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# The Abuse of Fixed-Term Employment Contracts: A Permanent Feature of the Spanish Labour Market

David Montoya Medina \*

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## 1. The “Causality Principle” in Fixed-Term Employment Contracts

Labour legislation in Spain does not favour the conclusion of open-ended employment contracts over fixed-term ones. Art. 15 of the Worker’s Statute (hereafter WS) establishes that a contract of employment may be of either a definite or an indefinite duration. Prior to the 1994 labour law reform, Art. 15 of the WS established a presumption in favour of open-ended employment contracts. Accordingly, Spanish labour law sought to popularise the conclusion of open-ended employment contracts, with fixed-term contracts regarded as an exception.

While not prioritising the implementation of contracts of an indefinite duration, the Spanish labour relations system still considers as exceptional the conclusion of temporary contracts, especially following the 1994 labour law reform. Unlike other regulatory models (e.g. the United Kingdom), Spanish employers are not free to decide whether to conclude open-ended or fixed-term employment contracts. By and large, fixed-term contracts can only be entered into in specific circumstances established by the law (e.g. to satisfy a temporary demand for manpower)<sup>1</sup>.

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<sup>1</sup> Other provisions of the WS indicate the preference of lawmakers for open-ended employment contracts over temporary ones. This is the case of Art. 8.2 WS (which establishes that an employment contract which is not concluded in writing is considered to be of an indefinite duration, unless evidence is given of its temporary nature). It is also

Therefore, the Spanish legal system limits the recourse to fixed-term contractual arrangements, which are subject to the “causality principle”<sup>2</sup>. In other words, a justifying reason must be provided to conclude temporary contracts, which is related to the temporary nature of the task to be performed. Otherwise, open-ended employment contracts are to be entered into. In this connection, Art. 15.3 WS sanctions the fraudulent use of fixed-term contracts<sup>3</sup>, i.e. when not provided by the law<sup>4</sup>.

According to Art. 15.3 WS, fixed-term employment contracts can only be entered into in three circumstances: on a temporary basis, when the worker is hired to carry out a specific project or service which is somehow related to the core business (*contracts for a specific project or service*); to deal with certain market fluctuations (e.g. a peak in production) or periods of peak demand (*temporary contract due to production overload or backlog*)<sup>5</sup>; to temporarily substitute workers (*temporary contracts*).

The three circumstances just described which validate the use of temporary contracts are regulated by Art. 15 WS, which in turn, was implemented through Spanish Royal Decree No. 2720 of 18 December 1998.

Although the foregoing examples are referred to in the law as “*numerus clausus*”<sup>6</sup>, Spanish legislation contemplates other cases where fixed-term contractual arrangements can be used which are not regulated by Art. 15 WS: training contracts (either in-house training or apprenticeships)<sup>7</sup>,

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the case of Art. 15.2 WS (where the same rule applies if the worker has not registered with social security).

<sup>2</sup> Regarding this principle, see R. Aguilera Izquierdo, *El Principio de «Causalidad» en la Contratación Temporal*, in *Revista del Ministerio de Trabajo e Inmigración*, 2001, No. 33, 99-122.

<sup>3</sup> J. López López, *La Contratación Temporal y el Fraude de Ley*, in *Relaciones Laborales*, 1990, No. 2, from 334 onwards.

<sup>4</sup> Art. 6.4 of the Spanish Civil Code considers fraudulent “those acts undertaken to pursue an outcome that is prohibited by or violates the law”.

<sup>5</sup> Spanish Royal Decree-Law No. 4 of 22 February 2013 concerns the promotion of young people’s employment and allows this contractual scheme to be used for unemployed and unexperienced people under the age of 30. Yet, and implicitly, this provision favours the recourse to fixed-term employment contracts, which is limited by law in the event of unemployment rates higher than 15%.

<sup>6</sup> Decisions of the Supreme Court of 27 July 1993 (Rec. No. 2206/1992) and of 6 May 2003 (Rec. No. 2941/2002).

<sup>7</sup> These employment contracts are regulated by Art. 11 WS; apprenticeships are also governed by Royal Decree 1529 of 8 November 2012, which makes provisions for dual vocational training.



“relay” contracts<sup>8</sup> and contractual schemes to promote the employment of disabled people<sup>9</sup>.

The temporary nature of each of these contracts is justified by different reasons. Training contracts have a maximum duration of two years (for in-house training) and three years (for apprenticeships), and their limited duration is justified by its training content. “Relay” contracts, which are rarely implemented, target the unemployed who can substitute those employees who have entered partial retirement. Finally, temporary jobs promoting the employment of people with a proven disability of 33% or more have a maximum duration of three years. The provisional nature of this contractual scheme is justified by the worker’s disability which thus constitutes an objective reason *per se*. They are governed by Art. 17.3 WS, which empowers the government to establish measures to promote the employment of specific groups who struggle to access the labour market, as in the case of physically challenged people.

## 2. Unemployment and Fixed-term Employment Contracts: Two Features of the Spanish Labour Market

Currently, two elements characterise the Spanish labour market: the high unemployment levels among the younger population, and the even higher number of fixed-term employment contracts concluded in Spain in comparison with other EU countries.

### 2.1. Spain’s Unemployment Rates

In 2007, the economic recession affecting European countries generated rampant unemployment in Spain, which has progressively increased since then. According to the latest data of the *Labour Force Survey (LFS)*, published by the National Institute of Statistics, unemployment in Spain increased between 2012 and 2013 affecting a further 563,200 people, with the total number of unemployed people standing at 6,202, 760 (27.16% of the labour force), a new high for the Spanish economy. This figure is the highest in the last ten years and accurately reflects a constant rising trend

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<sup>8</sup> Regulated by Art. 12.6 and 12.7 WS in accordance with the partial retirement regime laid down in Art. 166 of Spanish Legislative Royal Decree 1 of 20 June 1994 implementing the amended text of the General Social Security Law.

<sup>9</sup> Regulated by the first additional provision of Law 43 of 29 December 2006 to increase growth and employment.



in unemployment since the beginning of the economic recession. If 2007 is taken as a starting point, each financial year has ended with a rise in unemployment, which has hit young people the hardest (as of April 2013, 57.22 % of young people were unemployed).

## **2.2. The Increasing Number of Fixed-term Employment Contracts in Spain**

In Spain, the recent rise in unemployment can be related to the high share of temporary jobs reported in the labour market. According to the data provided by Eurostat, 24.1% of the employed people in our country are on fixed-term contracts, making Spain the country with the highest percentage of temporary contracts in Europe after Poland (26.7%)<sup>10</sup>.

