

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 2, No. 2 May-June 2013



**ADAPT**  
[www.adapt.it](http://www.adapt.it)  
UNIVERSITY PRESS

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# The Primacy of Company-level Agreements in Spain. An Unusual Approach for Continental Europe

Antonio Ojeda Avilés \*

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## 1. The Increasing Relevance of Company-level Agreements in Spain: A Comparison with Italy and France

Numerous labour reforms have been introduced in our country as a consequence of the 2008 international financial crisis. The one explored in the present paper brought about a “conceptual revolution” of unprecedented proportions, not necessarily because it contributed to reforming company-level agreements – a well-established collective tool – negotiated by and in favour of employers, but rather because it gives primacy to plant-level bargaining, breaking with a century-old Spanish and European tradition that assigned relevance to agreements reached at a higher level, as set out in Article 83 of the Spanish Workers’ Statute (ET) of 1980 and as clarified, to some extent, by the *prior in tempore* criterion contained in Article 84.

Thus far, collective agreements at the national or regional (autonomous community) level have determined the criteria used to regulate the relationship between agreements of different levels and other issues concerning the bargaining structure. Yet in the absence of further indications on the matter, the agreement concluded first would prevail, regardless of the bargaining level. The clear purpose of the first-in-time rule was to maintain as long as possible previously established – and presumably worse – working conditions, until quite suddenly the 2008

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financial turmoil turned the tide, with older agreements ending up being the ones actually providing the most favourable working conditions. Consequently, some economists suggested modifying the first-in-time criterion of primacy, adopting the principle of *lex posterior*, but, as expected the proposal was not welcome. The 2011 legislation moves in a different direction, establishing that company-level agreements prevail on certain matters, though being subject to agreements concluded at a higher level, in that those would prevail:

Unless a collective agreement established at the national or regional level pursuant to Article 83.2 provides different rules on the collective bargaining structure or on the relationship between agreements of different level.

After the amendments laid down in Law No. 3/2012, Article 84.2 of the ET reviewed the priority assigned to company-level agreements in clearer terms it rejected the foregoing conditions. According to paragraph 2 of Article 84:

The provisions laid down in company-level agreements – that may be negotiated at any time during the period of validity of higher-level collective agreements – prevail over any sectoral agreement at the national, regional or lower level in the following areas: a) the amount of base salary, bonuses and other allowances, including those related to company performance; b) remuneration for overtime and shift work; c) working hours and working day, the organisation of shift work and annual leave; d) the adaptation at company level of the job classification system; e) some aspects of the hiring procedures that, pursuant to this Law, fall within the scope of company-level agreements; f) measures to promote work-life balance; g) any other measure established by the agreements mentioned in Article 83.2. Equal priority in these matters is granted to collective agreements concluded by a group of employers who band together for organisational or productive reasons and are specifically indicated and referred to in Article 87.1. Collective agreements under Article 83.2 are not granted primacy as established by the present paragraph.

Since its enforcement in 2011, the primacy of company-level agreements was intended to improve the collective bargaining structure, promote a bargaining model that could move closer to companies as well as sectoral-level bargaining that could better adapt to the specific conditions of each economic sector. The 2012 legislation only introduced minor changes in the short preamble devoted to explaining the rationale of the reform: the amendments made to collective bargaining serve the purpose of ensuring that collective bargaining is a useful tool – rather than an obstacle – to adapting working conditions to the specific circumstances of the company, in relation to certain matters which are closely related to the



company, and for which a special regulation is justified as a means to improve labour relations in the productive and economic context to which it refers (Explanatory Memorandum, IV).

Yet the main problem of the Spanish bargaining system – i.e. the proliferation of provincial-level agreements – remains unsolved, despite it being a serious issue leading to the reform not producing the expected results.

There is no consensus among experts when it comes to assessing the benefits of a bargaining structure that prioritises company-level agreements, and, although human resources managers and economists have praised them for their adaptability to the real interests and needs of companies<sup>1</sup>, legal opinions have warned against the “dispersion effect” they may produce, and their impact over both the European as well as the Spanish collective bargaining system. Certainly in need of adjustments, our bargaining system does not deserve to be set aside and replaced by another world-renowned, though totally opposite model – i.e. a horizontal company-level bargaining with no pre-established common criteria – as is the one in the United States<sup>2</sup>.

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<sup>1</sup> In 2012, the newspaper *Expansión* carried out some interviews and published the opinions of human resource managers of companies such as Leroy Merlin, Kellogg's, Zurich or NH Hotels.

<sup>2</sup> F. Durán López is a discordant voice. In *Expansión*, he praises the virtues of the provisions on CEPs for their clear and precise formulation and clarifies his position against inter-professional and state- or regional-level agreements. Other critical views include T. Franco Sala *La reforma de la negociación colectiva*, in Various Authors, *La reforma laboral en el Real Decreto Ley 3/2012*, Tirant lo Blanch, Valencia 2012, 64 ff.; J. Gorelli Hernández, *Las nuevas reglas sobre concurrencia de convenios colectivos*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, n. 28, 2012; Valdés Dal-Ré, *La reforma 2012 de la negociación colectiva: la irrazonable exacerbación de la función de gestión*, in *Relaciones Laborales*, monographic issue on the 2012 labour reform, 221 ff.; L. Mella Méndez, *La nueva estructura de la negociación colectiva en la reforma laboral de 2012*; S. Olarte Encabo, *El papel de los interlocutores sociales ante la reforma de la negociación colectiva: retos y opciones*, in *Revista de Derecho Social*, n. 58, 2012; M. Llano Sánchez, *La negociación colectiva*, in A. Montoya Melgar and J. García Murcia (eds.), *Comentario a la reforma laboral 2012*, Civitas, Madrid, 2012; F. Perán Quesada, *La preferencia aplicativa del convenio colectivo de empresa y sus efectos sobre la estructura de la negociación colectiva* in *RGDTSS*, n. 33, 2012; A. Baylos Grau, J. Cabeza Pereiro, *La lesividad de los convenios de empresa concurrentes con los de sector al amparo del art. 84.2 ET*, in *Revista de Derecho Social*, n. 59, 2012; F. Vila Tierno, *La flexibilidad interna a través de la reformulación de la estructura de la negociación colectiva tras las sucesivas reformas laborales. Del real decreto ley 7/2011 a la ley 3/2012 (de las razones y los efectos)*, in *RGDTSS* 33 (2012); M. Correa Carrasco, *La ordenación de la estructura de la negociación colectiva tras las recientes reformas laborales*, in *Revista de Derecho Social*, 2012, n. 59; E. Blazquez Agudo, M. G. Quitero Lima, *La rauda aplicación del Real Decreto-ley 3/2012, de 10 de febrero (hoy ley 3/2012 de 6 de julio), versus el tormentoso calendario de aplicación de la ley 27/2011, de 1 de agosto. Contrapuntos del*

In the following paragraphs a more detailed analysis of the matter will be provided, though it must be noted at the outset that the primacy of company-level agreements is limited by the structure of collective bargaining and by the size of companies in Spain. Contrary to what is often assumed, the labour reform – dismissed by the Government as “aggressive” – has not followed the guidelines provided by the European Union, setting down its hierarchical criteria to regulate work organisation and employer’s power. Recommendations No. 2, 5, 6 of the European Commission to Spain for 2012, laid down within the framework of Europe 2020, focus on employment issues. Their aim is to achieve a rapid increase in retirement age, to improve labour market and active employment policies particularly those for youth, and, to reduce poverty through specific action. Reference – if general - to the launch of a new era of flexicurity is only made in the European Employment Strategy, where it is argued that it is important to “engage all participants in strengthening the flexicurity components and strengthening control mechanisms of national flexicurity arrangements”.

Measures which are akin to the company-level agreements’ primacy (*convenio de empresa prioritario*, from now on simply as CEP) have been introduced almost concurrently in other European countries such as Italy and France. These measures, differing in many respects from one another, seem to originate from the same assumption, and surely from the attempt to rationalize the business costs.

In France, company-level agreements are called “adaptation agreements” while in Italy – yet with some differences in terms of origins – they are named “proximity agreements”.

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*voluntarismo legislativo actual*, in *RGDTSS*, n. 32, 2012; M. A. Purcalla Bonilla, C. H. Preciado Domènech, *Cambios en la negociación colectiva tras la Ley 3/2012: breves notas para el debate*, in *RGDTSS*, n. 31, 2012; A. Merino Segovia, *La reforma de la negociación colectiva en el RDL 3/2012: las atribuciones del convenio de empresa y novedades en la duración y vigencia de los convenios colectivos*, in *Revista deDerecho Social*, n. 57, 2012. A more technical and neutral approach is provided by A. Sempere Navarro, R. Martín, Jiménez, *Claves de la reforma laboral de 2012*, Thomson-Aranzadi, Cizur Menor, 2012.

## 2. Collective Bargaining Structure

Collective bargaining has its own structure in every country, depending on what is laid down in agreements concluded by social partners, as well as on the negotiating power of large trade unions' confederations and employers' associations.

Over time, social partners have established a hierarchy between agreements of different levels, and although the Government has been tempted to intervene every time the bargaining structure becomes fragmented and dispersed<sup>3</sup>, its involvement into what is considered a fundamental collective right has been scarce thus far, allowing collective bargaining to develop uniquely in each country. Differences in the bargaining structure may arise especially in the presence of company unitary representations, which provide for negotiation practices which are distinct from union bargaining<sup>4</sup>. Generally speaking, collective bargaining has an autonomous structure, with the rules of coexistence between negotiating parties and between the various available collective tools that are established by the industrial relations system itself, as in the definition of J. Dunlop.

On some rare occasions, the legislator has intervened extensively, producing situations bordering on lack of autonomy, up to the point that one might dare speak of "heteronomous" structures. Perhaps Spain is the European country in which the legislator has been most active in establishing rules transforming the bargaining structure, going way beyond the simple setting of framework conditions. Both trade union bargaining and unit bargaining practices are fairly codified, as the Spanish legislator

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<sup>3</sup> By way of example, the Donovan Report in the UK criticized the existence of a formal and an informal bargaining system, that is sectoral and the company-level bargaining, for they frequently provide divergent views despite the prevalence assigned to the former. See The Royal Commission on Trade Unions and Employers' Association, *Report*, Her Majesty's Stationery Office, London, 1968.

