

Trade Unions' Rights, Work Councils' Functions and the Legal Framework for Governing European Corporations: a Spanish Perspective

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Landa, J.P., 2019. Trade Unions' Rights, Work Councils' Functions and the Legal Framework for Governing European Corporations: a Spanish Perspective. *Oñati Socio-legal Series* [online], 9(1), 19-31. Received: 12-09-2017; Accepted: 17-04-2018. Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1010>



Abstract

This paper provides analytical research about changing legislation on the functions of work councils and trade unions in participating in the decision making process at firm level in European countries with systems of double channel based models of representation (like Spain, France or Germany). The paper tests European regulations on the involvement of workers in management decisions, in connection with national rulings passed in some European countries, especially during the financial crisis. The paper will aim at responding the following key questions: What kind of complementarity is to be statutorily built between the functions of work councils and collective agreements in order to guarantee workers' participation in the governance of corporations? Is codetermination a more effective system than collective bargaining to build on new forms of corporate governance in a transnational context?

Key words

Collective bargaining; participation of workers; work councils; governance of corporations

Resumen

El presente artículo ofrece una investigación analítica de la cambiante legislación sobre las funciones de los comités de empresa y de los sindicatos para participar en los procesos de toma de decisiones en el seno de la empresa, en países europeos con sistemas basados en la doble representación, como España, Francia y Alemania. El artículo pone a prueba la capacidad de las regulaciones para implicar a los trabajadores en decisiones administrativas, en relación con legislaciones nacionales aprobadas en algunos países, especialmente durante la crisis financiera. El artículo se propone responder a las siguientes preguntas claves: ¿Qué tipo de complementariedad estatutaria debería construirse entre las funciones de los comités de empresa y los acuerdos colectivos para garantizar la participación de los trabajadores en el gobierno de las empresas? ¿Es acaso la codeterminación un

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sistema más efectivo que la negociación colectiva para construir nuevas formas de gobernanza corporativa en un contexto trasnacional?

Palabras clave

Negociación colectiva; participación de los trabajadores; comités de empresa; gobernanza corporativa

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1. Introduction

Collective bargaining at plant level is considered as a possible formula to promote internal flexibility, productivity improvement, process efficiency and welfare of employees at work. This is also the view of the social partners in collective bargaining at central level. The Spanish III AENC (Acuerdo para el Empleo y la Negociación Colectiva) states that it would be convenient to this end that sectoral agreements would encourage bargaining at plant level for matters such as working time, individual conciliation plans, mobility and job promotion, wages and their variables.

In Spain, however, decisions on matters that only the plant itself should be involved cannot be channelled through mechanisms different to collective bargaining. It could be possible to have plant level agreements negotiated by employees through their representatives, who would act jointly in the decision making process as co-decision bodies for organisational decisions. Were these decisions to have an impact on the collective agreements in force, they would certainly seek the additional support of their shop stewards or of the trade unions signatory to these agreements. In the absence of union representatives, they would have to request the intervention of the collective agreement's committee (in Spanish, they are called: *comisiones paritarias de seguimiento del convenio colectivo*) or of other mediation bodies in place for such cases.

There is no such statutory framework in Spain because work councils have become a union body of collective bargaining within the company, even replacing the union itself when concluding the process of collective bargaining, rather than a body of collaboration for the daily determination of improvement in work organisation and production, as is the case in the typical models of double channel of representation.

This distinctive feature of the Spanish system of industrial relations will be examined, in the first place, in the international regulatory framework, before moving on to how it operates in the Spanish system of industrial relations. In the second place, we will offer a discussion about the virtues, compatibility or imbalance of this national system to contribute – negatively or positively – to the design of a new cross-border regulation of collective negotiation effective for the democratic governance of multinational corporations. Finally, we will draw the conclusion, open for debate, that there are several cases of companies where cross-border regulation of collective bargaining and of multilevel governance of multinational corporations is already working to some extent, particularly in some European companies, and that this model is already interacting with the national systems of industrial relations, in dialectical strain, aiming at dynamic balance, by interacting with various national and European regulatory systems, searching for a legal or soft law regulation suitable for the good working of a global corporation, optimising profit for all of its partners: shareholders, financial, social and managerial partners.

