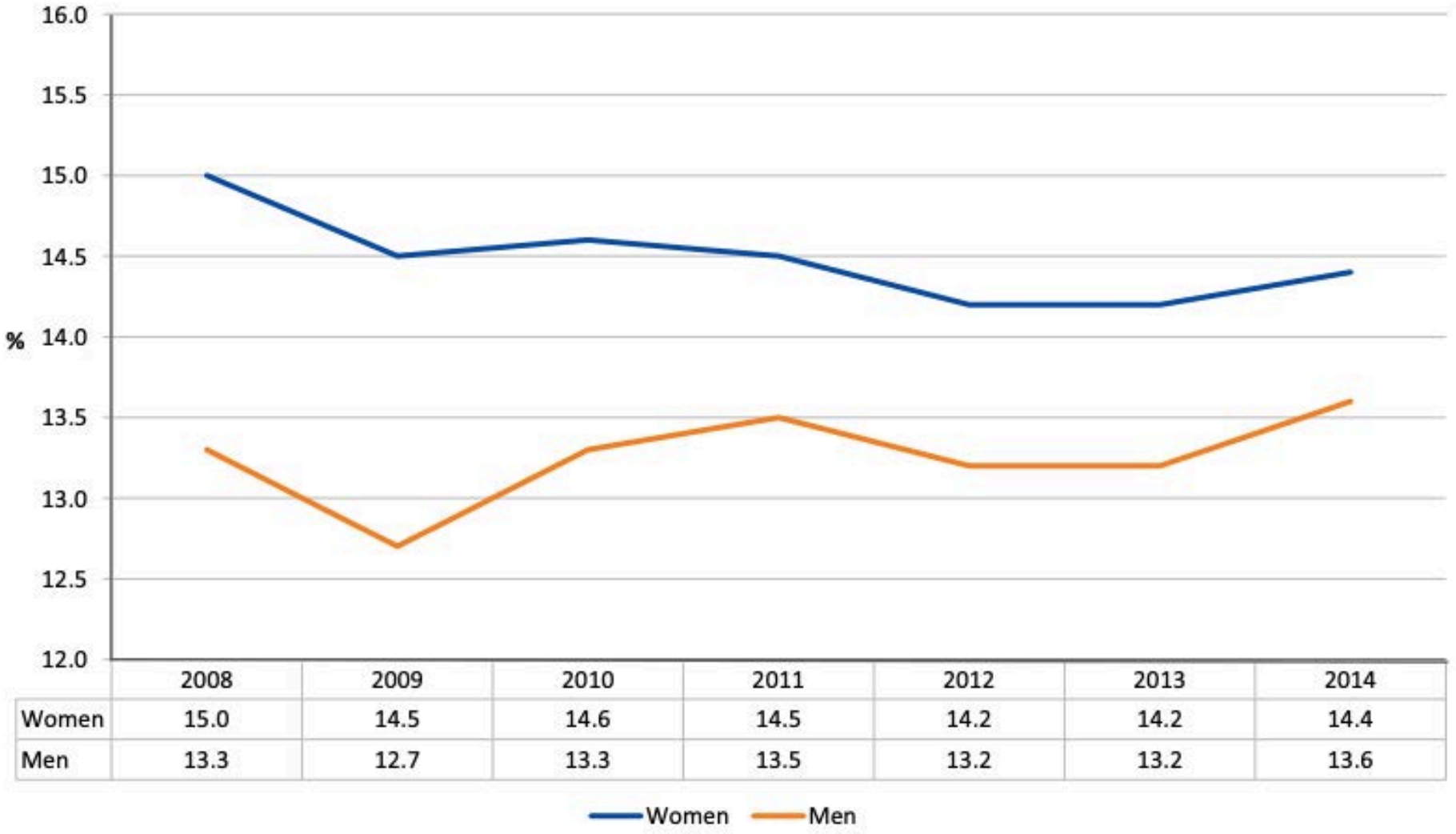


Figure 11: Temporary employment as a percentage of total employment, by sex, 2008–2014, EU28



	2008	2009	2010	2011	2012	2013	2014
Women	15.0	14.5	14.6	14.5	14.2	14.2	14.4
Men	13.3	12.7	13.3	13.5	13.2	13.2	13.6

Note: *15–64 age group*
Source: *EU-LFS (lfsa_etpga)*

EUROFOUND (2016) The gender employment gap: challenges and solutions

Job quality is key for workers' health and well-being, as well as for their work–life balance.

Addressing differences in job quality therefore helps improve the situation of both women and men at work.

Why do women earn less?

b) The glass ceiling: The position in the hierarchy influences the level of pay: less than 10% of top companies' CEOs are women. The profession with the largest differences in hourly earnings in the EU were managers: 23% lower earnings for women than for men.

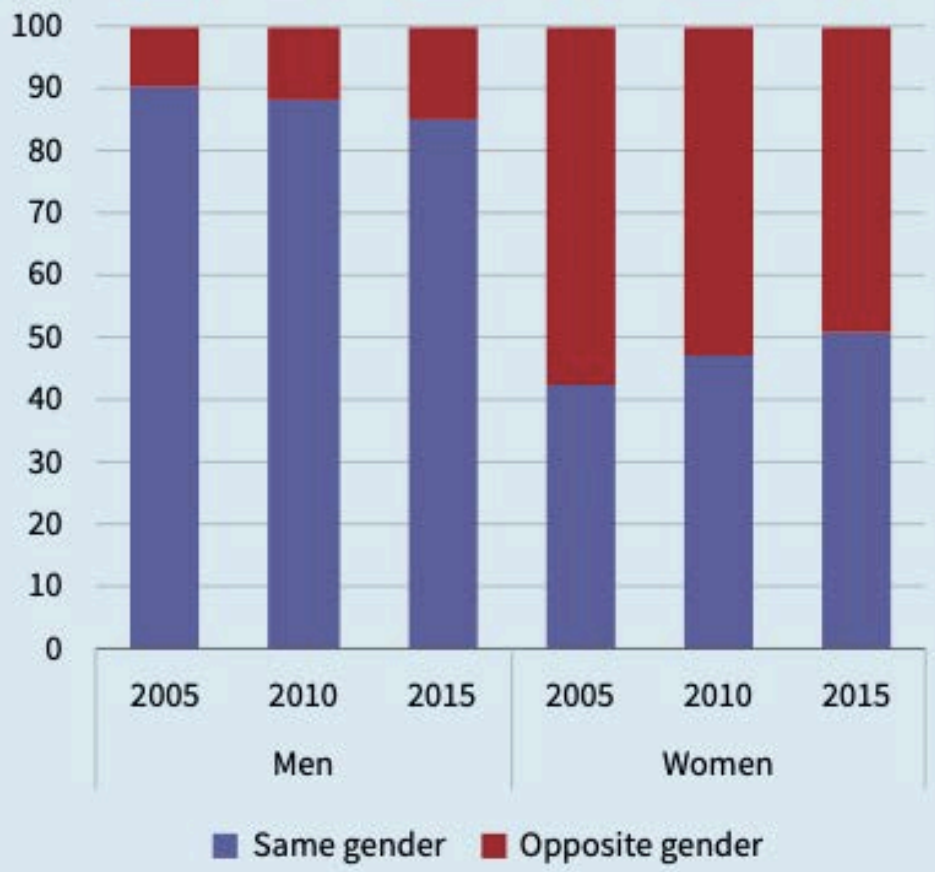
Women are only **7.5%** of board chairs and **7.7%** of CEOs in the EU's largest listed companies.

A Union of Equality: Gender Equality Strategy 2020-2025
COM(2020) 152 final

Box 1: Male and female managers

The vast majority of men have a male manager, but only half of female employees have an immediate manager of the same gender. The shares of men and women with a female manager have been increasing since 2005, but more so for women than for men (Figure 12).

Figure 12: Gender of immediate manager, by employee gender, 2005, 2010, 2015 (%)



Eurofound (2020), *Gender equality at work*, European Working Conditions Survey 2015 series, Publications Office of the European Union, Luxembourg.

Why do women earn less?

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en

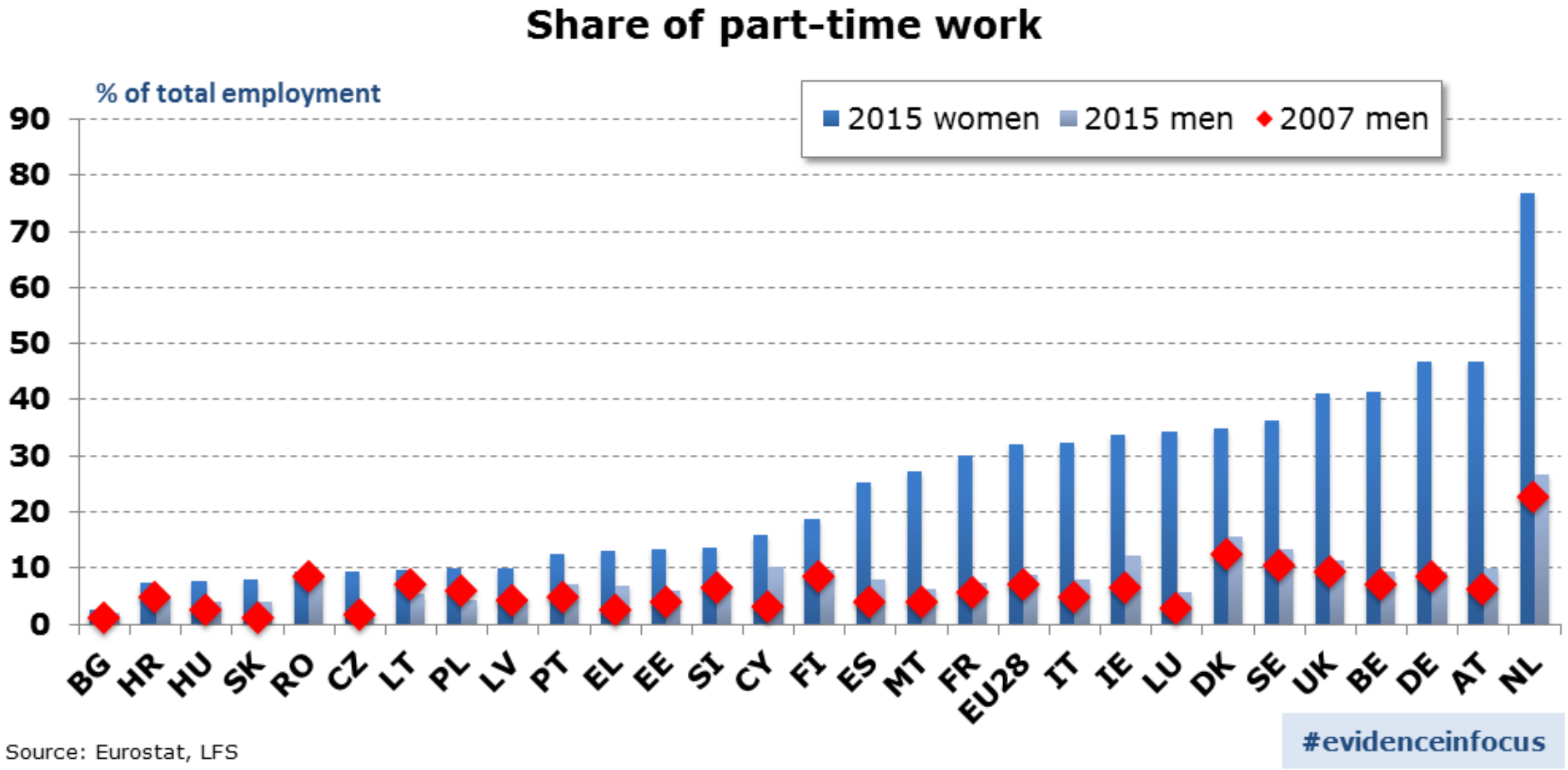
c) Work-life balance: Women spend fewer hours in paid work than men on average but more hours in unpaid work. In total, women have more work hours per week than men, which might affect their career choices.

44% of Europeans think that the most important role of a woman is to take care of her home and family.

43% think the most important role of a man is to earn money.

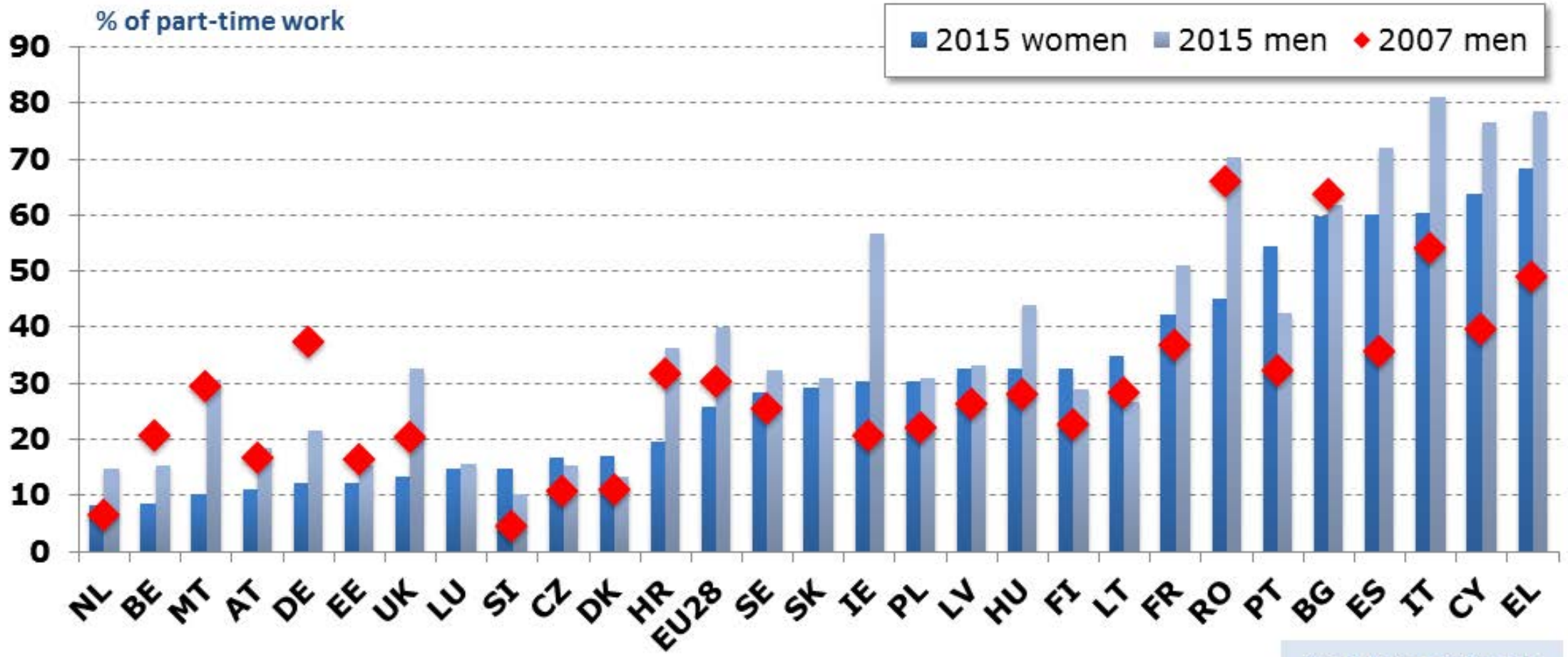
A Union of Equality: Gender Equality Strategy 2020-2025
COM(2020) 152 final

TYPE OF WORKING DAY



http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2535&furtherNews=yes

Share of involuntary part-time work



Source: Eurostat, LFS

#evidenceinfocus

Work–life balance

DIRECTIVE (EU) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 20 June 2019, on work–life balance for parents and carers

Work–life balance policies should contribute to the achievement of gender equality by promoting the participation of women in the labour market, the equal sharing of caring responsibilities between men and women, and the closing of the gender gaps in earnings and pay. (6th whereas)

How?

Is it a good option to increase advantages for women in order to balance their work and life?

ECJ Preliminary ruling in case C-104/09 (*Roca Álvarez*)

Measures in the Directive

The **imbalance** in the design of work–life balance policies between women and men **reinforces gender stereotypes** and differences between work and care. Policies on equal treatment should aim to address the issue of stereotypes in both men's and women's occupations and roles, and the social partners are encouraged to act upon their key role in informing both workers and employers and raising their awareness of tackling discrimination.

The current European Union legal framework **provides limited incentives for men** to assume an equal share of caring responsibilities. The lack of paid paternity and parental leave in many EU members contributes to the low take-up of leave by fathers.

- **"Paternity" leave**
- **Parental leave**

Both are different of the **maternity leave**. Different scope

C-5/12 (*Betriu Montull*)

STC 111/2018

- **"Paternity" leave:** leave of 10 working days from work for **fathers** or, where and insofar as recognised by national law, for **equivalent second parents**, on the occasion of the birth of a child for the purposes of providing care;

- **Parental leave:** leave of four months from work for **parents** on the grounds of the birth or adoption of a child to take care of that child;

- **Maternity leave:** leave of 14 weeks from work for **mothers** on the occasion of the birth of a child for the purposes of recovering (the mother) and providing care (to the child). **Council Directive 92/85/EEC of 19 October 1992**

Why do women earn less?

https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en

d) Discrimination: In some cases, women earn less than men for doing jobs of equal value. However, the principle of equal pay for work of equal value is enshrined in the Treaties of the European Union (article 157 TFEU) since 1957.

Discrimination

What is discrimination?

Not any differentiated treatment: only treating one person less favourably than another is in a comparable situation, on any of some particular grounds.

Direct discrimination

Treating one person les favourably because those grounds.

Indirect discrimination

Putting a person at a particular disadvantage because of those grounds using an apparently neutral provision, criterion or practice.

Directive 2006/54/EC

Affirmative action

Action adopted in order to increase opportunities of disadvantaged groups.

However, differentiated treatment CAN BE justified, so that "discrimination" is then not illegal.

Is it discriminatory paying person A 100€ more than B provided that both perform the same activity, just because the employer has a better relationship with A?

Is it direct or indirect discrimination to dismiss one woman because she is pregnant?

Is it discriminatory to employ only women as a models for a women's fashion show?

Is it discriminatory for a clause in a collective agreement to establish an obligation to employ only women as sales agents just because there are less women in that sector?

STJCE Case C-158/97, Badeck

STAELC Case E-1/02

Keeping in force a rule allowing the establishment of a quota of academic posts exclusively for members of the under-represented gender is contrary to the Directive on the implementation of the principle of equal treatment for men and women as regards access to employment.

Can it be discriminatory to establish a regime of retirement pensions that penalise part-time work?

Is it discriminatory to pay waiters at the bar of a hotel (men) more than the waitresses who serve the customers of that hotel in their rooms?

Is it discriminatory to pay lorry drivers (mainly men) more than refuse collectors (mainly women)?

Is it discriminatory that employees of a company who works for another (outsourcing) are paid less than those of the main company who do exactly the same job?

European Directive 2008/104 Temporary Agency Work

Collective agreement

Two different professional groups:

A) Salary : 1,300€

B) Salary: 1,000€

Professional group A mainly integrated by men

Professional group B mainly integrated by women

- **COLLECTIVE BARGAINING AT COMPANY LEVEL (2012)**

- **STOP TO INDEXATION OF WAGES IN COLLECTIVE AGREEMENTS (2012)**

  Mechanism used to escalate automatically wages in inflationary environments.

- **PRICE OF OVERTIME (1994)**

- **PAYMENT OF SENIORITY: NON COMPULSARY (1994)**

THE DEBATE:

A minimum wage for Europe?

Working time

Aim of working time regulations

- Protection of health
- Flexibility
- Redistribution of existing work
- Work–life balance

Maximum according to law

- **Spain**

Duration

- 9 daily hours
- 40 weekly hours
- 1826 hours per year
- Supplementary hours: 80 h/year
- Flexible hours: 10% annual W.T.

