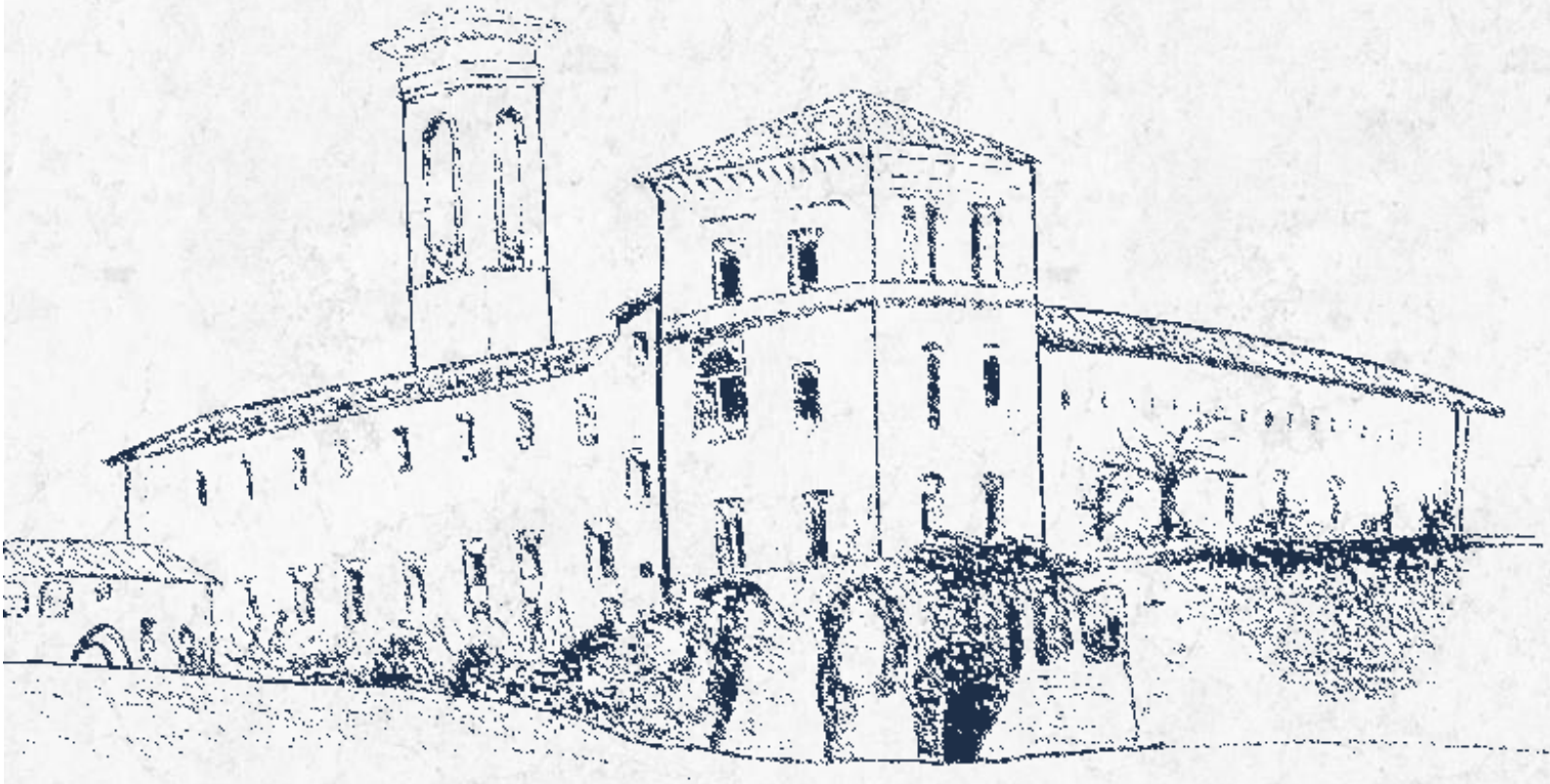
OPEN ACCESS
ISSN 2280-4056

*E-Journal of International and Comparative*

# LABOUR STUDIES

Volume 1, No. 3-4 October-December 2012



ADAPT
www.adapt.it
UNIVERSITY PRESS

# Collective Bargaining in Spain: the Reform of the Regulatory Framework[1]

Federico Navarro Nieto [*]

## 1. By Way of Introduction: Urgent Measures to Reform the Institutional Framework of the Bargaining System in Spain

Over the past few years, the need to review the bargaining system in Spain was deemed as a matter of urgency by both the social partners and the legal community. As a consequence, a number of changes have recently been put in place, with two significant policy reforms that introduced extensive amendments to Title III of the Spanish Labour Code (henceforth LET - *Ley del Estatuto de los Trabajadores*). These included Royal Decree-Law No. 7 of 10 June 2011 (RDL No. 7/2011) laying down urgent measures to reform the collective bargaining system and Royal Decree-Law No. 3 of 10 February 2012 (RDL No. 3/2012) – now Law No. 3 of 6 July 2012 – on urgent measures to reform the labour market.
Notwithstanding such good intentions, social dialogue produced limited results, prodding social partners into concluding several agreements to keep up with the regulatory changes and to amend the collective bargaining system. Among others, the Economic and Social Agreement of February 2011 – a bipartite agreement between trade unions and employers' associations which sets forth the main criteria for the reform of collective bargaining – and the Second Employment and Collective

[1] The present paper provides a summary of the presentation delivered during the conference *XXII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social*, on "*Las reformas del Derecho del Trabajo en el contexto de la crisis económica*", that took place in San Sebastián/Donostia, on 17 and 18 May 2012.