2. Collective bargaining as a trade union right and its application at plant level

Collective bargaining is viewed, both at international and national regulatory level, as a free instrument for the determination of work conditions in the hands of workers' representatives and of their organisations, on the one hand; and of managers and their organisations, on the other.

2.1. European labour law view

In my view it is quite clear that there exists a European model of labour relations at company level, one of its pillars being the participation of workers in the governance of European companies based on the principle of loyal cooperation and another being the primacy of a solution negotiated by the parties (Riesenhuber 2012, p. 641). Under European Union law, the mechanisms of information and consultation operate at shop level, and those of participation at board level, given that corporate governance

involves relationships between management, shareholders and other stakeholders (as defined by art.2 of SE-Directive, the European Council Directive 2001/86/EC of 8 October 2001).

From the perspective of European law, these two usual legal techniques of labour relations at the workplace are clearly interconnected. On the one hand, the negotiation and confrontation tools managed by trade unions, whose purpose under the Directives is limited to implement the objectives of the Directives at the workplace. On the other hand, the participation techniques that inspire these Directives and favour the involvement of workers through their direct representatives in a framework of cooperation between the parties that make up the structure of a company, in accordance with the model accepted by the majority of European partners to favour the development of industrial democracy.

I have to draw up the primacy of the negotiated solution is an inspiring principle of the European law approach to labour relations at the workplace. It was first established as the preferred method for determining the mechanism of information and consultation of the workers' representatives in the European Works Council Directive de 1994 (Council Directive 94/45/EC of 22 September 1994, reviewed by the Directive 2009/38/EC, of 6 May 2009). Indeed, this regulatory European intervention represents the first act of a European transnational law on the matter of industrial democracy at the workplace (Barnard 2006, p.705).

Nevertheless, European law does not sanction collective agreements celebrated between unions and corporate organisations as they go against article 101.1 of the EU Treaty, which prohibits decisions or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market, even if they clearly restrict competition in the work markets covered by their application. Since the European Court Judgment – hereinafter, ECJ – of 21 September 1999 (*Albany v Stichting*) and its ensuing case law, article 101.1 of the EU Treaty (previously article 85.1 of the EEC Treaty) does not cover provisions from collective agreements *ratione materiae*, because it would otherwise put in question the objectives of social policy sought by collective agreements. This doctrine has been in force ever since, without having to lean on the fundamental right of collective bargaining entrenched at present in article 28 of the European Union's Charter of Fundamental Rights (ECJ of 4 December 2014, A. FNV Kunsten). It has sufficed to this end the limitation imposed by the promotion of the ILO fundamental conventions on the development of economic and competition policies in the EU, as is generally accepted at international level by international commercial agreements and in particular by the World Trade Organisation (Hepple 2005, p. 129 and ff, Marginson 2016, p. 1039). Similarly, European policies on Corporate Social Responsibility encourage the adoption by cross border companies of codes of conduct for the respect of fundamental rights at work and, in particular, the basic norms of the 1998 International Labour Organization's – hereinafter, ILO – Declaration on the Fundamental Principles and Rights at Work (Daugareilh 2005, p. 349 and ff, Seifert 2016, p. 190).

2.2. International labour law view

It seems convenient, then, to remember first what the international instruments of the ILO say about collective bargaining, as they have become essential tools in the design of transnational regulations of labour relations, before moving on to our national law on collective agreements.

