

Labor Law and “Atomization of Work”: Legal Responses to the “Fissured Workplace” in Spain

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1. Introduction

Work has changed. We still tend to think of workers and workplaces according to the archetypes smartly captured in Chaplin’s great film *Modern Times*. But modern times are already the past. The old black and white picture of a numerous bunch of industrial workers employed together in the fordist-taylorist manufacturing chain of a big industrial plant is blurring. The new (smartphone?) pictures of work offer a much more complex and diversified panorama of employees, employers and workplaces. The classic patterns of salaried work have mutated in the context of the post-fordist version of capitalism developed since the late 1970s¹. As an indirect result of the 1973 crisis and with support in new technologic developments, traditional companies and new entrepreneurs started to follow new management orientations in business organization, as “flexible specialization” or focusing in “core competencies”, and strategies like externalization of activities, outsourcing or offshoring, with the aims of, among other things, increasing adaptability, reducing risks and responsibilities and cutting costs, according to the new ideal of “lean management” and “lean production”². These trends have been causing profound transformations in the characterization of work, workers, workplaces and employers, which is gradually moving away from the originals that we used to bear in mind. The former paradigm of large industrial companies managing the whole production and distribution processes and acting as single employer for all the legion of workers involved in such activities is being “fissured” or “atomized” into interconnected multi-layered business networks composed of a multiplicity of “daughter”/ “sister” companies, contractors, subcontractors, suppliers, franchisees and even other types of entities, each of them carrying out lesser piecemeal parts of the outsourced economic activity, as legally independent employers in charge of their own respective employees in minor-size workplaces³. To summarize, this process and its outcomes could be referred to as “atomization of work” or “the fissured workplace”, graphically outlining the fact that it has served to major companies and leading brands to shed jobs and inherent employer’s responsibilities that were once held inside, and which are now externally appointed to

¹ PIORE, M./ SABEL, C., *La segunda ruptura industrial*, Alianza, 1990, pp. 1-456.

² RIFKIN, J., *El fin del trabajo. Nuevas tecnologías contra puestos de trabajo: el nacimiento de una nueva era*, Paidós, 2003, pp. 119-136; CASTELLS, M., *La era de la información. Vol. I: La sociedad red*, Alianza, 2005, pp. 111-205; LETAMENDÍA, F., *Estructura política del mundo del trabajo: fordismo y posfordismo*, Tecnos, 2009, pp. 123-135.

³ VALDÉS DAL- RÉ, F., “La descentralización productiva y la formación de un nuevo paradigma de empresa”, *Relaciones laborales: Revista crítica de teoría y práctica*, n. 18, 2001, pp. 1-8; CASTELLS, M., *op. cit.*, pp. 201-249; LETAMENDÍA, F., *op. cit.*, pp. 133-155.

those other smaller units nonetheless integrated in a somehow coordinated business system⁴.

Labor Law was originally conceived on the basis of those earlier schemes of work that are now in withdrawal, addressing employment as a quite simplistic bilateral relationship of each single employer vis-à-vis the employees actually belonging to her staff, within the context of a “pre-fissured” workplace. Therefore, the new complexity of the world of work entails significant tensions and challenges for the application and enforcement of that legal system, which suffers from lack of adaptation to the renewed economic patterns⁵. The spreading of employment into complicated business networks entails increased risks of blurring of responsibilities or circumvention of law in regard to employers’ obligations and employees’ rights. It is a matter of fact that lack of compliance with labor standards has become more likely and harder to tackle in the context of “the fissured workplace”. But even leaving apart pathologic cases, the problem is that some of the classic institutions and regulatory orientations of Labor Law might be quite outdated and do not fit properly to the new shapes of business and workplaces⁶. On the other hand, employment relationships in the lower levels of subcontracting and supply chains or franchising arrangements are usually managed by small and weak employers subject to fierce competitive pressure from the markets and though requirements imposed by the leading business, being consequently trapped in a difficult position that pushes them to lowering labor costs and even to “social dumping”. As a combined result of those and other factors inherent to atomization of work, the moves towards “the fissured workplace” tend to result in decrease of wages, poorer working conditions and, in general, more precarious work⁷.

Hence, it is urgent for Labor Law to adopt appropriate legal responses to the new challenges arising from the “atomization” processes leading to a “fissured workplace”, in order to face its worst consequences, or even to accomplish a global resetting for a better adaptation to the new paradigms of work. This effort should acknowledge that, while “atomization” of work has enabled the leading companies and brands to reduce the responsibilities, costs and risks of being the employer by shedding employment to smaller units considered as legally autonomous undertakings, those upper-level stakeholders continue nevertheless to control the whole economic ensemble, by means of shareholding or imposing targets and rigorous standards to the lower levels of business-groups, subcontracting networks, supplier chains and franchising arrangements. In such circumstances, employees’ work within those networks is somewhat run from beyond the entities that have formally entered the employment contract, as these can often be considered as “subordinated employers”, or even as just the contractual connection to a complex “diffuse employer”⁸. Thus, even if the starting point is to consider that these

⁴ WEIL, D., *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014, pp. 7-27.

⁵ SUPLOT, A. et al., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, 2001, pp. 1-57.

⁶ BARREIRO FERNÁNDEZ, G., “Notas sobre la descentralización productiva en la empresa y su escisión interna”, *Revista española de derecho del trabajo*, n. 94, 1999, pp. 165-186; VALDÉS DAL- RÉ, F., “Descentralización productiva y desorganización del Derecho del Trabajo”, *Relaciones laborales: Revista crítica de teoría y práctica*, n. 20, 2001, pp. 1-10; RIVERO LAMAS, J., “Proyecciones de la descentralización productiva: instrumentación jurídico laboral”, RIVERO LAMAS, J./ DE VAL TENA, A. L. (Eds.), *Descentralización productiva y responsabilidades empresariales. El “outsourcing”*, Thomson-Aranzadi, 2003, pp. 23-62.

⁷ WEIL, D., *op. cit.*, pp. 93-177.

⁸ OJEDA AVILÉS, A., *La deconstrucción del Derecho del Trabajo*, La Ley, 2010, pp. 117-347.

daughter companies, contractors, subcontractors, suppliers and franchisees are independent employers that should fully bear their commitments as such before their own respective employees, there could be a basis to justify somehow extending responsibilities to other upper or parallel levels of the business network, going through the boundaries of the legal entity to declare joint liabilities of client or leading businesses, or even considering these as joint employer according to a reconceptualization on the matter. This paper explores to what extent Spanish Labor Law has established regulations with that aim, addressing the already existing provisions on several different forms of “the fissured workplace”. According to the comparative purposes of this publication, it adopts therefore a national perspective, although it should be acknowledged that the “atomization of work” is a global phenomenon that would surely require supranational responses, so the study of different domestic legal regulations in each country is to be considered just a – nevertheless valuable – starting point for building a wider-scope approach in the future⁹.

2. The Contemporary Picture of “The Fissured Workplace” in Spain

The phenomenon referred to as “atomization of work” or “the fissured workplace” is not entirely new in Spain. In fact, some of its most typical outcomes have been well-known for decades. Subcontracting has for a long time been very common in the construction sector, and it has expanded very quickly to the industrial sector since the late 1970s'. The most recent development is its rapidly raising diffusion through other sectors in which it was not so frequent, as services (i.e. banking or transport) and retailing activities. The underlying reason is probably the growing popularity of outsourcing strategies among business managers, as a useful mechanism for cost-cutting and shedding responsibilities and, at the same time, increasing profitability and operational flexibility. Besides, supply chains as such have always existed, but they have been increasingly used as a resource in the context of the plans for externalization of business over the last thirty years. On the other hand, contracting-out mere workforce supply was previously forbidden, but it has been widely used since the legalization of temporary work agencies in 1994, probably due to the importance of some activities of a temporary nature in the Spanish economic structure (i.e. construction and tourism sectors) and to an entrepreneurial culture excessively oriented to prefer fixed-term employment rather than indefinite-term contracts.

Business-groups are becoming a quite usual form of organizing activities, especially amongst the Spanish major companies or leading brands, and in the context of multinational corporations. This is the result of different factors: some traditionally large entities have transformed their structures into groups of smaller undertakings for operational reasons and following the aforementioned trends in business organization; at the same time, some previously independent businesses have merged into business-groups, maintaining their legally independent status under a coordinated economic management, as a result of shareholding arrangements and other movements for concentration of capital and strengthening positions in the market; finally, some former big-size public companies have been frequently divided into smaller pieces prior to their privatizing, nevertheless maintaining some interconnections, and they have afterwards tended to increasingly

⁹ For a comparative view on “the fissured workplace” from the standpoint of Labor Law, see the other contributions in this Volume and those included in *Comparative Labour Law & Policy Journal*, Vol. 37 (1), 2015.

organize their functioning as business-groups (i.e. Telefonica-Movistar, Iberia or the electric companies).

Conversely, franchising could be considered a rather contemporary feature from the outlook of “the fissured workplace”. Certainly, this is a kind of contractual relationship between independent businesses that has been for long admitted under Commercial Law. But its role in fissuring of work began to be important only as a result of the arrival to Spain of some well-known franchised brands as McDonald’s or Burger King, by the 1980s’. In recent years, this form of arranging business is quite generalized either for fast food and other different types of restaurants, and it is becoming very popular in other sectors too, from grocery and bakery to retailing or janitorial activities¹⁰. Moreover, it is currently being used not only by leading brands, but also by more modest entrepreneurs and start-ups. In this area, the use of franchising with the aim or effect of blurring employment responsibilities emerges as a raising problem. On the other hand, a relevant factor that, among others, could be underlying the rapid development of franchising is connected to the increasing customers’ demand for “low-cost” products and services, frequently delivered through franchises or similar schemes.

The topic of “the fissured workplace” is not unacknowledged in Spanish Labor Law, as there have been a number of academic, statutory and case law contributions on the matter in the last decades, mainly from the standpoint of the consequences of outsourcing over employees’ rights and industrial relations¹¹. In particular, subcontracting has been regulated for long, as it is the most visible and traditional outcome of the phenomenon. These rules follow different aims, like serving as a deterrent to negligent behavior of the actors in a subcontracting chain, tackling bogus/fraudulent subcontracting practices, or fighting against non-payment and abuse of workers in the context of domestic subcontracting practices. Responsibilities in cases of subcontracting were provided for the first time in Law 16/1976, 8th April, of Industrial Relations, and further regulated in detail by Decree 3677/1970, 17th December, establishing rules to prevent and punish fraudulent activities in the recruitment and employment of workers. These regulatory patterns were afterwards adopted by the Workers’ Statute since its first version of 1980 (Law 8/1980, 10th March), where article 42 contained provisions about subcontracting that are very similar to the ones in force today, although they were initially limited to declare joint liability of the client/owner for the debts on wages and Social Security obligations of the contractor or subcontractor concerning their employees. These provisions were transferred to the later versions of the Workers’ Statute, including that of 2015 (Legislative Decree 2/2015, 23rd October), currently in force. The regulatory basic scheme has therefore remained the same, although there have been several partial amendments tending to reinforce the specific framework of rights and obligations in subcontracting¹². In contrast, other forms of

¹⁰ In fact, Spain is probably the European country in which franchising is most widespread, following USA, Canada and China in the world ranking. In 2014, there were 1.199 operating brands and 4.4619 franchised branches in Spain, and 296 Spanish brands operating 19.874 franchised branches in 132 other countries (AFE, “La franquicia en España. Informe 2015”, Madrid, 2015; AFE, “La franquicia Española en el mundo. Informe 2015”, Madrid, 2015).

¹¹ For an early and profound overall view, CRUZ VILLALÓN, J., “Descentralización productiva y sistema de relaciones laborales”, *Revista de trabajo y Seguridad Social*, n. 13, 1994, pp. 7-33.

¹² The first relevant modification of article 42 of the Workers’ Statute (Law 12/2001, 9th July) incorporated information rights for workers and their representatives in regard to subcontracting processes. Another update was introduced by Law 43/2006, 29th December, with the purpose of reducing workplace accidents in the context of subcontracting. To that aim, that legal piece established specific requirements for coordination among all the undertakings operating in the same workplace, responding to the concern of the social partners for the numerous accidents that had occurred in cases related to subcontracting. Finally, a later reform by

fissuring the workplace have not been considered as attentively as subcontracting. Temporary work agencies are consistently regulated since their legalization in 1994, with several slight amendments, namely in the context of the latest major labor market reforms¹³. Conversely, other features of the “fissured workplace” as business-groups and franchising are only addressed by quite poor and isolated piecemeal provisions or some case law approaches, of unequal relevance and success, as it will be explained below.

