MODELS OF GOVERNANCE FOR INDUSTRIAL COMPANIES AND CORPORATIONS IN THE GLOBAL ERA OF CAPITALIST SUSTAINABLE PRODUCTION

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1.Introduction:

In 1993, a year that saw how an economic recession reached many EU countries – even if it was a cyclical recession rather than structural, as evidenced by the recession we are in since 2008 – the Eurofound - European Foundation for the Improvement of Living and Working Conditions published a Report on "*La implication du lieu du travail dans l'innovation technologique dans la Communauté Européenne*"[2]. Throughout its two volumes, this Report relates the debate begun in the previous decade on the impact that technological innovation has on workers and company management methods. It is a vast work (around the main countries of the 17 that made Europe back then) on the role of participation of workers in different areas of the management of processes of technological innovation (selection, starting up and evaluation), as well as the experiences related to the problems linked to worker participation in different phases of the production cycle, such as, for instance, in training programmes or work organization.

The Report was made from the hypothesis that the best defence for the competitiveness of European companies in the era of economic globalization was to take advantage of the potential for improvement offered by information technologies. This meant having more qualified personnel, capable of using these technologies, more motivated and with a spirit of cooperation. To this end it was necessary to revisit the hierarchical organizations that, based on the Taylorist production model, had been in place in European companies, mainly in manufacturing companies, but present in services companies too. In short, the Report points to an unavoidable conclusion: that in the era of globalization and global competition and its permanent pressure towards the management of change (restructuring process, innovation,…) it is urgent to discuss the model of corporate governance and try to define which is best suited to the challenge of global competition. This means having to discuss the role of the different stakeholders that made a company, and consequently, the functionality of the mechanics of worker participation in the design of said model of corporate governance.

The thesis of the central role of worker participation in the model of corporate governance can be found in European policies since the European Social Agenda laid down by the Council of Nice 2000 ("the involvement of employees in company decision-

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[2] Published in two volumes by "Office des publications officielles des Communautés Europénnnes". The first one in the same, in 1993 is "*Les voies de la participation*", authored by D. Frölich, C. Gill and H. Kriegeren; the second one, in 1994, authored by them together with T.Beaupain, entitled "*Questions relatives à la participation*".

making has become an essential part of the Community's mainstreaming strategy in its social policy agenda").

In the context of a global economy, characterised by permanent change and transnational competition, the term "innovation" signifies better than any other the recipe followed by corporations to face the challenges of globalization with success, a type of response that combines in practice a medium and long term strategy with a production model adapted to that strategy, where innovation is a goal shared by all. This has a clear repercussion in the way of directing and managing the production factor by definition – the human capital of a company. The objective of innovation requires from the individuals that manufacture, serve and develop the goods and services offered by the company, or at least, from the core workers, a capability of creation, mainly for the innovation of the product, but also in the production processes, in the organization management, as well as in the identification by its potential clients of the advantages added to new products (marketing, etc.).

From the perspective of the organization of work, and opposite the hierarchy of work relations typical of the Taylorist production model, the evolution of the capitalist model of production since the introduction of new technologies has opened new perspectives for a renewed model of labour relations, based on cooperation and collective learning[3], more favourable to the free expression of workers, of which corporate social networks are an example (for instance, Danone 2.0), and other ways of working and developing the collective intelligence of the corporate effort[4]. These changes show the way towards new forms of enhancing the labour factor, and places the individuals that give life to the corporate business (workers, suppliers or clients) at the heart of the business corporate strategy.

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[3] See B. Segrestin et A. Hatchuel "*Refonder l'entreprise*" (France: Editions du Seuil, 2012), 37.

[4] S.Riot, « *Vive la CoRévolution! Pour une société collaborative* » http://www.metiseurope.eu/vive-la-corevolution_fr_70_art_29599.html .

In fact, this discourse is not far from that of Serge Mallet in the 1960s[5] (*les 30 glorieuses*, during the French presidency of General De Gaulle), in the wake of the automatic industrial revolution (the intellectual foreword of the current technological or digital revolution). The author observed then the changes in the organization of work and the rising of a new working class: next to the manufacturing workers, there appears the class of the technicians of design or project offices. With factory automation the functions of the production chain disappear, and the taylorist company gives way to fewer and more integrated production units, where exchanges among workers and between workers and managers are higher and freer, where team working prevails, the unifying vision of the multitasking work. In this process, he urged the unions to claim management control.

This paper refers to the role of worker participation in the definition of a capitalist governance model best suited to the challenges of the economic globalization, and uses the term "worker participation" or, technically the more appropiate term of "employee participation", to broadly refer to all forms of employee involvement in the management of an enterprise (including diverse forms of influencing managerial powers), as well as employee involvement in the capital of the enterprise and in profit-sharing, irrespective of the different goals or results intended that in one way of participation or another may be achieved for the better and more effective governance of the company.

As I explained at the beginning, in the actual recession (financial, firstly; and economic, secondly); there are more and more those who use the word "structural", in light of the devastating effects that it has on work and welfare, but also because it is causing the revisiting –in most European countries- of the regulatory models of industrial relations and work, nearly a hundred years old and considered by most of us, labour law experts, as well established. However, this recession is also questioning the imaginary goodness of the neo-con financial deregulation, and, by extent, the goodness of market regulation outside the law. Similarly, we are starting to doubt the efectiveness of the organization of production of an outdated capitalism grounded on the traditional Taylorist model, so that there are open criticisms against the efectiveness of corporate governance based on the principle of profit sharing, whose capacity to save companies from liquidation in times of recession is far from being effective.

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[5] S. Mallet, "La nouvelle clase ouvrière", (Paris: Ed. du Seuil, 1963), 85 at 87.

This criticism is equally applicable to the legal regulation of corporate governance, exclusively oriented towards shareholders and the booster of the development of the financial markets, whose application in recession times has been proved to be basically harmful and incapable of sustaining a healthy social and economic order, "because by encouraging managers and investors to obtain higher short-term shareholder returns have, paradoxically, contributed to the destruction of trillions of dollars in shareholder value; in fact, the world now has to defray the financial costs of bad corporate governance"[6]. Similarly, the solutions applied, consisting of calling for more transparency of board meeting decisions, the review of the role played by rating agencies or auditors and other accountability agents – typical methods of the so-called anglosaxon model of corporate governance prevailing amongst the liberal market economies[7]- have not been, in the light of the economic consequences of the recession, a safe guarantee for shareholders, nor a guarantee of the goodness of the economic policies applied by Governments as ultimate keepers of the viability of national markets.

The principles of the free enterprise: agreements must be kept (*pacta sunt servanda*) or free competition, are typical elements of the capitalist production model and economic liberalism, but none of them determines the collective actions that are behind the human initiative to carry out the production of goods and riches. In this sense, corporate or labour law are neither inherent to the capitalist production system nor unchangeable elements, but rather a whole of organization instruments, and like any other social technique they may evolve with the development of new knowledge or according to the existing social rules.

At present, it may be said -at least hypothetically- that the best thing for the development of an evolution of corporations paced with globalization would come from the conceptual separation between the legal and political definition of public limited companies and the definition of companies as human organization for venture undertaking -its theoretical and conceptual mix-up seems to be the cause or one of the endemic causes of the actual crisis[8]. Redefining the idea of corporation from a better understanding of the productive collective action cannot be reduced to the traditional

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[6] This global recession has questioned, in practice, the validity and, maybe, the legitimacy of this "shareholder centric model of corporate governance". See John W. Cioffi,"Public Law and Private Power" (USA: Cornell University Press, 2010), 1 at 3.

[7] In opposition to the "coordinated market or social market economies" of countries such as Germany, according to the classification by J.W. Cioffi, above, 19.

[8] See B. Segrestin and A. Hatchuel, "*Refonder l'entreprise*", cit., 115.

balancing effort between capital and labour, it also has to respond to the actual challenges of competition through innovation, a legitimate management power, that does not only derive from the individual management contract (agency contract), but from the authority to manage the competencies required to direct an effective group action (reinventing its management power, originally contractual, through the development of a more horizontal function, as facilitator or encourager of that collective intelligence that is the engine of the corporate effort), from certain management principles that may help to acknowledge the consensus on its managerial function, from those who entrust their wealth as well as from those who entrust their professional careers through, maybe, a new kind of contract – complementing or replacing the typical labour contract – that is yet to be construed at a legal level: the company contract (*contrat d'entreprise)*[9].

For those that defend the existence of two types of capitalism, on the one hand the US Megacorp model, the expression of the liberal economics for the maximization of returns for shareholders in a relatively deregulated context, that in Europe we tend to mistake it with the anglosaxon model of corporate governance; and on the other, the European model of capitalism where the corporation is tempered by state regulation in the name of macro-economic policy and by state supported social policies regarding the welfare of employees and others[10], the economic recession impacts mainly on the credibility of the first type. From the social and political perspective of the heart of the European company model, the truth is that when facing the consequences of recession we tend to value the European model of capitalism, where the corporation is socially responsible because it is considered as a public actor at the moment of adopting its corporate decisions, the social impact of its economic activity before the public opinion, and not just before its shareholders, because its reputation and image may be questioned by other public actors.

