IS THE STRUCTURE OF EMPLOYEE REPRESENTATION INSTITUTIONS ADAPTED TO THE ECONOMIC TRANSFORMATIONS? ANALYSIS AND PROPOSALS FROM THE SPANISH CASE.

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1-BACKGROUND: NEW PRODUCTION STRUCTURES, SAME WORKER REPRESENTATION BODIES?

Workplaces and work centres have been affected in recent years by multiple and deep transformations that have altered the company and its production structures. Transformations have been driven by a number of factors, among which globalization, increased competence between companies, the emergence of new economic power in the global world scenario, industrial offshoring processes, technological innovation, and new forms of production organizing (flexible production, just-in-time, lean production): all of them, and some others, have contributed to a profound redefinition of companies and of the space they occupy in the wealth creation processes (Riesco-Sanz, 2012). Outsourcing, digitalisation and changes in the share of employment corresponding to industrial and service sectors, among other factors, have determined the downsizing of companies' individual workforce in many pre-existing establishments (Fita, 2017) and completely different structures in newly created companies. Establishments are now frequently much smaller or composed by employees pertaining to different companies. This phenomenon has been accompanied by a blurring of the work centre as a permanent standpoint, consequently to the increasing of jobs implying daily mobility and distance work. Platform economy business models are probably the main exponent of maximizing a profit by minimizing (employee status-recognized) workforce and pose extremely serious problems to the building of employee representation structures, to the point of making them unviable in the terms of current legislations, with very scarce room also to trade union representations where a double channel exists (Esteban, 2018; Gutiérrez, 2018; Guerrero, 2018). Finally, in some countries it is not unusual that employees who lose their jobs start activities as independent workers as the only way out of unemployment. This happened very clearly i.a. in Spain in the employment crisis that followed the 2008 financial crackdown. In fact, public powers have encouraged such an individual response to massive unemployment, by trying to build a discourse –or a tall tale- on entrepreneurship. Reality is that these independent workers often perform tasks previously developed by employees under similar subordination conditions but they are not recognised as employees. All in all, companies have considerably enlargened forms of obtaining economic activity from a large number of producers without the need of hiring them as employees, thus, they provide services under real but no legal subordination: "companies without workers and workers without companies" (Riesco-Sanz, 2012).

All these phenomena have a strong impact on employee representation, most especially in small and medium sized companies (SMEs), whose employees risk losing access to representation as consequence of downsizing. At the same time, many of these SMEs act as subcontractors for other firms (as much as half of them, according to Bouquin, Leonardi and Moore's estimations (2007)), and consequently their staff will probably be spread across a number of contractors' establishments, making it very difficult to build representation structures for these employees.

In fact, counteracting the effects of contracting out on employee representation bodies is one of the major challenge representation institutions need to face across Europe. It is not only a technical matter of reaching thresholds, that can be solved by legislative changes, it is also a more profound issue as outsourcing of activities might imply both a physical dispersion of workers and a dispersion of their interests leading to a weakening of trade unions' capability to represent workers' interests with exceptions in branches where trade union presence is strong and consolidated (Fita, 2017). That weakening will make it more difficult to create representation structures even where this would hypothetically be possible.

Notwithstanding, a previous problem needs to be solved. It is related to the nowadays existing employee representation structure, which is often inconsistent with the corresponding company structure.

2-EUROPEAN LEGISLATIVE SHORTCOMINGS: THE SPANISH CASE AS EXAMPLE

National regulations on employee representation in the workplace have not always accompanied all these transformations. On the contrary, they have frequently remained petrified, so that the disparity between company structures and workplace reality and legal provisions intended at guaranteeing employees a representation to supervise regulatory accomplishment on the part of the company and to defend their rights and interests, including collective bargaining, has strongly increased. The fact that many EU countries exclude workers in small and medium sized companies from employee representation by fixing high thresholds in countries where precisely SMEs are majority "seriously reduce the potential for collective representation and the exercise of union rights at the workplace level" (Bouquin, Leonardi and Moore, 2007, p.18). However, as Supiot (2007) reminds, worker representation has not ceased to be, together with negotiation and collective action, one of the pillars of social dialogue, which cannot develop if there are no actors to represent the interests in place. This is why employee representation structures should be revised.

To illustrate this assertion with cyphers, the following can be mentioned: for EU countries with employee representatives (work councils or equivalent institutions), the thresholds are changing in a wide range of 5 to 50 employees. Industrial relations systems have of course different characteristics and direct comparisons do not always reflect comparable situations. Also many other items can nuance the effect of a particular regulation, starting with the fact that the employee representation body is based, and so the threshold calculated, at company or establishment level, a decisive issue that will be further developed in this paper. The existence of trade union representations and how they relate to employee-elected representations is relevant. Just as an overview, examples of countries with low thresholds (5-6) are Austria, Czech Republic, Germany, Latvia, Slovakia or Spain. Other countries such as Portugal, Estonia or Lithuania do not fix a threshold at all. At the same time, other countries such as the UK, Poland, Norway or the Netherlands establish thresholds as high as 50 employees, even though in some cases minor representative bodies can exist in smaller production units (Eurofound, 2014).

Despite the fact that by only mentioning these numbers the picture is for sure incomplete or even inaccurate, they transmit quite clearly the idea that an extremely high number of establishments and employees in the EU lack collective representation at the workplace.