Yet temporary employment in Spain has experienced the most significant decrease in Europe since the beginning of the economic crisis. In 2006, Spain reported the highest share of temporary jobs in Europe – 34%, that is twice the EU average – before decreasing down to 25%. While not the highest rate in Europe, the share of temporary jobs in Spain is still 10 percentage points higher than the European average.

At first blush, the reduction in temporary work in Spain in the last seven years seems to be the result of the legislative reforms which have been implemented since 2006 to promote open-ended employment contracts. However, it is significant that such decrease was recorded precisely during the economic recession, when unemployment increased the most. Accordingly, rather than encouraging employment and social integration, the decrease of fixed-term contractual schemes increased the unemployment levels. The employer's first move to deal with an economic crisis or a fall in the demand of products and services is that of not extending fixed-term employment contracts. In this connection, the high costs to terminate employment contracts through dismissal must be considered (either disciplinary or due to economic reasons). Therefore,

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<sup>10</sup> Note that the rate of temporary work in Spain is 24.1%, which is ten percentage points above the EU average (14.1%, 15.6% in the Eurozone). Portugal (21.3%), the Netherlands (19.7%), Finland (17%) and Sweden (17%) follow. The lowest rates in the use of fixed-term contractual schemes can be found in Romania (1.9%), Lithuania (3.3%), Estonia (4%), Latvia (5.2%) and Bulgaria (5.5%).

the non-renewal of fixed-term contractual arrangements represents a more economical option<sup>11</sup>.

### 3. Employer Preference for Fixed-term Employment Contracts over Open-Ended Ones

A preliminary conclusion that could be drawn from what has been discussed so far is that a clear divergence exists in the Spanish labour relations system between the rules governing open-ended employment and the reality reported by statistics.

As seen, fixed-term contractual schemes can be entered into only in the cases expressly stated in legislation. Yet reality is different. With temporary employment reported to be at 24.1%, employers are expressing a clear and undeniable preference for hiring workers on fixed-term contractual arrangements. This is also evidenced by the abuse of different temporary work schemes, especially project contracts and those entered into to deal with fluctuating demand. Although prohibited by law, it is not unusual for employers to resort to these contracts to employ staff on a temporary basis<sup>12</sup>.

The reasons for Spanish employers to prefer fixed-term employment contracts over open-ended ones are not clear. A possible explanation is the attempt to reduce the inherent labour costs. In Spain, compensation for unfair dismissal is equal to 33 days' wage per year up to a maximum of twenty-four months (Art. 56.1 WS). Conversely, the compensation award to be paid by the employer at the time of terminating a fixed-term employment contract ranges between 8 and 12 days' wage per year (Art. 49.1 c WS and 3<sup>rd</sup> transitory provision WS). Thus, there is a natural tendency for employers to opt for fixed-term employment contracts<sup>13</sup> as a more effective and economical tool to manage the workforce.

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<sup>11</sup> On this issue, see A. Desdentado Bonete, *El Despido, la Crisis y la Reforma Laboral*, in *Diario La Ley*, 2010, No. 7337, 1-4. J.M<sup>a</sup>. Goerlich Peset, *¿Contrato Único o Reforma del Despido por Causas Empresariales?*, in *Relaciones Laborales*, 2010, No. 1, 1205-1228.

<sup>12</sup> L.R. Martínez Garrido, *Abusos en la Contratación Temporal y Control Judicial*, in *Actualidad Laboral*, 1991, No. 2, 343-352.

<sup>13</sup> More and more employers make illegal use of this contractual arrangement, although this violation is a serious administrative offence in Spain that can be fined. Furthermore, employers prefer this type of contract even though case law regards as unfair dismissal the termination of a fixed-term contract when no objective reason is provided. See, among many others, the Supreme Court ruling of 20 February 1995 (Rec. No. 3707/1993) and 21 December 1995 (Rec. No. 1646/1995).

## 4. Legislative Initiatives against the Abuse of Fixed-term Employment Contracts

Over the last fifteen years, different labour reforms have been implemented in Spain to tackle the abuse of temporary work schemes and promote stable employment. However, we will see that these attempts have been unsuccessful.

### 4.1. The Promotion of Open-Ended Employment Contracts in the 1997 Labour Reform

Traditionally, open-ended employment contracts have not been governed by specific regulations, nor have they been differentiated in labour legislation. Fundamentally, the first version of the Workers' Statute (Law 8/1980) and the provisions previously in force (Labour Relations Law of 1976, Work Contract Law of 1944, etc) were designed taking account of employment contracts of an open-ended type and the ensuing rights and obligations<sup>14</sup>.

Nevertheless, due to the overuse of temporary work schemes on the part of employers, more attractive forms of open-ended employment contracts were envisaged in order to promote their use. An example is the so-called “*contract to promote open-ended employment*”, introduced by the 1997 labour reform<sup>15</sup>, which was enforced alongside traditional permanent ones<sup>16</sup>.

The labour reform of 1997 constituted the reaction of Spanish lawmakers to rampant unemployment – which affected 22% of the working population (42% if young people are considered on an exclusive basis) – and the rising incidence of temporary work (34% of total employment, more than twice the EU average). This reform was the result of a preliminary agreement between the social partners (the *Interconfederal Agreements for Employment Stability*) which simply converted into law the previous agreements between trade unions and employers' associations.

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<sup>14</sup> Despite the high share of fixed-term employment contracts, many clauses of WS still exclusively apply to open-ended contracts. An example of this is Art 14 WS concerning the maximum duration of the probationary period in the absence of any provision in the collective agreement.

<sup>15</sup> Law No. 63 of 26 December 1997 on Urgent Measures to Improve the Labour Market and the Promotion of Open-ended Employment.

<sup>16</sup> A recent study on this contractual scheme before its repeal is J. Luján Alcaraz, *El Contrato para el Fomento de la Contratación Indefinida*, in R. Martín Jiménez, A.V. Sempere Navarro (eds.), *Contratos de Trabajo Temporales*, Aranzadi, Pamplona, 2011, 587-624.

The contract to promote open-ended employment targeted specific groups who were particularly affected by unemployment and precarious working conditions, e.g. young people under the age of thirty, people over forty-five, people who had been unemployed for over a year, disabled people and temporary workers. Subsequent reforms extended its scope of application to people who had been unemployed for more than six months, unemployed women previously hired in professions with low levels of female participation and women who had been victims of gender-based violence.