Resting time

- 12 daily hours
- One and a half day per week
- 30 days of annual holidays
- 14 bank holidays

- **France**

Duration

- 10 daily hours
- 35 weekly hours
- 1.607 hours per year
- Supplementary hours: 220 per year
  - No more than an average of 44 hours in 12 weeks
  - No more than 48 hours in the same week

Resting time

- 11 daily hours
- 24 hours per week
- 30 working days per year
- 10 bank holidays

-FLEXIBLE LIMIT TO DAILY WORKING TIME:

Up to 12 hours (1994)

-FLEXIBLE LIMIT TO WEEKLY WORKING TIME:

40 weekly hours in annual average (1994)

-FLEXIBLE LIMIT TO WEEKLY RESTING TIME:

One and a half days that can be accumulate in periods of 14 days (1994).

-BANK OF HOURS AT DISPOSITION OF EMPLOYER:

10% annual working time (2012)

-REDUCTION AND FLEXIBILISATION OF OVER-TIME:

Before 1994: 2 hours per day; 15 per month, 100 per year

After 1994: 80 per year

They can be compensated in working time (not necessarily in money).

-NEW REGULATION OF NIGHT WORK/NIGHT WORKER:

Allows over-time in night work (not for night workers).

-RIGHT TO ADAPT WORKING TIME FOR CONCILIATION (2019)

-ANNUAL HOLIDAYS AND MATERNITY/SICK LEAVE

(STJUE 2004/2009/2011…)

Work–life balance

–For care of new-born babies

- Art. 37.4 ET: breastfeeding
  - –Right: one hour free or half hour reduction
  - –Applies to: mother and father (JC C-104/09), but only one of them.
- Art. 37.5: premature babies
  - –Right: one hour's paid leave and up to two hours reduction (with wage cut).
  - –Applies to: mother and father (just one of them).

–For care of family members: art. 37.6 ET

- Requirements:

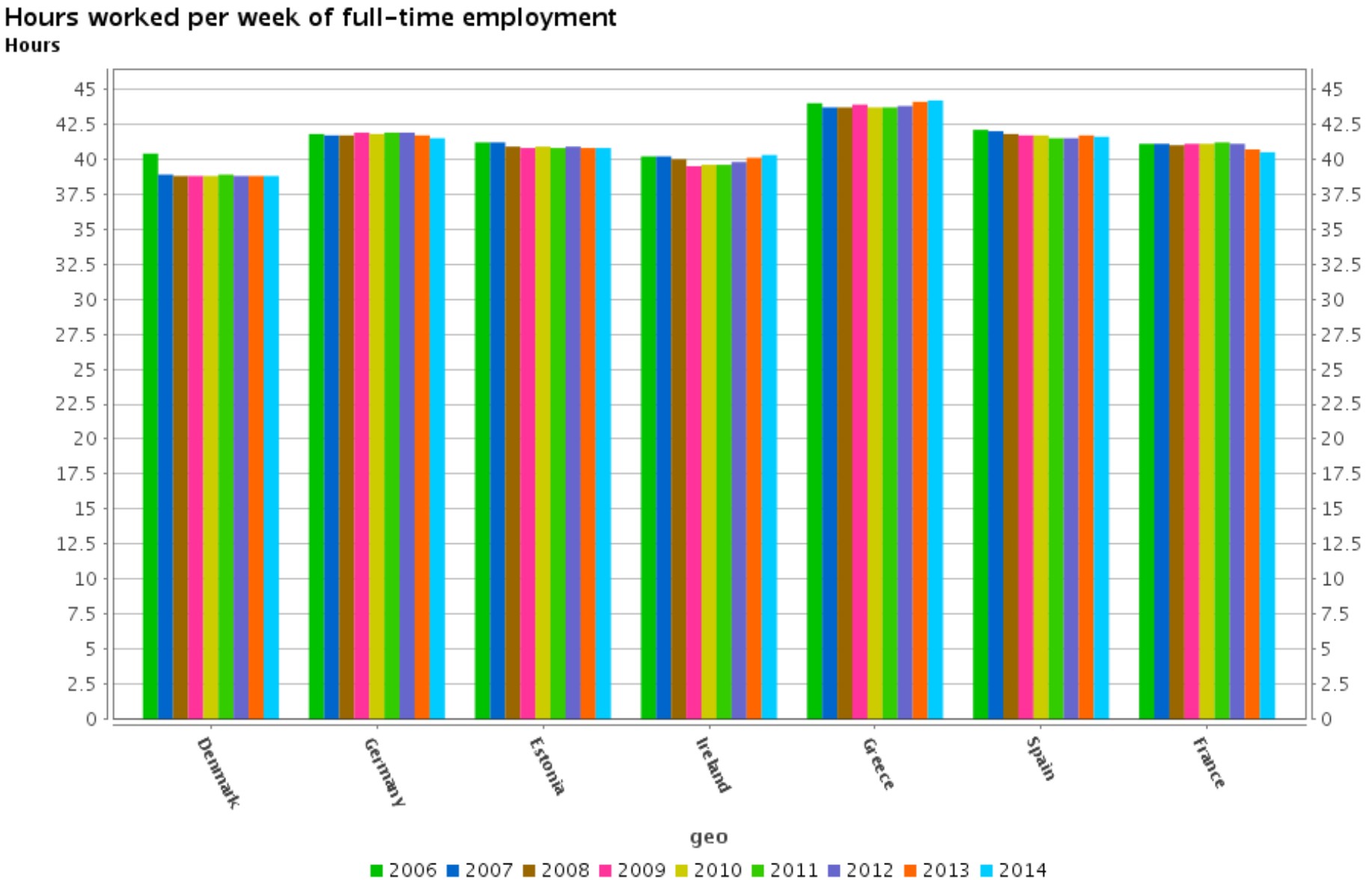
  Under 12 years old, the disabled or relatives up to 2nd degree of kinship who
  - cannot be independent;
  - are not in paid employment.
- Right: reduction of both wage and working hours between an eighth and a half.

–Other work–life balance rights: art. 34.8 ET

–Maternity and paternity leaves: art 48.4 ET

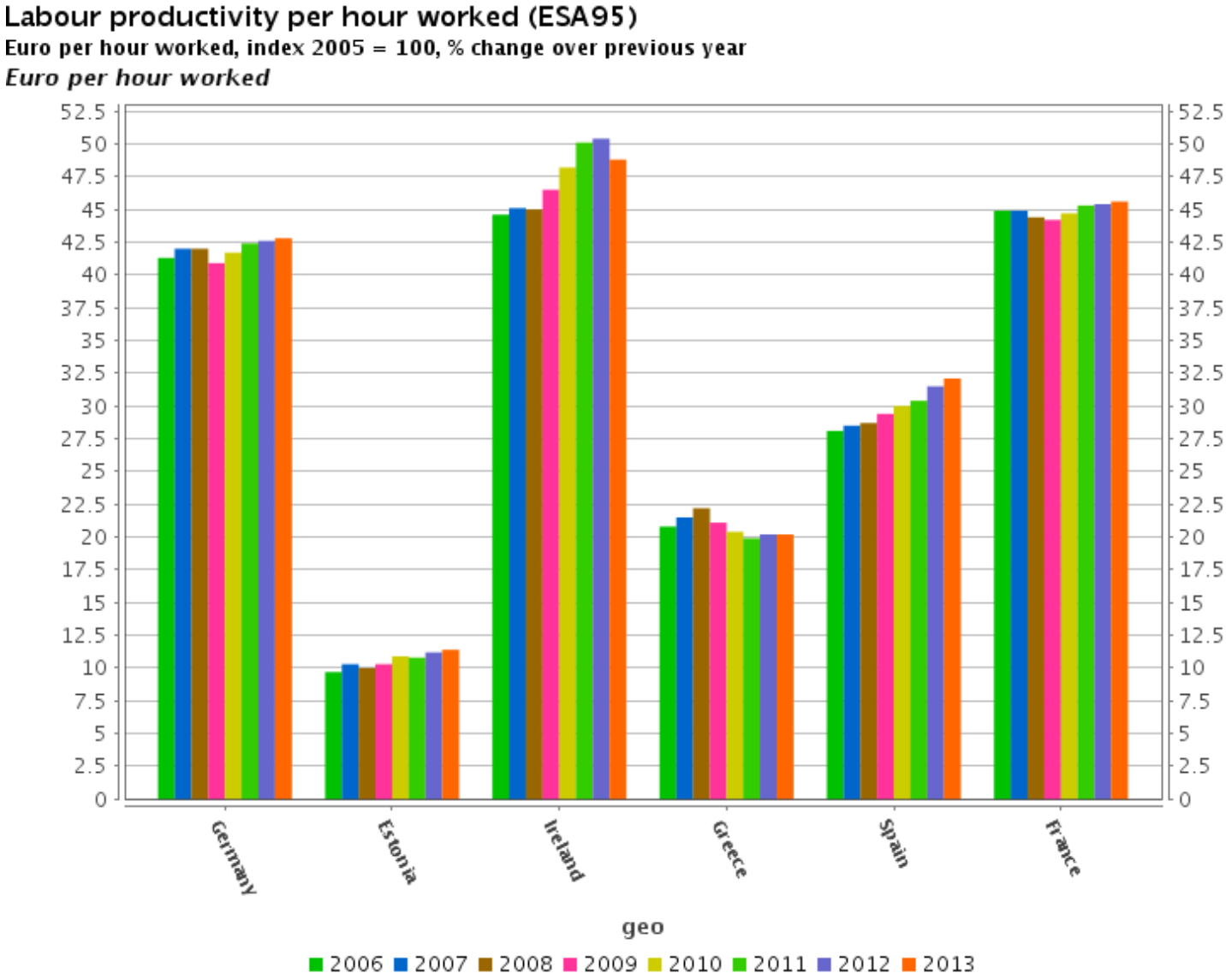
SOURCE: EUROSTAT

http://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tps00071&language=en&toolbox=data



SOURCE: EUROSTAT

http://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tsdec310&language=en&toolbox=data



Labour compensation per hour worked (OCDE)

https://data.oecd.org/lprdty/labour-compensation-per-hour-worked.htm

THE DEBATE:

four-day week?

THE DEBATE: four-day week

THE PROS (fastcompany)

Better productivity. Productivity during working hours increases to compensate for the lost day. Aside from the New Zealand study, we also have evidence from another study that overall productivity peaks at 25-30 hours per week for people over the age of 40.

More efficient usage of time. Employees spend less time on inefficient tasks like meetings and are less likely to “run down the clock” with time wasters like social media or excessive breaks.

Employee satisfaction. With less stress and a greater work–life balance, happy workers reportedly engage better with their work, along with increased motivation and creativity.

Team building. The emphasis on efficiency tends to bring teams closer together, as there’s less time to waste on disputes, and the entire team’s goals are more focused.

Lower unemployment rates. Under the notion of work sharing, companies can fill free hours with new employees, employing multiple workers to fill standard one-person slots. (Of course, this doesn't account for salaries.)

Environmental benefits. A four-day working week critically reduces each individual employee's carbon footprint by reducing commuter pollution.

Fewer overhead costs. If all your employees are out of the office one day a week, that cuts all office maintenance costs by 20%, especially electricity.

More productivity innovations. By encouraging new time-saving methods, employees are more likely to think up newer and better tricks to increase productivity.

THE CONS (fastcompany)

The risk is expensive. The most glaring drawback for employers is the costly risk that workers fail to meet their work requirements. This was most evident in Sweden's two-year trial that reduced a 40-hour week to 30 hours while continuing a five-day structure. While the study recorded higher worker satisfaction, it ultimately became too costly to sustain.

Not all industries can participate. Some industries require a 24/7 timetable or other such scheduling, making a four-day working week impractical.

It might lead to un-utilised labour. A study on the Netherlands' working week revealed that 1.5 million people wanted to work more hours but were unable to.

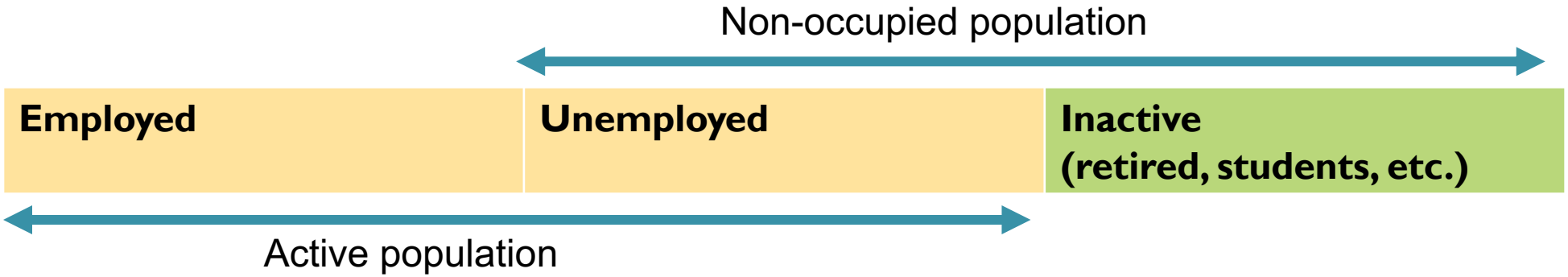
Workers put in the same hours anyway. Some jobs just take time. As was the case in France, some workers are putting in the same hours anyway—the only difference is they're paid over-time for it. While that helps the workers, paying extra over-time is just another expense for the company on top of potentially paying for a third *day off*.

Certain industries might suffer. Industries like office real estate benefit from people being at work in a way that wouldn't be transferred to whatever the workers do in their day off.

Unemployment/ employment

CLASSIFICATION OF THE POPULATION BY WORK

- ACTIVE POPULATION: has a job or is seeking one (ACTIVE = EMPLOYED + UNEMPLOYED)
  - Employed population: works for profit (it includes workers and professionals or businessmen)
  - Unemployed population: doesn't work for profit but is available for work and actively seeking a job
- INACTIVE POPULATION: rest of working-age population (16—64 years)
  - Includes people without paid employment and not seeking it (retirees, housewives, students, volunteers, discouraged workers, etc.)



UNEMPLOYMENT RATE

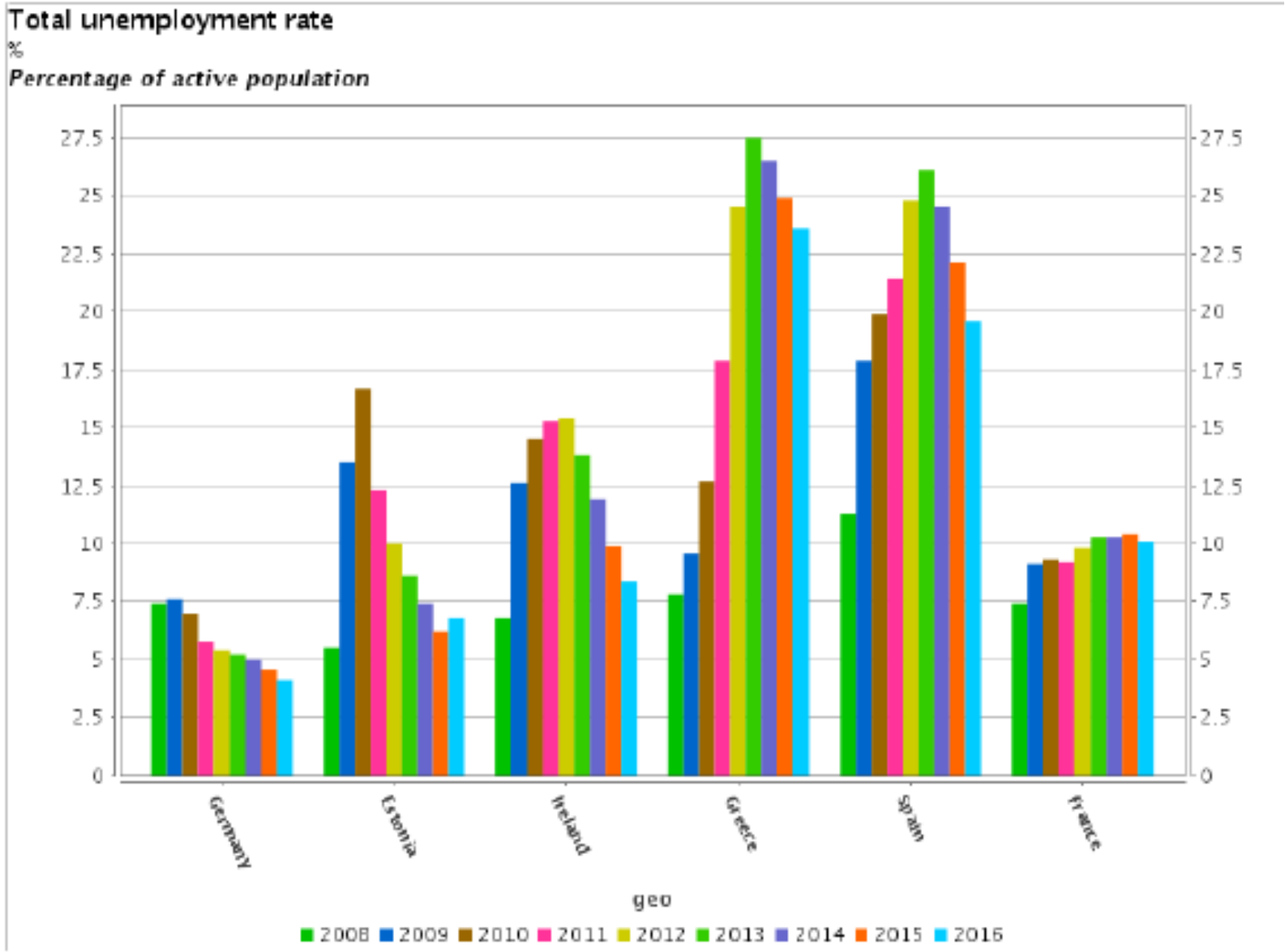
- **Concept:** ratio between the number of unemployed persons and the active population. UR= Unemployed persons / active population * 100
  - The **unemployed population increases** significantly **during recessions** in the Spanish economy, driven by job losses but also by the increase in the active population (except in the last two years of the current crisis). In the upturns, the amount of unemployed people falls to a lesser extent than employment grows because of rises in the workforce.
  - In Europe, Spain is characterised by a **higher than the average rate**
  - **In times of crisis**, **unemployment of men** grows because of job losses, but the male active population is static or shrinks, while **female unemployment increases** grows due to job losses and an ever-greater female workforce.
  - It sharply affects young people and foreigners.
  - In times of crisis, the number of **families with no earner** rises.
  - The variation in unemployment and employment rates **between regions** is significant, reflecting the existence of different productive structures and patterns of activity in each territory.

EMPLOYMENT RATE

- **Concept:** ratio between the number of employed persons and the active population. UR= Unemployed persons / active population * 100

ACTIVITY RATE

- **Concept:** ratio between the number of active persons (employed workforce and the unemployed) and the corresponding working-age population. **AR=** Active population / working-age population * 100
  - Continuous growth of the active population, more expansive in upturns and less in periods of recession (with a fall in the last two years of crisis).
  - The **male activity rate** is always higher than the female, but the gap has narrowed significantly through the differing dynamics of men and women.
  - **Influential factors** in the increase in the activity rate: change in the traditional pattern of **women** entering and leaving the labour market (they no longer leave the labour market upon marrying or having a first child, and if they do so, they return to activity more quickly), higher activity rate among the **immigrant population.**
  - The **rate of Spanish activity** was below the European average (chart 2), but there has been a gradual convergence until reaching parity, thanks to the strong increase in activity in our country (especially women).