Therefore, strong shortcomings can be identified in many countries' current legislations regarding worker representation structures and thresholds, as these often fail to guarantee that large numbers of workers effectively do have voice in their companies as contemplated in these same regulations. This aggravates severely the deficiencies made evident in the last decades in the field of industrial democracy and stirs very interesting debates on how industrial democracy could be deepened. Lately some proposals have been formulated in this context, such as that of Ferreras (2017), who advocates for a democratization of companies by granting employees at least the same political rights in the governance of the company as the capital owners have, through a mechanism she names "economic bicameralism", where capital and labour investors would be represented equally. Certainly, the debate on how the dissociation of democracy and the institutional structure of companies should be addressed, as interesting as it might be, is not the focus of this paper. However, bringing on the table Ferreras' reflections on the lack of voice citizens experiment when they become employees is pertinent to the main point of this paper. She argues that people raised as citizens in a democracy aspire to have a say in their lives, but that ambition is in total contradiction with the functioning of companies, and so experience in the world of work can be very frustrating in this respect and does not respond to the aspiration of large segments of the population. This makes the case for defending at very least the need of strong representation structures.

However, the lack of voice within the company is glaring if we consider the large amount of workers who do not even have a representative to stand for their rights and interests. Consequently, legal changes to grant that every employee does have a voice within the firm through a representative are urgent. This argument is in line with more general statements proposed by prestigious labour law scholars such as Alain Supiot (2007), who holds that representation of workers is one dimension of collective relations affected by the changes in the organisation of labour occurred during the last years, while the field of small companies remains free from collective representation. He concludes that an adaptation of collective labour law to the new forms of organising developed by companies is needed.

From this standpoint a discussion on how the problem regarding unadapted workplace representation structures could be solved, or, at least, mitigated, will follow. First, some specific maladjustments that are key to producing the mentioned results need to be identified.

I intend to do that by using one blatant example: one of the countries where the imbalance is particularly serious is Spain, as its legislation on employee representation structures has never undergone a reform since it was approved in 1980 –a legislation that had some serious shortcomings already at the time-. That categorical statement can be sustained even though at first glance –see figures published by Eurofound and mentioned above- Spain could be classified among the countries with a lower threshold and, consequently, among those who guarantee to a greater extent representation rights. It is true that the law fixes a threshold of 6 employees. However, the Spanish regulations base employee representation on the establishment level, banning the use of the undertaking level to elect representatives. That point, together with some other issues that will be mentioned next, is key to understand why so many Spanish employees lack workplace representation. At the same time, the notion of establishment defined by the law and the interpretation given by the courts result in considering every single production unit, the small and simple it might be, as an establishment. The courts also restrict the possibility of modifying employee representation structures through collective agreements. The only provision existing in order to facilitate the grouping of two or more establishments to obtain employee representation is limited to those with 10 or

more employees each and settled in the same province (Spain has 57 of them), thus a possibility extremely limited. In the following lines these issues will be developed.

As mentioned, the consideration of the establishment as constituency, that is, that employee representatives are not elected at company level but at establishment level is highly relevant. In fact, the law is not completely clear on that point. On the contrary, its wording is quite confusing: article 62.1 and 63.1 of the Statute of Workers[1] say that "representation of employees in the company or working centre (…) corresponds to worker delegates" and that "The works council is the representative body for all workers in the company or in the work centre (…)". This led a number of academics in the 80s and 90s to maintain that there was no obstacle to interpret the legal provision so as a choice between the company as a whole or its establishments was possible (scholar positions compiled by Rojo (1999), who shared the view that a flexible understanding of articles 62 and 63 was possible). However, it is also true that it is not unreasonable to interpret that the employee representatives need to be elected at establishment level or at company level only when the company does have one only establishment. That interpretation can be upheld by the same article 63.1 "(…) by creating [a works council] in every establishment employing 50 or more people", as well as by article 63.2, mentioning the precise cases in which establishments can elect a joint works council. By using these arguments the Supreme Court declared in two 2001 judgments -and has maintained ever since- that no choice is possible and that the constituency is the work centre[2]. Excluding the possibility of constituting the workers' representation bodies at company level entails of course very serious consequences, especially in a context where, as described above, companies and work centres are downsizing.

That key element to the exclusion of many employees from being entitled to elect representatives is accompanied by a number of other factors, all of them leading to the same direction. These are mainly related to the huge restrictions to joint representation structures in the Spanish legislation and judicial interpretation.

As for the legal regulation of joint representation structures, article 63.2 of the Statute of Workers sets a limited geographical criterion: work centres can only elect joint representation bodies if they are situated in the same province (administrative geographical division) or in the rare case of being situated in a town pertaining to another province but bordering the first. If the geographical criterion in these terms could have some sense in 1980, this is certainly unjustified in 2019. Communication technologies make it perfectly possible that groups of employees geographically far one from the other but sharing working conditions and interests keep in touch and are represented together in front of the company[3].

A further restriction derives from the fact that the law contemplates that in case some establishment reaches the number of 50 employees within the eligible geographical framework that establishment will not participate in the joint representation, that is, if for

[1] Royal legislative decree 1/2015, of October 23rd (new version of Law 8/1980, including no changes in these articles).

[2] Judgments of 31st January and 19th March 2001.

[3] In fact, the ILO encourage trade unions to adopt innovative organizing techniques, including the use of digital technology, to organize labour. It insists that digital technology provides workers' organizations with the potential to connect with workers outside traditional workplaces. Therefore, if technology should be used for the mentioned purposes, the use of it to facilitate employee representation should also be accepted and these technological possibilities should give place to the revision of legislation created when they did not exist.

example one establishment has 51 employees and the other establishments together 48, the first will have its own works council but the others will enjoy no worker representation at all, as, once excluded the first one, the others do not reach the number of 50 employees. In that case the law leaves little room to interpretation, as it is quite clear in this point.