The conclusion of contracts promoting stable employment offered two advantages to the employer. To begin with, entering into an open-ended employment contract or converting a fixed-term work scheme into an open-ended one comes along with many benefits in terms of social contributions. Further, this contractual arrangement provides for a lower compensation award in the event of dismissal for objective reasons initiated by the employer that is declared unfair by the courts. In this case, compensation amounts to 33 days' wage per year for 24 months, and not to 45 days' wage per year up to 42 months as in the case of other employment relationships. Evidently, redundancy pay was lower, as it was intended to encourage employers to hire staff on a permanent basis.

#### 4.2. The 2001 Labour Reform and the Economic Disadvantages to Hire Workers on a Temporary Basis

The labour reform of 2001<sup>17</sup> represented a new attempt to mitigate the high incidence of fixed-term employment contracts. Importantly, this provision narrowed down the powers of collective bargaining to extend the twelve-month duration of temporary work schemes due to production peaks and the period within which this contract could be performed (eighteen months). Furthermore, Art. 15.5 WS called for collective bargaining to regulate the conclusion of multiple fixed-term employment contracts with different workers to fill the same position. It also established that collective agreements could include objective criteria for converting temporary employment contracts into permanent ones.

The 2001 labour reform also introduced other measures to discourage the use of temporary work. More specifically, the social security contributions to be paid by the employer for common contingencies in the case of

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<sup>17</sup> Law 12 of 9 July 2001 on Urgent Measures to Reform the Labour Market to increase Employment and Improve its Quality.

fixed-term employment contracts lasting seven days or less were increased to 26% (save for some contractual arrangements).

For the first time in the Spanish legal system, an obligation on the part of the employer was introduced to pay compensation amounting to eight days' wage per year of service at the end of fixed-term employment contracts. Yet compensation was only established for contracts entered into for specific projects or services or to deal with periods of peak demand. It is no coincidence that this is the most common form of employment in the Spanish labour market.

Several reasons justify the introduction of this form of compensation. First, it is viewed as a deterrent to the recourse of fixed-term employment contracts, making them more onerous. Second, compensation protects workers who are not granted stable employment. According to case law, employers are exempt from paying such compensation when, once ended, fixed-term employment contracts are converted into open-ended ones<sup>18</sup>.

Finally, there is also a question related to equality. Law 14 of 1 June 1994 determines that once the fixed-term employment contract has expired, compensation should be paid by temporary employment agencies amounting to twelve days' wage per year of service. Given that the temporary work schemes used by the employment agencies are the same as those made available to employers, there was no reason to compensate agency workers on an exclusive basis. Yet even after the passing of the 2001 reform inequality was not completely eradicated, as compensation was set at eight days' wage, whilst it was twelve days' wage for agency workers<sup>19</sup>.

#### 4.3. The 2006 Labour Reform and the Attempt to Prevent the Repetitive Use of Fixed-term Contractual Arrangements ("chains" of contracts)

A new reform undertaken in 2006 represented a step further in the battle against temporary employment, with measures directed at stimulating the recourse to employment contracts of an indefinite duration and limiting the use of fixed-term ones. The reform sought to promote open-ended

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<sup>18</sup> Decisions of the Supreme Court of 22 April 1997 (Rec. No. 3076/1996) and 7 May 1997 (Rec. No. 3571/1996).

<sup>19</sup> Subsequently, Law 35 of 17 September 2010 concerning urgent measures for reforming the labour market dealt with this issue, raising compensation to twelve days' wage. Compensation was gradually increased (one day per year), so that it was equal to nine days' and twelve days' wage for employment contracts concluded before 1 January 2012 and 1 January 2015 respectively. Cfr., the 13 transitory disposition of WS.

employment, for example by means of incentives to those employers willing to convert temporary work schemes into open-ended employment relationships. In addition, the reform incorporated some provisions of Art. 15.5 WS in Spanish legislation, particularly those limiting the repetitive use of fixed-term contractual arrangements. In this respect, an employee who, within a 2-year period, has been employed on 2 or more fixed-term contracts for more than 24 months in total shall become a permanent employee<sup>20</sup>. This provision also applies to fixed-term employment contracts, the conclusion of which is supported by a justifying reason. Indeed, Art. 15.3 WS makes provision for the fraudulent use of fixed-term contracts, laying down a non-rebuttable presumption to convert them into open-ended ones. In other words, the new provision supplements, but not replaces, those regulating the improper use of these contractual arrangements. The mere passing of time will determine the conversion of fixed-term employment contracts into open-ended ones, whether or not they have been illegally entered into.

The introduction of regulations limiting the repetitive use of fixed-term employment contracts is the result of the transposition in Spanish legislation of Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work<sup>21</sup>. Clause 1 of the Agreement explicitly refers to the achievement of two objectives: to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

The non-discrimination principle had already been incorporated in Spanish legislation through Law 12/2001 according to the terms stipulated in the 4th clause of the Framework Agreement. Since then, Art. 15.6 WS has established a regulation to grant temporary workers the same rights as permanent ones, placing an obligation on employers to assess their seniority entitlement irrespective of their employment relationship.

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<sup>20</sup> On the first draft of this important rule, see I. García-Perrote & J.R. Mercader Uguina, *Problemas bajo la Sombra del Artículo 15/5 del ET: Mención de Contratos Temporales, Despido y Cálculo de la Indemnización*, in *Justicia Laboral: Revista de Derecho del Trabajo y de la Seguridad Social*, 2007, No. 31, 5-10. A. Matorras Díaz-Caneja, *A Vueltas con el Encadenamiento de Contratos Temporales*, in *Aranzadi Social*, 2007, No. 5, 2039-2086. J. Lahera Forteza, *Límites Novedosos en el Encadenamiento de Contratos Temporales*, in J. Cruz Villalón (ed) *La Reforma Laboral de 2006 : (Real decreto Ley 5/2006, de 9 de junio)*, Lex Nova, Valladolid, 2006, 41-78.

<sup>21</sup> On the transposition of this Directive in UK law, and the limitations to temporary employment, see D. Montoya Medina, *La Contratación por Tiempo Determinado y la Prevención de su Abuso en el Reino Unido*, in *Relaciones Laborales*, 2012, vol. I, No. 10, 61-84.

