

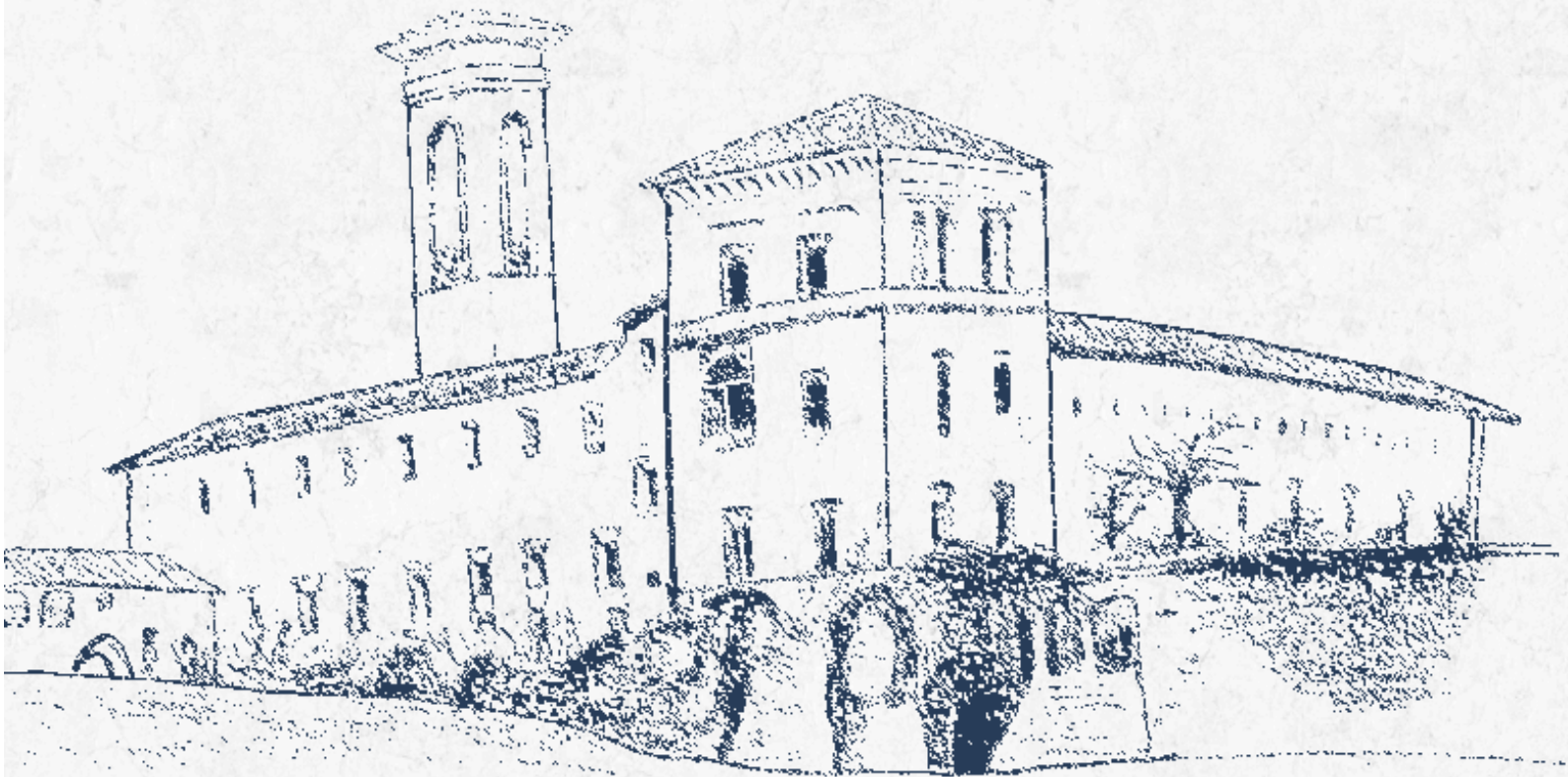
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# Recent Trends in Collective Bargaining in Europe

Ana Teresa Ribeiro \*

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## 1. Introduction (the Crisis Background)

Europe has recently been undergoing a severe economic and financial crisis. Although several countries had already been introducing labour reforms in the past years, the crisis was undoubtedly an accelerating force that called for more and deeper changes. And, in some cases (such as Portugal and Greece), the reforms were even demanded by external entities as a condition for financial assistance. These impositions were laid down in Memoranda of Understanding, documents with detailed timetables for austerity measures and structural reforms, and to which the concerned countries had to adhere in order to receive the relevant credit tranches<sup>1</sup>.

Naturally, and due to its impact in wage-setting, collective bargaining has been one of the targeted domains, which has led to the alteration of the bargaining landscape in Europe<sup>2</sup>. In fact, legislators not only changed the rules regarding the substance of wages, working hours, dismissal,

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<sup>1</sup> A. FISCHER-LESCANO, *Competencies of the troika: legal limitations of the institutions of the European Union*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 55.

<sup>2</sup> B. VENEZIANI, *Austerity measures, democracy and social policy in the EU*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 132.

pensions, and unemployment benefits, but also the way working conditions/labour standards are set<sup>3</sup>.

The purpose behind these changes was, mainly, to allow for an internal devaluation, instead of currency devaluation, to which the Member States inserted in the Eurozone can no longer resort to due to being locked to the single currency. Internal devaluation through the reduction of domestic wages and living standards was seen, therefore, as the key to restore competitiveness in internationally-traded goods and services<sup>4</sup>.

