**CUATRECASAS** / **BEERG**

When in Spain: Spain´s riders Law and gig economy workers. Provision on algorithmic transparency for workers

Wednesday feb 14th, 2023

Intro

1. Royal Decree-Law 9/2021, of May 11

2. GDPR and local law:

   – Rights on automated decision and profiling

   – Privacy on IT systems

   – Privacy on video surveillance and voice recording

   – Privacy on GPS

   – Right to disconnect

3. CBA as an additional law.

4. Presumption applicable to individuals managed by software.

5. Modification of Criminal Code.
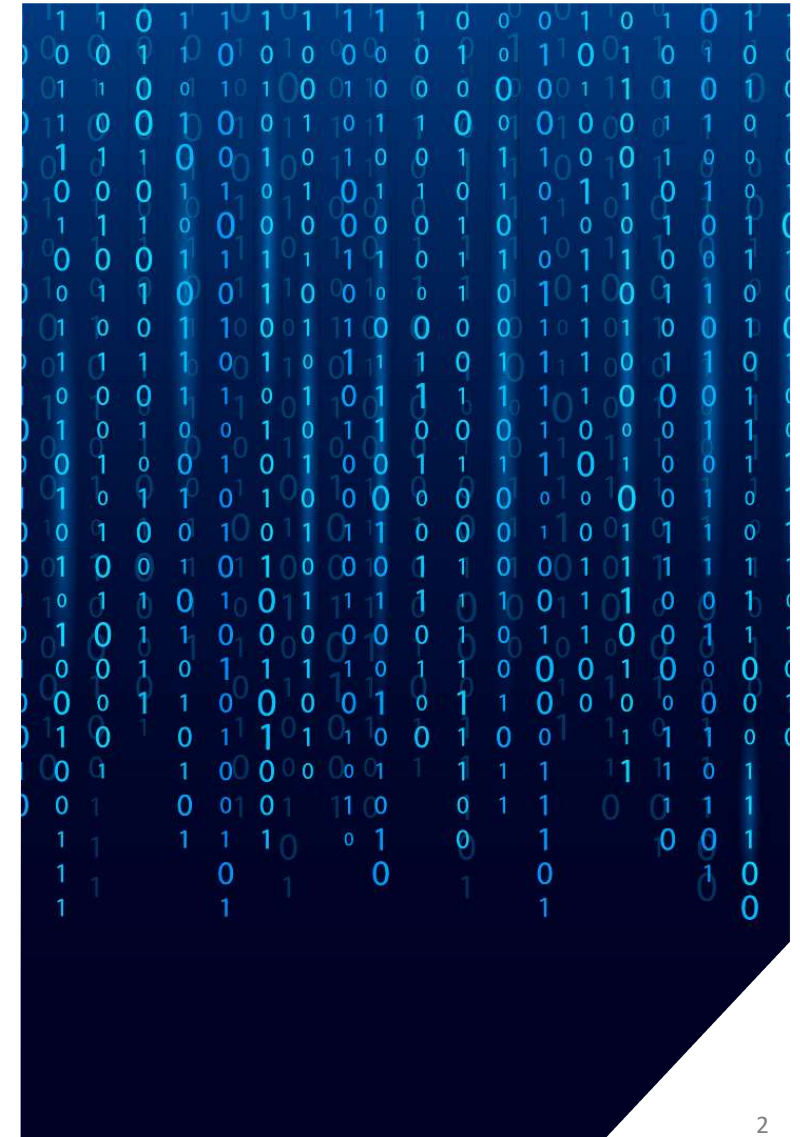
Gig economy – delivery.

**- WSA: Employment assumption in the scope of digital delivery platforms**.

By application of the provisions of section 8.1, the activity of individuals who provide remunerated services involving the delivery or distribution of any consumer product or goods, on behalf of employers who exercise the business powers of organization, management and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform, is presumed to be included within the scope of this Act.