[*] Federico Navarro Nieto is Full Professor of Labour Law and Social Sciences at the Faculty of Labour Law, University of Cordoba, Spain. Translation from Spanish by Pietro Manzella and Martina Ori.

Bargaining Agreement of 2012 to be implemented also in the years 2013 and 2014, signed on January 2012. Although not impinging on the basic mechanisms of collective bargaining, the changes introduced in 2011 and 2012 affected the Spanish model in important respects[2], as it was the case for the reform of the industrial relations system of the previous year, through Law No. 35 of 17 September 2010 laying down urgent provisions to reform the labour market. RDL No. 3/2012 is illustrative of this aspect, as it envisaged some major changes – mostly in qualitative terms – that will certainly make "an impact on the balance of the bargaining system"[3].

The idea which underlies the foregoing reforms is that of resorting to collective bargaining to increase the levels of internal flexibility. In addition, the Explanatory Statement accompanying these urgent provisions insists on the relationship between labour reforms and the review of the bargaining system as a way to boost employers' competitiveness and productivity.

This intent can also be observed in the way the set of rules has been arranged. By way of example, both Law No. 35/2010 and Law No. 3/2012 refer to the reform of the bargaining system as being part of a larger chapter devoted to "Measures to promote internal flexibility of companies". In a similar vein, the Explanatory Statement of Law No. 3/2012 states that the goal of collective bargaining must be "to promote – rather than to prevent – the adaptation of working conditions to specific company needs".

---

[2] This idea emerges from the preliminary studies carried out by some labour law scholars on the bargaining reforms. See T. Sala Franco, *La reforma de la negociación colectiva (Real Decreto-Ley 7/2011, de 11 de junio)*, AL No. 18, 2011; and *La reforma de la negociación colectiva*, in various authors, *La reforma laboral en el Real Decreto-Ley 3/2012*, TB, 2012; J. Cruz Villalón, *Texto y contexto de la reforma de la negociación colectiva*, in I. García-Perrote Escartín, J. R. Mercader Uguina (eds.), *La reforma de la negociación colectiva*, Lex Nova, 2011; J. R. Mercader Uguina, "*La reforma de la negociación colectiva en el Real Decreto-Ley 3/2012: la empresa como nuevo centro de gravedad*", in García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012; M. Correa Carrasco, *Acuerdos de empresa*, F. Lefebvre Editions, 2012.

[3] This is the argument put forward by M.C. Palomeque López, *La versión política 2012 de la reforma laboral permanente. La afectación del equilibrio del modelo laboral*, in I. García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012. In a similar vein, M. Rodríguez-Piñero, F. Valdés and M. E. Casas, in *La nueva reforma laboral*, *Relaciones Laborales*, No. 5, 2012, maintain that RDL No. 3/2012 undermines mechanisms of collective bargaining to adapt working conditions to company needs and increases the scope for unilateral decision on the part of the employer in relation to both internal and external flexibility, 2.

Yet one might note that a reform process should take as a starting point the function and critical aspects of collective bargaining which call for ad-hoc solutions and responses.

This assumption is partly missing in the reforms – most notably in Law No. 3/2012 – in that it underestimates the complex nature of the bargaining system and ends up confusing the two distinct levels of regulation, that of collective bargaining in a strict sense and measures aimed at increasing internal flexibility.

As far as the institutional framework is concerned, the interventions made in 2011 and especially in 2012 exemplified the traditional approach taken by the Government at the time of reviewing the industrial relations system. In Spain, collective bargaining is highly institutionalised, and likewise regulated is the negotiation process.

The Spanish Constitution guarantees the right to collective bargaining and the binding nature of collective agreements (Article 37.1). Further, LET strongly encourages negotiation as a means for enhancing the role of inter-professional agreements in a neo-corporatist perspective, promoting stability, attributing bargaining legitimacy to most representative organisations, and ensuring that collective agreements having force of law are generally applicable, with a view to improving the overall working conditions.

However, from the mid-1990s onwards, the Government has become more and more involved in the bargaining process, due to an awareness among decision-makers of the institutional implications of collective bargaining on the industrial relations system. Accordingly, much store was set by the institutional framework and by the need for a more precise definition of the bargaining mechanisms. Innovative rules on the bargaining structure were put in place, and new powers were allocated to collective agreements – also at a company level – in order to achieve higher levels of flexibility.

The newly-issued reforms made a significant impact on the manner in which collective bargaining is organised. This is because amendments have been made to the bargaining structure itself, also by enhancing the role of company-level bargaining. Concurrently, the reforms might produce a change in the allocation of the bargaining powers that ideally could give rise to adverse effects on the workers.

The role of trade unions and employers' associations in this bargaining model is strengthened, as sectoral-level bargaining gains momentum and helps to fill regulatory vacuums in certain sectors.