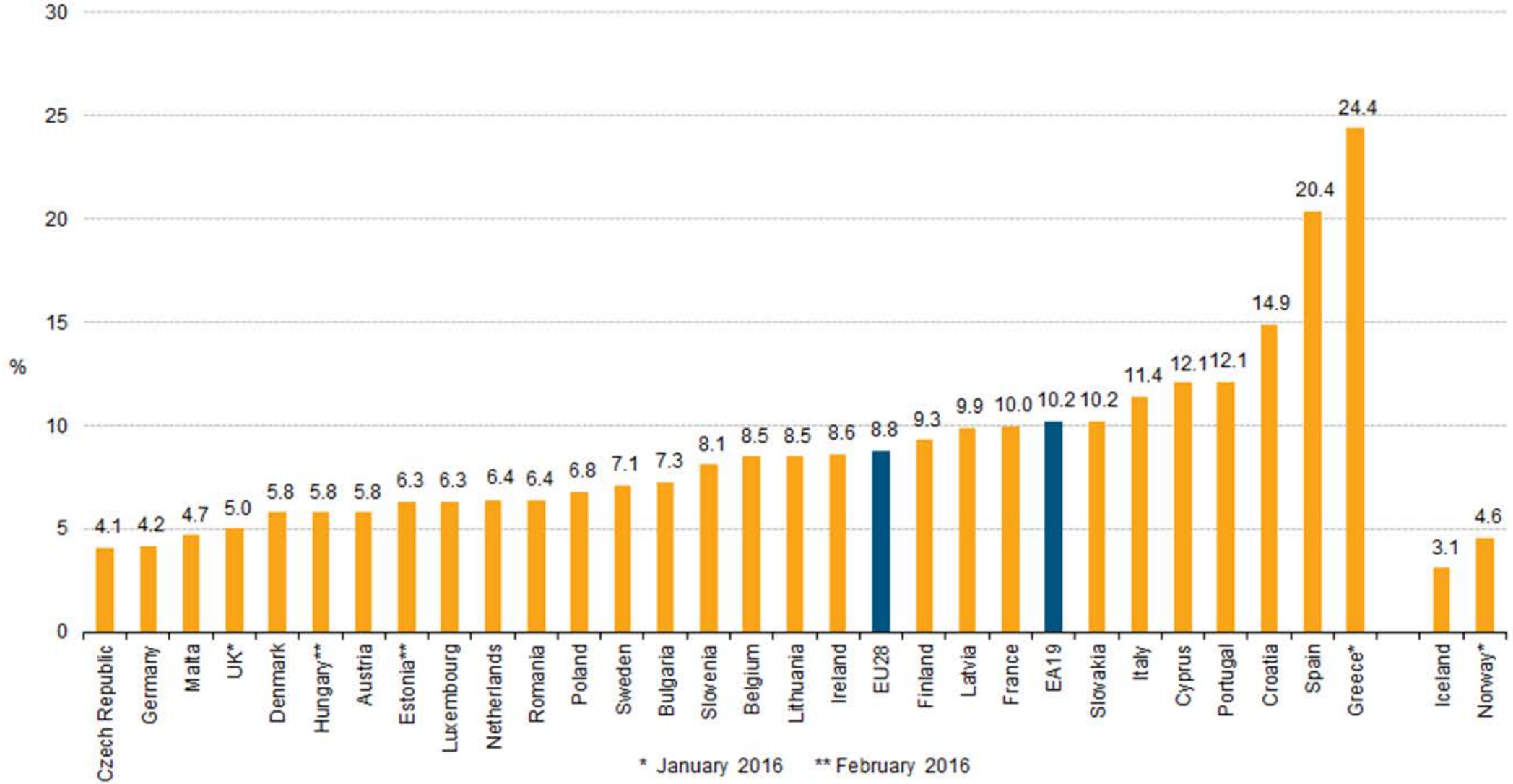
Employed persons comprises those aged 15 years and more who during the reference week worked for at least one hour for pay or profit or family gain.

SOURCE: EUROSTAT

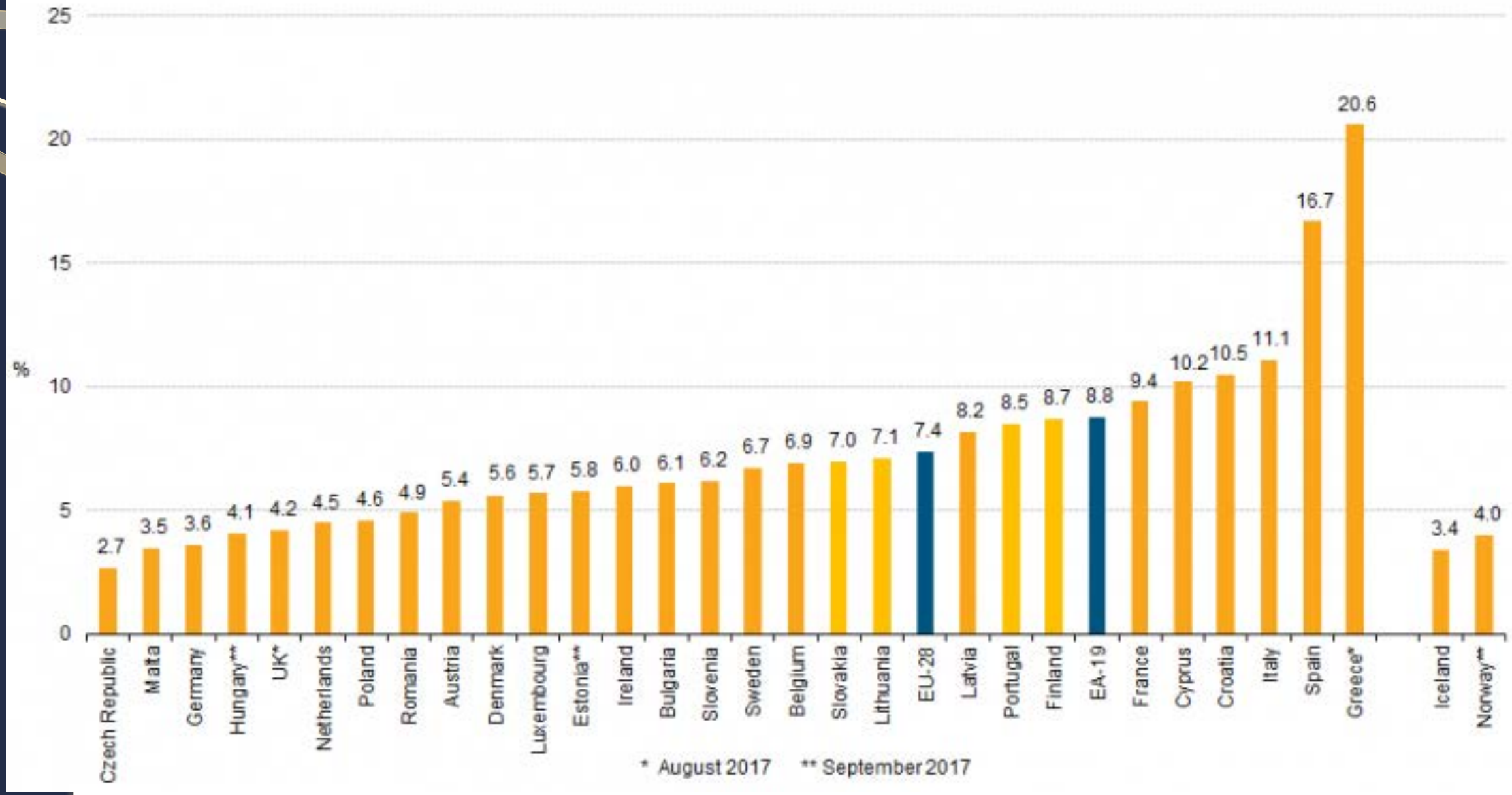
Unemployment rate

SOURCE: EUROSTAT

http://ec.europa.eu/eurostat/statistics-explained/images/8/80/Unemployment_rates%2C_seasonally_adjusted%2C_March_2016.png



SOURCE: EUROSTAT



Economically Active Population Survey (EAPS) Fourth quarter of 2017

•**The number of employed persons** decreased by 50,900 persons in the fourth quarter of 2017, standing at 18,998,400. The quarterly employment variation rate stood at -0.27%.

•The employment rate (percentage of employed persons in relation to the population aged 16 and over) stood at 49.07%, representing a decrease of 20 hundredths as compared to the previous quarter. In annual variation, this rate rose by 1.1 points.

The number of unemployed persons increased by 34,900 this quarter (0.94%), standing at 3,766,700. The quarterly variation of unemployment is -1.65% in seasonally adjusted terms. Over the last 12 months, unemployment has decreased by 471,100 persons (-11.12%).

The unemployment rate stood at 16.55%, which is 16 hundredths more than the previous quarter. Within the last year, this rate decreased by 2.09 points.

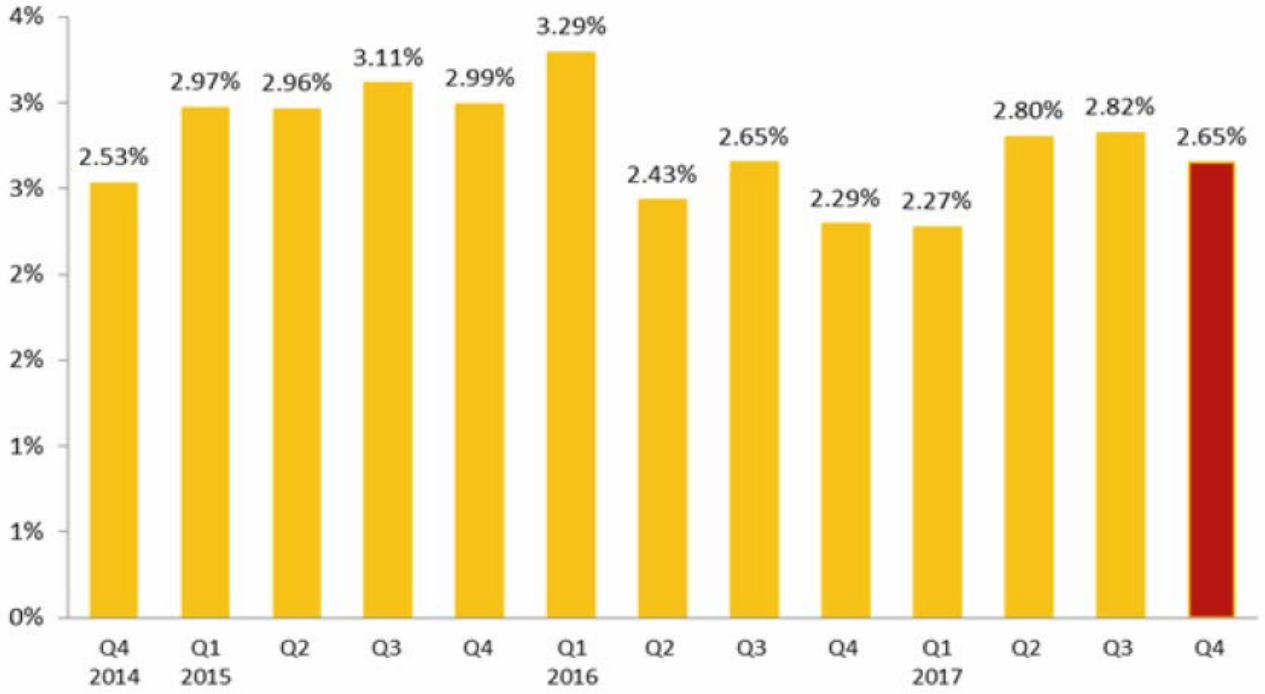
Activity rate 2017:

This quarter, the number of economically active persons decreased by 15,900, to 22,765,000. The activity rate decreased by 12 hundredths standing at 58.80%. Over the last year, the economically active population has increased by 19,100 persons.

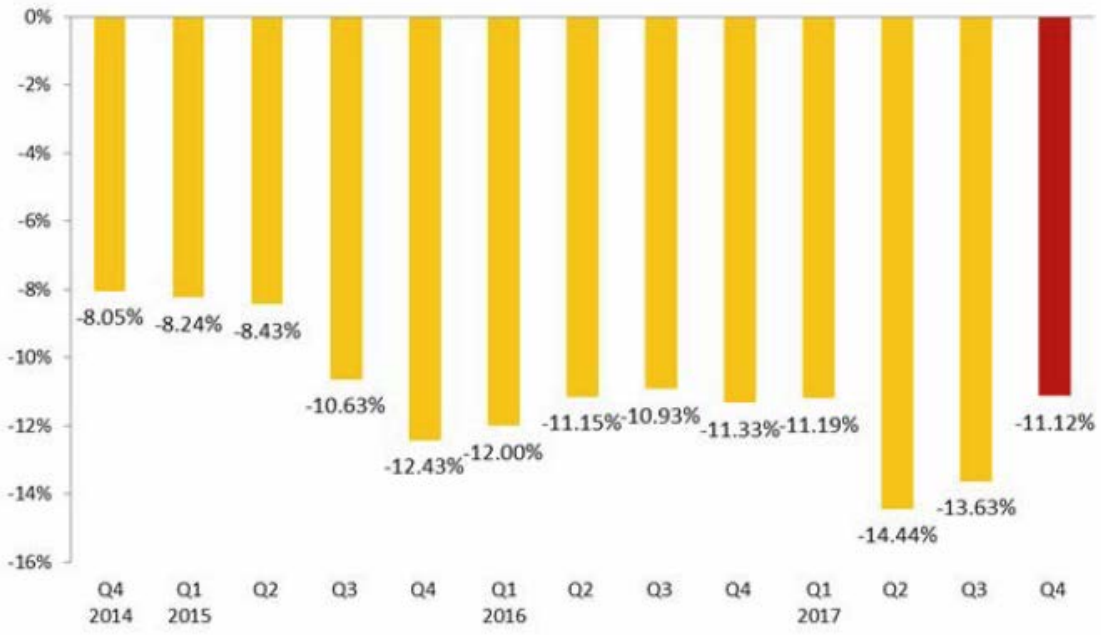
Economically Active Population Survey (EAPS) Fourth quarter of 2017