## 2. Main Changes in the Landscape of Collective Bargaining

### *The Relation Between Sources of Labour Law. The Principle of the Most Favourable Source*

The relations between norms created at multiple levels are generally determined by hierarchy rules<sup>5</sup>. Acts of parliament have priority over collective agreements and company rules; and collective agreements have priority over company rules and contracts of employment. However, this logic is reversed when, due to the principle of the most favourable source, a lower source contains standards that are more generous towards the employees. In this case, usually, the lower source has priority over the higher one. This idea, however, is not absolute<sup>6</sup>. In fact, since some companies or sectors may be unable to comply with statutory norms, due to their specific characteristics, some rules were made dispositive, instead of mandatory, allowing their deviation *in pejus*<sup>7</sup>. And such derogation is possible not only regarding statutory norms, but also among collective agreements.

This phenomenon is visible in France where lower levels agreements can provide worse conditions (towards employees) than the ones determined at a higher level. However, to achieve this, the company agreement must be a “majority agreement” (it must have been approved by the trade unions that won the majority of votes at the workplace elections).

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<sup>3</sup> A. JACOBS, *Decentralisation of Labour law standard setting and the financial crisis*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 171.

<sup>4</sup> S. DEAKIN, *Social policy, economic governance and EMU: alternatives to austerity*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, ps. 92-93.

<sup>5</sup> A. JACOBS, *op. cit.*, p. 171.

<sup>6</sup> A. JACOBS, *op. cit.*, p. 172.

<sup>7</sup> A. JACOBS, *op. cit.*, p. 172.

Despite the opposition presented by French labour lawyers and trade unionists, who argued the absolute nature of the principle of the most favourable source, in 2004, the French Constitutional Court ruled differently. And since then, further examples of this sort of norms have been appearing in the French regime<sup>8</sup>.

In 2004, Statutes provided that sector or company-level agreements may include provisions that depart wholly or in part from rules enshrined in broader agreements, unless such departures are expressly forbidden at a higher level. This possibility was not open, however, to wages, their main subject being working hours. Later, in 2008, it was added that company agreements might also adapt wage increases laid down in higher/broader agreements, provided that the wage increase is at least equal to that in the higher/broader agreement and that minimum wages are respected. Finally, in 2013, the legislator went a step further, introducing the “*accord de maintien de l’emploi*”. Currently, companies in serious economic difficulties may ask their employees to agree to a reduction of working time, work organisation and/or salary in exchange for employment stability (the prohibition of any dismissal on economic grounds). The maximum duration of this agreement is of two years, a number of statutory rules or wages below 120 per cent of the French statutory minimum wage must not be affected, and managers and executive staff must make proportional sacrifices. This concession bargaining must be signed by one or more of the representative trade unions that obtained, at least, 50 per cent of the votes in the company during the previous “social” elections. If an employee does not agree, he may be dismissed according to the normal rules on dismissal on economic grounds (Article L 5125 *Code du travail*)<sup>9</sup>. Something similar happened in Italy, in 2011<sup>10</sup>, where an Act allowed for regional, local, or company agreements to derogate *in pejus* from national laws and collective agreement stipulations determined at national level<sup>11</sup>. The lower agreements must have been signed by the majority of the representative unions in the company/region<sup>12</sup>.

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<sup>8</sup> A. JACOBS, *op. cit.*, ps. 173-174.

<sup>9</sup> A. JACOBS, *op. cit.*, ps. 178-179.

<sup>10</sup> Article 8 of *Manovra-bis*, Decree no. 138, ratified by Legge no. 148/2011, of 14<sup>th</sup> September 2011.

<sup>11</sup> B. VENEZIANI (*op. cit.*, p. 133).

<sup>12</sup> A. JACOBS, *op. cit.*, p. 174. According to B. VENEZIANI (*op. cit.*, ps. 133-134), this change defies the constitutional rule, since, when signed by a majority of the relevant union organisations, these derogating agreements are valid to all workers. In fact, Article 39 of the Italian Constitution states that *erga omnes* effects of collective agreements may only be pursued throughout a constitutional procedure.

According to B. VENEZIANI<sup>13</sup>, the rationale behind this modification is to try and increase employment, to improve the quality of labour contracts, to put a stop to illegal labour, to manage industrial and employment crises, and to encourage new investments, and the start-up of new activities.

Previously, in 2008, a cross-sectoral agreement had already provided that all sectoral agreements shall contain opening clauses, according to which at the enterprise level there may be deviation from sectoral standards under certain circumstances (economic difficulties, restructuring, introduction of significant new investment). Such deviations must be agreed to in a company collective agreement signed by a majority of the unitary workplace structures. The workplace must confirm the diverging company agreement if one of the signatory trade unions or, at least, 30 per cent of the employees request it<sup>14</sup>.

This trend has been visible under German law for quite some time now. Opening-clauses were introduced in the 1980s, allowing for enterprise-level deviations regarding sectoral remuneration or working time arrangements. In the late 1990's, concession bargaining appeared. By 2005, 29 per cent of all employees working under a collective agreement in western Germany were covered by opening-clauses. And since the middle of the last decade, an increasing number of opening clauses has been concluded not only in the context of serious difficulties, but also to improve competitiveness, safeguard employment, and facilitate fresh investment<sup>15</sup>. Trade unions seem to have accepted their widespread use as the lesser of two evils, the other being the decline of the bargaining system<sup>16</sup>.

In turn, in the Spanish regime, an Act of 1994 already contained a mandate to include opt-out clauses in collective agreements at sectoral and inter-sectoral level, allowing companies to adopt lower wages than those agreed at higher level, when temporarily experiencing economic difficulties. The subjects open for derogation were broadened by two Royal Decrees of 2010 and 2011 (10/2010 and 7/2011). And, more recently, an Act of 2012 has given company agreements priority over sectoral agreements, even when less favourable than the sectoral collective agreements and even if agreements at a higher level state otherwise. It is

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<sup>13</sup> B. VENEZIANI, *op. cit.*, p. 133.

