

The Role of the Trade Union within the Framework of Company Restructuring Processes: Current Legislation and *Lex Ferenda* Proposals

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Abstract

The aim of this study is to make a specific proposal regarding the capacity of trade unions to represent the interests of all workers in company restructuring operations. We will particularly refer to the case of companies that do not have workers' representatives; when a restructuring is going to happen in a company, the Spanish Law requires a period of bargaining; and it is difficult to share that workers, in an individual point of view, can bargain in name of other workers; even if he/she has been elected for this occasion. The method used in this work is focussed in a comparison between the rules trade unions have to negotiate and the treatment of trade unions as representatives of workers in the field of the conflict and the strike.

Key words

Trade unions; micro size firms; restructuring

Resumen

El propósito de este trabajo es hacer una propuesta concreta respecto de la capacidad del sindicato para representar los intereses de todos los trabajadores en el marco de las reorganizaciones de ámbito empresarial, independientemente de la afiliación de aquellos; especialmente nos vamos a referir al caso de las empresas que no cuenten con representantes de los trabajadores. Cuando una empresa comienza una reestructuración en su seno, la ley española exige la apertura de un período de consultas. Parece difícil compartir que los trabajadores, individualmente considerados, puedan negociar en el nombre de otros trabajadores; incluso aunque él/ella haya sido elegido para la ocasión. El método que se utiliza en este trabajo se dirige a comparar las reglas jurídicas sobre la legitimación legal para negociar en la empresa, con el tratamiento deparado a los sindicatos como representantes de los trabajadores para actuar en el marco del conflicto colectivo y la huelga.

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Palabras clave

Sindicatos; microempresas; reestructuración

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1. Trade union action in companies without workers' representatives: notes on the model of collective representation of workers in Spanish microcompanies

1.1. Workers' collective representation in the small companies

The aim of this study is to make a specific proposal regarding the capacity of trade unions to represent the interests of all workers in company restructuring operations, regardless of whether they are union members or not. We will particularly refer to companies that do not have workers' representatives, either due to apathy on the part of the workers when it comes to choosing representatives – non-union or trade union – in a company or because of the micro dimension of the enterprise, which justifies not having to call union elections or even elect representatives [see articles 62 and 63 of the Spanish Workers' Statute – in Spanish, Estatuto de los Trabajadores (2015); hereinafter, SWS –]. In fact, it is the last mentioned scenario that is of most interest to me, because given that the Spanish industrial fabric is largely made up of small (or very small) companies, it is difficult to understand why the legislators do not focus on this aspect of representation in companies.

Indeed, in accordance with the Spanish Workers' Statute, article 62.1, in companies or work centres with between 11 and 49 workers, the representation of the workers corresponds to the workforce delegates elected under the electoral rules envisaged in the SWS (arts. 67 and subsequent). However, the same article 62.1 makes the existence of a sole workforce delegate possible "in companies or work centres with between six and ten workers, if these so decide by majority". This means that it is the workers who will endorse the decision or not; without prejudice to the fact that the most representative trade unions may call elections and later base their actions on the majority decision of the workers, through the voting procedure itself.¹ Even so, the final decision is in the hands of the workers, not the unions.

The intentional omission by the legislator referred to above is justified, on one hand, by data provided in the Explanatory Statement (section III) of Act 3/2012, where it is stated that "companies with fifty or less employees constitute 99.23% of Spanish enterprises, according to data from the Central Directory of Companies of the National Statistics Institute". Likewise, the National Statistics Institute (Instituto Nacional de Estadística 2018) reveals two illustrative figures: (i) companies with between one and two employees, plus those with between three and five employees, are the most numerous in the Directory;² (ii) if we consider the historic band that began in 1999, the number of companies with small workforces has risen, something that has not occurred in companies with more employees, who maintain a more or less stable level.

Furthermore, the weight of the decentralization of production in Spain is another major factor that favours the dispersal of workers.³ The industrial subcontracting sector is very strong in the Spanish economy and is a key element in the development and consolidation of industries. The Spanish subcontracting industry is characterized by its high level of specialization, technical knowledge and flexibility, capable of providing solutions based on customers' needs. It is a sector made up of highly specialized small- and medium-sized companies with a strong presence of Spanish capital.

1.2. Companies without collective representation of workers and job change

Whether through apathy, or because it is considered that the smaller the number of employees, the more fluid the interlocution between employer and employee, as we

¹ Constitutional Court Sentence (STC) 36/2004, and many others later.

² In effect, the biggest group of companies is the one without salaried employees.

³ The only data available are from studies and analyses made by the Chamber of Commerce of Spain (see Cámara de Comercio de España 2018) and the Network of Local Chambers of Commerce.

saw before, in Spanish companies without workers' representation the management of change in a company that sets out to reach agreement with the workers is a complicated process.

We understand *job* change to be a business situation in which economic, technical, organizational or production reasons combine that require a company, for example, to substantially modify its working conditions, either if these conditions are stated in *individual* or *collective* agreements, without prejudice to the fact that the procedure in case of collective agreements will not end as in the case of individual conditions agreed (see art. 82.3 SWS; see Cruz Villalón *et al.* 2017).

It is true that by the time the *change* is imminent, and in the case of workplaces or companies that do not have workers' representatives, the judicial-labour reform of 2012 (Act 3/2012) – initiated in 2010 by the Socialist government – filled the gap, with greater or lesser success. This introduced the *possibility* of workers choosing between what is (i) known as an *ad hoc* committee, i.e. workers who do not represent the company or the workplace and are chosen for the occasion by the workers at that site, or (ii) a *unionised* committee consisting of trade union representatives who fulfil certain objective criteria (art. 41, related to art. 88.2 of the SWS).

Specifically, if we look at the text of article 41.4 SWS referred to in article 82.3 SWS, an intervention by the company management as interlocutors in a consultation procedure aimed at major modifications to working conditions would correspond to the *legal representatives of the workers*, a group that would consist of thirteen members at most. The legislator's first choice is the participation of *union branches* "when these agree to do so, and provided they have the majority representation in the works council among the workforce representatives of the affected work centres, in which case they will represent all the workers in the affected centres".⁴ However, in the absence of that envisaged in that paragraph,⁵ the workers' interlocutors will be different depending on whether the measure adopted by the company affects one or more work centres.

- If it affects just one work centre, the works council or workforce representatives will act as an interlocutor. In the absence of legal representation of the workers,⁶ the legislator gives the affected workers the choice between "assigning their representation for the negotiation of the agreement, at their criterion, to a committee of a maximum of three members made up of workers of the company, chosen by them democratically, or to a committee with an equal number of members, according to their representability, by the most representative trade unions from the sector in which the company operates and which would be legitimised to be part of the negotiating committee for the collective bargaining agreement in application of the same" (art. 41.4 SWS).⁷
- In the event of the procedure affecting more than one work centre, the solutions are various and diverse depending on whether (i) there is an intercentre committee with that function attributed to it by collective agreement (also see art. 63.3 SWS), a priority solution over the others; (ii) all the centres have legal representatives of the workers who will act as interlocutors in the committee created; and (iii) some centres have legal representatives and others do not. It is this case - the most complex one -

⁴ With Benavente Torres 2014, p. 130, the priority of the union branches was established on Legislative Royal Decree (Real Decreto-ley or RDL) 7/2011, probably with the aim of aligning it with the constitutional supremacy of the trade union and the Covenants and Recommendations of the ILO.