Instituto Nacional de Estadística

Evolution of the total number of employed persons, in annual rate

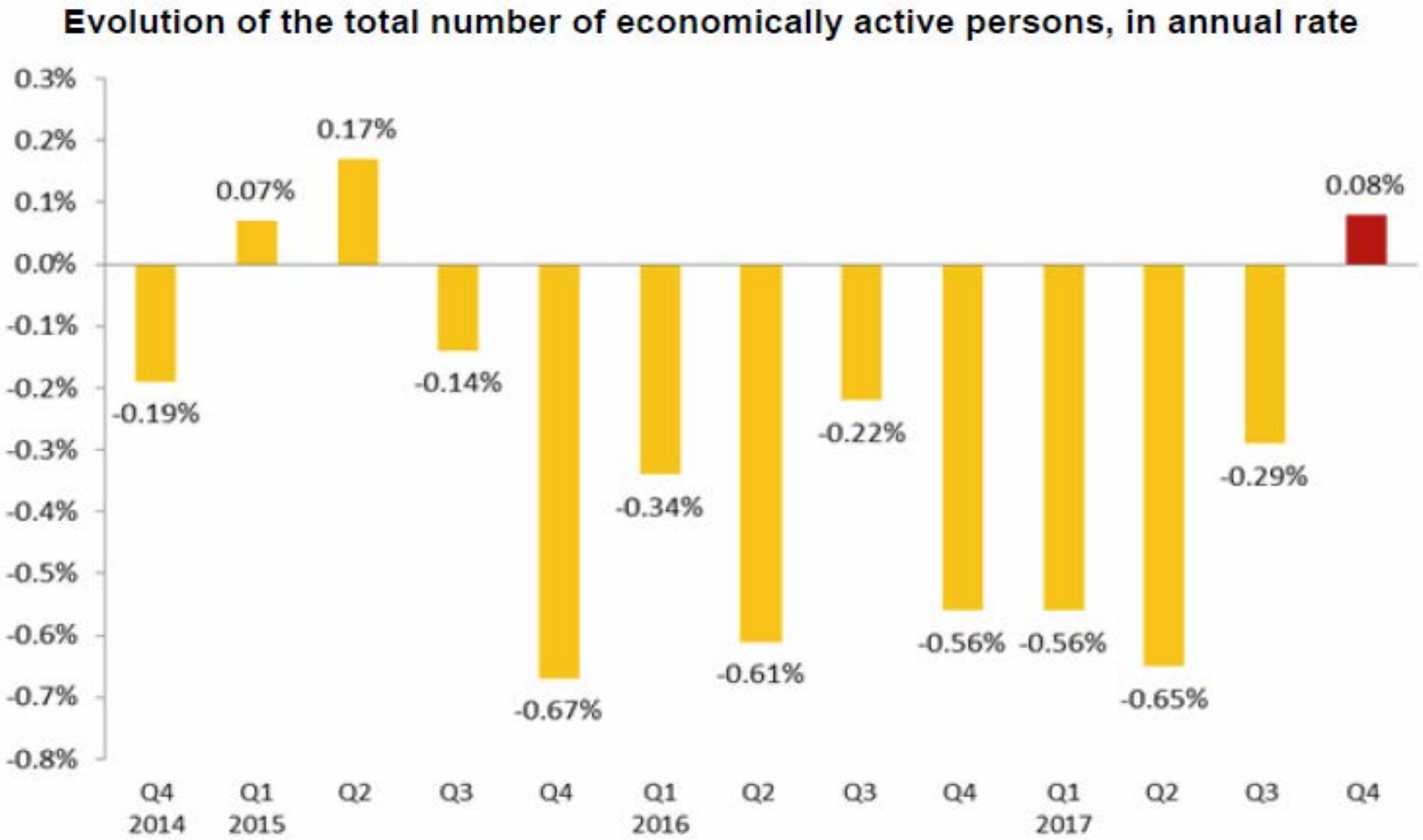


Evolution of the total number of unemployed persons, in annual rate

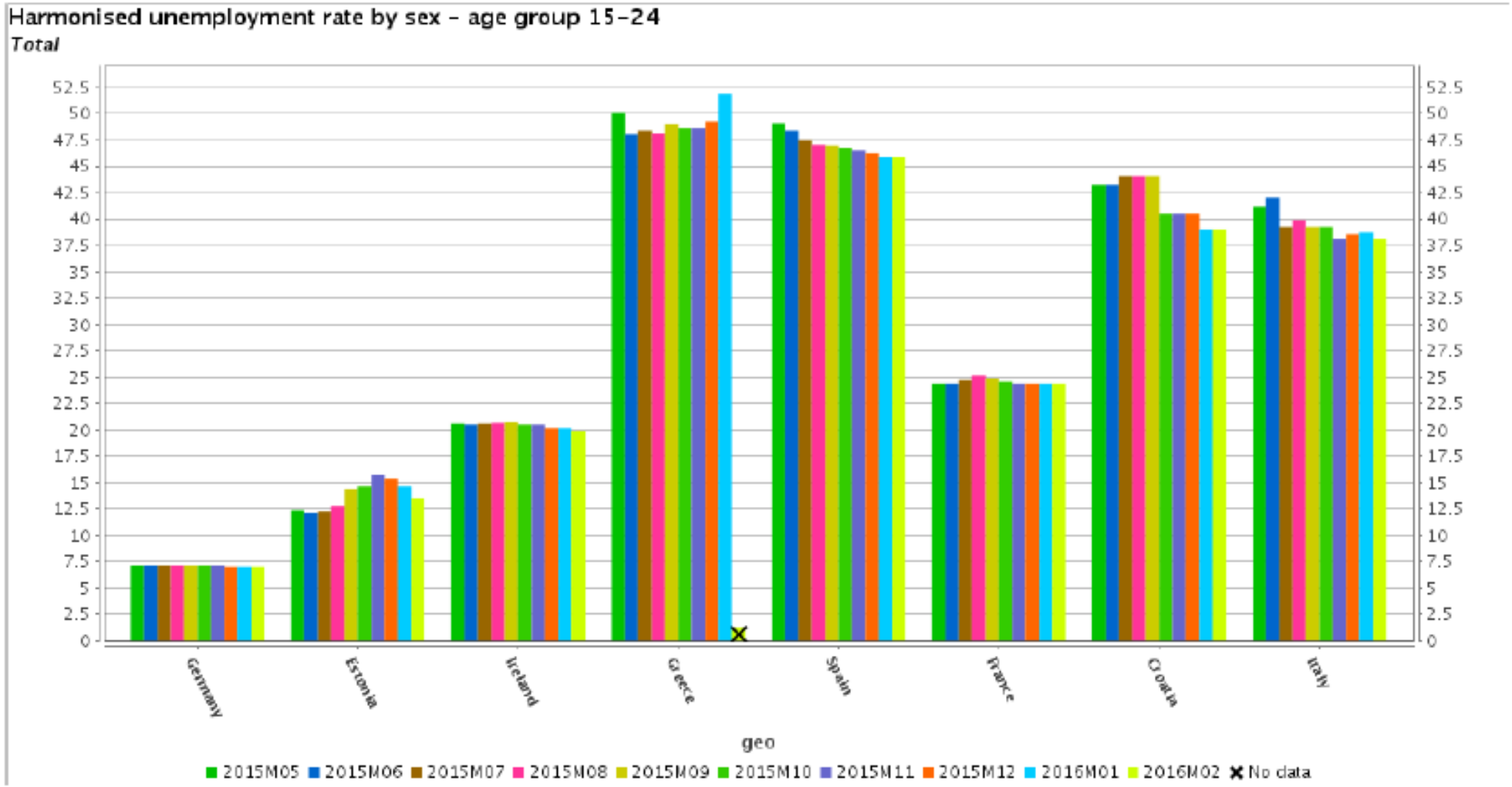


Instituto Nacional de Estadística

Economically Active Population Survey (EAPS)
Fourth quarter of 2017



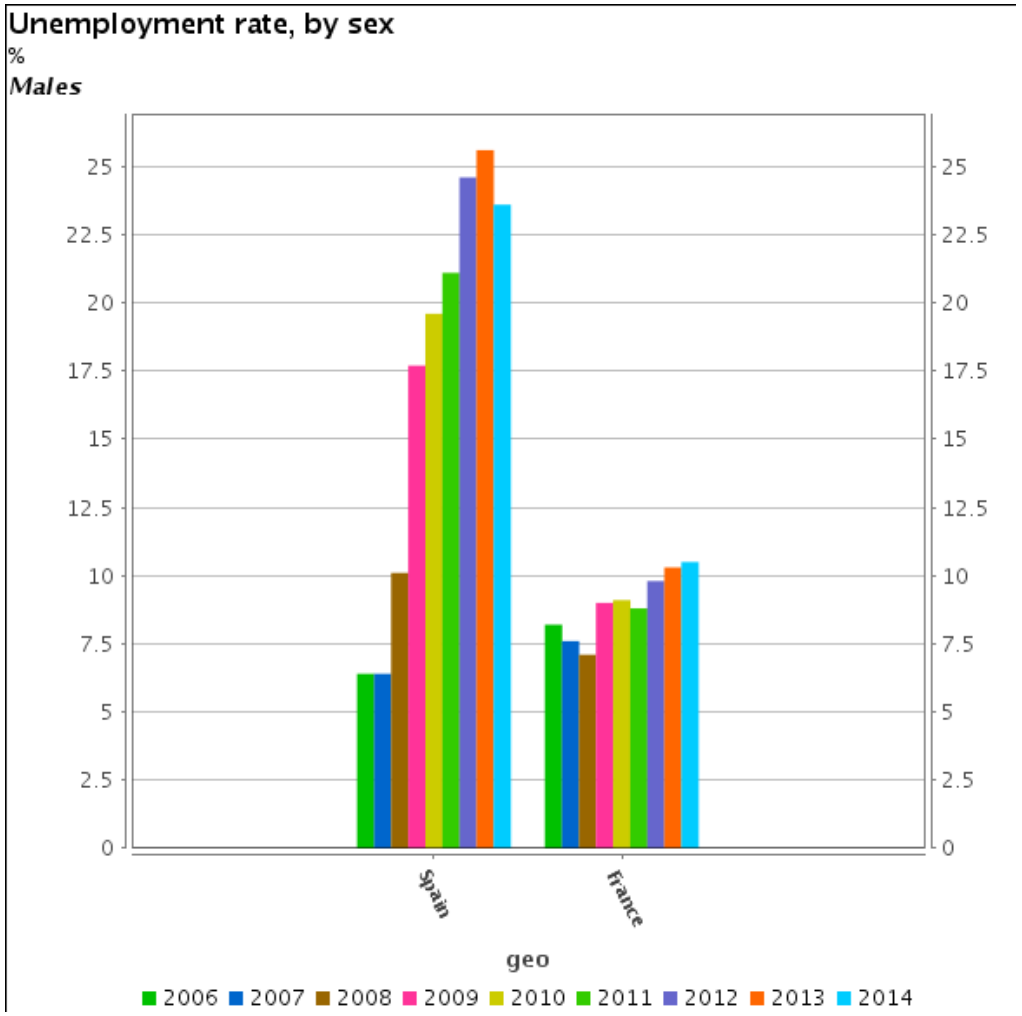
Unemployment rate by age group 15–24

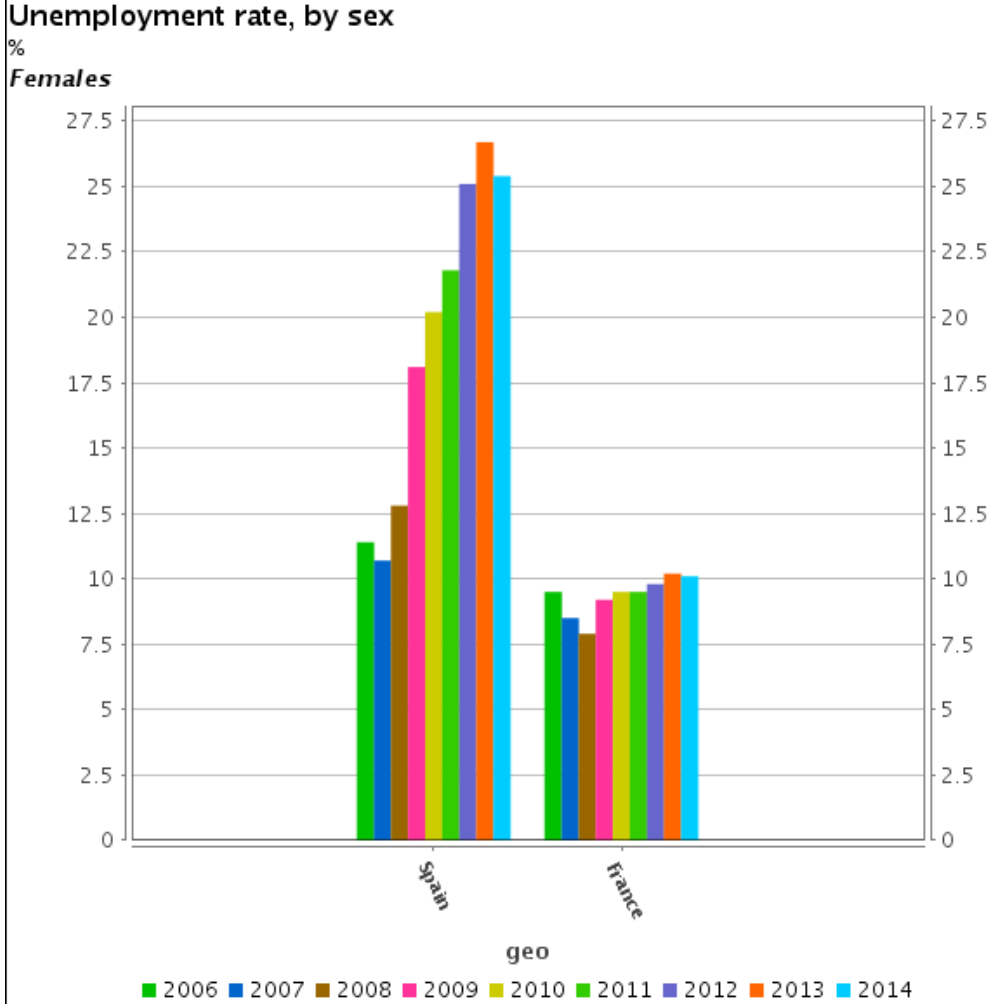


Source of Data: Eurostat

Last update: 10.05.2016

SOURCE: EUROSTAT





ESPAÑA: 25.6

FRANCIA: 10.3 2013

ESPAÑA: 23.6

FRANCIA: 10.5 2014

ESPAÑA: 26.7

FRANCIA: 10.2 2013

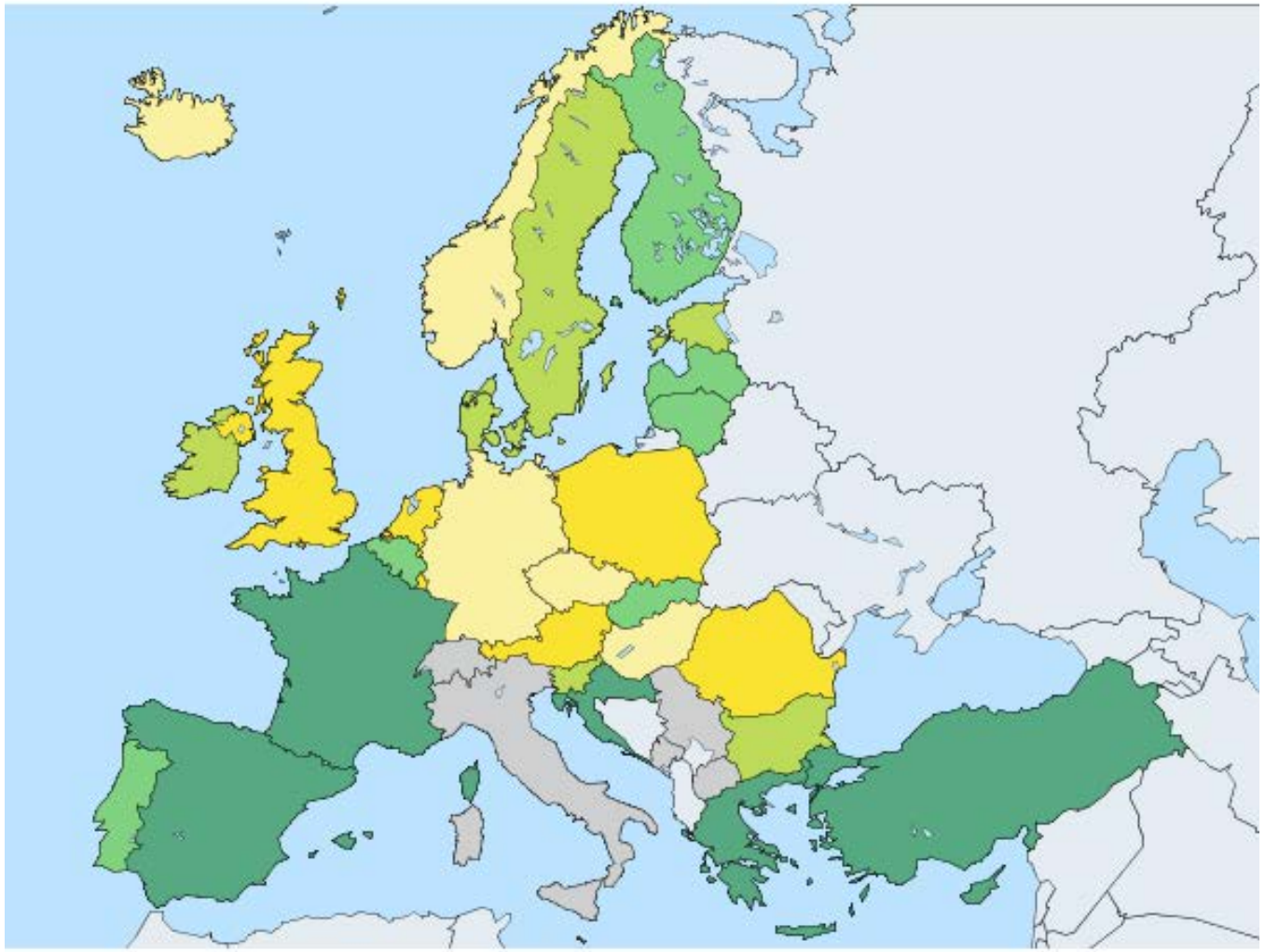
ESPAÑA: 25.4

FRANCIA: 10.1 2014

Total unemployment rate

% - 2017

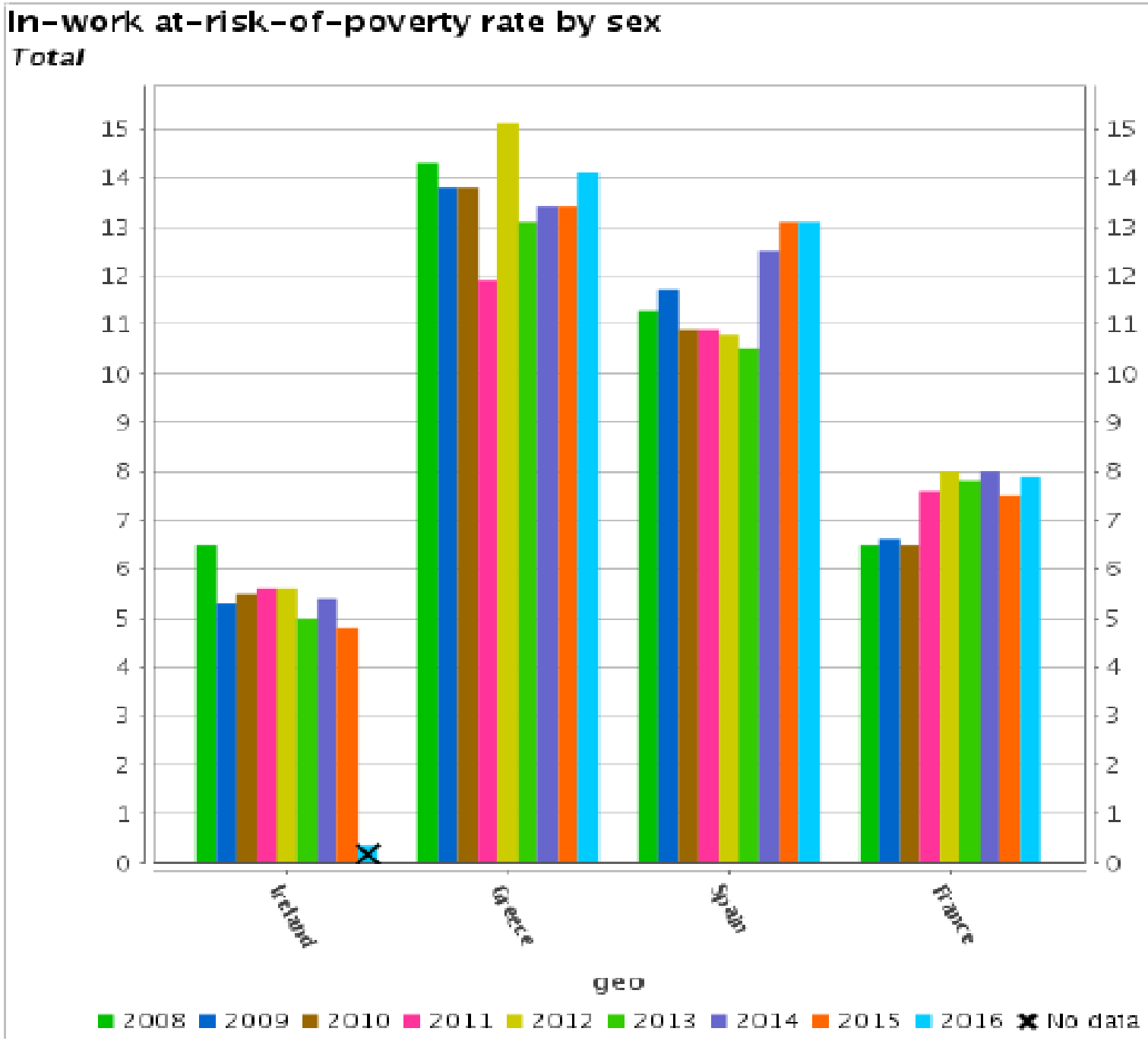
Percentage of active populationPercentage of active population