<sup>4</sup> The Donovan Report mentioned above sets an example of the numerous amendments made to the system of sectoral agreements, formally prevailing over informal collective bargaining at the company level, by way of company-level agreements, de facto making sectoral agreements progressively powerless. This state of affairs caused the informal company-level bargaining system to exert increasing influence on industrial relations (par. 154). The analysis of the six changes and the prophecy of the necessity to modify the bargaining system through legislative intervention is available in R. Banks, *The Reform of British Industrial Relations: The Donovan Report and the Labour Government's Policy Proposals*, in *Relations Industrielles / Industrial Relations*, n. 2, 1969, 333 ff. See also the interesting analysis by A. Fox, A. Flanders, *The Reform of Collective Bargaining: from Donovan to Durkheim*, in *British Journal of Industrial Relations*, n. 2, 1969, 151 ff.



prefers to define and assign functions *a priori*, rather than intervening afterwards, adopting an approach which characterises International Law in addressing and resolving concurrency conflicts, i.e. by indicating *tout court* the subject or – in this case – the agreement that prevails over the others involved. For our purposes, the most relevant concurrency rules are laid down in the ET:

- a) Principle of favourability, in the case of conflict between rules of different natures - state, collective or individual - (Article 3 of the ET).
- b) Principle of *prior in tempore* in the case of conflicts between collective agreements. According to the first-in-time principle, it is the older agreement that prevails (Article 84 of the ET).
- c) The scope for state- or regional-level agreements to establish other rules regulating conflicts between agreements (Article 83 of the ET).
- d) The scope for company-level agreements to opt out from certain working conditions established in the higher-level agreement in force, on reasonable grounds, such as current or expected economic loss, or persistent decreases in revenue or lower than usual sales (Article 82 of the ET).
- e) The scope to modify company agreements on certain matters, similarly to what we have seen for collective agreements, pursuant to Article 41 of the ET, yet if no amending agreement is reached, the employer can unilaterally take action and modify the agreement.
- f) The scope for some regional agreements to deviate from the provisions laid down in national-level agreements in certain subjects (Article 84 of the ET).
- g) Absolute primacy of company-level agreements in certain matters, pursuant to Article 84 ET, which is the focus of the present analysis.

The reader will surely find these rules unsystematic and even contradictory, though there is a reason for such a complex system. In Spain, collective agreements concluded with the most representative social partners of the sector (50%+1) are extended to all workers and employers in the same industry, a formula that has some parallels with the U.S. system. The application of the *erga omnes* principle dates back to the time

of the General Franco dictatorship, when those who negotiated were on the one hand corporatist unions made up of workers' representatives; and on the other hand were employers who were automatically affiliated to them. Such agreements were equal to laws and for this reason the corporatist legislator required them to abide by rigorous and lengthy state standards. Paradoxically, upon transition to democracy in 1976 the unions preferred to keep the *erga omnes* validity of agreements and the legislator kept some control over them, although all in respect of union and bargaining autonomy as laid down in the Constitution of 1978. Currently, the ET is quite respectful of the freedom of the negotiating parties, but the extraordinary validity of "statutory" agreements (*convenios estatutarios*) has led the legislator to set forth a number of more stringent rules, among which are those that have just been mentioned when referring to the bargaining structure and to cases of conflicting agreements.

### 3. Antecedents in Spanish History

These provisions owe very little to comparative models, which are limited to the French and the Italian case, as we will discuss later. The closest antecedent, although dating back to distant times, is to be found in Spain itself, namely the Collective Agreements Act of 1973, adopted during the dictatorship, which established that Company-level Agreements (capitalized) would apply to the exclusion of any other, unless otherwise agreed (Article 6). This was not intended to set forth the principle of company unity, as it would have been enough to say that one single agreement would apply to the whole company, no matter which level, whereas this was an express reference to company-level bargaining. The legislator came to accept the legitimacy of state-level agreements, and even recognized the power to establish bargaining structure, but it was still wary of agreements between employers and workers to levels higher than company level<sup>5</sup>. Resistance to state-level agreements had led to a proliferation of provincial agreements that have produced a very complex bargaining structure, with an excessive and redundant proliferation of agreements, with intermediate bargaining units that have come to play an increasingly important role in the negotiation process.

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<sup>5</sup> 1958 Collective Bargaining Law Act introduced a *numerus clausus* for bargaining units, which culminated in the interprovincial level regulated by Art. 4.

Against a veritable plethora of agreements, democratic governments have developed a complicated system of weights and counterweights to achieve a more balanced and autonomous bargaining structure. Suffice to recall the primacy of agreements of highest level, recognized since the first 1980 ET, which allowed state and regional agreements to establish the structure of collective bargaining and to set the rules for resolving conflicts between agreements of different levels, also recognizing the principle of complementarity. Although no excessive “imperialism” on the part of highest-level agreements was detected, some Autonomous Communities warned of a possible “tyranny” that led to a modification of the ET, making it possible to derogate from the application of the higher-level agreement principle by means of an agreement of lower level bearing certain characteristics. Against the odds, the reaction to this reform was just the opposite, as state-level agreements drew on an array of clauses on competition and complementarity placing constraints on lower agreements. Evidence can be found in the whole range of limiting and standardising clauses laid down in agreements, but it may be enough to consider that the majority of confederations started imposing a hierarchy between national-level and local-level sectoral agreements, that should in all cases be negotiated by the two main central workers’ federations and employers’ confederation, thus targeting enterprise-level agreements that were mostly negotiated by works councils and the employers.

No distinction is made in our country in terms of what must be negotiated at each level; so that state-level agreements have come to regulate all subjects and all agreements have the power to establish the bargaining structure. In this respect, Spain does not differ much from other European countries, as the purpose of collective agreements has always been that of preventing social dumping, with competition that should be based on the quality of products or on the efficiency of organization, rather than on working conditions, as this may otherwise reach back to the aberrations of the first decades of the Industrial Revolution.

Any opt-out or opening clauses are generally accepted in certain cases, either by law or by sectoral agreements, yet with a difference: whereas in Europe the sectoral agreements generally establish minimum standards at the sectoral level, with company-level agreements containing additional improvements<sup>6</sup>. In Spain the relationship between collective agreements is

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<sup>6</sup> This is the case of Germany. Here, some 250 collective agreements (*Tarifverträge*) were concluded at the national or regional level in 2009, and company-level agreements did not necessarily introduce more favourable provisions for workers. See R. Bispinck, R.

not governed by the principle of the more favourable rule but by *the prior in tempore* principle, since equal status is granted to all agreements regardless of their level. This is a major difference with other countries, in turn offset by the overall effectiveness or *erga omnes* validity of Spanish collective agreements. A system based on uniform standards established at the sectoral level combined with enterprise-level agreements of lower importance breaks down when the American model comes to the fore and begins to exert influence not only in Europe but worldwide. Even in countries like Japan, where unions have strong centralized organization, bargaining takes place at the firm level and simultaneously in the “big spring offensive”. The picture that prevails today in the world is that of an “invertebrate” enterprise-level bargaining, although there do exist some forms of standardisation, such as “model” agreements concluded by large companies, which serve as a point of reference in their respective sector. Concerning Spain, the primacy of state-level agreements was limited by the reform of 2011, when bargaining units were no longer considered complementary to one another but rather of equal relevance. This left state-level agreements with only the power to define the bargaining structure and concurrency criteria<sup>7</sup>. Then, the government in 2012 made a further step forward establishing that highest-level agreements do not prevail over company-level bargaining. The problems arising after the reform’s enactment concerned conflicting company-level agreements – now granted primacy over all others – and state-level agreements, which, according to extant legislation, were prevailing over all others, as will be discussed later.

Undoubtedly, however, the structure of collective bargaining has changed significantly, to the point that Professor Marín Alonso proposed a new criterion to establish primacy, which he termed the “closeness” or “proximity” principle<sup>8</sup>. In this respect, one must bear in mind that

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Schulten, *Sector-level Bargaining and Possibilities for Deviations at Company Level: Germany*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2011, 1.

<sup>7</sup> In this connection, one might note that Royal Decree-law No. 7/2011 repealed the principle of complementarity and established the primacy of company-level agreements, while subjecting company-level agreements to agreements concluded at higher level of bargaining.

<sup>8</sup> I. Marín Alonso, *La progresiva desprotección del trabajador público frente al trabajador común : de las singularidades de la regulación individual y colectiva al desmantelamiento del derecho a la negociación colectiva*, forthcoming; H. Ysàs Molero, *La articulación de la negociación colectiva sectorial y de empresa en Francia : ¿un modelo válido para España?* in *Relaciones Laborales*, n. 3, 2012, 63 ff.

agreements falling under the *prior in tempore* principle (Art. 84.1 ET) or under the principle of highest level (Art. 83 ET) prevail over all other agreements in those subjects that do not fall under the new primacy rule, in addition to other exceptions that will further be discussed in this paper.

#### 4. Comparative Law

The idea of company-level agreements' primacy as a means to address the 2008 crisis is not new, and the first measures of the kind appeared well before the crisis in France, followed by Italy and Spain a few years later, in the summer of 2011. A comparison with these systems will help assess strengths and weaknesses of the Spanish model.

The “principle of substitution” appeared in France through laws 2004-391 and 2008-789, amending Article 132-23 of the Labour Code<sup>9</sup>, as a way to adapt inter-sectoral agreements to specific conditions of businesses or plants. Although with reference to minimum wages, job classification and social security issues, lower-level agreements cannot deviate from the minimum standards set out in higher-level agreements, in other matters: “they can derogate in whole or in part from the applicable standard by virtue of an agreement or arrangement with a wide scope of application in geographical or sectoral terms, unless the higher-level agreement provides otherwise”.