⁵ With Cruz Villalón 2010, p. 98. We understand that, there being no unitary representatives, consultation/negotiation with union branches could not take place.

⁶ Here we transcribe the data provided by the Explanatory Statement (section III) of Act 3/2012. In that "[c]ompanies with fifty or less workers constitute, according to data from the Central Directory of Companies of the National Statistics Institute, 99.23% of Spanish companies". This figure leads one to think that the absence of legal representation in Spanish companies is not merely anecdotal.

⁷ Called "labour committee" and "trade union committee" by De la Villa Gil 2011, p. 3.

that we will focus on. Thus, “if any of the affected work centres has legal representatives of the workers and others do not, the committee will only be made up of legal representatives of the workers of the centres that have these representatives”; with the important caveat that “the workers in the centre that do not have legal representatives may decide to appoint the committee referred to in paragraph a)”, i.e. the *non-union* committee, “in which case the representative committee will be jointly made up of legal representatives of the workers and members of the committees envisaged in said paragraph, in proportion to the number of workers they represent”.

It may also be the case that, regardless of whether the procedure affects one or more work centres in which there are no legal representatives of the workers, these decide to not appoint an *ad hoc* committee, so their representation will lay with the legal representatives of the workers of the affected work centres that have them, “in proportion to the number of workers they represent”. Finally, “[i]f none of the work centres affected by the procedure has legal representatives of the workers, the representative committee will be made up of whoever is elected by – and from – the members of the committees appointed in the affected work centres, as per paragraph a), in proportion to the number of workers they represent”; i.e., this last scenario refers to the analogous solution of the procedure affecting just one work centre, which allows the workers to elect the type of committee they wish to set up, i.e. *non-unionised* or unionised.

The novelty in the current text⁸ *vis-à-vis* the reform of 2010,⁹ or regarding the previous legislation, lies in that the areas that the agreement may invalidate are those listed in article 82.3 SWS, i.e. working hours, working timetable and the distribution of work time, shift work system, the remuneration package and salary levels, work and performance system and functions, when these exceed the limits envisaged in article 39 of this Act for functional mobility and voluntary improvements in the protection provided by the Social Security system.¹⁰ These are more substantial and numerous than those envisaged in the text of article 41.2 SWS that was in force until the labour reform.¹¹ This is complemented by the fact that Act 3/2012 extended the *closed* list of areas covered by the legal procedure to ignore certain provisions of collective bargaining agreements or not apply them, which did not occur with the list of conditions that could be substantially modified (cf. Roldán Martínez 2014, p. 222).

To put it more clearly, due to the effect of the 2010¹² and 2013-2014 reforms the employer, together with committees set up by the workers for the occasion, may substantially modify the working conditions agreed by the parties legitimized to agree

⁸ Art. 9.2 of Act 1/2014 on the protection of part-time workers and other urgent measures of an economic and social nature. In any case, the text of art. 9.2 of Royal Decree-Act 11/2013 was the same as that of this Act.

⁹ It was, effectively, Legislative Royal Decree (RDL) 10/2010 on urgent measures for the reform of the labour market that consecrated these committees. For Nieto Rojas (2015, p. 24), the reform with the biggest impact in terms of the levels of representation of workers in the firm's field.

¹⁰ In reality, in the case of the entire State (year 2013), lower salary levels *alone* was the most common feature, as it affected 42%; these lower salary levels and remuneration *at the same* time, 8.6%; salary levels, the remuneration package, the working day, work timetables and the distribution of work hours (simultaneously) at 5%; and other non-specified cases at 35.8%. Data obtained from Ministerio de Empleo y Seguridad Social (2014).

¹¹ Until then, art. 41.2 SWS envisaged that a company agreement that would decide not to apply certain conditions of the collective bargaining agreement in force for the company could do so regarding working hours, the shift work system, the remuneration package and the work and performance system.

¹² In reality, the alternative between the trade unions and the internal *ad hoc* committee was not envisaged in RDL 10/2010, although it does appear in Act 35/2010. The former stated that “In cases of the absence of legal representation of workers in a company, the workers may assign their representation (...) to a committee of a maximum of three members made up, depending on its representability, of the most representative trade unions and representative of the sector the company belongs to, appointed by the joint collective bargaining committee applicable to it”.

collective agreements, obviously when reasons that justify it in the company are the case.

In reality, there are several questions around the issue we are dealing with, but the study partly focuses on analysing the legitimization of company agreements that favour the non-application of certain conventional areas in a particular firm, through the agreement between the employer and an *ad hoc* workers' committee (arts. 82.3 and 41.4 SWS). This is not raised in the action of unconstitutionality against Act 3/2012 – without prejudice to the fact that the doctrine accused it of being unconstitutional (Casas Baamonde 2014 and Benavente Torres 2015) – nor did the Constitutional Court treat it *obiter dicta*, nor did it lead to a complaint by the trade union representations that formulated it against the Spanish Government (CCOO, UGT, CSIF, USO and other national unions; see International Labour Office 2014) – although defending its international disconnection (Terradillos Ormaetxea 2016, pp. 9-12) –, probably because that figure had already been introduced in the 2010 reform (Act 35/2010, art. 5).¹³

1.3. *The representation of the collective interest by a trade union in firms without workers' representatives*

This study sets out to confirm the initial hypothesis mentioned above: under current legal regulation, the trade union as an organisation encounters serious difficulties when it comes to acting in the business environment to *represent* the interests of workers of companies or workplaces with a small workforce, especially in the phase just prior to *job change*. Indeed, article 61 of the SWS, the entry point to *Title II* on participation, points out that workers are entitled to participate in the company through the representative bodies regulated under this title. Furthermore, this same article adds that this should take place “without prejudice to other forms of participation”. The Labour Union Freedom Act 11/1985 (Ley Orgánica 11/1985; acronym in Spanish: LOLS) completed the legal regime for the participation of workers in companies.

We will not reproduce the debate that was created by the approval of the LOLS, although it envisaged union branches (art. 8) and union representatives (art. 10.3) as bodies belonging to a trade union that defend *member* workers in a company. According to articles 2.1 d) and 2.2 d) of the LOLS, trade union freedom includes the right to trade union action, whose manifestations include the presentation of candidatures for the election of works councils and personnel delegates. On one hand, we would highlight the fact that the legislator clearly opted for a model or representation of workers' interests through the so-called “legal or non-union institutions” within which trade unions may incorporate their members. On the other, if we focus on the text, the LOLS is not restrictive. On the contrary, it is explicit when it states that trade union action will mean at least these powers and functions, although this does not exclude others. Indeed, article 10.1 of the LOLS, by envisaging the constitution of union representatives based on certain requirements, gives these the powers and functions corresponding to trade union action (art. 10.3), particularly “having access to the same information and documentation that the company provides to the works council” (section 1), and lists these rights “excluding those that may be established in a collective bargaining agreement” (art. 10.3 of the LOLS).