<sup>14</sup> A. JACOBS, *op. cit.*, p. 179.

<sup>15</sup> BISPINK, DRIBBUSCH, and SCHULTEN, *German collective bargaining in a European perspective. Continuous erosion or re-stabilisation of multi-employer agreements? WSI Discussion Paper no. 171*, 2010, p. 6.

<sup>16</sup> A. JACOBS, *op. cit.*, ps. 77-178.



now possible for lower agreements to depart from almost all aspects of employment and working conditions<sup>17</sup>. The same Act also made the possibility more precise for employers to opt out from collective bargaining (they may do it if the enterprise records a drop in its revenues or sales for six consecutive months)<sup>18</sup>.

Finally, in Greece, there was the introduction of a new type of branch-level collective agreement whose contents may be less favourable, towards workers, than those of industry or occupational collective agreements<sup>19</sup>.

It should be noted that under Portuguese law, the most significant change in this domain occurred in 2003. At that time, the Labour Code determined that, as a general rule, collective agreements (of every level) could depart in *in pejus* from Statute. Until then, the rule was that deviations should be *in melius*, but currently this happens only for a number of selected issues. And it was unnecessary to intervene in the relations between collective agreements, since the rule has been, for quite a long time, that company agreements had precedence over broader kinds. It should be noted, however, that in spite of this, until recently, most agreements were concluded at sector or national level. This tendency has only inverted recently, with a significant decrease of this kind of agreements and a greater incidence of company level agreements.

One may wonder if this growing trend will lead to the weakening of labour law. The derogation *in pejus* of statutory norms through collective agreements was a technique created under the assumption that both parties (employers and trade unions) are of equal bargaining strength.

Nowadays, however, this is often not the case. The power of many trade unions has been fading, due to lower membership and to the rise of yellow unions<sup>20</sup>. And in this scenario, the growing number of cases in which it is possible for collective agreements to depart from Statute is, indeed, a way of weakening labour law<sup>21</sup>. There is, therefore, reason for concern. Particularly since, in some situations, the competence to opt-out

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<sup>17</sup> Except in the matters of minimum terms of work and pay laid down by general collective agreements – *vd.* M. SCHMITT, *Evaluation of EU responses to the crisis with reference to primary legislation (European Union treaties and charter of fundamental rights)*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 201.

<sup>18</sup> A. JACOBS, *op. cit.*, p. 181.

<sup>19</sup> SCHMITT, *op. cit.*, ps. 201-202.

<sup>20</sup> M. WEISS (*Re-inventing labour law?* In *The idea of labour law*. Eds.: Guy Davidov and Brian Langille. Oxford, Oxford University Press, 2011, p. 47) refers to the decline of trade unions.

<sup>21</sup> A. JACOBS, *op. cit.*, p. 174.

of statutory rules is granted not only to trade unions, but also to other bodies of employees' representation, such as work councils. Here, the risk of abuse is greater, since these structures are generally considered even weaker and more permeable to pressure than trade unions<sup>22</sup>.

To avoid this danger, in Italy, an earlier ambiguous definition of the parties to company agreements was replaced by "trade unions operating in the company". In contrast, in Spain, the law still attributes priority to negotiations with trade unions over bargaining with local work councils. But in companies without union representation, company agreements can be concluded by non-union groups of workers<sup>23</sup>.

### *Decentralisation of Collective Bargaining*

Depending on the level at which labour standards are set, one can speak of *centralisation* (when they are determined collectively and by broader sources) or *decentralisation* (when they are set in an individual way and by lower, narrower sources)<sup>24</sup>. Trade unions tend to favour the former, as it guarantees widespread application of the standards attained by their struggle. Employers, on the other hand, tend to favour the latter, as it gives them greater flexibility<sup>25</sup>. Most economies have developed a certain compromise between both regimes, and in some periods one may be more visible than the other<sup>26</sup>.

Decentralisation is mainly achieved by allowing the departure from higher-level agreements provisions by lower level ones (which we previously analysed) and also by conferring priority to company level bargaining regarding some specific issues.

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<sup>22</sup> A. JACOBS, *op. cit.*, p. 174. J. GOMES (*Algumas reflexões sobre as alterações introduzidas no código do trabalho pela Lei n.º 23/2012 de 25 de junho. Revista da Ordem dos Advogados*, 2012, ano 72, vols. II e III, ps. 608-609) points out some of the frailties of works councils, such as their reduced independence from the employer; lack of official financing sources, among others.

<sup>23</sup> A. JACOBS, *op. cit.*, p.181.

<sup>24</sup> A. JACOBS, *op. cit.*, p. 172.

<sup>25</sup> Larger firms may push towards decentralisation, to increase the scope for local adjustments for regulations (which allows them savings in operational costs). But smaller firms may prefer sector agreements (extended *erga omnes*), in order to ensure peace of the labour market and to save regulatory costs, since they lack the organisational back up (A. JACOBS, *op. cit.*, p. 185).

<sup>26</sup> A. JACOBS, *op. cit.*, p. 172.

After the Second World War, most Member States adopted the rule according to which broader collective agreements have priority over narrower ones, unless these are more favourable towards the employees<sup>27</sup>. The transition to a more decentralised system was already in place in some countries even before the crisis (such as Sweden, Denmark, and the Netherlands). After the onset of the crisis, other countries followed this path<sup>28</sup>. For instance, in 2009, Ireland saw its long tradition of cross-sectoral bargaining implode. Issues that were previously dealt with at this level, now have to be negotiated by lower sources. And since the structures of collective bargaining are often not present at sectoral level, collective bargaining at company level must fill the gap. Consequently, in many firms employees can no longer enjoy these rights, as workers' representatives are not strong enough to have them included in company agreements. Still, it should be noted that, in the midst of the crisis, in France, Austria, Finland, and the Netherlands, central social partners were able to negotiate pacts, adapting the labour market regulations<sup>29</sup>.