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<sup>9</sup> Article L132-23 of *Code du Travail* (Amended by Law No. 2004-391 of May 4, 2004 - art. 42 JORF May 5 2004 and repealed by Ordinance No. 2007-329 of March 12, 2007 - art. 12 (VD) JORF March 13, 2007/8) states that “*La convention ou les accords d'entreprise ou d'établissements peuvent adapter les dispositions des conventions de branche ou des accords professionnels ou interprofessionnels applicables dans l'entreprise aux conditions particulières de celle-ci ou des établissements considérés. La convention ou les accords peuvent comporter des dispositions nouvelles et des clauses plus favorables aux salariés. Dans le cas où des conventions de branche ou des accords professionnels ou interprofessionnels viennent à s'appliquer dans l'entreprise postérieurement à la conclusion de conventions ou accords négociés conformément à la présente section, les dispositions de ces conventions ou accords sont adaptées en conséquence. En matière de salaires minima, de classifications, de garanties collectives mentionnées à l'article L. 912-1 du code de la sécurité sociale et de mutualisation des fonds recueillis au titre du livre IX du présent code, la convention ou l'accord d'entreprise ou d'établissement ne peut comporter des clauses dérogeant à celles des conventions de branche ou accords professionnels ou interprofessionnels. Dans les autres matières, la convention ou l'accord d'entreprise ou d'établissement peut comporter des dispositions dérogeant en tout ou en partie à celles qui lui sont applicables en vertu d'une convention ou d'un accord couvrant un champ territorial ou professionnel plus large, sauf si cette convention ou cet accord en dispose autrement*”.



The scope to impose less favourable conditions than those detailed in the applicable sectoral agreement is not permitted with reference to minimum wage, and this exception ensures to some extent a standardisation of the main working conditions, although other aspects related to remuneration fall within the scope of enterprise-level bargaining. However, in other areas, such as working hours, there are only a few framework legal provisions. Moreover, sectoral agreements can exert some power over company-level agreements, virtually with the same rules laid down in our 2011 legislation, repealed in 2012.

Almost concurrently, yet with prior consultation with the social partners, that proved unsuccessful in Spain<sup>10</sup>, the Italian government adopted the *Manovra di Ferragosto* with the Decree Law of August 2011, where Article 8 regulated so-called “proximity agreements”<sup>11</sup>. This is a far more complex regulation and almost as radical as the French one, with three main features:

a) Power is assigned to “proximity” agreements to deviate from national-level agreements, as well as from “the legal provisions that regulate the subjects referred to in paragraph 2”, upon compliance with the Constitution as well as EU and International Law. EU and international standards are irrevocable, which raises the question of what solution is to be adopted when neither of them sets minimum standards on a specific issue or when such standards are defined so broadly that enforcement is impossible.

b) Primacy is granted also in very important matters related to the individual or collective termination of the employment contract, with the exception of discriminatory layoff, women’s dismissal in the case of marriage, pregnancy up to one year after childbirth, adoption or parental leave. However, with regard to wages or working weeks, these provisions do not seem to reach much further than the Spanish ones. Other matters

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<sup>10</sup> The Explanatory Memorandum of Royal Decree-Law No. 7/2011 clarifies how social parties required negotiating reform proposals, without however reaching a satisfactory result for months, until the Government intervened. In Italy, the social partners and the government had negotiated a significant reform drawing on the agreement of 2 January 2009 which led to the introduction of the scope for company-level agreements to deviate from national-level agreements. See Di Stasi, *Diritto del Lavoro e della Previdenza Sociale*, Giuffrè, Milan 2011, 16.

<sup>11</sup> “*Sostegno alla contrattazione collettiva di prossimità*”, Art 8 of Decree-Law No. 138/2011 (converted into Law by Act No. 148/2011 and subsequent amendments).

in which the Italian “proximity” agreement can prevail over other agreements are those relating to audiovisual control systems, new technologies, worker tasks, job classification and grades, and the whole universe of possible contractual arrangements as well as the shift from one employment contract to another. A rather unusual series of subjects with respect to what we are used to in our country, as will be seen later.

c) However, in one respect “proximity” agreements do differ significantly from Spanish CEPs, as they refer not only to agreements signed at the company level, but also to those signed at the sectoral level by most representative trade unions or union representatives in the company. These acquire *erga omnes* validity, provided they are signed by the most representative unions. In other words, there is no real opposition between company-level agreements and sectoral agreements at any level, as also these can prevail over laws and national-level agreements. It is a relative “proximity”, therefore, in the sense that an agreement signed at the local or provincial level is certainly “closer” to companies than national-level agreements or than the law itself. To a certain extent, conflict between agreements is limited, as striking as it may appear to us the possibility granted to “proximity” agreements to deviate from the law itself. However, the primary role played by trade unions gives them more power to control bargaining as compared to Spain, where company-level agreements are usually negotiated by the workers’ representatives in the company, much more independent from trade unions than union representatives within the company. Moreover, even though the focus of the paper is not the *erga omnes* validity of agreements, it is still worth pointing out that this system presupposes a considerable additional effort, especially in a country where agreements are usually only applied to the members of the signatory organizations<sup>12</sup>.

A comparison with other countries would be incomplete without an overview of another major continental bargaining paradigm, i.e. the German system. Bispink and Bahnmüller have analysed the progressive decentralization process brought about by opt-out clauses set out in

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<sup>12</sup> One might note that in the public sector the validity of these agreements has been regulated by Legislative Decrees No. 29/1993 and 165/2001, according to which collective agreements in the public sector have *erga omnes* effect when they are signed by trade union organizations representing the majority of workers. A similar trend can be found in Italy and France regarding the criteria for granting unions “representative capacity”. In the Italian case, this is granted if two criteria are met, i.e. the number of members and the number of votes obtained at the elections of union representatives within the company.

sectoral agreements, through which employers can establish less favourable conditions than those fixed by higher-level agreements<sup>13</sup>.

This is why Bispinck calls this phenomenon “controlled decentralization”. The process began in the metal industry during the mid-eighties when the sectoral agreement gave employers the right to organise a working day independently, in exchange for a gradual reduction of the overall working time down to a maximum 35 hours per week.

After the German reunification in 1990, opt-out clauses (“hardship clauses”) were introduced for companies facing difficulties located in the former East Germany<sup>14</sup>, and over time, the practice spread to West Germany as well. In Germany, as well as in Italy, employers can evade the application of collective agreements by pulling out of employers’ associations, a phenomenon that is gathering pace due to the widening gap between employers’ associations and their members. In this way, employers can either independently negotiate with unions less favourable working conditions, thus challenging the role of employers’ associations, or simply cease to apply the relevant sectoral agreement. Significantly, at present and as indicated by Schulten<sup>15</sup>, Germany has one of the lowest levels of bargaining coverage in Western Europe.

Consequently – and quite surprisingly – the recent attempts on the part of the German government to impose less favourable working conditions have been in place for quite some time by means of agreements between unions and employers, whereas the government started no earlier than in the first decade of the 21<sup>st</sup> century with the Hartz strategy to review legal minima and reduce workers’ protection. In addition, the rules regulating agreements’ validity after their expiration are still in place, falling under former Article 4 of the Collective Agreements Act, which extends validity of normative clauses – i.e. *Rechtsnormen* – until a new agreement is reached.

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<sup>13</sup> R. Bispinck, *Kontrollierte Dezentralisierung der Tarifpolitik - Eine Schwierige Balance*, in *WSI-Mitteilungen*, n. 57, 2004, 237 ff.; R. Bahn Müller, *Dezentralisierung der Tarifpolitik - Restabilisierung des Tarifsystems?* In R. Bispinck, T. Schulten, (eds.), *Tarifautonomie der Zukunft. 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick*, publisher VSA, Hamburg, 2010, 81 ff.

<sup>14</sup> For an overview of the process, see R. Bispinck, T. Schulten, *op. cit.*, 2.

<sup>15</sup> T. Schulten, *Das deutsche Tarifvertragssystem in europäischen Vergleich*, in R. Bispinck, T. Schulten, (eds.), *Wohin treibt give Tarifsystem?*, VSA, Hamburg 2007, 217 ff.

## 5. Limitations to the Primacy of Company-level Agreements

The ET mentions company-level agreements with no other details, which can be found instead in the relevant provisions, especially to determine who is authorized to sign agreements and what procedural rules must be complied with to ensure validity. In this respect, the most controversial point of this new regulation relates to the scope to extend primacy to agreements of different nature, that are similar to company-level agreements, but which do not fall under the definition of “company-level agreements” *stricto sensu*, despite the very many commonalities which may bring them closer to “company-level agreements”.

To answer this question, it is first and foremost necessary to better understand what is meant by primacy of collective agreements. From the point of view of the *intentio legis*, primacy involves a preference on the part of the legislator towards tools of this kind, thus leading one to think that a broad interpretation is to be preferred.

However, if the typical approach adopted by case law is taken into consideration, then the notion of “primacy” implies that a type of agreement prevails over all the others, and although theoretically all agreements have the same hierarchical rank, the concept of “company-level agreement” should have a narrow interpretation.

Finally, from a functionalist point of view, one should ponder whether the similar tools in question may serve the same function, which ultimately is that of better adjusting bargaining to the needs of single employers, starting from what is regulated in sectoral agreements. The word “adjusting” refers to the attempt to strike a balance between workers and employer, usually but not necessarily intervening at a lower level, to foster competitiveness, running the risk of fragmentation and destruction of collective standards by allowing market competition to be based on labour conditions.

Some of these tools raise doubts in that respect: enterprise-level agreements, agreements with no *erga omnes* validity (*convenios extraestatutarios*), workplace-level agreements and group agreements, applying only to specific categories of workers in a plant (*convenios de franja*). It seems appropriate, therefore, to briefly analyse their differences in comparison with company-level agreements with the aim to figure out the most appropriate interpretation criteria.

a) Enterprise-level agreements are similar to company-level agreements, being collective informal tools negotiated by workers’ legal representatives

or in some cases by an *ad hoc* committee made up of three workers elected for the purpose<sup>16</sup>.

b) *Convenios extraestatutarios* (in the sense that they do not fall under the ET) usually do not have *erga omnes* validity in Spain, as the union or unions that could give them overall effectiveness abandon or do not participate in negotiations, limiting the scope of application of these agreements to the workers affiliated to signatory unions. Some argue that “yellow unions”, leagued with or sponsored by the employer, are involved in this process, although this is generally not true, for this is only an exceptional case, as otherwise employers would run the risk of incurring legal action against anti-union behaviour. In this context, the limited power of representation of negotiators is counterbalanced by the limited efficacy of the agreement. Yet in terms of effectiveness, they can contribute to solving specific problems arising at the company level which the employer considers of particular relevance.

c) Workplace-level agreements do not have overall validity as company-level agreements either, although negotiators would have the power to do so. When problems are limited to a specific plant – in the field of logistics – an agreement at the plant level can be reached to solve the problem. This type of agreement is also put in place when a specific plant is of particular relevance over all the others, as in the case of some car companies (Seat, Fiat, Volkswagen).