It is also widely known that, due to the legal regime of elections in companies (arts. 69 and following of the SWS) based on a minimum threshold of workers (art. 62.1 of the SWS), trade unions can present *member* candidates to cover posts on the works council or directly present *member* workers to be appointed as personnel delegates.

¹³ Furthermore, other procedures related to complaints about International Labour Organization – hereinafter, ILO – Agreements ratified by Spain have been analysed, as well as Spain's situation in relation to the obligation to report. In reality, two themes related to the ILO 87 and 98 agreements have been found, although they are relative to the determination of minimum services during strikes and a 5% reduction in the salaries of civil servants in Spain, cf. ILO 2013.

The channel of action of the trade union in a company, at least for the recognition of the rights under *Title II* related to participation, therefore consists – except for cases that will be described later – of the *infiltration* of unionised workers into non-union representative bodies. We would point out, however, that this legal regulation differs considerably from that chosen by the Spanish legislator to represent workers' interests in the *field of negotiation or conflict, even within the framework of strikes*.

Another issue that merits attention at this point is that the consultation period that can be initiated in different procedures of company restructuring (imminent change) is mostly covered in *Title I* of the SWS, under the heading *Content of the employment contract*. Specifically, this study will start with this section.

2. Company reorganization and consultation period in Spanish legislation: differences with European directives and links to other areas of trade union action

2.1. The consultation period in the recent history of labour relations in Spain

An initial approach to the text of Act 8/1980 of the Workers' Statute (hereinafter, WS 1980), in relation to procedures for the management of change, i.e. the subject of this study, reveals a striking simplicity which (logically) emerges from the low level of current regulation regarding company flexibility measures that could favour the continuity of a company instead of its disappearance or partial cessation of activity. This deductive initial perspective also reveals quite a clear separation of the activities of consultation and collective bargaining. The former was fully regulated in *Title II (On the rights of collective representation and assembly of workers in a company)* and the latter, in *Title III (On negotiation and collective rights)*.

The right to consultation, normally exercised in the phase prior to the materialization of the "change", was understood as the "issue of reports", a competency that the organs of unitary representation of the workers had – and still do – and envisaged, with the odd exception, in article 64 SWS. As regards the objective domain to which the "weak" right to consultation was applied, this same precept (specifically, art. 64.1 three SWS 1980) referred to themes related to the restructuring of the workforce and total or partial, definitive or temporary dismissals by the company; shorter working days, or the total or partial transfer of facilities, company vocational training plans; the implementation of system reviews to organize and control work; time studies, the establishment of systems or bonuses/incentives and job evaluation. Likewise (64.1 four SWS) the works council had (and has) the competency to issue a report when the merger, absorption or modification of the legal *status* of the company represented any factor that could impact on the number of jobs.

Regarding the regulation of workers' participation at the time of *company change*, it is seen that neither in the scenario envisaged in article 40 (geographic mobility) or in article 41 (substantial modification of working conditions), the latter being extensively reformed in recent years, no consultation period was envisaged in the sense of negotiating in good faith with a view to reaching agreement. This occurred, however, without prejudice to the fact that the statutory regulation should envisage the possibility of an "agreement" between the company and the workers' representatives regarding the particular case (Escudero Rodríguez 1997, p. 249). The tone of arts. 40 and 41 WS1980 was very clear; both allowed a transfer or modification when there were technical, organisational or production reasons that justified it (or contracting related to the company's activity in the case of transfers), in such a way that it was the company that should accredit the just cause, which would be authorised by "the labour authorities, following a file processed for the purpose".

The text of article 41.1 was significantly different, although the unilateral nature of the change authorised by the labour authorities persisted (in this case, "following a report by the Labour Inspectorate"): "the company management, when there are

proven technical, organisational and production reasons, may agree substantial modifications to working conditions which, if not accepted by the legal representatives of the workers, will have to be approved by the labour authorities (...)".

Business succession was simplified by the notification of such a change to the legal representatives of the workers of the assigned company (art. 44.1 WS 1980); while the procedure for the suspension of contracts for technological, economic reasons or others arising from *force majeure* was the same as the one for collective dismissals.

The previous requirement for "authorization by the labour authorities" for a company to proceed with carrying out major measures with a clear impact on the workforce and their labour rights such as collective transfers, substantial modifications to collective working conditions, the suspension of contracts for technological, economic reasons or others arising from *force majeure* or collective dismissals for those same reasons – regardless of the fact that Spain had not joined the EU at the time – was advocated as the ultimate safeguard to preserve workers' rights.

Regarding the extinction (and suspension, see above) of contracts for technological, economic reasons or others arising from *force majeure*, stated in article 51.3 SWS, references were only found to a "period of twenty calendar days for *discussion and consultation* with the legal representatives of the workers". However, neither in this section nor in others was the combination of consultation and negotiation in good faith stated. For example, section 5 of article 51 SWS states that "Once the consultation period has concluded with the agreement of the parties, this will be notified to the labour authorities (...)". In practical terms, the Regulation implementing article 51 WS 1980 (see art. 9 WS 1980 titled *Prior consultation*)¹⁴ did not add much, except for the requirement-obligation to present it in writing (arts. 11 and 12 WS 1980).

More importantly, the law dispensed with strict legitimization rules for reaching a company agreement; neither was there provision for a register or deposit of documents (see Royal Decree – RD – 1040/1981, in force at the time) and, basically, the only prior – and not lesser – control over them fell to the labour authorities, who, if "they could appreciate, either *ex officio* or at the request of a party, wilful intent, coercion or abuse of law in the conclusion of the agreement, they would notify the judicial authorities so that they could declare them null and void" (section 5. II of art. 51 WS 1980).

The freedom to agree shorter working hours, the partial transfer of facilities or collective dismissal, to quote some examples, was very wide-ranging; i.e., if an understanding between the parties was feasible, simple or easy to reach, any agreements whose proceduralization was as free as it was informal¹⁵ became "improper" acts or agreements. However, their origin was collective autonomy, given that the rules of legitimization of negotiations, while being generic – "representatives of the company and the legal representatives of the workers" – projected the effects of the collective agreements onto the pact.¹⁶ Naturally, if there were no legal representatives of the workers to agree these initially unilateral company decisions

¹⁴ Royal Decree 696/1980 applying the Workers' Statute to dossiers of substantial modifications to working conditions and suspension and extinction of labour relations. The periods of thirty and fifteen days respectively, referred to in points two and thirteen of article 51 of the SWS, will be understood as maximums, and within them, the parties may consider the consultations terminated before the expiry of the time limit through an agreement between them, or through express disagreement reflected in a corresponding official document.

¹⁵ For the implementation of the content of the statute, refer to Royal Decree 696/1980 for the application of the SWS to the dossiers of substantial modifications to working conditions and suspension and extinction of the labour relationship, a regulation that only demanded that the pact or agreement should be made in writing (art. 2.1 SWS).