Equally enhanced is the role of company-level bargaining, particularly as regards the most representative trade unions, for they are identified as the

main bargaining party in the search for internal flexibility – either through workplace trade unions, or trade union committees in the absence of a system of employee representation at the workplace.
However – and somehow contradictory – an effective collective counterweight could be missing in small-sized enterprises at the moment of dealing with internal flexibility, as by statute employees are allocated direct bargaining power. I shall come back to this point later.
Ultimately, these reforms give to parties engaged in collective bargaining the responsibility to carry out negotiation in an effective manner – mainly by scaling back the period of validity of collective agreements after its expiration – and to resolve deadlocks autonomously, by reducing the degree of uncertainty arising from the implementation of urgent measures on the part of the Government.
In addition, new functions have been allocated to collective bargaining, in an attempt to keep up with a trend that has been in existence since the 1990s[4].
Aside from the traditional regulatory powers which govern the working conditions more generally – viz. working time, everyday activity and remuneration – collective bargaining has also become a tool to organise work and to increase internal flexibility, by managing aspects such as functional mobility, changes in working conditions, job restructuring and so forth. The gradual shift from a static to a more dynamic bargaining model is closely related to the issue of workers' participation in decision-making. Another major aspect is that the reforms might affect the national legal system, furthering a tendency started in the 1990s that concerns the changing nature of the relationship between statutory law and collective agreements, and providing social partners with new tools to conduct negotiations, above all by prioritising the role of company-level agreements over national collective agreements[5]. In this connection, Law No. 3/2012 drew a neat dividing line between internal flexibility as imposed unilaterally by the employer (Articles 40, 41 and 47 of LET) and internal flexibility agreed upon at the company level and resulting from derogations from national collective agreements (Art. 82.3 and 84.2 of

[4] See S. Del Rey Guanter, *Una década de transformación del sistema de negociación colectiva y la "refundación" de la teoría jurídica de los convenios colectivos*, *Relaciones Laborales*, No. 1-2, l.996; J. Rivero Lamas, *Estructura y funciones de la negociación colectiva tras la reforma laboral de l.997*, in REDT, No. 89, l.998.

[5] An examination of the regulation of company-level agreements after the labour reforms is provided in a monograph by M. Correa Carrasco, *Acuerdos de empresa*, F. Lefebvre Editions, 2012.

LET). Company-level agreements as a means to boost internal flexibility provide for a new legal paradigm, offsetting the powers of employers and narrowing down the role of national collective bargaining. In this context – and pursuant to Art. 37 of the Spanish Constitution – one might imagine a bargaining system that responds to different needs, depending on the functions allocated to each agreement.

An in-depth assessment of the reform process entails a closer analysis of the bargaining system and the effects of the Government's involvement at different levels. Of course one might also consider that the interplay of different market forces has much bearing on collective bargaining, and so has the innovation of the production system. Accordingly, the point of departure of such an analysis must be the rationale of collective bargaining and its close interrelation with the economic and business dimension, as well as with the labour market. From this perspective, an ever-changing economic and production system – as is the current one – might have a profound impact on labour relations and points out the need for long-awaited amendments in the Spanish bargaining system.

That being said, the review of the collective bargaining system must also start from the assumption that collective bargaining mainly serves to govern labour relations in that it sets down regulatory standards to prevent cases of social dumping, and ensure workers' protection by increasing the levels of employment security. More broadly, in implementing such reforms, it is also important to consider that traditionally collective bargaining provides employees with an important collective "counterweight".

## 2. Regulatory Changes in the Bargaining Structure

Further problems arise at the time of dealing with the bargaining system which originate from a series of factors: the fragmentation and the lack of coordination of the bargaining structure, as well as the prevalence of agreements concluded at a territorial level. This has so far contributed to increase the costs of negotiation and differences in regulation, with the system that has proven inadequate to meet macroeconomic objectives in keeping with overdue decentralisation. Rather than from the development

of the production system, this state of play results from certain historical inertia[6].
In the last few years, the reforms of 2011 and 2012, as well as the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014 have focused on the bargaining structure and its shortcomings and on the need of a radical overhaul. The emphasis on the legal perspective produced a reform process that moved in two directions, as the following paragraphs will explain.

### *2.1. First Line of Action: the Bargaining Structure*

The first line of action concerns the enforcement of rules on the bargaining structure to be laid down in sectoral agreements at both national or regional level. This trend is confirmed by RDL No. 7/2011 and the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014, yet this goal is pursued also by some other provisions.
In this sense, a primary role is assigned to sectoral-level bargaining – mainly at a national level – at the time of arranging the collective bargaining structure. Further, collective bargaining at a territorial level, once considered pivotal, is now given limited significance. This state of affairs enhances decentralisation through company-level bargaining in some industries, following the amendments made to Art. 41.6 of LET and above all Art. 82.3 of LET, pursuant to which pay levels might be reduced as agreed upon by derogations from national bargaining.
Decentralised collective bargaining is a major component of the 2011 reform, although collective bargaining at a national level can still have a say on the mechanisms of the whole negotiation process. This aspect emerges in the provisions laid down in the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014, whereas Law No. 3/2012 has introduced measures to favour company-level bargaining and scale back the role of higher levels of bargaining.
On close inspection, one might note that par. 2 of Art. 83 of LET clarifies the role of multi-industry agreements in determining the bargaining structure and the rules to be applied in the case of conflict arising between

[6] For an historical overview of the regulatory framework, see, F. Navarro Nieto, *La estructura de la negociación colectiva: marco jurídico y disciplina contractual*, Bomarzo Editions, 2009.

agreements concluded at different levels. The innovation here lies in the fact that these powers are also allocated to "sectoral collective agreements at the national or regional level" (par. 2 Art 83 of LET), thus widening this practice at national level and empowering sectoral-level agreements to determine the structure of collective bargaining at this level. So far, only multi-industry agreements or framework agreements were given this special function, but they were deemed unsuitable for this purpose.