Curiously enough, we could reflect on the goodness and analytical perspectives offered by the thesis of two models of capitalism -anglosaxon and European- but its usefulness is evident when we talk of reforming corporate governance. The anglosaxon model poses regulatory questions on transparency and disclosure, and rules governing corporate boards and shareholders' voting rights, but rarely talks about strengthening the role of labour as stakeholder in governance matters, where the latter is one of the three actors -owners, managers and workers- that made up the organization of production through the final destination of the corporate venture. However, within this, (hypothetically) European model, it is frequent to find, in those countries where there is a

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[9] B. Segrestin et A. Hatchuel, cit., 116 at 117.

[10] See Irene Lynch Fannon, "*Working within two kinds of capitalism"*(Oxford: Hart Publishing, 2003), 4 at 5.

corporatist governance model (as in Germany, the Netherlands or Sweden, but in Japan as well)[11], the idea that managers and workers need equal protection from the interests of the shareholders, and managers should also respond, if only rethorically, to the interests of others stakeholders.

Nonetheless, none of this has really been taken into account when reforming corporate governance in the frame of the anglosaxon regulation models. Indeed, the limits of that reform were clearly set out in the Cadbury Report within the logical boundaries of the anglosaxon governance model. Cadbury defined corporate governance as "the system by wich companies are directed and controlled". But, naturally, Sir Adrian Cadbury referred to "mechanisms of managerial accountability, assuming for the most part that this refers to managerial accountability to shareholders", all of which is regulated by company law. But, as A. Johnston has well said, "the conventional meaning of corporate governance is wider than this, and extends to the ways in which the various markets and other institutions to which the company is exposed operate in the gaps left by the law, influencing decision-making and increasing managerial accountability to shareholders, in this sense corporate governance is concerned with the totality of constraints and incentives which affect management decision making, both internal and external to the corporations, inside or outside the Company law provisions"[12].

From the point of view of what we have described as the European perspective, there is another approach that would lead us to a definition of corporate governance in its broader sense, as suggested at the beginning. If we have mentioned rating or financial valuation agencies, the new era of the capitalist production model should incorporate other types of valuation and other types of agencies -non-financial- to give account of the other challenges that modern corporations face during recession times, and, why not, in post-recession times. For instance, being able to explain their decisions and options to stakeholders and public opinion, not just to their shareholders (introducing economic democracy in the corporate decision-making process)[13]. On the other hand, even if this does not belong to any of the productive capitalist models, what we suggest is to look for regulatory mechanisms capable of bringing the interests of workers and of other stakeholders close to the decision-making of corporate organization; together with the

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[11] See Peter A. Gourevitch & J. Shinn, "Political power and Corporate control (The new global politics of corporate governance)", (New Jersey: Princenton University Press, 2005), 294 at 295.

[12] See Andrew Johnston, "EC Regulation of Corporate Governance" (Cambridge: Cambridge University Press, 2009), 1 at 2.

[13] Measurements and valuations of corporate responsibility of companies or of corporate investments socially responsible, such as those given by the agency VIGEO. See Nicole Notat, "*L'entreprise responsable, une urgence*", (France : editions dialogues, 2012), 18 at 19.

traditional consideration towards the interests of shareholders, which would translate into different legal or collective-private mechanisms of corporate governance, depending on the country, the structure of ownership and the various kinds of participation of workers in those decisions (depending on whether the union culture tends to cooperation or confrontation).

A good part of the inspiration of the European model of corporate governance promoted by the EU is based on the relative success of the German economy during this recession, which has been attributed in part to the well established system of co-determination (*Mitbestimmung*), which means that workers are involved in decision-making not only at plant level through works councils, sharing responsibilities for decisions in some areas of work organization, but also at company level through the membership of worker's representatives on the supervisory board controlling the company. The participation of workers' representatives in the decision-making bodies (board of directors or of supervision) of publicly quoted companies has recently been implemented in France as well through legislation that only affects, in principle, publicly quoted companies with more than 5,000 employees.

The formulation of a corporate governance model adapted to the changes that await in a capitalist production model is not a minor thing. Collective awareness on the need for a better adjustment of the corporate governance model to global times is pushing the way through optimization and improvement of the efficiency of work organization more suited to innovation and corporate competitiviness. In reality, the practice of work principally obeys to the Taylorist organisation of work, based on the division of subordinated labour force that often results in management practices that are not efficient, nor legitimate to guarantee a high level of performance of collective labour. During this time we have been facing a labour market where productivity is more dependent on a type of work typically intellectual and aimed at an intangible production, not easily measured, produced mainly by the service industry[14]. A resulting trend of this change in the model of production in many capitalist enterprises, and in the managerial or direction practices that can be observed, at least, in those companies that are more innovative and productive, is that the vast majority of them promote their innovative potential through the involvement of its employees[15].

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[14] See Xavier Baron, "*La performace collective*" (France:éditions liaisons, 2012), 10 at 12.

[15] Certainly, the idea of worker participation in their corporation is not new at all, whether it is found in the works of Owen, Fourier or Proudhon, through cooperatives or the so-called enterprises of social economy – there are many examples of such practices. See Isabelle Ferreras, "*Gouverner le Capitalisme*" (Paris: Presses Universitaires de France, 2012), 206 at 207.

Free enterprise, the basic principle of the capitalist production model, implies freedom of organization of the activities undertaken. If the theories on participative management of corporations are as old as capitalism itself, in the Europe of the second half of the 20th century, under the influence of German teaching and also the Catholic social teaching, many authors regarded corporations as an institution that shelters both labour and capital under a shared goal: the interest of the company (the institutional theory of corporations, put forward, among others, by Michel Despax or Paul Durand, the forefathers of labour law in France). According to this concept of French labour law teachings of 1950, labour law favoured a certain political vision of corporations, dominated by references to public liberties and by the search of a representative democracy in corporate management, which is summarised in the social control that workers' representatives had on the economic power of the manager or company boss[16].

Without completely embracing the idea of enterprise-institution, the Spanish constitutional model tackles the complex balance between free enterprise, in the words of article 38 of the Constitution, and the right to work, conditioning the former to the requirements of the economy in general and to economic planning, in particular. This means, in practice, that free enterprise allows to give entrepreneurs or managers the maximum freedom to carry out their business project, by enhancing competitiveness but guaranteeing the stability of employment within the framework of the law (there is no free dismissal in Spain). The constitutional framework would also allow, in my opinion, through an appropriate legal reform, the regulation of an autonomous enterprise idea under corporate law, in the immediate future of a sustainable economic policy.

The criticised mix-up between the enterprise as the free expression of individual and collective action of entrepreneurship and the legal form of the corporation mentioned above was easier to comprehend when businessmen were conceived as tradesmen, but it is more difficult to mistake when the initial corporation has subsidiaries, networks, groups, or starts being financially controlled by another, or subject to the management of some bigger concern, as frequently happens in business these days. Modern concerns have few similarities with the original idea of a firm and gradually identify themselves with the legally ambiguous idea of corporation. For this reason, it would be interesting to rethink the very notion of enterprise aside from the traditional clothing given by corporate law. To this end, from the perspective of labour law, and of the institutions of corporate law, with or without the additional help of public law (fiscal, etc.) bridges may be built to bring together two traditionally opposite perspectives that, however, recession obliges, may permit the survival of companies in the short and long term, and with it, the welfare of persons and nations.

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[16] See Alain Supiot, "Le droit du Travail", spanish edition (Buenos Aires: Ed. Heliasta, 2008), 51. However, for Supiot, the company-institution is an illusion, because it is the expression of the freedom to undertake, and therefore, an "*insaisisable*" legal concept

In this paper, we give a short account of the main institutions that have served, until now, to favour or implement mechanisms of worker participation in whole or partial decisions of the capitalist production model throughout the European and anglosaxon experiences. From this analysis we will consider the potential of these mechanisms to modify, enhance or improve the traditional models of corporate governance. Lastly, some final considerations for a discussion that, in my opinion, is central to the future of a system of industrial relations for the capitalist production model in the sustainable economy of the 21st century.

2. Financial participation as an instrument for a change in corporate governance?

Despite the traditional dichotomy and its opposite legal conceptualization between work contract and corporate contract, where the former has the nature of an exchange, in which each party pursues a particular economic end and only in a mediate sense could it be said that both take part in the common goal of the company; whereas in the latter the object of the contract is the cooperation to achieve a common goal, sharing, in the event of success, the benefits of the venture, and in the event of failure, distributing the losses in proportion to the contribution to the venture. The truth is that, in many modern companies, especially in the big European corporations, there apply models of organization of work and of return sharing oriented to give participation not just to the investors (shareholders), but also the workers (stakeholders), especially the rewards of corporate results, although it is more rare to have so in case of losses.