This presumption does not affect the provisions of section 1.3 of this Act.
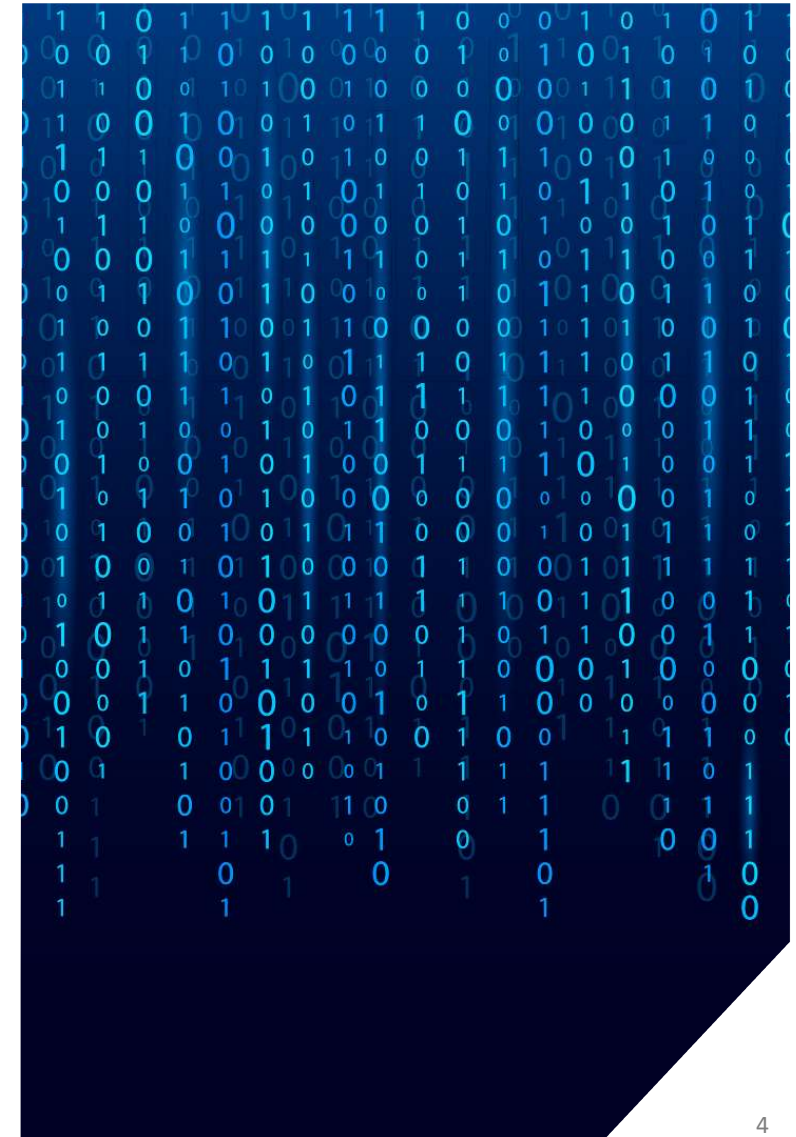
- Criminal Code:

Will be punished with imprisonment of six months to six years and a fine of six to twelve months:

2.º Those who impose illegal conditions on their employees by hiring them under formulas different from the employment contract, or keep them against an administrative requirement or fine.
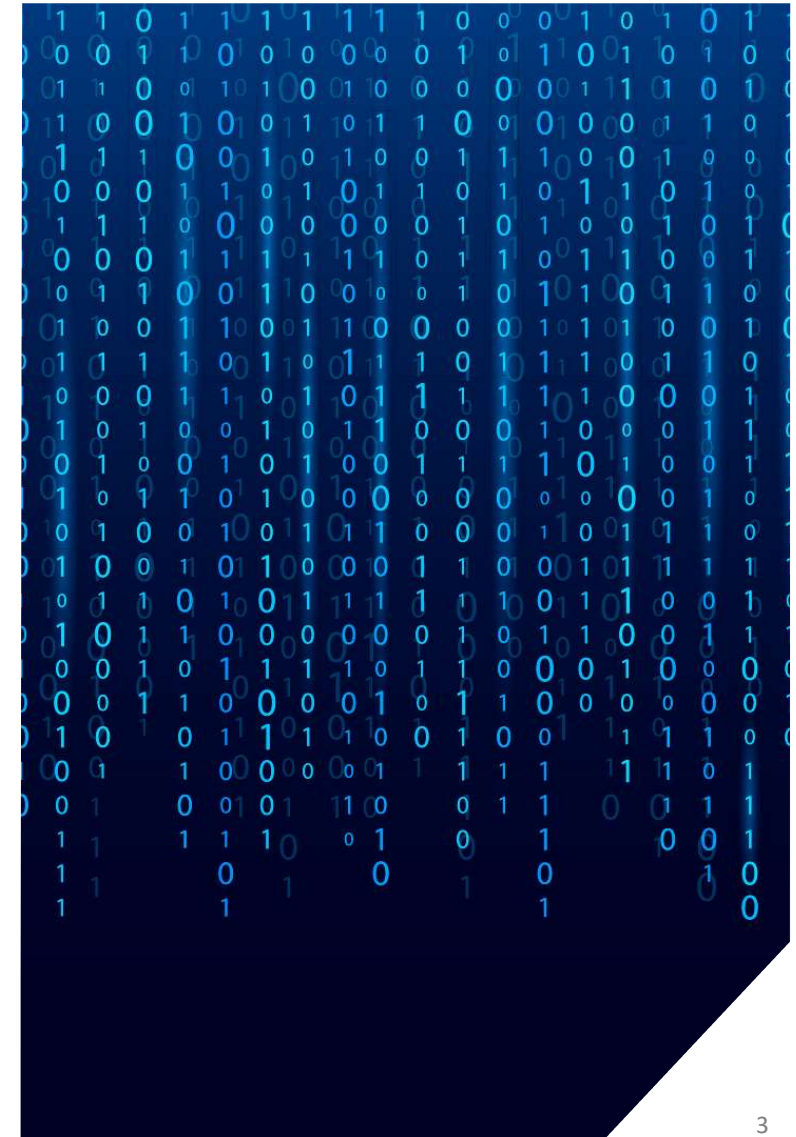
Script – Information right

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1. CONTEXT (1)

PREVIOUS OBLIGATIONS TO INFORM AND CONSULT WORKERS' REPRESENTATIVES

ARTICLE 64.5 OF THE WORKERS STATUTE ("WS") (currently in force)

The works council is entitled to be **informed and consulted** about all company decisions that may cause significant changes to the company's **work organization** and employment contracts.