3. Protection of Employees in Subcontracting Processes

Within the Spanish legal system, the most outstanding measures aiming the protection of workers in the context of the “fissured workplace” are those related to the employees’ rights in the context of contracting-out or subcontracting processes, all of them often broadly named “subcontracting”¹⁴, which are submitted to a framework of joint obligations and liabilities of the diverse involved undertakings that clearly implies going beyond the boundaries of the legal entity of the primary employer¹⁵. In general, outsourcing by means of external contractors and subcontractors is a lawful way of organizing economic activities in Spain, and limitations to this formula are very few, since article 38 of the Constitution recognizes freedom to conduct a business, this including the free adoption of the preferred model for carrying out production and selling of goods and services. Nevertheless, as subcontracting causes a shift in corporate responsibility that can affect workers, Labor Law establishes protective rules for employees involved in these situations¹⁶. The substantial general rules on employees’ protection in contracting-out and subcontracting chains are contained mainly in article 42 of Workers’ Statute¹⁷, article 168 of the Social Security Law¹⁸, and article 24 of Law on Health and Safety at Work¹⁹, all of

Law 13/2012, 26th December, extended the deadline for enforceability of the client/owner’s liability related to Social Security obligations in regard to the employees of the contractors or subcontractors. On the other hand, going beyond the general regulation of the Workers’ Statute, Law 32/2006, 18th October, established a special set of rules for subcontracting in the construction sector, with the main aim of reducing workplace accidents in cases of subcontracted construction works.

¹³ Law 35/2010, 17th September, on Urgent Measures for Labor Market Reform, and Law 3/2012, 6th July, on Urgent Measures for Labor Market Reform.

¹⁴ Spanish legislation does not provide clear definitions of the different actors and facts involved in subcontracting schemes. Anyhow, judges and experts on Labor Law frequently use some key terms and definitions that should be explained here for better understanding. The client or owner is any person or legal entity, of public or private nature, ordering and/or paying for the works/services or goods provided by other person or entity. The principal contractor is the person or legal entity to whom the client hires the work/service. This contractor can execute the work/service with means and personnel of her own. But the contractor can hire another contractor to execute total or partially the work/service hired by the client. The subcontractor is the person or legal entity hired by the principal contractor or other contractors to execute the work/service. Nevertheless, it is quite usual to refer as subcontractors to all the undertakings involved in contracting-out processes, including the principal contractor. If the contractors/subcontractors successively hire the execution of the works/services to a third party, then a subcontracting chain is created.

¹⁵ CRUZ VILLALÓN, J., “Descentralización productiva y responsabilidad laboral por contratas y subcontratas”, *Relaciones laborales: Revista crítica de teoría y práctica*, Vol. 1, 1992, pp. 114-162; DE VAL TENA, A. L., “La responsabilidad empresarial en contratas y subcontratas: del supuesto de hecho a la diversidad de regímenes”, RIVERO LAMAS, J./ DE VAL TENA, A. L. (Eds.), *Descentralización productiva y responsabilidades empresariales. El “outsourcing”*, Thomson-Aranzadi, 2003, pp. 83-123; GARCÍA MURCIA, J., “Contratas y subcontratas”, *Revista del Ministerio de Trabajo e Inmigración*, n. 48, 2004, pp. 13-38.

¹⁶ For a general comparative perspective on the diverse European regulations on the matter, JORENS, Y./ PETERS, S./ HOWERZIIL, M., “Study on the protection of workers’ rights in subcontracting processes in the European Union”, European Commission, DG EMPL/B2-VC/2011/0015, pp. 5-192.

¹⁷ Royal Legislative Decree 2/2015, 23rd October.

¹⁸ Royal Legislative Decree 8/2015, 30th October.

¹⁹ Law 31/1995, 8th November, on Health and Safety at Work.

them applicable to every economic sector. In addition, there are special rules for subcontracting in the construction sector²⁰.

3.1. Joint and several liabilities and other legal obligations concerning subcontracting of works and services

Article 42 of the Workers' Statute, entitled "subcontracting of works and services", establishes a large range of obligations and responsibilities for the different undertakings involved within subcontracting schemes, trying to prevent or to compensate the tendency to circumvention of labor standards that is often underlying in these situations²¹. However, article 42 of the Workers' Statute is not applicable to all types of contracting-out or subcontracting processes. Indeed, it applies to every economic sector, but only when contracting-out or subcontracting affects the so called "own activity" of the client or "leading business". Therefore, the concept of "own activity" involves an important limitation for the scope of application of these regulations. As a consequence, contracting and subcontracting concerning works and services that are outside of the concept of the "own activity" of the client fall apart of that framework of legal responsibilities and obligations, which covers only the area of contractors and subcontractors directly involved in the core tasks for production of the goods or rendering of the services which are the final product of the whole chain.

That key concept of the "own activity" has been quite controversial in the past. Some academic opinions considered the "own activity" equivalent to all the activity which is "necessary" or "indispensable" for the client, in order to carry out her business properly. Other authors, however, preferred to limit the "own activity" to the accomplishments that are "inherent" to the client's production cycle, a more strict interpretation that would only be referred to those tasks that are a part of the process to develop the final product (good or service), and which, in the absence of contracting-out, would have to be carried out by the leading business itself with its own staff. Finally, the case law of the Spanish Supreme Court of Justice decided to support this second interpretation, therefore narrowing the area of action of the regulations on subcontracting established in article 42 of the Workers' Statute²². Consequently, according to the legal concept of "own activity" (as interpreted by the case law of the Supreme Court), contracting-out and subcontracting of auxiliary, instrumental or accessorial activities, notwithstanding how necessary they are for the company that hires them, is excluded from the application of the obligations and responsibilities contained in article 42 of the Workers' Statute. So it is, for instance, with regard to building of infrastructure, repairing and maintenance of company's facilities or machinery, to the promotion, marketing, distribution and transport tasks, or to surveillance and security, janitorial, canteen and cafeteria services. Of course, all those contractors whose activity is limited to supplying of materials and resources and that are not directly involved in tasks "inherent to the production circle" of the client are outside of the scope of application of article 42 of the Workers' Statute too. In addition, it must be pointed that article 42 explicitly indicates that there will be no liability of the client for the acts of the contractor when the contracted activity relates exclusively to the construction or repairing of a family home, or when the client does not hire it because of a business activity.

²⁰ Law 32/2006, 18th October, on Subcontracting in the Construction Sector.

²¹ Among others, BARREIRO FERNÁNDEZ, G., "Responsabilidad empresarial en contratadas y subcontratadas (art. 42)", *Revista española de derecho del trabajo*, n. 100 (1), 2000, pp. 889-902.

²² Supreme Court 3-10-2008, app. 1675/2007.

Therefore, article 42 of the Workers' Statute contains a quite complex set of rules on prevention of fraud, joint liability and information rights, but focusing exclusively in contracting and subcontracting related to the "own activity" of the client or leading business, as explained, and consequently not being applicable to other forms of contracting-out. On the other hand, article 42 of Workers' Statute is applicable in the public sector too, and specifically in regard to administrative concessions involving the indirect management of a public service²³. But there are some peculiarities, according to Public Administrative Law on public sector contracts, and to specific provisions referred to public sector contracts in the fields of defense and security. Besides, article 42 also applies to the so-called contract for posting of disabled employees concluded between a "special disabled-employment center" and an ordinary company for temporary employment of those workers²⁴.

Article 42 of the Workers' Statute establishes checking obligations for the client or owner for which the contractors or subcontractors provide works or services. It obliges the client, owner (or any of the contractors in regard to their own subcontractors) to check, using the appropriate request to the Social Security Treasury, if the contractor or subcontractor is up to date in Social Security related payments. If the General Treasury of the Social Security certifies that there are no debts, or if there is no answer within thirty days, the client/owner is then relieved of liability concerning Social Security obligations of the contractor/subcontractor in regard to her workers. This certification must be requested every month during the period of time along which the relationship between the client/owner and the contractor/subcontractor extends. Otherwise, if the client/owner does not accomplish this previous checking obligation, or if subcontracting goes ahead while the Treasury of Social Security has assessed a lack of payment, the client/owner will be held responsible for the Social Security obligations of the contractor/subcontractor in regard to her staff, during all the period not covered by certificates on the absence of debts²⁵.

Accordingly, along with the checking and information obligations and strongly connected to them, article 42 (2) of the Workers' Statute establishes a rule on joint and several liability of the client/owner and the contractor/subcontractor concerning Social Security payments referred to the employees of the last, shared responsibilities that can be nevertheless avoided by the client/owner through the aforementioned mechanism of the certification issued by the General Treasury of the Social Security. This joint and several liability is exclusively referred to Social Security debts arising during the period in which contracting or subcontracting was being executed, but it can be enforced within three years after the termination of the relationship between both undertakings. These provisions refer not only to Social Security contributions and charges for outdated accomplishment, but also to payment of social benefits in some cases in which the employer may be obliged to directly afford them, so the arising responsibilities are quite serious and could reach large amounts of money. Besides, article 42 (2) of the Workers' Statute imposes joint and several liability of the client/owner concerning wages owed by the contractor/subcontractor to her employees. This liability is established in regard to debts arising during the execution of the contracted works or services, being enforceable within a year since the termination of the subcontracting relationship. On the other hand, conversely to what has been explained

²³ Supreme Court 24-06-2008, app. 345/2007.

²⁴ Article 1(4) Royal Decree 290/2004, 20th February, on Promoting Employment of Disabled Workers.

²⁵ Supreme Court (3rd Chamber) 12-7-1994, app. 9559/1990. Supreme Court (3rd Chamber) 30-7-1996, app. 755/1991. Supreme Court (3rd Chamber) 4-3-1997, app. 329/1991.

for Social Security obligations, there is no possibility for the client/owner to avoid the application of this joint and several liability on wages by means of previous checking proceedings, so it covers the whole contracting-out or subcontracting process in every case. This liability includes unpaid salaries in a strict sense, including remuneration due for holidays not taken at the time of termination of the employment relationship, but excluding any other economic concepts or perceptions that do not have that wage nature, as for instance severance payments or compensations related to unlawful dismissal²⁶.

Thus, these regulations, both in the areas of Social Security obligations and wages, provide that all the contracting-out undertakings are joint and several liable regarding wages owed by the contractors and subcontractors to their employees and debts for Social Security payments during the term of the subcontracting relationship. Furthermore, as they have been interpreted by the Supreme Court, these responsibilities are applied as “chain liability”, being therefore claimable against every undertaking participating in any of the upper links of a subcontracting chain, from the lower level subcontractor to the leading business on the top, and through all the range of intermediate level contractors²⁷. On the other hand, creditors (the workers of the contractor or subcontractor who are owed wages, or the Social Security Treasury) can claim against any of the two (or more) undertakings responsible for the payment of the debt, and even against them all simultaneously. When the employees have claimed the debt to one of the responsible entities and this has not made the payment of that debt in full, the workers may claim to any of the other stakeholders of the subcontracting chain for the amounts remaining.

Article 42 of the Workers’ Statute also includes the obligation of the involved undertakings to inform their workers about the circumstances of subcontracting. Again, these obligations only apply to the subcontracting processes related to the “own activity” of the client, as explained above. The employees of the contractor or subcontractor must be informed in written by their employer of the identity of the client for which they are serving at the time. This information must be provided before the start of the works or services to be performed for another undertaking, and it must contain the name and address of the client/owner/principal contractor, and her registered office and tax identification number. Along with those individual information rights, article 42 establishes collective information rights in regard to the workers’ representatives of the staff of both the client and contractor/subcontractor too, as it will be explained below in the section dedicated to collective rights. Also, the contractor or subcontractor shall report the identity of the client to the General Treasury of the Social Security. In addition, when the client and the contractors or subcontractors continuously share the same workplace, the client must have a registry book in which information in regard to all the various undertakings involved in subcontracting on the premises of the leading business must be recorded²⁸.

Anyhow, article 42 of the Workers’ Statute is not the only provision focusing on subcontracting. From August 1st, 2011, undertakings which contract-out works or services of their “own activity”, or to be performed continuously in the workplace of their property, have an additional obligation to previously check that the workers to be involved in such

²⁶ Supreme Court 23-12-2003, app. 4525/2003.

²⁷ Supreme Court 9-7-2002, app. 2175/2001.