In relation to assessing the requirements concerning the prevention of the use of successive fixed-term employment contracts, Art. 15.5 WS initially assigned this task to collective bargaining, in line with clause 5 of the Framework Agreement<sup>22</sup>. However, the high share of temporary jobs – more than twice the 2006 European average – required lawmakers to take a firmer stance and to make provisions giving other actors the power to deal with this question<sup>23</sup>.

#### 4.4. The 2010-2011 Labour Reform: Some Contradictory Measures to Tackle Temporary Employment

Between 2010 and 2011 – that is in the throes of the international recession – the Spanish government tried to move forward with the reform of the labour market, prompted by the financial markets and their regulatory institutions, among others the European Central Bank and the European Commission.

A first attempt was the passing of Law 35 of 17 September 2010 concerning urgent measures for reforming the labour market. Taking into account the 25% share of temporary jobs out of total employment, the aim of Law 35/2010 was twofold: limiting the unjustified use of fixed-work employment contracts and favouring the recourse to open-ended ones. However, the provision was not stringent enough and was rendered partly ineffective by subsequent measures. We shall go back to this point later.

In order to promote the use of open-ended employment contracts, Law 35/2010 introduced two measures which are worthy of mention. On the one hand, it extended the categories of those who can be hired on permanent contracts; on the other hand, it introduces a new timeframe for converting fixed-term contracts into those promoting stable

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<sup>22</sup> In accordance with clause 5: «To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall [...] introduce [...] one or more of the following measures: a) objective reasons justifying the renewal of such contracts or relationships; b) the maximum total duration of successive fixed-term employment contracts or relationships; c) the number of renewals of such contracts or relationships».

<sup>23</sup> For the scope of Art. 15.5 WS before and after the 2006 labour reform, see cf. A.V. Sempere Navarro *Limitaciones a la Contratación Temporal*, in A.V Sempere Navarro (ed.) *La Reforma Laboral de 2006 (Análisis de la Ley 43/2006, de 29 de diciembre)*, Thomson-Aranzadi, Pamplona, 2007, 121-154.



employment<sup>24</sup>. The objective of this reform was to widen the use of this type of contract which provides lower compensation awards for unfair dismissal. As a result, an increasing number of workers, either employed or unemployed, fell within the scope of application of Law 35/2010<sup>25</sup>. In reality, the provision did not produce the expected results, notwithstanding a 31% increase in the use of this contractual arrangement in the first 6 months following the reform. To the extent that Law 35/2010 was subsequently repealed by the 2012 reform. The same reform amended the regulation of economic redundancies, clarifying the ambiguity concerning its legal assessment, which indirectly encouraged the use of fixed-term employment contracts to avoid the costs for terminating workers in salaried employment. Aside from easing the procedures to initiate dismissal for economic reasons, the 2012 reform redesigned the requirements to provide the reason causing the dismissal – whether related to economic, technical, or organisational reasons – relaxing judicial control<sup>26</sup>.

In reference to the limitation to the use of fixed-term employment contracts, Law 35/2012 introduced three measures which are worth investigating<sup>27</sup>:

First, the amount of compensation for terminating a fixed-term contract was raised from eight days' to twelve days' wage. The increase was intended to align the costs of termination for fixed-term contracts with those for open-ended ones. Indeed, Law 35/2010 also established that a

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<sup>24</sup> Art. 3 of Law 35/2010, which is referred to in the 1 additional provision of Law 12/2001, will benefit workers hired through a fixed-term contract (including training contracts) concluded prior to 18 June 2010 and then converted into a contract to promote stable employment before 31 December 2010 or 31 December 2011.

<sup>25</sup> An example of this is provided in L.E. De la Villa, *La Reforma Laboral Intempestiva, Provisional, Anodina y Nebulosa: Comentario de Urgencia al Real Decreto-Ley 10/2010, de 16 de junio, de Medidas Urgentes para la Reforma del Mercado de Trabajo*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2010, No. 22. A consequence of widening the scope of application of these employment contracts is that they include workers predominantly hired on open-ended employment contracts – especially those between 30 and 45 years old – who were only required to register as unemployed for one month.

<sup>26</sup> M. Bellido Aspas, *La Reforma Laboral Efectuada por la Ley 35/2010: Modificaciones en las Extinciones de los Contratos de Trabajo*, in *Aranzadi Social*, 2011, No. 6-11, 59-78.

<sup>27</sup> An overview of this issue is provided by C.L Alfonso Mellado, *Lo viejo y lo Nuevo de la Temporalidad y su Retórica*, in A. Baylos Grau (ed.) *Garantías de Empleo y Derechos Laborales en la Ley 35/2010 de Reforma Laboral*, Bomarzo, Albacete, 2011, 88-108. C.L Alfonso Mellado, *Las Actuaciones para Reducir la Temporalidad en los Contratos Temporales*, in *Temas Laborales*, 2010, No. 107, 87 onwards.

part of the compensation award should be paid by the Wage Guarantee Fund in the event of dismissal for objective reasons (Art. 53.1 b) WS)<sup>28</sup>.

Due to the impact that this measure could have in terms of job creation, the increase in compensation was intended to be gradual (a one-day-per-year increase)<sup>29</sup>, with the twelve days' wage provision applying to the employment contracts concluded from 1 January 2015 onwards. In many respects, the caution in applying this measure seems excessive. This is because of the irrelevant increase in compensation – which does not even have a retroactive effect – and because of the principle of equality laid down in Art. 14 of the Spanish Constitution. In other words, compensation paid to terminate fixed-term contracts should be equal to that granted to workers hired through temporary employment agencies (twelve days' wage)<sup>30</sup>.

Second, the reform reinforced Art. 15.5 WS which limits the use of successive fixed-term contracts, providing more flexible conditions to transform them into open-ended ones<sup>31</sup>. The amended version of the provision stipulates that workers can access a permanent job even though they have been temporarily employed in different positions. Given these new conditions, employers cannot circumvent the law by changing the workers' qualification<sup>32</sup>. This also applies to workers who concluded fixed-term contracts and who operate in companies within the same business

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<sup>28</sup> See J. Lahera Forteza *La Reforma de la Contratación Laboral*, in M. Rodríguez-Piñero (ed.), *La Reforma del Mercado de Trabajo y la Ley 35/2010*, La Ley, Madrid, 2010, 101.

<sup>29</sup> Law 35/2010 added the 13 transitory provision WS, whereby compensation will progressively increase from eight days' to twelve days' wage considering the following calendar:

a) Eight days' wage for each year of service for fixed-term contracts concluded prior to 31 December 2011; b) Nine days' wage for each year of service for fixed-term contracts concluded after 1 January 2012; c) Ten days' wage for each year of service for fixed-term contracts concluded from 1 January 2013; d) Eleven days' wage of wages for each year of service for fixed-term contracts concluded from 1 January 2014; e) Twelve days' wage for each year of service for fixed-term contracts concluded from 1 January 2015.