Additionally, and very importantly, the severe deficiencies of the legal regulation are shown by the fact that the law does not mention the possibility of adding work centres to elect not a joint works council but a joint personnel delegate or delegates. Note that in Spain personnel delegates and works councils are attributed exactly the same functions; the constitution of one or the other depends on the number of employees an establishment has (up to 49 employees personnel delegates and 50 employees or more works councils). Having both figures exactly the same functions and being the only difference between them the number of employees they represent and the number of representatives (1-3 in the case of personnel delegates and 5-75 in the case of works councils) a justification to admit joint works councils but no joint personnel delegates is hard to find: if joint works councils are used to enable employee representation in case of a plurality of work centres that don't reach the threshold required to elect works councils separately, the same rule should be applied for those works centres that don't reach the threshold to have personnel delegates separately but they would reach the threshold together. The legal gap could have given place to an interpretation of the Supreme Court by resorting to analogy or even by using purpose interpretation instead of limiting to a word-by-word interpretation of the law (both interpretation means are considered in the Spanish Civil Code). In fact, admitting the possibility of choosing joint delegates would by itself expand to a large extent employee representation in small and medium-sized companies with more than one work centre in the same geographical area.

Still, limitations to joint works councils do not finish here. Works centres with less than 6 employees are excluded form electing representatives; this is the threshold applicable in Spain, as in other countries other thresholds apply. But the law does not say whether these employees will be counted to determine whether the threshold is reached to constitute a joint works council. Despite the law being silent on that point, the Supreme Court has determined that these employees are not to be counted. The argument used is debatable, because not having enough dimension to elect their own representatives does not necessarily lead to the conclusion that they cannot be considered to elect a joint body representing a plurality of works centres. The logic of the threshold is of course that in small works centres employees do not need representatives as they are capable to represent themselves because they are few and close to the employer. But in the case maybe not of small-sized companies but of medium-sized or even of large companies with many small works centres, can employees really represent themselves in front of the employer? Is really the employer so close to them that negotiations can take place directly without the need of intermediaries? The answer is probably not, so thresholds should maybe not be the same for single work centre small-sized companies than for plural work-centre larger companies, or at least in that case small work centres should be able to join in order to obtain common representatives. As it is the case with the current jurisprudence, employees in a company with many small works centres cannot elect representatives, no matter how many workers the company employs in a specific geographical area and no matter how many works centres it has. Therefore, large companies with large workforce can avoid employee representation if they are organised in small works centres.

Here the legal definition of a work centre and its interpretation appears again. The work centre is defined in article 1.5 of the Statute of Workers as "a production unit with specific organisation and registered with the Public Administration". The last requirement is purely formal, as its absence does not determine that the unit is not considered a work centre. In fact, the most relevant element is the "specific organisation", which is in general understood in quite flexible terms, so that the fact that a middle-level manager is based at the work centre and that he or she is able to take some decisions regarding day to day organisation, such as hiring or distribution of working time is enough to consider that a separate work centre exists. Consequently, as Pastor (2018, p. 224) puts it, the application of that regulation "is not neutral and it does not necessarily respond to objective realities", uninfluenced by the interests of the parties. On the contrary, the employer has room to determine the boundaries of his or her work centres by taking some organisation decisions and so he or she can manoeuvre to obtain wished results in terms of division of the company in work centres and to minimise the presence of employee representatives.

Further limitations to joint representation bodies need to be related. Not only employees working in work centres under 6 employees are not counted, but employees in work centres with 6 to 10 employees are only counted if such employees previously organise a vote and decide for that participation. This statement set by the Supreme Court in judgement of 20th February 2008 and others has been severely criticised by scholars (for instance Cabeza, 2008), especially since the Constitutional Court had previously established in the case of a work centre by work centre election that a vote to decide whether a vote to choose a representative is organised is not needed. On the contrary, the vote to choose a representative can be organised and if employees participate by majority to it, it will be considered that they consent the vote. The Constitutional Court privileges that interpretation (judgment of 8th March 2004), by arguing that it is the interpretation needed to sufficiently safeguard the fundamental right to trade union freedom of association. Therefore, it can be interpreted that the restriction set by the Supreme Court, as far as it is not a direct requirement of the law, is contrary to the fundamental right of union freedom of association.

Finally, one last mention to the -again- very limited possibility that the Spanish legislation offers to create a joint committee at company level ("inter work centre committee" in a direct linguistic translation) that groups the different works councils or personnel delegates already existing in the respective work centres. That is, the so-called joint committee is a second-degree representative body that is created so that companies with multiple workplaces can count with a space where issues common to the different workplaces can be discussed. However, it must be underlined that the joint committee presupposes the existence of a plurality of work centre representative bodies. That is, it does not solve the problem of employees who do not have representatives in their work centres. Even in the cases of companies including work centres with representatives and other work centres without them, the joint committee will be composed by the previously elected representatives, so none of them will come from the establishments that could not elect representatives. Consequently, a distance between members of the joint committee and employees in work centres without representation is inevitable. Furthermore, the creation of the joint committee is not automatic once more than one work centre elect representatives. It will only be possible if the applicable collective agreement includes and regulates that institution. Also, the joint committee will have the competences that the collective agreement includes. Its functioning is also determined by the agreement.