These types of economic democracy, that cover a variety of forms of direct participation by employees in the ownership of the Enterprise and in the distribution of economic rewards, have been supported by the European Union, through several attempts to incentivate the development of diverse schemes for employee financial participation. Since Directive 77/91/EEC, that regulated the Capital Directive on the formation of public limited liability companies and alteration of capital, or the Commission Memorandum on employee participation on asset formation of 1979, or the Social Charter Action programme of 1989, that precipitated the adoption of a non legally binded Recommendation concerning the promotion of employee participation in profits and Enterprise results, known as the Pepper Recommendation (92/443/EEC), until the Communication at promoting greater use of employee financial participation schemes across Europe (COM (2002) 364)[17].

[17] C. Barnard, “EC Employment Law” (Oxford: Oxford Press, 2006), 745 at 746.

At least hypothetically, the more evident formulae of this participative orientation of the other members of an enterprise aside from shareholders is that of the financial mechanisms of participation of workers in the company for which they work. In particular, where workers have nominally all or more than half of the stock of the company, as is the case with the so-called cooperative companies[18].

In this section I will look into the mechanisms of financial participation, aside from other corporate mechanisms whose legal nature tends to be identified –by virtue of the exchange nature of the work contract- with the remuneration for work done, and not just as a participation mechanism of corporate nature (shareholder). In this sense, the existence and use by the company of these additional direct or indirect mechanisms for remuneration are better suited to the traditional view of the enterprise as the corporate entity owned by the capital or investors, much more coherent with the liberal view of the capitalist enterprise that was so vividly expressed by, for instance, M. Friedman when he famously said that the social responsibility of the business is to increase its profits[19], or by Alchian and Demsetz, around the efficient management of the company, whose goodness requires to be financially controlled by shareholders and only by shareholders[20]. A liberal capitalist view that, on the other hand, has much helped to underline the superiority of the publicly incorporated company over other types of corporate organization, giving its shareholders the power to elect, control and penalise its directors.

However, this ideological view of corporate governance, traditionally found in the anglosaxon world, and in continental Europe as well, can hardly carry on in the 21st century because it is not useful for the new emerging economy. Indeed, it needs to take into account the complex challenges faced by modern company management to adapt to the organization of productive work, highlighted, among other factors, by the need to invest in its own I+D with an aim to favour the introduction of technological changes in the design of products and in the production process. Equally, it ignores the logical cooperation between the actors that made up a company, of which modern theories on

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[18] In some countries, such as Spain, corporate law also regulates other types of companies, of limited liability or privately incorporated, where the ownership of capital belongs to the majority of workers (this is the case of the corporations regulated by Law 15/1986, of 25 April, of labour corporations of limited liability).

[19] M. Friedman, "Capitalism and Freedom" (Chicago: University of Chicago (1962), 2002 -40th Anniversary edition), 133.

[20] A.A.Alchian & H.Demsetz, "Production, Information costs and Economic Organization", The American Economic Review, vol. 62, 1972, 777 at 795.

social responsibility that we discuss in section 4 are a vivid expression; or the difficulties to mobilise the human factor behind the productive goals of the business action under the prism of more cooperative implication of the people that perform the production cycle[21], or rather the implication of individuals, community groups and local institutions in the very corporate action[22].

This kind of problems would be easily resolved if we would discard that view of the enterprise aimed at the exclusive benefit of shareholders as its only goal and we could start from a more wholesome view of the set of interests served by the enterprise, for instance, by considering that workers are part of the company and risk even more than the shareholders in the business venture. Probably the enterprise will not be able to guarantee the security of employment, the main goal of that who works in exchange of a salary; however, if the worker is considered as another participant in the enterprise, it may be understood, somehow, that he is to be placed at the same level as a creditor, at least, with regard to the end result of the business. As a creditor to the result of the business venture, the corporation may give back to the worker in various ways: mainly by acknowledging and recognising his professional or technical capacities, but also by giving him a share in the returns given to shareholders, either periodically or accumulated at the end of his contract, or upon retirement. This acknowledgement of his right to take part in the profits would correspond to the board's economic valuation of his professional or technical contribution to the productive and commercial goals, to the generation of profits by the enterprise, as happens already with high level management. This way, the company's board acknowledges that its returns, its profits, are also the result of the work well-executed, in an innovative way or, at least, efficient way.

As is well known, this financial participation of workers may take place through different ways, some of them typical of labour law, such as pension plans or guaranteed capitalization funds. Others come from corporate law, such as Employee Stock Ownership Plans, or other types of company plans, through the purchase or not of stock or shares (broaded based stock options plans).

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[21] From the perspective of the individual valuation of every worker, understood as the capability to adapt to changing conditions and expectations in the workplace, a factor of increasing importance for work management decisions. In general, vid. W.Archer & J.Davison, "Graduate Employability: The views of Employers "(Council for Industry and Higher Education, 2008). K.McMillan & J.Weyers, "The Smarter Student: skills and strategies for success at university" (Pearson, 2006). J.J. Votinius, "Having the right attitude: Cooperation skills and Labour law". The International Journal of Comparative Labour Law & Industrial Relations, vol.28, 2012, 223 at 248.

[22] As evidenced by the *case studies* carried out in places as unalike as Turkey or USA. The first one, B.Akbulut and C.Soylu, "An inquiry into power and participatory natural resource management", Cambridge Journal of Economics, vol.36, 2012, 1143at 1162. The second one, J. Brecher, "Banded together (Economic democratization in the Brass Valley" (USA: University of Illinois Press, 2011), 186 at 202.

In Europe, the financial participation is widely extended, especially in the big European concerns, and especially in nordic countries, United Kingdom and France. In the latter, more than half of the workers in big corporations are shareholders. In contrast, the financial participation of workers is significantly lower in Southern and Eastern Europe. As we can see, even if these practices are deeply rooted in many European countries[23], it continues to be a controversial matter in Southern countries such as Italy or Spain, in which the focus of participation of workers, when contemplated aside from collective bargaining and conflict, is treated as a question of "economic democracy", and therefore its approach brings back the old debate of the beginning of the 20th century (from *i consigli di fabbrica* to work self-management), undermining partial perspectives –hardly alternative- favourable to a one-off participation in the sharing of profits obtained by the financial play of the enterprise, either in the stock market or through other means of financial capital management. In these countries, the Council Recommendation nº92/443/EC, of 27 july 1992 (cit.), concerning the financial participation of employees in enterprise results and profits (including share ownership) that required Member States to adapt their national frameworks to the promotion of employee financial participation, also by means of financial or tax relief, have been unnoticed and these recommendations have not been followed up by any relevant legislative action neither in Italy, nor in Spain, pointing to a specificity of the system of industrial relations of the countries of Southern Europe opposite those of Central and Northern Europe.

From the perspective of the evolution of the corporate governance models, the problem resides in finding out whether the end pursued by the systems of individual shareholding participation and/or, above all, the collectively agreed ones, is to promote the involvement of workers in the decision-making or, rather, to favour their loyalty and implication in the production task, in some cases; or, as it happens more often, to alter the pay systems, flexibilising them through the financial participation variable, especially in the cases of exclusively individually oriented schemes as stock options plans.

For instance, in the Italian regulation on share participation (art.2349 Civil Code), it is up to the shareholders meeting to approve the number of shares to be distributed among employees, as well as the rights that go with the allocation of shares (including voting rights, if any). If it is an allocation of shares on a collective basis, schemes of this kind may be considered to be an atypical form of share ownership. In these cases, not legally regulated in reality, the usual thing is to have a group of shares in a unit trust fund, by means of this instrument the company allocates shares to individual employees, but places them in a professional managed unit trust fund and the employees have a share in

[23] In places as distant as Quebec or Spain, the unions manage the pension funds financed via their respective companies by the owners and the workers themselves; in France there are plans of pay savings (*plan d'épargne salariale*); these are all experiences based on the workers' capacity to intervene in the control of their investments or work savings, so that we initially have to consider them as true mechanisms of participation – partial, at least, in the management of the investments of these financial funds – of the workers in the company.

the fund based on the number of units allocated. Another option is employee shareholding schemes set up for the workers in a company based in a collective arrangement for those participating in the shareholding plan. The latter operate with a view to promoting the identification of the employees with management objectives, acting as collective incentives schemes in order to promote efficient practices within the company; whereas the former are true schemes to complement salaries indirectly.

The regulation model of the financial participation mechanisms in Spain is very similar to the Italian one: hardly regulated, case law that gives very little legal certainty to the development of financial participation systems and, when it does so (it is certainly referred to individual plans on stock options), it declares its salary nature and without voting rights[24].