¹⁶ On the collegiate action of the works council and its effect on the decisions adopted within it, see Nieto Rojas 2015.

with, the safeguard always remained of the authorization of the dossier by the labour authorities.

In conclusion, with the labour legislation of 1980 agreements on the “management of change” could – or not – arise from consultation that could be compared to *free* or *open* negotiation and to consultation as such, although in which negotiation in good faith was dispensed with.¹⁷ In our opinion, therefore, the management of change, when the labour authorities did not interfere, took place more in the domain of participation rather than in collective bargaining, and the spaces between the two models were much clearer than in the current legislation.

This cohabitation of consultation and the proceduralization of company decisions underwent a major upheaval when *en masse* company agreements appeared in WS 1995.

It is well-known that such agreements, through which both internal flexibility measures (collective transfers, the substantial modification of working conditions of a collective nature, the collective suspension of contracts, reduction in working hours and non-application of the collective agreement) and external flexibility measures (collective dismissals) are the result of a negotiation process that the legislator has come to call “consultation period”. This phase mainly takes place under Chapter III of the SWS titled *Modification, Suspension and Extension of the Employment Contract* and is inherent to *Title I, On the Individual's Relationship to [his/her] Work*.

However, these company agreements, when they refer to workers' participation, lack one of the basic characteristics of legal rules: the automatic application of their clauses. Perhaps the fact that they are stated in *Title I, Chapter III* of the SWS, i.e. in a place titled *On the Individual's Relationship to [his/her] Work*, and specifically in the phase of *Modification, Suspension and Extinction of the Employment Contract*, gives sufficient clues as to the legislator's intentions. Basically, it allows changes to what has been agreed based on individual autonomy, and provided that there is a good cause on the part of the company; in second place, and with the inevitable civil norms of reference intervening, trying to reach an agreement between the parties; an agreement of a contractual nature, in any case, although with *erga omnes* effectiveness.

In effect, in the case of article 41 of Legislative Royal Decree (Real Decreto Legislativo or RD) 1/1995 (WS 1995) it was added (section 4) that “[s]uch an agreement would require the agreement of most of the members of the committee or works council(s), or workforce representatives, as the case may be, or other union representations, if they exist, that represent a majority overall”. Nonetheless, article 41, regardless of whether agreement is reached or not, stated that “after the completion of the consultation period the employer will notify the workers of its decision on the modification”. More importantly, in accordance with article 138 of Legislative Royal Decree 2/1995, Labour Proceedings Law (hereinafter, LPL), the worker who is individually considered and affected by the “company decision” may initiate, for example, the process of “substantial modification of working conditions”. Emphasising the above, section 2 of article 138 LPL required that the worker's representatives should also be called to make a claim when the measure had their agreement, so that despite the agreement – and this is important – through the procedure under article 138, the objections made by a worker affected by geographic

¹⁷ In favour of separating the functions contained in the collective negotiation in a company (salaries and working hours) from other working conditions that are inherent to the management of change (introduction of new technologies, promotion and mobility, conciliation, training, work and performance systems, salary structure, productivity bonuses, holiday calendars and other time off work, timetables and distribution of the working day, overtime, social plans, etc.) about the consultation periods, cf. Landa Zapirain 2017.

mobility, substantial modifications, suspension or reduction of working hours would be substantiated.¹⁸

This observation of the procedures indicated is a determining factor when it comes to deciding the legal nature of “agreements to manage change”. This is because current labour procedural law does not allow a collective bargaining agreement to be challenged by an individual worker, regardless of how much he/she disagrees with it.

In this context, with that legislation the non-existence of legal/union representatives of the workers to undertake the consultation-negotiation was not a big problem for the purposes of formalizing an agreement. Royal Decree 43/1996, which approved the Regulations for the procedures to regulate employment and administrative action in the field of collective transfers, envisaged (art. 4) that the subjects indicated in the previous article would be legitimized to intervene in the employment regulation procedure. In cases where there was no collective representation of the workers in the work centre or centres, the workers themselves could intervene in the conduct of the procedure. If the number was equal to or higher than ten, they should appoint up to five representatives with which the labour authorities would deal with in successive actions.

Reading all this together leads us to conclude that company agreements under *Title II* of the SWS show more differences from collective agreements than could appear *a priori*. It would be different to say that company pacts or agreements are part of the mere participation of the workers in the company management or are the result of collective bargaining. In reality, for a part of the scientific doctrine the legislator replaced a legal paradigm by another here (Escudero Rodríguez 1995, p. 149): from mere participation of the workers, the SWS led to a truly collective bargaining. For another sector of the doctrine, these mechanisms to manage change would correspond to a “procedure for taking decisions” of a business nature,¹⁹ in an approach to defending the tenets of company freedom is inherent to article 38 of the Spanish Constitution (hereinafter, CE).²⁰

It should be remembered that, in accordance with our case law (Sentence of the Supreme Court – STS – 4017/2013), the consultation period intrinsically involves the duty to *negotiate* in good faith. In the words of the Supreme Court, “the legal expression offers undeniable generality, by not making any reference to the obligations that the duty involves and – even less – to the behaviours that may infringe it”. In any case, in accordance with the Supreme Court, in the definition of the duty to negotiate, it should not be forgotten that the legal provision should not appear as a *mere specification of the general duty to good faith that corresponds to the employment contract [and to any contract: art. 1258 on collective agreements]*,

¹⁸ As is known, in the case of collective dismissal the Labour Proceedings Law (LPL) in force until 2011 (art. 124) allowed the judicial authority to declare null and void, *ex officio* or *at the request of a party*, the company agreement to collectively extinguish contracts if the prior administrative authorization has not been granted.

¹⁹ Pérez de los Cobos Orihuel 1998, p. 145. This thesis ties in with the notion of company freedom proclaimed in art. 38 CE.

²⁰ *Company freedom* understood not so much as *freedom of business initiative* but as the freedom to organize the means of production. According to the jurisprudence of the Constitutional Court, the essential element of this freedom, as a manifestation of the economic system, has three basic dimensions: 1) although we will not go into detail on it now, freedom of access to the market, a freedom that needs other additional and previous rights to be acknowledged (arts. 33.1, 35.1 CE) and protected to facilitate contractual freedom [art. 1255 Royal Decree of 24 July 1889 (Spanish Civil Code)]; 2) the freedom to exercise a company's activity which, in turn, would have two manifestations: the freedom to take decisions, or the entitlement of the employer to establish his/her own economic purposes or objectives to organize the company and orientate its activity, and 3) the freedom to compete, which is not part of the scope of this study, as it obliges individuals to avoid conducts that could favour commercial practices or arrangements of a monopoly or cartel nature, and from which an artificial increase in prices or a restriction of production could emerge. In effect, the Constitutional Court has duly profiled the essential content of company freedom. See the doctrine contained in its sentence, STC 112/2006 (F.J. 8), which also refers to previous sentences.

and that in the field of collective bargaining art. 89.1 of the SWS specifies that “both parties are obliged to negotiate according to the principle of good faith”.