²⁸ The registry book shall contain the following information in regard to each contractor or subcontractor: 1 - name or business-name, address and tax identification number of the contractor or subcontractor; 2- purpose and duration of the contract; 3 - place of execution of the contract; 4 - number of workers to be occupied by the contracts or subcontracts in the workplace of the client undertaking, and 5 - measures envisaged for coordination of activities from the standpoint of health and safety at work.

subcontracting processes are adequately registered into the Social Security system²⁹. Besides, article 168 of the Social Security Law establishes secondary liability for the client regarding the Social Security debts of contractors and subcontractors arising during the term of subcontracting. Conversely to the regulation of article 42 of the Workers’ Statute, this responsibility applies to all forms of subcontracting, not only to those related to the core “own activity” of the client. On the other hand, it covers not only Social Security contributions, but also the direct payment of benefits by the employer in the cases in which she has been held responsible to do so. When the employer fails to fulfil Social Security obligations regarding register, affiliation and contribution in regard to her employees, she is considered obliged to direct payment of Social Security benefits at her own cost³⁰. In this case, the client/principal/contractors can be declared liable for such direct payment. However, in relation to both contributions and direct payment of benefits, this is a secondary or subsidiary liability that can only be claimed against the client/owner if the principal debtor (contractor/subcontractor) has been previously declared totally or partially insolvent.

3.2. Health and safety at work within subcontracting schemes

Law 31/1995, 8 November, on Health and Safety at Work, establishes a number of obligations in case of subcontracting, especially when the activities of workers belonging to the staff of different undertakings are developed in the same workplace³¹. These are mainly obligations to report, to cooperate and to coordinate between employers, and for the adoption of various prevention measures, as in regard to individual means and resources for protection against risks and hazards. These duties have been extended not only to any kind of employment relationships, but to self-employed people working in such shared workplaces too. In addition, undertakings (the client) that contract-out their “own activity” are required to verify that contractors or subcontractors adequately comply with the rules on health and safety at work³². The duty of care in the area of health and safety requires the client to ensure that contractors and subcontractors fulfill their obligations regarding the prevention of occupational hazards while working on the workplace of the client/owner, during the term of the contract and in the work related to the “own activity” of the client. In executing this duty of care, Royal Decree 171/2004, 30th January, imposes instrumental obligations to the client, such as the following: requiring contractors and subcontractors, before the start of the activity in the workplace, to evidence in written that they have made the necessary risk assessment and planning of preventive measures concerning the engaged activity, and that they have fulfilled the information and training obligations for workers there posted; checking that contractors and subcontractors have established the necessary measures for coordination among them; finally, having a registry which reflects all the circumstances of the contracting or subcontracting process, including the measures for coordination from the point of view of health and safety at work.

²⁹ Article 5 Royal Decree Law 5/2011, 29th April, on Measures for the Regulation and Control of Undeclared Employment and Promoting Rehabilitation of Home Buildings. Failure to comply is punishable as a serious infringement, according to article 22(12) Royal Legislative Decree 5/2000, 4th August, on Infringements and Penalties in the Social Order.

³⁰ Article 167 Royal Legislative Decree 8/2015, 30th October, General Social Security Law.

³¹ DE VAL ARNAL, J. J., “Deberes de seguridad y salud laboral y externalización de actividades empresariales: la coordinación”, RIVERO LAMAS, J./ DE VAL TENA, A. L. (Eds.), *Descentralización productiva y responsabilidades empresariales. El “outsourcing”*, Thomson-Aranzadi, 2003, pp. 163-186.

³² Article 24 (3) Law 31/1995, 8 November, on Health and Safety at Work.

All these obligations on health and safety at work are enforced by means of the regulation on infringements and penalties contained in Royal Legislative Decree 5/2000, 4th August. In the case of a breach, all the undertakings involved in the subcontracting process (including the client business) might be considered responsible, as joint and several liability is applied in this field too. Furthermore, any agreement that they may subscribe in order to avoid joint liability in circumvention of law shall be considered void and null, and should be punished as very serious offence against social legislation³³. From another point of view, when an accident at work has occurred or its consequences have been aggravated as a result of a failure in prevention of occupational hazards, article 164 of Social Security Law establishes that the employer will be responsible to pay the employee an additional amount, ranging between supplementary 30 - 50 percent, of the Social Security benefits to which that injured worker might be entitled. This additional amount is called “benefit surcharge” due to lack of adequate health and safety measures. In this regard, when the client and the contractors/subcontractors share the same workplace, the client/owner is likely to be held responsible for the default in complying with the obligations in relation to health and safety at work, as she is the one that has the full capacity available to implement prevention measures within the physical environment in which the accident occurs, and the one that ultimately benefits from the products or results of work. Therefore, the main contractor may also be responsible for that “benefit surcharge”, and this cannot be excluded by means of agreements between the engaged undertakings, which should be considered void and null.

3.3. Specific provisions for the construction sector

Law 32/2006, 18th October, on Subcontracting in the Construction Sector, contains special provisions for subcontracting in this specific economic activity³⁴. Most of these rules aim to adequately ensure health and safety of the employees of contractors and subcontractors, as they were approved in line with a great concern of trade unions related to the frequency and seriousness of accidents in the context of subcontracted works within the construction sector. Anyhow, this regulation also seeks to improve job security and working conditions for the workers employed on those premises, in broader terms. For this purposes, this act provides a number of special limitations on subcontracting in this sector, which are to be applied additionally to the general legal framework explained before. First of all, this legislation explicitly prohibits contracting-out when the subcontractor’s role is limited to providing workforce, that is, when only hand tools, including those portable or motorized, are needed to perform the relevant contracted work. Secondly, these special regulations establish restrictions to the number of undertakings that can be involved in construction works through contracting-out, therefore blocking the indefinite extension of the subcontracting sequence. While in other activities there are no limits regarding the number of participants in subcontracting schemes, in the construction sector the chain is circumscribed to three levels as a general rule. The law does not allow subcontracting the activity for the self-employed people, nor for the third subcontractor³⁵. As an exception,

³³ Articles 13(14) and 42(3) Royal Legislative Decree 5/2000, 4th August, on Infringements and Penalties in the Social Order.

³⁴ For a deeper analysis on this specific act, MERCADER UGUINA, J. R. (Coord.), *Contratas y subcontratas en el sector de la construcción*, Lex Nova, 2008; GARCÍA BLASCO, J. (Dir.)/ DE VAL TENA, A. L. (Coord.), *La subcontratación en el sector de la construcción*, Thomson-Aranzadi, 2009.

³⁵ Article 5 of Law 32/2006, 18th October, on Subcontracting in the Construction Sector.

Law 32/2006 allows a fourth level of subcontracting in some special situations, when it can be justified on grounds related to the high level of specialization of the work, technical difficulties or unexpected events³⁶. This possibility is not supported, however, neither for self-employed or for undertakings that do not use more than hand tools, except in cases of force majeure.

Additionally, Law 32/2006 requires the contractors and subcontractors involved in construction works to monitor the compliance by subcontractors and self-employed workers of a wide range of legal obligations. Among other things, in order to participate in subcontracting of construction works, the contractors and subcontractors need to be in possession of an accreditation certifying that they are adequately equipped and that their staff has the necessary training on prevention of risks and hazards, being consequently listed in the public registry of certified undertakings. So, the client/owner/contractors need to check that contractors/subcontractors meet these requirements prior to hiring them. Subcontracting with companies that have failed to comply with accreditation and registration obligations, as subcontracting in breach of the aforementioned limits of Law 32/2006, involves joint and several liability in relation to Labor Law and Social Security obligations of contractors and subcontractors. This responsibility is broader than that covered by Article 42(2) of the Workers’ Statute for the following reasons: a) it is applicable not only to subcontracting referred to the “own activity” of the client, but in any case; b) it does not include temporary restrictions relating to the deadline to enforce it; finally, c) it refers to all Labor Law responsibilities, not strictly to wages, so it may reach other perceptions such as severance payments or voluntary improvements of Social Security benefits.

3.4. Evaluation and future prospect

The rules on joint and several liability of the client/owner and contractors/subcontractors, including chain liability, are powerful and surely useful in order to ensure payment of wages to contractor’s or subcontractor’s employees, along with adequate compliance with Social Security obligations, and they seem to be properly serving in practice. It is to remark that they create a strong incentive for contracting-out companies to carefully select only solvent contractors and subcontractors that adequately comply with wage payment and Social Security obligations. However, these regulations contained in article 42 of the Workers’ Statute are attached to a limited scope of application according to the narrow definition of subcontracting of the “own activity” of the client, therefore not being applicable to all kinds of subcontracting. Furthermore, that definition has been built on the basis of a quite old-fashioned image of contracting-out in traditional manufacturing processes, with the fordist-taylorist paradigm as background, therefore leaving out other new forms of outsourcing that might deserve a similar treatment³⁷. It could be arguable, but there should be at least some debate on updating that conception and somehow extending the area covered by these provisions. Besides, joint and several liabilities in subcontracting arising from article 42 of the Workers’ Statute refer only to Social Security obligations and wages, but it might be convenient to extend joint or subsidiary liability to other employer’s responsibilities, as dismissals or working time issues. Beyond article 42, other regulations

³⁶ Article 5(2f)(3) of Law 32/2006, 18th October, on Subcontracting in the Construction Sector.

³⁷ VALDÉS DAL- RÉ, F., “Descentralización productiva y desorganización del Derecho del Trabajo”, *cit.*, p. 4.; ESTEVE SEGARRA, A., *Externalización laboral en empresas multiservicios y redes de empresas de servicios auxiliares*, Tirant lo Blanch, 2016, pp. 116-120.

addressing subcontracting, as the specific ones for the construction sector or those on health and safety matters, seem to be even more complete and penetrating, but it must be said that lack of adequate compliance is not rare in practice³⁸.

4. Contracting-out Workforce Supply: General Prohibition and Constrained Admission of Temporary Agency Work

Whereas subcontracting is considered a lawful way of organizing business activities, the loan of workers is considered unlawful in Spain as a general rule, with the exception of assignment of employees by means of legally authorized temporary work agencies according to their specific legal framework, and few other particular situations (business-groups, special regulations for professional sports, seaport dockers and protected employment of disabled persons). This means that contracting-out or subcontracting exclusively referred to workforce supply, with no other input by the contractor/subcontractor apart from assignment of employees, is rigorously forbidden, unless in the aforementioned cases in which it is explicitly allowed under strict legal conditions, as it will be immediately explained in detail.

4.1. Illegal assignment of workers

As the pure and simple loan of workers is in general considered fully illegal, Spanish legislation provides rules aiming to prevent companies and other undertakings shedding their responsibilities as employers by means of contracting-out mere workforce supply. In particular, these regulations seek to tackle those situations where the client companies try to circumvent Labor Law by using a bogus appearance of subcontracting that, indeed, just hides behind a plain loan of workers. These regulations are contained mainly in article 43 of the Workers' Statute, entitled "Illegal assignment of workers". Its first section establishes the general prohibition of loan of workers, in the already explained terms. Besides, the second section addresses the core legal issue of defining what illegal assignment of workers is, and how to distinguish between illicit trafficking of employees and, on the other hand, lawful subcontracting, what might be difficult in practice. In this sense, article 43(2) of the Workers' Statute provides that there is no subcontracting, but illegal assignment of workers, whenever any of the following circumstances are met: a) the object of the service contracts between the involved undertakings is solely limited to a mere provision of workers; b) the contractor or subcontractor does not have a differentiated economic activity or its own and stable organization, or does not have the means and resources to carry out a business on its own, or c) the contractor or subcontractor does not effectively perform the functions inherent to being a true employer (as, for instance, managerial powers, setting of payment, monitoring of workers or deciding about new hires and dismissals).

These criteria for assessing illegal assignment of workers, now made explicit in statutory law, were previously developed by the labor courts, providing an important background for legal interpretation on the matter. According to this case law, there is illegal assignment of workers when the contractor/subcontractor is just an empty nutshell

³⁸ In regard to the already existing academic discussions and proposals for the amendment and update of the provisions on subcontracting, GARCÍA MURCIA, J., "La dispersa regulación de las contratas y subcontratas: propuestas de cambio", *Documentación laboral*, n. 68, 2, 2003, pp. 129-145; DE VAL TENA, A. L., *op. cit.*, pp. 120-123.

used for shedding employees, under the false appearance of subcontracting between different undertakings. But even if the contractor/subcontractor is an undertaking with a consistent structure and a real business activity, illegal assignment could be assessed too, relaying on the key criterion lastly outlined by article 43(2) of the Workers' Statute: who is effectively behaving as the real employer of the employees? That is to say, for instance, who is really giving orders and instructions to workers? Who supplies working tools, resources or even uniforms? Who is checking the correct performance of work and how? The supervisors of work belong to the staff of the contractor/subcontractor or to that of the client? If the answers point to the contractor/subcontractor, that is lawful subcontracting, while if they point to the client, the situation should be considered as illegal assignment of workers.