The works council is entitled to **issue a report**, before the employer implements any decisions it may have taken, on the following issues:

f) Implementation and revision of **organization and work monitoring systems**, **time tracking**, establishment of **bonus and incentive schemes** and assessment of job positions.

1. CONTEXT (2)

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Spanish Labour Ministry hails 'epic' new gig economy law forcing disclosure of algorithms

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Spanish unions to get access to app algorithms to monitor workers' rights

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CHAMPIONING INDEPENDENT WORK

Spanish Trade Unions to Monitor Gig Economy Apps

Tech

Spain is trying to smash the black box of gig economy algorithms

2. ROYAL DECREE-LAW 9/2021, OF MAY 11

Sole article. Amendment of the revised text of the Workers Statute, approved by Legislative Royal Decree 2/2015, of October 23.

The revised text of the Workers Statute, approved by Legislative Royal Decree 2/2015, of October 23, has been modified as follows:

d) be informed by the company of the **parameters, rules and instructions** on which **the algorithms and AI systems** are based and that affect **decision-making related to working conditions, and access to and preservation of employment**, including profiling.

Second final provision. Entry into force.
This royal decree-law will enter into force three months after its publication in the Official Gazette of the Spanish State.

3. SUBJECTIVE SCOPE: AFFECTED COMPANIES

Any company with workers' legal representatives ("WLR")

that uses **algorithms or AI systems**

that **affect decision-making** related to **working conditions, access to and preservation of employment** and **profiling**
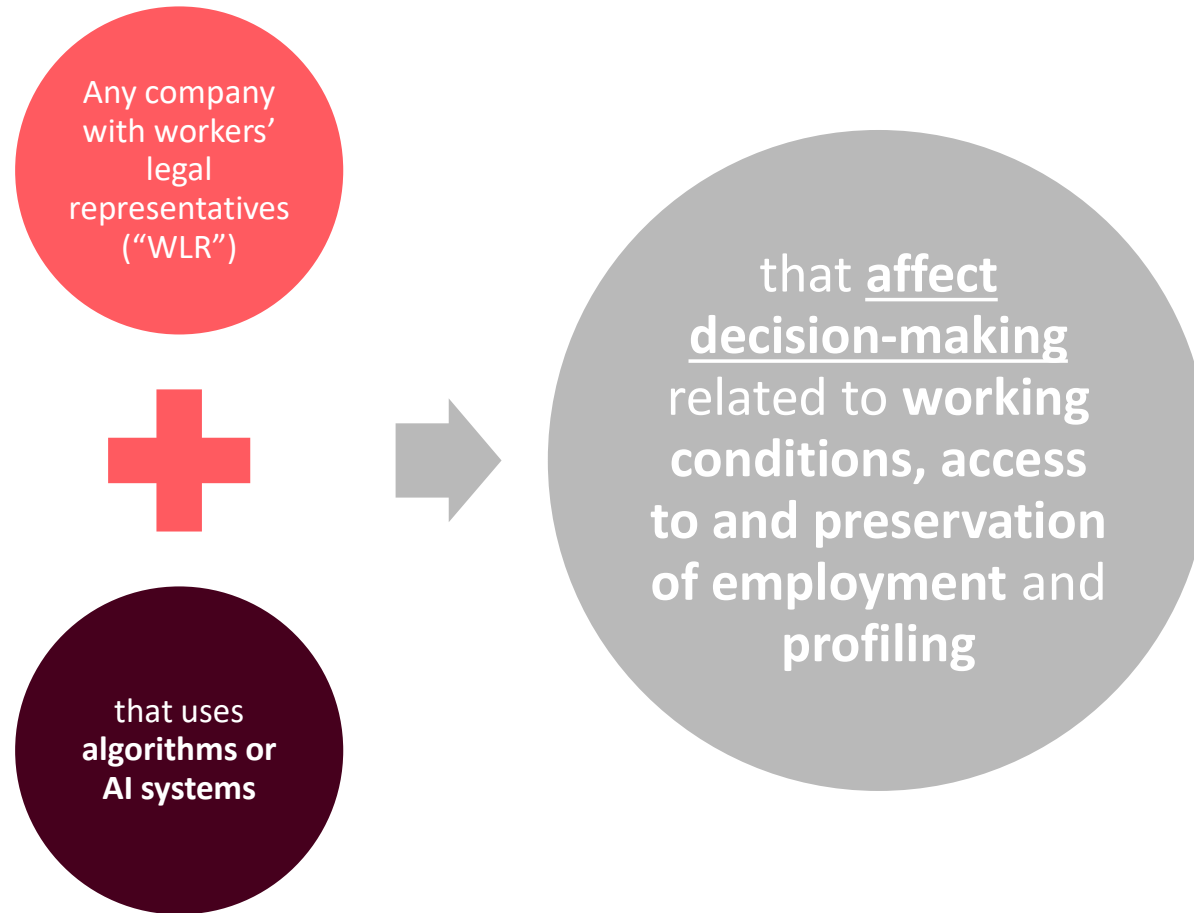
4. ENTITLEMENT: ADDRESSEES

Works councils

Staff representatives

Union representatives

Trade union sections?