Article 2 of the ILO Convention no. 154 (1981) defines "collective bargaining" as follows: the term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers organisations, on the one hand, and one or more workers' organisations, on the other, for: a) determining working conditions and terms of employment; and/or b) regulating relations between employers and workers; and/or c) regulating relations between

employers or their organisations and a workers' organisations or workers' organisations. This means, in principle, that trade unions are the ones to represent workers at the negotiating table. However, and despite some opposing statements from the ILO Committee on Freedom of Association, the intervention of other types of workers' representatives in collective bargaining is possible and it is not contrary to ILO Recommendation no. 91, insofar as there are not union associations in the concrete area of negotiation a specific collective agreement (Gernigon *et al.* 2000, p. 37).

With regards to the issue of legal imposition at plant level as the preferred scope for negotiation, the ILO supervisory bodies have stated that the parties to collective bargaining are entitled to choose, independently and without any interference from the authorities, the level at which the negotiation is to be conducted (central, sectoral, or enterprise level), and that trade unions federations and confederations should be able to conclude collective agreements (Gernigon *et al.* 2000, p. 36).

On the other hand, the 1951 ILO Recommendation no. 91 also clarifies what is to be interpreted by *binding force of collective agreements*, and does so in contractual terms. This is, a collective agreement binds employment contracts between employees and employers that are covered by the collective agreement signed on their behalf, so that any clause in the employment contract that goes against the collective agreement is deemed null and void – unless it is more favourable to the employees (Gernigon *et al.* 2000, p. 35) –. Notwithstanding this, it is not contrary to ILO principles that the law grant the unions that represent a high percentage of workers or their majority a preferential or exclusive right to negotiate collectively on their behalf (Gernigon *et al.* 2000, p. 51).

We will now examine the Spanish case from the point of view of ILO principles on the right of collective bargaining.

2.3. Spanish regulatory framework

Even though article 10.2 of the Constitution mandates the authorities to interpret the rules on fundamental rights and freedoms in accordance with the international treaties signed by Spain, the Spanish legal model of constitutional rights of collective bargaining retains some peculiarities when compared with the legal framework of ILO conventions and recommendations mentioned above.

Article 37.1 of the Spanish Constitution does not specify the type of worker representative that may negotiate collective agreements. It is understood that it cannot, in any event, exclude trade unions, but neither does it exclude work councils. Consequently, the statutory regulation of collective agreements (the Workers' Statute of 2015 – hereinafter, ET, from the Spanish name, Estatuto de los Trabajadores –) gives work councils priority to negotiate collective agreements at plant or shop level, whilst union representatives may only replace them if they have the majority of the work council to do so (article 87.1 ET). Eventually, I believe that the unions may also negotiate in the absence of work council or other bodies of legal representation, as they do when intervening at negotiation levels of superior or inferior scope.

On the other hand, although the law (article 83.2 ET) formally allows trade unions and corporate associations to establish the structure of collective negotiations between national, sectoral and enterprise level, article 84.2 ET gives absolute priority to the company agreement over any other level of negotiation when it comes to regulating certain issues such as salaries, work time or parental leaves, among others.

Finally, another peculiar trait of the Spanish regulation of collective agreements is that beyond the binding force of collective agreements over individual employment contracts under their scope – the solution recommended by the ILO – by virtue of article 82.3 ET the legal efficacy of the collective agreement will be extended to any

company or individual employment contract that falls within its territorial, functional and subjective scope; even if these have not been represented at the negotiating table, provided that the negotiators have some level of representation in that area of negotiation (the majority of representatives at the company or at the higher level if may be).

Despite this, this *erga omnes* efficacy granted to collective agreements by law may be disregarded through an opting-out procedure. It consists of a collective agreement at plant level reached by management and the work council. This once again shows the work council as a privileged negotiator of collective agreements at plant level – even against the position of the unions that have signed the collective agreement *erga omnes*. Interestingly, this opting-out procedure is called consultation procedure (art. 82.3 ET) by reference to article 41.4 ET as to the steps to follow, as if it were a mechanism of participation in work organisation, which is very contradictory.