As a result of all the above described regulatory limitations and Court interpretations, the number of employees who are not covered by employee representation in Spain is extremely high. The following data illustrate the preceding affirmation: 78,7% of companies have no establishment with employee representatives, as none of them has 6 employees or more. As for the resting 21,3% of companies, they might not have worker representation in some of their work centres. Moreover, less than half of the Spanish employees (47,4%) do have employee representatives, and the percentage is especially low in the case of precarious workers (37%), women (44,2%) and young employees under 25 (34%) (Alós, Beneyto, Jódar, Molina and Vidal, 2015).

The previous data also bring about the need of a reflection on abidance by Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. First, it is true that the Directive is lax in its definitions, leaving room to Member States to maintain very dissimilar definitions of undertaking and, especially, establishment, resulting in extremely different demands in terms of where employees will have to be consulted. The States can choose to apply the Directive whether to undertakings with at least 50 employees or to establishments with at least 20 employees. In countries where employee representation bodies are based on establishment level the second option will be chosen, as the first one would imply having to inform and consult at a level where no representatives are often found (for example, in Spain many companies with more than 50 employees but divided in small establishments under 6 employees have no representatives at all). In that case, the obligation or non- obligation to inform and consult employees will depend on the national definition of the concept "establishment". The definition provided by the Directive considers that it means "a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources". From a formal point of view, the Spanish definition of establishment is probably consistent with the Directive, as it is defined as a production unit with "a specific organization". However, interpretation of that last requirement by Courts is so broad that, as mentioned above, almost every production unit will be defined as an establishment. This results in a multiplication of establishments that makes it very often difficult to reach the threshold of 20 employees, and so it reduces to a great extent the scope of the Directive. That practical result can bring into question whether Spain –and probably many other States- is really providing the legal framework necessary to accomplish with the Directive's material provisions, consisting in consulting "at the relevant level of management and representation" (article 4.4 (b)) on the recent and probable development of the undertaking's or establishment's activities and economic situation; on the situation, structure, and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged; and on decisions likely to lead to substantial changes in work organization or in contractual relations (article 4.2). If a State uses a very restrictive definition of establishment that even allows employers to artificially split companies, isn't it failing to fulfil with the obligations fixed by the Directive?

The Court of Justice of the European Union (CJEU) has never pronounced on that specific matter. However, other cases might bring light to that point. In Judgment AMS v. CGT (C-176-12, 14 January 2014) the Court stated that the examined national legislation (in that case it was a French provision excluding a category of employees from being counted to determine if thresholds were reached) "has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that directive. Consequently, it is liable to render those rights meaningless and

thus make that directive ineffective" (paragraph 25). In following paragraph 27, the Court affirms that "the margin of discretion that the Member States in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of European Union law or of a provision of that law". The Court also reminds (paragraph 28) that Article 11 of the Directive requires Member States to take all necessary steps enabling them to guarantee the results imposed by Directive 2002/14 and declares that a provision of the Directive cannot be interpreted so that it allows Member States to evade the obligation to reach a clear and precise result imposed by European Union law. This issue would certainly deserve a deeper analysis and it is a path that to my mind is worth going through, but the limited extension of this paper makes it necessary to leave it for future developments.

3-ALTERNATIVES TO BE FOUND IN THE EUROPEAN CONTEXT: IN PARTICULAR, THE FRENCH MODEL

The paper aims to explore regulatory alternatives that other countries have adopted to ensure a wider coverage of employee representation institutions, with a particular attention to the recent reforms that France has implemented in that field.

As a matter of fact, France's worker representation structure is worth taking into consideration. Even though quite a complex institution, regulations on the new social and economic committee (CSE) (works council) guarantees to a much wider extent than that of other European countries that a large number of employees are represented. In fact, the old institutions, personnel delegates, works councils and hygiene and security committee also did that (Giraudet, 2018). Starting from the company level, where a works council is compulsory if the company as a whole has at least 11 employees, a range of possibilities are deployed, from establishment works councils plus a centralized works council to an "economic and social unit" works council, which might regroup different companies with close economic linkages, to "inter-companies" works councils joining employees and employers of different companies sharing the workplace. Collective agreements are called to specify the possibilities offered by the law. Collective bargaining can also define the boundaries of the concept "establishment" to these effects in every single case.

In essence, the main difference between the Spanish and the French model is the space where employee representation is based: whereas in Spain employee representation is based on the workplace and the possibilities of pushing representation to a larger level, whereas company or even multi-work centre level are extremely limited, in France the representation is based *at least*, in the company level and maximum flexibility is then used to create representative bodies in lower or higher-level spaces depending on the interests at stake and with the participation of the parties implied.

The main possibilities offered by the French legislation have been mentioned, but it is interesting to observe some more details of the French legal framework as it is an example of how worker representation can be regulated so that a much larger number of employees obtain representation in the workplace, compared to Spain.

To be more precise, the perimeter of the representation bodies are to be negotiated by the social partners, that is, trade union representatives, or by the company works council itself, together with the employer. They can determine the boundaries of a "distinct establishment", that can correspond to one single or multiple workplaces. Only if the agreement could not be

reached (lack of agreement with the trade unions or lack of legitimated trade unions and impossibility to reach an agreement with the works council), can the employer determine unilaterally a distinct establishment. In any case, the fixation of distinct establishments can never be used as a tool to avoid the constitution of employee representation bodies[4], as a company works council will always exist (whereas a company CSE if no distinct establishments are fixed or a central CSE otherwise). Additionally, the employer's decision can be contested in front of the administrative authority, that will decide whether justification enough to the fixation of a distinct establishment following the legal criteria is proved. These legal criteria can be reduced to the fact that the distinct establishment is an appropriate context to carry out the functions corresponding to personnel representatives, where significant management autonomy concerning the staff decisions is exercised by a head of establishment; the distinct establishment is then a legal concept not necessarily corresponding to a physical establishment.