The term *consultation* can be misleading, taking us to the area of participation rights under *Title II* of the SWS, with the notable difference that in the procedures indicated in *Title I*, the “parties should negotiate in good faith with a view to reaching an agreement”. For this reason, early case law put a nuance on what “negotiate in good faith” means. In other words, in the consultation phase authentic negotiation is required, i.e. a real will to negotiate and reach agreement that should not be equated with the obligation to obtain an agreement.²¹ Furthermore, this does not happen in the field of the negotiation of a collective bargaining agreement either. The holding of the consultation period does not admit either the mere appearance of negotiation or the exclusion, in advance, of reaching an agreement. Therefore, if this negotiation does not occur for reasons attributable to the party initiating the process – the employer – the entire phase will not be completed.

The reference to “good faith” takes on considerable importance in the understanding of the scope of the “consultation period”. What was initially a rather vague legal concept – “good faith” in negotiation – has been defined by our judges on many occasions. This consultation period constitutes, as defended in case law (STS 4017/2013), a *manifestation of collective bargaining* that requires the interlocutor of the employer to be either a workers’ representative – either union or non-union – or an *ad hoc* committee.

This concept of a *Spanish-style* consultation period exceeds (according to the principle of the most favourable regulation) the provisions of the European directives that govern the interests at stake at times of company restructuring. Specifically, we refer to Council Directive 98/59/EC (Approximation of the legislation of the Member States that refers to collective redundancies) and to Council Directive 2001/23/EC (Approximation of the legislation of the Member States related to maintaining workers’ rights in the case of transfers of companies, centres of economic activity or parts of companies or centres of economic activity). For example, article 2.1 of Council Directive 98/59/EC states that “Where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time *with a view to reaching an agreement*”.²² Equally important is the content of article 2.2, when it demands, in reference to the content of consultation, that it should “*at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at assistance for the redeployment or retraining of workers made redundant*”.²³

Basically, it is not just a case of referring to the grammatical rules for the interpretation of norms, which would be sufficient, but according to the Supreme

²¹ See, recently, the Sentence by the Spanish National High Court (SAN), Social section, 394/2014 – Point of Law 17 – when referring to the procedures of non-applicability of collective bargaining agreements: “The first thing to be said is that, in the case of procedures of non-applicability of collective bargaining agreements, the existence of sufficient prior negotiation in good faith during the consultation period is an essential requirement for the administrative body to assume its competency. Therefore, the lack of this period of negotiation in which the requesting party has made all the necessary efforts to reach an agreement is a case not only of *infringement of the obligation to negotiate collectively*, which in the case of articles 40, 41, 47 and 51 give rise to the nullity of the measure adopted, but also a case of lack of competency of the negotiating body to decide, which in the case of administrative resolutions also constitutes incurable nullity [art. 62 of the LEJPAC (Law on the Legal Regime governing Public Administrations and the Common Administrative Procedure; Act 30/1992)] However, this nullity would arise from lack of competency and the assumption of this competency by the Administration inevitably means the failure of the prior negotiation for reasons not imputable to the requesting party” (the italics are ours).

²² The letters in italics are ours.

²³ In relation to the useful effect of the information, the Court of Justice of the European Communities (Section Four) [Judgment of the Court of 10 September 2009, section 52] rules that “From this provision it is understood that the information can be communicated during consultation, and not necessarily at the start of the consultation process”.

Court we should once again highlight the insertion of “fair dealing” in good faith – with the odd variant in relation to contractual good faith – that should preside the consultation period in Spanish companies. This does not appear in the minimum requirements text of the Directive. Therefore, the most demanding part of the text of the Workers’ Statute was sufficient to transpose the Directive, as it was the most favourable to the workers (see art. 5 of Council Directive 98/59/EC).²⁴ The doctrine, however, locates the reference Directive within the group of regulations that foster the achievement of consensus-based solutions through social dialogue and managerial collective bargaining (Monereo Pérez 1992, pp. 171-172). In practice, this interpretation has meant the adoption of a range of legislative policy opinions by the Member States of the Union in cases of company restructuring.

Directive 2001/21/EC (Approximation of the legislation of the Member States related to the maintenance of workers’ rights in the case of transfers of companies, centres of economic activity or parts of companies or centres of economic activity) is the other Directive related to managing change. This Directive was transposed into the Spanish legal system after the 1995 Labour Reform. Its Preamble stated that “information, consultation and participation of workers should take place through suitable mechanisms, bearing in mind the practices currently in force in the different Member States”. It continues by underscoring that “information, consultation and participation should be carried out at the right time, particularly when company restructurings or mergers take place that affect workers’ employment”.

Regarding the articles of the abovementioned Directive, the precepts dedicated to information and consultation are contained in Chapter III. This chapter indicates when these rights should be exercised, the subjects involved, or by whom or at what level of the company they should be exercised. Of interest to us is section 2 of article 7 of that Directive, which requires that if the transferor or transferee envisages the adoption of measures related to its workers, it will be obliged to present these measures for consultation to the workers’ representatives sufficiently in advance “with the aim of reaching an agreement”.

However, section 9 of article 44 of the SWS, which contains the transposition of this precept in the Directive – and which, prior to the transposition, had a very different tone²⁵ – extends the powers of Spanish workers’ representatives to make *negotiating in good faith* compulsory during the consultation period, with a view to reaching an agreement. Naturally, a negotiation of this nature should be carried out when the measures envisaged consist of collective transfers of personnel or substantial modifications to their working conditions.

Nevertheless, it is reiterated that the obligation to negotiate in good faith in these periods, both under European and Spanish legislation, does not involve an obligation to reach an agreement, nor is it acceptable that the negotiation should necessarily involve a reduction in the scope of the measure initially proposed by the company. This should not preclude that the good faith shown by the company in the negotiation

²⁴ The same occurred with Directives 94/45/EC, then 2009/38/EC and 2001/86/EC. Regarding the first, Act 10/1997, which transposed the original Directive, in its art. 10 envisaged that the central management and the negotiating committee should “negotiate in good faith, with a view to reaching an agreement”. On this occasion, the Spanish legislator was more explicit regarding the nature and effectiveness of the agreement, giving it the nature of a statutory company agreement (see art. 13) and demanding compliance with the formal rules (in writing, register, deposit and official publication in accordance with the terms of the SWS). For its part, an agreement that leads to the constitution of a representative body of workers in a European company, or even the establishment of rules for participation, will be the result of a process of *negotiation in good faith* between the central management and the negotiating committee set up for the purpose (art. 8.1 Act 31/2006); and, naturally, the agreement would be of a legal nature.