A variation on these financial participation systems is the complementary social security regulation (private pension funds) which have belatedly been passed both in Italy (Act 124/1993) and in Spain (Act 1/2002). These are systems different from the social mutuals (*mutualidades de previsión social*), where the participation of the worker (*mutualista*) is clear and set, in Spanish pension plans the applicable regulation may transform them into a financial participation instrument of employees in their own company (through the acquisition of a significant share portfolio by the pension fund itself).

However, keeping myself to the experience of the two cases that I am considering, in one case and the other it is rare –albeit not impossible- that the possession of a group of employees of a significant number of shares give right to become a board member in companies with a unitarian governance structure, which are the vast majority in both countries. There is some case where this possibility has taken place thanks to the shareholders meeting, for instance in Italy (Dalmine SA, with a 10% share participation)[25], whilst there are more examples to the contrary, both in Italy (Alitalia) and in Spain (CAF or Inditex), in which with similar or even higher participation levels they do not have access to board membership, and where the distribution of shares among employees does not actually consist of a true formula of capital participation, in the sense

[24] I.Alzaga Ruiz, "*Retribución de directivos y crisis económica*" (Madrid:Thomson Reuters/Civitas, 2012). P.Nieto Rojas, "*La participación financiera de los trabajadores en la empresa*" (Valencia: Tirant lo Blanch, 2011).

[25] Bilateralism and Employees' participation, in www.bollettinoadapt.it, 468.

that it does not give power to intervene in the decision-making or the management of the enterprise[26].

In summary, in the two cases reviewed, employee shareholders are not considered as an organized group, and do not have organizational autonomy, nor a functional position within the company, enabling them to influence company decisions or exert pressure on management. Although with limited effects, my conclusion is that financial participation rarely allows employees to intervene in the decision-making process of the company.

3. Regulation of information, consultation and participation through workers' representatives as governance mechanisms and limits of the instruments of the industrial democracy

From a quantitative point of view, although also from the view of the political boost, the European Union has devoted more effort to the guarantee of the industrial democracy than the economic democracy. Indeed, in this case it is not just Recommendations and Communications as in financial participation of employees, but European directives based on art.153 TFEU and on the Community Charter of Fundamental Social Rights 1989 (arts.17-18) and the EU Charter of Fundamental Rights 2000 (arts. 27-28) on rights to information, consultation and participation for workers in the employer's decision making. The EU has focused particular attention on encouraging dialogue between workers, their representatives and their employers, because it sees a clear link between dialogue, trust and productivity within companies; and it's also seen as the cornerstone of corporate governance designed to create a high skill, high effort, high trust European labour market which now lies at the core of European Employment Strategy and beyond[27].

Etymologically, the term "to participate" means "to have something" or "take part in something", which when referred to the corporate organization necessarily means the participation in the decision-making. However, the mechanisms for information and consultation are a very weak type of participation, because the final decision, whether it reflects more or less the opinion of the employees, remains with the employer.

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[26] JP. Landa Zapirain, "Nuevas formas de participación en la empresa", in *Actas del XVII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social (*Madrid: Ministerio de Trabajo y Asuntos Sociales, 2007), 692.

[27] See C. Barnard "EC Employment Law", cit., 702.

In some instances, however, the consultation process is linked to collective bargaining, as in Directive 98/59/EC, on collective redundacies, where employers must consult with the workers representatives with a view to reaching a bona fide agreement. This way, in this latter case, we would not really have a bilateral consultation process, where one party gets to know the other party's opinion before the company's unilateral decision-making, but a collective bargaining process inspired and procedurally fixed as to its possible effects by the law (Directive 98/59 refers to national regulations for its implementation). We will see below the use of collective bargaining as a tool or mechanism for participation in decision-making, and we will now concentrate on the analysis of the search for participation mechanisms in the decision-making within the framework of Community law on information, consultation and participation in the company aside from the instruments of social dialogue.

The involvement of the social partners in the economic and social decisions is a constant of the Community policy since the first Action Programme of the European Community in 1974. But the bumpy road to the passing of employee participation in the European Company Statute Regulation 2157/2001 (Accompanying Dir. 2001/86) dating back to 1970 and approved after 40 years of negotiation is a good sample of the difficulty of introducing into Community law the employees right to participate in the decision-making of the business, the result of the confrontation between corporate governance models like the anglosaxon and the European, but also the cultural perception of employee participation in the North (Norway, Sweden, Denmark), the Centre (Germany, Austria, the Netherlands or, more recently, France) and the South (Spain and Italy).

The result has been a Community legislative action that meant shifting away from requiring consultation on specific issues (as collective redundancies, i.e) and instead requiring employers to set up a mechanism, when asked to do so by their staff, in which to consult workers or their representatives on a regular basis. This regular basis would be generalised as the European model of corporate governance with the model-type of the Works Council Directive 94/45 which establishes a procedure that invites to reach an agreement on the participation model of the company, and if not, there apply subsidiary requirements set up in the Annex[28].

[28] Indeed, this same procedure of regulation of worker participation has been implemented in the ensuing Directive 2002/14 on national level information and consultation, the Directive 2003/72, on worker participation in the European Co-operative Society, or Directive 2005/56 on cross-border mergers of limited liability companies.

In particular, the Directive on participation formulae found in the *Societas Europea*, SE (Dir.2001/86) is the one that has gone further in the area of participation, allowing through the negotiation agreements established in the Directive the implementation of participation systems in which employees elect or appoint the members of a single administrative board (one-tier system of participation) or the supervisory board (two-tier system for countries as Germany or Netherlands). Procedural rights of this kind blur the distinction between corporate governance and labour law and permit to state that the Community regulation on corporate governance transcends the pure shareholder value model which is still present in many member states of the EU[29]. However, I think that this result has been achieved in a sharper way, thanks to the harmonization process of European Company Law, rather than by approximation between the different national regulations in the field of European Labour Law. Indeed, the former is being more prescriptive (through regulations) whereas the latter is rather reflexive, less prescriptive and with a relative absence of legal penalties[30]. Since the questions of employee participation have been left to the latter, this one, however, is not completely devoid of legal effects since it creates an opportunity for dialogue and eventually agreements between management and labour. Consequently, we could say that Community Directives on information, consultation and participation, inasmuch as they pose procedural constraints on management decision–making should also be considered part of EC regulation of corporate governance –and not just the Community regulations on Company Law[31].

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[29] See A. Johnston "EC Regulation of Corporate Governance", cit., 311.

[30] Reflexive regulation as reflexive labour law hinges on dialogue through procedural mechanisms which allow law to remain responsive to the needs of those which it affects. Procedural mechanisms are monitored, and self regulation is steered or channeled toward best practice with a view to generating superior outcomes. In so doing, reflexive law gives worker and employer representatives the opportunity to engage in deliberative processes at a sectoral level or at the level of the enterprise. See A. Bogg & T. Novitz, "Investigating voice at work", Comp. Labor law & pol'y journal, vol.33, nº3, 2012, 337.See also S.Deakin, "Reflexive Governance and European Company Law",CLP Research Paper 20/2007, vol.3, nº4, at 7.

[31] See A. Johnston, ult. cit., at 315.

In any event, in practice, the Directives that have looked to establish at European level forms of employee involvement have failed (in March 2013, there were 1730 SE, of which only 241 could really be considered as true productive enterprises with 5 or more employees, out of which only 41 have workers representatives in the board*)*[32]. Despite calls for the creation of a EU Industrial Relations System[33], there is still in Europe a national regulatory model of employee participation. With the exception of the EWC *Directive* that has allowed the information, consultation, and even sometimes, the collective transnational negotiation, the instruments of corporate participation depend mainly on the regulatory model of corporate governance existing in each state member. In France and in Spain, for example, the works council is the true counterpower body in the enterprise, it has decision-making powers in certain work-related fields, as well as in the organization of work (with a scope similar to the German co-determination model), in some cases, it even has collective bargaining powers. Unions have their own representation in the company and national law has the appropriate tools to empower them to control the works councils, so that these have, in the majority of cases, trascended their original function of cooperation with management, to become a body that expresses the conflict of interests of its members[34].

[32] http://www.metiseurope.eu/administrateurs-salariés-le-paysage-europeen_fr_70_art_2...12/04/2013. See critical commentars in S.Gonzalez &H-D. Köhler, "*La representación de intereses laborales en la sociedad anónima europea (SE)…*".Revista de Derecho Social, nº60, 2012, 231.

[33] M.Rönnmar, "Labour Law, Fundamental Rights and Social Europe" (Oxford: Hart Publishing, 2011), 20.