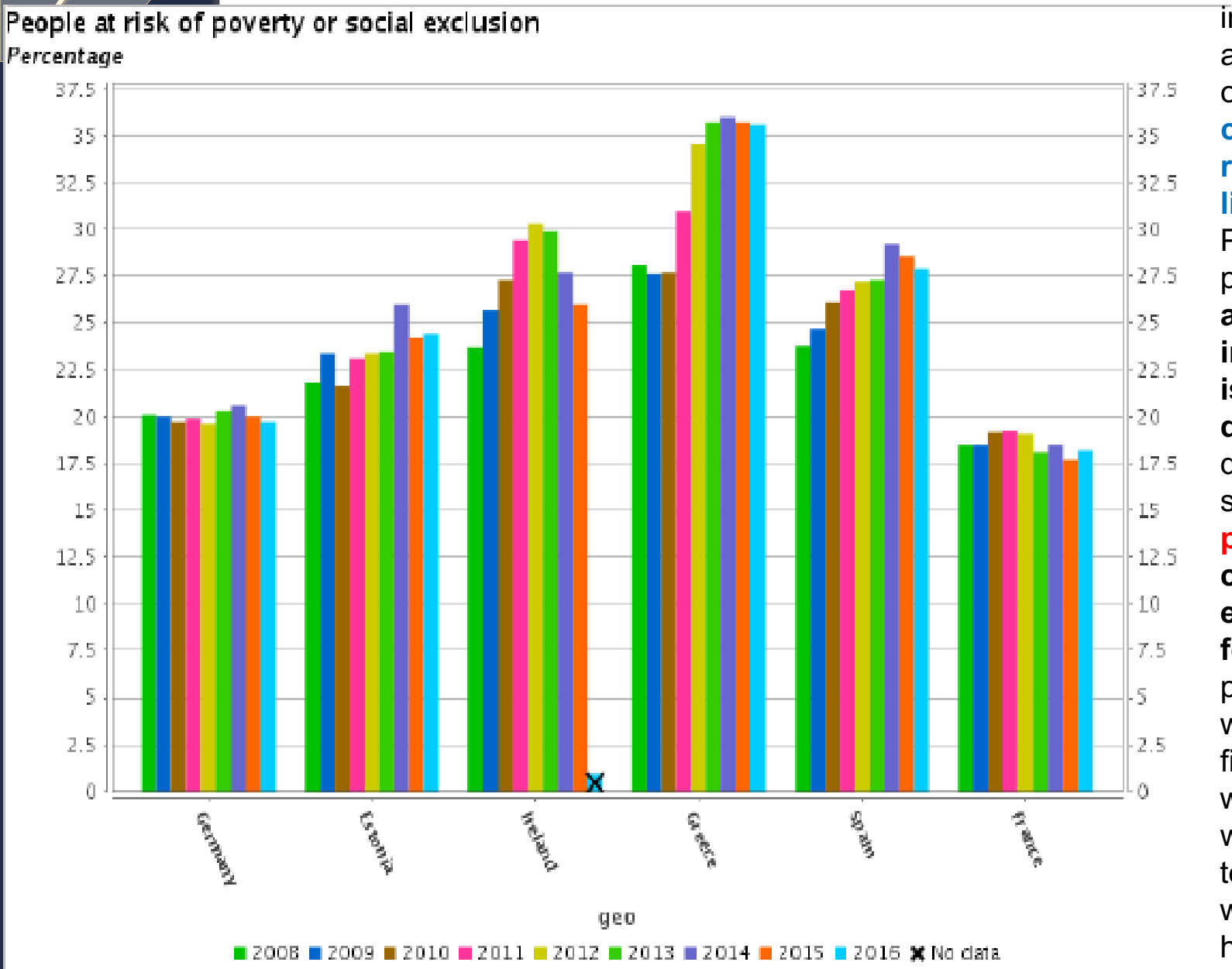
SOURCE: EUROSTAT

April 2017

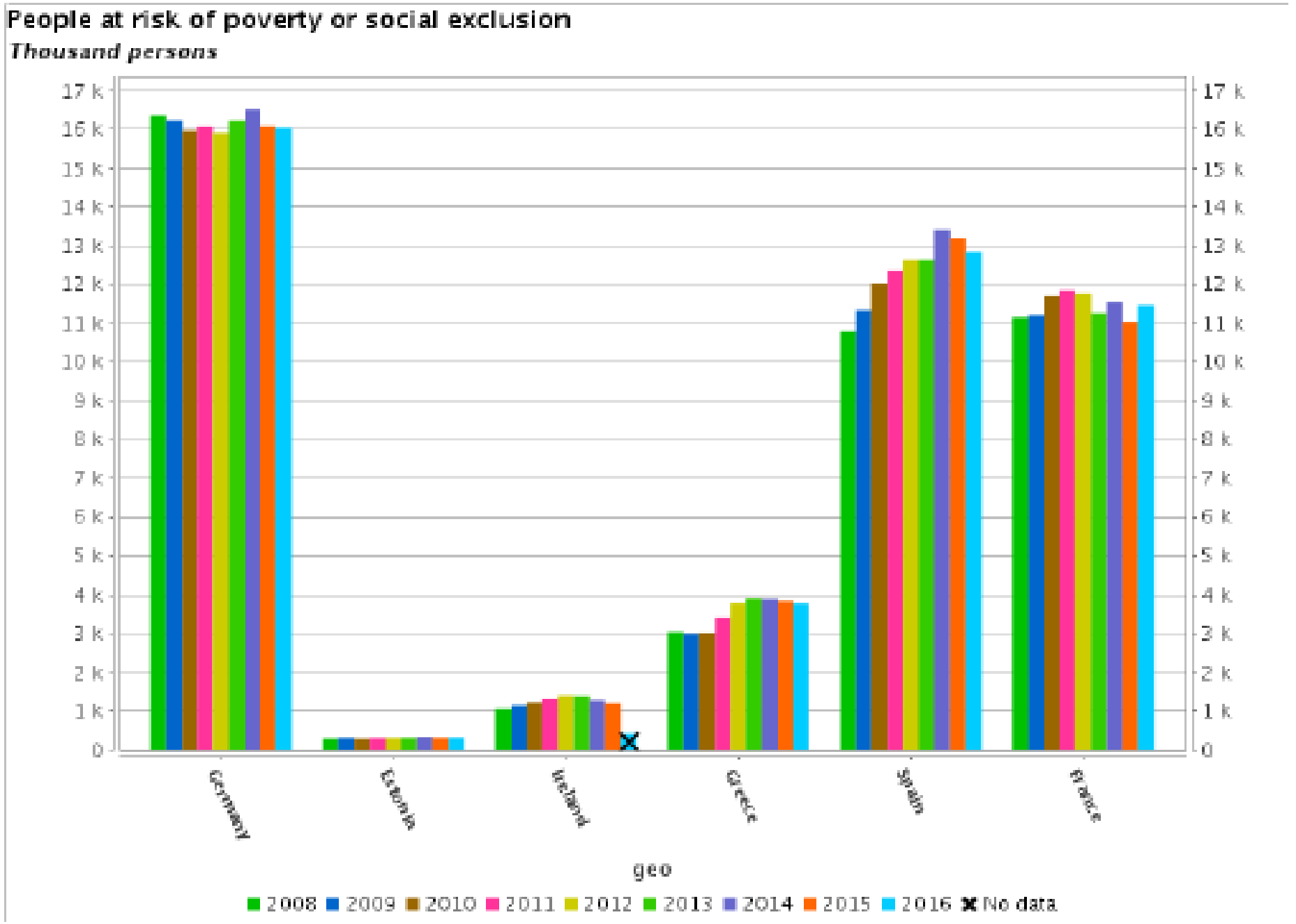
PEOPLE AT RISK OF POVERTY AND SOCIAL EXCLUSION



SOURCE: EUROSTAT



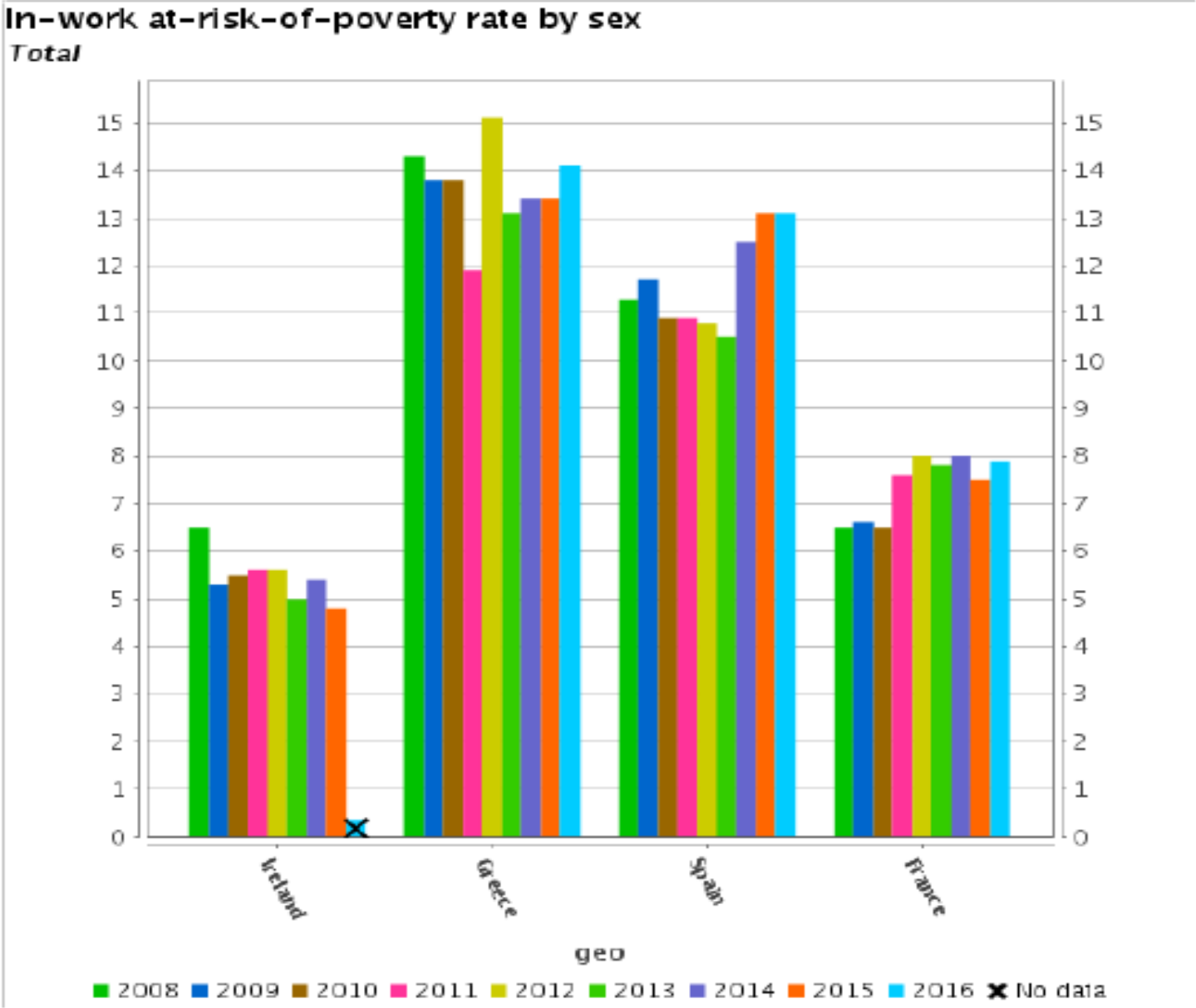
The Europe 2020 strategy promotes social inclusion, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and social exclusion. **This indicator corresponds to the sum of persons who are: at risk of poverty or severely materially deprived or living in households with very low work intensity.** Persons are only counted once even if they are present in several sub-indicators. **At risk-of-poverty are persons with an equivalised disposable income below the risk-of-poverty threshold, which is set at 60 % of the national median equivalised disposable income** (after social transfers). Material deprivation covers indicators relating to economic strain and durables. **Severely materially deprived persons have living conditions severely constrained by a lack of resources, they experience at least four out of nine of the following deprivations items: cannot afford i)** to pay rent or utility bills, **ii)** keep home adequately warm, **iii)** face unexpected expenses, **iv)** eat meat, fish or a protein equivalent every two days, **v)** a week's holiday away from home, **vi)** a car, **vii)** a washing machine, **viii)** a colour TV, or **ix)** a telephone. People living in households with very low work intensity are those aged 0-59 living in households where the adults (aged 18-59) worked less than 20% of their total work potential during the past year.


People at risk of poverty or social exclusion
Thousand persons
17 k
16 k
15 k
14 k
13 k
12 k
11 k
10 k
9 k
8 k
7 k
6 k
5 k
4 k
3 k
2 k
1 k
0
Germany
Estonia
Ireland
Greece
Spain
Poland
geo
2008 2009 2010 2011 2012 2013 2014 2015 2016 No data

IN-WORK POVERTY AND INCOME DISTRIBUTION

In-work at risk of poverty

http://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tesov110&language=en&toolbox=data



SOURCE: EUROSTAT

The share of people at work and having an equivalised disposable income below the risk-of-poverty threshold, which is set at 60% of the national median equivalised disposable income (after social transfers).

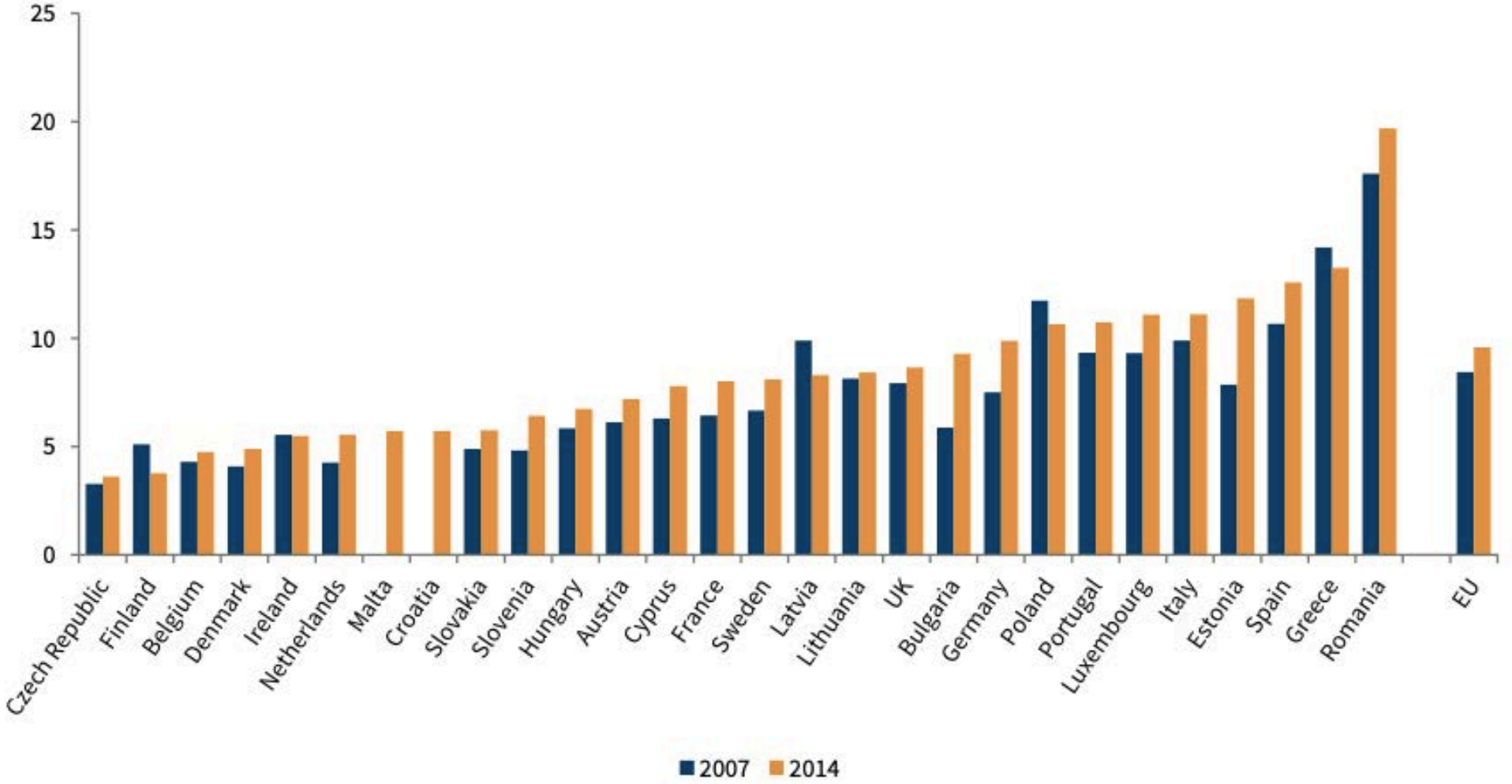
a) In work poverty

b) Decent job creation

c) Unemployment benefit / wages

https://www.eurofound.europa.eu/publications/report/2017/in-work-poverty-in-the-eu

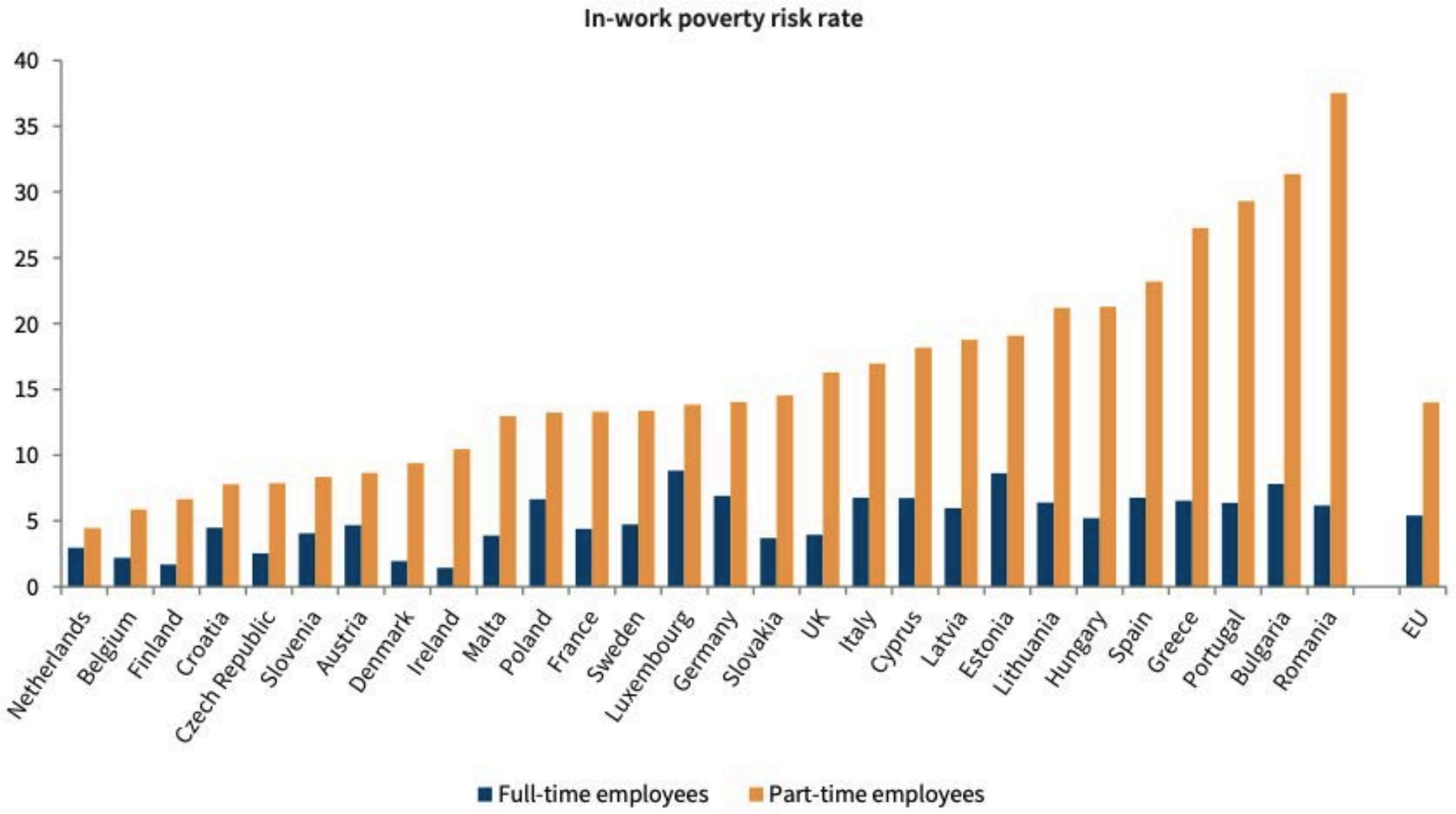
Figure 5: Proportion of workers at risk of in-work poverty (%), by EU Member State, 2007 and 2014



Note: *Croatia and Malta were not included in the survey in 2007. EU values exclude these countries.*
Source: *EU-SILC 2007 and 2014 microdata, weighted by PB040 or PB060, all working-age people*

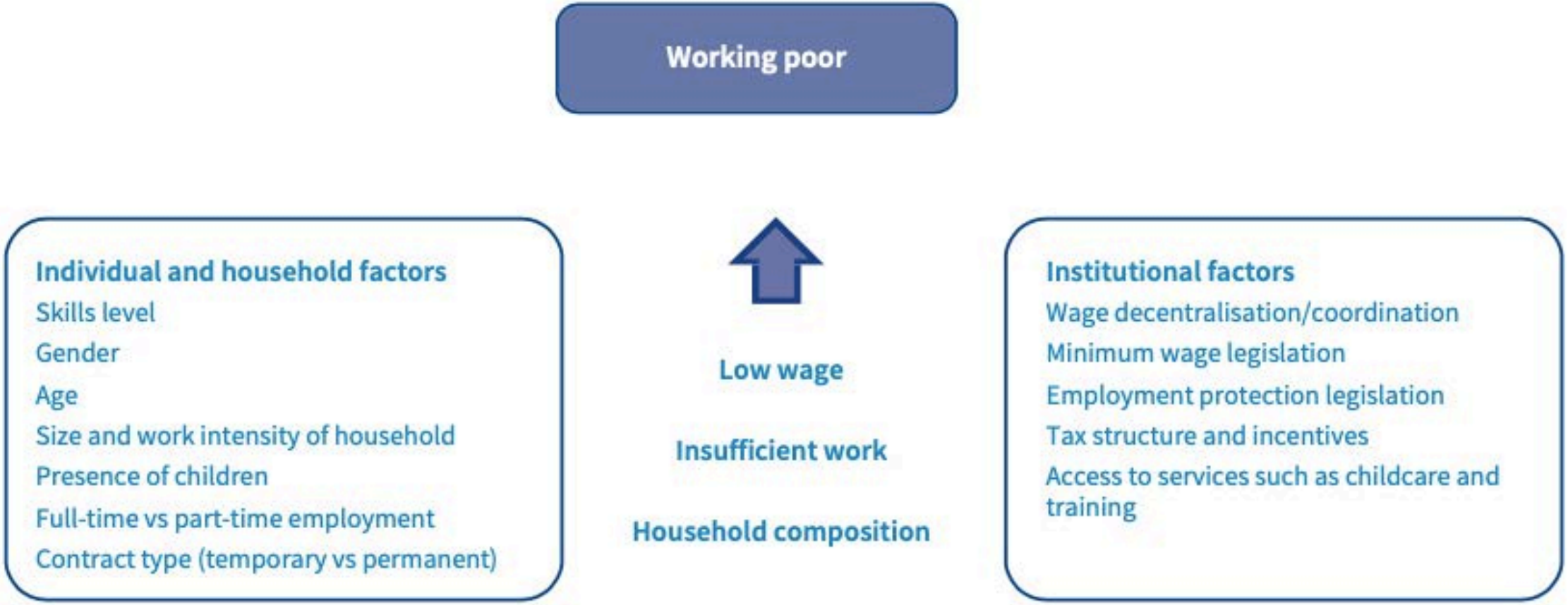
Eurofound (2017), *In-work poverty in the EU*, Publications Office of the European Union, Luxembourg