²⁵ Indeed, art. 44 of WS 1995 lacked any reference to workers’ possible information and consultation rights regarding measures arising from the transfer of a company. Only art. 64.5 of the SWS referred to the right to consultation in the sense of issuing a report prior to the carrying out, by the employer, of restructuring measures. In greater detail, Monereo Pérez 1992, pp. 438-442. Also see the next section of this study.

would be assessed according to certain basic principles (transparency and reasonableness).²⁶

Neither is it the case that the *negotiating* procedure to be carried out in a Spanish company determines the legal nature of the company agreement reached, because it is a common space in which there is collective bargaining that leads to statutory collective bargaining agreements; this is also the case, for example, in extra-statutory collective bargaining agreements of a contractual nature. Basically, the appearance of company agreements in the text of the Spanish Workers' Statute of 1995 (RDL 1/1995) led to the proceduralization of the company agreement *towards* the rules of a statutory collective agreement. A good example of this is the obligation to good faith that governs the procedures of *Title I* and the negotiating phase of *Title III* (art. 89 of the SWS).²⁷

Another indication of the similarities between the consultation and negotiation phases in a collective agreement are the provisions contained in the Third Agreement for Employment and Collective Negotiation (III Acuerdo para el empleo y la negociación colectiva 2015, 2016 y 2017). In the chapter on restructuring processes, the social partners call for the strengthening, *through collective bargaining*, of the application of measures for suspending contracts and the temporary reduction of working hours in one-off situations, while maintaining employment. The parties also observe that the management of restructuring would be done by considering the social consequences related to a series of factors, among them *collective bargaining agreements* and workers' needs. The Agreement also proposes that negotiation processes should be transparent and carried out with the *workers' representatives*.

2.2. The trade union in company restructuring processes: less scope for action?

Returning to Spanish legislation, the connections between Titles I and III of the SWS are clear: both in different procedures of company restructuring (*Title I*, including art. 82.3 II of the SWS) and in the formalisation of a statutory company agreement, the intermediate process consists of collective bargaining between the parties. Therefore, it is not understood that, in the case of the absence of workers' representatives in a company or a centre of activity, art. 41.4 a), the SWS allows workers in the centre to choose between an *ad hoc* committee and a *unionised* committee.

Indeed, article 41.4 of the SWS states that, in a centre of activity where there is no legal representation of workers (and/or there are no union branches, or these have not been agreed in the composition of the representative committee under the terms of article 41.4 II of the SWS), the workers affected by these modifications have two options:

- Constitute a "committee of a maximum of three members made up of workers of the company and chosen by these democratically";
- Constitute a "committee of an equal number of appointed members, depending on their representativeness, from the most representative trade unions of the sector to which the company belongs, which would be legitimised to be part of the negotiating committee of the collective agreement applicable to it".²⁸

²⁶ See SAN 394/2014, same Point of Law.

²⁷ FIDE (2016, p. 1072, section 27) proposes that art. 3 of the SWS should define the legal effectiveness of those other collective agreements that are different from collective bargaining agreements. Although I agree with Rojo Torrecilla (2016, p. 1084) that the Document is in favour of accepting the contractual effectiveness of these agreements.

²⁸ Note that the Sentence of the Supreme Court of Navarra (STSJNA), Social section, 627/2015 prevented the replacement of the commission made up of "the most representative and representative trade unions in the sector" of art. 41.4 a) of the SWS, by one consisting of the trade unions that are signatories to the agreement. Moreover, the disassociation between a signatory trade union and a representative trade union

An agreement reached by any of these committees with employers' representatives would adopt a "presumption of conformity", i.e. it is presumed that the justifiable grounds required by section 1 of article 41 of the SWS concur. In line with this precept, the agreement "may only be challenged before the social courts in the event of the existence of fraud, deceit, coercion or abuse of law in its conclusion". Hence the importance of the composition of this committee.

The criticism we make of the so-called *ad hoc* committee lies in the fact that the rules governing civil contracts seem to be gaining ground in our Legal Code. Indeed, article 41.4 *in fine* of the SWS requires that the agreement signed by an *ad hoc* committee requires the agreement of most of its members (two persons) but "provided that it represents most of the workers in in the affected centre or workplace". This major novelty takes us back to the Civil Code, whose article 1259 warns that "[n]obody may contract in the name of another person without being authorised by that person or holds his/her legal representation by law".²⁹

The *FIDE Document* (Fundación para la investigación sobre el Derecho y la Empresa – FIDE – 2016) also proposed the disappearance of *ad hoc* workers' representation, linking this to a demand for the effective creation of internal flexibility measures and their compliance and implementation in practice. Curiously enough, this effectiveness involves having strong and permanent or stable trade union representation (FIDE 2016, p. 1072, section 31).

Having established the connections between the consultation periods in company restructuring processes and collective bargaining in companies, it is opportune to advance towards the presence of trade unions in that specific area of collective bargaining, and in other areas where they carry out their functions. All this aims at discovering the links (or disconnections) between certain areas and others.

3. The trade union as an organisation in collective bargaining, industrial actions and strikes. Required reading

3.1. Criteria for action of a trade union in collective bargaining

Starting with the sphere of collective bargaining, legislators in the 1980s (and this is still the case today) opted for a very guarantee-based implementation of article 37.1 of the Spanish Constitution, whose text reads: "The law shall guarantee the right to collective labour bargaining between workers and employers' representatives, as well as the binding force of the agreement". Thus, *Title III* of the SWS gave legal effect and *erga omnes* to the collective agreement negotiated in accordance with its rules. With the text of article 82.3 of the SWS, "the collective bargaining agreements regulated by this Act are binding upon all employers and workers included within their scope of application, throughout the entire period of their validity". This wide-ranging effect is still evident when we examine the scope or benefits of sector agreements, or the benefits in groups of companies and/or enterprise networks, both areas in which trade unions can negotiate directly. Naturally, the rules for the adoption of agreements within the negotiating committee once again link the trade union with the area of representation, by envisaging (art. 88.2 of the SWS) that "... the negotiating commission shall be validly constituted, without restriction to the right of all the parties legitimized to participate therein in proportion to their representativeness, when the unions, federations or confederations and the employers' associations referred to in the preceding article represent at least,

is considered by the Court as harmful to the right of trade union freedom, "as it attributes distorted representation to the signatory regardless of its representativeness in the sector".

²⁹ Regarding the adoption of agreements in the *ad hoc* committees, the Supreme Court doctrine argues that, "bearing in mind that it is a committee, its *modus operandi* should be equated with that established for non-union representative bodies of workers". Therefore, action by its members should be collegiate and not individual, and that the manifestation of the collegiate will should be made through the majority of its members (STS 2322/2015, STSJNA 627/2015).

respectively, the absolute majority of the members of the works committee and workers' delegates, as applicable, and the employers employing the majority of the workers affected by the agreement".

However, in the case of sectors in which there are no workers' representation bodies, the same article provides a specific solution: the negotiating committee will be legally constituted when it consists of the trade union organisations that have the *greatest representation* in the sector at the national or regional level. Obviously, by using italics the aim is to underline that the legal criteria chosen to connect the legitimacy to reach collective bargaining agreements with the target group for their application is not just *unionisation* but the *greatest representation*. In such an important matter as the adoption of a collective agreement between the two sides in a negotiation, leading to the signing of a statutory collective agreement (art. 3 of the SWS) in the employment contracts of all those who come under its scope of application, the criterion of greatest representation is valid vis-à-vis the law.