The company collective agreement can also include the creation of another figure: the proximity delegate. That delegate, who can be a member of the CSE or simply designed by it, will be designed in a more reduced field compared to the company CSE or even the distinct establishment CSE and its functions, quantity and functioning will be determined by the collective agreement itself. The idea is that they stay close to the employees to defend their rights by, for instance, presenting claims to the employer.

A group works council can also be established so that employees can be consulted at group level about strategic business orientations. At the same time, a collective agreement signed by two or more companies can establish an intercompany CSE whenever the nature and importance of the problems common to these companies, settled in the same site or even in a shared geographical zone, justify the need of a common body. Here again, the regulation of all the details is left to the social partners, who will establish the number of representatives, the functions associated to that body, etc. In any case, an intercompany CSE will not substitute each participating company's CSE.

Another possibility offered by the French legislation is the constitution of a so-called economic and social unity (UES) works council. The economic and social unity is defined as an ensemble of separated companies closely bonded one to the other. A UES is not a group of companies, which is defined as an ensemble of companies where one company is the parent company and the others are subsidiary or controlled companies. In the UES ties can be conformed in many ways, but there must be a common interest for employees of the different companies that justifies the convenience of establishing a joint representation body. UES's are established by collective agreement or by court decision in case no agreement has been reached upon that point. It can be divided in distinct establishments as if it were one only company.

As we can see, French regulations on employee representation leave a considerably wide margin to the social partners, so that they can agree upon a broad range of possibilities to determine the structure of employee representation in companies or even within wider frames, based on common interest criteria that will be determined by the social partners themselves. In fact, the social partners can decide the structure of a company or an ensemble

[4] It might though be used no undermine the representation capacity by reducing the number of representatives and representation hours compared to the previous situation, as now one single establishment can be fixed where in the past multiple establishment each one of them with their own representation could exist.

of companies to the effects of employee representation with multiple possibilities to choose from and to divide or assemble employees. However, the freedom left to the social partners in order to decide such compositions will never be detrimental to the representation of one single employee, as a company representation body will be in any case guaranteed, no matter if distinct establishments, economic and social unities or intercompany bodies are agreed upon.

Underlying the regulation of the CSE (but also the previous and equivalent works council and personnel delegates) is the idea that the company is not only an economic entity but also a social entity and that it is not only defined under economic parameters but also by its social composition. This explains the fundamental idea that the determination of the "space" where a CSE needs to be constituted has to be guided by the effectiveness in the defence of the workers' rights and interests. A clear contrast between the French and the Spanish system can be verified in that point.

Despite the logical and reasonable that the French approach to employee representation might look like, in fact many other European countries apart from Spain base worker representation structures not in the company but in the workplace/establishment. This is the case of Germany or Austria, where the threshold is however lower, of 5 employees, or the Netherlands, with a minimum threshold of 10 employees. As consequence, problems faced in Spain in the field of workplace representation might be common, at least partially, to other European countries.

This work has as one of its main goals to formulate proposals in order to rebuild the structures of employee representation institutions that could not only contribute to solve Spanish deficiencies in this respect but also provide ideas to face adaptations that other countries might need.

4- PROPOSALS TO INCREASE EMPLOYEE-ELECTED REPRESENTATION COVERAGE AND TO IMPROVE ITS EFFECTIVENESS

Some proposals are therefore here discussed.

The starting point in the reshaping of personnel representation institutions should be a shift in the centre of gravity of employee representation: it should move from the establishments to the company. As we have seen, many countries have chosen the establishment as the space where representatives are to be elected. Even though different both regulatory and structural conditions influence the dimension establishments tend to have in each country, giving as a result disparate representation coverage rates, it can be maintained that global transformations in company structure generally produce a reduction in large production units and a widespread of small or very small production units. This also happens as consequence of outsourcing and the growing use of independent contractors. Consequently, whenever employee representation is based on establishments, and as long as thresholds regarding the minimum number of employees an establishment needs to have –fixed by almost all national regulations- are maintained, it will be inevitable that large numbers of employees do not have access to representation in the workplace. Therefore, a shift from the establishment to the company as representation field as general rule would open access to representation to a larger percentage of employees. A further argument to the defended position is that in doing so employee representation bodies would come closer to the spaces where the main decisions

affecting staff are taken. That is, the centralization of corporate power also demands a centralization of worker representation for the latter to be effective.

All in all, it is quite a simple move: by transferring employee representation bodies to the company level, the impossibility to choose them in so many establishments in so many companies disappears, and so the lack of representation for so many employees is solved.

Of course, increasing the effectiveness of employee representation is not as simple as that. Despite the proposed correction, strict centralization of employee representative bodies might still not be operational in companies with a wide geographical extension, especially in the bigger countries. This would be the case of Spain as of many other countries. In that case some adjustments can be recommended. In particular first level works councils –establishment level- could be settled on a geographical basis that should be specified according to the national context. In the case of Spain the existing administrative divisions under the name of provinces could be suitable in some cases. However, the geographical criterion is not necessarily the only one that can be proposed today. Communication technologies make it possible to keep permanent contact between employees based in different production units, as well as between employees and employers. The geographical distance is then a side item if a common interest exists. In this sense, the French idea of the establishment not as a physical reality, but as a community of interest regarding contractual and working conditions is very interesting, as it brings about the idea of dividing the company so that all employees are represented and so that they are represented at the most suitable level. In fact, academics acknowledge elsewhere that the "working community" is defined by the sharing of interests and worries (Fita 2017), but the French legal framework has the particularity of effectively basing employee representation structures on that notion. It is true that, as Fita (2017) points out, fragmentation of production processes and precariousness are powerful vectors of common interest disintegration. We could nevertheless regard that common interest from a different point of view and understand that sometimes traditional spaces of common interests might dissolve but other spaces of common interest might appear, such as the common interest of employees geographically disperse in very small production units but working for the same company under the same working conditions. Such common interest could not be united in the past and it can be today by using technologies, as abovementioned.