Prevention representative

5. TEMPORAL SCOPE: FREQUENCY

ARTICLE 64 WS

4. The works council, **with the frequency required in each case**, is entitled to:

d) be informed by the company of the parameters, rules and instructions on which the algorithms and AI systems are based and that affect decision-making related to working conditions, and access to and preservation of employment, including profiling.

6. MATERIAL SCOPE: CONTENTS (1)

ARTICLE 64 WS:

4. The works council, with the frequency required in each case, is entitled to:

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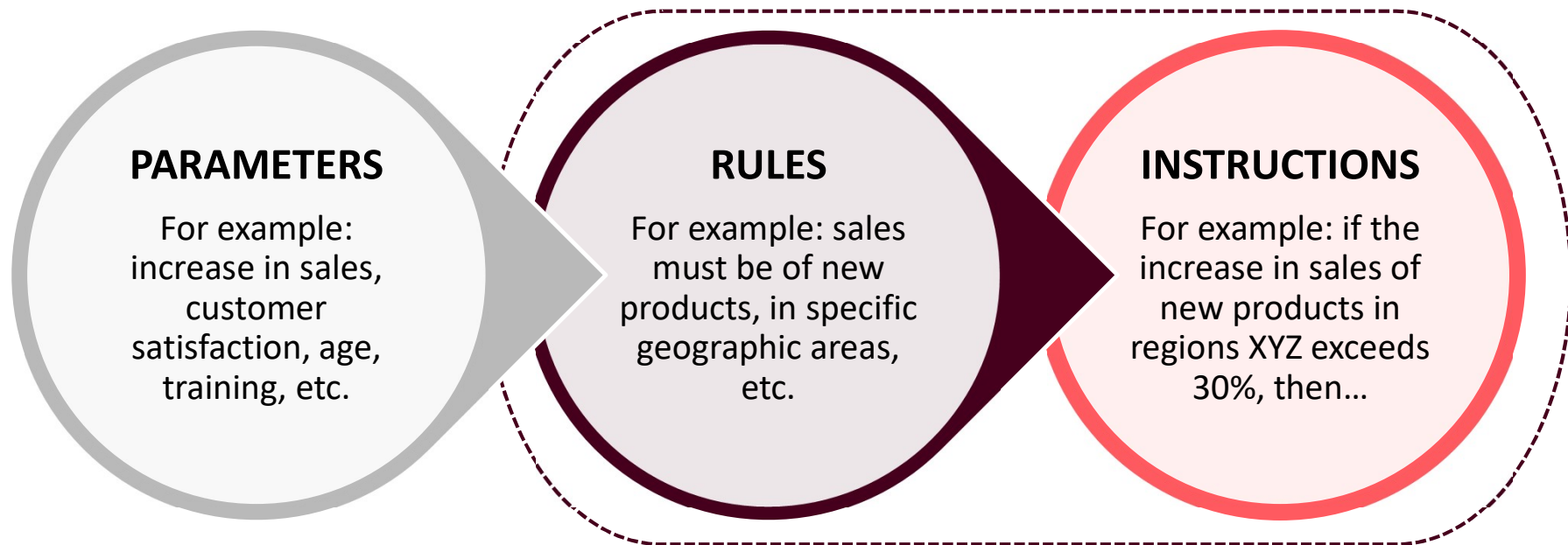
6. MATERIAL SCOPE: CONTENTS (2)

What types of algorithms and AI systems does this encompass?

What are the "parameters, rules and instructions"?

Is it obligatory to provide the WLR with the code or formula of the algorithm?

6. MATERIAL SCOPE: CONTENTS (3)

PARAMETERS

For example: increase in sales, customer satisfaction, age, training, etc.

RULES

For example: sales must be of new products, in specific geographic areas, etc.

INSTRUCTIONS

For example: if the increase in sales of new products in regions XYZ exceeds 30%, then...