Illegal assignment of workers leads to joint and several liability of all the involved undertakings, both the workforce providers and the user undertakings³⁹. These shared responsibilities include absolutely all Labor Law and Social Security obligations in regard to the illegally assigned employees (wages, severance payments and other economic compensations for dismissals, health and safety at work, Social Security contributions, direct payment of social benefits, among others), covering thus a much wider scope than in the case of lawful subcontracting. In addition, the workers engaged in these unlawful practices have the right to claim the consideration as permanent employees either of the workforce provider or of the user undertaking, with the same working conditions than any other similar worker in those employers' staff, and seniority counting since the beginning of the illegal assignment situation⁴⁰. On the other hand, illegal workforce supply is considered a very serious infringement punishable with an administrative penalty, consisting in fines that may reach quite high amounts⁴¹. Joint and several liability applies to providers and users also in regard to these responsibilities⁴². In the most serious cases, this behavior can be punished even with a penalty of imprisonment from two to five years and fine from six to twelve months under Criminal Law.

4.2. Temporary Work Agencies

The loan of workers, in general forbidden as it has been explained, is however admitted in Spanish legislation when it is carried out by temporary work agencies according to their specific legal framework⁴³. These provisions follow the model of allowing this particular form of outsourcing, but only to a limited extent, under a quite strict administrative control and abiding respect to a wide range of conditions and responsibilities. To begin, temporary work agencies can operate as such only under an administrative authorization by the Labor Administration⁴⁴. The issuing (and the maintenance) of this entitlement requires the fulfillment of some complex organizational requisites in regard to the solvency and functioning of the company. Among other things, the temporary work agency shall institute a financial guarantee, an economic deposit that needs to be fixed in order to ensure payment of workers' wages and Social Security

³⁹ Article 43 (3) of Workers' Statute.

⁴⁰ Article 43(4) of Workers' Statute.

⁴¹ Articles 8(2) and 40(1)(c) of Legislative Decree 5/2000.

⁴² Article 42(1) of Legislative Decree 5/2000 in connection to article 43 of Workers' Statute.

⁴³ This regulation is contained in Law 14/1994, 1st June, on Temporary Work Agencies, and Decree 417/2015, a national regulation on the matter that is also in accordance to EU Directive 2008/104 (and Directive 91/383/CEE in regard to health and safety at work).

⁴⁴ Article 2 of Law 14/1994.

obligations, reaching a considerable amount (25 times minimum wage in the beginning and as a total minimum, and 10% of total salaries when the company has already started to operate)⁴⁵. Other obligations refer to maintaining a minimum permanent staff and compulsory investment in occupational training of workers⁴⁶.

The hiring of workers through temporary work agencies is only allowed in some specific cases in which the temporary character of the workforce needs is clearly evidenced, therefore not being lawful to use this mechanism to recruit employees in regard to activities of a permanent or indefinite-term nature. So, the assignment of workers from temporary work agencies to user undertakings is subject to the prerequisite of existing temporary hiring grounds, and to maximum duration limits, both aspects matching to the regulations established for individual fixed-term contracts⁴⁷. If these requirements are not met, the situation should be qualified as “illegal assignment of workers”, with the consequences above explained according to article 43 of the Workers’ Statute: joint and several liability of the agency and the user undertaking in regard to all Labor Law and Social Security obligations, and possibility for the workers to claim declaration as permanent employees of the staff of either of the involved entities. The workers may also claim the declaration as permanent employees of the user undertaking if they continue to perform work on its premises exceeding the maximum period of duration established for the temporary assignment of workers⁴⁸. Besides, assignment of workers through temporary work agencies is explicitly forbidden in regard to some especially dangerous jobs, for substitution of workers on strike, for covering positions previously suppressed by the user due to economic or organizational reasons, or for assignment of employees through another temporary work agency⁴⁹.

Temporary workers hired through an agency are entitled to the same labor rights that they would have enjoyed if they had been directly recruited by the user undertaking, at least in regard to “essential working conditions”⁵⁰. That consideration as “essential” is given in regard to the following matters: remuneration, workday and maximum working time, overtime working, rest and breaks, holidays and night work. The same rule shall be applied in regard to protection of young employees and pregnant workers, or in relation to equal treatment and non-discrimination principles. On the other hand when the temporary contract is terminated, the employees are entitled to a severance payment, equivalent to 12 days of salary for each year of service⁵¹. On the other hand, in the context of temporary work agencies, subsidiary liability is imposed to the user undertaking concerning wages, Social Security obligations and compensations for the termination of the contract in regard to the posted workers, being applicable as a secondary responsibility in the case of insolvency of the temporary work agency, and all along the duration of the workforce supplying contract between the involved entities⁵². However, this turns into joint and several liability if the workforce supplying contract has been arranged violating the already explained legal requirements established in Law 14/1994 in regard to grounds and conditions for agency work.

⁴⁵ Article 3 of Law 14/1994.

⁴⁶ Article 2 of Law 14/1994.

⁴⁷ Articles 6 and 7 of Law 14/1994, in connection to article 15 of the Workers’ Statute.

⁴⁸ Article 7 of Law 14/1994.

⁴⁹ Article 8 and additional provision two of Law 14/1994.

⁵⁰ Article 11(1) of Law 14/1994.

⁵¹ Article 11(1) of Law 14/1994.

⁵² Article 16(3) of Law 14/1994.

Finally, the special legal framework on agency work establishes a specific scheme on employer’s responsibilities of the different involved entities. The temporary work agency is the formal employer and, as such, it is in charge of most employer’s functions and responsibilities (i.e. payment of wages and social security contributions or dismissals). But the user undertaking is the one entitled for direct management and monitoring of work performance, and it is also mainly responsible in the field of health and safety protection for temporary workers, and regarding the aforementioned Social Security “benefit surcharge”⁵³. The same liability regime is applicable respectively in connection to administrative penalties (fines) for ordinary infringements on wages and health and safety⁵⁴. On the other hand, contraventions related to prohibitions, terms and conditions or preventive measures regulated in Law 14/1994 can be punished by means of administrative penalties specifically foreseen for temporary agency work in Legislative Decree 5/2000: article 18 lists minor, serious and very serious punishable infringements of temporary work agencies (e.g. unlawful arrangement of workforce supplying contracts, or lack of actualization of the legally required financial guarantee for wages and Social Security payments); besides, Article 19 contains minor, serious and very serious infringements of user undertakings (e.g. unlawful arrangement of workforce supplying contracts, and lack of information, formation or preventive measures regarding occupational risks for temporary workers). In all these cases, fines can reach important amounts, depending on the grade of guiltiness and seriousness of the infringement, and increasable in the case of reiteration⁵⁵.

4.3. Evaluation and future prospect

Article 43 of the Workers’ Statute on illegal assignment of workers is a potent instrument in order to tackle trafficking of employees or abuse in contracting-out workforce supply, as it imposes joint and several liabilities to every undertaking involved in such practices in regard to all Labor Law and Social Security obligations. In other words, what this provision does is going beyond the boundaries of the legal entities to declare them as joint employers, being therefore the most ambitious regulation of Spanish legislation in that sense. It is frequently applied by the courts in practice, playing a key role in regard to those cases in which a formal appearance of lawful subcontracting hides behind pure and simple shedding of employment. Accordingly, contracting-out of workforce supply is quite effectively limited to the action of temporary work agencies, which are at the same time subject to a very strict legal framework. The rules on the matter adequately ensure the basic labor rights of the temporary employees, as namely the payment of wages, backed by a financial guarantee and subsidiary liability of the user undertaking.

From another perspective, it is important to outline how these legal rules establish Labor Law responsibilities beyond the formal employer: article 43 of the Workers’ Statute allows to declare illegal assignment of workers and consequent joint liabilities when it is not the person or entity that has actually signed the employment contract, but the one behind, who performs “the functions inherent to being a true employer”; on the other hand, the legal framework on agency work establishes a distribution of responsibilities between the temporary agency and the user undertaking, according to a separate consideration of different areas of employer’s functions. Hence, these regulations somewhat point to a

⁵³ Article 16(2) of Law 14/1994.

⁵⁴ Article 42(2 and 3) of Legislative Decree 5/2000.

⁵⁵ According to articles 40 and 41 of Royal Legislative Decree 5/2000.

“functional concept of the employer”, an approach that has been suggested as a meaningful response to the phenomenon of the “fissured workplace”⁵⁶, and that might be useful to explore more deeply in the future, maybe taking these provisions as starting point for a surely convenient update of the definition of the employer within Spanish Labor Law⁵⁷.

5. Other Outcomes of “The Fissured Workplace”: Piecemeal Regulations and Legal Responses “Under Construction”

Subcontracting and contracting-out workforce supply are the most obvious forms of workplace “fissurization”, but not the only ones. Other formulas of economic cooperation among businesses and companies as supply chains, business-groups and franchising have played an important role in deconstructing the workplace from the old picture of the large industrial factory to the new one of the business network. However, Spanish Labor Law focuses almost exclusively in those more evident types of outsourcing, while it provides very few and quite poor legal responses regarding these other more subtle ways of externalization. These consist of rather isolated legal provisions and some deeper case law interpretations developed to fill-in an area in which there is still little to tell, and much to do. Besides, the widespread trend of shifting from traditional salaried employment to (sometimes pretended) independent self-employed contractors – frequently involved in subcontracting, supply-chain or franchising schemes under the control of a leading business – is another key element underlying “atomization of work”, which involves an increasing tendency to “escape” from the application of labor standards⁵⁸, in spite of some legal instruments and judiciary decisions trying to counteract against it.

5.1. Supply Chains: can they be subsumed within the current legal framework?

Supply chains in the strict sense (this is, providing material resources to client businesses) are not explicitly regulated as such in Spanish Labor Law. Therefore, the client business and the suppliers are to be seen in general as independent legal entities, each one with its own staff and separate Labor Law and Social Security responsibilities in regard to their respective employees. However, depending on the precise circumstances in which the supply relationship is performed, the situation may fall under the scope of application of the provisions on subcontracting or assignment of workers, in the terms explained in the above sections. For instance, if the object of the supply relationship is hiring and lending of workforce (and provided that it is done out of the legal framework of temporary work agencies), that should be qualified as illegal assignment of workers under article 43 of the Workers’ Statute, consequently leading to going beyond the boundaries of the legal entities by means of the already mentioned rules on joint and several liability, and compulsory integration of the employees into the permanent staff of either of the engaged undertakings at their choice.

⁵⁶ In regard to the idea of a functional concept of the employer, DEAKIN, S., “The Changing Concept of the ‘Employer’ in Labour Law”, *Industrial Law Journal*, Vol. 30, n. 1, 2001, pp. 79-84; PRASSL, J., *The Concept of the Employer*, Oxford University Press, 2015, pp. 149-231.

⁵⁷ MOLERO MARAÑÓN, M. L., “Sobre la inminente necesidad de revisar el concepto de empresario en su dimensión jurídico-laboral”, *Relaciones laborales: Revista crítica de teoría y práctica*, Vol. 1, 2001, pp. 561-594.

⁵⁸ RODRÍGUEZ-PIÑERO, M., “La huida del Derecho del Trabajo”, *Relaciones Laborales*, n. 12, 1992, pp. 1-8.

Besides, Labor Law regulations on subcontracting might be applied to supply chains if the engagement between the client and the supplier is too close, going further than a simple selling-buying of goods and services, a renting contract or other purely commercial relationships between fully independent legal entities. If the activities carried out by the supplier are totally integrated into the production process led by the client, as a core part inherently belonging to it, that could be qualified as subcontracting of the “own activity” of the client, therefore being applicable the above described rules set in article 42 of the Workers’ Statute, including those about joint and several liability on wages and Social Security obligations. Nevertheless, this requires clearly evidencing that the situation is a true case of externalization rather than a mere external supply of resources, and this might entail difficult interpretation issues in practice. However, these could be addressed by assessing some relevant circumstances: does the supplied good or service have a separate economic utility itself, or does it only make sense on the premises of the client as leading business? Is the supplier free to supply the same goods and services openly in the market for other clients, or is she working on that exclusively for a leading business? Is the supplier allowed to freely manage the production process herself, or is this necessarily carried out according to strict standards previously given by the client? The aforementioned regulations on subcontracting of the “own activity” could only be applied when the answers to these or other similar questions point to a really strong outsourcing link between the involved undertakings. If that is not the case, supplier and client are to be considered as independent businesses with fully separate Labor Law responsibilities.