The origins of this provision, where there was previously a gap, lie in Royal Decree Law (RDL) 7/2011. In the Explanatory Statement of the RDL (section V), after pointing out that one of the objectives of the reform was to adapt the collective bargaining system to the new realities of the business world in the labour market, the Preamble announced that new rules for legitimising the negotiation of collective bargaining agreements would be included, and also to foster negotiated internal flexibility. Specifically, revised article 88 of the Spanish Workers' Statute established the rules for the composition of the negotiating committee more clearly, although without great changes to the existing ones, even when novelties were included in sector agreements in the event of the lack of business associations that had sufficient representativeness in a certain area. The criterion chosen is very well-known: in these cases, the negotiating committee would consist of the most representative trade union or employers' organisations at national or regional level (art. 88.2 of the SWS).

Later judicial-labour reforms have not modified this regulation, at least article 88 of the SWS, despite the fact that RDL 7/2011 changed the text of article 82.3 II of the SWS (non-applicability of collective bargaining agreements), inserting a text that is still in force in current legislation: "In cases of the absence of legal representation of workers in a company, these may allocate their representation to a commission appointed in accordance with the terms of article 41.4".³⁰ In other words, this judicial-labour reform³¹ wished to differentiate, on one hand, between the legitimisation for negotiating collective bargaining agreements and the non-application of collective bargaining agreements when justifiable grounds that affect the company concur. The Explanatory Statement of RDL 7/2011, citing the same objective of adapting the collective bargaining system to new or renewed business realities in our labour market, announced the existence of new rules to legitimise the negotiation of collective bargaining agreements and to foster internal negotiated flexibility. It differentiated between two blocks, however; 1) articles 87 and 88 of the SWS and 2) articles 40, 41, 51 and 82.3 of the same.

When we refer to article 82.3 of the SWS (in *Title III*), and always in a scenario of the absence of workers' representatives, we see that the rules of social legitimisation so as not to apply collective bargaining agreements when reasons that affect companies concur were – and are³² – different in comparison to those envisaged for a collective agreement negotiated "in a situation of normality". The existence of certain legally envisaged objective reasons may explain the different social

³⁰ One will recall that this precept allows workers affected by company changes to choose between an *ad hoc* committee and a "unionised" committee. See De la Villa Gil 2011, p. 10.

³¹ It was RDL 10/2010 on urgent measures to reform the labour market that consecrated these committees. For Nieto Rojas (2015, p. 24), it is the reform with the greatest impact in relation to levels of workers' representation in the business environment.

³² Act 3/2012 did not modify this legal text.

legitimation seen in some cases and in others. Nevertheless, the legislator does not adopt the same criterion of choosing different components on the social side when it is case of companies with legal representation of workers. Indeed, in these cases, both when it is a case of negotiating a company collective agreement and not applying a collective agreement, the rules in force on the social side are the same; they are stated in *Title III* of the SWS.

Basically, as article 88.2 of the SWS indicates how to proceed in the case of a process of collective bargaining in which there is no collective representation of workers – without losing sight of the proportionality rules indicated in article 88.1 of the SWS – it is striking that article 82.3 of the SWS invokes a regulation separate from its Title for a process of collective bargaining that could lead to the non-applicability of an agreement: article 41 of the SWS, part of *Title I* of the SWS. Even so, the legislative technique of *Title I* of the SWS covering the consultation periods aimed at modifying working conditions contained in contractual sources seems deficient to us, given that it covers a different rule from the one in force for the collective bargaining of a collective agreement.

3.2. Criteria for action of a trade union in the field of industrial action and strikes

If we look at the field of industrial action and strikes, the presence of trade unions in the workplace is simpler than in company restructuring processes under *Title I* of the SWS.

Effectively, and based on the Act Regulating Social Justice (Act 36/2011, LRJS), if the trade union wishes to challenge a collective agreement on the grounds of illegality it can do so through the channels of the industrial action process. Article 165.1 a) of the LRJS only requires an *interest* on the part of the trade union when the reason is illegality; any third party whose interests have been seriously harmed will be actively legitimised when the reason for the challenge is harm caused (section b).

Case law³³ regarding the text of the procedural labour law that preceded the present text (RDL 2/1995, Labour Procedure Act), article 163, which also actively legitimised the “interested trade union” to challenge a collective agreement, made an extra demand on this collective figure. In effect, the Supreme Court held that “trade unions are legitimised to take legal steps challenging a collective agreement for the violation of legality, *provided that they can accredit a link to the sphere of the industrial action*, as they cannot stand as abstract guardians of illegality, which would be the case if any trade union could challenge an agreement even though it had no presence in the corresponding area”.³⁴ This was held “[w]ithout forgetting that trade unions, both through express recognition by the [Spanish] Constitution (arts. 7 and 28) *contribute to the defence and promotion of the economic and social interests which they represent that not only lies in the link of unionisation but also in the union nature of the group*”.³⁵

The Constitutional Court has also declared, on several occasions, that it is possible *a priori* to consider trade unions legitimised to act in any process in which the collective interests of workers are at stake, making clear the constitutional importance of the trade unions for the protection and defence – including the legal defence – of workers’ rights and interests. In 1982 the same Court overturned the resolution of the former Central Employment Court for not reinterpreting ordinary legality in the light of constitutional precepts (FJ 5), specifically article 7, which consecrated trade unions as instruments that contribute to the defence and promotion of the economic and social interests that are incumbent on them; article 28, which recognises the right to join a trade union and union freedom, and article 37, which recognises the right to collective bargaining and recourse to industrial action. Using this

³³ See STSJAND 206/2012 and the case law cited there, F.J. 3º.

³⁴ The italics are ours.

³⁵ The italics are ours.

constitutional scenario as a basis, the Constitutional Court understood that trade unions generally have the capacity to *represent* workers and, by extension, initiate industrial action procedures that aim to reinterpret a collective agreement, as whoever intervenes in the negotiation of an agreement should be able to present an industrial action about it (STC 210/1994).

In the negative sense, however, the representative nature of a trade union, required under the SWS (arts. 87 and 88) to award it legitimacy for collective bargaining in general, or for institutional representation, cannot be confused with the requirement of trade union involvement in an industrial action (accredited link between the organisation that acts and the aim pursued). This is required in jurisprudence to justify the intervention of a trade union in a particular process, as we have pointed out, among others, in SSTC 7/2001, 24/2001 and 112/2004.³⁶

On this same level of industrial action, although now in terms of the right to strike, in line with sections 1 and 2 of article 3 RDL 17/1977 and Constitutional Court Sentence 11/1981, it is deduced that trade unions may declare a strike regardless of their field if they are involved in the *work sphere to which the strike extends* (STC 11/1981, F.J. 11 and Ruling section 2 a). The Constitutional Court added, however, that in the case of a strike affecting more than one workplace, it is not necessary to adopt an agreement to strike in each workplace for which the call to strike is legal. This means that the workers in any workplace within the scope of the call may join in to exercise their rights (STC 11/1981, F.J. 11 and Ruling section 2 b).