6. MATERIAL SCOPE: CONTENTS (4)

ALGORITHMS AND AI SYSTEMS

In mathematics, logic, computer science and related fields,
an algorithm is a set of clearly defined, unambiguous, well ordered and finite **instructions or rules**
typically used to solve problems, perform calculations, process data,
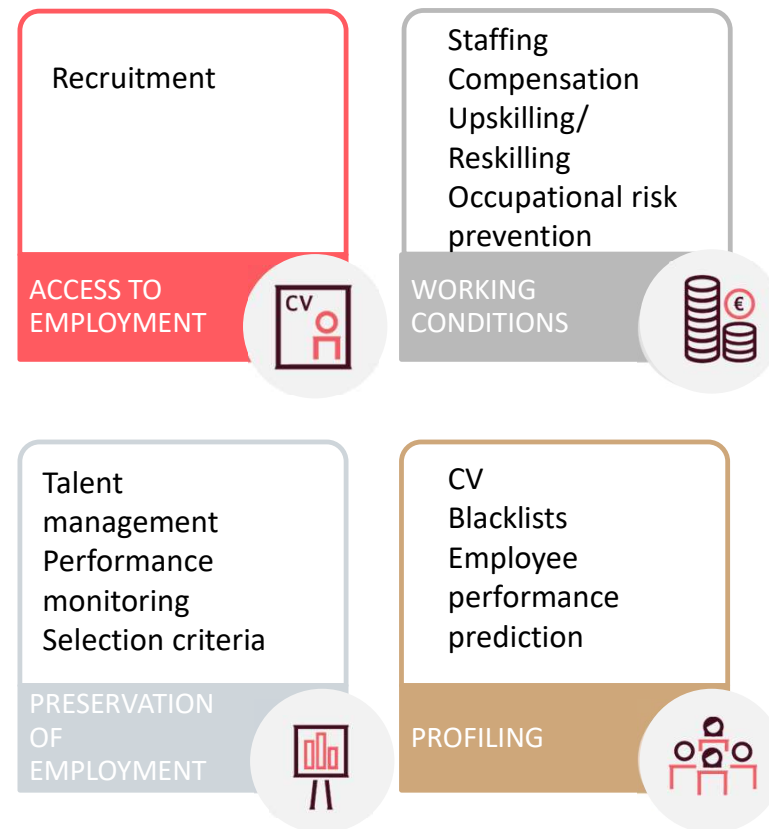and carry out other tasks and activities.

- Algorithms can be expressed in many kinds of notation, including natural languages, pseudocode, flowcharts and programming languages, among others.
- Natural language expressions of algorithms tend to be verbose and ambiguous.
- Pseudocode and flowcharts avoid many of the ambiguities common in natural language statements.

6. MATERIAL SCOPE: CONTENTS (5)
ALGORITHMS AND AI SYSTEMS INCLUDED UNDER ART. 64.4.d) WS

Only those that **AFFECT** **decision-making** related to **working conditions, access to and preservation of employment**, including **profiling**

Recruitment

ACCESS TO EMPLOYMENT

Staffing
Compensation
Upskilling/
Reskilling
Occupational risk
prevention

WORKING CONDITIONS

Talent
management
Performance
monitoring
Selection criteria

PRESERVATION OF EMPLOYMENT

CV
Blacklists
Employee
performance
prediction

PROFILING

# 7. LIMITATIONS ON THE RIGHT TO INFORMATION (1)

ART. 65.2 WS

- Duty of secrecy as regards information disclosed on a confidential basis

ART. 65.4 WS

- Disclosure of industrial, financial and trade secrets
- Trade Secrets Act 1/2019
  - Requirements to be considered a trade secret
  - Lawful access to information

7. LIMITATIONS ON THE RIGHT TO INFORMATION (2)

Code or mathematical formula?