Lately, due to the crisis (and the blame attributed to "rigid" labour law systems), there has been increasing pressure in order to decentralise the establishment of employment conditions to company-level agreements. Many employers were not satisfied with the existing possibilities for derogation at sector-level bargaining<sup>30</sup>.

Until recently, southern EU Member States had high levels of bargaining centralisation and bargaining coverage. This tendency was inverted and they are now confronted with the existing wage-setting arrangements and the de-collectivisation of labour relations<sup>31</sup>. This may lead to a greater convergence of collective bargaining structures in the EU, since a more fragmented and decentralised model is characteristic of several countries in northern regimes<sup>32</sup>.

However, it should be noted that, in Italy, despite the trend towards decentralization, the national sectoral collective agreement continues to be the cornerstone of the system (which explains the shock provoked by the

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<sup>27</sup> A. JACOBS, *op. cit.*, p. 175.

<sup>28</sup> A. JACOBS, *op. cit.*, p. 175.

<sup>29</sup> A. JACOBS, *op. cit.*, p. 176.

<sup>30</sup> A. JACOBS, *op. cit.*, ps. 176-177.

<sup>31</sup> Recent data from Portugal and Spain shows that there has been a sharp decline in the bargaining coverage in these countries – A. JACOBS, *op. cit.*, p. 186. For more details on the Portuguese case, see *infra* Erga omnes *extension*.

<sup>32</sup> A. JACOBS, *op. cit.*, p. 186.

shift of Fiat towards a single-employer bargaining model)<sup>33</sup>. In fact, the relation between the national legal framework and multi-employer bargaining is strong, particularly where bilateralism has been established. Since the 1980s, and following the example of the building sector, employers' associations and trade unions have been setting bilateral bodies in industries where industrial relations are weak and that display a prevalence of micro enterprises, unstable employment, high employee turnover, and limited trade union presence. To leave the multi-employer bargaining system would also imply abandoning the bilateralism that has been contributing to the efficient governance of a highly complex, dynamic, and fragmented labour market<sup>34</sup>.

Finally, we must stress that, although opposed by some, decentralisation is not, necessarily a negative phenomenon. But some conditions must be secured for this to be true. There must be a strong union workplace representation and high union coverage in small firms. And allowing non-unionised employees' representatives to enter into agreements that depart *in pejus* from other of a higher level (even if only in the absence of union presence in a company) undermines trade unions and sector-level agreements, because trade unions are hardly present at company-level.

In addition, one must avoid the abusive exploitation of multiple unionism and of dual models of workers' representation at company-level. And in order for that to happen, representativeness criteria for trade unions must be observed.

Finally, decentralisation should be organised either by the partners themselves or by statute, but, in this case, with proposals from the most representative social partners at cross-sectoral level. If decentralisation is imposed by law against the wishes of these social partners, it becomes much more dubious. According to JACOBS<sup>35</sup>, in the absence of one or more of these prerequisites, decentralisation becomes problematic, as has been the case of many recent developments of collective bargaining.

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<sup>33</sup> P. TOMASSETTI, *The shift towards single-employer bargaining in the Italian car sector: determinants and prospects at Fiat*. *E-Journal of international and comparative labour studies*. 2013, vol. 2, no. 1, p. 94.

<sup>34</sup> We follow closely TOMASSETTI, *op. cit.*, ps. 109-110. The Fiat case seems to be an exception only accomplished thanks to the exclusive dominance of the group in the relevant labour market. Most Italian companies seem to lack the necessary bargaining power to impose structural constraints on trade unions, as a single-employer bargaining system would require – *idem, ibidem*, p. 110.

<sup>35</sup> A. JACOBS, *op. cit.*, p. 187.

*The Emergence of New Bargaining Actors*

As previously mentioned, it is now becoming more common for bodies other than trade unions to intervene in collective bargaining in representation of workers' interests.

In Portugal, since 2009, work councils have been competent to enter into collective agreements (at company level), as long as this task is delegated to them by trade unions represented within that undertaking<sup>36</sup>. At first, this option was only available for enterprises with, at least, 500 employees. Since 2012, it has been open for undertakings with 150 or more employees<sup>37</sup>. The Memoranda also stated that work councils should be allowed to negotiate functional and geographical mobility conditions, as well as working time arrangements. This demand has not been fulfilled, since it asked for work councils to be given an autonomous competence to participate in collective bargaining, which did not happen<sup>38</sup>.

In Greece, the bargaining monopoly of trade unions was abolished. Currently, collective agreements can be negotiated by other associations of employees ("unions of persons"<sup>39</sup>) that represent at least three-fifths of the staff. In large firms (with 50 or more employees) such bodies of workers' representation can only be established in the absence of active trade unions in those companies. Conversely, in smaller firms, they may be created even in the presence of active unions. This has resulted in a new practice under which, in many sectors, collective agreements are now entered into with these workers' representatives. And, in these agreements, wages are on average 22 per cent below the sector's average. In addition, due to a rule according to which those trade unions must have at least 20 members in a company in order to negotiate agreements, these entities can no longer conduct company-level agreements (since 90 per cent of the jobs are in firms with fewer than 20 workers)<sup>40</sup>.

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<sup>36</sup> These agreements will only apply to the employees affiliated to the trade unions that delegated this power.