In such a case a second level works council formed by members of all the first level works councils should be set. In fact, whenever a division of the company is implemented to the effects of establishing employee representation, a second or third level body grouping should be set to guarantee that representatives exist at each level where the company may take decisions affecting the personnel and its working conditions. It should not be a possibility only applicable under agreement but contemplated by law.

Of course the latter correction does not necessarily offer a satisfactory response to the objection that can be opposed to centralising employee representation at company level, because in day to day activity the distancing of representatives to the daily contact with represented employees and their needs might persist with territory works councils. Even though technologies can help they do not solve the problem, as it is more a matter of permanent and informal contact, also building trust. That is why creating the figure of a "unit delegate" could be interesting. It should preferably be a member of the company works council based in the affected production unit. However, in very fragmented companies or in those with production units of diverse size, it can be the case that not all production units are represented in the works council. In such cases, the works council could designate an

employee so that he or she exercises that task. In both cases, and especially if the unit delegate is a member of the works council, a direct connection between employees and the works council is secured. In fact, as already mentioned, this figure is contemplated by the French Code du Travail. It is called "proximity representative" and it will only be activated if the social partners agree upon it in a company agreement. Following the line of wide competences left to the social partners in determining the structure of collective representation, the law establishes that the proximity representative's functions will be determined by the collective agreement. In my opinion, the possibility to appoint a proximity or a unit delegate should not be left as an option to the social partners. It should be part of the representation structure designed by the law, that is, it should be obligatory when a company with multiple production units has one only company works council or territory works councils grouping several establishments in a more or less broad territorial level. A further possibility to rationalize the system –also contemplated by the French legislator- and that appears to be reasonable enough, is that a proximity delegate is designed for more than one production unit. It would to my view be an appropriate response in the case of very small but geographically close production units, for example those in the same town. Proximity representatives should be equipped with prerogatives to exercise control of compliance of labour regulations in the workplace and to interact with the establishment management in parallel to their functions as works council's members when they are or in permanent contact with a correspondent works council member.

Even though the law should contemplate complete representation structures, collective bargaining is a very adequate instrument in order to adapt the structure of worker representation bodies to the particularities of every sector and every company. This is why sectoral agreements and even in more precise terms company agreements should be able to determine that structure. However, in doing so, negotiators should take care not to produce a structure that provide workers with narrower possibilities of making worker representation bodies real. That is, representative coverage deriving from legislative provisions should be granted and changes in the structure of worker representation by collective agreements should only be accepted if they result in an equivalent or larger coverage. This is in fact what the French legislation stipulates, by establishing a company works council when no distinct establishment CSEs are created.

Finally, when discussing the personnel representation in the company, a special mention to representation issues in outsourcing contexts is relevant. Outsourcing generates two types of problems related to employee representation. First, it eminently contributes to the fragmentation of workplaces and to the reduction in dimension of productive units. If the definition of establishment to the effect of employee representation remains linked to the separate production unit, as occurs in Spain, and if grouping establishments is severely limited by the existing legal frameworks, the result will inevitably be –again- that many employees remain unrepresented. This is clearly the case of Spain, where the unchanged definition of establishment combined with decentralization of production result in large numbers of micro-establishments where the number of workers does not reach the thresholds fixed by this same non updated regulation to elect representatives. A solution to that issue could be provided by the aforementioned proposals in themselves, insofar employees pertaining to the principal company as well as those pertaining to contractors and subcontractors would be represented at least in their respective company works council, while works council members would at the same time act as delegates in the workplace. However, further provisions could be necessary to ensure that the contractors' and subcontractors' staff is represented in front of the principal

company, which is the one that will be taking many decisions affecting them. For that purpose a workplace council, formed by works council members elected in the workplace for every intervening company, might be suggested.

Even if legislations were reformed to establish representation bodies (at least) at company level and so representation coverage in multiple work centre companies was extended, still many employees working in small companies with one only work centre would be excluded from representation. In fact, it is reasonable to maintain that in these cases employees can directly interact with their employer and therefore they do not need representation. Still, they might share interests with other employees in the same sector or geographical surrounding; the abovementioned inter-company works council can be an alternative when a limited number of companies easily identifiable are affected. However, sectoral territorial-level representation bodies could also be envisaged, especially to deal with health and security matters[5]. Experiences of inter-enterprise representatives or district delegates created by collective agreement or even simply the reduction of thresholds through collective bargaining can also be found across Europe (Bouquin, Leonardi and Moore, 2007); the severe exclusion of collective bargaining from changing representation structures or reducing thresholds dictated in Spain by the Supreme Court results the more incomprehensible if we adopt a comparative perspective.