Protection of trade secrets?
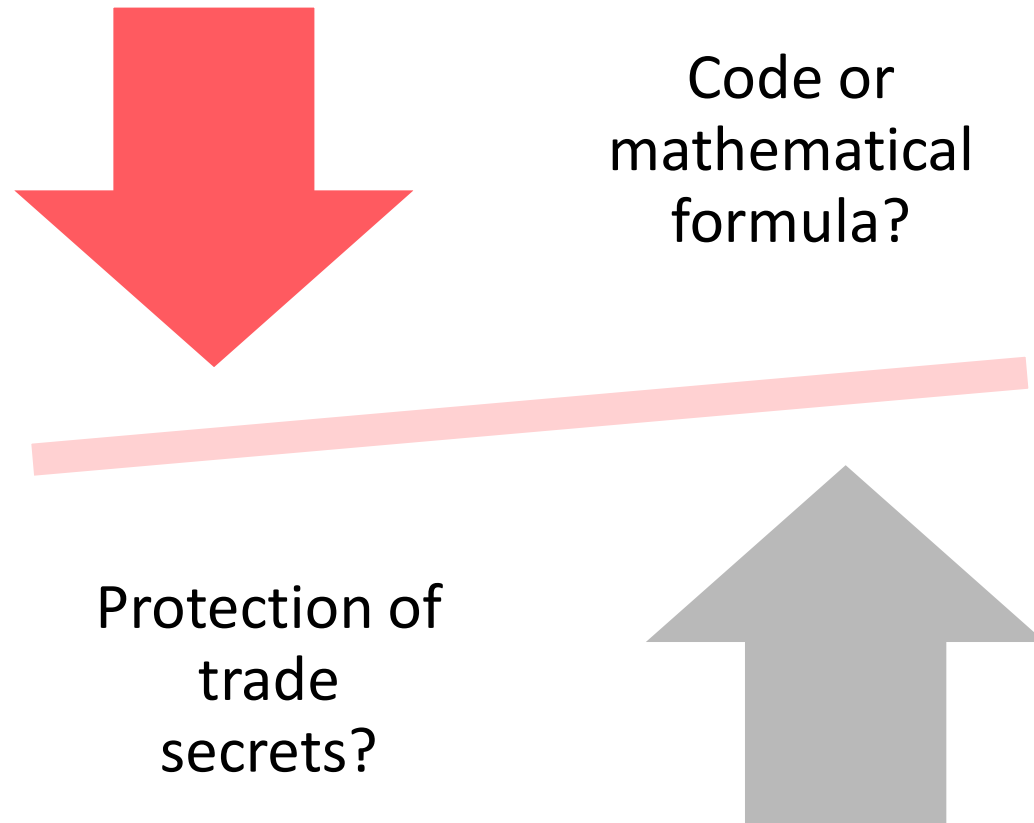
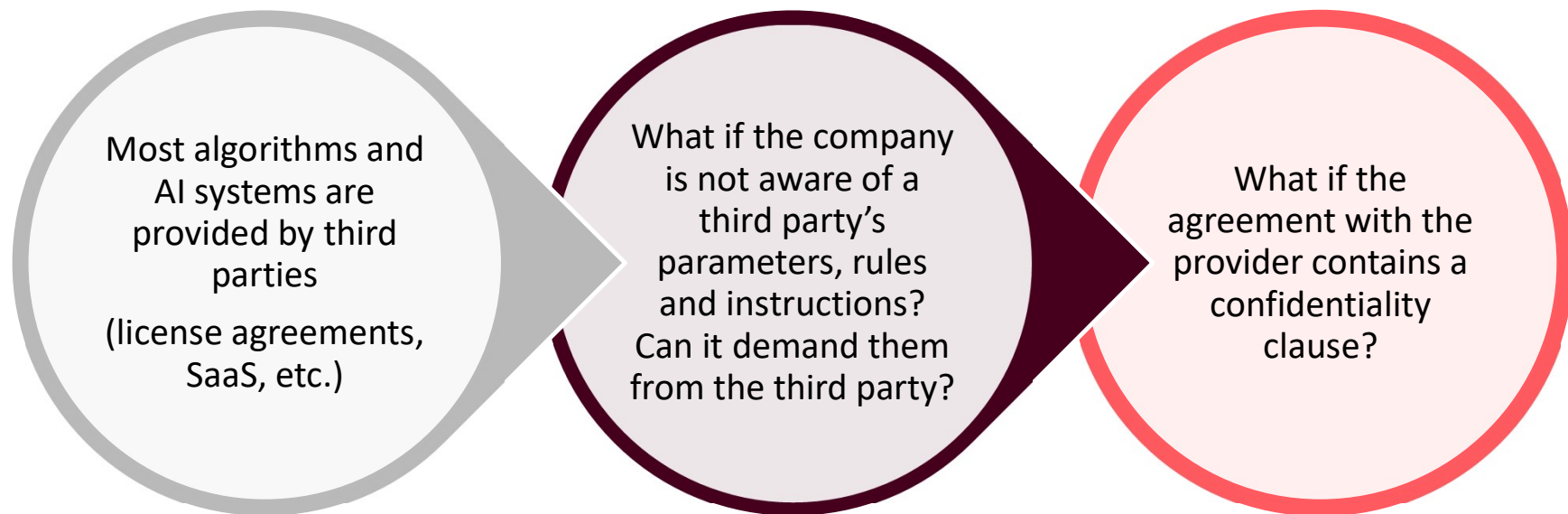# 8. ALGORITHMS AND SYSTEMS DEVELOPED BY THIRD PARTIES (1)

1. Own development

2. Third-party development

3. Acquisition of a standard solution

4. Outsourced services

8. ALGORITHMS AND SYSTEMS DEVELOPED BY THIRD PARTIES (2)
IMPLICATIONS CONCERNING SOFTWARE PROVIDERS

Most algorithms and AI systems are provided by third parties

(license agreements, SaaS, etc.)

What if the company is not aware of a third party's parameters, rules and instructions? Can it demand them from the third party?

What if the agreement with the provider contains a confidentiality clause?