[34] A. Supiot, "*Le Droit du Travail*", cit., 92

However, in the letter of the law (both Spanish and French), the role of the works council is primarily that of consultation (in France since the *Auroux* Act of 1982). The peculiarity of the German regulation of the works council (*Betriebsrat*) is that, besides having power to decide on the production management and organization of work through the introduction of employee participation in the supervisory board (laws of 1951 for coal and steel companies, Law of 1976 for all companies with more than 2000 employees: 2/3, and more than 500 employees:1/3) the workers' representatives also intervene in the decision-making on strategies for the economic orientation of the company. But, as we pointed out in our introduction, things are happening in France where, as a consequence of the *Gallois Report* of 5 November 2012 and by previous agreement between unions and corporate associations (*Accord interprofessionnelle* of 11 January 2013) there has recently been approved by law that boards of directors in corporations with more than 5,000 employees (which will affect nearly 200 companies) shall have one or two members representing the employees (*administrateurs salariés*). There were some precedents of this participation in the higher decisory body of a company (old state companies such as Air France, Renault, Société Générale, France Télécom, EDF, GDF, …)[35]. This way France will take part in the group of 12 European countries where the presence of workers representation in the management bodies of big private companies is regulated. The French law is an important example, that reinforces the European trend towards the involvement of stakeholders in the decision-making of the company and contributes to strengthen the image of a real European model of corporate governance.

Meanwhile, in the UK, although we can still hear the echoes of the Bullock Committee's inquiry into industrial democracy in 1976-77 putting forward the representation of workers in boards of directors, the withdrawal by the Government of these proposals meant the British reaffirmation of the the anglosaxon governance model, which in turn gave place to a long misunderstanding between the EU and UK on matters of company participation (V Directive, Vredeling proposal, until the formula reached by compromise in Directive 2001/86, accompanying the European Company Statute).

Ultimately, even if we acknowledge the relevance for the definition of a European corporate governance model of Community Directives on information, consultation and participation, applicable to corporations with headquarters in Europe, which have even been applied to foreign companies that operate in the European market (especially with the EWC Directive), it is thanks to the national laws of each state member that workers` participation in decision-making has succeeded. There is also another factor -possibly the more decisive one- for the success and extension of the participative governance model established in Community Directives, the achievement of negotiation of true collective bargaining agreements. These agreements may also have been favoured by the existence of default rules found in the annexes of the Directives. Collective agreements that have

[35] It is calculated that in 2012 there were 39 directors representing employees in 16 boards of directors, the majority representing employee shareholders, which means that nearly 20% of the publicly traded companies in France have at least one employee representative in their boards. See http://www.metiseurope.eu/administrateurs-salariés-on-pourrait-mieux-faire_fr_70_ar...12/04/2013

ultimately been driven by those procedures, by Directives that have contributed to their advance and that are undoubtedly helpful, but whose effectiveness resides not really in the regulations that develop them, but in the very legal nature of the instruments of collective union bargaining according to the national features contemplated for their development and execution.

3.1. Social dialogue and collective bargaining as the regulatory framework of the decision-making process for the management of the company

Collective bargaining agreements frequently serve to introduce participation formulae at company level. We have often seen it in big European corporate groups[36]. In the systems of industrial relations of Southern Europe, collective bargaininig must be considered the means which, more than any other makes employee participation possible, at the same time exerting an strong influence over decision-making in companies. As we have just seen, the mechanisms of information and consultations may influence the decision-making process more effectively if they are accompanied by instruments of collective bargaining, above all if the binding effects on the parties arise from the collective agreement or, if you prefer, if the binding nature derives from the contractual nature of the collective agreement.

The functionality of the instruments of collective bargaining does not stop at the formulation of participative mechanisms in the enterprise, but, mainly, allows the expression of the interests of workers and their influence is favoured if the negotiation is accompanied by pressure instruments (collective conflict, strikes,…) adequate to their defence. This is a very necessary role in times of economic recession like the present one[37], but also after the recession, because in the knowledge and services economy that business activity heads for it would be more effective if its commercial and production goals were the result of a wide agreement with stakeholders. In this sense, the global enterprise is more and more managed as if it was a political body[38], and the negotiation

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[36] Companies involved in concluding transnational company agreements are mostly big multinationals in the metal, construction, chemicals, food and financial sectors, headquartered in Europe and having well established European Works Councils. European Commission (2008a) "Mapping of transnational texts negotiated at corporate level", Brussels (EMPL F2 EP/ bp2008).

[37] According to the "World of Work Report 2011" of the ILO, work participation in the distribution of national income has diminished by at least 75% during the last three decades in the 69 group of countries of which there are available data. On the other hand, the progressive reduction of salaries –the recipe being applied, particularly in the EU, to respond to the economic recession- is not stopping the growth in unemployment. ILO Report, n. 90, (Madrid: Ministerio de Empleo y Seguridad Social, 2012), 95.

[38] I. Ferreras, « *Gouverner le capitalisme*? », cit., 256.

instruments may well be adapted to the image had by some of the enterprise of the 21st century.

In Europe, collective bargaining has its own speciality of what has been called the social coordinated-market economies, an extended model in the Europe of 17 countries – opposite the liberal market economies – and whose cornerstone is social dialogue. A characteristic of social dialogue is its typological variety, and the result is the multiplicity of levels and contents of the collective bargaining, because it is not just limited to negotiation in the company, but adds other national or local branches too without detracting from the economic performance the productive result of the enterprises, whether at macro or micro economic level[39]. The efficiency of this model is shown in the coordinated action of German collective bargaining: the competencies recognised by law to the *betriebsrat* (works councils) allows a controlled derogation of the national or regional collective agreements, because the relation between negotiation levels is not hyerarchical[40]. The works councils are relatively independent from the unions that direct the collective bargaining at supracompany sectorial level. The German employer is contractually bound to those agreements, the branch ones (with the unions) and the company ones (with the works council), and at this latter level are agreed the questions that relate to the competencies recognised to the works-councils by law[41]. In short, a model that shows its flexibility and adaptability to economic changes.

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[39] For the Dutch case, see: JK. Looise, N.Torka & S.Zagelmeyer, "Industrial relations systems, innovation, and economic performance: uncovering myth and reality from a dutch point of view". Ind. Jour. of Com. Lab. Law, vol.28,nº2, 2012, 273.

[40] See M.Faioli, *"Oltre la continuitá. La contrattazione collettiva decentrata nell'esperienza francesa e tedesca"*, Riv. Italiana di Diritto del Lavoro, Vol. I, 2012, 484.

[41] Art.87 of the *Betriebsverfassugsgesetz* rules the right to co-determination in the work council and gives it regulatory competencies on, inter alia: work sanctions, hours, pay mechanisms, professional promotion, leaves, security at work, bonus, work organizations or performance of work groups.

In the rest of Europe, in an attempt to get closer to that model of decentralised coordination, we can see that the systems of industrial relations evolve through legal reforms towards that model of articulated negotiation, trying to keep their own national traditions and specific system of industrial relations through social dialogue -as is the case in France. The French example is symptomatic of this trend, the Law 789 of 20 August 2008 focuses strategically on the superior role of local or company negotiation levels as opposed to the sectorial or branch negotiation level. To this end the reform has introduced various changes in the traditional legislative technique. Now the higher union representativity is measured through the majority principle which since the reform gives legitimacy to negotiate at all negotiation levels. Besides, it procedes to the destructuration of the hierarchical relations between law and collective agreement, and between branch agreement and company agreement, until acknowledging the preeminence of the company negotiation level through the introduction of the principle "*specialia generalibus derogant*", that replaces the traditional principle of "*favor lavoratoris*"[42]. Another recent example of this trend is Spain, where, since the Law 3/2012, of 6 July 2012, the company agreement (negotiated with the work council or the company unions) is also given priority before the sectorial agreements, even if it has a limited scope over the matters that may be subject to negotiation, though these are the ones that matter most to workers (for instance, total amount of remuneration, distribution of working time, or number of work shifts)[43]. In fact, in Spain there is a relatively loss of significance of the traditional consultation mechanisms in exchange of a higher incidence in the procedures of the negotiation of the decision-making on management and organization of work.

[42] See M.Faioli, ult. cit. , 489.

[43] New wording of art.84,2 and 82,3 of the Ley del Estatuto de los Trabajadores of 1995. Comentaries to the reform of these articles in the work soon to be published: JP. Landa Zapirain (editor) "*Flexibilidad interna e innovación en la empresa*", (Madrid: Dykinson, 2013), now in printing.

The trend is similar in many other Eastern and Southern European countries, especially as a consequence of the concessions made by the national authorities to implement the Memorandum of Understanding imposed by the European Union, the IMF and the ECB to get access to the so called 'financial rescue umbrella'[44]. In any event, among the unions of these countries there is an extended opinion that these reforms of collective labour law will definitely weaken trade union representation and action at all bargaining levels.