Accordingly, the new regulations, alongside intersectoral agreements, will allocate the power to determine the structure of collective bargaining and the rules to deal with possible forms of conflict arising from different-level agreements also to "sectoral collective agreements concluded at national or regional level". Albeit indirectly, the scope of these accords is thus widened by the emphasis placed on out-of-court dispute resolution procedures, ex Art. 83.3 of LET in resolving stalemate in negotiations.

Another major innovation lies in the reform of Art. 84 of LET. Whereas Art. 82.3 LET empowers the collective agreements to lay down the mechanisms of the bargaining system, Art. 84 sets forth provisions dealing with possible overlapping between different-level agreements. Problems might arise, however, at the time of implementing the two measures concurrently. The 1994 reform was accompanied by a great deal of criticism on the part of a number of scholars for it narrows down the power of collective bargaining to set the bargaining structure on an autonomous basis, as the rules detailed in collective agreements according to par. 2 of Art. 83 of LET were only supplementary to those established by Art. 84 of LET.

Under RDL No. 7/2011, national- and regional-level agreements prevail – Art 83.2 LET over Art. 84 LET – the latter being applied only in the absence of the former. Therefore, Law No. 3/2012 has strengthened the role of collective bargaining. In this sense, according to Art. 84, section 1 of LET, "a collective agreement, once enforced, cannot be amended by provisions laid down in agreements concluded at a different level, unless otherwise agreed under Art. 83.2".

Section 1 recalls the 1980 version of the provision in that it aims at resolving clashes between collective agreements by applying the principle of *prior in tempore*, i.e. the oldest prevails. However, three exceptions are possible under Law No. 3/2012. First off, such principle only applies if there is no other agreement in force under Art. 83.2 of LET – basically at the national or regional level – which states otherwise. Further – and pursuant to Art. 84.3 of LET – regional-level agreements are empowered to amend the rules set at the national level. Pursuant to extant legislation,

the national level of bargaining prevails in defining the structure of the bargaining system.
It is also possible to deviate from national-level sectoral agreements through subsequent agreements concluded between bodies based in the Autonomous Communities, pursuant to Art. 84.3 of LET. Yet a number of important limitations exist in this respect. For instance, in accordance with Art. 83.2 of LET, derogations are allowed only if not expressly prohibited – i.e. sectoral agreements at the national level can veto the recourse to opt-out clauses. Moreover, compliance with special conditions concerning representation is required. Finally, there are a number of cases where opting out is never possible. For instance, non-negotiable matters include the probationary period, recruitment procedures, job classification, annual maximum working hours, sanctions, minimum safety standards and mobility. Apart from that, Art. 84.2 of LET establishes the prevalence of company-level agreements in certain matters over sectoral-level bargaining. This second exception will be discussed in details later on.
The newly-issued Art. 84 of LET scales back the scope of territorial bargaining, since it is no longer given preference over sectoral agreements concluded at the national level, with derogations which are now possible through company-level agreements. This move is intended to establish higher levels of uniformity within the bargaining system which has proved unable to adapt to labour market changes and to respond to the thrust of collective bargaining towards inter-sectoral level agreements, making it complex to deal with the macroeconomic effects of collective bargaining as well as to cope with the demand of more dynamic negotiating practices on the part of employers.

### *2.2. Second Line of Action: the Autonomy of Company-level Bargaining*

The most relevant aspect of the reforms of 2011 and 2012 concerns the increased levels of autonomy of collective bargaining conducted at company level. This is a major development that could lead to different outcomes in legal terms, as it might strike a balance between the collective regulation of the working conditions and the needs of employers in terms of internal flexibility.
Social partners and legal scholars have long agreed on the need to streamline the Spanish bargaining system, that is developing a more coordinated and simplified bargaining structure, while leaving much room for decentralised bargaining.

These amendments were necessary to keep up with macroeconomic and market needs – in terms of employment and remuneration – to meet the demands of employers, and to provide common minimum standards in terms of protection.
This approach is consistent with the assumption that collective bargaining might help increase internal flexibility and facilitate the adjustment of wages and working conditions to the level of productivity across sectors and firms, as well as to adapt working conditions and pay levels to the different levels of productivity, competitiveness and employment of the various Spanish regions.
The tendency towards decentralisation to benefit company-level bargaining is evident also in other European countries. For instance, decentralisation in Germany was first introduced through opt-out clauses agreed upon at company level, opening to the possibility to derogate on matters related to wages or working time, a move that was supported by social partners, at least initially[7]. Some recent experiences in countries like Spain and Italy go in the same direction, but in this case decentralisation is encouraged by national governments. Doubts are cast as to whether this trend will result in the imposition of a decentralisation model, whether coordinated or disorganized. Law No. 3/2012 goes beyond the mere re-organisation of the bargaining system, as it opens up to unlimited possibilities of derogating at company level according to Art 84.2 and 82.3 of LET, with the risk however of establishing a decentralised though disorganised bargaining model[8].