5.2. Business-groups: isolated statutory provisions and “piercing the corporate veil”

Business-groups and corporate groups, in the different various forms of holding, trust, crossed shareholding and other types of coordination of economic activities, are a rising phenomenon in the economy of the whole world, and Spain is not an exception. However, Spanish Labor Law provides very few statutory provisions explicitly addressing it, as the scope of application of regulations continues to be based mainly on a classical and quite formal concept of employer referred separately to each legal entity that directly hires its own staff⁵⁹. The employment relationship within business-groups is expressly considered as such only in regard to a pair of specific cases: high level managers, who can be promoted from ordinary work in a company to managing tasks in the same or another entity belonging to the same business-group⁶⁰; on the other hand, the regulation on posting of workers for transnational rendering of services is applicable when the employees of any kind are posted to a workplace of their employer or of “another undertaking belonging to the same business-group”⁶¹. Besides, some other provisions that will be mentioned later take business-groups into consideration from the perspective of collective Labor Law and information rights of the workers’ representatives.

With that quite poor background as starting point, the courts have developed some creative solutions to deal with some Labor Law related issues arising from business-group relationships in practice, as the problems of identification of the real employer, the risk of

⁵⁹ Article 1(2) of the Workers’ Statute.

⁶⁰ According to article 9 of Royal Decree 1382/1985, 1st August, on Special Employment Relationship of Managers.

⁶¹ Article 2 of Law 45/1999, 19th November, on Temporary Posting of Workers in the Framework of Transnational Rendering of Services.

circumvention of responsibilities and the situations of employees' mobility between the different companies of a group, among others⁶². The milestone in this regard has been the application of the doctrine on "piercing the veil", this meaning trespassing the formal legal outlook to check what the external appearance of independent entities hides behind in reality⁶³. As a result, the judges have sometimes identified as true employer a company that pretended to avoid the consideration as such, imposed joint and several liabilities among different companies of a group, or even declared different and apparently separate business as joint employer, using as underlying legal basis the analogic application of the shared responsibilities established in articles 42 (subcontracting), 43 (illegal assignment of workers) and 44 (change in ownership of business or workplace) of the Workers' Statute.

Although the concept of employer outlined in article 1(2) of the Workers' Statute refers to a natural person, entity or joint-ownership with a separate legal status, the courts have said that different formally independent bodies can be considered as joint employers being part of the same employment relationship with an employee if some circumstances are met. When the employee has been performing work equally and simultaneously or successively for different undertakings belonging to the same economic group, being difficult to identify a single employer, some judgments tend to consider all of them as joint employer, especially if this situation has extended for a long period of time⁶⁴. On the other hand, those cases of simultaneous or successive working for different undertakings within a same business-group have been considered lawful posting of employees, excluding the application of the rules on illegal assignment of workers of article 43 of the Workers' Statute. Besides, several decisions specifically outline that the computation of seniority in such circumstances should totalize the periods of services successively rendered on behalf of all of the entities. On the other hand, the temporary association of companies for specific works or projects has been usually considered as a particular case of joint ownership acting as a single employer⁶⁵.

Finally, even if the different undertakings of a group are to be considered as legally independent employers, each one with its own separate staff, "piercing the veil" could lead to declare joint and several liability concerning some specific Labor Law responsibilities, for instance, in regard to dismissals or wages. Nevertheless, case law requires some special circumstances in order to do so, in a doctrine which is summarized in three leading cases: Supreme Court 3-5-1990, systemizing the characteristics that justify "piercing the veil"; Supreme Court 26-1-1998, app. 2365/1997, clarifying cases in which "piercing the veil" is not to be applied; finally, Supreme Court 27-5-2013, app. 78/2012, offering a more recent overall consideration. Accordingly, joint and several liability of the different undertakings of a group should be declared in the following situations: (a) when there is an "integrated or unified functioning of work organization amongst the different companies of the group"; (b) when work is performed equally or ambiguously for different undertakings at the same time; (c) when the business network has been created with the purpose of blurring or circumventing Labor Law responsibilities⁶⁶. The mixing of financial resources, credits, buildings, facilities or services of various entities can also be a relevant element to take

⁶² OJEDA AVILÉS, A., *op. cit.*, pp. 231-233.

⁶³ Supreme Court 18-5-1998, app. 3310/1997; 9-7-2001, app. 4378/1999; 26-9-2001, app. 558/2001, and 6-3-2002, app. 1666/2001.

⁶⁴ Supreme Court 6-5-1981; 7-12-1987; 17-5-1990; 31-1-1991, app. 780/90; 18-5-1998, app. 3310/1997, and 23-1-2007, app. 641/20.

⁶⁵ Supreme Court 29-9-1989.

⁶⁶ Supreme Court 3-5-1990, and 27-5-2013, app. 78/2012.

into account⁶⁷. Of course, the existence of an economic coordinated action, a unified management or other business-group link between the companies is a prerequisite, but not enough basis by itself for “piercing the veil”, unless any of the already mentioned further requirements come across⁶⁸.

5.3. Franchising and other forms of business cooperation: a pending gap

Franchising and other similar relationships of close business cooperation between legally independent undertakings are allowed and already quite widespread in Spain. However, Labor Law does not address them explicitly⁶⁹. In general, they are seen as contractual relationships between autonomous entities, each of these considered as different single employers in regard to their respective staff. This outlook is firmly supported on elements of the legal background that might seriously block the attempt to shift to another viewpoint: the classic concept of employer established in article 1(2) of the Workers’ Statute on the basis of the separate legal status of the natural person or legal entity that hires the employee within the employment contract and, on the other hand, the legal coverage of franchising and analogous business arrangements as merely contractual relationships according to both traditional and modern categories of contracts between independent entities, as admitted under Civil and Commercial Law (franchising itself, and also works or services contracts, hiring of industry or commercial licensing, among others). However, as it has been accurately pointed, franchising can imply a deep involvement of the franchisor in the production process of the franchisees and in regard to management of their activities, by means of delivering detailed “know-how” guidelines and strict standards and instructions, along with setting sophisticated methods for monitoring compliance⁷⁰. Moreover, those demands and controls of the franchisor might sometimes affect work performance of the franchisee’s employees very strongly and directly, in despite of not being their formal employer⁷¹. Let’s think of the workers of a fast food restaurant whose diary activities are driven – even to the minute – by the rulings of a franchisor requesting, for instance, to fully clean the grill every half an hour. One could even wonder if the subordination inherent to the employment relationship is here really in regard to the actual employer or to someone beyond in fact.

In regard to these cases of particularly penetrating involvement of the franchisor in production and working management of the (only) theoretically independent franchisee, it could perhaps be conceivable to legally discuss the possibility of establishing joint and several liabilities, by means of applying the regulations of subcontracting set in article 42 of the Workers’ Statute, or through the doctrine on “piercing the veil”⁷². However, according to what has already been explained, the application of article 42 would require to clearly evidence that the relationship amongst the franchisor (potentially client or owner) and the franchisee (potentially contractor/subcontractor) is indeed a subcontracting process related to the “own activity” of the first, by means of which an inherent part of the

⁶⁷ Supreme Court 18-5-1998, app. 3310/1997, and 6-3-2002, app. 1666/2001.

⁶⁸ Supreme Court 26-1-1998, app. 2365/1997; 30-4-1999, app. 4003/1998; 21-12-2000, app. 4383/1999; 26-12-2001, app. 139/2001, and 20-1-2003, app. 1524/2002.

⁶⁹ For an early overview, see GONZÁLEZ BIEDMA, E., “Aspectos jurídico-laborales de las franquicias”, *Revista española de derecho del trabajo*, n. 97, 1999, pp. 657-680.

⁷⁰ WEIL, D., *op. cit.*, pp. 122-158.

⁷¹ WEIL, D., *op. cit.*, pp. 12-14 and 195-201.

⁷² OLMO GASCÓN, A. M., *La franquicia. Un procedimiento de descentralización productiva desregulado laboralmente*, Tirant lo Blanch, 2004, pp. 86-168.

integrated production process globally governed by the client is contracted-out to be externally handled by the contractor. But this is quite difficult to assess concerning franchising, as this kind of business arrangements usually do not involve deconstruction of a unique production cycle, but simply spreading the different and somehow autonomous production tasks and economic activities (i.e. marketing, production, retailing) of the whole business. In fact, franchisees are frequently in charge only of final retailing or serving, not participating at all in the core of the production process as such, therefore not being applicable the current regulation on subcontracting to these situations that, as said before, tend to be regarded under the traditional legal culture as mere contractual links between independent businesses, according to Commercial Law categories such as hiring of industry or trade licensing for retailers. On the other hand, the use of the solutions based in “piercing the veil” requires assessing the above mentioned “special circumstances” outlined by case law, which are not so often met in regard to the most usual forms of franchising, so this seems to be a difficult path to follow that remains somehow unexplored to the date.

Moreover, even if there is not consistent and fully unified case law on the matter, one should outline that the attempts to claim joint Labor Law responsibilities of the franchisor before the courts tend to end in failure⁷³. The application of article 42 on joint and several liabilities in subcontracting processes has been rejected, for instance, in the case of a gas station managed by the actual employer under the brand of a big petrol company⁷⁴. Also, claims of employees of the franchisee for joint and several liabilities of the franchisor according to article 43 on illegal assignment of workers do often fail⁷⁵. Besides, the declaration of the franchisor as joint employer has been denied in regard to a telephone service and smartphone retailing office integrated in the large franchising network used for that purpose by one of the major telephone companies, Vodafone⁷⁶. Similarly, a judgment related to urgent post services was reluctant to consider the franchisor as true employer of the franchisee’s staff⁷⁷. The use of the doctrine on business-groups and “piercing the veil” has been refused in the case of franchised dentistry and ophthalmology clinics⁷⁸, and concerning franchises for language learning centers too⁷⁹. Finally, in the outstanding example of Burger King’s and McDonald’s’ fast food restaurants, the claims for joint liability of the franchisor have not been successful to the date⁸⁰. Conversely, a grocery store franchisor has been considered as real employer and jointly responsible for unlawful dismissal of an employee of the franchisee, provided that the first was strongly involved in the ordinary activity of the last⁸¹. In a case linked to the international brand Coverall, specialized in franchising of janitorial services, “piercing the veil” has actually led to imposing joint and several liability⁸². Finally, the business-groups and “piercing the veil” doctrine was applied to declare the franchisor jointly responsible for the void dismissal of a

⁷³ OJEDA AVILÉS, A., *op. cit.*, pp. 259-268.

⁷⁴ Catalonia Higher Court 1391/2003, 26th February.

⁷⁵ Castilla y León Higher Court, 167/2007, 28th February; Madrid Higher Court 68/2010, 2nd February, and 373/2012, 28th May.

⁷⁶ Andalucía Higher Court 457/2014, 13th March, and 464/2014, 13th March.

⁷⁷ Galicia Higher Court 4395/2015, 9th July.

⁷⁸ Andalucía Higher Court 2654/2005, 19th October; Galicia Higher Court 1362/2012, 5th March, and 1370/2012, 6th March.

⁷⁹ Galicia Higher Court 11-3-2004; Catalonia Higher Court 260/2005, 14th January.

⁸⁰ Andalucía Higher Court, 194/2000, 25th January, and 1928/2000, 10th November.

⁸¹ Catalonia Higher Court 1105/1993, 26th February.

⁸² Catalonia Higher Court 5152/1994, 30th September.

pregnant employee of a franchised hairdressing salon, considering the deep involvement of the leading business in recruitment, training and managing of the staff of the franchisees⁸³. Therefore, looking at the overall scenery, one could say that, in regard to franchising, it is quite unlikely to expect going beyond the boundaries of the formal employer under the current legal framework, although it is not absolutely impossible. There might be a window to do so, but it is still to be fully-opened.