Figure 8: In-work poverty risk and material deprivation rates (%), by full-time and part-time status, EU Member States, 2014



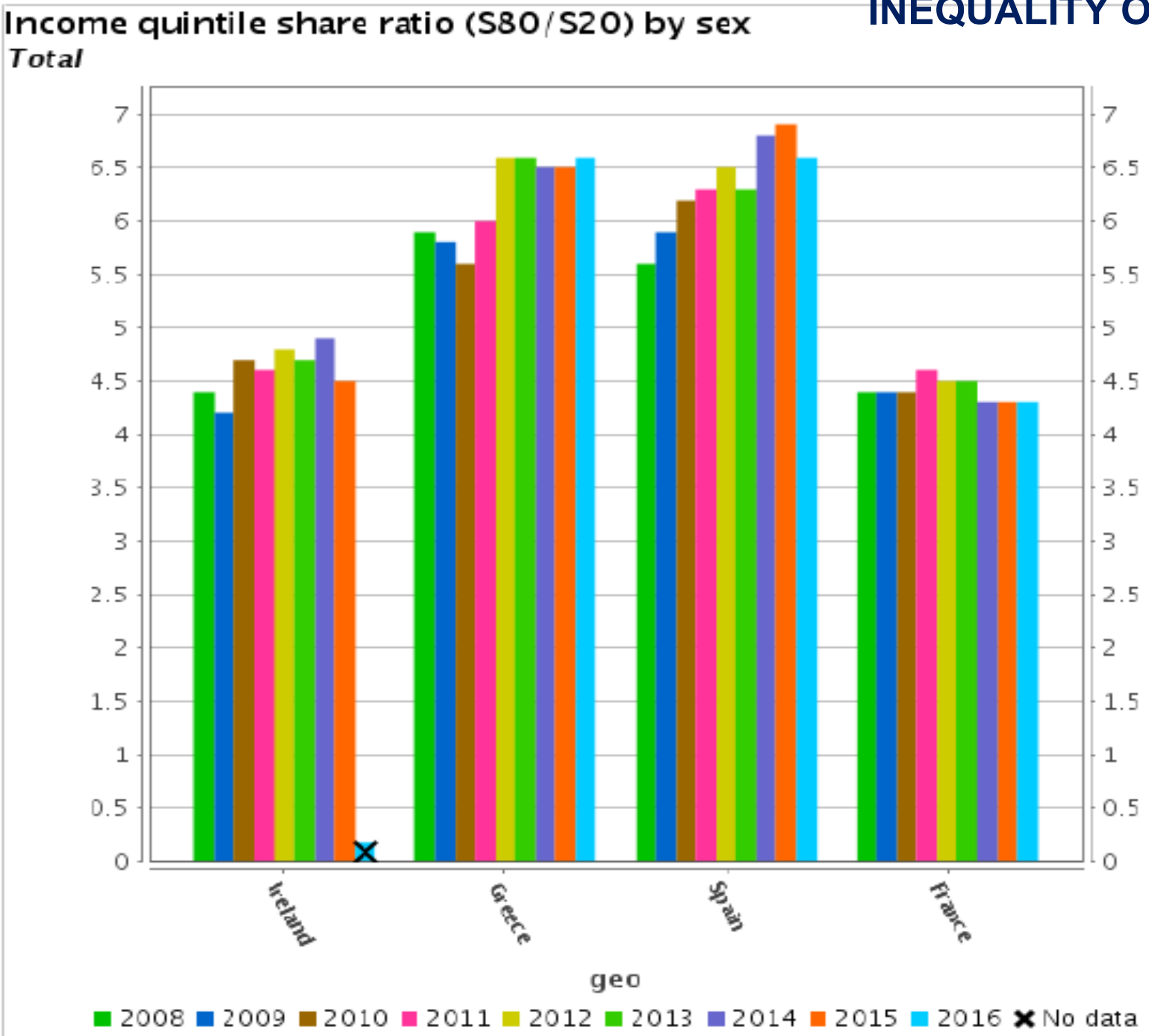
Eurofound (2017), *In-work poverty in the EU*, Publications Office of the European Union, Luxembourg

Figure 1: Factors influencing in-work poverty



Eurofound (2017), *In-work poverty in the EU*, Publications Office of the European Union, Luxembourg

INEQUALITY OF INCOME DISTRIBUTION



The ratio of total income received by the 20% of the population with the highest income (top quintile) to that received by the 20% of the population with the lowest income (lowest quintile). Income must be understood as equivalised disposable income.

Complementary instruction (Employment and Labour Law)

Fernando Fita Ortega

Several key points must be taken into account when introducing this subject:

Firstly, a 10 hours course about the legal regulation of the labour market and industrial relations will only provide us the opportunity to take a general approach to the subject.

On the other hand, considering that students have no legal background (at least not necessarily), the contents of the course need to be adapted to their standards and skills regarding legal terminology.

Finally, the heterogeneity of the group (students coming from different countries) renders the task even more complicated, but more interesting too.

Despite these – let's say – inconveniences, the course will give the students the opportunity to discover the *leit motiv* of employment and labour legislation and the impact that the economic, productive and technological context has in it. We also will focus on questions related to the gender-gap in industrial relations and the concept of discrimination.

In order to achieve this goal, the introduction to the legal framework of employment relations will be conducted from a broad point of view (that is to say, considering international and European Union rules and referring to Spanish legislation only as a particular example) underlining the consequences that the social and economic context has on employment law. This approach will give students a more valuable knowledge of the topics of the course, which can be enriched by student contributions as they will be asked to present the situation of employment legislation – and how it deals with new challenges – in their respective countries.

Activities for Erasmus Mundus

For our first session:

Before the first session, read the document *Reform of employment legislation in Spain* (one page).

Search for a brief description of the reforms of employment law in your own countries in the last 25 to 30 years.

For our second session

Read the document *Digital work in Spain.*

Read the Judgement of the European Court of Justice in case C-104/09 and answer the following questions:

- Do you think this regulation could be discriminatory to men?
- Do you think this regulation could be discriminatory to women?
- Do you think this is a measure of affirmative action as is claimed by Spanish Government? (affirmative action is defined in art. 3 of the Directive 2006/54/EC)

The judgement refers to a prior version of art. 37.4 of the Spanish Statute of Employment. According to that version, a leave to breastfeed was granted to working mothers whose children were under 9 months old:

> *Female workers shall be entitled, for the purpose of feeding a child under nine months of age, to take an hour off from work, which they may divide into two parts. In the event of a multiple birth, the duration of the leave shall increase proportionately.*
>
> *The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose or accumulate it into whole days on the terms laid down in the collective agreement or in the agreement which she reaches with the employer in accordance, as appropriate, with the terms agreed in the collective agreement.*
>
> *This leave may be taken by the mother or the father without distinction provided that they are both employed.*

Only women working under a contract of employment hold this right, so if a mother is not classed an "employee" as per the Statute of Employment, this right does not arise, and the father – even when employed – will not be entitled to this right.

The Spanish Government claims, in this judgement, that the objective pursued in reserving the entitlement to the leave for mothers is to compensate for the genuine disadvantages suffered by women, in comparison to men, in keeping their jobs following the birth of a child. According to the Spanish Government, it is more difficult for mothers of young children to enter the world of work or to remain in it.

Instructions in order to read the judgement

What you are going to read is a preliminary ruling that a national court (in this case a Spanish court) presented to the European Court. In this preliminary ruling, the national court asks (literally) the European Court whether a national rule is or nor compatible with European Union law.

Thus, this is a way of harmonising the interpretation of EU law.

The European Court does not decide the case that made the national court present a preliminary ruling, but provides a criterion to follow in order to do so.

The judgement begins by analysing the legislation (both European and national).

Afterwards, the judgement refers to the questions raised by the national court.

Then it sets out arguments to answer the various questions and, finally, gives the answers (they normally appear in bold letters).

For our final session

Considering we have been studying adaptation of employment legislation to the changing context, try to highlight the main aspects in which employment law in your own country is doing so. If you cannot find any information on this, or you find problems in dealing with it, please get in touch with me. I know this could be really hard work, and I do not want you to go crazy over it, so only try to find the main aspects. In cases of countries outside the European Union, try to point out the basic regulation of: working time, wages, mobility (functional and geographical), an overview of the different types of contracts of employment (the main ones) and causes, cost and procedure of dismissal. A general overview, I insist!!

If you prefer, you can participate in the proposed debates (in the slides):

- A minimum wage for Europe? (pros and cons)
- A weekly working day of four days? (pros and cons)

Please upload your presentations into the folder I will create in the Online Classroom (Aula Virtual) before our final lecture, as I want you to orally present your work during this lecture.

A brief introduction to the reforms in the Spanish *Estatuto de los Trabajadores*

Fernando Fita Ortega, tenured professor of employment law, Universitat de València.

Following the end of Franco's dictatorship, the Spanish *Estatuto de los Trabajadores* or *Estatut dels Treballadors* (Statute of Employment) was issued on 10 March 1980. This was an employment law inspired by the 1970 Italian *Statuto dei Lavoratori* (Statute of Employment). Thus, the Spanish law was born outdated, as the context in which both laws appeared had changed dramatically after the oil crisis of the mid-seventies of the last century. The huge rate of unemployment, a consequence of the economic crisis, lead to the main modifications to employment law after the *Estatuto de los Trabajadores* was issued. Hence, the first important reform, in 1984, aimed at reducing the unemployment rate, involved external *flexicurity* (recruitment). New contracts appeared, characterised by their lack of stability, and those less favourable to employees that already existed were modified in order to make them easier to use. A segmentation of the labour market was created, in which employees hired under the rules applicable to the new contracts co-existed alongside those who were hired before the reform with more stable contracts of employment, and whose working conditions were not affected by the reform. Worse than segmentation was the culture of instability sown among employers, making it really complicated to fight against the new problem born from that decision: the instability of a significant part of the workforce, forced to rotate in the labour market under different temporary contracts of employment.

The second major reform was introduced in 1993–1994. Unemployment was still high (the rate reached 22.7% in 1993) and the segmentation of the workforce was by then perceived as an important concern. However, a new anxiety moved those reforms. This was the impact of globalisation and the need for companies to compete. Therefore, the reform passed into law focused on adaptability and protecting companies' performance in order to guarantee the survival of the company in the future. The measures adopted deepened flexibility, involving both external (recruitment and dismissal) and internal flexibility. Despite seeing segmentation of the labour market as a problem, nothing effective was enacted in order to avoid the huge number of temporary contracts of employment until 1997–1998 (from 31.36% of temporary contracts in 1993, the rate reached 37.23% in 1997 and 35.69% in 2001). External flexibility was implemented facilitating dismissals, both individual (reducing their economic cost) and collective (increasing the number of legal reasons for dismissal). Internal flexibility was achieved with what can be described as "less law and more collective agreement". Several working conditions regarding salary (seniority, cost of over-time) or working hours, previously regulated in the law, were given over to collective agreements. Professional classification and modification of working conditions were also adapted to the demands of flexibility.

Reforms implemented during the first decade of the new century were adopted in name of the eternal problems of the Spanish labour market (excess of temporary contracts and a huge percentage of unemployment) and deepening flexibility following the European *flexisecurity* approach (later on named *flexicurity*). However, a widely spread opinion holds that, under such arguments, those reforms were, in fact, intended to lower standards of protection for employees, increasing the contractual power of the employer. From 2010 onwards, reforms were made to face the huge economic recession

that started in 2008. New modalities of temporary contracts of employment were introduced, considering that better any job – even a precarious one – than none; dismissals were facilitated as they became less expensive, formalities for collective redundancies were reduced, and the requirements to legally dismiss on economic grounds were lightened; collective bargaining at the company level was given priority, and more flexibility was introduced in the rules applying to functions, working hours and modification of working conditions by the employer.

Finally, it is important to note that several reforms were introduced since the second half of the 80s in order to: 1) adapt Spanish legislation to the requirements of EU regulations and the decisions of the Court of Justice of the European Union; 2) introduce protection for work–life balance and against discrimination based on gender.

App-based employment relations in Spain

Fernando Fita Ortega, tenured professor of employment law and social security, Universitat de València

1. Importance of the phenomenon

There are no official statistics regarding the gig economy in Spain. However at least three different documents can be consulted in relation to this phenomenon and its impact in Spain: a) *Digital Labour Platforms in Europe: Numbers, Profiles, and Employment Status of Platform Workers.*[1] This research analyses different European Union countries, including Spain; b) *Huella Digital: La plataformización del trabajo en Europa;*[2] c) *The digital labour market under debate*: *Platforms, Workers, Rights and WorkerTech.*[3] All three underline the high participation of workers in the gig economy in Spain. According *Digital Labour Platforms in Europe*, the UK has the largest proportion of platform workers for whom it is their main job (3.6%), followed by the Netherlands (2.8%) and Spain (2.7%). Nevertheless, adjusted estimates (adjusted for high frequency of internet use) shows that Spain leads the range (from 6.9 in Finland to 12.5 in Spain). There is a fourth report, but only referring to Catalonia: *La dimensió de l'economia de plataforma a Catalunya,*[4] interesting as it also confirms the other reports' data and adds some relevant information.

Some remarkable figures can be found in the research project *Huella Digital*. The first is related to gender, showing that women are less involved in platform work (22.4% compared with 32.5% men in the global population of working age) but platform work as a sole source of income is more likely among women (11.5%) than men (8.1%). The second is related to the age of platform workers. Platform workers can be found in any age group (the report only takes into account people from 16 to 65 years old), but the percentage is higher among young people: 21,5% between 16 and 24 years; 25.7% between 25 and 34; 22.7% between 35 and 44; 17.7% between 45 and 54 and 12.5% between 55 and 65.

Finally, of interest is the data this report offers related to the activities carried out throughout platform apps, showing that platform workers generally do more than one activity through apps, and the wide range of activities performed by platform workers who provide services at least once a week:

- 40.4% office work (short tasks, click-work)
- 35.4% more qualified tasks (design, publishing, software development, translation)
- 33.9% routine tasks in an office on somebody's else premises
- 31.4% Some occasional jobs in private homes (plumbing, electrical, etc.)
- 30.5% regular task in private homes (cleaning, gardening, etc.)
- 34% professional services, be it accountancy or legal)
- 28.6% transport of persons (Uber, Cabify, etc.)

[1] https://op.europa.eu/en/publication-detail/-/publication/14e150fe-adbf-11e9-9d01-01aa75ed71a1/language-en/format-PDF/source-101693069
[2] https://www.fundacionfelipegonzalez.org/pdf/huella-digital-la-plataformizacion-del-trabajo-en-europa/
[3] https://cotec.es/media/COTEC_PIA_Ouishare_WorkerTech_EN_ExecutiveSummary.pdf
[4] https://www.ccoo.cat/pdf_documents/2018/informe_economia_plataforma_catalunya.pdf

• 27.8% personal services (hairdressing, physiotherapy, etc.)

• 28.2% delivering food by car or van

• 27.5% delivering food by bicycle

• 26.6% delivering other products by car

• 26.8% delivering goods by bicycle, motorcycle, scooter

In relation to their status, the report shows that 48,3% of platform workers said they did it on a full-time basis; 10.7% worked part-time; 6.4% were self-employed; 4.2% were full-time parents; 3.7% were retired and 10.6% were students. The rest of the platform workers interviewed, up to 100%, were classified as unemployed; suffering from long-term illnesses or handicapped. The report titled *La dimensió de l'economia de plataforma a Catalunya* shows that 55% of platform workers have a university degree; platform work as a source of income is more frequent among foreigners and platform work in mainly carried out from the worker's house.

2. Classification of the activity carried out by platform workers

2.1. Different legal status for platform workers in Spain. The question of what class this activity falls under is essential in order to determine the rights of those who work under these conditions. In the Spanish legal system, there are three different options: a) to consider them self-employed; b) to consider them *economically dependent self-employed* (under the acronym *TRADE*); and finally, c) to recognise their condition as employees. In all three cases, Spanish regulations provide some rights for these workers, broader in the last scenario, narrower in the first.

However, before laying out the different rights pertaining to each situation, it is important to remark that two more, intermediate, *categories* exist: special employment[5] and self-employed – not necessarily TRADE – with some typical *labour* rights.[6]

a) Rights recognised for self-employed regarding their working conditions. Self-employed are considered all those who are not subjected to the managerial decisions of anybody else, so that they organise autonomously their work, and support the risks of their activity. *Ley 20/2007 del Estatuto del Trabajo Autónomo* (Spanish Statute of Self-Employment, LETA) grants a host of rights to them, some of those in direct consonance with the Spanish Constitution (CE), and others recognised by infra-constitutional law, such as: the right to work and the free choice of profession and trade (art. 35 CE and

[5] As is the case of sales representatives. Their legal status can be included either in the common employment relations, in a special employment relations or, finally, considered self-employment. The differential factor is the degree of submission to the *employer's* organisational power (*dependency*). When the activity is carried out on the employer's premises, so that there is the possibility of wielding maximum control over the employees' activity, the relation would be considered as employment with full application of the Statute of Employment. When the activity is carried out on the employer's premises but the worker is in charge of organising it (what areas to cover, working hours or schedule, etc.), then the activity is considered to be employment but with special regulations adapted to the peculiarity of the conditions in which activity is performed. When the activity is fully organised by the person doing it, there is no employment (art. 2.f Spanish Statute of Employment and art. 1 Royal Decree 1438/1985, of 1 August) but rather a civil contract (called a *sales agent contract*).

[6] Is the case of sales agents, Law 12/1992, on Sales Agents, regulates some contractual rights for sales agents which are typical in employment law (regular payment of salary; duration of contract; expiry of contract of employment, right to information on commissions, etc.) and goes into much more detail and length than does Spanish civil law.