Many of the novelties of decentralisation at plant level in collective bargaining have taken place through legal reforms during the last 2008 financial crisis. The first serious evaluations of the real effects on the Spanish system of industrial relations offer rather limited results on the reforming scope over the system of collective negotiation since the legislative changes of 2010–2012.

According to a Eurofound research report (Welz *et al.* 2016, p. 5) the old trend towards decentralisation of collective bargaining at enterprise level has speeded up since the 2008 recession. But in contrast with the Nordic and central-western European industrial relations systems, where this process has been not only limited but better organised, the Southern European countries still have a prevailing disorganised centralisation. Indeed, there would not have been a decentralising effect were it not for the unilateral intervention of the state, at the expense of the fall in sectoral and intersectoral (national) collective bargaining, as well as the level of protection of workers by collective agreements (which in Spain had reached 90% of workers with an employment contract). This research report also shows that multiemployer bargaining is coming back again after the recession, thereby mitigating the decentralising impact of these reforms.

In this sense, in the Spanish case the data seem to corroborate the scarce impact on the system of industrial relations of negotiating decentralisation and other flexibility measures of collective agreements, since with the end of the recession the traditional structure of centralisation and *erga omnes* efficacy of collective agreements is coming back, despite all the legislative reforms passed during the crisis time (CNCC – National Commission of Collective Agreements; in Spanish, Comisión Nacional de Convenios Colectivos – Observatory 2017).

However, there are data on the Basque Country Autonomous Community for the year 2014 (Muguruza 2015, pp. 330, 335), the last year of the recession, in an area which is more industrialised than the average in Spain, where we may observe a bigger impact of the reforms, although it would have to be checked against the post-recession data in the same area. For instance, the rate of coverage by collective agreements fell from 96% to 79% in January 2014. This was due on the one hand to the end of automatic renewal (*ultraactividad*) of collective agreements; and on the other to the lack of renegotiation of some 143 sectoral agreements in the Basque territory that affected 133,860 workers (around 15% of the working population in the Basque Country Autonomous Community). By the end of 2014, the rate of coverage went up to 80,5% due to the new negotiation of enterprise level agreements (mainly in small companies of <50 employees), reaching 26,1% of Basque workers covered by enterprise agreements, well above the Spanish average (and also thanks to the stance by ELA trade union in favour of bargaining at enterprise level). However, the result is similar to the Spanish average when it comes to opting out, which has been of little relevance (114 companies as of June 2014, affecting 4,790 workers), mainly centred on salary changes, mostly negotiated and produced in small companies in the services sector.

3. The work council as singular partner in collective bargaining at plant level in Spain

If there is a singular characteristic in the Spanish model of collective bargaining is the existence of two types of workers representatives in the negotiation of a plant agreement: the union and the work councils (or workers' delegates, if applicable in the absence of the other two). Although this is not particularly exceptional it does however determine the model of regulation of the right of collective bargaining in Spain, and consequently the legal regime of collective agreements.

This peculiarity has not only limited the freedom of unions of negotiation at plant level, but has also allowed the negotiation tool to expand beyond the scope of work conditions of employment contracts with binding force. For instance, towards the participation and consultation of the workers' representatives when taking organisational decisions on work and productions, such as the changes in restructuring processes (mobility, turns, salaries, work time distribution), economic dismissal and other decisions on the stay or extinction of employment contracts, wholly or partially, in the context of restructuring processes.

In principle, the body of representation of workers called upon the steering of this participation process through information and consultation is the work council. It could also be the union through the trade union section (or shop stewards), on condition that it represents the majority at the work council. Even without a formally constituted work council, the procedure for consultation/negotiation could take place with an *ad hoc* body elected directly by the workers to this effect (article 41.4 ET). In any event, the aim of this *sui generis* participation process is not to be informed of the situation and the reasons alleged by the company so as to give an opinion by the representatives, but to actually start a true process of collective bargaining in good faith so as to achieve a collective agreement at enterprise level using all appropriate means of pressure and conflict. In the event of disagreement or agreement reached by coercion, ill faith or fraud, the agreement may be challenged before the courts (articles 138 and 153 of the Labour Procedural Law), unless arbitration or mediation take place to sort out any differences arisen during the (wrongly called) consultation procedure (article 41.4 ET).