<sup>30</sup> These criticisms can be found in D. Montoya Medina, *La Reforma de la Contratación Temporal en la Ley 35/2010*, in *Aranzadi Social*, 2011, No. 1, 6.

<sup>31</sup> See C.L. Alfonso Mellado, *op. cit.*, from 88 onwards.

<sup>32</sup> However, a section of case law provides a looser interpretation of this rule, allowing its application when the worker has undertaken different jobs yet maintaining the same employment grade or qualification. *Cfr.* The Andalusia Supreme Court ruling of 5 March 2008 (Rec. No. 293/2008), which allows the repetitive use of contracts for specific projects or services with Scientific Research Board (CSIC for developing different research projects). Similar cases are contemplated in Rulings of the Supreme Court of the Region of Valencia of 3 November 2009, (Rec. No. 95/2009), Supreme Court of Madrid of 29 June 2009 (Rec. No. 2645/2009) and 2 November 2009 (Rec. No. 3907/2009).

group. Yet in this case a problem arises about which company in the same business group should hire the worker on a permanent basis, an aspect on which the law remained silent. However, it seems reasonable that the foregoing company should be the last one for which the worker provided his services. The 2010 reform also applies in the event of new ownership whether laid down in relevant legislation (Art. 44 WS) or agreed upon in collective bargaining. In other words, the new undertaking must be subrogated to the employment relationship between the worker and the previous undertaking with which the contract has been concluded. Yet this aspect might appear of little significance since – even before the reform – the employer terminating the employment contract with temporary workers is still under the obligation to comply with requirements concerning their seniority (Art. 15.5 WS). On close inspection, the reference to cases of subrogation is an effective move to provide more stability to workers, especially those hired on project contracts by service contractors<sup>33</sup>.

Yet the government soon reviewed the rule laid down in Art. 15.5 WS limiting the use of successive fixed-term employment contracts. This time, and somehow paradoxically, lawmakers suspended its implementation for two years<sup>34</sup>, which is striking if one considers that Art. 15.5 WS was amended just twelve months earlier to promote its application<sup>35</sup>. In order to justify this initiative, the government referred to the worrying unemployment rates which at the time were close to 20%. More specifically, the suspension sought to limit the deterring effect of this rule on employers. This action was paradoxical and reprehensible, as it supported temporary contracts as an instrument to create employment

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<sup>33</sup> Sentence TS of 14 June 2007 (Rec. No. 2301/2006). However, relevant case law also provides that the termination of the employment contract cannot take place when services are no longer provided due to the contractor's will (Sentence TS, 2 July 2009, Rec. No. 77/2007), when he/she renews the contract (Sentence TS, 28 April 2009, Rec. No. 1419/2008) or when, at the end of the contract, the activity of the worker in the company continues under the same terms (Sentence TS, 14 June 2010, Rec. No. 361/2009).

<sup>34</sup> This measure was introduced by Royal Decree-Law 10 of 26 August 2011 regarding some urgent measures for the promotion of young people's employment, job stability, and the right to retraining of people no longer covered by unemployment benefits. As a result of this suspension, Art. 15.5 WS was no longer applicable from 31 August 2011 to 31 August 2013.

<sup>35</sup> It should be taken into account that the reform of Art. 15.5 was introduced for the first time by the government by way of Royal Decree-Law 10 of 16 June 2010 regarding urgent measures to reform the labour market that preceded Law 35/2010 which came into force on 18 June.

when only a few months earlier action had been taken to restrict this type of employment<sup>36</sup>.

The last measure discouraging the use of temporary work schemes was introduced by Law No. 35/2010 setting a maximum duration for the contracts for specific projects or services. A statutory time-limit was introduced by the 2010 reform which corresponds to three years, which could be extended for a further twelve months by collective bargaining. The reform also provided that, after this time-period, fixed-term employment contracts should be converted into open-ended ones<sup>37</sup>. This amendment was welcomed, since contracts for specific projects and services are the most commonly used tools to employ workers in the Spanish labour market<sup>38</sup>. Yet doubts arise about the practical implementation of this measure in relation to the limitations placed in the use temporary work schemes<sup>39</sup>. To begin with, the new three-year limit allows the employer to easily circumvent the law related to the conversion of the fixed-term contract into an open-ended one, by simply terminating the contract before its end. Further, the three-year maximum duration set for fixed-term employment contracts seems unrealistic and might only benefit a limited number of workers, since statistics show that their average duration is less than one year. Additionally, the time-limit provision has no retroactive effect and only applies to project contracts concluded following the passing of Law 35/2010. Another point is that the provision does not affect the decisions taken in collective bargaining at sectoral level especially in the construction sector<sup>40</sup>, therefore the time-limit for these contractual arrangements does not apply if other conditions

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<sup>36</sup> On this measure, see R. Martín Jiménez, *Dudas Acerca de la Suspensión Temporal del Encadenamiento de Contratos Temporales*, in *Actualidad Jurídica Aranzadi*, 2011, No. 828, 5.

<sup>37</sup> On the new regulation of this contract, see cf. A. Blasco Pellicer, *La Duración Máxima del Contrato para Obra o Servicio Determinado*, in *Actualidad Laboral*, 2011, No. 2, from page 2 onwards. A. Fernández Díez, *El Contrato de Trabajo Temporal de Obra o Servicio Determinado, Duración Máxima y Vinculación con las Contratas tras la Reforma Laboral del Año 2010*, in *Tres Años de Cambio Laboral*, vol. II, Lex Nova, Valladolid, 2013, 1585-1590.

<sup>38</sup> In accordance with the statistical data provided by the Public State Employment Service, out of the total number of employment contracts registered in 2012, 38.7% were contracts for specific projects and services and 39.7% were fixed-term employment contracts concluded to deal with production peaks. *Cfr.*: [http://www.sepe.es/contenido/estadisticas/otros\\_informes/pdf/ANUAL2012.pdf](http://www.sepe.es/contenido/estadisticas/otros_informes/pdf/ANUAL2012.pdf)

<sup>39</sup> See L.E. De la Villa, *op. cit.*, 11 onwards.