5.4. “Independent” contractors: “economically dependent autonomous workers” and “bogus self-employment”

In the “new economy” developed after the 1970s’, the archetype of the salaried employee arising from the first industrial revolution and the employment contract have been somewhat in withdrawal as a consequence of emerging “alternative forms of contracting work” as, in particular, the engagement of independent contractors through other diverse kinds of commercial or professional contracts placed – at least initially – outside the boundaries of Labor Law⁸⁴. Furthermore, it is already a quite common business strategy for slimming company structures and staff, and consequently avoiding risks and responsibilities, to replace direct recruitment of employees by shedding tasks – maybe formerly performed inside – to an external multiplicity of individual “self-employed” contractors or “freelance workers”, with the aim or the effect of escaping from employment law (and collective bargaining), and sometimes even undermining working conditions. By means of contracting and subcontracting, supply arrangements, franchising schemes or other various types of relationships, these persons are integrated into business networks, formally as autonomous contractors, but frequently under a strict control by the leading company or brand indeed, and probably as the weakest link of the chain. However, notwithstanding that strong linkage and a high level of economic dependency from the leading business, this one cannot be claimed against concerning employer’s responsibilities, as these workers are legally independent contractors that fall apart from the application of Labor Law standards referred to salaried work, even if they are often in a very precarious situation that might deserve a somewhat similar protective regulation.

Somehow in accordance to these last considerations, a statutory act entitled “Statute of Autonomous Work” provided a general legal framework on self-employment and, specially, some particular regulations explicitly aiming protection of those most vulnerable self-employed persons, called “economically dependent autonomous workers”⁸⁵. These are defined as self-employed workers whose income depends mainly (at least 75%) of one same client business, provided that some other requirements are met too (business structure, equipment and resources of their own; separate performance of work, not merging with the staff of the client; organizational autonomy; last but not least, not being employers of other workers)⁸⁶. On that basis, this Law establishes some specific rights for such economically dependent self-employed workers, which somehow look like “labor rights”, although they are not recognized with the same extent and consistency: among others, non-discrimination, maximum working time and rest periods, right to interruption of the activity (on the

⁸³ Madrid Higher Court 366/2002, 21st May.

⁸⁴ CASTRO ARGUELLES, M. A., *Formas alternativas de contratación del trabajo: de los contratos de actividad a la descentralización productiva*, Thomson-Aranzadi, 2007, pp. 13-220.

⁸⁵ Law 20/2007, 11st July, “Statute of Autonomous Work”, particularly articles 3 to 22.

⁸⁶ Law 20/2007, 11st July, “Statute of Autonomous Work”, article 11.

grounds of illness, family reasons or imminent risk for health and safety) and holidays⁸⁷. On the other hand, this regulation proclaims some collective rights, and even supports a kind of “collective bargaining” that enables the adoption of “professional interest agreements” for the regulation of the conditions of execution of the working activity⁸⁸.

Anyhow, shedding employment to independent contractors can in many cases be considered as a problem of misclassification of workers as “self-employed”, while the true underlying nature of the situation perfectly fits in fact to a salaried employment relationship. The scope of application of Labor Law is mandatorily defined in Spain in regard to the legal concept of the employee (“workers who voluntarily provide paid services on behalf of someone else, within the management and organization area of another natural person or legal entity called employer”⁸⁹), and the essential characteristics of the employment relationship that can be accordingly inferred (voluntary/subordinated/paid work on behalf/at risk of other). Hence, Labor Law shall be applicable if the basic elements of the definition of salaried employment (paid subordinated work on behalf of another person or entity) are met in fact, regardless of the external appearance and the formal characterization (*nomen iuris*) agreed by the parties of the contract, in accordance to the principle of primacy of facts. Thus, misclassification of employees as independent contractors is an unlawful situation of bogus self-employment that could be claimed against by either the workers or the Labor Inspection, and subsequently reverted into a declaration on the dependent employment real status corresponding to the relationship, and on the applicability of labor standards. This final statement should be adopted by the labor courts through assessing the presence of the characteristics of salaried employment in the concrete circumstances of the case. Besides, in uncertain cases, the judges tend to decide relying in a legal presumption in favor of the existence of an employment contract, which has been deduced from article 8.1 of the Workers’ Statute.

There is already a consistent and noteworthy case law doctrine on the matter, and the true employment nature of the relationship underlying other pretended legal cover (i.e. works or services contracts, hiring of business, retailing distribution agreements or supply contracts) has been asserted in a large number of judgments⁹⁰. So, this approach could be used to reveal the existence of an employment relationship, and consequently to affirm the applicability of Labor Law, when franchising or other similar features are simply hiding behind misclassified employees under a false appearance of independent self-employed contractors, provided that the characteristics of salaried work are met in practice⁹¹. For instance, the Supreme Court stated that the individuals managing telephone box offices of the Spanish major telephonic brand, supposedly under services contracts, were indeed employees of the Telefonica Company⁹². Similarly, in several cases related to franchised dentistry clinics, the dentists working on the basis of fake works contracts, allegedly outside the boundaries of Labor Law, were finally considered as dependent employees of

⁸⁷ Law 20/2007, 11st July, “Statute of Autonomous Work”, articles 6, 14 and 16.

⁸⁸ Law 20/2007, 11st July, “Statute of Autonomous Work”, article 13. ROQUETA BUJ, R., “Los derechos colectivos de los trabajadores autónomos. Los acuerdos de interés profesional”, *Temas Laborales*, n. 114, 2012, pp. 13-30.

⁸⁹ Workers’ Statute, article 1(1).

⁹⁰ Among others, Supreme Court 20-9-1995, app. 1463/1994; 29-12-1999, app. 1093/1999; 29-11-2010, app. 253/2010, and 25-3-2013, app. 1564/2012.

⁹¹ OJEDA AVILÉS, A., *op. cit.*, pp. 248-251.

⁹² Supreme Court 20-7-1999, app. 4040/1998.

the franchisee⁹³. However, the courts missed that good chance for going a step ahead, examining from this perspective the relationship between the franchisee's employees (and even the franchisee herself) and, on the other hand, the franchisor as possible employer of them all. Therefore, assessing franchising as a matter of bogus self-employment and misclassification of employees might be conceivable, but this possibility has not been fully explored to the date.

5.5. Evaluation and future prospect

Spanish Labor Law offers just very few provisions about employment relationships in business-groups, although these are a raising feature within the Spanish economy. Therefore, a more exhaustive and systematical legislation on the matter would undoubtedly be desirable. Nevertheless, the lack of statutory regulation has been counterbalanced to some extent by means of creative solutions developed by the labor courts, which have often dealt with practical problems in regard to business-groups. The probably most outstanding among those case law responses is the "piercing the veil" doctrine, which, in some circumstances, allows to claim for Labor Law responsibilities beyond the boundaries of the formal employer, declaring the "mother" entities of the group, or the whole group as such, jointly responsible in regard to the labor rights of the employees belonging to the staff of the "daughter" (or "sister") entities. This is a powerful tool for the reconstruction of the previously deconstructed employer's responsibilities in fissured structures, and points to an interesting path to follow in future legislation. However, the application of this mechanism by the courts is very cautious, as very strict requirements need to be met. Indeed, they tend to apply it only to "pathologic" cases of business-groups in which the exclusively formal separation of the entities is in contrast with the real situation of merged finance and management, or when the group structure has been deliberately used with the aim of blurring responsibilities or circumventing Law⁹⁴. It would be appropriate to adopt a broader legal discipline on labor rights and responsibilities in business-groups in general, regardless of the fact of being "pathologic" or not, although this is a quite controversial issue in which further developments should probably be expected not from judges, but from legislators, including a more precise and detailed approach and taking into account the actual differences between the diverse types of company networks⁹⁵.

On the other hand, the legal responses to other outcomes of the fissured workplace as supply chains and franchising are even poorer. In some cases, they might be addressed by applying the current legal provisions on subcontracting and illegal assignment of workers, or by using the case law doctrine on business-groups and "piercing the veil". However, that has been attempted in several claims before the courts, and most of them have failed, as there are many obstacles that hinder a wide-ranging extension of employer's responsibilities on the aforementioned premises, as, among others, the narrow conception of "own activity" in which subcontracting regulations are based, or the self-restraint of the courts in the use of "piercing the veil". Though, concretely in regard to franchising, it should be acknowledged that it often involves a high level of implication of the franchisor

⁹³ Supreme Court 19-6-2007, app. 4883/2005; 12-2-2008, app. 5018/2005; 18-3-2009, app. 1709/2007, and 9-3-2010, app. 1443/2009.

⁹⁴ OJEDA AVILÉS, A., *op. cit.*, pp. 218-226.

⁹⁵ In regard to academic debate and proposals on the matter, among others, MONEREO PÉREZ, J. L./ MOLINA NAVARRETE, C., *El modelo de regulación jurídico-laboral de los grupos de empresas. Una propuesta de reforma*, Comares, 2002, pp. 1-181; RIVERO LAMAS, J., *op. cit.*, pp. 49-60.; OJEDA AVILÉS, A., *op. cit.*, pp. 215-235.

in production processes issues, work organization schemes and staff management decisions that the franchisee is supposed to accomplish as independent employer, but which are indeed strongly controlled by the first. This invites to reflect on to whom the employees of the franchisee are subordinated in reality, and consequently to discuss a new and different legal approach to the problem, going beyond the current silence of statutory legislation and the quite superficial responses given by the courts to the date⁹⁶. Finally, concerning the issue of “independent” contractors, the Spanish legal system offers two different sorts of approach: the extension of some protective regulations to economically dependent autonomous workers, and tackling bogus self-employment and misclassification of employees by means of a mandatory definition of the scope of application of Labor Law applied with the noteworthy support of the legal presumption in favor of the existence of an employment relationship. But these seem to be quite weak and incomplete remedies against the flow of the so-called “escape from Labor Law”.

6. Collective Labor Law and Labor Relations in “The Fissured Workplace”

Spanish collective Labor Law does not intensively deal with the issues arising from the “atomization” of work. It provides only a few isolated regulations concerning some of the most outstanding features of “the fissured workplace”, as subcontracting and business-groups. On the other hand, workers’ representatives and trade unions could be expected to be important actors in this field, and they certainly are to some extent. However, equally to legislation, they seem to focus their scope of action on the most obvious outcomes of the phenomenon, while its deeper consequences do not seem to be properly assessed, even if these are actually undermining the strength of their representation, bargaining and conflict functions and means. Anyhow, this is just a general outlook that should be more precisely addressed in the following lines, by means of a more detailed insight throughout different areas within collective Labor Law and labor relations.

6.1. Workers’ representation and information and consultation rights in subcontracting schemes

Employees’ elective representation bodies (works councils or workers’ delegates, depending on the size of the workplace) play a very significant role in enforcement and monitoring related to the rules on subcontracting. The client/owner or any undertaking that contracts-out a part of its “own activity” has the obligation to inform workers’ representatives about the following issues: name, commercial and taxation identification data and address of domiciliation of contractors or subcontractors; purpose and duration of contracting or subcontracting agreements; place for the execution of the contract; number of employees of the contractor or subcontractor expected to perform their activity within the workplace of the client; finally, measures foreseen for coordination regarding prevention of occupational risks⁹⁷. Besides, the contractor/subcontractor has the obligation to inform workers’ representatives about the identity of the client undertaking (including name, commercial and taxation identification data and address of domiciliation); purpose and duration of the contract or subcontract; place for the execution of the contract; number

⁹⁶ For interesting proposals on the matter, see GONZÁLEZ BIEDMA, E., *op. cit.*, pp. 657-680.

⁹⁷ Article 42(4) of Workers’ Statute.

of employees expected to perform their activity within the workplace of the client; finally, measures foreseen for coordination regarding prevention of occupational risks⁹⁸. Additionally, workers' representatives have the right of free access to the obligatory subcontracting book in which the several different undertakings sharing the same workplace should be registered, as said before⁹⁹. Further ahead, the Workers' Statute establishes a broad information right of works councils (or delegates) on subcontracting processes¹⁰⁰, and a general entitlement for monitoring compliance with all Labor Law, Social Security Law and Health and Safety legal standards, which can of course be used regarding this specific matter¹⁰¹. In addition, trade unions could also be relevant actors concerning application or enforcement of the rules on protection of workers' rights in subcontracting processes, in particular by means of trade union representatives at the workplace, who have also general information rights that can be used regarding this subject¹⁰². However, they usually act in this field through their presence among works councils and workers' delegates, as far as these take profit of the particular framework of specific rules hereby described.