4.2.a LETA); freedom of economic initiative and freedom to compete (art. 4.2.b LETA and included in the freedom of enterprise settled in art. 38 CE); right to copyright and industrial property regarding their work or services (art. 4.2.c LETA); protection of fundamental rights and non-discrimination (art. 14 CE, art. 4.3 and art. 5 of LETA); protection of privacy and dignity. Also, the right to an adequate protection against sexual harassment or harassment on grounds of sex or any other circumstance or personal or social condition (art. 4.4 LETA, 10 CE and 18 CE); right to instruction and professional recycling (art. 4.2.d. LETA and 40.2 CE); right to physical integrity and health protection (art. 4..2.e LETA, 15 CE and 43 CE); right to punctual payment of the agreed salary (art. 4.2.f); right to work–life balance, including the right to leaves of absence in cases of birth, shared care of a new-born, risk during pregnancy, risk during breastfeeding, adoption and similar situations regulated by Spanish civil law (art. 4.2.g LETA); right to assistance and minimum social benefits in cases of need (included unemployment since Law 32/2010, of 5 August, art. 4.2.h LETA); right to go to court and to use alternative dispute resolution mechanisms (art. 4.2.i and j LETA and art. 24 CE).

Most of the above mentioned rights do not have a specific regulation, so they are only listed in the law. However, the law regulates some of them (such as discrimination) and set some specific rights for self-employed workers. That happens in questions as form and durability of the contracts (art. 7 LETA); health and safety regulations (art. 8 LETA and Law 31/1995, of 8 November*, on Health and Safety);* protection of minors (art. 9 LETA) or guarantee of economic rights (art. 10 LETA). It is interesting to underline the last right, as it recognises the right to sue the main company in cases the self-employed works for a contractor in cases of outsourcing.

In relation to collective rights, self-employed workers who employ subordinate employees have the right to association (but not to create trade unions) as employers in order to defend their professional interests. Self-employed workers who do not hire subordinate employees can join trade unions and create specific associations for self-employed workers (art. 19 LETA; art. 1 Organic Law 11/1985, of 8 August, on Union Freedom,; Law 19/1977, of 1 April, on the Freedom of Association, and Organic Law 1/2002, of 22 March, on the Right of Association).

b) TRADE employment rights. Legislation (art. 11 LETA) classes as TRADE those self-employed who pursue an economic or professional activity in exchange for money, habitually, personally, directly and predominantly for one individual or legal entity, known as the client, on which they depend economically because they receive from that client at least 75% of their income obtained from the work performed and from economic or professional activities. In any case, some conditions must be fulfilled to be classed as TRADE: not taking on employees nor contracting third parties for the whole or part of their activity; not performing their activity in the same way as those who do any kind of activity for the client under a contract of employment; having a productive infrastructure with which to perform their activity; carrying out their activity using their own organisational criterion; earning a salary while assuming the risk of the activity. The legislature opted to add these requirements in order to distinguish TRADE from the self-employed and employees.

The law grants more rights to TRADE in comparison to those self-employed who cannot be considered TRADE. Firstly, it gives them some collective rights, such as

the right to specific collective bargaining[7] (professional interest agreements, in which the regulation of weekly rest, maximum working time and its distribution can be regulated) or exercise collective activity in defence of their professional interests (arts. 13 and 19 LETA). Moreover, the law establishes several individual rights for them: eighteen days of annual holidays; over-time only on a voluntary basis, right to reorganisation of the working schedule when the TRADE is a woman who is a victim of gender violence, etc. (arts. 14, 15 and 16 LETA)

c) Employees. The condition of *employee* is attributed to those who perform their activity under the sphere of control of the employer (*dependency*) and assume the risk of the activity (*subsidiarity*). In order to establish the presence of both elements, Spanish courts use a tell-tale sign system (similar to the one used in other countries) where *dependency* can be assumed given different factors such as the regulation of working time (working days and hours not decided by the employee); the company's power to control the activity and the consequent existence of disciplinary measures taken by the employer; the obligation to use clothes or items with the logo of the company; the organisation of work lying in the company's hands… to summarise, all these signs show that the employee works under the company's control and the organisation of the activity is decided by the employer. On the other hand, *subsidiarity* is analysed from different perspectives: property of the means of production; property of the result of work (*fructus separati*); risk of the activity performed (guaranteed salary); relation with the market in which the employee works (employees do no work directly in that market, as a third person stands between them).

2.2. The system of signs and its suitability for platform work. The system of tell-tale signs is not outdated and is still key – even in platform work –to ascertaining if a specific relationship falls under the rules of employment law. Thus, new technology has not cast doubt upon the signs used to classify employment as they are flexible and able to adapt to a new productive reality, as has been demonstrated throughout the decades they are in use.

Nevertheless, because of the specific characteristics of platform work, the legal nature of such activity has been debated. This is so, in the first place, because this is one of those *grey zones*, that is to say, areas in which we can find contradictory signs depending on what we focus on. Secondly, owners of platforms made some attempts to steer clear of any contract of employment when the first demands for recognition of the condition of employees appeared. Thus, they not only forbade the use of certain terms – such as salary, uniform, work schedule, etc. – that might point to a subordinate relationship, but have also introduced changes in the organisation of work, complicating the legal classification of the relationship even more. Whereas in the first case, it is possible to detect an attempt to avoid a true contract of employment (bogus self-employment in an attempt to circumvent the law), in the second, the strategy of platform companies is to move the conditions in which the activity is carried out as far away as possible from that of employment.

In both cases, platform companies are trying to avoid offering signs pointing to subordination. However, their serious attempts – leaving aside those focused on formally concealing the reality – to achieve that goal are not successful. The apparent

[7] The agreements reached do not have, in any case, *erga omnes* effect. They only have effect on those who are represented by the negotiators and only to those TRADE who expressly accept them.

freedom of workers to choose their working hours, or to refuse to undertake jobs, usually claimed by platform companies as reasons to deny the existence of an employment contract, is not a consequence of workers' independence but of the organisational possibilities that such a productive system allows the employer, as crowdsourcing is based on a large workforce, so that it is easy to substitute a particular worker and it can be done immediately thanks to the technology that platforms use.

However, it is possible to conclude that, whether the legal status of platform workers is TRADE or employee, they need protection, as they suffer all the inconveniences of being the weaker party in the contractual relationship. Therefore, the emerging problem is to determine what legislation gives better protection to such workers. TODOLÍ SIGNES holds the opinion that none of the existing legal statuses suit platform workers. TRADE legislation does not, simply due to the definition of TRADE, which is not an intermediate category between employee and self-employed, but a specific form of self-employed work, and the terms of the conflict centre on platforms as mere intermediaries between those who do the service and those who use it, or subordinated employees who obey their entrepreneur's instructions. The typical employment relationship does not either, because many of the implications of treating them as employees do not fit the characteristics of this work (greater flexibility of working hours compared with employees; rotation of the workforce, etc.) Hence, he proposes creating a new special employment status specific to platform workers.[8] Other Spanish colleagues also support the idea of a new special employment relationship, taking in those who are outside a subordinate relationship but cannot be considered self-employees as the requisite of *regularity* is absent from their activity.[9]

Some other opinions are in favour of granting all platform workers a different and new statute, whatever the legal classification of their contractual relationship with the platform might be, that is to say, creating a kind of professional statute. Equally, digital platforms demand a new category within that of TRADE (*digital TRADE*), aiming to definitively settle all platform workers under TRADE regulations but offering to extend some social benefits, following the French example of *Loi n° 2016-1920 du 29 décembre 2016 relative à la régulation, à la responsabilisation et à la simplification dans le secteur du transport public particulier de personnes*.[10] Such a proposal seems to face the same constitutional problems and limits as the exclusion from the sphere of application of employment law of some transport activities had in 1999 (Constitutional Court Sentence 47/1999, of 22 March).

There are opinions sharing the ambition to achieve a uniformed regime for platform work but, contrary to the previous ones, moving platform workers closer to employment status. These options recreate the debates held in the 1980s on employment law trying to explain its use and whom it serves, in an attempt to extend the protection of employment law by underlining the character of *weaker party* in the relationship. One argument used is that Directive (EU) 2019/1152, of 20 June 2019, on Transparent and Predictable Working Conditions in the European Union, refers in its first paragraph, to the fact that the definition of worker has to take into consideration the legal precedent of the Court of Justice. In this sense, the High Court of Asturias, in its

[8] A. TODOLÍ SIGNES, "El trabajador en la «Uber economy»: ni dependiente ni autónomo, sino todo lo contrario", *Trabajo y Derecho* no. 25/2016, pp. 43-60.
[9] S. GONZÁLEZ ORTEGA, "Trabajo asalariado y trabajo autónomo en las actividades profesionales a través de plataformas informáticas" *Temas Laborales*, nº 138/2017, p. 123.
[10] This is the case of *Asociación Española de la Economía Digital* (Adigital) in their *Propuesta normativa en materia de trabajo en plataformas digitales.*

sentence of 25 July 2019 (no. 1818/2019), supported this idea concerning freedom of movement for workers (Case C-66/85, *Lawrie Blum*).

Regarding this question it is important to note that recently (14 February 2020) the Spanish Employment Minister declared that riders for digital platforms are not self-employed workers, and has announced up-coming regulation, but without detailing what this new regulation will be like.

2.3. Criteria of Spanish employment tribunals regarding the employment status of platform workers. Even though Spanish employment tribunals are split over the nature of the relationship of platform workers, the majority of decisions have been, up to now, in favour of recognising employment between the owner of the platform and the worker.[11] That is so even in appeal case judgements where using those criteria, two such sentences have decided the activity riders perform for platform companies can be classed as employment,[12] and an – up to now – third and final one considers it to be a true TRADE relationship.[13] All of them involve the Glovo company and correspond to individual claims against dismissals.[14]

It is remarkable that in most of the cases demanding recognition of employment that have reached the courts, the employer began the relationship with no contract at all, or only a contract for services with a self-employed person, and later recognised it as a TRADE contract. That illustrates the key elements present in platform work: shadow economy and bogus self-employment, perhaps co-existing with real self-employment. It also highlights the problem in establishing various guidelines to regulate human work, that is to say, the multiplier effect that differing boundaries have on the difficulties deciding how to classify a given activity.

What are the criteria judges are using in order to decide whether there is a true TRADE relationship or it simply conceals a contract of employment? The traditional ones, given the continuity in courts' interpretation of the law when analysing new forms of work:

a) Irrelevancy of *nomen iuris* (or the principle of reality). The nature of the contract depends on the material aspects in which rights and duties are performed independent of whether the parties have declared otherwise. This criterion prevents the parties engaged in the contract from deciding what legislation is applicable, and so gives precedence to the material aspects of the relationship over the formal ones. In other words, the parties' own declared wish or intention is not a factor in determining the nature of the contract and thus in determining whose is the statutory duty.

The irrelevancy of *nomen iuris* does not only apply to the name the parties give their relations, but also to other of its formal aspects, such as the social security or taxation regime that the parties apply. These regimes are not for them to choose, but rather a consequence of the formal status they give their relations; an incorrect regime

[11] Existing judgments related to offline platform activities only affect riders for the Glovo and Deliveroo platforms.
[12] Judgement of the High Court of Asturias no. 1818/2019, of 25 July, and Judgement of the High Court of Madrid no. 1155/2019, of 27 November.
[13] Judgement no.. 715/2019 of the High Court of Madrid, of 19 September.
[14] There are several other judgements arising from the activity of employment inspectors, and therefore they do not affect individual claims but rather the whole plaintiff of platform companies.

might lead to responsibility in those areas, but does not predetermine the nature of their relations.

Surprisingly, High Court of Madrid Sentence no. 715/2019, of 19 September 2019, confirming the first instance judgement no. 284/2018 by Employment Tribunal no. 39 of Madrid (and so recognising true TRADE relations), does not seem to take this criterion into account, despite the fact the judgement refers to it.[15] Considering that the analysis of this judgment is more complex, we must also admit that the appeal case judgement focusses, among other aspects, on the fact that in this case, the rider asked the company (Glovo) to sign a TRADE contract and considers that it was not proved that the activity did not respect the terms of the contract of employment. This fact is criticised in the dissenting opinion of Judge Enrique Juanes Fraga, who reminds us that employment rights cannot be relinquished, according to art. 3.5 of the *Estatuto de los Trabajadores* (ET).

b) *Intuitu personae* (personal performance) aspect of the contract. Considering *intuitu personae* contracts as those *in which "the personality of one party is regarded as essential in terms of its particular aptitudes", in which are included competencies that is, those qualities the party holds that make it recommendable as a contractual partner,*[16] among the qualification criteria, courts assess whether it is possible to substitute the worker: by whom and how is this decided.

However, the criterion of substitution includes many nuances, as it must be significant, not only under very occasional circumstances,[17] and has to be a real possibility and not a mere option or desideratum in the contract, otherwise difficult to implement without detriment to the employee.[18] In those cases when it is not very relevant when applying the contract, such a clause can be considered as an element inserted into an essentially employment-based relationship in order to camouflage it (Employment Tribunal Sentence no. 263, of 26 February 1986 or 22 December 1992, appeal no. 2654/1991).

c) System of tell-tale signs. Using evidence to identify subordination is, as said above, still valid. It allows us to take on new ways of performing activity and classify them. Courts distinguish between signs of subordination (*dependency*) and signs showing the person does not run their own business nor assumes the risk so derived (*subsidiarity*).

c.1. Signs of *dependency.* The main aspect leading to the recognition of true TRADE relations is the workers' freedom to decide their own working hours, or to refuse to undertake jobs. Nevertheless, as High Court of Asturias Sentence no.. 1818/2019, of 25 July[19] states, it must be remembered that such freedom of choice is exercised within the regime the platform applies, which can lead to penalisation for those riders who opt to leave orders unattended when they choose. This is considered a kind of soft control carried out by means of a program which allows for permanent control over employees, as those occupying the top positions in the ranking can choose the best periods of

[15] The High Court of Madrid Sentence no. 715/2019 reaches its conclusion taking into account the conditions the contract established, disregarding how the activity was performed, as the rider could not prove the two differed. Sometimes the reality that the judgement reflects does not seem to be the same as real life.

[16] D. DEACONU-DASC LU, "The scope of the assignment of contract" *Public Administration & Regional Studies* 7th Year, no. 2 /2014 Galati University Press, p. 99.

[17] Judgement no. 193/2019 of Employment Tribunal no. 31 of Barcelona, of 11 June 2019.

[18] This is the same criterion followed in the judgement of the Central London Employment Tribunal of November 2016 in reference to Ms. M. Dewhurst (Case no: 2202512/2016).

[19] In the same sense, Madrid High Court Sentence no. 1155/2019, of 27 November.

activity and those refusing to undertake a job take the risk of not being offered a job again.

In such a context, freedom to decide whether to undertake a job, or when to be available, does not offer any power to the rider with which to influence how the activity is performed. In the end, it is the platform companies who decide the days, zones and working hours of the riders, and the availability of riders is essential for the service they provide. That situation means that platform companies can easily find a person to undertake a job; thus, riders lose all bargaining power and so need the protection of employment law.

Other signs of *dependency* are:

- Employees work exclusively for one company. Therefore, not working exclusively for one company is a sign of independent work. This tell-tale sign was used – among others – in Judgement no. 284/2018 of Employment Tribunal no. 39 of Madrid in order to class the relationship as TRADE work. This judgement uses the criterion of exclusivity despite the fact, noted by the court, that the worker's freedom to contract the performance of any kind of activity with third parties was limited by the need to keep the percentage of their income from the company above a certain level to continue being considered TRADE (which requires at least 75% to do so). Nevertheless, as Judgement no. 193/2019 of Employment Tribunal no. 31 of Barcelona, of 11 June 2019 affirms: *Jurisprudence has already admitted the presence of an employment contract in cases of multiple employment; of involvement in business organisation and the absence of an independent organisation of such activity by the worker; and of presence in the workplace before Supreme Court doctrine has advanced to adapt itself to the reality of the social and economic context*.

- Platform companies exercise a certain control over the quality of the activity and the performance of riders, which can, in some circumstances, result in their exclusion. This control is implemented by means of evaluations by clients of their services, so that, in order to guarantee a high standard of services, the companies rely on them instead of giving instructions and directly controlling the activity.

- Platform companies require riders to undergo two interviews before entering the rider profession. In these interviews, the companies give some instructions about how the service should be conducted.

- Riders' activity is only a question of getting the job order through the app and following the instructions the company provides. The platform company demands a certain attitude be shown toward both the restaurant and the customer, and they also provide health and safety instructions for handling the food they deliver.

- The app is able to keep both customers and the platform company informed about the rider's location using the geolocation. GPS is more than a tool to control distances, as companies also use it to decide which rider to call in line with the smooth running of the business. It also allows them to monitor the route that riders follow and where are they during their working hours.

- In relation to uniform, despite the fact that the companies do not allow the rider to wear hats or t-shirts with the name of the platform company, they use the boxes provided by the company with their logo, which constitute the visible face of the company for the general public.

- Platform companies keep the right to discipline riders and normally add many more justified causes to extinguish a contract than those regulated by self-employment legislation . They are closer to the justified causes permitted under the *Estatuto de los Trabajadores* for employees.

c.2. Signs of *subsidiarity.*

- The employee does not own the main equipment needed to perform the activity. Certainly, riders do use their own bikes or scooters, but they are not the essential tool for performing the activity, which is the platform itself. The ownership of the transport that couriers use to perform their activity does not allow us to conclude that they are running a business, as the cost of the bikes and their maintenance shows that they are a secondary element in the personal activity (a criterion already laid down by Employment Tribunal Sentence of 26 February 1986, regarding messengers who performed their activity using bikes or scooters).

- Platform work is carried out through apps: companies provide an application without which the activity cannot be performed and they exercise decisive influence over the conditions under which that service is provided. Users have to install these apps in their mobile phones in order to receive instructions for work.

- It is this app which organises the service and offers jobs to those who are online during the period and in the location chosen by the rider, so that it is the platform's technology that makes contact between the rider and the customer possible. Hence, algorithms make the decisions, but behind them there is an owner of those same digital media through which an economic activity is developed. In addition, platforms keep custody of the contact details of both restaurants and customers (clients of these restaurants).

In other words, it is impossible to believe riders could perform their activity as self-employed workers without the app. Platform companies base their success on the technological equipment in their property, which is then used by riders.

- Platform companies get in touch with restaurants and determine the commercial conditions and the price which is paid to riders by the client. The rider does not intervene either in fixing the price to be paid or in the payment itself, which is made through the app. Riders do not even know what restaurants co-operate with the platform.

- The platform companies are the ones who publicise their activity. The only contact riders have with the market in which they perform their activity is, precisely, when they carry out that activity.

- In case of cancellation of the service once a rider has begun it, or when the end customer is not at the address given, the rider has the right to the basic tariff for the service.

- Riders receive payment from the platform company periodically as established by the platform company and accompanied by an invoice provided by the company.

- The fact that the rider is responsible to the customer for harm to or loss of the product during the delivery is compatible with an employment relationship as it betrays the underlying employment duties typical in a contract of employment.

d) Existence of a presumption of employment (art. 8.1 *Estatuto de los Trabajadores* [ET]). Courts also refer to the provision of art. 8.1 ET which establishes that a contract of employment must be presumed to exist between anyone rendering a service on behalf

of and within the scope of the organisation and management of another, and the person receiving it in exchange for a compensation paid to the former. However, this legal presumption has barely any force, as it rests upon the two basic aspects that certify the existence of a contract of employment: *dependency* and *subsidiarity.*

3. Collective rights of platform workers

Full collective rights (right of association; right to collective bargaining and right to strike) are only recognised for employees. TRADE have been granted the right to join trade unions (but not to create one); the right to create a specific organisation for self-employed workers; the right to negotiate professional interest agreements (*acords d'interès professional*) and the right to adopt conflict measures to defend their professional rights. Self-employed (hiring-dependent employees) only have the right to create employers' associations, to negotiate collective agreements in the role of employer – so not regulating their working conditions but rather those of their employees –) and the right to lock-out as a defensive measure before illegal or abusive strikes. Self-employed, whenever they do not have employees, can join a trade union regardless of whether they can be qualified as TRADE or not.