<sup>37</sup> The Portuguese legislator was more liberal than the Memorandum, since it only required for the threshold to be lowered to 250 employees.

<sup>38</sup> Despite expressing some doubts, J. GOMES (*op. cit.*, p. 608) defends this was the Memorandum's intention.

<sup>39</sup> M. SCHMITT, *op. cit.*, ps. 201-202.

<sup>40</sup> A. JACOBS, *op. cit.*, p. 182.

### *Maximum Duration of the Agreements*

In Portugal, before the Labour Code of 2009, it was possible to include clauses in collective agreements according to which those agreements would stay in force until being replaced by another one entered into by the same parties. However, in 2009, these “perpetuity clauses” were given an expiration deadline of five years<sup>41</sup>, after which any of the parties will be able to terminate the agreement, even without any substitution.

Recently, with *Act no. 55/2014*, this term was reduced to three years. Clearly, there was an effort to allow social partners to free themselves more easily from unwanted conventions.

On the other hand, in Greece, open-ended agreements were also converted to fixed term ones, with a maximum duration of three years, from the time of their coming into force<sup>42</sup>.

### *After-Effects of the Agreements*

Another imposition from the Memoranda, regarding the Portuguese regime, was the shortening of the after-effects of expired, and not renewed, agreements. In fact, according to Portuguese law, the termination of an agreement does not produce immediate effects. There is a period of time during which it will still be fully applicable, and during which the parties are supposed to try and negotiate its substitution. Until recently, these after-effects had a minimum duration of 18 months. *Act no. 55/2014*, 25<sup>th</sup> August, however, reduced it to 12 months<sup>43</sup>. Furthermore, Article 3, no. 1, of *Act no. 55/2014* prescribes that these deadlines should be reduced again in the near future. The goal is to decrease the after-effects to a period of merely six months (and “perpetuity clauses” should also have a smaller term, of two years). However, this change shall be preceded by a negotiation between the social partners.

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<sup>41</sup> This timeframe is calculated from one of three possible events: a) the last (integral) publication of the convention; b) the termination of the convention by one of its parties (since it doesn't produce immediate effects); c) the presentation of a proposal for the revision of the convention, that includes the revision of the perpetuity clause (see Article 501, no. 1, of the Labour Code).

<sup>42</sup> A. JACOBS, *op. cit.*, p. 183; and SCHMITT, *op. cit.*, ps. 201-202.

<sup>43</sup> See Article 501, no. 3, of the Labour Code. The 12 months countdown will suspend if the negotiations are interrupted for more than 30 days, due to conciliation, mediation, or mandatory arbitration between the parties (Article 501, no. 4). But even in this case, the minimum duration of the after-effects shall not exceed 18 months (Article 501, no. 5).

At the end of the current timeframe, either party is free to inform the Ministry of Labour that the negotiating process was unsuccessful. And, from that moment on, the convention will only be applicable for an extra 45-day period (before *Act no. 55/2014*, it was 60 days).

In turn, in the Spanish regime, previously there was the rule that collective agreements would remain applicable until being replaced by a new one. Recently, Statute has limited this after-effect to one year after the scheduled end of the collective agreement (*Act no. 3/2012*)<sup>44</sup>.

### *Erga Omnes Extension*

The power to confer binding effect to collective agreements is an important instrument in their role towards workers' protection<sup>45</sup>. However, the tendency is to tighten the requisites to resort to this mechanism.

In Portugal, this change was conducted under the impulse of the Memoranda, which stressed the need to define clear criteria for the extension of collective agreements. And it added that the representativeness of the negotiating parties and the consideration of the implications of the extension for the competitive position of non-affiliated firms should be among those conditions<sup>46</sup>. This demand was fulfilled by the *Resolution of the Council of Ministers no. 90/2012*, which determined that from now on, an agreement would only be open to extension by State intervention if the following criteria are met:

- the extension of an agreement must be required by its signing parties (one trade union and one employers' association);
- in order for all of the enterprises (and employees) of the sector to be included in the scope of the extension, the employer's side of the convention must employ, at least, 50 per cent of the workforce of that sector.

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<sup>44</sup> A. JACOBS, *op. cit.*, p. 183.

<sup>45</sup> A. JACOBS, *op. cit.*, p. 183.

<sup>46</sup> Paragraph 4. 7. ii), of the *Memorandum of understanding on specific economic policy conditionality*: "(...) the Government will: (...) define clear criteria to be followed for the extension of collective agreements and commit to them. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria".

Due to the sharp decline of extensions and the strong protest from social partners, in 2014, the government introduced a new alternative criterion through *Resolution of the Council of Ministers no. 43/2014*. Since then, extensions are possible if the employer's side of the convention employs, at least, 50 per cent of the workforce of that sector **or** if the employers' association that signed the agreement is composed, at least, in 30 per cent by SME.

It should be stressed that despite the *inter partes* efficacy of Portuguese collective agreements, and the very low participations of SMEs in collective bargaining, until recently around 92 per cent of workers<sup>47</sup> were covered by these agreements. This was due to the very frequent extension of collective agreements by State intervention, the "true star in the sky of the Portuguese collective autonomy"<sup>48</sup>.

Lately, the number of extensions has diminished quite visibly. While in 2009 and 2010, 103 and 113, respectively, were performed; in 2012 only 12 took place, there were nine in 2013, and merely 13 were produced in 2014. In the current year, so far, 33 extensions have been carried out<sup>49</sup>. Therefore, it is not surprising that – and according to information provided by social partners – while in 2008 two million employees were covered by these agreements, in 2013 only 200.000 were benefiting from them<sup>50</sup>.