Each undertaking of the subcontracting chain is independent, and must have its own workers' representatives, if the legal requirements on the matter are met. But article 42 of the Workers' Statute provides possibilities for coordinated action. When the employees of the contractors and subcontractors do not have legal representation, they have the right to bring questions and claims to the representatives of the client about working conditions while sharing the same workplace. If both the client and the subcontractor have representatives, they have a right to celebrate coordination meetings or assemblies among them in connection to the execution of activities in the shared workplace¹⁰³. Accordingly, workers' representatives of contractors and subcontractors that share continuously the same workplace at the owner's site have the right to use the places or premises available in that location for representative functions, even if they are property not of their employer but of the client, nonetheless in terms and conditions that have to be previously agreed¹⁰⁴. On the other hand, when the employees of the contractors and subcontractors sharing location do not have their own works councils or delegates, they have the right to bring questions and claims before the representatives of the shared workplace of the client, concerning issues related to the execution of their activity in the context of subcontracting¹⁰⁵. Violations of all this wide range of collective rights could involve important penalties¹⁰⁶.

⁹⁸ Article 42(5) of Workers' Statute.

⁹⁹ Article 42(4) of Workers' Statute.

¹⁰⁰ Article 64(2) of Workers' Statute.

¹⁰¹ Article 64(7)(a) of Workers' Statute.

¹⁰² Articles 8 and 10 of Law 11/1985, 2nd August, on Trade Union Freedom of Association.

¹⁰³ Article 42(7) of Workers' Statute.

¹⁰⁴ Articles 42(7) and 81 of Workers' Statute.

¹⁰⁵ Article 42(6) of Workers' Statute.

¹⁰⁶ Royal Legislative Decree 5/2000 establishes administrative penalties for violations of the described information duties of the employer [articles 7 (7,11) of Legislative Decree 5/2000 in connection to articles 42(3), 42(4,5) and 64(2)(c) of Workers' Statute], in regard to the requirement of having a fully updated register book for contractors and subcontractors which perform their activities in the same location [article 7(12) of Legislative Decree 5/2000 in connection to article 42(4) of Workers' Statute], and also related to the obligation of allowing reunions between workers' representatives from the different undertakings (client and contractors) sharing a common workplace [article 8(5) of Legislative Decree 5/2000 in connection to article 42(7) of Workers' Statute]. Joint and several and chain liability is applicable in the context of these penalties to the client and the contractors, in the terms of article 42 of Workers' Statute, [article 42(1) of Legislative Decree 5/2000]. The amounts of the fines depend on the grade of culpability and seriousness of the

6.2. Workers' representation and information and consultation rights in business-groups

In the field of business-groups, Spanish Collective Labor Law is currently lacking a global systematic approach, but it offers nonetheless several regulations on some specific issues. Most of them refer to employees' representation bodies and information and consultation rights of workers' representatives. Within this area, there are some provisions aiming to safeguard those information and consultation rights of the representatives in "daughter" or subsidiary businesses in regard to key management decisions, even if these are adopted by a parent or holding company beyond the boundaries of the actual employer. Concretely, as to changes in the ownership of the employer entity and collective dismissals, it is explicitly outlined that information and documents on the matter should be provided in those situations to the employees' representatives of the concerned workplaces, regardless of the fact that the managerial decisions have been adopted either by the direct employer or by another entity exercising control from an upper level, excluding justification of non-compliance based on the fact that the leading business has not delivered the relevant elements underlying its decision¹⁰⁷. Moreover, according to statutory regulation, the previous information and consultation proceedings required in order to adopt collective dismissals should take part at the company or workplace-level, as a general rule¹⁰⁸. However, although it was not legally foreseen, case law has admitted that business-groups as such can directly initiate collective dismissals in regard to the several different entities gathered inside, and that information and consultation proceedings with the workers' representatives in these cases could be accomplished jointly in the whole group-scale, instead of in the lower level of the diverse undertakings and workplaces¹⁰⁹. This is surely a very adequate solution from the standpoint of the workers and their representatives, and in the interest of the employers too, as it combines better chances for effectively organizing collective action of the employees and simplification of procedures for the business-group managers.

On the other hand, business-groups are directly addressed in legislation on workers' consultation and information rights in multinational European-scale undertakings, according to the common EU Law framework on the matter. Law 10/1997, 24th April, contains the national transposition of EU Directive 2009/38/EC, 6th May, on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (which involves modification and recast of the previous Directive 94/45/CE). Accordingly, those undertakings and business-groups are obliged to negotiate the creation of a European-level representation body, or an alternative information and consultation procedure, and, in case that there is not an agreement, these regulations provide subsidiary rules for compulsory setting of a European Works Council. Similarly, European-scale joint stock companies and cooperatives ought to negotiate the establishment of a system for the involvement of the employees, according to Law 31/2006, 18th October, which is national transposition of EU Directive 2001/86/EC, 8th October, on

infringement, and are increasable in the case of reiteration (according to articles 40 and 41 of Legislative Decree 5/2000).

¹⁰⁷ Articles 44 (10) and 51(8) of Workers' Statute.

¹⁰⁸ Articles 51 (2) and 41(4) of the Workers' Statute.

¹⁰⁹ Supreme Court 25-6-2014, app. 165/2013.

supplementing the Statute for a European company with regard to the involvement of employees, and Directive 2003/72/EC, 22nd July, on supplementing the Statute for a European Cooperative Society with regard to the involvement of employees¹¹⁰. In practice, many Spanish-based multinational corporate groups have already established European-scale information and consultation bodies in accordance to this legal framework.

6.3. Collective bargaining

From a different perspective, business-groups are somewhat considered by the legal regulations on collective bargaining agreements. In the past, these rules used to focus on sector and company-level agreements, not foreseeing collective bargaining in business-groups. This became however quite widespread in practice, although the legal framework presented some lack of adaptation on the matter, bringing up some problems, especially in regard to the statutory rules on legitimate representations entitled to negotiate such business-group agreements. The courts gave some case law responses expressly enabling collective bargaining in business-groups, and solving the difficulties concerning legitimate actors by combined analogical application, as appropriate, of rules either on sector and company-level negotiations. Through a reform enacted by Decree-Law 7/2011, 10th June, these case law solutions have been afterwards incorporated into statutory legislation, which now explicitly allows collective bargaining agreements for business-groups and for other situations of multiplicity of undertakings with organizational or production-related links. The legitimate representation of workers in this regard is now unambiguously conferred to trade unions under the same requirements requested for sector-level bargaining¹¹¹.

Leaving business-group agreements apart, as said already frequent, collective bargaining does not envisage the issues connected to the topic of “the fissured workplace” very deeply in practice. Collective agreements could regulate on the matter whenever to improve workers’ rights and minimum standards given by statutory Law. In that sense, it is very common for collective agreements to contain references to subcontracting, while addressing other forms of “fissurization” is quite rare. However, these regulations are often limited to repeat the legal provisions, and do not introduce real original contents. Most sector agreements contain clauses about subcontracting, although with very little innovation. Some collective agreements provide a wider range of responsibilities compared to those established in article 42 of Workers’ Statute, reaching, for example, voluntary improvements in social security benefits (i.e., collective agreement for the construction sector). Conversely, it is not usual to find rules in this field in company-level agreements. In fact, the greatest contribution of collective bargaining is, in some sectors such as cleaning or hospitality, to establish the duty of a new contractor or subcontractor to continue to maintain the contracts of workers who were carrying out their activities for the previous contractor or subcontractor. Also, the great concern for health and safety at work explains that in some sectors collective agreements have developed preventive guidelines

¹¹⁰ Respectively linked to Regulation 2157/2000, 8th October, on the Statute for a European company, and Regulation 1435/2003, 22nd July, on the Statute for a European Cooperative Society.

¹¹¹ Article 87 (1,2) of Workers’ Statute.

and measures to avoid accidents, as in the construction sector and in the chemical industry¹¹².

6.4. Trade union action and the right to strike

In regard to the workers' collective action and the rights to trade union freedom of association/action and to strike, both proclaimed as constitutional fundamental rights in the Spanish Constitution [article 28 (1,2)], there is not a statutory regulation specifically addressing the outcomes of "the fissured workplace" in that ground. However, the case law of the Constitutional Court has already dealt with the problem of violations of workers' constitutional rights (including the right to strike) caused not directly by their actual employer, but as a consequence of decisions or instructions adopted beyond, by the client for whom the first acts as a contractor or subcontractor¹¹³. The facts concretely examined by the Constitutional Court refer to a subcontracting case, where the client decided to cancel the relationship with the contractor, as a retaliation reaction against claims and a strike carried out by the contractor's employees, with the final result of these being dismissed as a consequence of the loss of the service contract. The Constitutional Court declared that the client is liable for the violation of fundamental rights (to judiciary action and to strike) in such circumstances, although the nature and distribution of liability among both involved undertakings was not clearly established. This case law has been very welcome by some commentators and sharply criticized by some other voices, including the attached dissenting opinions of some magistrates¹¹⁴. Employers' associations clearly dislike its orientation, and show a great concern on its possible further consequences, pointing that it creates uncertainty for business relations. However, from a less biased standpoint, the orientation of the commented judgment seems to be interesting in order to prevent using outsourcing as an instrument for directly undermining collective rights.

Another outstanding case refers to collective dismissals and the right to strike in "Coca Cola Iberian Partners", the business-group currently operating production and distribution of the world famous drink in Spain and Portugal under the well-known international brand. The beverage used to be produced and stocked in various plants and facilities belonging to different companies, each of them fabricating and serving for different parts of the Spanish territory. After shareholding movements, not for fissuring but for concentrating control by the parent undertaking "CC Iberian Partners", this new managing company decided a restructuring process leading to the prospect of closing some plants, the dismissal of an important number of employees and the reallocation of others. The previous consultation on restructuring measures and collective dismissals with the workers' representation, which is compulsory according to Labor Law¹¹⁵, was held at the group-level, not in the company or workplace-level as it is legally required as a general rule¹¹⁶. This was nevertheless accepted by the courts¹¹⁷, which seem to be adequately flexible to admit joint bargaining of these procedures for the whole business-group, as said

¹¹² MENÉNDEZ CALVO, R., *Negociación colectiva y descentralización productiva*, CES, 2009, pp. 102-136; PÉREZ DE LOS COBOS ORIHUEL, F. (Dir.), *Contratación temporal, empresas de trabajo temporal y subcontratación en la negociación colectiva*, CCNCC, 2010, pp. 199-313.

¹¹³ Constitutional Court Judgments 75/2010, 76/2010, and 98 to 112/2010.

¹¹⁴ ESCRIBANO GUTIÉRREZ, J., "El derecho de huelga en el marco de la descentralización empresarial", *Temas Laborales*, n. 110, 2011, pp. 195-206.

¹¹⁵ Articles 51 and 64 of Workers' Statute.

¹¹⁶ Articles 51 (2) and 41(4) of Workers' Statute.

¹¹⁷ National Appeal Court 108/2014, 14th June.

before¹¹⁸. However, the Judgments of both the National Appeal Court and the Supreme Court declared these collective dismissals void and null for other reasons, and especially due to assessing a very particular form of violation of the right to strike in terms that are necessarily to be remarked here¹¹⁹. During the process for adopting collective dismissals, the employees of some – not all – of the plants, located in Madrid, initiated a strike against the business-group managers’ intentions. Of course, the purpose of the strikers was to leave the capital city and the whole region with little coca cola to drink. However, the managers quite succeeded to avoid the effects of the strike by operating on the basis of logistics and decisions delivered to other companies within the holding: they just made the drinks come to Madrid from other companies and facilities belonging to the group and located in nearby regions, but which had never produced and distributed Coca Cola for that geographical area before. This was judiciary examined bearing in mind the prohibition of substitution of striker workers, a behavior considered a violation of the fundamental right to strike [article 28 (2) of Constitution], and explicitly forbidden in statutory legislation too¹²⁰. Even if there was not a physical replacement of the striker employees by recruiting other workers in the terms of the statutory ban, the courts assessed that there was an abnormal use of the managerial powers and of the resources belonging to other companies of the group with the purpose of neutralizing the effects of the strike in the workplaces located in Madrid, and this brought to declare a violation of the fundamental right of article 28 of the Constitution, and consequently that the collective dismissal was void and null.