8. ALGORITHMS AND SYSTEMS DEVELOPED BY THIRD PARTIES (3)
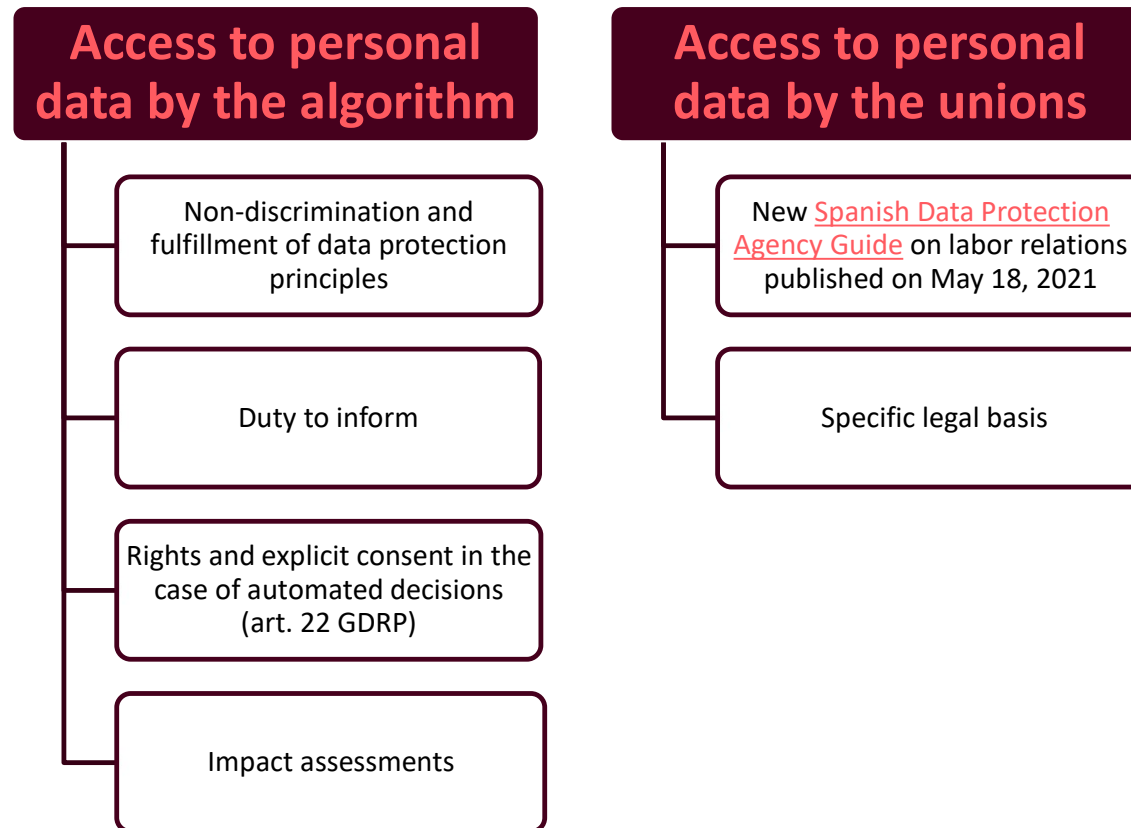### SOFTWARE AND NON-DISCLOSURE AGREEMENTS

Is all software, whether own or third-party software, subject to the requirement provided under art. 64.4.d) WS?

Must information be provided if it is only known by the software provider?

How do confidentiality clauses in agreements with software providers work?

9. PERSONAL DATA PROTECTION (1)

Access to personal data by the algorithm

- Non-discrimination and fulfillment of data protection principles

- Duty to inform

- Rights and explicit consent in the case of automated decisions (art. 22 GDRP)

- Impact assessments

Access to personal data by the unions

- New Spanish Data Protection Agency Guide on labor relations published on May 18, 2021

- Specific legal basis

9. PERSONAL DATA PROTECTION (2)

64.4.d) WSA vs. 4.4 and 22 GDPR

Profiling - Art. 4.4, also considering art. 71 GDRP

- *"Any form of **automated processing** of personal data consisting of the use of personal data to **evaluate certain personal aspects** relating to a natural person."*

- Automated processing + individual decision-making.

- It does not require profiling to be based "solely" on automated processing.

Automated individual decision-making - Art. 22 GDRP

- **Without the active intervention of a human being + legal implications or "significant effects that are similar"**
- **General prohibition**, except:
  - Legal basis:
    - Explicit consent
    - Conclusion of an agreement
    - EU or national regulations
  - Concise, transparent, intelligible and easily accessible information: algorithmic decision-making + logic
  - Strengthened rights:
    - Specific right to object
    - Right to obtain human intervention
    - Right to express point of view and to contest the decision

10. RISK ASSESSMENT

Non-compliance

- Serious infringement under the Labor Infringements and Sanctions Act ("LISOS")
- Union Freedom