### *2.2.1. A First Example of Increased Autonomy of Company-level Bargaining: the Regulation of Enterprise-level Agreements Pursuant to Art. 84.2 of LET*

A first example of increased autonomy of company-level bargaining regards the regulation of relevant agreements pursuant to Art. 84.2 of LET. As for the bargaining structure, the re-organisation of the Spanish

[7] Particularly relevant in this respect is the Pforzheim Agreement of 2004 concluded with employers in the metallurgic sector (*Gesamtmetall*) and the trade union IG-Metall.
[8] As pointed out by M. Rodríguez-Piñero y Bravo Ferrer "by leaving the structure of the reform of 2011 unscathed, this provision has gone much further, as it introduces some new elements that may limit the role of collective autonomy, undermine the structure of collective bargaining and open up to reductions in wages and working conditions somehow reflecting the substantial loss of power of trade unions during the crisis". See M. Rodríguez-Piñero y Bravo Ferrer, *Flexibilidad interna y externa en el Real Decreto-Ley 3/2012*, Diariolaley.es, 10.

model necessarily implied a decentralisation process. This idea is further upheld by some recent studies on collective bargaining conducted by the social partners[9]. In economic terms – and as discussed earlier – such a reform seems appropriate to increase working time flexibility and to conform pay levels and working hours to productivity levels across sectors and companies nationwide. Therefore, reviewing the levels of bargaining autonomy at the company level against the centralisation thrust of sectoral agreements was seen as of fundamental significance.

A number of rules have been introduced by the reform. First of all, once enforced, a collective agreement cannot be superseded by provisions laid down in agreements concluded at a different level pursuant to Art. 84.1 of LET, unless an agreement concluded in accordance with Art. 83.2 LET states otherwise – e.g. a recently-issued sectoral agreement prevails over the company-level agreement. Secondly – and here lies the major innovation of the reform process – under certain circumstances enterprise-level agreements can deviate from sectoral agreements according to Art. 84.2 of LET. For the purposes of Art. 84.2 of LET, provisions set down at company level "prevail over sectoral agreements at the national, regional or lower level" when it comes to such subjects as remuneration, pay for overtime and shift work, working time and holiday, job classification, recruitment procedures, and work-life balance.

Much dissatisfaction arose with the regulations introduced by RDL No. 7/2011, as sectoral agreements at the national level – as laid down by art. 83.2 of LET – still leave to company-level agreements the scope to deviate from the national level in the sectors listed in Art. 84.2 of LET. In other words, following the reform of 2011, sectoral agreements continued to limit the role of enterprise-level bargaining. By contrast, Law No. 3/2012 narrowed down the power of sectoral-level agreements, thus moving away from "standardised forms" of agreements, particularly at territorial level. The reform of Art. 84.2 of LET by means of Law No. 3/2012 is successful in that it protects employers from the risk of a sort of "over-standardisation" of agreements concluded at local level and enhances the role of collective bargaining more generally. Yet this is half a victory, given the maze of subjects on which enterprise-level agreements prevail.

[9] Economic and Social Agreement of February 2011 and Second Employment and Collective Bargaining Agreement of 2012, to be implemented also in 2013 and 2014.

### *2.2.2. Increased Autonomy of Company-level Bargaining and the New Provisions of Art. 82.3 LET: a Further Example*

The store set with the flexible nature of the reform of Art. 84.2 of LET loses momentum with the new version of Art. 82.3 of LET, which establishes that company-level agreements can regulate a number of issues that were traditionally only the province of sectoral collective bargaining, thus making amendments to the bargaining structure.

Art. 82.3 LET provides for the scope for a company-level agreement to deviate from those regulating working conditions in the company. This option was included in the LET by means of Law No. 11/1994 that governs opt-out clauses on pay levels in order to favour derogations from collective agreements in businesses facing financial problems. The new regulation makes this rule applicable to all companies, with a view to increase working time flexibility. Opting out is possible, paradoxically, in a higher number of cases than those provided by Art. 84.2 of LET: working hours, working time organisation, shift work arrangements, pay and pay levels, work organisation, changes in functions – whereas exceeding the limits provided for functional mobility in Art. 39 LET – and voluntary increase in the forms of social security protection.

At this point, investigating the reasons justifying the widening of subjects allowing for derogations might be of interest. Traditionally, the areas allowing for a deviation by collective agreements by virtue of Art. 41 of LET – which concerns substantial changes to working conditions – has been the result of an attempt to adapt to the changing demands of work organisation, incompatible with the static nature of current collective regulation and with the employers' needs.

Yet the new version of Art. 82.3 of LET opens to derogations also for purely quantitative issues – e.g. working time – casting doubts about the use of opt-out mechanisms rather than to adapt work organisation and working conditions to exceptional or specific circumstances, as a way to increase competitiveness with respect to competitors in the same sectors.

One thing is to facilitate the harmonisation of rigid sectoral regulations and company needs in areas such as wages or working time, another thing is to give preference to company-level bargaining, depriving the sectoral collective agreement of its proper function, i.e. the setting of common standards.