Employees undoubtedly need legislations that are not an obstacle but facilitate the constitution of representation bodies to represent those who cannot interact directly with a decision-making employer and to do that in the most appropriate level. However, as Gumbrell-McCormick and Hyman show, it has to be considered that institutional representation structures do not always predict the reality of industrial relations. First because legal provisions deploying an accurate employee representation system do not always guarantee that these institutions are effectively created everywhere they should. To picture that statement almost any European country can be taken as example concerning employee representation structures in small and medium companies. It is the case for Germany, for France and for Spain, among others. In the German case, Schlömer, Kay, Rudolph and Wassermann (2008) qualify the existence of works' councils (Betriebsräte) as exceptional in small and medium-sized work centres (specifically, a study by IAB (Institute for Employment Research)-Betreibspanels conducted in 2004 gave as result that only about 10% of small and medium-sized work centres who could have a works' council did have such an institution, compared to 93% of big-sized work centres)[6]. Additionally, many other contextual factors determine the development of collective relations in companies. The case of France is paradigmatic: it is described as the European country where managerial practices are probably more paternalistic, authoritarian and resembling to those common in the US (Gumbrell-McCormick and Hyman, 2006) despite having one of the most complete and elaborate worker representation system. At the same time, the lack of an institutionalized representation body does not always mean that employees do not have opportunities to collectively defend their rights and interests, as alternative mechanisms might exist. Schlömer et al. (2008) found that in Germany in medium-sized establishments forms of collective representation other than

[5] Eurofound (2014) cites as an example Sweden's Regional Safety Representatives, established as far back as 1949 in the construction and forestry industries, but later extended to all sectors in 1974. Also in Italy territorial representation bodies were established in 1989 in the craft sector. In Spain, collective agreements can create representation bodies with competences exclusively in health and safety issues for all work centres under that collective agreement.

[6] Note that these data do not coincide by those provided by Eurofound (see following footnote).

works councils were more frequent than these (works councils existed in 17,1% of work centres employing 20-49 employees, whereas other forms of collective representation such as round tables, employee committees, employee designed as intermediary or spokesman or spokeswoman, existed in 18,2% of work centres the same size). Eurofound (2014) coincides in sustaining that "the ability to establish institutionalized structures/bodies of employee interest representation seems to be more heavily influenced by the relevant industrial relations framework and in particular the organizational strength of trade unions and their presence at company level than by legal regulation", and cite as example the Nordic countries or Belgium, where thresholds are high but the real presence of representation structures in small and medium-sized companies is quite extended. This publication provides very interesting data demonstrating that in small and medium-sized companies, even if representation bodies can be set up, reality is quite different and such companies mostly do not have employee representatives[7]. However, Schlömer et al. (2008) also found that whenever a conflict arises the need of a works council is frequently verified.

A further and very interesting debate refers to representation of workers who do not have employee status, and that have been mentioned in this paper's background section. Surprisingly, the ILO takes sides in a very clear manner: in the World Report on the Future of Work (2019), it openly advocates for including independent workers in collective representation bodies, even though it does not specify how. It should be noted that the Report does not refer to the creation of specific representation bodies for independent workers, but apparently proposes the inclusion of that category in existent employee representation institutions. This is an idea that can be explored, especially for independent workers who permanently work a considerable number of hours as subcontractors for one same company and who share some interests with employees. Nevertheless, it would be very difficult to realize from the practical point of view: how can we determine which independent workers should be included in the list of voters? Should they be represented by employees or should a share of representation positions be attributed to independent workers? How can both employees' and independent workers' conditions be included in one single negotiation when the legal framework applicable to them is totally different? All these questions should not lead to the exclusion of such inclusion possibility; on the contrary they should invite to further reflection on that matter. For example, it is arguable that the inclusion of independent workers can be easier in sectoral or territorial level representation bodies than in a particular company,

[7] For instance (percentage of companies or establishments with representation bodies where they could be elected): Austria: companies with 5-10 employees: 3%; Estonia: 5-9 employees: 2,3%; Germany: 5-50 employees: 6%; the Netherlands: 10-49 employees: 16% works council and 12% mini works council. However, Denmark: 5-9 employees: 67%. It is interesting to see the results for France as this paper has put its model as an example of a better regulation of employee representatives: 11-19 employees: 37%, which is more than other countries but less than could be expected considering the broadness of its legislation. In the case of Spain, the data offered by Eurofound do not refer to employee representatives in small or medium sized establishments. However doubts on these data should be expressed, as they are quite different from those offered by Eurofound itself in a 2011 publication: coverage of employees by employee representation bodies in establishments between 10 and 19 employees: Austria 10%; Denmark 57%, Germany 39%; France 29%; the Netherlands 26%. The difference could be partly explained by the fact that in the 2014 report only legal structures were considered, whereas in the 2011 report also bodies derived from collective bargaining were contemplated. Still, the differences can hardly be explained by that single factor or by the 3 years passed between the publication of both reports. Also, Eurofounds' 2011 report finds that 46% of Spanish establishments between 10 and 19 employees do have representation bodies.

as issues discussed are more general compared to the ones dealt with at a company level. In any case the ILO's assertion contributes to laying the discussion on the table.

Finally, it must be underlined that the idea that legislation guaranteeing that employees do have voice in the company by updating representation structures so that they cover in the future a much larger portion of employees than they do today is in line with the concept of industrial citizenship, which has been discussed by scholars throughout the years, and its updating in a fast evolving world of work (Fudge, 2005). It is a thoroughly insufficient yet indispensable basis of industrial democracy.