4. Corporate social responsibility or the voluntary regulation of participative corporate governance.

There are opinions among the labour law authors that the involvement of workers in the enterprise is a question that should preferably be addressed outside the hard law, following the example of the Community law of a reflexive law approach (a regulation method half-way between the hard law and the soft law), because this approach has the advantage of allowing diversity of practices in the industrial relations traditions of different member states[45]. In short, the model to follow would be that of the rights of information and consultation and board-level participation in decision-making as regulated by EU Directives. If it is a question of imagining harmonization ways between national laws (a role entrusted to social Community policy) or of looking for new methods of transnational law, this road could also be explored from the experience of Community law itself, looking at the potentialities that the extension and impulse of participation in the company may be had by the soft law approach to Corporate Social Responsibility (CSR).

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[44] S.Clauwaert & I.Schömann, "The crisis and national labour law reforms: a mapping exercise". ETUI., 2012, Brussels, 13 at 14.

[45] According to A.Johnston the success of this non invasive approach to regulatory competencies in state members has been in "leaving free choice of governance models" . See A.Johnston, ult. cit., 232 at 233

In the EU[46], the discourse on CSR had its relevant moment when the European Commission launched a consultation with its 2001 Green Paper on Corporate Social Responsability[47], whose results were detailed in a further Commission Communication issued in july 2002[48]. Later examples of this process pioneered by the Commission are the Final Report of the European Multi-Stakeholder Forum on CSR, and a further Communication of 2006[49]. The conclusion of this process has led the Commission to clarify that its intention was not to monitor voluntary measures such as codes of conduct against international standards, such as those promulgated by the OECD , ILO or lately ISO[50], as had been the will expressed by the European Parliament; but rather, the Commission continued to develop the voluntarist conception of 2001, in steering business

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[46] Not just the EU, but the OECD and UN have put forward proposals on the governance of multinational companies, social responsibility or responsible investments. For instance, the UN Programme for the Environment (UNEP-Financial) of 2006 proclaims the principle of socially responsible investment to defend that the orientation of financial investments according to social, environmental or corporate governance issues may influence on their returns. See N. Notat, ult. cit., 43 at 44.

[47] Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2011) 366 final, 18 july 2001. In this paper the Commission defined CSR as "a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment…companies integrate social and environment concerns in their business operations and in their interaction with stakeholder with stakeholders on a voluntary basis". The Green Paper refers to a wide concept of CSR, operating inwards and outwards, which is seen in its projection on matters such as the relation between workers and management, or the convenience to find the participation and implication of all the parties affected through open information and consultation. The ISO 26000 also includes in its definition of social responsibility its integration in the daily life of all the organization and its implementation in its internal and external relations..

[48] Communication on Corporate Social Responsibility: A business contribution to sustainable development, COM (2002) 347 final, 2 july 2002.

[49] Communication of the Commission implementing the partnership for growth and jobs: making Europe a pole of excellence on CSR (COM (2006) 136 final, 22 march 2006). However, this paper does not imply a step forward on the internal dimension of CSR, even less so of worker participation, save the generic references to the partnership culture or the pro-active dialogue in situations of company restructuring

[50] Regulation ISO 26000 adopted in November 2010. According to the definition of its "technical norms" offered by the ISO itself (International Standardization Organization), these are approved by consensus, that give, by its repeated use, rules, guiding lines or characteristics according to their results, guaranteeing an optimum order in a specific context". M.Capron, F. Quairel-Lanoizelée & MF. Turcotte "*ISO 26000: une norme hors norme ?* » (Paris : Ed. Economica, 2011), 6.

towards voluntary adoption of CSR practices, contributing to the creation of the European Alliance for CSR[51]. This way, the EU is ratified in the soft law approach to CSR, which permits enterprises to adopt the adequate strategy among multiple variables, choosing the one more suited to its culture and origin, or the determinisms of its network of economic and social relations, or the challenges of the competition, whenever it assumes the responsibility of its impact on society.

From the international perspective of the soft law approach on CSR, the approval of ISO 26000 has been particularly relevant, yet another example of this voluntary or self regulated approach to CSR by enterprises. It is a typical international norm, but not certifiable, because it is not another procedure to be met to obtain the recognition of the ISO organization (as the preceding ISO 9000 and 14000), rather, probably, the ISO 26000 aims at defining and promoting a collective attitude that remains whilst corporate action evolves, where we could say that the promise based on the contract between the different stakeholders of the enterprise is the foundation of that CSR, not one and only, but changeable depending on the characteristics of the enterprise. At least, this may be said of those companies that have negotiated their respective codes of conduct with union representatives at transnational level, and it would be more arguable to say so in relation to codes of conduct or corporate codes not reached by agreement, or unilaterally approved by management of shareholders meeting.

ISO 26000 (legally qualified as technical rules) is a unique norm. It has been legally valued as a new source of autonomous law (an unorthodox construction by the authors within a pluralist approach to legal sources[52]) guided by the search for balance between diverging interests. However, beyond the political -and market- judgement on the prestige of the ISO norms, the truth is that these technical rules, especially the ISO 26000, lack any kind of control procedures -particularly penalties in the event of breach[53], in the purest soft law style. If, besides -as we were saying at the beginning of

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[51] Communication of 25 October 2011 on the renewed EU strategy 2011-2014 for CSR (COM (2011)681 final), offers a new definition of CSR, whose voluntary adoption by corporations, through close collaboration with interested stakeholders pursues the integration of social, environmental and ethical issues, the respect for human rights and the concerns of consumers in their corporate activities and basic strategy, to maximize the creation of value shared by its shareholders and other interested parties and society in its wider sense …at 7.

[52] F. Laronze, « *La norme ISO 26000, une source de droit en matière sociales ?* », Rev. Droit Social, nº4, 2013, 346.

[53] I. Daugareilh,"*La norme ISO 26000 sur la responsabilité sociétale des organisations : observations sur une expérience d'inter-normativité* », en M. Capron, F. Quairel-Lanoizelée & MF. Turcotte, cit., 160 at 161.

this section- this entails the absence of legal rules in its proper sense, rules establishing said social responsibility -self-proclaimed but ultimately acquired- and the consequences of its breach by the enterprise, there may exist a replacement of the rule of law by a promise and a compromise -between parties of unequal contractual power or unilaterally by management- that is difficult to control and not actionable before the courts.

In this out of law context, another formula even more alternative than the reflexive regulation approach, that the CSR could play, at least in theory, an important role in the development of a renewed concept of the interest of the enterprise that would not only take into account the interests of shareholders, but also of other stakeholders, particularly of employees. Having said that, the current practice shows, especially in the case of liberal market economies corporate governance codes, that these codes of conduct or private rules are more oriented to external matters of the company, and have not been used to promote employee participation but, at most, have contributed to reinforce the focus of the company on the health and safety at work, training of personnel or the respect for human rights among its employees[54].

The hope for a potential use of the CSR mechanisms in the internal relations of the enterprise and eventually as a regulation framework for active participation of the employees in the company needs more heteronomous regulatory instruments, even if it is just through reflexive regulation, establishing procedures for monitoring, reporting, judicial control or bargaining and mediation. In practice, examples of this kind of ethics codes of responsible governance are found among coordinated social market economies. The clearest example is, maybe, the approach of the German Corporate Governance Code that presents essential statutory regulations for the management and supervision of German listed stock corporations and contains internationally and nationally recognized standards for good and responsible governance in order to clarify the obligation of the management board and the supervisory board (where workers representatives sit)[55] to ensure the continued existence of the Enterprise and its sustainable creation of value in conformity with the principles of the social market economies. The Management Board coordinates the enterprise's strategic approach with the Supervisory Board and discusses the current state of strategy implementation with the Supervisory Board at regular intervals. Transactions, change of asset, financial or earnings situations of enterprise require the approval of Supervisory Board. The management Board is responsible for

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[54] Even in those that are the result of collective agreements, according to field research carried out byT. Jaspers in German, French and Dutch multinationals, in JP. Landa (editor), "*Flexibilidad interna e innovación en la empresa*", (Madrid: Dykinson, 2013), now in printing.

[55] The supervisory board appoints, supervises and advises the members of the management board and is directly involved in decisions of fundamental importance for the enterprise. The representatives elected by the shareholders and the representatives of the employees are equally obliged to act in the enterprise's interests. See D. Hexel *"10 Jahre Corporate Governance in Deutschland. Eine Bestadsaufnahme aus Gewerkschaftlicher Sicht"*. AuR 9, 2012, 335.

independently managing the enterprise in the interest of the enterprise, thus taking into account the interests of shareholders, its employees and other stakeholders, with the objective of sustainable creation of value. The full Supervisory Board determines the respective total compensation of the individual Management Board members[56]. In other cases, such as France, the control of the control of the codes of conduct or of responsible governance of the enterprise, within the framework of the law, may be carried out by private qualification or consulting agencies (example:VIGEO).