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<sup>16</sup> The ET is not clear about the nature of the collective agreement in question, that is whether it is a statutory agreement or an informal company-level agreement, as it refers to “an agreement between the company and those workers’ representatives entitled to negotiate collective agreements as provided in Article 87.1”, a circumlocution that would have not been necessary if the aim was to give powers only to statutory agreements at the company level. We may therefore conclude that it concerns both types of agreement signed at this level. Could these derogating agreements “erode” the standards established in higher-level agreements up to the point that the employer can unilaterally decide not to comply with minimum standards established in collective agreements? Yet, if the collective agreement is made inapplicable by virtue of such – non-statutory – company-level agreements, these in turn can be made inapplicable according to Art. 41.4 ET, which establishes that it is up for the employer to make the final decision after a period of consultation, as described in section 5. See my own article *Barrenado de convenios y contenido esencial del derecho a la negociación colectiva*, in Borrajo Dacruz (ed.), *El nuevo Estatuto de los Trabajadores: puntos críticos*, in *Actualidad Editorial*, Madrid 1995, 199-217. The importance of such legislative issue has remained in the background during the debate around the role of the National Advisory Commission on Collective Agreements in the case no agreement is reached, Art. 82.3 ET.



d) Group-level agreements (usually applying to the most numerous group of workers performing the same job within the company) may also be better suited to respond to company needs, and they generally apply to groups of workers who have a certain degree of autonomy – such as airline pilots, hospital doctors, professional players, and so on.

In such a context, a traditional narrow interpretation would probably be applied by the courts, in our case admitting only company-level agreements *stricto sensu*, plus the exceptions expressly provided in legislation. However, the boundaries between company-level agreements and other similar tools are blurring and almost impossible to grasp. Workplace-level agreements, for instance, apply theoretically only to a single workplace, as one part of the business, but in reality in Spain, “workplace” and “company” coincide in the vast majority of cases, being businesses mainly small-sized, or being composed of a larger manufacturing plant and a managing headquarter with fewer workers. Only minor differences may be found between the collective company-level agreement and enterprise-level agreements, since in practice there are only formal and procedural changes making them different from each other, although in the negotiation of the latter there could sporadically take part in *ad hoc* committees.

From the functional point of view, one could also assess to what extent a restrictive interpretation can protect workers from being granted less favourable working conditions by means of opt-out procedures, or instead whether a rigid interpretation of company-level agreements contributes to empowering employers to effectively make use of this tool. For instance, if it is only through company-level agreements in a strict sense that it is possible to modify wage levels established in a higher-level agreement, although the required adjustment is limited to a single plant or to a particular group of workers, through a company-level agreement the employer acquires the power to review all salaries within the company. It is then no wonder that in other countries the term “proximity agreements” is used for this purpose, and Marín Alonso introduced the principle of “proximity”, this tool being a mere variant of the old principle of regulatory specialty.

Not only, however, does this interpretation contradict the aim of the legislator, but it also gives company-level agreements more power than necessary. If the parties decide to negotiate an agreement with more limited application, then the company will apply Art. 84.2 of the ET. In

short, under the concept of “company-level agreement” we should broadly expect an agreement that does not extend beyond that boundary. There are two important exceptions in Art. 84 of the ET. Equal primacy of application, as stated in par. 2, will be granted to agreements concluded by corporations or by a plurality of companies linked to each other for organizational or productive reasons, provided their names are listed in the agreement. This could refer to two different situations, namely:

a) Groups of companies, as formally identified for the purpose of corporate or tax law, or groups existing in practice because of common interests which have determined joint management. These now have more room to manoeuvre being defined in the ET as “pluralities of companies”, i.e. businesses gathering for organizational or production reasons, with sporadic and limited coordination most frequently in the form of joint ventures (JVs), created for specific business purposes and for a fixed term. Unlike in the case of proper groups, here coordination is limited and there is no interference with the autonomy of the single companies involved in it.

b) In addition to JVs, there are other types of partnerships between companies. These include Economic Interest Grouping, regulated in Law 12/1991, with a common specific purpose, or Economic Interest Grouping of Port Companies, as laid down in Law 48/2003 and made up of loading and unloading companies, or European Economic Interest Groupings falling under the EU Regulation 2137/1985, where revenues are shared among member companies. Similarly, companies gathering for a specific productive reason, such as in the case of contractor-subcontractor relationship, fall within the above-mentioned definition of “pluralities of companies” gathered for organisational or productive reasons, as provided in Article 84.2 ET.

c) Franchising also involves a partial coordination of activities, since the franchisor or brand set out standards in relation to the service to be provided by the franchisee, often including working conditions to some extent. As indicated by Bescós Torres, the handbooks provided to franchisees by franchise networks usually detail obligations, hiring and firing procedures, personnel training and recruitment, working time, and

so on<sup>17</sup>. Olmo Gascon<sup>18</sup> makes a point that franchising is a kind of deregulation of production which is not subjected to labour laws. Franchising is a method of companies' coordination typical of the present time, but widely neglected by labour law it seems, although labour courts have intervened on several occasions on the matter. An agreement between the franchisor and sectoral unions would fall under the case we are analysing, provided that the agreement specifies *nominatim* all the franchisees involved, as required by the ET.

d) Cases of limited coordination between companies such as those mentioned above, without being proper "groups of companies", are nonetheless groupings of enterprises gathering for organizational or productive reasons which also include supply companies<sup>19</sup> in the case of a joint use of spaces or of shared workplaces. In this case, cooperation is required in implementing work safety standards, as detailed in Royal Decree 171/2004. It is unlikely, however, that only by virtue of limited coordination, these companies can conclude agreements in the subjects regulated by the ET. When this happens, these agreements fall under the cases mentioned above, for instance in cases of agreements regulating shared prevention measures (Article 21 of Royal Decree 39/1997) or in the subjects specified by the law.

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<sup>17</sup> M. Bescós Torres, *La franquicia internacional. La opción empresarial de los años noventa*, BEX, Madrid, 1989, 58.

<sup>18</sup> A. M. Olmo Gascón., *La franquicia: un procedimiento de descentralización productiva desregulado laboralmente*, Tirant lo Blanch, Valencia, 2004. See also E. González Biedma, *Aspectos jurídicolaborales de las franquicias*, in *Revista Española de Derecho del Trabajo*, 1999, n. 97, 665 ff. On the sentences of High Courts, see my book, *La deconstrucción del Derecho del Trabajo*, La Ley-Wolters Kluwer, Madrid, 2010, 252 ff.

<sup>19</sup> Collective bargaining sometimes covers the parent company and subcontractors and/or suppliers. For instance, an International Framework Agreement was concluded for the television channel Eurosport on 10 October 2012 covering its offices in 59 countries, as well as suppliers and subcontractors (EWC ACADEMY, CEE News 4, 2012, n. 9).

## 6. Conflict and Coordination between Agreements

1. Since the law only aims to give primacy to enterprise-level agreements in certain areas, but not in others, uncertainty can arise about which agreement is to be applied in which subjects. A widespread practice, that we will not analyse in detail, is referencing, i.e. the practice of referring back to previous agreements at the time of drafting the new ones, in order to retain important provisions provided in the former. However, the “synallagmatic” nature of any higher-level agreement is broken, when a company-level agreement establishing specific rules on wages, vacation or job classification is introduced.

Probably the government had this in mind when it granted primacy only to company-level agreements that were concluded *after* the sectoral agreement, to make sure that negotiating parties can adapt company-level agreements to their higher-level counterpart, developing a well-articulated and efficient structure through the effective combination of different agreements. Clearly, as we go through this analysis, we may think that, given the whole array of possible combinations, this could engender noticeable degrees of schizophrenia. The structure of collective bargaining is in this way characterised by great instability and complexity, a condition that is far from the desired unity of agreements, for which case law has repeatedly made an argument. It may have been better to proceed in the direction of a simplification of the bargaining landscape, especially at provincial level, rather than taking such a risky roundabout path as the one we have discussed.

2. The second issue relates to the coexistence of different agreements, all granted primacy by virtue of different rules. Although Article 84.2 ET proclaims the inviolability of the primacy principle of company-level agreement, but this holds true only in a limited number of subjects mentioned in legislation, with the power to structure the bargaining system that remains in the hand of state and regional agreements, despite restrictions. Hence, two “primacies” have to coexist at the two ends of the bargaining process. Having said that, however, it does not seem impossible to make the two “primacies” coexist, as highest-level agreements prevail at macro level, by defining the “architecture” of the bargaining structure, while company-level agreements prevail at the micro level.

However, conflicts can still occur between CEPs and regional “amending” agreements (*convenios de afectación*) regulated in Art. 84 in paragraphs 3 and 4. This is quite complex because it determines the primacy of regional

agreements only over state-level agreements and only in certain matters implicitly deductible *a contrario sensu*, since the law exclusively indicates the subjects that cannot be modified<sup>20</sup>. Hence, there are several important issues that can be regulated concurrently by regional agreements and company-level agreements.

It should be noted that the legislator has introduced company-level agreements' primacy with this regulation on regional agreements in mind, as some of the subjects are explicitly excluded from the regulation of regional agreements as provided in par. 4, par. 2 which explicitly establishes the prevalence of company-level agreements. This is true for instance with reference to hiring procedures, which cannot be modified by regional agreements, but fall within the scope of company-level agreements<sup>21</sup>, as well as job classification, that cannot be regulated by regional-level agreements but by company-level agreements that prevail over all the others.

However, when both agreements can regulate a specific subject, this raises the question as to which agreement actually prevails. An argument for giving priority to regional-level agreements goes back to a passionate parliamentary debate over the issue, with the last version of the law that limited the scope of a very broad initial legislation, introducing strict requirements in terms of the representation needed to prevail over national-level agreements.