Discrimination

- Very serious infringement under LISOS
- Compensation for damages

Data protection

- Spanish Data Protection Agency Guide report
- GDPR penalties

11.HOW TO BE READY
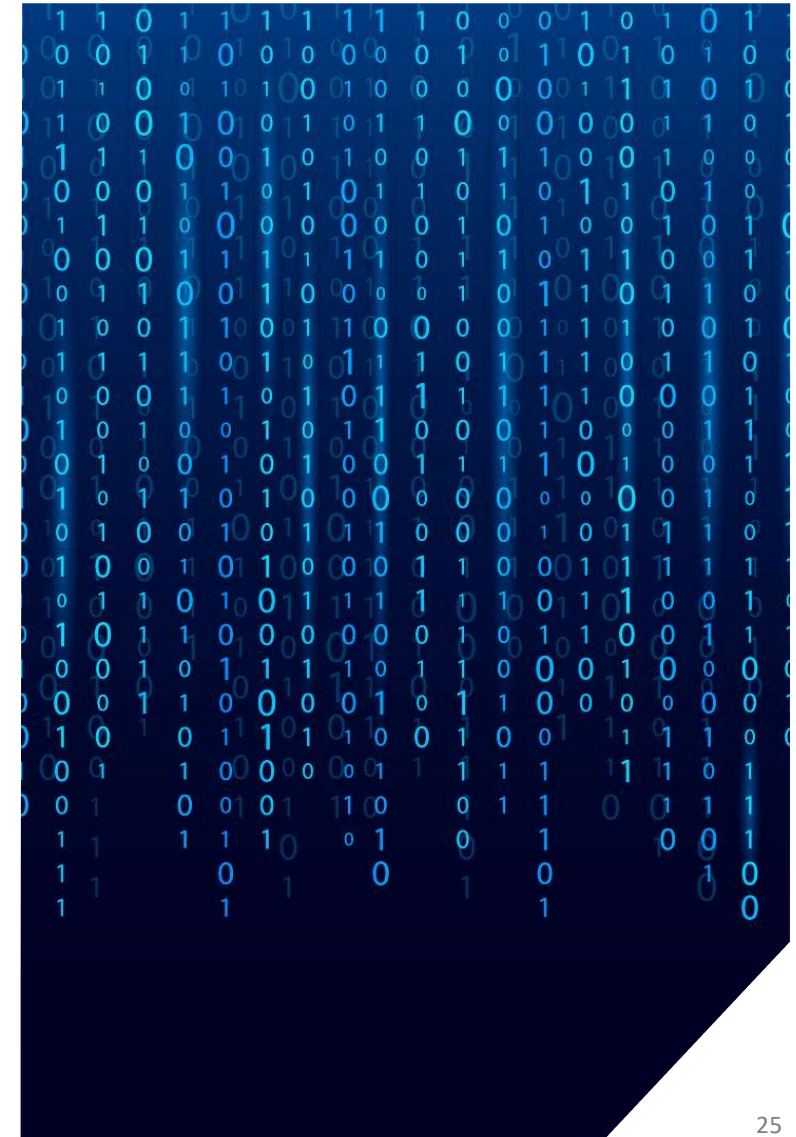
Individual diagnosis

Risk assessment

Planning

Deliverable?

12. SUMMARY – KEY POINTS

✓ Complexity - relevance

✓ Not only employment-related issue

✓ MUST: Legal + technical advice

13. ALGORITHMIC INFORMATION TOOL (1)
MINISTRY OF LABOR

A. General information on the use of algorithms or artificial intelligence systems for automated decision-making

1. Does the company use or is planning to use algorithms and automated decision-making systems for the management of employees or candidates?

2. Does the company use algorithms or automated decision-making systems for profiling people?

3. Which decisions regarding people management are automated using algorithms or artificial intelligence systems?

4. What kind of technology does the algorithm use?

   a) Does it generate a "black box" model?

   b) Is it a continuous learning algorithm?

   c) Who has developed the model?

13. ALGORITHMIC INFORMATION TOOL (2)
MINISTRY OF LABOR

A. General information on the use of algorithms or artificial intelligence systems for automated decision-making

5. Which is the software or product used by the algorithm?

    a) Who is the supply company?

    b) Have any modifications or alterations been made to the software during its installation?

    c) If applicable, of what type and for what purpose?

    d) Does the software have any kind of certification?

6. Is there qualified human intervention in the decision-making process?

    a) If applicable, what is the extent of the person's involvement in the final decision-making process?

    b) What is the competence and authorization of the person intervening in the decision-making process?

    c) What is their ability to modify the decision taken by the algorithm?

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13. ALGORITHMIC INFORMATION TOOL (3)
MINISTRY OF LABOR

B.   Information on the logic and the functioning of each algorithm used

7.   In case of profiling, what type of profiles does the algorithm produce?

   a)   Specifically for the employee or candidate, to which profile have they been assigned?

   b)   Has the profile been used or is it intended to be used for a different purpose?

8.   What are the variables used by the algorithm?

   a)   Is there any personal data included as variables?

   b)   What type of personal data is used?

   c)   Have the reporting obligations relating to the use or, if applicable, re-use of personal data been complied with?

   d)   What type of non-personal data is used?

13. ALGORITHMIC INFORMATION TOOL (4)
MINISTRY OF LABOR

B.   Information on the logic and the functioning of each algorithm used

9.   What criteria/parameters does the algorithm use?

10. What are the rules and instructions used by the algorithm during the decision- making process?

11. What training database has been used? And, if applicable, which validation database has been used?

   a)   Are the training data suitable, relevant, and not excessive?

   b)   Have these points been verified? If applicable, who has completed the verification?

   c)   Is its use as training data consistent with the purpose for which it was obtained?

   d)   If applicable, what type of patterns have been identified in the training data?

13. ALGORITHMIC INFORMATION TOOL (5)
MINISTRY OF LABOR

B.   Information on the logic and the functioning of each algorithm used

12. Have errors or inaccuracies been detected in the algorithm in the classification of people in the different profiles?

   a)   What is the approximate error rate?

   b)   What are the performance metrics per profile?

13. Have audits or impact assessments been conducted or are they planned?

   a)   Are they conducted with own or external resources?

   b)   What has been the result of the audit and/or impact assessment?

13. ALGORITHMIC INFORMATION TOOL (6)
MINISTRY OF LABOR

C.   Information on the consequences that may arise from automated decision-making processes or the use of the algorithm.

14. What consequences for employees or candidates may derive from the decision taken by the algorithm or of the profiled created?

15. To the employee's legal representatives, what is the impact of the algorithm on gender equality and non-discrimination?

    a)   Is there any evidence regarding possible bias problems?

    b)   Has the impact of the algorithm been included in the diagnosis prior to the elaboration of a Gender Equality Plan?

D.   Other relevant information for employees' legal representation

16. Have employees or candidates been informed about the use of algorithms for automated decision-making?

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THANK YOU.

Rubén Agote
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Co-head Employment Practice

Slide 32

RA1   Ruben Agote, 14/02/2023