In logical reciprocity, the participating functions of the work council in the management or organisation or production changes are also unionised, since the union sections (or shop stewards) may also intervene in restructuring decisions when reaching an agreement on those. Hence it is confirmed that the consultation process is a process of collective bargaining, based on the recognition and defence of party interests, rather than a formula for managing participation on decisions based on the spirit of cooperation, taking into account the interests of both company and workers (as stated by article 64.1 ET). And if there was any doubt left that the Spanish system of participation in the company is non-existent in the practice of industrial relations in our country, we can see that only a minority of companies, thanks to their company culture – and disregarding the legislative pattern – develop participation channels (either through shareholding or through alternative methods or work organisation) that are not contemplated by law. We could give some examples in the historical territory of Gipuzkoa, both of shareholding and of participation in the management of production change or a combination of both.

4. Collective bargaining in company groups and corporations as a paradigm of new regulatory practices

In a global economy with international competition, companies and cross-border multinational groups are the main reference of the evolutionary dynamic of employment relations and the systems of industrial relations. Cross-border labour law is a framework of multi-level governance in constant search of social justice (Blackett and Trebilcock 2015, pp. 4-6), which combines various legal instruments, traditional ones (rule of law) and new ones (soft law or reflexive new governance

methods) in which there exist new institutional arrangements at international level in addition to existing institutions and regulatory arrangements at national level (Marginson 2016, p. 1034), both of private law (international private law on contracts) and of public law (international law principles of the ILO or the WTO) and true instruments of cross-border law such as European law rules (or Mercosur rules).

From the perspective of labour law, this configuration of cross-border law of employment relations conceals the usual risk there exists when considering soft law and reflexive regulations, i.e. the disappearance of universal substantive standards in favour of procedural rights, which in turn result in variable substantive standards (Marginson 2016, p. 1050). In any event, this new cross-border labour law is becoming the main answer of labour law in the face of the emerging dynamics of corporations and multinational groups that exceed the regulatory frameworks strictly national. To configure this cross-border labour law and rise to that challenge there are the International Trade Union Federations (ITF) and the International Trade Union Alliances (ITA), as well as the international collective agreements (IFA), which are agreements signed by an ITF and a multinational corporation, normally with the aim of enforcing the fundamental rights at work in all the workplaces of the multinational corporation. In 2016 there were more than 2,000 international collective agreements in the world.

This is a good example of the adjustment of traditional instruments of collective industrial relations to the new circumstances of the globalised corporation. In practice the ITF and ITA that supervise their application are being more functional than the institutionalised European social dialogue (article 155 of the European Union Treaty), both in its sectoral dimension and its interprofessional one, that with little success the framework agreements and sectoral agreements tried to reproduce at European level, so characteristic of the internal legislation of the various national realities of the State Members that belong to the EU hard core.

Certainly the content of those international framework agreements is limited to the basics, i.e. to enforce the fundamental labour rights enshrined at international level in all work places of the corporation or of the multinational group, as well as in their subcontractors. Despite the actual limitations of said content they are the logical course for the construction of a new transnational labour law, which will bring more development of collective bargaining in multinational corporations, and in highly globalised industrial sectors (such as transport) which are in need of collective agreements of international scope to establish minimum salary conditions for the sector. Undoubtedly an effective tool to fight against social dumping, possibly more effective than the limited guarantees established in the controversial Directive 96/71/CE on the posting of workers and the Directive 2014/67/UE that complements it (García Trascasas 2017, pp. 301 and 302).