In Greece, similar stricter criteria for the extension of collective agreements were introduced. An extension is only possible when the employers covered by the agreement represent, at least, 51 per cent of the workforce in the respective sector<sup>51</sup>. But, in addition, extension procedures, regarding branch-level collective agreements, were suspended until the end of 2015<sup>52</sup>.

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<sup>47</sup> *Estatísticas em síntese – Quadros de pessoal 2010*, p. 6 (available at: <http://www.gep.msess.gov.pt/estatistica/acidentes/at2010sintese.pdf>, accessed 22<sup>th</sup> September 2015).

<sup>48</sup> J. LEITE, "O sistema português de negociação colectiva", in *Temas laborais Luso-Brasileiros*, Coimbra, Coimbra Editora/Jutra, 2007, p. 149.

<sup>49</sup> Available data at <http://bte.gep.msess.gov.pt> (accessed 22<sup>th</sup> September 2015).

<sup>50</sup> [http://www.jornaldenegocios.pt/economia/emprego/lei\\_laboral/detalhe/ugt\\_alteracoes\\_ao\\_codigo\\_do\\_trabalho\\_vao\\_ajudar\\_a\\_dinamizar\\_contratacao\\_colectiva.html](http://www.jornaldenegocios.pt/economia/emprego/lei_laboral/detalhe/ugt_alteracoes_ao_codigo_do_trabalho_vao_ajudar_a_dinamizar_contratacao_colectiva.html) (accessed 30<sup>th</sup> December 2014).

<sup>51</sup> A. JACOBS, *op. cit.*, p. 184.

<sup>52</sup> M. SCHMITT, *op. cit.*, 201.



*Legislative Intervention in the Contents of Collective Agreements*

Additionally, in some cases, such as Portugal and Greece, the legislator went as far as suspending the application of agreements' provisions.

In the Greek regime, provisions conceding increases in wages or bonuses, were deemed inapplicable until unemployment returns to an acceptable level of under ten per cent of the active population<sup>53</sup>.

Conversely, in Portugal it was determined that provisions regarding overtime payment, extra holidays, severance payment, and compensatory rest for overtime should be, respectively, suspended (in the first case), reduced (in the second) and considered null and void (for the last two). In fact, the statutory regime of these matters had been addressed in a recent reform, so the aim was to create a barrier against the past. Several commentators opposed this rule, calling it bizarre and even unconstitutional. However, when the Portuguese Constitutional Court (see *Judgment of the Constitutional Court no. 602/2013*) was called to pronounce itself on this issue, it merely decided against the reduction of extra holidays provisions and the invalidity of provisions regarding compensatory rest for overtime. In fact, since these are bargaining issues *par excellence*, and the legal measures were not suited to attain their purpose (because the parties could just negotiate new agreements and reinstate those conditions), the Court deemed the legislative step as an intolerable interference with trade unions' collective autonomy.

The intervention on clauses regarding severance payments was considered valid because this is a domain with strict statutory regulation and, therefore, less open to collective bargaining. The same happened with the intervention on clauses providing for overtime payment, because, despite being a typical bargaining issue, the bargaining parties were prevented from bargaining on it for a period of two years. And, therefore, the measure was considered adequate, necessary, and proportional<sup>54</sup>.

In Ireland, as well, the 2009 Recovery Plan included a suspension of the private sector pay agreement, except in certain circumstances<sup>55</sup>.

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<sup>53</sup> M. SCHMITT, *op. cit.*, ps. 201-202; A. JACOBS, *op. cit.*, p. 184.

<sup>54</sup> Restrictive legal measures, on issues that relate to fundamental rights, must be, among other things, adequate, necessary and proportionate (Article 18, no. 2, of the Portuguese Constitution). And, in addition, they must respect the core of the right (Article 18, no. 3). The Constitutional Court ruled that this had been the case.

<sup>55</sup> A. JACOBS, *op. cit.*, p. 184.

### 3. The Recognition of Trends

Several golden rules of collective bargaining (related to the role and participation of unions; the relation of sources; the collective autonomy) have been subjected to change in the latest reforms<sup>56</sup>.

This has led to the dismantling of national and sector level wage setting and its replacement by decentralised, company-level bargaining. Trade unions, bodies with more guarantees as to their independence, lost their prominence as bargaining agents to locally nominated, non-unionised employees' representatives. The principle of the most favourable source has been abandoned and individual bargaining has been given a major role in the determination of pay and labour conditions, in detriment of collective bargaining<sup>57</sup>.

Based on a complaint presented by Greek trade unions, the ILO Committee on Freedom of Association stated that the suspension of collective agreements containing wage settlements could violate ILO Convention 98. It also stressed the importance of involving social partners in the framework of the agreements concluded with the European Commission, the International Monetary Fund, and the European Central Bank, the issues relating to fundamental human rights, freedom of association, and the collective bargaining process<sup>58</sup>. And, finally, it stated that procedures that systematically give priority to decentralised negotiations, with the intention of ensuring worse conditions than those established at a higher level, generally destabilise the negotiation mechanisms and the organisations of employers and workers. This behaviour weakens freedom of association and the right to collective bargaining, which clearly contradicts the principles of ILO conventions 87 and 98.

In turn, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has criticised the tendency to give precedence to individual rights over collective rights on employment matters<sup>59</sup>. For instance, the CEACR has criticised the fact that, in certain countries, direct agreements between employers and groups of non-

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<sup>56</sup> B. VENEZIANI, *op. cit.*, p. 134.

<sup>57</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>58</sup> Case 2820, November 1-6, 2012, *365<sup>th</sup> Report of the Committee on Freedom of Association* (available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_193260.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_193260.pdf), accessed 22<sup>th</sup> September 2015).