<sup>40</sup> On this sector, see L.M. Camps Ruiz, *El Contrato de Trabajo Fijo de Obra del Sector de la Construcción y Disposiciones Adicionales 1.ª.2 de la Ley 35/2010 y 3.ª de la Ley 23/2006*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2013, No. 33.

have been agreed upon during negotiations<sup>41</sup>. Finally, the conversion of fixed-term contracts into open-ended ones comes along with exceptions and limitations in the public sector, being that public sector careers are merit-based<sup>42</sup>.

#### 4.5. The 2012 Labour Reform: Flexibility in Dismissal to Promote Stable Employment

In November 2011, after the new government took office and in the face of rampant unemployment, a new reform of the labour market was put forward after the unsuccessful attempt to collaborate with the social partners. Law 3/2012 of 6 July concerning urgent measures to reform the labour market was passed, which thoroughly reviewed the labour relations system.

In 2012, the legislator expressed concern over the high share of temporary jobs in Spain in comparison with other EU countries, also in consideration of the fact that employers reacted to the crisis by terminating or not renewing fixed-term employment contracts. Consequently, the reform introduced by Law 3/2012 sought to encourage the use of open-ended employment contracts and contained some controversial and unprecedented measures (e.g. the reduction in compensation resulting from unfair dismissal). In this sense, the 2012 labour reform provided different formulae to obtain higher flexibility in dismissal and to promote stable employment. Among others the reduction of the costs associated with unfair dismissal resulting from:

- The abolition of the obligation on the part of employers to pay wage arrears<sup>43</sup> in the event of unfair dismissal when they decide to pay compensation instead of reinstating the dismissed employee.

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<sup>41</sup> This is precisely the case of the 4<sup>th</sup> collective agreement concluded in the construction sector. Article 20 establishes a three-year maximum duration of the contract for projects or services typically used in this sector, after which the contract is terminated. Alternatively, the worker can extend the contract with the construction company for the time necessary to conclude his/her tasks.

<sup>42</sup> These limitations apply to universities and public research institutions, save for contracts for a specific project or service where research or investment projects last more than three years. Cfr. Additional provision 15.2 WS.

<sup>43</sup> Here “wages arrears” refers to remuneration due to workers from the day they were dismissed to that of the court decision declaring such dismissal unfair. Alternatively, wage arrears should be paid to workers until they find a new job, if the recruitment takes place before the court ruling (Art. 56.2 WS).

- The significant reduction in the compensation award in the event of unfair dismissal: 33 days' wage in lieu of 45 days' wage per year of service for a maximum of 24 months.

This new provision has no retroactive effect in order not to affect those workers with more seniority. To this end a two-tier system was introduced for the employment contracts concluded prior to the reform. The 45 days' wage compensation award was granted for the years worked before the passing of the new reform, whereas the 33 days rule applied for the period of time served after the introduction of the reform. This was done to encourage employers to conclude open-ended employment contracts, balancing the costs of compensation for unfair dismissal with those arising from terminating fixed-term contracts. This measure attracted criticism, since significantly and unprecedentedly reduces the amount of compensation granted to Spanish workers who are unfairly dismissed. However, it is based on certain theories suggesting that the employers' reluctance to conclude employment contracts of an indefinite duration stems from their inherent costs<sup>44</sup> and that stable employment could benefit from lower compensation awards<sup>45</sup>.

The overall reduction of compensation for unfair dismissal established by the 2012 labour reform gave rise to the derogation of the contracts promoting stable employment, which resulted in little compensation in the event of dismissal for objective reasons declared unfair by the courts. One might note that in spite of the efforts to boost the recourse to open-ended employment contracts, this contractual arrangement was rarely implemented<sup>46</sup>. Further, following the 2012 labour reform, compensation for unfair dismissal was set at 33 days' wage irrespective of the employment contract, thus entering into contracts to promote stable employment was no longer as beneficial as before.

The 2012 labour reform introduced further measures concerning flexibility on dismissal, mainly related to economic redundancies. Drawing on the 2010 reform, the attempt was at watering down the criteria to assess the justifying reasons and the procedures to initiate dismissal for

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<sup>44</sup> T. Sala Franco, *Puntos Críticos de la Contratación Temporal*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2003, No. 3, 6.

<sup>45</sup> L.E De la Villa Gil, *La Peripécia de la Reforma Laboral*, in *El Cronista del Estado Social y Democrático de Derecho*, 2010, No. 16, 22.

<sup>46</sup> This work scheme accounted for 0.7% of all the employment contracts concluded in 2011, a rate that is even lower than that of traditional open-ended employment contracts (3.8%).

Cfr. [http://www.sepe.es/contenido/estadisticas/otros\\_informes/pdf/ANUAL2011.pdf](http://www.sepe.es/contenido/estadisticas/otros_informes/pdf/ANUAL2011.pdf).



economic reasons, as an incentive to promote the conclusion of open-ended employment contracts.

Regretfully, no limits were introduced in relation to fixed-term employment contracts, and no amendments were made to Art. 15 WS either. An imbalance followed; the promotion of higher levels of flexibility in dismissal was not accompanied by a review of the criteria justifying the conclusion of fixed-term employment contracts. In this respect, the reform simply established that the suspension of the provisions laid down in Art. 15.5 WS concerning the use of successive fixed-term employment contracts should be reduced to eight months from 1 January 2013. Evidently, this action is of little relevance if compared with previous regulations on dismissal<sup>47</sup>.

The 2012 labour reform also laid down incentive measures (e.g. social security benefits) to promote stable employment, targeting the employers who are willing to convert fixed-term contracts into open-ended ones. More specifically, employers transforming training and apprenticeship contracts into contracts of an indefinite duration are supported in the payment of social security contributions up to a maximum of three years. The same applies for employers with less than fifty workers who agree to provide stable employment to employees recruited on different employment contracts.