How could it be that a company-level agreement approved with only a 25% representation prevails over a regional agreement whose approval requires more than 50% of representativeness? Whereas in favour of the primacy of company-level agreements, there is a simple two-line text in

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<sup>20</sup> These requirements seem to have neutralized primacy, except in the case of errors or omissions. Requirements include that a regional-level agreement must be concluded when representativeness in the sector is more than 50%, and no agreement at the highest level (in this case the state-level agreement) providing otherwise should be concluded.

<sup>21</sup> Primacy here seems to be a *flatus vocis*, as it consists in the adaptation to business conditions of all the aspects already handed over by law through company-level agreements. The insubstantiality of the provision is clear also when analysing the subjects that can be regulated by company-level agreements: these are almost all provided in art. 12 ET in relation to part-time contracts, and consist of details that are left in their actual implementation to sectoral agreements "or alternatively, to lower-level agreements". Art. 15 of the ET also makes reference to company-level agreements regarding the regulation of temporary contracts, yet they are given the same relevance as sectoral agreements, for example in identifying jobs or tasks in contracts for works and services, although there are cases in which some subjects are limited to sectoral agreements only, and others more generally to collective bargaining, including company-level agreements and, in our opinion, collective tools other than statutory agreements.



the Official Bulletin of the State: agreements of highest level will not prevail over company-level agreements. So simple, yet so definitive, to the point that it seems to undo all the efforts made to grant regional-level agreements legitimacy through representation. As indicated in the preamble of Act 3/2012, the aim was to prevent the highest-level agreement from hampering decentralization<sup>22</sup>.

### 7. Scope of CEPs

The subjects in which collective agreements at the company level prevail over other agreements reflect the immediate concerns of the legislator towards the economic crisis. The attempt is to promote decentralisation in wage determination but also in other areas closely related to the day-to-day work, such as working time, job classification, contractual arrangements or work-life balance. In comparison with other tools available to companies, such as modification (Art. 41 ET) or opting out (Art. 82 ET), the subjects in which company-level agreements prevail over all the others are in principle much more numerous.

This “generosity” is evident not only from the long list of subjects laid down in legislation, but also from the “closure rule” (*norma de cierre*) that gives higher-level agreements the possibility to add other subjects in which company-level agreements can prevail, something that is not allowed in the case of modifications or opting out clauses.

On the other hand, a significant difference makes modifications and opting out more interesting than company-level agreements. This consists of the possibility of modifying the total amount of working hours, and not just the distribution of working time. This difference works to the detriment of CEPs and shows how the reform has actually played a role in rebalancing the powers between these three collective tools.

This can help us draw some conclusions on the use of CEPs, although for a complete analysis, it should also be noted that, if for modifications and

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<sup>22</sup> The previous labour market reform also sought to modify the bargaining structure giving primacy to company-level agreements over other agreements in a number of subjects that are considered central to the flexible management of working conditions. However, the effective decentralization of collective bargaining was left to state- or regional-level agreements, thus preventing the actual enforcement of the primacy principle. The novelty here is that the reform aims precisely at ensuring decentralisation in order to facilitate “bargaining of working conditions as close as possible to the reality of companies and their employees” (EM, section IV).

opting out a specific cause is required, this does not apply in the case of CEPs. Again, we can observe here the delicate balance achieved by the legislator, although the effectiveness of these measures can only be assessed after a certain observation period. To modify or opt out from an agreement, the ET requires the presence of “economic, technical, organizational or productive reasons” that must be validated by the court, while for company-level agreements no cause or reason is required. This does not automatically imply lower guarantees, since primacy is granted only to agreements negotiated by workers’ representatives, whereas modifications and opting out can be unilaterally imposed by the employer<sup>23</sup>. Safeguards against abuse differ greatly, although they come to be equivalent, being the implementation of agreements justified either by a serious cause or by collective bargaining.

## 8. Transitional Law Issues. The Conflict between Law and Collective Agreement

### *8.1. The Relationship between Existing Agreements after the Enactment of Reform*

As on many other occasions in which a new law has altered the bargaining structure, this reform too was received with some reluctance. This time conflicts have actually been harsher than usual, since the reform impacts a number of aspects, since the aim of the 2012 reform was no less than a radical transformation of the European bargaining structure in favour of a decentralised and unstructured American model. In this connection, it may be convenient to recall what happened when the 40-hour working week was introduced in 1983 when a large number of agreements still applied the 42-hour working day. In this way, we can easily see how the radical reform brought about by the introduction of the company-level agreements’ primacy, as it implies an even more profound and controversial transformation by challenging the hierarchy of higher-level agreements, that used to determine the bargaining structure and the rules on concurrency between agreements<sup>24</sup>.

<sup>23</sup> R. Bispinck, *Kontrollierte Dezentralisierung der Tarifpolitik - Eine Schwierige Balance*, in *WSI-Mitteilungen*, n. 57, 2004, 237 ff.; R. Bahn Müller, *Dezentralisierung der Tarifpolitik - Restabilisierung des Tarifsystems?* in R. Bispinck, T. Schulten, (eds.), *Tarifautonomie der Zukunft. 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick*, publisher VSA, Hamburg, 2010, 81 ff.

<sup>24</sup> Thus, Art 3 of the Galician Funeral Homes Agreement of 17 February 2012, states that “The parties expressly agree that from the entry into force of this agreement the

However, the reform will not have the same impact on all sectors, as they greatly differ from each other in terms of bargaining structure. Even when provincial agreements prevail, there are differences depending primarily on the size of companies, since in some sectors labour relations are in the hands of large enterprises, while in others, where we only find small-sized companies, labour relations are regulated mainly through sectoral agreements<sup>25</sup>. We will now provide a brief overview of the clauses regulating the bargaining structure laid down in state- and regional-level agreements that led us to such a conclusion.

Numerous sectoral agreements, and not just of highest level, contain inseparability clauses, according to which if any part of the agreement is held invalid or not applied for a court decision, the parties must renegotiate the relevant clauses. It is hardly the case that a company-level agreement leads to the partial annulment of a higher-level agreement, as the ET talks about “modification”, “amendment”, “non-application”, just as French and Italian laws speak of “derogation” from higher-level agreements on the part of “supplementary” or “proximity” agreements. Conflicts arise when enacting these agreements, rather than in terms of their validity, as higher-level agreements are not effective in certain areas, although the introduction of CEPs does not automatically imply the elimination of the provisions laid down in higher-level agreements.

The labour authority, the tax ministry and collective stakeholders can challenge the legality of agreements (Article 165 of the Law on Social Jurisdiction 36/2011). This process may culminate in a judgment of invalidity immediately enforceable, and third parties may take legal steps to claim damages if they have suffered negative consequences due to the application of such agreements. The weakness of this procedure is that it requires a review of the entire agreement if one of its clauses is considered illegal or damaging or is held invalid<sup>26</sup>. One might think that a full review

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subjects set out in Article 84.4 of the Workers’ Statute as well as the structure and amount of wages and benefits, working day, compensation, and pay of overtime and shift work cannot be regulated by collective agreements referred to in paragraphs 2 and 3 of Article 84 of the Workers’ Statute, i.e. company-level agreements”.

<sup>25</sup> One of the arguments made by the defence in case of contestation of the General Agreement of the Cement Derivative sector was precisely the absence of any conflict, as in that sector no enterprise-level agreements were concluded.

<sup>26</sup> Thus, Art. 9 of the V Agreement of the Building Sector concluded on 20 January 2012 and submitted for registration and publication at the Employment Department on 23 January 2012 states that “2. Whereas the relevant authority, in the exercise of its powers does not approve or reject any provision of this Agreement, the Agreement shall be reviewed and reconsidered in its entirety. To this end, the signatories to this Agreement

is useless as it is merely a means to prevent the application of company-level agreements, and it would be tantamount to restarting the negotiation process. This reasoning however does not take account of Article 84.2 which only extends primacy to company-level agreements concluded after the introduction of higher-level agreements. Questioning the loss of primacy company-level agreements already in place before the review of the higher-level agreement is, in short, only a weak pretext for legal action. More plausible conflicts can arise with reference to procedural rules laid down in state- and regional-level agreements, especially those aimed at resolving concurrency conflicts between agreements at different levels, generally determining the primacy of lower-level agreements in the relevant sector and in the subjects provided. This is what happened in state-level agreements in the Building and Cement Derivatives sector<sup>27</sup>, with the peculiarity that the first agreement was concluded and registered, but not published, before the enactment of the reform, whereas the second was signed some time after it.

Prompted by the desire to “liberalise” the market, as stated during a number of international events, the labour authority and the Directorate General for Employment of the Ministry of Employment and Social affairs urged for the immediate enforcement of the primacy principle, threatening to reject or bring to court agreements not complying with the new regulation or with the provisions of Article 84.2 of the ET<sup>28</sup>. The agreements of the Building and Cement Derivatives sector, highly important for a sector that had been so dramatically hit by the crisis, posed a number of problems in this respect, leading to two different solutions. This is due to the fact that in the first case, the agreement was signed before the enactment of the reform, whereas the second was signed afterwards. In the end, the first managed to be registered and

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undertake to meet within ten working days after the decision in order to solve the problem. If, within forty-five days from that date the parties have not yet reached an agreement, they undertake to schedule meetings to renegotiate the Agreement in its entirety. 3. Collective agreements falling within the areas covered by this Agreement shall include an inseverability clause”.

<sup>27</sup> For example, in its original version, the V General Collective Agreement of the Cement Derivatives sector provided that company-level collective agreements must necessarily conform to sectoral-level agreements in the following areas: collective bargaining structure, working day, pay conditions and economic structure.

<sup>28</sup> On 18 September 2012, Cabeza Pereiro wrote in his blog that “It causes anger that the challenge to the agreement has come from the Directorate General of Employment – and not from an association of employers”.

published<sup>29</sup>, whereas the second was not published and was brought to court for non-compliance, resulting in a judgment of the High Court that will be discussed below.

## 8.2. Court Responses

The labour reform of 2011-2012 provided employers and company-level collective actors with a wide range of tools to use to tackle difficulties at company level. However, this shift has come at a price, as to do so, it has been necessary to dismantle a structure that has worked very well for decades, but which needed to be set aside – hopefully for a limited period of time – because of the emergence on the global scene of countries that do not apply the European social model. What emerges from this trend is a very much unstructured legal edifice, more oriented to providing solutions rather than guarantees.