6.5. Beyond legal issues: trade unions and labor relations in the “fissured world”

Anyhow, going beyond the strictly legal issues, the deepest outcome of “fissurization”, and probably the most difficult to acknowledge at the same time, is its serious impact in the core of trade unions, workers’ representation schemes and, in general, the classic features of collective labor relations. To begin, the “atomization” of companies and workplaces and the replacement of the former big fordist factory by the post-fordist business networks of smaller-size and formally and physically separated legal entities involves obstacles for contact and collective organization among increasingly disperse workers, therefore rising “invisible barriers” to workers’ movement, which is suffering the consequences of profound changes in its traditional context and premises¹²¹. Additionally, the “new economy”, innovative business strategies, globalization and other circumstances have fissured not only the workplace, but also the working class itself. Its old internal homogeneity according to the archetypical factory worker is now being broken into a multiplicity of different types of employees, of a highly diverse nature and often with diverging or even opposed interests: blue collar/ white collar/ silicon collar workers; qualified/ not qualified workers; permanent/ temporary/ “precarious” workers in a segmented labor market; typical/ “atypical” workers; nationals/ immigrant workers; well-paid/ middle-paid/ low-wage/ underpaid workers; last but not least, employees/ self-employed/ economically dependent self-employed/ workers misclassified as

¹¹⁸ Supreme Court 25-6-2014, app. 165/2013.

¹¹⁹ National Appeal Court 108/2014, 14th June, and Supreme Court 20-4-2015, app. 354/2014.

¹²⁰ Article 6(5) Decree-Law 17/1977, 4th March.

¹²¹ VALDÉS DAL- RÉ, F., “La externalización de actividades laborales: un fenómeno complejo”, PEDRAJAS MORENO, A. (Dir.), *La externalización de actividades laborales (outsourcing): una visión interdisciplinar*, Lex Nova, 2002, pp. 42-44.

self-employed. Obviously, this tendency inherently involves a massive loss of class consciousness. On the other hand, this rising fragmentation is also a problem in regard to the usefulness and real effectiveness of the traditional institutions of industrial relations. Both collective bargaining and strike were conceived on the basis of the adequateness of “mass contracting” and “mass conflict” for handling industrial relations in the context of quite unified interests of workers, but these premises are also fissuring at present, according to what has already been said.

Besides, the position of collective bargaining in regard to setting of wages and other working conditions has been significantly undermined as a consequence of “fissurization”. As it has been smartly pointed, the move from the traditional model of large companies in charge of the whole business to a chain of formally independent contractors, subcontractors and suppliers entails a really important change in wage determination, shifting from a staff management and industrial relations issue to a matter of fixing tariffs in highly competitive markets¹²². Formerly, the big employer had to negotiate (usually through collective bargaining) vis-à-vis her employees, who could put pressure on the first by means of trade unions, strike and collective action supported by a numerous bunch of employees belonging to the staff. But now, smaller-size contractors, subcontractors and suppliers have to contend amongst them in a much more open competition to gain a “little piece of the pie” that the leading companies are contracting-out, and obviously only those offering lower prices to the client business succeed. In order to decrease the fees, this competition necessarily requires dropping costs as much as possible and an inherent pressure to reduce wages, with no real opposition of workers due to different circumstances: (a) if wages are not adjusted to drop the prices offered to the client business, this will probably choose a cheaper contractor or supplier and there will be no jobs for the workers, so they are likely to accept; (b) contractors may use temporary workers, who will only be recruited if they accept the low wages fixed according to the prices agreed with the client, and (c) on the premises of small-size contractors, subcontractors or franchisees, generally, there is not collective representation of workers nor collective bargaining or action possible in order to push up salaries. Of course, collective bargaining in the sector level could be a remedy against this panorama, as it allows fixing standardized salaries and other working conditions equally applicable to the whole economic segment, including all the contractors, subcontractors and other undertakings, thus stopping to some extent the wage-cut competition and limiting social dumping. However, sector collective bargaining does not cover all the economic areas, and it has been constantly in withdrawal in recent years. In Spain, the number of employers and employees covered by sector-level collective bargaining has significantly decreased, and the area of coverage is generally referred to the most traditional economic activities, while the newest ones – perhaps more likely to fissure – tend to be left out. In addition, the latest Labor Law reforms¹²³ stand for the decentralization of collective bargaining, through broadly enabling the employers to derogate from sector-level agreements and, besides, giving absolute priority to the application of company-level agreements. This is contributing significantly to weakening sector-level collective bargaining and consequently reducing wages. On the other hand, the situation seems to be difficult to revert, as the direction of this legal orientation has been drawn up by the institutions of the European Union as a core part of the particular policies imposed to some Member States in the context of the economic and financial crisis.

¹²² WEIL, D., *op. cit.*, pp. 76-92.

¹²³ Decree-Law 7/2011, 10th June; Decree-Law 3/2012, 10th February; finally, Law 3/2012, 6th July.

Possibly, trade unions have not perceived all the above mentioned changes and emerging challenges in full, and surely they have not succeeded to adapt to them. As a combined result of this lack of comprehension and adaptation and the new "invisible barriers" to collective action, they are currently suffering a deep intrinsic crisis, undoubtedly worsened in the adverse economic scenery subsequent to the great economic crash of 2008. Trade unions seem to remain attached to their old structures and strategies conceived in regard to the classic paradigms of work arising from the first and second industrial revolutions, focusing primarily on the traditional industrial sector, on the large workplaces and manufacturing plants according to the fordist-taylorist model, and on "blue collar" factory workers or "white collar" bureaucratic employees. Therefore, there is a loss of connection to other more recently developed economic activities and jobs, and consequently a "representation short-circuit" concerning the actual situation of, for instance, "silicon-collar workers", "precarious workers", new forms of employment linked to information and communication technologies, false or economically dependent self-employed, and, in general, "fissured workplace" employees. At the same time, these new categories of workers perceive that, while they generally bear poorer living and working conditions, trade unions concentrate their attention on their traditional and well-known areas, so those are increasingly developing rejection feelings that result in a vicious feed-back circle which is enlarging the mutual distance.

What is more, current legislation on workers' representation and trade unions does not help much. It has also been designed in regard to the old models, focusing in big or middle-size workplaces. Workers' elective representation is established mainly taking each workplace as reference, instead of the entity as a whole, consequently complicating the designation of representatives in big businesses divided into small units, as it is usual in practice. Besides, only workplaces of at least 50 employees can elect works councils, while those between 10-49 (or from 6, if decided by a majority of workers) can elect staff delegates, and those of 5 or less employees shall not have any representation scheme¹²⁴. So, the existence of representation in smaller-size entities is not favored by statutory legislation, even if small and micro-size businesses are currently predominant in the Spanish economy. Accordingly, "fissuring the workplace" into small pieces can be a way of avoiding the creation of representative bodies too. Moreover, trade unions' representativeness, in order to the attribution of relevant functions and stronger means for action, is measured proportionally to the results obtained by the candidates of each union in the elections for delegates and works councils. As only large workplaces provide important election results in this regard, this system creates an incentive for unions to focus mainly in those big sites, usually located in traditional sectors. Therefore, the legal regulation itself discourages paying attention to small entities and fragmented sectors, consequently aggravating the already explained tendency of unions to withdrawal into their classic areas of action, leaving emerging sectors and "fissured workplaces" almost unattended.

6.6. Evaluation and future prospect

Collective Labor Law is probably the area providing poorer and less adequate regulations to deal with "the fissured workplace". Certainly, there are a few interesting provisions on workers' representation and their information and consultation rights in the context of some forms of multi-layered organization of work. Namely, this matter has been

¹²⁴ Articles 62 and 63 of Workers' Statute.

carefully and properly regulated in regard to subcontracting, both from a general perspective and specifically in regard to health and safety, by establishing a wide range of information rights and correlative duties for the different involved undertakings, along with inspired solutions for coordinating and co-involving workers' representation structures beyond the boundaries of their respective employers (i.e. right to coordination between representatives belonging to different entities, joint assembly, right of subcontractor's employees to issue claims to the representatives of the client's shared workplace). In the area of business- groups, paradoxically, there are significant regulations on works councils and information rights in European-scale grouped undertakings, while there are only some isolated provisions for national-scale structures, fortunately counterbalanced by some case law approaches on the matter and group collective agreements. But, leaving apart those piecemeal regulations and judiciary or collective bargaining developments, the Spanish legal framework on workers' elective representation remains devoted in general to very classic schemes predominantly attached to big-size and middle-size workplaces as basic reference, therefore tending to obstruct the building of representation mechanisms in multi-layered business structures deconstructed into small-size units. Besides, a parallel situation could be assessed in regard to trade unions, as both statutory law and their internal organization and strategies seem to be based primarily in the old fordist-taylorist paradigms of work, employees and employers, being consequently immerse in a crisis closely related to a lack of adaptation to the current context of "the fissured workplace" in post-fordist capitalism. Adequate comprehension of this phenomenon by the unions themselves and by legislation on the matter is crucial and urgent, in order to slow down a dynamic which is increasingly weakening the position of trade unions and creating a serious imbalance in the industrial relations system.

Collective bargaining is also being somehow destabilized as a consequence of the fragmentation of work. The deconstruction of production into a multi-level network of contractors, subcontractors and suppliers dilutes the former position of collective bargaining concerning setting of wages and other working conditions, which are now pre-determined in a highly strong market competition amongst contractors and subcontractors. A rearrangement of the framework and the structure of collective bargaining are subsequently needed. The support given to business-group-level collective bargaining by the courts and a later legal reform is a good step in this regard. Conversely, the aforementioned Labor Law reforms aiming decentralization of collective bargaining go in the wrong direction, weakening the position of sector-level agreements and favoring wage competition and social dumping, so they should be reverted. This is however unlikely, as these modifications have been introduced with strong political support from the European Union, the International Monetary Fund and business organizations. Finally, the "atomization" of work into multi-layered business structures involves new threats for the right to strike too. Among other things, the different forms of cooperation and interaction between legally separate entities allow employers to adopt innovative strategies to prevent strike, to block its effects or to retaliate against striker workers. Some judgments are adopting innovative approaches and noteworthy solutions on the matter, but unions and workers' representatives should develop their own strategies to face these arising challenges by themselves.

Conclusion

The classic patterns of salaried work have intensively changed in the context of the evolution of the economic structures since the late 1970s'. They have been increasingly moving from the former paradigm of large industrial companies managing all the crowd of workers involved in the production process in big- size plants to the “atomized” or “fissured workplace”, deconstructed into a multi-layered business network composed of an interconnected multiplicity of smaller-size “daughter”/ “sister” companies, contractors, subcontractors, suppliers and other entities, each of them carrying out small parts of the outsourced economic activity, as legally independent employers in charge of their own respective employees. As Labor Law was primarily conceived and built on the basis of the traditional model, this phenomenon is leading to increasingly emerging challenges and concerns on its appropriate application and enforcement. Among other things, the renewed business structures in the fissured context entail blurring of responsibilities, increased risks of circumvention of law, and, more broadly, a general trend towards lowering of labor standards and undermining the efficacy of legal and collective bargaining regulations.

Certainly, the “atomization” or “fissuring” of work has not been completely unnoticed for Spanish Labor Law. In fact, many issues related to this matter have been already addressed by different statutory provisions since the 1980s'. However, the regulation does not provide a systematical and fully complete regulation of the phenomenon, and the responses given to its diverse outcomes are somehow unequal. While subcontracting and temporary assignment of workers are quite intensively regulated, there are just very few and quite isolated rules in regard to business-groups and other more innovative forms of fissuring. These are starting to be dealt with by means of some interesting case law solutions, which are nevertheless still incomplete and can be considered “under construction”. Further ahead, some challenging problems – as those arising from franchising schemes – remain somewhat unexplored or even misjudged, and the topic of “the fissured workplace” has not been considered from a global perspective, as it would be surely desirable. From a different point of view, the features in the field of individual Labor Law and Social Security seem to be more consistent than those in the area of collective labor relations.

Anyhow, in those fields in which it provides at least a piecemeal approach, Spanish Labor Law offers some interesting contributions to be remarked, as the already well-known and broadly applied mechanisms of joint and several liabilities, the creation of crossed workers' representation structures and information rights exceeding the landmarks of each independent employer and the “piercing the veil doctrine”. All these tools are interesting inputs that might be further considered by the Spanish legal system (and even exported or shared with other systems), in the direction of (at least partially) going beyond the strict boundaries of the formal legal entity of the employer. However, this is still a path to follow in the future, which should probably be walked bearing in mind a deeper reconsideration of the concept of the employer, the notion of subordination and other basic founding institutions of Labor Law, adapting them to the new shaping of work in the era of post-fordist capitalism.