It seems evident that for CSR to be something more than good intentions without any real effectiveness (which is rather like the logics of the ethics of Kantian beliefs, individual and legally unaccountable), the problem seems to be the absence of a sufficient regulatory framework, which in accordance to legal logic should tend to have universal value and therefore international scope. A regulation capable of effectively guaranteeing the demands for responsibility of the enterprise in face of its own breaches (liability required by the Weber concept of the ethics of responsibility), or, at least, that will make enterprises assume a corporate governance system capable of responding in a fast and reactive way to the breaches of the codes of conduct or company agreement on CSR.

The axiom of the international discourse on CSR is well known and is based on the famous saying of J.Elkington "the triple bottom line of responsible business"[57]. But its implementation by companies is far from being homogeneously recognised at international level. In the social market economies the emphasis is made on the added value given to corporate governance by adopting a CSR strategy. Indeed, the significance and reach of CSR is not just limited to the compliance with the legal obligations derived from the law, but in obtaining something extra that the law does not require or demand. That added value consists in companies directing their efforts towards the development and maintenance of the human capital, the defence of the environment and the value of relations with other stakeholders and with the social medium. But usually there are no other indications on employee participation on behalf of the interest of the enterprise other than those set in the legal regulatory framework.

5. What kind of regulation of corporate governance – labour law or company law?

[56] See D. Hexel, ult. cit., 337 at 338.

[57] B. Horrigan, "Corporate social responsibility in the 21th century: debates, models and practices across government, law and business". (Cheltenham: Edward Elgar Publishing, 2010), 36.

As we have just seen, the traditional regulatory techniques of employee participation through the rights to information, consultation and negotiation, or those of some European regulatory models on the participation in the management bodies of the company or in its capital, as those modern approaches to the review of corporate governance from the point of view of soft law techniques, such as CSR or the corporate codes of conduct, lack control and verification mechanisms in some cases, or of valid penalties in other, or are not sufficiently democratic (without voting rights or vetoing rights) to guarantee the true consideration of the interests of employees in the decisions on strategy or performance of the enterprise. After all, it is up to Company Law to regulate the internal operations of companies, by making managerial decision-making the main mechanism by which corporate entities exercise strategic control over business, it provides the legal foundations for corporate governance[58].

The question is whether the role of company law is also that of regulating the notion of enterprise. I am thinking of the notion of enterprise differentiated from the corporate notion, the enterprise-human venture that pursues the complex but collective interest of all the components of the same enterprise. A complex interest, precisely, that has to be legally defined. In these times of crisis of models and values, it may be timely to revive the legal and political debate around the notion of enterprise as a juridical concept, a definition that be more adjusted to the present moment of capitalist production model in the new post-recession era that will emerge after the present uncertainty.

To this end, the techniques typical of labour law may help (it may be construed, hypothetically, a labour law notion of the enterprise not found under labour law), but its reach will always be limited to the legal effects of pure labour law, and more specifically, the legal attribution of obligations derived from the execution of the labour contract. This limited approach is possibly not enough if what we are trying is to rebuild the original idea of enterprise as the collective organization of persons ready to pursue a commercially profitable goal in the interests of all of its members, which also includes a goal of environmental sustainability and of personal satisfaction for the stakeholders in these times of a globalised economy and environmental change. It may be that the techniques of industrial democracy are not enough to give an answer to this definition of enterprise, as used by social and economic agents with the more or less support by the public administration until that moment; it is possible that company law ought to be revisited with the help of labour law authors, going back to the debates of the beginning of last century about the idea of professional managers had a responsibility to society as a whole[59].

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[58] A. Johnston, "EC Regulation…"cit., at 1.

[59] And…" they must (like trustees) exercise their powers for proper purposes and in good faith. A fiduciary duty requires you to put the interests of someone else, here the company, before your own", said B.Wedderburn, "The future of company law…", cit., 7.

The reasons that call for rethinking in depth the corporate governance model, founded basically on the company law aimed at the stock and shares company are many, but there is a major one at this moment of economic crisis, which is that from the microeconomic point of view, the prevailing role of financial investors in corporate governance has made that many manufacturing companies the decision-making has shifted from the technical or industrial management to a group of interests that represent those financial investors. This situation has meant that, in many cases, it is no sure -technically speaking- whether companies are governed by criteria of good professional management. This fact may result in a higher factor of dissolution of the traditional balance that had historically sustained the construction of the so-called Industrial Relations System of the 20th century, but at the same time it may be determining the crisis of the labour value in the era of the capitalist productive relations in the world. As I have tried to expose in the above section, the loss in value of labour may be harming at medium or long term the very sustainability of the enterprise, by turning it into a mere element of financial speculation in the short term through its financial investors, with all the economic, social and political consequences that said actions may have on the company and, in particular, on the employees and their families.

In all evidence, too, the independence of the management power of the professional managers may be bought through salaries, fees, share option schemes, bonuses and golden handshakes. This makes the implication of stakeholders in the decision-making bodies even more justified. We could add to this good corporate governance, which is not the cure-all solution, other mechanisms of economic democracy, that would permit the external control of other stakeholders or even of civil society, for instance, through its local representatives.

On the other hand, the question of better corporate governance and the role that employee participation may have in this betterment, is a recurrent theme that has never left the debates by experts, and it is certainly present in the current legislative action and the dynamics of many enterprises. The continuity of the debate is probably due to the persistence and relatively successful German model of governance, also implemented in other European countries like Austria or the Netherlands (and recently Czech Republic, Slovakian and Slovenia[60], its dual governance model (with two decisory bodies), the co-

[60] With its own specificities, the German model of co-determination, by which employee representatives are appointed or elected for the boards of directors, is followed in the Scandinavian countries of Sweden, Denmark, Finland and Norway (with the specificity that its imposition is not compulsory, save where demanded by the unions, the majority of workers or the work councils according to the applicable corporate law, and depending on the number of employees, that, even if it is not usual, may be requested in the small and medium enterprises of these countries). In the Netherlands, workers participate in the shareholders meeting, with no voting rights. Also in Austria, with one third of the board of directors, although employee representation cannot intervene in the pay committee; similarly, employees are represented in the decision boards of steel companies in Luxemburg or in privatised public companies in Spain and Poland. Other European countries are introducing this participation via the law, as has just happened in France, or is still being debated as a reform in corporate law, as in the UK.

determination system through the *betriebsrat*; it has been, in reality, the necessary counterpoint to the generalization of the purely liberal governance model based on the centrality of creating shareholder value as the only goal of the business venture.

There have been many sociological and economic studies that have tried to demonstrate the better performance of one model or the other, without clarifying which of the models really does perform. What is clear is that there is no direct relation between employee participation and company results, as there is no direct relation between performance and type of company either, say publicly quoted companies and cooperatives[61]. The problem, maybe, is in the concept of company effort -what is the goal of a participative enterprise, to create share value or to meet the interests of its stakeholders through a social and economically sustainable production?

The participation of employees in the management and strategy bodies ought to be of particular interest to labour law experts, because employees are not just stakeholders, they are a constituting part of the enterprise, since the existence of the enterprise depends on their work. Their role in the board of directors and appointed committees may be more efficient than that which has been performed, for instance, by independent directors (who have occasionally contributed to exacerbate the financial interest of the enterprise)[62]. This last formula was suggested during the debate on corporate governance of the last quarter of the century, but has a serious problem, since the independent directors ignore the activity of the enterprise, whereas the employees have been performing it since the origins of the company.

For the legal construction of this renewed commercial notion of enterprise suggested, there are other elements that are indispensable. In parallel to the idea of sustainable economy, there is, in the first place, the notion of CSR (see note 47). Inspired by this idea of CSR we have the attractive proposal by Segrestin and Hatchuel on a new type of company the "*société à objet social étendu (SOSE)*"[63], whose organization

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[61] The Biedenkopf Commission concluded that there was no proof of negative economic effect derived from the companies with a codetermination model. See Hans-Bockler-Stiftung, "*Résultats de la Commisssion Biedenkopf, Commission gouvernamentale pour la modernisation du système allemand de co-détermination au niveau de l'entreprise*", http://www.boeckler.de/:7, 2007, 3.

[62] According to the "World of Work Report 2011" of the ILO, the benefits of the non-financial corporations in the advanced economies of the first world have been more and more used to pay dividends and to invest in financial assets instead of performing productive investments, when the creation of employment basically depends on productive investments, ult. cit., 63 at 64.