The role of courts in ensuring the smooth running of newly created labour institutions as well as in determining the primacy of company-level agreements is reinforced, especially if, as it is the case, it is impossible to apply a narrow definition of a company-level agreement. In this context, it is necessary to take into account the entire array of existing agreements. Judges are already unexpectedly playing a relevant role in determining the validity of collective redundancies for economic causes, especially after the elimination of any administrative controls, and they now have similar functions in determining the relationship between CEPs and higher-level agreements.

The intervention of courts in this respect was first required by the labour authority for a case regarding an agreement signed after the reform's enactment without, however, complying with it. This refers to the High Court judgment No. 95/2012, of October 10 relating to the above-mentioned Building and Cement Derivatives sectoral agreement. The recourse, however, has a mere declarative nature, because, as pointed out by the defence, no company-level agreement exists in this sector, thus not giving rise to any prejudice or conflict with other agreements<sup>30</sup>. Despite

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<sup>29</sup> Official Bulletin of the State, 15 March 2012.

<sup>30</sup> This took place although the statement was contradicted by the State Bar on behalf of the Directorate General of Employment during the trial in the High Court. The sentence therefore does not include a statement of the facts found, which would have had great relevance. It should be noted that Cement Derivatives Subsector is not the same as the Cement subsector, which does have a tradition of company-level agreements (Holcim,



that, the reason for challenging the agreement lies in the fact that it does not comply with the legal provisions, regardless of whether it has caused damages that can be subject to sanctions or not. This is why the central labour authority has started a procedure, as the agreement was signed on 21 February 2012, when the Royal Decree-Law 3/2012 had already come into effect on 10 February.

The aim of the recourse was to produce a warning effect directed to those negotiators who attempted to ignore the legislative change, although in practice the sentence could have produced little or no effect. This is not so much for the absence of company-level agreements in that sector, but rather because collective stakeholders can at any time challenge the validity of higher-level agreements including all the acts deriving from it, through later individual or collective action, as pointed out by Art. 163.4 LJS 36/2011.

The real conflict here points to the relationship between law and collective agreements, and this constitutes the focus of our analysis that will leave aside the specific conflict between the above-mentioned agreement and the reform<sup>31</sup>. Specifically, our aim is to determine the moment when the reform starts affecting industrial relations, which are

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Intalcementi, etc.). Art. 4 of the V agreement specifies the functional area: production of concretes and mortars, cement product manufacturing, handling and assembling. On the two-tier bargaining structure, at state and provincial level, P. Ballester, J. Garrigues and V. Palacio, *La Negociación Colectiva en el Sector de la Construcción (Actualización 2005)*, Comisión Consultiva Nacional de Convenios Colectivos, Madrid, 36, state that “The sub-sector of Cement Derivatives is a separate sector, and collective bargaining has undergone rationalization and structuring through national and sectoral collective agreements, which, as happened with the CGSC, comprises two bargaining levels: the CGDC aimed at replacing the OLCVC and provincial or regional collective agreements. As occurred in the other subsector, from the geographical point of view, it is the second-level bargaining, and in particular provincial level over the regional level that prevails. In particular, in the Cement Derivatives sector, there is a provincial level agreement, the Balearic Agreement and the Agreement of the Autonomous Community of Valencia”.

<sup>31</sup> The agreement laid down several clauses that were considered by the labour authorities in contradiction with the reform. These include Art. 58, “Lower-level collective agreements must necessarily adjust pay and economic conditions according to what is established in the present chapter. This adaptation is necessarily made during the first round of negotiations carried out after the entry into force of this agreement, unless otherwise provided by the present chapter. The parties can agree to introduce the terms that best suit them, but must necessarily comply with the present agreement. Pay levels established in the present agreement cannot in any case be reduced in their annual calculation as a result of the application of the present agreement”. The Text of the V agreement is available at <http://www.andece.org/images/ANDECE/vconvenioderivadoscemento.pdf> (Accessed 10 June, 2013).

currently regulated by a collective norm, also considering the general non-retroactivity of laws (Article 2 of the Civil Code), in particular in the case of punitive or unfavourable rules or laws restricting individual rights (Article 9.3 of the Constitution), and in the light of the right to collective bargaining expressed in Art. 37.1. As for the first argument, there seems to be an indication in the Constitution not to modify collective agreements until their expiration. Against that, there is the idea that laws always prevail over collective agreements, and by virtue of that principle, agreements must be adapted to comply with legal provisions.

The Court decided that the parts of the agreement that did not comply with legislation were to be considered null and void. The court followed the principle of the primacy of laws, and deemed the reform immediately enforced, not infringing the principle of non-retroactivity. This means that the law has immediate consequences over the agreements introduced after the reform's enactment, this being "a minimum degree of retroactivity very close to the notion of immediate effect". As a basis for the argument, the court cites a wide repertoire of Supreme Court judgments and two Constitutional judgements, and some scholarly positions. Case law and the constitutional basis of these principles, i.e. the primacy of law and the minimum retroactivity, are such straightforward concepts that do not require further explanations<sup>32</sup>.

But by resorting to the idea of primacy of law and to the principle of non-retroactivity, the sentence has left some points open for discussion. In this case, the law in question is not a law, but rather a Decree, the concurrence of sectoral and company-level agreements does not pose problems in terms of validity, but rather in terms of application, in the case of conflicts between law and agreements, the principle of the more favourable rule usually applies, the challenge of an agreement by the labour authority is a residue of the past, the conflict between sectoral and company-level agreement has no legal consequences in the Cement Derivatives sector, and so on. We will now go into more detail regarding this and examine why the judgement is so doubtful:

a) The judgements the Constitutional Court (CC) put forward to confirm that some parts of state-level agreements contrary to the principle of primacy of company-level agreements must be considered null and void are No. 58/1985 and 210/1990. Both were aimed at solving constitutional

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<sup>32</sup> On 18 September 2012, Cabeza Pereiro wrote in this blog that: "The judgement was predictable, orthodox and in line with the law in force. It is not the judgement being at fault, but rather the law itself".

doubts with regards to substantive laws that had a broad impact on citizens, the first regarding the Additional Provision No. 5 of the ET and forced retirement clauses laid down in agreements<sup>33</sup>, and the second regarding the reduction of the maximum working week to 40 hours laid down in Law 4/1983. In both cases, as well as in another sentence of the Constitutional Court also related to Additional Provision No. 5 of the ET, the 22/1981, initial claims had not been about the illegality of the relevant agreement, but rather on the enforcement or non-enforcement of the law, specifically with reference to layoffs of elderly workers and the failure to adapt to the new working day regulation on the part of the companies affiliated to the Federation of Employers of the Metal Sector of Gran Canaria. It has not been necessary to wait for the decisions of lower courts to raise constitutional complaints, as the judges themselves had raised the issue of unconstitutionality before the High Court. The Constitutional Court confirmed the constitutionality of both legal rules with a variety of arguments, in particular the capacity of the law to limit or promote collective bargaining. Yet even here there were some differences with the judgment under analysis: in the case of layoffs of elderly workers, the Constitutional Court had offset the decision with the requirement that workers could be dismissed only if entitled to a retirement pension, and provided the decision had a positive effect on overall employment levels within the company, in the case relating to the 40-hour working week, the court opted for an immediate reduction in working hours.

None of this occurs in the Cement Derivatives case. No conflict or damage occurred, no employers or workers or unions or employers' associations have challenged the agreement, no question of unconstitutionality was raised by the Court, since the case did not have the same social relevance as those that had required the intervention of courts of highest level, and, finally, the judgment did not introduce any requirement to rebalance the agreement that was being challenged.

b) In addition: the judgment of the High Court fully applies the principle of the primacy of law, and only rejects some articles of the agreements, which were then considered null and void. The court did not think that the attack to the Cement Derivatives sectoral agreement might be

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<sup>33</sup> "It is possible to determine retirement age through collective bargaining, with no prejudice to the provisions related to Social Security". The controversial existence of DA 5<sup>a</sup>, converted into DA 10<sup>a</sup>, ended with its repeal through Law No. 3/2012, yet with a transition period as provided in DT 15<sup>a</sup> of the same law.

disproportionate and unnecessary, as the recourse was only meant to have an “intimidating” effect, rather than restoring legality. We could well understand the decision of the court by referring to what the judgement reports in relation to wage levels. The sectoral agreement was reproducing the same provisions laid down in agreements in force before the reform, being as “a kind of clone of what had already been agreed in the past, and which could have perfectly been avoided, as it had been previously agreed”<sup>34</sup>. In addition, the absence of company-level agreements in the sector, the absence of conflicts and contradictions between collective and individual levels have allowed a judgement that was defined as “orthodox and consistent with the law in force”, in the awareness that without any practical purpose, it would have just been a “pie in the sky”.

Nothing could have been further from reality. The ruling has been hailed by financial newspapers as a “major boost” to the reform and attracted the attention in discussion forums. We will now discuss the issue starting from the prudent approach of the Constitutional Court in imposing the principle of hierarchy in the law-agreement relationships.

c) The primacy of law is not stated in legislation as clearly as the legislator itself would have wished. Surely, in recognizing validity to industrial relations law, it is still the law that sets limits and rules, though with a secondary role limited to providing a framework. It was only until the “awaking” from sleep of the legislator in the nineteenth century that definitions of minimum standards were applied by social parties in the bargaining process. In this respect, the primacy of law is outside the core of labour law and goes beyond fixing working conditions, as has been highlighted in Art. 3 of the ET: the law always prevails over other types of regulations, but between laws of different nature the more favourable rule is applied.

However, Art. 3 of the ET focuses on some elementary principles, and case law and doctrine have considered another aspect of the principle of primacy of law, which is particularly relevant for our discussion, as pointed out in the judgement. This makes the appeal against the judgement subsequently presented by the trade union confederation of workers’ commissions<sup>35</sup> even more relevant. These are cases in which it is

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<sup>34</sup> S.AN. 95/2012, legal basis 5º.