Yet the most innovative measure envisaged by the 2012 labour reform is the introduction of an “open-ended employment contract supporting entrepreneurs”, which can only be utilised in companies with less than fifty workers<sup>48</sup> and grant employers different forms of tax relief and social security benefits<sup>49</sup>. This new contractual arrangement is viewed as an

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<sup>47</sup> F.J. Gómez Abelleira, *Medidas para Favorecer el Empleo Estable: el Contrato de Apoyo a los Emprendedores y la Recuperación de la Conversión en Indefinido por Reiteración de Contratos Temporales*, in I. García-Perrote and J.R. Mercader Uguina (eds.), *Reforma Laboral 2012. Análisis Práctico*, Lex Nova, Valladolid, 2012, 74; L.M. Camps Ruiz, *Contratación, Formación y Empleo en el RDL 3/2012*, in A. Blasco Pellicer (ed.), *La Reforma Laboral en el Real Decreto-Ley 3/2012*, Tirant lo Blanch, Valencia, 2012, 98; B. Lleó Casanova, *Incidencia de las Reformas de 2012 en la Contratación Laboral y en la Formación Profesional*, in C.L. Alfonso Mellado, G.E. Rodríguez Pastor (eds.) *Reforma Laboral 2012. Últimas Reformas Laborales y de la Seguridad Social*, Tirant lo Blanch, Valencia, 2013, 59. An overall view about Art. 15.5 WS reforms in J. A. Nicolás Bernard, *Más de una Década de Cambios en la Sucesión de Contratos Temporales: de la Estabilidad en el Empleo a la Flexibilidad (2001-2012)*, in *Relaciones Laborales*, 2013, No. 3, 63-88.

<sup>48</sup> Companies with less than fifty workers constitute 99.23% of all firms in Spain (Source: National Institute of Statistics).

<sup>49</sup> Tax incentives are provided pursuant to Art. 43 of Spanish Corporate Tax Law (Royal Decree-Law 4 of 5 March 2004). Two types of fiscal benefits exist which are compatible



emergency tool, since its use is possible only when unemployment rates are equal to or lower than 15% (Law No. 3/2012). Others think it favours unstable employment, above all because of its one-year probationary period; employers can terminate the contract in the first year without providing a justifying reason and compensation. The excessive duration of the probationary period has also been criticised since it distorts the genuine function of this work scheme. The risk is that employers make use of it as a one-year contract for which no compensation is due in case of dismissal<sup>50</sup>.

Furthermore, Art. 4 of Law No. 3/2012 specifies that the one-year rule applies in all cases without collective bargaining being able to negotiate a shorter period. Finally, the regulation of the probationary period has raised doubts in relation to its constitutionality and its possible violation of the right to work acknowledged in Art. 35.1 of the Spanish Constitution<sup>51</sup>.

### **5. By way of Conclusion: The Excessive Recourse to Fixed-term Employment Contracts and Some Proposals to Reduce it.**

Explaining the exact causes of the high shares of temporary jobs in Spain is arduous, all the more so considering the numerous provisions to promote stable employment.

As seen, a significant decline was reported in the 2006-2010 period in the conclusion of fixed-term employment contracts (from 34% to 24%). Rather than to labour reform, the drop in the use of temporary work

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with one another: those applying to employers hiring employees for the first time, which are intended to support entrepreneurs, and those targeting employers who hire recipients of employment benefits. Social security benefits can be claimed when employment contracts are concluded with young people between 16 and 30 or with workers over 45.

J.V. López Gandía, *El Ingreso del Trabajador en la Empresa*, in L.M. Camps Ruiz, J.M. Ramírez Martínez, *Derecho del Trabajo*, Tirant lo Blanch, Valencia, (3 ed), 2013, 220.

<sup>50</sup> This and other criticisms can be found in F.J. Calvo Gallego, *Modalidades Contractuales, Dualidad en el Mercado y Reformas Laborales en el Bienio 2010 a 2012 (II): la Ley 3/2012*, in *Documentación Laboral*, 2012, No. 95/96, 145-150. Concerning this new open-ended contract, see also J. García Blasco, *La Contratación Laboral en la Reforma Legal de 2012: entre el Estímulo de la Contratación Indefinida y la Preocupación por el Empleo*, in *Temas Laborales*, 2012, No. 95-96, from page 10 onwards; B. LLeó Casanova, *op. cit.*, 62-76; L.M. Camps Ruiz, *op. cit.*, 71-74; A. Benavides Vico, *El Marco de la Contratación Laboral tras la Ley de Medidas Urgentes para la Reforma del Mercado Laboral*, in *Tres Años de Cambio Laboral*, vol. II, Lex Nova, Valladolid, 2013, 1676-1682.

schemes should be attributed to lower termination costs and, more generally, to lower employment rates reported during that period.

Today, with the share of temporary jobs which is 10% higher than the EU average, doubts arise about the efficiency of the reforms of the labour market. Measures such as those relating to severance pay and social security benefits, albeit promising, have not been implemented with determination. The little impact of the reforms on the contractual arrangements utilised to employ staff is also the consequence of the peculiarity of the Spanish labour market, with the abuse of fixed-term employment contracts which appears to be a permanent feature of national labour law. Accordingly, the fluctuation in unemployment and the incidence of temporary work are universally attributed to some permanent features in the Spanish labour market. Some sectors – e.g. the construction, catering and tourism industry – employ many seasonal workers favouring job rotation. Yet the economic crisis caused a decrease in the job opportunities particularly in the foregoing sectors. Meanwhile, those industries more likely to provide stable employment (e.g. the IT sector) have shrunk, indicating an opposing trend in comparison with those countries (Germany, the Czech Republic and Slovakia) which reported a decrease in the use of temporary staff.

In the author's view, the main contributing factor to the high shares of temporary jobs is the Spanish production model. Yet other aspects might come into play, such as the tendency of Spanish employers to hire workers on fixed-term employment contracts, also taking account of their lower termination costs. Statistics further confirm this trend: out of the total number of employment contracts recorded each month by the Public Employment Service, 90% are fixed-term contracts and only 10% are open-ended ones<sup>52</sup>.

While labour reform might prove inefficient to amend the well-established Spanish production model, a cultural change on the part of employers who prefer to recruit staff on a temporary basis is certainly possible and can be promoted through adequate labour laws. A starting point could be the provision of measures narrowing down the costs associated with the conclusion of open-ended employment contracts, while the recourse to fixed-term contracts should be limited to the cases established by the law. The 2012 labour reform, and the reduction of the compensation award for unfair dismissal therein, might once for all ascertain the possible direct

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<sup>52</sup> T. Sala Franco, *op. cit.*, 3.

relation between the costs for terminating open-ended employment contracts and the rise in the share of temporary jobs.

However, as previously mentioned, the lower levels of stable employment, which also caused a reduction in compensation for unfair dismissal, were not offset by a parallel increase in the cost of hiring temporary staff to discourage employers from using fixed-term contracts. The author of this paper is of the opinion that this increase is a necessary move and can be practiced in several ways (e.g. setting compensation at 12 days' wage, or increasing the amount of the social contributions for fixed-term employment contracts lasting less than one year).