It is also the case that a trade union is not required to be present in each workplace in relation to a strike; it is sufficient that it can be identified with a certain sphere of work. Without making it explicit, the Sentence of the Constitutional Court would support this sphere being inter-enterprise, sector, various sectors, provincial, regional, inter-regional, national... It could be argued that it is not sufficient for a trade union to accredit its status of *great representation* to call a strike, although I think we can agree – resorting to the aphorism *he who can do more can do less* – on that whoever usually holds that status of greater representation is usually present in the area under industrial action.

The interesting thing about this comparative exercise between the area of collective representation and the scope of strike action is that a trade union can carry out its action and negotiate workers' claims in a *workplace* even under the instrument of the strike without having an effective presence in it. As for the rest, following the conditions prescribed by law, it is required that a certain relationship between the *territorial* areas of action of a trade union and the industrial action or negotiation in question should be the case.

4. Conclusions

This study makes it abundantly clear that the presence of a trade union is advocated, also as an organisation, in the sphere of companies or workplaces that lack workers' representatives. This should be the case at key moments, e.g. when a company restructuring process is being discussed and whenever a consultation phase is begun, or during the *tempus* of collective bargaining.

As per Spanish Constitutional Court Sentence (STC) 70/1982 (F.J. 3), to quote one of the first sentences, it is understood that "the right recognised in article 28 of the Spanish Constitution is the right of freely created trade union organisations to carry out the role and the functions recognised to them in article 7 of the Constitution, so that they can participate in the defence and protection of workers' interests". From this, we interpret that their function is not the mere representation of their members through the mechanisms of empowerment and representation of private law. When

³⁶ The requirement of involvement in the area of the industrial action as a requirement for the active legitimisation of a trade union has been a constant in the case law of the Supreme Court in all cases (see STS 2092/2010).

the Constitution and the Law endow them with the function of defending workers' interests they are legitimized to exercise those rights which, strictly speaking, still belong to each worker *ut singulus*, but should necessarily be exercised collectively".³⁷ For this reason, it is proposed, according to *lex ferenda*, to correct the sequence of parties legitimized to negotiate in consultation periods under the procedures stated in arts. 40, 41, 44, 47, 51 and 82 of the SWS, in the sense of enabling a *unionised* committee to prevail in the terms expressed in this study. The matters to be dealt with in these procedures are highly collective in nature and are of such substance that they need more than just a few workers to carry them out.

To recapitulate, the arguments we have used in this study to support this hypothesis are as follows, although more could be added:

- Without doubt, it would be more appropriate under the rules of trade union rights to entrust the functions of the representative committee under article 41 of the SWS to persons from a trade union (representative or most representative of the sector in which the company operates) than doing so to an *ad hoc* committee. The other disconnections and inconsistencies that this legal regulation presents have been indicated previously.³⁸
- Furthermore, there are less scientific data that lead to the same result of seeing a loss of control of these spaces by trade unions: in principle, these *ad hoc* committees lack the professionalism implicit in legal and/or trade union representation, and they also lack the information that can be obtained through legal representation via article 64 of the SWS. Indeed, it has been shown that, in practice,³⁹ many of these *ad hoc* committees are appointed in small-sized companies or workplaces (Rojo Torrecilla 2016, p. 1084). The conclusion, therefore, is that there has been a displacement, or relaxation, of negotiating capacity (consultation-negotiation) of the trade union as an association of workers, at least in those spaces of micro-companies, which are so numerous in the Spanish business world. If it helps to round off this argument, this practice of *ad hoc* committees is not the norm in comparative law (Navarro Nieto 2016).
- The loss of control by trade unions in this kind of small company does not correspond to the function entrusted to them by the law and jurisprudence in the areas of negotiation and industrial action, in cases where there are no workers' representatives.
- Furthermore, as one can imagine, the collective agreements that emerge from these committees are usually of poorer quality than those achieved by committees consisting of non-union or trade union representatives. Another factor lies in the data, according to which –and in accordance with the law– if the consultation period on a major modification of working conditions or the non-applicability of a collective agreement (for example) ends in an agreement, it will be considered that the reason that gave rise to the start of the procedure concurs, and that it may only be challenged before the competent jurisdiction for reasons of fraud, deceit, coercion or abuse of law (art. 41.4 *in fine* of the SWS and paragraph VI, art. 82.3 of the SWS). How will an *ut singulus* worker – in the company of another two – be able to bring about the non-application a collective agreement signed by one or more trade unions? As well as moving away from the purist legal logic, the content of this precept means that legal control over the causes would no longer be justified, with all the consequences that this involves.

³⁷ For a complete analysis of this doctrine that promotes the role of the trade union, see STC 8/2015, specifically the dissenting opinion (F.J. 6) formulated by Judge Valdés-Dal Ré.

³⁸ Others have also been highlighted in the *FIDE Document* (FIDE 2016), p. 1073, sections 26 and 31.

³⁹ Navarro Nieto (2016) confirms this reiterated practice.

- Workers considered individually – within an *ad hoc* committee – would be creating Law. In the words of Magistrate Valdés Dal-Ré,⁴⁰ “whatever the name given to the product of these consultations – covenant or agreement – it is clear that this differentiation is made on the basis of an accidental element, the content of which is agreed: either general or with the aim of regulating all working conditions (collective agreement) or singular, dealing with one area or group of areas that have a certain homogeneity”.⁴¹

To finish, as the doctrine proclaims (Baylos Grau 2017, p. 128), the trade union should recover the voice of the people it represents in the workplace, not just its members, as a way of better understanding the place from where the union should act in their defence.

Trade union organisations should continue to be present at the *supra* level but they should also make a greater effort to recover the *micro* domain. To quote one of the most recent documents issued in the EU, this is not the role that the Communication of the Committee to the Parliament, the Council, the EESC and the CEDER relating to the establishment of a European Pillar of Social Rights [COM(2017) 250 final] assigns to trade unions. The EU allots trade union and employers’ associations to the *supra* level (the political level), and not the workplace as the sphere of action and demands. Not that I share this point of view, although I also believe that trade unions should not neglect the terrain that is closest to the workers, i.e. the focus of their action.

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⁴⁰ STC 8/2015, Law of the Forum 6 of the Dissenting Opinion. Here is an example of a *hybrid* company agreement, somewhere between a contract and a collective agreement, even though it is considered a typical product of collective bargaining, with the same legal basis: case 121/2001 settled by the Constitutional Court Sentence (STC, Sala Segunda, 121/2011).

⁴¹ Previously, many had defended a distribution of powers and functions among trade union representation in companies. They would deal with negotiation and industrial actions, and the non-union representation would attend to information and consultation. See Durán López 1985, p. 28 and Cruz Villalón 1986; Rodríguez-Piñero 1986, pp. 219-225. Recently, FIDE 2016, where it is advocated that the law should propitiate the rearrangement of the “dual channel of representation” of workers in companies and workplaces in such a way that the functions of collective bargaining, dealing with industrial action and strikes should be exclusively attributed to the trade unions, understanding that the consultation phase under the procedures of *Title I* of the SWS is part of collective bargaining.

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