Derogation clauses are allowed only if based on "economic, technical, organisational or productive grounds" (Art. 82.3 par. 3 and 4 of LET).

So far, legal requirements included:

a) objective circumstances documented by the employers;

b) a justification of the reasonableness of the measures to be taken, such as business competitiveness and job preservation. Following the 2012 reform, employers are only required to indicate objective reasons, which are however loosely defined in legal terms. A justification is based on economic grounds "when from the data on the company performance it emerges a difficult economic situation, in cases such as current or expected losses, or persistent reduction in revenue or sales. Persistent reductions mean a drop for two consecutive quarters in revenue or sales, that must be lower than the same time-period of the previous year". A justification is regarded as technical "when changes occur, among others, in the means of the production", organisational "when changes occur, among others, in working systems and methods or in the organisation of production" and productive "when changes occur, among others, in demands for the products or services that employers intend to place on the market".

An overall analysis of the motives provided statutorily shows that opting out is no longer limited to exceptional cases arising from a difficult business situation. Unlike the past, Art. 82.3 of LET is not intended to safeguard jobs in a scenario of economic crisis. In addition, consensus within the company is seen as implying that some valid justifying reasons exist (Art. 82.3 par. 6).

Drawing on this assumption, the monitoring of company-level agreements should only document the existence of fraudulent practices, or any form of deceit, duress or abuse. This approach is in line with the objective of increasing legal certainty and confidence in the effectiveness of the bargaining system. In this context, however, employment tribunals will have to deal with cases in which the agreements concluded do not detail the justifying reasons, especially following the consent on the part of the employee committee.

Opt-out clauses must be agreed upon by both the employers and employees' representatives. In the case there are no employee representatives in the company, negotiations take place directly with workers through a committee composed by the workers themselves or by union representatives at a sectoral level. This helps to overcome the problem of small-sized businesses for which – pursuant to the earlier version of Art. 82.3 of LET – derogations from collective agreements on matters related to pay levels were not applicable, as there was no scope to set up representative bodies.

However, the regulation of these committees might give rise to some questions. First, a non-union committee is not an instrument of collective regulation even if derogating from national collective agreements.

Accordingly, it is a mere alternative to individual agreements, as it neither represents a collective counterweight to the power of employers, nor does it provide information rights and safeguards to negotiating parties. Compounding the problem is the technical complexity of trade-union committees which is unsuitable for the purpose, as workers may be discouraged and refrain from appointing one. At a more theoretical level, trade-union committees could represent an opportunity for trade unions to appeal to workers in small-sized businesses – who are generally non-unionised – yet it is likely that these workers would rather opt for appointing a non-union committee, as seemingly more informal and easier to deal with.

In the event of the latter, a risk might arise in that a genuine workers' countervailing power in the consultation process might not be provided. This aspect – alongside the objective grounds for which derogations from collective agreements are allowed – enhances the central role of agreements concluded at company level in increasing internal flexibility.

A cursory analysis of Art. 82.3 seemed to indicate that derogations were initially intended as a "safety valve" within the bargaining system, to be used in exceptional cases and mainly in relation to pay levels. Yet recent changes converted it into a means to respond to physiological needs, both as a way to avoid job losses and reduce labour costs as well as to facilitate the reorganisation of work and to increase business competitiveness. In this connection, it might be the case that Art. 82.3 of LET will be mainly used to fight off competition with other companies by abating costs and increasing productivity – through an increase in working hours – rather than boosting competitiveness by means of technological, organisational and human capital investment.

Moreover, opt-out clauses are mainly viewed as a tool to enhance business flexibility, rather than a way to enhance the autonomy of company-level agreements within the bargaining structure. This prevents the development of a coordinated bargaining system as advocated by Art. 84 of LET. Moreover, company-level agreements are basically configured as an alternative to national collective agreements, indirectly casting doubts on their effective binding nature.

## 3. Compulsory Arbitration: the Cases of Deadlocks on Derogations from Collective Agreements (Art. 82.3 of LET)

If disagreement upon possible derogations from collective agreements arises, various solutions can be put in place to overcome possible stalemate, according to Art. 82.3 of LET. Whereas requested by either party, a joint committee must be called upon to solve the issue (Art. 82.3 par. 7 of LET). However, if the intervention of the joint committee is not expressly requested, or if the committee is unable to put forward a solution, the parties may resort to out-of-court forms of conflict resolution in the case of disputes happening at the national or regional level, under Art. 83 of LET (Art. 82.3 par. 7 of LET). If still no solution is found, one of the parties – most likely the employer if workers reject the derogations proposed – may require the intervention of the National Advisory Commission on Collective Agreements (CCNCC) – in the case of companies with branches in more than one Autonomous Community – or of the relevant authority within the Autonomous Communities in all other cases (Art. 82.3 par. 8 of LET).