[63] B. Segrestin & A,Hatchuel, "*Refonder l'entreprise*", cit.,106 at 114.

principles would be the equal sharing of company results, of stock capital and of management control among shareholders and employees; and at the same time extends the freedom and autonomy of management. In the opinion of these authors, there should be a law to regulate "*the Enterprise*"[64] with its own charter, setting the collective business action, creative and supportive, under an absolute priority: to avoid that short term returns (classical statement of fiduciary duties) could determine the strategy of directors or managers for the social objective of the company in its economic, social and environmental dimension[65]. This charter would not be alternative but supplementary to the traditional charter of companies, cooperatives or groups of economic interest, provided that we differentiate one from the other. A more radical form of company would start from the idea of a new "company contract", added to the "work contract" in the case of employees or to the "shareholding agreement" for shareholders, whose clauses would set out the rules on management power (executed by the entrepreneur/manager), a common pre-established organization and rules on the supportiveness required from the corporate action.

There would also inspire the new idea of enterprise as a separate notion from publicly quoted companies, the principles behind cooperatives[66], a minor element in company law but whose legislative history is as old as the very regulation on corporations. One of the main values of cooperatives is that their model of corporation has been proved particularly apt to the traumatic effects of the recession on

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[64] The definition in social and political terms given by these authors is of an absolute modernity, because they are not relevant in themselves, nor the goal of valuation of its assets, nor it is defined according to its foundation partners or the particular techique developed by them, but according to the capacity of development of its organization, without limit in the nature of the goods that it will manufacture, the techniques that it will have to movilise or the persons that will take part in it. Ibidem, 33.

[65] They mention as the model to follow the Law of 9 October 2011 of the State of California, that regulates a new type of company: the flexible purpose corporation, together with other legal projects that seek to create a new type of company, a hybrid between a for-profit corporations and non-profit organizations (B-Corporations in Maryland & Vermont states). See B.Segrestin &A.Hatchuel, ult. cit., 109.

[66] Cooperative principles such as the company capital being distributed among worker-partners, every partner has say and vote in the shareholders meeting, the directors are elected by the worker-partners, the shareholders meeting approves the pay policy for workers and directors, and benefits are equally shared between worker-partners after company provisions are deducted. On the other hand, the model of cooperative company is widely supported by the CSR discourse, the new definition of CSR set in Communication 25 October 2011 expressly states that "cooperatives, mutuals, and family-owned businesses, have ownership and governance structures that can be specially conducive to responsible business conduct", ult. cit., 8.

unemployment, because it permits to reallocate partners to other roles or positions, as has been demonstrated, in the Spanish case, by the company group *Mondragón Corporación Cooperativa* (MCC)[67].

Facing a subject like corporate governance, and admitting that it is necessary to reform company law, there is no doubt that the dual structure of company management with two types of decision-making bodies, typical of the German model, has inspired the creative controversy between those for and those against it, whilst the defenders of the anglosaxon governance model have not been able to convince anyone of the lesser efficacy of the European model, based on the existence of internal relations between parties, long-lasting and interdependent[68]. For instance, the proposal by Isabelle Ferreras of *l'entreprise bicamérale*[69], with a body of representatives of the labour investors (to decide by majority on strategic issues) and another representative of capital investors (to appoint by majority the members of the board), and management accountable before those two bodies or representative chambers, and not just before the shareholders, is a proposal that, in essence, tries to correct the false parity of the German co-determination model. In my view, François Bloch-Lainé's proposal was more pragmatic and practicable[70], suggesting back in 1963 to subject corporate governance to a combined management representing capital and workers in a supervisory commission to monitor the directors. That simple, but equally difficult to incorporate into law in the countries of Southern Europe.

6. Final

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[67] MCC is ranked as number 10 among Spanish industrial corporations, with more than 40,000 worker-partners, with a labour relations model based on the principles of participation, information, training and work flexibility, and has managed to keep practically its full level of employment in 2012, at levels prior to the start of the recession (2007), at a time where the unemployment rate is 26.8% in Spain and 13.6% in the Basque Country, thanks to the application of financial and work measures allowed for in the corporation's charter. See J. Mongelos, "*La comunicación, la participación y la formación de los trabajadores, núcleo duro de la competitividad y el empleo en la empresa*", Revista del Ministerio de Empleo y Seguridad Social, nº96, 2012, 96 at 97.

[68] Boutillier et al. "*Finacement et gouvernement des entreprises. Exceptions et convergences européennes"*, Revue d'économie politique, 2002, vol.112, nº4, at 500, 501.

[69] I.Ferreras, "*Gouverner le capitalisme*?", cit., 130 at 131.

[70] F. Bloch-Lainé, "*Pour une réforme de l'entreprise*" (Paris: Ed. du Seuil, 1963),14.

To date, it is not possible to demonstrate that there is a corporate governance model as a reference of economic efficacy, even less so if we pretend to combine economic efficacy with democratic participation, in reflexive and evolutive cooperation of its stakeholders in the decision-making. This calls for pragmatism in our conclusions, because in all probability the solution to this issue lies in understanding the unavoidable variety of different developments that free productive capitalism is capable of inventing and generating. The present regulatory plurality in company law, that does not however manage to satisfy the ideal of a humanly responsible enterprise that underlies my thoughts needs a regulatory harmonization -globally assumed by all public powers and private agents- on the ideal concept of enterprise to be used in the economic relations of the 21st century. This can only come from the interrelation of international regulatory powers (ILO, UN, OCDE, OMC, ISO and other international regulatory bodies) and the national regulatory systems. Awaiting for such magnificent surprise from politicians and institutions, we will welcome future research on the collective performance of one type or the other of corporate governance, in the short and long term, with or without economic crisis.

In the short term, however, there is evidence that calls for some optimism on the possibility of global harmonization around the corporate governance model more suited to changeable times, which, in contrast with what seems to be the case now -and against all odds- would not be oriented towards the dominant ultraliberal shareholder value model, but towards a corporate governance model more balanced between the representation of the interests of the parties that make it up, besides being socially responsible. In particular, there is certain convergence in the EU among company regulations of state members, towards governance formulae that follow, in one way or another, the representation of the main stakeholders ingrained in the dual structure, especially in the case of medium and big enterprises[71]. We could talk of an emerging hybridization regulatory process under the cover of Community law, through regulatory techniques originally stemming from hard law and reflexive law, and the national legislative practice in the majority of state members. The clearest example is that, in those systems less prone to dualization, that have a one-chamber system, there have however been reforms to introduce non-executive boards (also called independent) in publicly quoted companies, which in principle do not represent the interests of the shareholders, indeed in some of these cases these directors or independent members represent the interests of employees, as it frequently happens in big privatised national companies. We should not reject the idea that state members intervene to strengthen the

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[71] There is a vague opinion among the experts on corporate management that the demands of corporate governance democratically accountable and socially responsible cannot be extended, but with multiple nuances and exceptions, to small and family-owned businesses, microcompanies and self-employed workers. See J.P. Landa & R. Otxoa-Errarte.“ Pymes y cooperativas ante el reto de la RSC:La nueva ISO 26000”, Oñati Socio-Legal Series, Vol. 2, No. 2, 2012 , http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049865## ISSN 2079-5971.

representation of the general interest of the enterprise -or of the group of its stakeholders- by these independent members.

This hybridization process is an interesting trend in the debate on the necessary reform of corporate governance for the 21st century, a governance more suited to the era of technological revolution and economic globalization, more in line with the introduction of principles of democratic management and social responsiblity. Because a rather clear conclusion that arises from the comparative review of dual (two-chamber) and one-chamber structures is that very frequently the former respond to the interests of shareholders (or portfolio managers that may exert the control over the company), whereas the latter have a more holistic approach to the enterprise, by which the interests of the group of stakeholders are taken into account[72]. Mainly for this reason dual governance may be found in the coordinated market economies of European countries and shows more advantages in the face of the challenges of global competition and offers better responses to the social effects derived from the capitalist crisis.

We can also find in this debate on corporate governance the existence of a higher interdependence between the institutions of labour law and company law, and between these two and economic public law (confirming Cioffis' theory about nexus of law). In my opinion, besides constituting evidence, it is also the way that labour experts must defend and delve in, recognising and safeguarding the contribution made by workers; and from my point of view the best area where workers may contribute to the business activity is via the double route of valuation of the contribution of human capital to the business venture and the exercise of control in decision-making by the representatives of employees within the institutional mechanisms regulated by law. This is the basis for the genesis -irrespective of the type of company- of a humanist idea of enterprise in its conception and values (besides being economically viable), with an exercise of internal power democratically controlled by the majority of its stakeholders, and a responsible management by managers. This formulation of the idea of a humanist enterprise may still cause certain problems in the framework of national industrial relations, political and union-related problems mainly. However, I still believe that to solve the challenge of corporate governance for the 21st century is crucial to the strategic redefinition of new objectives and instruments of union action which will lead to a renewed and modern unionism, and to smarter managers, more aware and responsible.

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[72] M.Boutillier et al. "*Finacement et gouvernement des entreprises. Exceptions et convergences européennes*", cit., 535.