In line with that, the ILO states in the recent World Report on the Future of Work (ILO, 2019), that "collective representation of workers and employers through social dialogue is a public good that lies at the heart of democracy" (p. 41). The ILO refers of course to social dialogue to a much larger extent than the company level, but also to the company level. Furthermore, representativeness to participate at sectoral, inter-professional and even international level is gained in many countries at company level. This would be the case of Spain, where trade unions are representative at national level when they obtain at least 10% of the total number of representatives elected in all companies. This is the reason why the unjustified exclusion of employees from choosing representatives does not only have effects on industrial democracy but also on democracy to a much wider extent.

BIBLIOGRAPHY:

ALÓS, R.; BENEYTO, P.J.; JÓDAR, P.; MOLINA, O. and VIDAL, S. (2015): *La representación sindical en España*. Fundación 1º de Mayo.

BOUQUIN, S.; LEONARDI, S.; MOORE, S. (2007): Introduction: employee representation and voice in small and medium-sized enterprises- the SMALL project. *Transfer,* vol. 13, n.1.

CABEZA PEREIRO, J. (2009): *Las elecciones sindicales*. Bomarzo. Albacete.

ESTEBAN LEGARRETA, R. (2018). *Cuestiones sobre la articulación de la representación del personal al servicio de plataformas colaborativas*. Paper. XXVIII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social, Descentralización productiva: nuevas formas de trabajo y organización empresarial. Cinca. Madrid.

EUROFOUND (2014), *Social dialogue in micro and small companies*, Dublin. https://www.eurofound.europa.eu/publications/report/2014/industrial-relations-business/social-dialogue-in-micro-and-small-companies

EUROFOUND (2011): *Employee representation at establishment level in Europe. European Compnay Survey 2009.* Dublin. http://www.eurofound.europa.eu/pubdocs/2011/43/en/1/EF1143EN.pdf.

FERRERAS, I. (2017): *Firms as Political Entities. Saving Democracy through Economic Bicameralism*. Cambridge University Press. Cambridge.

FITA ORTEGA, F. (2017): El impacto del actual contexto productivo en los derechos de representación de los trabajadores. *Revista General de Derecho del Trabajo y de la Seguridad Social*, num. 46.

FUDGE, J. (2005): After industrial citizenship. Market citizenship or citizenship at work? *Industrial Relations*, vol. 60, nº 4.

GIRAUDET, C. (2018): *Nécrologie juridique du comité d'entreprise: transformation et succession d'une institution juridique*. Revue de l'IRES n. 94-95, 1-2.

GÓMEZ ABELLEIRA, F.J. (2015): "La representación de los trabajadores en las pequeñas empresas" in MERCADER UGUINA, J.R. (dir.): *Las relaciones laborales en las pequeñas y medianas empresas. Problemas actuales y perspectivas de futuro*. Tirant lo Blanch. Valencia.

GUERRERO VIZUETE, E. (2018): "La digitalización del trabajo y su incidencia en los derechos colectivos de los trabajadores" in TORRES-CORONAS, T.; ELUNZEGUI BELASO, A. and MORENO GENÉ, J. (eds.): *2nd SBRLAB international virtual conference: Finding solutions to societal problems*. Universitat Rovira i Virgili. Tarragona.

GUMBRELL-McCORMICK, R. and HYMAN, R. (2008): *Embedded collectivism? Workplace representation in France and Germany*. Industrial Relations Journal, vol. 37, num. 5.

GUTIÉRREZ COLOMINAS, D. (2018): "La necesaria reforma del modelo de representación sindical de los trabajadores en las empresas dispersas: reflexiones y propuestas de mejora a propósito del ámbito de constitución" in TORRES-CORONAS, T.; ELUNZEGUI BELASO, A. and MORENO GENÉ, J. (eds.): *2nd SBRLAB international virtual conference: Finding solutions to societal problems*. Universitat Rovira i Virgili. Tarragona.

ILO- GLOBAL COMMISSION ON THE FUTURE OF WORK (2019): *Work for a brighter future.* Geneva.

MEJÍAS, A. (2015): *Elecciones sindicales. El preaviso electoral*. Tirant lo Blanch. Valencia.

MOLERO MARAÑÓN, M.L. (2010): "La representación de los trabajadores en los procesos de subcontratación" en VALDÉS DAL-RÉ, F. y MOLERO MARAÑÓN, M.L.: *La representación de los trabajadores en las nuevas organizaciones de empresa*. Ministerio de Trabajo e Inmigración. Madrid.

NIETO ROJAS, P. (2015): *Las representaciones de los trabajadores en la empresa.* Lex Nova. Cizur Menor.

PASTOR MARTÍNEZ, A. (2018): Una aproximación a la problemática de la representación colectiva de los trabajadores de las plataformas "colaborativas" y en entornos digitales. *Iuslabor*, num. 2.

RIESCO-SANZ, A. (2012): Empresas sin asalariados y asalariados sin empresas: apuntes sobre la crisis y transformación del empleo. *Lan Harremanak,* num. 27.

ROJO TORRECILLA, E. (1999): Elecciones provinciales de delegados de personal. *Aranzadi Social,* vol. V.

SCHLÖMER, N.; KAY, R.; RUDOLPH, W and WASSERMANN, W. (2008): Arbeitnehmerbeteiligung in mittelständlichen Unternahmen. *WSI Mitteiligungen*, num. 5.

SUPIOT, A. (2007): *Critique du droit du travail*. Paris. PUF.

VIVERO SERRANO, J.B. (2017): *La obsolescencia y los inconvenientes del modelo de representación unitaria de los trabajadores por centros de trabajo. Por un nuevo modelo*

basado en la empresa, la negociación colectiva y no encorsetado a nivel provincial. REDT, núm 194.