The new par. 8 of Art. 82.3 of LET sets the obligation to initiate public arbitration procedures – i.e. the jurisdiction must not be indicated, it suffices that one of the parties submits a request – through the CCNCC, which consists of a tripartite structure involving also representatives from the public administration who are called upon to settle the dispute. With respect to the voluntary nature of the arbitration mechanism that traditionally acts as a safeguard of the bargaining autonomy in Spain, Law No. 3/2012 attributes to it special constitutional significance as it is related to the protection of productivity and freedom of enterprise (Art. 38 of the Constitution). Art. 82.3 of LET specifically refers to major changes in terms of work organisation, which could undermine the binding character of collective agreements. In such a situation it is not possible to speak of a proportional reduction of constitutional rights at the expense of the right to collective bargaining. Spanish case law admits the introduction of compulsory arbitration procedures only in the event of exceptional circumstances or if justified by reasons of general interest.

Alternatively, the recourse to mandatory arbitration procedures agreed upon over collective autonomy is a viable avenue to pursue.

The ability to structure and regulate issues through inter-professional agreements having force of law concluded at national and regional (Art. 83 of LET) could prevent the recourse to mandatory forms of dispute settlement procedures. In this sense, some sectoral agreements at the

national level have introduced compulsory arbitration in the case of disagreement over negotiations on opt-out clauses.
Leaving aside the dogmatic character of some of the problems accompanying the provisions laid down in par. 8 of Art. 82.3 of LET, particularly relevant are the practical consequences that the present regulation entail. Operational problems could arise due to delays in courts caused by an increase in the number of disputes on internal flexibility mechanisms or in the appeals against the decisions resulting from arbitration procedures.
In historical terms, the legal community favoured the recourse to mandatory arbitration for labour dispute resolution which brought about a change in the relationship between collective bargaining and business management. As a consequence, while in 1994 collective bargaining influenced decision-making and enhanced the role of unions in conflict resolution processes – through Art. 85.1 of LET[10] – now it is employers who may unilaterally impose amendments to collective agreements for the benefit of the company.

## 4. Reviewing the Rules on Bargaining Legitimacy

Changes in bargaining legitimacy resulting essentially from RDL No. 7/2011 could be introduced only if supported by a wide political consensus. Measures of this kind are usually justified by technical and legal grounds, although some of them are just a matter of political choice.
This is the case of the new role given to company-level union representatives (Art. 87.1, par. 2 LET) in the bargaining process. In the Spanish system, the power to negotiate enterprise- or lower-level agreements is given to works councils and workers' representatives at the various plants or, alternatively, to branches from the most representative union which operate in company representation units. Until now, there was no preference in terms of bargaining legitimacy, but RDL No. 7/2011 established that "participation in negotiations will be permitted to unions if they agree so". This aspect has major political implications, as clearly pointing to a further involvement of trade unions through company-level union branches, both in terms of negotiation and promotion of internal flexibility and in the processes of workers' relocation (Art. 40, 41, 51 and

[10] See M. E. Casas Baamonde, *Arbitrajes de consultas, judicialización de las relaciones laborales y estructura de la negociación colectiva*, *Relaciones Laborales* No. 2, 1994, 21.

82.3 of LET). It also gives unions – especially the most representative – more bargaining and consultation power, as non-unionised representatives are excluded from the negotiation process.

As for non-sectoral negotiation, Art. 87.1 of LET identifies three possible agreements: enterprise- and lower-level agreements, so called "*franja* agreements" and agreements signed at the level of corporate groups or networks of enterprises. Regarding agreements directed to a group of workers with a specific professional profile" (*franja* agreements), bargaining legitimacy will be granted to union branches the members of which are appointed by this group of workers through personal, free, direct and secret ballot (Art. 87.1 par. 4 of LET).

As for negotiation for agreements in corporate groups, the absence of specific regulation poses problems of legal certainty, especially as the rules concerning bargaining legitimacy are very unclear. RDL No. 7/2011 provides a special set of rules in these cases (Art. 87.1 par. 3), granting bargaining legitimacy to unions that – pursuant to Art. 87.2 of LET – meet the criteria of representativeness concerning sectoral agreements.

Drawing on the evolution of case law on these matters and bargaining practices in corporate groups, these legal provisions may appear too strict, as they do not provide bargaining legitimacy to workers' representative bodies or trade union branches set up within corporate groups. The law should have taken into consideration that in recent years the role of workers' representatives – and union branches – within corporate groups has been reinforced by EU Directive 94/45 as well as by Spanish legislation by means of Law No. 10/1997. For this reason, legitimacy could also have been attributed to representative bodies set up within corporate groups or to those trade unions mostly represented in workers' representative bodies.

A major amendment in the regulation of sectoral bargaining units regards the introduction of specific rules for those sectors where collective bargaining does not take place due to an absence of representative bodies, establishing for these cases certain criteria to be met by both trade unions and employers to gain bargaining legitimacy (Art. 87 and 88 of LET). Bargaining legitimacy is attributed to most representative trade unions and employers at the national or regional level in the sector to which the subsector refers or in geographical areas where no collective agreement applies. The new regulations do not, however, lay down the specific criteria to be fulfilled, posing major problems in terms of legal certainty in identifying the bargaining parties.

## 5. Period of Validity and Renewal of Collective Agreements

One of the most significant problems of the Spanish bargaining system lies in the paralysing effect generated by the automatic extension of collective agreements (Art. 86.1 of LET) or by the prolongation of the period of validity of collective agreements after their expiration (art. 86.3 of LET). In this respect, no specific mechanism has been put in place in the past to encourage the renewal of agreements, with the 2012 reform which is the only attempt to lay down some significant changes to stem the downsides of this paralysis.