3.1. Right to strike. The main theoretical question that has arisen in relation to the collective rights of TRADE is related to the right to adopt measures of conflict in order to defend their professional interests. The right to strike and the right to adopt measures of collective conflict do not have the same protection in the Spanish Constitution. As the Constitutional Court Decision 11/1981, of 8 April, declares, the systematic location of both rights within the Constitution (the right to strike is part of Section 1 of Chapter Two which addresses rights and freedoms, whereas the right to adopt measures concerning collective conflict is in Section 2 of Chapter Two, which simply mentions citizens' rights) *has obvious consequences in respect of the future legal system of each right, the right to strike in art. 28 and the adoption of measures of collective conflict in art. 37. Thus* […]*, constitutional legislature considered strikes to be a fundamental right whereas the right to take measures of collective conflict was seen as a right which is not accorded that category.* Hence, attempts to establish a parallel between both practices by seeing the lockout as a strike by employers have been disregarded.

The Spanish Constitutional Court (TC) distinguishes between each practice: *The first difference refers to freedom of work. Strikers are salaried individuals who have freely decided to take part in a protest movement or, if preferred, what may be termed a situation of conflict. Opposed to this, the decision to carry out a lock-out affects not only conflictive staff but also peaceful staff whose rights and freedoms are seriously infringed. Against the comparison between strike and employer's lock-out it may be said that the parallel corresponds to the era in which these practices were forbidden. It is true that both are forms of coercion; however, there is no functional identification between both terms. A lock-out is not an "employer's strike". Its practice only has collective significance in terms of the plurality of workers affected. There is no protest in a lock-out, simply defence. The differences are also very marked in respect of the basis of each practice. As has correctly been stated, strikes are a counterweight designed to permit persons in a situation of wage dependency to establish a new relation of forces in a manner which is more favourable to them. It tends to re-establish the balance between parties with unequal economic power. In contrast, a lock-out is a greater complement of power granted to a person who already held power beforehand.*

In this context, it does not seem like a potential recognition of the right to "strike" for – at least – economically dependent self-employed workers would break this conceptual mould. In the case of economically dependent workers (TRADE), we can observe the existence of a counterpart they can put under pressure in order to negotiate better working conditions. Indeed, the economic dependence of these workers puts them at a disadvantage compared to their contractual counterpart. This situation is somewhat comparable to those covered by the earliest employment regulations. For this reason, the regulations applicable to these workers do allow them a certain right to negotiate, as a guarantee mechanism for these workers given their situation of economic dependence.

Thus, it is possible to speak of a *tertium genus*, located between the right to strike and the right to lock-out – legally recognised, respectively, in arts. 28.2 and 37.2 of the Spanish Constitution. Despite the fact that the regulation of self-employed workers may not receive the same legal treatment as the right to strike, it could avoid eventual liabilities for failure to comply with contractual obligations, although it may enter into conflict with interests and rights – even fundamental ones – of third parties.

Article 19.1.c of the Spanish Statute of Self-Employment (Law 20/2007) could set a legal basis for this conclusion as it regulates the right of independent workers to exercise *collective activity* to safeguard their professional interests, which has a clear conflictual resonance that goes beyond mere representation, and which, although it cannot legally equate to a strike, eliminates contractual liability for non-compliance with its customers, although it may conflict with interests and rights – even fundamental ones – of third parties.[20] However, this is not unanimously accepted, as some authors defend TRADE conflict actions are only tolerated as a civil right (in the same way demonstrations are allowed) but the resulting breach of contract could have civil consequences. In this sense, the Spanish Constitutional Court Decision 11/1981 (adopted before TRADE workers were regulated) said: *A strike is characterised by the deliberate wish of strikers to place themselves provisionally outside the framework of the work contract. The constitutional right to strike is granted so that the holders of the right may temporarily disassociate themselves from their legal and contractual obligations. Here there is an important difference which separates the strike constitutionally protected by art. 28 and that which at some point may be termed independent workers' strike, that of the self-employed or professionals who although in a broad sense are workers, are not employed workers bound by a salaried work contract. Cessation of this type of persons' activities, if the business or professional activity is freelance, may take place without the need for any regulation to grant them any particular right, notwithstanding the consequences entailed by the disruptions this may produce.*

In any case, there would be the obligation to respect the limits imposed by public safety or social order, in a similar way to the constitutional clause regarding maintenance of essential community services (present both in art. 28.2 and in art. 37.2 of the Spanish Constitution). In TRADE workers' strikes, this final remark is of special interest, since we are not dealing with a constitutionally guaranteed strike.

In addition to the above considerations, we also have to consider that the exercise of the right to strike by digital platform employees (in a subordinate

[20] The idea of collective activity has a clear conflictual resonance that goes beyond mere representation, which, although it cannot legally equate to a strike, eliminates contractual liability for non-compliance with its customers, although it may conflict with interests and rights – even fundamental ones – of third parties.

relationship) presents significant difficulties. This is because employment regulations and jurisprudence have not adapted to the digital productive context. Even though strikes can be called by employees themselves – thus the difficulties involved in appointing employee representatives are not a problem – the decision-making process presents several obstacles. In cases where the strike is decided by the employees directly, their support – by simple majority – is needed, through a secret ballot (art. 3.2.b *Real Decreto-Ley de Relaciones de Trabajo* (Royal Decree with Legal Effect on Labour Relations, RDLRT). The absence of a physical space shared by employees makes it difficult to discuss the need to adopt the measure and conduct the ballot. At least, unless the workers' assembly is held online. Hence, a mobilisation called using a mobile application, such as Whatsapp, without any previous agreement to support it, must necessarily be declared illegal, and the dismissal of the worker who actively participates in it (urging others to strike or contributing, by the attitude they take, to maintaining it) could not be declared null and void.[21]

On the other hand, the effectiveness of the strike is also compromised in these cases by the characteristics of platform work. Activity organised through platforms is characterised by the existence of a vast plurality of potential workers providing the service in a competitive regime – which fosters an individualistic spirit –. Thus, given a call to strike, it is easier for the digital entrepreneur to fill the strikers' positions. In such cases, it is difficult to argue that the employer is illegally substituting the strikers, as it should be analysed from the perspective of workers' right not to strike.

In short, this is the organisational advantage of working through platforms, which allows the employer to have an army of workers willing to accept a temporary provision of services – which, by the way, affects the price of their services as they have to compete among themselves –. On the other hand, the interpretation of the Spanish courts that there is no technically *illegal* substitution of strikers lends weight to this conclusion, reinforcing the argument of *technological asepsis* in order to separate the consequences of those decisions from the company's intentions. [22]

In relation to strike picketing, in the absence of a well-defined geographical workplace, they would be almost impossible or, at least, of little use, as a hypothetical boycott of the app could not be considered a legal action. This boycott would probably be considered illegal, because this kind of action would cause disproportionate damage to the company and would affect the right to work of those who did not wish to join in.[23] Different conclusions could be drawn in cases where the employee voluntarily decides – by his own free will or due to the legitimate pressure of picketers – to turn off his application, an option that also meets obstacles in practice, given the difficulties in effectively protecting the exercise of the right to strike from possible retaliations.[24] In fact, given the criteria often used when offering such services, it can be difficult to demonstrate possible retaliations for taking part in a strike. It is important to note that

[21] Judgement no. 53/2019 of Employment Tribunal no. 33 of Madrid, of 11 February 2019 (sentence no. 53/2019), considers the dismissal of an employee using Whatsapp to promote a strike called without respecting the rule of law illegal (at least this is what emerges from a reading of the sentence). The judgement considers the worker's comments to be mere opinions on the strike so they cannot be interpreted as an incitement to support the strike. The judgement concludes the comments are protected by freedom of expression.

[22] Judgement no. 193/2019 of Employment Tribunal no. 31 of Barcelona, of 11 June 2019.

[23] As the company alleged in the letter of dismissal in the case of Judgement no. 53/2019 of the Employment Tribunal of Madrid, of 11 February 2019.

[24] This is the case of Judgement nº 193/2019 of Employment Tribunal no. 31 of Barcelona, of 11 June 2019.

platform companies adopted just such an attitude during the first digital workers' mobilisations for better working conditions.[25] The "reputational" systems for assessing the activity of the riders contribute to the difficulties in proving any imposition of sanctions for participating in strikes, since that evaluation can be affected by the exercise of collective rights and, thus, act as an indirect sanction against the legitimate exercise of a fundamental right.

3.2. Right to collective bargaining. Regarding TRADE workers' right to bargain, Spanish legislation grants them the right to collective negotiation as it is possible to regard them as the weaker party in the relationship because of their economic dependence. Thus, TRADE can negotiate what are called *acords d'interès professional* (professional interest agreements), although this is no obstacle for the principle of independent, which generally governs relations between them and each of their clients. The recognition of professional interest agreements does not imply transferring the role of establishing working conditions to collective bargaining. This only allows for the possibility of an agreement that transcends the mere individual contract, but with limited personal usefulness, since it only affects the agreement's signatories.

In the case of professional interest agreements, conflict arises between the right to influence working conditions and competition law. Whereas for collective bargaining of employees, the freedom to negotiate all debatable questions is protected (art. 85 ET), art. 13 of the Spanish Statute of Self-Employment (Law 20/2007), applicable to TRADE, circumscribes such negotiation, exclusively, to working conditions within the limit of competition law. This reference to the protection of competition, which is not mentioned in labour regulations[26], seems to be explained by the position that TRADE occupy in the economic system, as they operate in the goods and services market under the same conditions employers do, unlike subordinate workers, who operate within the labour market.

On the other hand, collective bargaining (which can conclude in collective agreements with *erga omnes* effect) for the employees of those who work through digital platforms also faces important problems. The first is that the platform companies do not recognise the riders that work for them as employees. The only example of collective negotiation of an agreement by platform employees is the recent modification (Official Gazette of the Government of Spain [*Boletin Oficial del Estado*], 29 March 2019) of the *V Acuerdo Laboral de ámbito estatal para el sector de Hostelería*. This is a framework-agreement aiming to set the limits of collective bargaining in the hostelry sector. As result of the modification, the functional sphere of application of the collective agreement has grown, as it now includes the activity of food and beverage delivery through digital platforms. The agreement was signed, in the name of the

[25] Following the calls to strike in 2017, those delivery employees who decided to go on strike in defence of better working conditions were dismissed/disconnected. In the case of Deliveroo, some five riders were disconnected in Madrid. In Barcelona, the same happened to more than fifteen, linked to the *RidersxDerechos* (Riders for Rights) organisation. In a similar move, Glovo disconnected a courier. This is a perfect example of what platform companies think of riders' collective organisation and their right to strike.

[26] However, it does not mean that collective bargaining is not affected by competition law. Numerous conflicts between the right to collective bargaining and the right to compete have arisen in Spanish employment case law. In any case, we can conclude that the trend for exemption from anti-trust rules for collective bargaining is not necessarily applied in the same way in cases where collective decisions on working conditions affect independent workers.

employees, by the most representative Spanish trade unions at national level (*Comisiones Obreras* and *Unión General de Trabajadores*) and *Confederación Intersindical Galega* (a trade union which is considered the most representative in the region of Galicia). Employers were represented by the *Confederación Empresarial de Hostelería de España* and the *Confederación Española de Hoteles y Alojamientos Turísticos*.

The legitimacy of a union including employees operating through platforms in the hostelry sector poses no problem, since the signatories are the most representative unions, who are granted this power by virtue of their greater representativeness (art. 87.2 ET). Nor does the legitimacy of the agreement come into question as a result of no specific representation of hostelry entrepreneurs who operate through platforms having signed it, because what legitimises an organisation to sign an *erga omnes* collective agreement is its level of representation in the sector affected, not the means through which it is organised (the digital platform, in this case).

Reaching a collective agreement by union or non-union workers' representatives in the company would be more complicated: in the case of agreements signed by non-union workers' representatives (*Comitès d'empresa* and *Delegats de personal*), because calling union elections within them will meet with numerous obstacles, not even allowing such a representation to exist; in the case of trade union representatives, because their legal appointment is still in the earliest of stages. This situation might be counterproductive for the platform companies, who might wish to avoid applying the agreement covering the sector (only one of which so far exists), since they would need to find a valid interlocutor with whom to negotiate a company-wide agreement.

3.3. Right to unionism and representation. The dual channel of worker representation within the company which characterises the Spanish model is difficult to implement in the gig economy from both a legal and sociological perspective. Legally, because the model of unitary representation, of an elective base, is designed for those who share the same geographical and temporal area. From this shared existence there follows a community of interests on which the model of unitary representation (*delegats de personal* and *comitès d'empresa*) is based, as it allows direct contact between electors and employee candidates. The principle of immediacy between representative bodies and those they represent constitutes one of the key aspects of the regulations surrounding workers' representatives, which justifies the fact that the electoral district is equated to the workplace and not the company, since the first best guarantees the proximity between electors and the elected.

To the same end, electoral law does not allow employees who have been employed for less than one month to take part in elections. Legislation also limits electability to those who have been employed for at least six months (art. 69 ET). Such requirements make it really hard to introduce non-unionised representatives in the digital platform, as it is characterised by short-term work and a huge rotation of workers; and employees work independently, spread over large geographic areas, and in direct competition with one another.

In such conditions, it is hard to find the solidarity among workers needed for collective organisation to appear. But if it can be found, it would also be complicated to proceed with the election as this means identifying the workplace which will constitute the electoral district. This is a relevant question, as it determines who are electors and who are eligible; which employees are in charge of monitoring the vote; where the ballot box will be installed, etc.

This fact will also hinder trade unions. They are interested in holding elections for workers' councils, and taking part in them, as a result of the criterion for asserting their representativeness in Spain, as for trade unions – as well as for independent candidates – it will be difficult to reach the electors. At least, this is what will happen if we follow the traditional method of trade union action within the company, as they are currently regulated in our employment regulations (right to a meeting-room and a bulletin board, art. 81 ET). It should be noted, in this regard, how the issue of using more modern means of communication between representatives and workers (e-mail; an intranet for trade union use in the company domain, etc.) was raised in court, but no action was taken by the legislature.

Judgement 281/2005 of the Spanish Constitutional Court, of 13 December 2005, recognised the right to use these communication tools provided that the normal activity of the company was not disturbed and it does not affect the intended use of the technology, concluding that the interest of the trade union should not prevail. The use of these tools should maintain a harmonious relationship between union use of these tools and their use in pursuing the company's purpose – that is, the reason that led to their introduction in the company. According to the Constitutional Court, it would be constitutionally lawful for the company to predetermine the conditions of their use, provided that it does not exclude them in absolute terms. This ruling of the Constitutional Court enshrines, moreover, the doctrine that the use of the company's technological equipment or resources for union purposes cannot cause additional costs or significant inconveniences for the employer.

From a sociological perspective, there are also obstacles to platform employees collectively organising themselves. On the one hand, the tenuous link between workers and their platforms (part-time and temporary employment) discourages union membership. On the other, employees' fear of reprisals if they join a union. Finally, as there is a clear rejection of traditional forms of union organisation by workers, especially the youngest ones, with a career dogged by instability. This makes it even more difficult for the traditional union to penetrate this sector. As a result of the meagre union membership and the low popularity of the traditional union among gig economy workers, introducing traditional union representatives in the company is complicated. The difficulties in implanting union representation structures in the company do not derive, therefore, from the legal prescriptions regarding the levels of representation in and outside companies, given the broad powers of union self-organisation recognised in law (arts. 2.2 and 4 of the Organic Law on Union Freedom [LOLS]), but rather from the obstacles that the union faces in penetrating the company itself.

At a time when trade unions suffer from a generalised lack of support (because of own errors but also as a consequence of neo-liberal attacks) and are not familiar with such new technology, platform workers have started to organise themselves by means of the technology they use to work (WorkerTech), in some cases with help of smaller trade unions. This is the case of *RidersxDerechos* (Riders for Rights), a platform created within the *Intersindical Alternativa de Catalunya,* a union which tries to distance itself from traditional unionism. This is the method by which some strikes and protests demanding better working conditions for platform workers have been organised, giving birth to a new type of unionism called *cyber-unions*. As we shifted from the factory to digital labour platforms, a new way of collective organisation has appeared.

Spanish traditional trade unions have understood the risk of losing contact with platform workers and their demands. Therefore, they have not given up on representing digital platform workers. As a result, traditional trade unions have learned from 4.0

movements and, echoing the actions of platform workers, have begun to explore digital tools to further their union activity in order to convince these non-standardised workers to join them.[27] Consequently, they have moved to gain greater recognition among them, creating apps to channel their demands.

4.- Some final thoughts

The traditional criteria for identifying subordinated work are still valid for classifying contracts. The problem with classification is that, all the while courts are making their decisions based on criteria which qualify a relationship as one of employment, companies are moving toward a new form of organisation which puts distance between them. Hence, the nature of the relationship becomes less clear. One example of this, in the United Kingdom, can be seen in the decision of the Central Arbitration Committee regarding Deliveroo[28] in which, after a modification of the terms of the contract and the way the services were accomplished, the Committee concluded the rider was not an employee. Something similar will likely happen in the Spanish context.

Whether or not the criteria are still valid, what has obviously become outdated is employment legislation itself, which still moves in a productive context where employees confront a single employer, both located and co-existing in the same place and in which the workforce meets at the same time. Such legislation hardly takes into account either the introduction of new technology, the new form for providing services, or the internationalisation of the productive system. An in-depth review of employment institutions should probably be undertaken. However, the present moment does not seem to be, up until now, particularly favourable to such a course of action, as neo-liberal tendencies make workers' organisations afraid of such legal intervention. In the new political context, the Spanish Government announced its intention to carry out an in-depth reform of the *Estatuto de los Trabajadores* in order to cover these and other fields, but many obstacles must be overcome to do so.

On the other hand, the emergence of digital platforms has strengthened the trend towards the consolidation of a labour model with no rights, in an evolutionary process of relations between capital and labour that dehumanises the latter, satisfying the desire of capital to avoid the obligations that may arise from employment relations. The result is instability. While new legislation to protect platform workers is being discussed and, eventually, is approved, platform workers have innovated and created new forms of unionism. Therefore, more dynamic instruments of organisation have been created, using platform workers' own tools – digital technology. That is how a digital organisational movement, in contrast to the equivalent traditional trade unions, has emerged. A more flexible way of organising, which allows the trade union organisation to cross national borders more easily, offering a better response to the challenges posed by capital, clearly favoured by the internationalisation of the economy that long time ago surpassed the boundaries of the nation-state, and going so far as to hold several global strikes.

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[27] For example, the actions of UGT regarding riders' digital platforms were born out of the many queries received through *Tu respuesta sindical* (Your union response), a tool created in September 2017 through which the union approached and made itself available to digital platform workers. http://www.turespuestasindical.es (last access, 5 March 2020)

[28] Case number: TUR1/985(2016) 14 November 2017.

These new structures are bodies of representation that signal the beginning of a path towards institutionalisation, constituting the origin of a new labour union movement, which, unlike the labour movement of the proletariat emerging from the Industrial Revolution, could be characterised as the labour movement of workers whose instability is the consequence of the digital revolution. A movement which initially has sought social support for its demands. Thus, after the success of the public awareness campaigns on platforms such as *change.org* or *avaaz.org* – platforms that could be described as *general-interest* – other platforms and applications, specifically for demanding fair platform working conditions, have appeared. Platforms such as *co-worker.org*, or *theworkerslab.com*, and applications such as *workitapp.org*, or new forms of organisation in cooperatives, such as the Spanish *Mensakas*[29], which are channelling a new form of organisation for workers' mobilisation, laying the foundations for what could be considered a digital labour movement of international scope.

[29] Created by the *RidersxDerechos* (Riders for Rights) platform, this application is defined as the *responsible food delivery app*, taking the battle for rights into the field of competitivity by starting a cooperative made up of former riders from various platforms (Deliveroo, UberEats, Glovo etc.) which offers the same services as they do.