<sup>35</sup> The Appeal to Supreme Court No. 1034104/2012 of 18 December 2012, presented by CCOO to the Board for Social Affairs of the National Court and to the Social Department of the Supreme Court in the case 132/2012. The appeal was signed by counsel D. Lillo Enrique Perez.

impossible to derogate from the law, though this would make collective bargaining unable to improve or worsen the conditions established in the law itself. The examples that are usually mentioned, such as the age for admission to work or the rules of procedure do not give a full account of the extent to which the law can play a role in shaping the internal structure of collective bargaining. The law, in short, can move into the core of collective bargaining as much as it deems it appropriate, and can impose its will. It cannot, however, act “capriciously” and without limitation, as the Constitution and international agreements consider bargaining part of fundamental trade union rights, if not even a fundamental right in itself<sup>36</sup>, in that it is a necessary measure and adjusts the level of intrusion by workers depending on the desired effect, and it must be justified, as any limitation of fundamental rights should be. With regards to the primacy of company-level agreements established by law, no derogation is permitted, as the law does not provide any alternative, but what is questioned here is whether this “pitch invasion” is justified by the attempt to liberalize and adapt to the company level.

It is likely that similar questions have pushed the administrative authority to challenge the Cement Derivatives agreement before it came to actual conflict with a company-level agreement. In that particular case the challenge would have been put forward by a union or a group of workers because of the lower wage established in the latter, and courts would have at least hesitated on what principle was to be applied, whether the hierarchy of law or the most favourable rule. It is a reasonable doubt, and with reference to the issue of the primacy of some agreements over others we have to point out that we are not arguing about the principle of favourability and working conditions, but rather about the structure of collective bargaining (agreements’ concurrency), although from a different perspective, i.e. the subjects in which the primacy principle applies we want to focus resolutely on specific rules and enforced standards that give real content to the principle of favourability. These doubts would have been enough, perhaps, to raise the issue of unconstitutionality and extend the intervention further beyond than what was desired by the Administrative authority.

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<sup>36</sup> On the concept of collective bargaining as part of the fundamental right of freedom of association, see the Constitutional Court, as well as the judgment of the European Court of Human Rights in the *Demir and Baykara*, Case No. 34503/97 of 12 November 2008 and Art. 11 of the European Convention on Human Rights and Fundamental Freedoms. On the idea of a fundamental right in itself, see Art. 28 of the Charter of the Fundamental Rights of the European Union.

There is an additional argument when looking for appropriate solutions. The legislator acts very differently, and in a much more respectful way, when it comes to abolishing the old rule that allowed collective agreements to establish age related layoffs: such layoffs are prohibited according to DT 15 of Law No. 3/2012, starting from agreements signed after the enactment of this law, but with respect of existing contracts, the law becomes effective only upon expiration of the agreement. The reason for abolishing forced retirements in collective agreements, is that of increasing the sustainability of the Social Security system, and is not related to the principle of primacy of company-level agreements, but it is nonetheless important. And although what is common under labour law is not necessarily what is common in other branches of law where a new law is also applicable to previously existing relationships, labour law also takes account of the constant presence of subsequent agreements even recognising the principle of favourability to avoid compliance with laws that no longer exist, following the example of the civil servants law with reference to “acquired rights” and similar formulas as existing in other countries (vested rights)<sup>37</sup>.

If the potential for conflict within the sector did not exist and if the attitude in other cases was more respectful of collective bargaining than the one adopted in this case by the legislator, and if the reform had given entrepreneurs a whole series of tools to opt out, derogate and modify agreements, the consideration that this recourse deserves is that it was a disproportionate and unreasonable challenge. In our view, the action should have been declared inadmissible for lack of purpose or for merely being declarative. Otherwise it would have been necessary to raise the question of unconstitutionality before the Constitutional Court, given the doubts covertly expressed by the court itself<sup>38</sup>.

d) The labour authority intervention in the collective bargaining challenge has been constantly criticised even by judges as an improper action that should have been handed over to the Tax Ministry, yet it “is very difficult to explain that if there are collective representation or stakeholders

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<sup>37</sup> The CCOO appeal refers to the rejection by the Supreme Court in its judgment of 9 March 2004 of the implementation of the new rule prohibiting forced retirement clauses to be included in the agreements, drawing on the DT 2<sup>a</sup> CC, on the basis that “acts and agreements concluded under previous legislation, and complying with it, will be subject to the legislation previously in force”.

<sup>38</sup> “It is clear that, upon entry into force of the above-mentioned rule, it remains valid as long as it is not declared unconstitutional, and collective agreements must comply with it”. (Legal Basis No. 3).



affected by the challenges and enabled by the law to take direct action, there should be a procedure establishing that the Administration acts as intermediary and has the power to initiate such procedure”<sup>39</sup>. It has no constitutional justification, according to Conde Martín de Hijas, a challenge in which the Administration defends a private subject who should actually defend themselves.

The idea that the illegality of an agreement should result in an actual or at least predictable damage to justify the intervention of the administrative authority<sup>40</sup> is backed up by some scholars. So, surely the judgment should in any case restore a legal situation where it is possible to eliminate flaws and correct defects, either by recognizing rights and legitimate interests, or by repairing damages, as indicated by Martín Valverde and García Murcia with the support of Alonso Olea and Miñambres Puig<sup>41</sup>. The intervention of public authorities in this field derives from the time when the Ministry of Labour had the power to control the appropriateness and legality of the agreements that were presented to the register, and which could be rejected also because the time was not deemed right to grant the required improvements<sup>42</sup>.

Now it is time to limit at most the intervention of the labour authority in the area of collective agreements, at least when none of the stakeholders insists on intervention or when there is no apparent damage or prejudice, as is suggested by the majority of scholars<sup>43</sup>. Professor de la Villa

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<sup>39</sup> V. Conde Martín de Hijas, *Proceso de impugnación de convenios colectivos*, in Consejo General del Poder Judicial, *Estudios sobre la nueva Ley de Procedimiento Laboral*, Madrid, 1991, 746.

<sup>40</sup> *Ibid.*, 746. Some scholars justify administrative intervention as a form of collaboration with the tribunals “in the attempt to safeguard the purity of the Legal System” (A. Baylos Grau, J. Cruz Villalón, M. F. Fernández López, *Labor Procedural Law Institutions*, Trotta, Madrid, 1995, 262 and 267), which is meaningless, because in that case it should have also power to safeguard the purity of non-statutory agreements or arbitral awards that violate legality, a rule which is not provided in the Law (Art. 163 LJS 36/2011), although the literature and case law indirectly admit it by way of other collective tools, ex Art. 85.1 ET (J. L. Monero Pérez *et al.*, *Litigation Manual Labor Tecnos*, Madrid, 2010, 293).

<sup>41</sup> A. Martín Valverde, J. Murcia García, *Las impugnación de los convenios colectivos de trabajo*, REDT, 24, 1985, 507; M. Alonso Olea, C. Puig Miñambres, *Derecho Procesal del Trabajo*, Civitas, Madrid, 1994, 266.

<sup>42</sup> Collective Agreement Law of 24 April 1958, Art. 13 and 14, and Art. 19 of the Regulation of 22 July 1958. Control was even stricter towards “internal” unions, under the Ministry of Union Relations as defined under Art. 11.4 of the Regulation. In the case of a refusal, a decision could be put forward “internally”. Control continued further, though with some limitations as laid down in the Collective Agreement Law of 1973 and the Royal Decree-law on Labour Relations No. 17/1977 in its initial version.

<sup>43</sup> On the need to restrict the legitimization of an abstract control of the lawfulness of the agreement, in order to limit the risk of undermining its internal balance by considering

considers the origin of administrative intervention as a residue of a time in which this was a way of controlling collective initiatives, as the initial formulation of Article 90 of ET clearly shows. At the time this was the only viable way to challenge agreements, and this principle is still laid down in the ET, although the literature recognises other ways to challenge agreements, which have been gradually accepted by courts and procedural law<sup>44</sup>.

Despite admitting an abstract control procedure to ascertain legality, as much as this is an extra-ordinary procedure limited to collective agreements, what we object here is the role of the Labour Administration in the process as a last vestige of a foregone era in which the Administration was in charge of both control of legality as well as of the assessment of appropriateness<sup>45</sup>.

e) Such an arguable mechanism is put in place in defence, not of a law, but of a decree-law, being it another weakness in the whole series of weaknesses that the court has not highlighted. Art. 86 of the Constitution is very clear in defining decree-laws: in case of extraordinary and urgent necessity, the government may issue temporary legislative provisions that take the form of decree-laws and which may not affect the basic

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control as an exceptional measure, see M. Valverde, G. Murcia, *La impugnación de convenios colectivos*, 500; F. Durán López, *Los pactos para la retribución de las horas extraordinarias y su consideración jurisprudencial*, in *Documentación Laboral*, vol. 8, n. 63, 1983; M. F. Fernández López, *El control jurisdiccional de la negociación colectiva*, in *VI Jornadas Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Sevilla, 1989, 226; R. Pérez Yáñez, *El control judicial de los pactos colectivos*, Madrid, 1996, 105.

<sup>44</sup> L. E. De La Villa, *Impugnación de los convenios colectivos tras la LPL de 1990*, en Consejo General del Poder Judicial, *Estudios, op. cit.*, 779. According to the author, the doctrinal debate started between Suarez Gonzalez and Ojeda Avilés, followed by the judgments of 1982 and 1983 TCT opening to the opportunity to challenge the agreement through regular collective dispute procedures, although the judgments of the Supreme Court (S.TS. July 12, 1983) and the TCT (S.TCT. November 10, 1986) introduced some restrictions. Subsequently, there has been a progressive opening, until finally the Constitutional Court supported a broad interpretation, through sentences No. 47/1988 and No. 124/1988. On the evolution of case law and on its role in paving the way for a process that was initially monopolized by the administrative authority, see J. A. Bengoechea Sagardoy, *El proceso sobre conflictos colectivos e impugnación de convenios Colectivos*, Consejo General del Poder Judicial, 276 ff.