An important innovation is the scope to revise the agreement during the period of validity (Art. 86.1 par. 2 LET). This possibility was not expressly provided in legislation before the reform, often questioning the legitimacy of a revision during the period of validity of the agreement, that was finally acknowledged by case law.

Recently-issued legislation introduces the scope to review the agreement provided two requirements are met. First, the review must be agreed on by all the signatories parties – since there is no obligation to review an agreement that has not expired, according to Art. 89.1 of LET – and, second, the review can be carried out by all the subjects who have acquired bargaining legitimacy under Art. 87 and 88 of LET. This means that participation in the review process is not limited to the signatories. This can produce a paradoxical effect in that bargaining parties that did not sign the collective agreement can be involved in the review process too and this can prejudice the balance of an agreement.

As for the validity of the collective agreement after its expiration, if no agreement is reached by the parties during the review process, the previous agreement continues to be valid. This means that before the reform of 2012 only clauses concerning obligations expired, whereas normative clauses remained valid until the enforcement of a new agreement, unless the parties had agreed otherwise (art. 86.3 of LET).

This provision is of a clear political fashion, as it is aimed at strengthening the bargaining position of workers' representatives. Also, it limited the regulatory gaps in the governing of working conditions in the period preceding the conclusion of a new agreement, ensuring legal certainty and industrial peace. Arguably, it also has some drawbacks in that it does not favour the renewal of agreements, stiffening the bargaining process – upon the assumption that higher-level agreements could not affect lower-level agreements in the period of validity after their expiration – and hampering the development of new bargaining units.

Law No. 3/2012 establishes that the collective agreement remains in force during the review process and potential out-of-court conflict resolution procedures for a maximum of one year, after which the agreement is no longer valid unless otherwise agreed[11]. After this period, the applicable higher-level collective agreement is implemented.

It is essential to note that the focus is on the contractual relationship between the parties. Therefore, the parties can still negotiate the clauses of the agreement that remain in force after its expiration, and the duration of the additional period of validity. This aspect can be extremely important to avoid regulatory gaps in the absence of higher-level collective agreements.

Two issues are of interest here, namely the duration of the additional period of validity and its effects, as well as the problems of regulatory gaps in case higher-level collective agreements are not implemented. Regarding the first issue, a time limit aims at facilitating the renewal of agreements and a one-year extension which seems reasonable.

With regard to the second issue, problems could arise in situations in which there are no valid collective agreements concluded at higher levels. Problems due to regulatory gaps exist also in other countries that have adopted different solutions in line with their own legal system or by means of specific statutory provisions.

Devising a common framework that goes beyond minimum standards is a complicated matter, given the technical nature of the provisions laid down in agreements already expired. In this regard, mention should be made of a court decision that rejects the application of so-called *convenios extra-statutarios* – i.e. agreements that do not comply with the LET – after their expiration, as these are a "consequence of a pact concluded autonomously by the parties and which expressly provided a fixed duration, and for which there is no reason to prolong its validity after its expiration, contravening what had been previously agreed upon" and "its implementation during its validity is not indicative of the will of the employer to grant a greater benefit than those imposed by the applicable law or collective agreements" [12].

It is difficult to provide a forecast of future scenarios. These reforms could speed up negotiations, but also exacerbate conflict, lead to an increase in out-of-court conflict resolution procedures or, less likely, employers might continue applying collective agreements after their

[11] Law No. 3/2012 amended RDL No. 3/2012 that envisaged a period of two year.
[12] See STS 11-5-2009 (RJ 2009, 4548).

expiration[13]. When a sectoral agreement expires, it is reasonable for employers to carry on applying it, as a supplement of the provisions adopted at the company level to make up for the absence of sectoral collective agreements. Another solution could be the conclusion of sectoral agreements providing minimum standards, to avoid regulatory gaps at the sectoral level[14], that should be signed by the most representative social partners. In any case, in consideration of potential problems that could arise in terms of legal certainty and conflict, it seems also reasonable that the dissenting parties resort to arbitration procedures before the end of the period of prolongation of the agreement, reducing the number of controversial issues to be solved through subsequent dispute resolution procedures.

## 6. Concluding Remarks

In conclusion, businesses' demand in terms of internal flexibility will significantly affect the future of collective bargaining. In such a scenario, a new cultural approach is required, with collective bargaining that will become increasingly important within the national industrial relations system. Without amending the bargaining structure, the current reforms may result in a completely unstructured system that could ultimately undermine the socio-economic role of bargaining and the normative character of collective agreements. To avert this risk, it will also be necessary to strengthen employee representation and participation within companies and enhance their role in the collective bargaining processes.

[13] See. J. Cruz Villalón, *Procedimientos de resolución de conflictos y negociación colectiva en la reforma de 2012* in García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012, 414.

[14] In Spain, attempts have been made in this respect with the so-called *Acuerdo Interprofesional de Cobertura de Vacíos* of 1997.

**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

For further information about the E-journal and to submit a paper, please send a mail to *LS@adapt.it*.

CSMB Centro Studi Marco Biagi
www.csmb.unimore.it
UNIVERSITÀ DEGLI STUDI DI MODENA E REGGIO EMILIA

ADAPT International.it
Building the future of work together