<sup>59</sup> A. JACOBS, *op. cit.*, p. 189.

unionised workers are much more numerous than collective agreements concluded with representative workers' organisations. And it called on governments to take measures to prevent direct agreements with non-unionised workers from being used for anti-union purposes<sup>60</sup>.

The European Committee of Social Rights has also been critical regarding the negative impact of decentralising collective bargaining. Concerning the Spanish rule that allows the suspension of wage clauses if they pose a threat to the company and to the employment's stability, the Committee stated that this could lead to the undermining of the mandatory nature of collective agreements if no procedural safeguards are provided for<sup>61</sup>.

However, the verdicts of these Committees are being neglected in the new systems of EU Economic Governance. In 2012, the Directorate General for Economic and Financial Affairs recorded in a study that the new economic-political instruments of control must be used with the aim of reducing the wage-setting power of trade unions. Another document, issued by the same Commission Department in 2013<sup>62</sup>, recommended further employment market reforms in Spain; the lowering of the minimum wage in Slovenia and France, and for Italy to create a general framework friendlier to big businesses (in a clear allusion to collective bargaining negotiations that are still taking place at a supra-company level)<sup>63</sup>.

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<sup>60</sup> CEACR, *Giving globalization a human face. General survey on the fundamental conventions concerning rights at work in the light of the ILO declaration on social justice for a fair globalisation*, Geneva, 2008, ps. 82, 96-97 (available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_174846.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf), accessed 22<sup>th</sup> September 2015).

<sup>61</sup> ECSR, Conclusions XX-3, Spain, Art. 6(2) ESC (available at: [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/SpainXX3\\_fr.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/SpainXX3_fr.pdf), accessed 22<sup>th</sup> September 2015).

<sup>62</sup> See Communication of the Commission of April 10, 2013, *Results of in-depth reviews under Regulation (EU) No. 1176/2011, on the avoidance and correction of macroeconomic imbalances COM (2013), 199* (available at: [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/com\(2013\)\\_199\\_final\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/com(2013)_199_final_en.pdf), accessed 22<sup>th</sup> September 2015).

<sup>63</sup> A. JACOBS, *op. cit.*, p. 191. Similarly, S. DEAKIN (*op. cit.*, p. 95) states the in new economic governance initiated by the EU institutions, namely the "Euro Plus Pact", agreed in March 2011, the reduction of labour costs and decentralisation of wage bargaining are still main goals for policy coordination.

#### 4. Analysis of the EU's Role

Another critical point concerns the validity of the Memoranda of Understanding. More than one voice has risen against the participation of the European Commission and the European Central Bank in the conclusion of these documents. It is argued that the negotiating procedure did not respect the general principle of Union law (as the European Parliament was not sufficiently involved), nor the requirement for institutional competence under Union law, since the Commission acted in areas for which it lacked competence, such as wage setting. And, in addition, the encroachment on human rights was disproportionate<sup>64</sup>.

It must be noted that the evaluation of EU responses to the crisis is a complex task, particularly concerning collective bargaining and wages, which are not regulated by European Law. For the EU to act in a field, it must have the competence to do so, which must be conferred by the Treaties. Article 153 TFEU lists the fields that may be subjected to an approximation of national legislations, through the adoption of minimum requirements by means of directives for their gradual implementation in Member States. Neither pay nor collective bargaining are included in this list. On the contrary, pay is expressly excluded from competence for harmonisation by Article 153(3) TFEU. Therefore, EU institutions may not impose any binding act on the Member States regarding this matter<sup>65</sup>.

This does not signify that any action is prohibited. European social partners retain competence for developing contractual relations and, if they so desire, to reach agreements (Article 155(1) TFEU). And the list of fields within the European Commission's competence to encourage cooperation between Member States appears to be broad enough to cover pay – but this competence may give rise only to non-binding acts (Article 156). Moreover, the Union's lack of competence is not absolute, since the prohibition on discrimination in matters of pay is enshrined in the Treaty (Article 157), regulated by many directives and broadly interpreted by the Court of Justice<sup>66</sup>.

Regarding collective bargaining, this is also one of the domains in which harmonisation directives cannot be issued (Article 153(1) TFEU), but cooperation may be encouraged (Article 156). Additionally, Article 152 states that the institutions must take into account the diversity between national systems. It is apparent, from these provisions that the TFEU

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<sup>64</sup> A. FISCHER-LESCANO, *op. cit.*, p. 81.

<sup>65</sup> We follow closely M. SCHMITT, *op. cit.*, ps. 209-210.

<sup>66</sup> M. SCHMITT, *op. cit.*, p. 210.

excludes the competence of the Union to adopt mandatory rules for Member States on this issue. The same applies to acts of a European institution (such as the Council, the Commission, the European Central Bank) requiring a reduction of pay for overtime, or termination benefits, which, according to the jurisprudence of the CJEU, are considered pay. And the same applies to any acts requiring Member States to amend their legislation regarding the matters of competence of union representation; (non-union) parties entitled to enter into collective agreements; or the conditions for the validity of collective agreements<sup>67</sup>.

Aside from considerations regarding their merits, the validity of the Memoranda is, therefore, highly questionable, due to the active role the European Commission and the European Central Bank played in their negotiation. The EU institutions should have chosen a different (non-binding) instrument to deal with the crisis in the most affected Member States.

All the changes that we have analysed translate a radical alteration of the structures and principles that were the essence of the system of collective bargaining.

One cannot ignore the placement of the right to collective bargaining and freedom of association within the Charter of Fundamental Rights, the European Social Charter, and the European Convention on Human Rights, as well as in several ILO Conventions. And as long as these instruments are binding, crisis management measures must be justified within the framework they provide (and also the one delivered by the Treaties)<sup>68</sup>.