The possibility of using the European work councils (EWC) as partners in the negotiation, beyond certain experiences in cases of restructuring of multinational groups or of adoption of common grounds which may later be transformed into codes of corporate conduct (as anticipated by Jean-Paul Jacquier 1996, p. 1084), and their promotion and defence by some authors (Terradillos Ormaetxea 2010, p. 300, or González Begega *et al.* 2017, p. 271). In my opinion, this possibility exceeds the actual regulatory framework of European work councils and contradicts the right of information, consultation and participation granted to them since Directive 94/45/CE, revised by Directive 2009/38/CE. As bodies of participation of workers in the company through their representatives, their design calls for cooperation in management, not for negotiation and confrontation, even if their role may be strategically very useful for the unions as instruments to gather information or for being consulted in the event of the negotiation of an international framework agreement (IFA).

5. Epilogue: collective bargaining, participation rights, which instrument is best suited for the governance of cross-national companies?

The existing workers' rights to information, consultation and participation (ICP) as enshrined in the EU Charter of Fundamental Rights and EU Directives make up the hard core of European collective labour law. In particular the regulation by Directives such as the already mentioned European Work Councils Directive of 1994 (Council Directive 94/45/EC of 22 September 1994, reviewed by the Directive 2009/38/EC, of 6 May 2009), as well as the European Companies Directive (Council Directive 2001/86/EC of 8 October 2001), the Information and Consultation Framework Directive (Directive 2002/14/EC of 11 March 2002), or the Directive 2005/56/CE, of 26 October 2005, on cross-border mergers of limited liability companies, constitute, together with the international framework agreements, the main cross-border legal framework for the functioning of worker's collective rights within cross-border companies based in Europe.

In practice, the European Work Councils exercise the rights to information, consultation and participation (even codetermination, if the company adheres to this system of participation, as contemplated by the European Company Directive, for instance). Meanwhile the International Union Federations or the International Union Alliances are the ones that – sometimes with the collaboration of European Work Councils – lead to cross-border collective negotiation through International Framework Agreements and are, definitely, signatories to them.

In my view, the practice of European collective labour law designs a framework of variable geometry simultaneously based on the rights to collective bargaining through the unions and the rights to information, consultation and participation through the work councils, as a flexible formula of corporate governance and workers' implication through a double channel of representation, one more cooperative for the making of decisions of common corporate interest and the other more confrontational for establishing the contractual conditions of employment.

Besides ideological controversies, in the legal logic of international law and specifically in European collective labour law, the role of workers in the governance of European companies should be based on the combination of participation instruments in the making of strategic decisions of the enterprise, as well as in those related to the efficient organisation of work and improvement of the internal plant productivity; with the techniques of collective union bargaining at the level adequate to establish minimum contractual work conditions (negotiated at cross border level) and those specific for each company or plant, in accordance with the prevailing negotiating structure in the country of location.

Although it may be viewed as not decisive, in truth we may reach the conclusion that the national systems of industrial relations based on a double channel representation are better suited than the industrial systems of a single channel of representation when it comes to carry out this distribution of functions between negotiation and participation. This conclusion is supported on the more efficient results – from the point of view of corporate performance – of the models of codetermination that exist in some European countries (data refer to Germany, Paul Davies 2015, p. 369) thanks to a work organisation more participative and favouring competition than the one that exists in those models without it, such as Spain or Italy.

Our conclusion is indirectly backed by the results of the *Third European Company Survey* (Akkerman *et al.* 2015) where best workplace practices are examined through interviews with human resource managers and representatives of work councils and unions. This survey permits to classify European companies in five groups on the basis of their own culture of organisation and human resources. The conclusion reached is that the performance of establishment and workplace wellbeing are higher in those companies whose systems of human resources are based on schemes that

are interactive and involving or systematic and involving (both participatives) than in those that are top-down and internally oriented or with a passive management.

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