In parallel, measures should be introduced to prevent the fraudulent use of temporary work schemes, for which unfortunately no statistics are available. Yet the significant number of disputes arising from the improper use of fixed-term contracts and the high shares of temporary jobs might hint at many attempts to circumvent the law. The measures contemplated in Spanish labour law appear to be insufficient to stem the problem. For instance, although administrative sanctions apply in the event of non-compliance with regulations on fixed-term contracts, the monitoring and the inspection system is inadequate. The launch of awareness-raising campaigns might be an effective, albeit temporary, solution. Ensuring more judicial protection might offset the inadequate number of inspectors. In general, the author welcomes the introduction of additional sanctions, for example in terms of compensation, the amount of which is left to the discretion of the court if fixed-term employment contracts have been concluded against the law<sup>53</sup>.

Further measures should also be taken in relation to the reason justifying the conclusion of fixed-term employment contracts – particularly contracts for a specific project or service. The 2010 labour reform adopted too soft an approach, emphasizing some less relevant aspects (duration)<sup>54</sup> and leaving to collective bargaining and case law ample room to manoeuvre.

Par. a) of Art. 15.1 WS empowers collective bargaining to identify the tasks for which fixed-term employment contracts can be concluded, with their use that in many cases was also extended to assignments other than

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<sup>53</sup> This proposal was already put forward by F.J. Calvo Gallego, *op. cit.*, 163-165.

<sup>54</sup> On this issue, see. W. Sanguinetti Raymond, *El Contrato Temporal para Obra o Servicio Determinado y su Causalidad en la Negociación Colectiva*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2003, No. 3, 1 onwards.

temporary<sup>55</sup>. A more decisive intervention on the part of lawmakers might help to limit the power of collective bargaining.

As for case law, Spanish courts have long recognised the widespread practice of contractors to hire workers on project contracts, the duration of which is adjusted considering the commercial contract with the outsourcing company. Case law regards this practice as a legal one, since the contract for a specific project or service is issued by the contractor and outsourced services are temporary (e.g. cleaning, surveillance and so forth). We should not forget that project or service contracts are the most widespread forms of employment in Spain, so some limitations should be implemented in their use. In this sense, a more determined effort to reduce the share of temporary jobs would require some amendments to their legal framework preventing their use in the business main activities.

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<sup>55</sup> *Cfr.*, for example, Art. 17.2 b) of the Collective Agreement of the Plastic Transformation Industry of Valencia (Resolution of 9 March 2010, Provincial Gazette No. 75, of 30/03/2010), which identifies «*clearly laid-out programmes to launch new products*» in the form of projects or services.



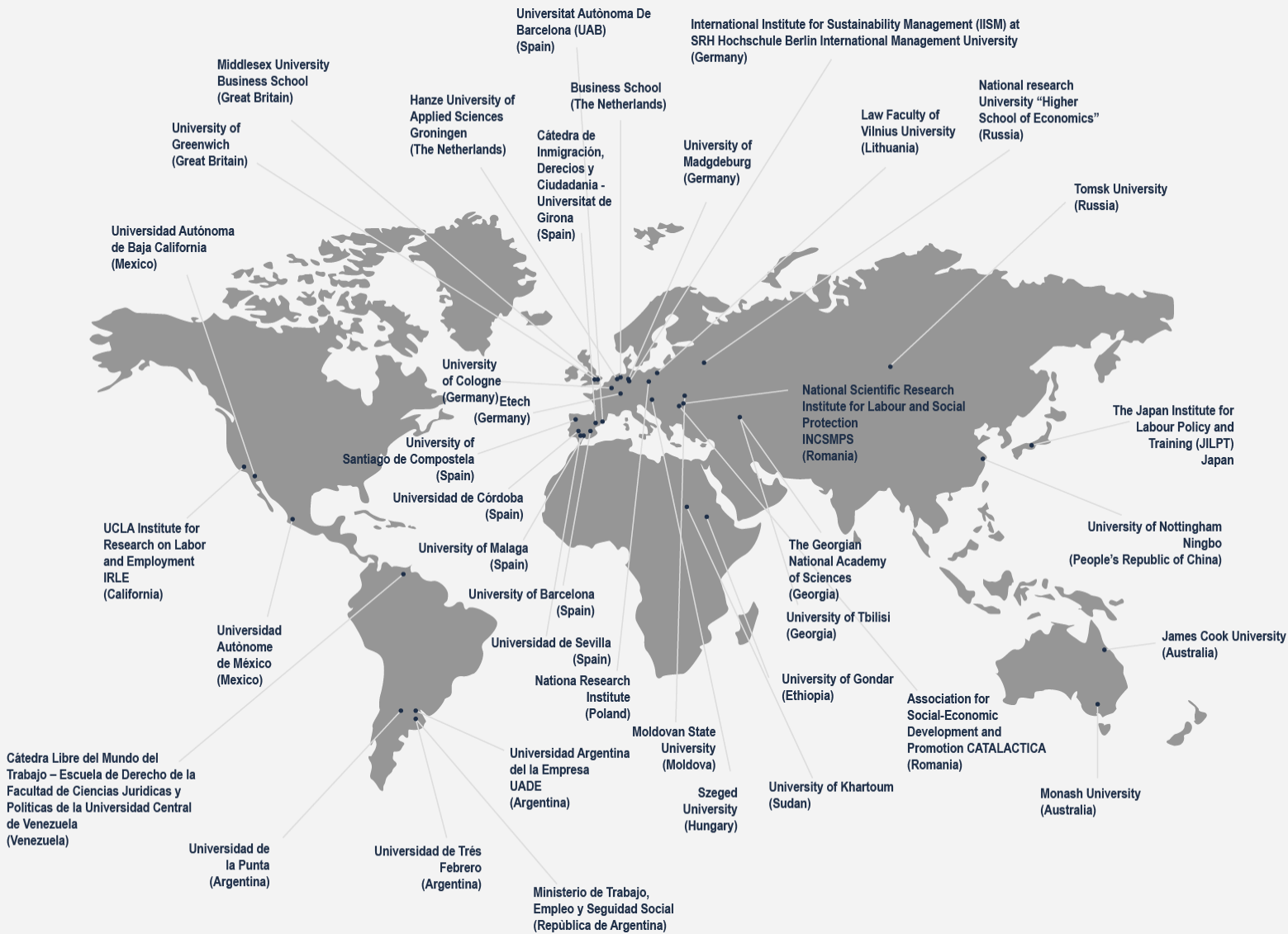


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