The weakening of collective bargaining and the floor of social rights may have the short-term effect of reducing nominal wages and making payment systems more responsive to immediate market pressures. However, the long-term effects of these actions are uncertain<sup>69</sup>.

According to some commentators, the increasing divergence of wages and productivity growth has greatly been due to the absence, in the Eurozone, of coordinated wage bargaining<sup>70</sup>. Therefore, the most feasible route to deal with the crisis and to reduce unit labour costs is, on one hand, to promote the coordination of pay rises across the economy, and, on the other, to encourage investments in human capital and related aspects of workforce upgrading. The dismantlement of collective bargaining

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<sup>67</sup> We follow closely M. SCHMITT, *op. cit.*, ps. 210-212.

<sup>68</sup> A. FISCHER-LESCANO, *op. cit.*, p. 57.

<sup>69</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>70</sup> S. DEAKIN, *op. cit.*, p. 93.

arrangements, makes it even more difficult to put in place mechanisms for coordinated wage determination, precisely when they are most needed as part of an integrated strategy, along with training and industrial policy, for the improvement of competitiveness<sup>71</sup>.

In addition, one must highlight that the Troika's policies are counterproductive. To begin with, they have a negative impact on effective demand. The weakening of sector-level bargaining has a deeper impact within groups at the lower level of the earning scale, since they are less equipped to engage in voluntary wage bargaining. While the cuts to minimum wage and social security benefits affect directly the poor. And there is a higher propensity to consume within lower income groups rather than among the ones of a higher income scale. In this kind of panorama, the combined effect of these changes is a drop in domestic demand, which is worsened by the greater ability of high income groups to move their capital and savings out of the jurisdiction altogether.

Lower domestic demand leads to an increased number of bankruptcies and higher unemployment, and, consequently, a reduction in tax revenue, while further stepping up the pressure for wage and benefits cuts<sup>72</sup>.

In addition, there is also an increase of social costs. The reduction of public expenditure exposes disproportionately lower income groups (who have a greater risk of joblessness, poverty, and ill health), and these costs fall back onto the State in the form of additional charges on social assistance and health care programmes, precisely in a time in which they are least able to deal with these extra expenditures<sup>73</sup>. DEAKIN<sup>74</sup>, therefore, appeals for the reverse of this policy and for the creation of a framework for effective wage coordination at both national and transnational level. And although this is not an easy solution, it seems, undoubtedly, to be the best way to ensure workers' rights, while promoting the competitiveness of European undertakings and economies.

## 5. Conclusion

All the changes that we have analysed translate a radical alteration of the structures and principles that were the essence of the system of collective bargaining. One cannot ignore the placement of the right to collective bargaining and freedom of association within the Charter of Fundamental

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<sup>71</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>72</sup> S. DEAKIN, *op. cit.*, ps. 93-94.

<sup>73</sup> S. DEAKIN, *op. cit.*, p. 94.

<sup>74</sup> S. DEAKIN, *op. cit.*, p. 104.

Rights, the European Social Charter, and the European Convention on Human Rights, as well as in several ILO Conventions. And as long as these instruments are binding, crisis management measures must be justified within the framework they provide (and also the one delivered by the Treaties)<sup>75</sup>.

The weakening of collective bargaining and the floor of social rights may have the short-term effect of reducing nominal wages and making payment systems more responsive to immediate market pressures. However, the long-term effects of these actions are uncertain<sup>76</sup>.

According to some commentators, the increasing divergence of wages and productivity growth has greatly been due to the absence, in the Eurozone, of coordinated wage bargaining<sup>77</sup>. Therefore, the most feasible route to deal with the crisis and to reduce unit labour costs is, on one hand, to promote the coordination of pay rises across the economy, and, on the other, to encourage investments in human capital and related aspects of workforce upgrading. The dismantlement of collective bargaining arrangements, makes it even more difficult to put in place mechanisms for coordinated wage determination, precisely when they are most needed as part of an integrated strategy, along with training and industrial policy, for the improvement of competitiveness<sup>78</sup>.

In addition, one must highlight that the Troika's policies are counterproductive. To begin with, they have a negative impact on effective demand. The weakening of sector-level bargaining has a deeper impact within groups at the lower level of the earning scale, since they are less equipped to engage in voluntary wage bargaining. While the cuts to minimum wage and social security benefits affect directly the poor. And there is a higher propensity to consume within lower income groups rather than among the ones of a higher income scale. In this kind of panorama, the combined effect of these changes is a drop in domestic demand, which is worsened by the greater ability of high income groups to move their capital and savings out of the jurisdiction altogether.

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<sup>75</sup> A. FISCHER-LESCANO, *op. cit.*, p. 57.

<sup>76</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>77</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>78</sup> S. DEAKIN, *op. cit.*, p. 93.

<sup>79</sup> S. DEAKIN, *op. cit.*, ps. 93-94.

In addition, there is also an increase of social costs. The reduction of public expenditure exposes disproportionately lower income groups (who have a greater risk of joblessness, poverty, and ill health), and these costs fall back onto the State in the form of additional charges on social assistance and health care programmes, precisely in a time in which they are least able to deal with these extra expenditures<sup>80</sup>. DEAKIN<sup>81</sup>, therefore, appeals for the reverse of this policy and for the creation of a framework for effective wage coordination at both national and transnational level. And although this is not an easy solution, it seems, undoubtedly, to be the best way to ensure workers' rights, while promoting the competitiveness of European undertakings and economies.

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<sup>80</sup> S. DEAKIN, *op. cit.*, p. 94.

<sup>81</sup> S. DEAKIN, *op. cit.*, p. 104.



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