<sup>45</sup> A distinction between a critique against the abstract control of the lawfulness and the legitimacy to exert such control can be found in F. Lopez-Tarruella Martínez, *Autonomía colectiva y control judicial de los convenios colectivos: el miedo a la impugnación de los convenios*, in Various Authors, *El proceso laboral. Estudios en homenaje al profesor Luis Enrique de la Villa Gil*, Lex Nova, Valladolid, 2001, 534.

institutions of the State, as well as rights, duties and freedoms of citizens provided in Title I, Autonomous Communities, or the general electoral law. In other points, the reform is justified by an extraordinary and urgent need, but not in relation to company-level agreements' primacy, and even less in the case of non-existent company-level agreements, such as in the Cement Derivatives sector. There is more. Decree-laws cannot introduce limits to fundamental rights: "Through an exceptional norm that requires a constitutional justification that is based on urgent need such as a Decree-law, it is not possible to regulate the structure of collective bargaining"<sup>46</sup>. To prevent abuse in the recourse to decree-laws, courts have some powers of control<sup>47</sup> - similarly to those of the Constitutional Court - to override the Decree-law *ultra vires*<sup>48</sup>.

The Cement Derivatives sectoral agreement will undoubtedly serve as a "leading case" to give direction in the field. The appeal could end up with a question of unconstitutionality, but the most likely result could be a partial annulment of the judgement. Contrary to what one might think at first glance, a judgment of appeal is not useless: although in this case Royal Decree-law 3/2012 was converted into Law 3/2012, a declaration of the validity of the agreement is certainly of paramount importance, as the agreement extends the period of validity of the provisions laid down in a temporary decree-law, although the agreement itself was considered in contradiction with the decree-law by the High Court. In this situation, there should be another challenge from the labour authority, which would be difficult to accept.

In the meantime, a challenge of unconstitutionality was made against CEPs and other aspects of Law No. 3/2012 for which an admission by

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<sup>46</sup> This is the justification supplied by the court of appeal against the AN judgement on the CCOO AN concerning the unconstitutionality of Royal Decree-Law No. 3/2012.

<sup>47</sup> Arts. 1 and 25 ff. of Law No. 29/1998.

<sup>48</sup> See the interesting report by J. Lahera Forteza, J. C. Garcia Quiñones *Informe 254. Argumentos jurídicos para una eventual impugnación del Real Decreto-Ley 8/2010, de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público*, 2010, [www.feteugt.blogs.upv.es/files/2010/07](http://www.feteugt.blogs.upv.es/files/2010/07), 2, on the power of the Constitutional Court to reject, in the case of presumed abuse or arbitrary use on the part of political bodies of the concept of extraordinary and urgent necessity, a Decree-Law, which can be declared unconstitutional for absence of urgent reasons or because the government is exerting the powers reserved to Parliament by the Constitution (SSTC 29/1982, of 31 May 111/1983, of 2 December 23/1993, of 21 January 182/1997, of 28 October; 137/2003, of 3 July 189/2005, of 7 July and 329/2005, of 15 December).

the Constitutional Court could make the appeal in the high court superfluous<sup>49</sup>.

### 9. Concluding Remarks: *Intentio Legis* versus *Voluntas Legislatoris*

At the beginning of this paper, we analysed the role of CEPs as defined in the Explanatory Memorandum of Law No. 3/2012, similar to the Royal Decree 3/2012, namely that of better adapting labour relations to the economic and productive environment in which they operate. The mistaken perspective underlying the norm is that labour relations develop only within the economic and productive context of the company, though this statement is relativised by globalization and by the structure of businesses, whereby many of the important decisions are made at supra-company level. Leaving aside that for a moment, we would like to focus briefly on another dichotomy, that of the potential divergence between *intentio legis* and *voluntas legislatoris*. As in many other cases, the stated intention of a norm may differ from the real will of the legislator, as it may be clear by the express statements of legislator holding the parliamentary majority supporting the law, or through comments expressed in the socioeconomic scenario.

In the previous section we explained that the management of labour relations at company level cannot take place in the sector analysed and which served as a point of reference due to the absence of company-level agreements claiming primacy according to the most recent legislation. It is useless to give power that cannot be exerted. Furthermore, we do not know whether there is another intention to this, a point that we have also analysed. It may be useful to think, however, that what happened here may be different in the rest of the economy, because most of the agreements in our country are bargained at company unit level, (72.8% in 2012, which makes only 27% at local or sectoral level). The sector that we have analysed here is therefore the absolute exception to the rule, since

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<sup>49</sup> Appeal accepted for consideration on 30 October 2012, presented by the Grupo *Socialista and the Izquierda Plural (IP)* against seven articles and two provisions. These gave the National Commissions on Collective Agreements the power to deviate from provisions laid down in collective agreement, giving preference to company-level agreements, establishing a probationary year in the new permanent contract for SMEs and eliminating the clause establishing the payment of salaries accrued by dismissed workers during court proceedings, i.e. while waiting for a judgement on the lawfulness of their dismissal, among other issues.

the overwhelming majority of agreements have been concluded at enterprise level, with a small minority signed at the sectoral, mainly provincial level.

Yet, on the one hand, the number of agreements signed at company-level has little to do with labour relations in our country if we look at the number of workers who are covered by one or the other agreements. In 2012 only 8.1% of Spanish workers were covered by company-level agreements, with around 92% of workers that were covered by sectoral agreements<sup>50</sup>. The distance between the two is actually increasing every year, to the point that “in terms of collective bargaining structure, it emerges that the relative weight loss of company-level agreements, despite the labour reform of 2012 has strengthened their role”<sup>51</sup>. In addition, the figure on the overall number of agreements is misleading, as is in relation to sectoral agreements, a 72.8% of company-level agreements are overwhelming, they constitute only 1% of all enterprises in Spain. Company-level bargaining is merely episodic, corresponding to about 20,000 companies that have negotiated agreements at company level from 1959 to today, compared to 3,246,986 of companies surveyed only in 2011<sup>52</sup>. It must be said, as pointed out by the Spanish Confederation of Business Organizations a few years ago, that enterprise-level agreements are typical of larger-sized companies, with an average of 305 workers, whereas sectoral agreements include smaller-sized companies, with an average of seven workers<sup>53</sup>.

<sup>50</sup> Comisión Consultiva Nacional de Convenios Colectivos, *Boletín del Observatorio de la Negociación Colectiva* n. 36, 2012, 2 and 3. The bulletin refers to the workers “covered” by agreements.

<sup>51</sup> Comisión Consultiva, *Ibid.*, 4. The data provided refer that the number of workers covered by enterprise-level agreements was between 2006 and 2012, at 11.8%, 10.9%, 10.2%, 9.6%, 8.6%, 8.9% and 8.1%, while simultaneously an increase was reported of the number of workers covered by state-level agreements. The decline “corresponds both with the disappearance of businesses and jobs resulting from the crisis that began in late 2007, as well as with the delay on the part of collective bargaining that is due to the difficulties posed by the crisis in reaching new agreements between employers and employees”. And, both the number of agreements concluded, as well as that of workers covered by them has been declining with the crisis, whereas between 1985 and 2006 the number of company-level agreements had increased from 2,590 to 4,271, and the workers covered from 1,062,500 to 1.1879.000 (CEOE, *Balance* cit., 21).

<sup>52</sup> Data taken from the Bulletin of the Lex Nova blog of 25 September 2012, *El convenio de empresa manda*.

<sup>53</sup> CEOE, *Balance de la Encuesta CEOE sobre Negociación Colectiva 2007. Estructura y Contenido de los Convenios Colectivos en España*, Madrid, 2008, 20.

The purpose of the legislator cannot be, for the above that of adapting labour relations to company needs, when the vast majority of them and of their workers fall under the application of a sectoral agreement. It remains to find out what may have been the real intention of the legislator, as denying one thing does not make the opposite true, and we need to find an answer, running the risk of making mistakes.

The perspective of the legislator is not company-based, but rather oriented towards the macroeconomic situation, as Law No. 3/2012 was introduced in response to the international financial crisis. Whether it is for external impulse on the part of international creditors, or for the firm conviction of the parliamentary majority that brought the rule forward, the primacy of company-level agreements is only one of the tools used, along with other collective tools provided in the law, including opting out, amendment and modifications to change the industrial relations model, which has now become sharply individualised, leaving behind social dialogue as a means to regulate labour conditions. The dismantling of collective standards, considered necessary to compete in a globalized economy, leads to increased, even temporarily, of disorganization and labour conflicts<sup>54</sup>, as well as to a rise in unemployment, which after all can undermine the expected recovery. For the sake of flexibility, as pointed out by Vila Tierno, attempts are made to dismantle the rules that we have been having since 1994 (and in many cases even from the original version of ET in 1980)<sup>55</sup>. According to Perán Quesada, one of the most unjust accusations made to our bargaining model and therefore to the social actors that support it, is that it is not only an inappropriate tool for adapting working conditions to the specific circumstances of the company, but that it is “an obstacle”, especially with regard to wage levels. It is argued that union empowerment has a negative effect on wage determination, and that wages do not go down, or do not go low enough in periods of economic crisis. And, certainly, to shift collective bargaining to the company level will certainly make union action weaker and bargained working conditions less favourable to workers<sup>56</sup>.

Destroying a system based on social dialogue and collective bargaining, which has produced good results in Spain as well as in other EU countries and which lies at the foundation of the European social model and of EU

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<sup>54</sup> The news agency Europa Press reported that there have been 36,000 demonstrations in the first year of the Conservative government, nearly 120 daily, mostly related to labour issues, without trade unions taking a leading role in organizing them.

<sup>55</sup> F. Vila Tierno, *op. cit.*, 4 (original version).

<sup>56</sup> S. Perán Quesada, *op. cit.*, 4 (original version).



primary law should not occur so thoughtlessly. The fact that social dumping prevails today in the global economy should not make us forget that other European countries, and significantly Germany, are able to overcome the crisis through social dialogue and codetermination<sup>57</sup>. However, this is a different topic distant from the focus of the present paper, which brings us to the conclusion of our analysis of company-level agreements' primacy.

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<sup>57</sup> A remark on the achievements of the Hartz reform in Germany, or Agenda 2010, with the clear statement that the positive outcomes in the country are mainly due to the active participation of trade unions in the management of companies and the good performance of the manufacturing sector in Germany is available in H.D. Köhler, *El mito de las reformas en Alemania*, in *El País*, 4 January 2013, 35.



# Adapt International Network



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