Recent Collective Bargaining Articulation Reforms in France and Spain

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Received: 26 July 2014 / Accepted: 9 September 2014

Abstract: Articulation of collective bargaining has been deeply modified both in Spain and in France in recent years. This study outlines and compares the decentralising process undergone by both countries in a context of broader changes in industrial relations in Europe. For decades, both the Spanish and French systems were based on the sectoral bargaining level, which provided a certain degree of equalization to working conditions within every sector, even though historical factors have led to differing evolutions of the two systems. The decentralising of collective bargaining in favour of the enterprise level began timidly in France in 1982 but the real legislative revolution in French collective bargaining occurred in 2004 and 2008. Today, enterprise collective agreements may "revoke" conditions established by a sectoral collective agreement. This is also the case in Spain, deriving from two more recent reforms (2011 and 2012), but, despite strong parallels between both countries, there are also clear differences regarding how these changes are being applied.

Keywords: collective bargaining, decentralising, compared law.

1. Introduction

Collective bargaining is a key instrument in defining working conditions in Europe. Institutions such as the International Labour Organisation (ILO) argue that collective bargaining not only provides a means of determining wages and working conditions, it also enables employers and workers to define the rules governing their relationship. Therefore, collective bargaining may be advantageous for both workers and employers. For workers, it ensures adequate wages and working conditions that may not be achieved through individual negotiation, providing them with a "collective voice". It also offers workers control over decisions regarding personnel and fair distribution of gains resulting from increases in technology and productivity. For employers, collective bargaining contributes to industrial peace, helping to stabilize industrial relations. Furthermore, employers may also address the need for change in order to facilitate modernisation and restructuring (ILO).

Moreover, collective agreements have been defined as key tenets of democracy and essential means by which workers may balance bargaining power in employment relations and negotiate improvements in working conditions (Hayter, 2011). However, power balancing is not homogeneous at all bargaining levels. Clearly, in most cases of enterprise and lower-level bargaining, the imbalance favours the employer. Therefore, the decentralization of collective bargaining has been a long-standing aspiration in certain sectors—an aspiration that has gained support due to the current economic crisis, which, according to the European Commission (2010), is an unprecedented challenge for European industrial relations systems. Hayter (2011) reported that collective bargaining is seen from certain sectors as an expense and an obstacle to the flexible adjustment of enterprises and the smooth functioning of labour markets. This has led to policy advice calling for the weakening of collective bargaining rights and the decentralization of collective bargaining. Similarly, in the Athens Manifesto, the European Trade Union

Confederation (ETUC, 2011) condemned the hostile attitudes of European institutions and many European governments towards wage indexation and centralized bargaining in general.

Nevertheless, at European and national levels, social partners accept that the development of bargaining at an enterprise level is, to a certain extent, useful for introducing new forms of internal flexibility that must be adopted in order for enterprises to adapt to changing economic realities. Collective agreements cover new issues such as restructuring, competitiveness and access to training, and are applicable to new categories of employees, for example agency workers (European Commission, 2006). The European Commission (2006) stated that these agreements are important tools to adjust legal principles to specific economic situations and particular circumstances of specific sectors.

This paper aims to compare the collective bargaining reform processes in two European countries: France and Spain. The final objective of both of these countries is similar—to decentralize collective bargaining and thereby increase the role of enterprise agreements. However, the two countries are conducting this process in very different ways that will undoubtedly lead to distinct outcomes. Over recent years, French collective labour law has gone through profound transformations, affecting collective bargaining regulations as well as related institutions such as worker representation in the enterprise and representativity. All of this reform has aimed to adapt legislation to the needs created by a final objective: to increase the centrality of enterprise collective agreements. This has been carried out by rearticulating sectoral and enterprise agreements and expanding the content of the same through the implementation of bargaining obligations for a number of issues. According to some authors, this evolution has been progressive and employers are not demanding crucial changes permitted by the new legislation in order to maintain a certain balance within the industrial relations system (Ray, 2008).

The case of Spain is significantly different. The decentralization of collective bargaining has been an on-going demand of employers, who have been particularly insistent over the past four years. This demand has been introduced extensively in collective bargaining reform which was passed in 2011, although some changes along this line had already been adopted in June of 2010. The most recent reform to date (February 2012) has followed along the same lines. It is clearly too early to fully evaluate the consequences of these changes but many of them are beginning to reveal themselves.

This study aims to provide clarification regarding the changes occurring in European systems of industrial relations by presenting two relevant examples.

2. Reforms in France: progressive reinforcement of collective bargaining at the enterprise level

In France, the number of reforms concerning collective bargaining has been so high over the last decade that already in 2004 Teyssié claimed that a completely new law on collective bargaining had emerged.

The reinforcement of collective bargaining against laws and regulations began in 1982, when the so-called Auroux laws[1] were passed. Not only did they create new spaces for collective bargaining, but they also introduced the first rules on decentralization after decades of a strongly centralized bargaining structure. Before 1982, only legal minima were contemplated, referred to in France as "social public order". This meant that collective agreements could only improve conditions regulated by the law, not worsen them. The Auroux laws introduced the "revocation" concept in France, implying that: (1) an agreement may establish worse conditions than those established by the law and (2) that a lower bargaining level agreement may establish worse conditions than those established at a higher level (e.g. an enterprise agreement as compared to a sectoral agreement). However, the possibilities of "revocation" provided by the Auroux laws were very limited and only affected a very specific issue: overtime.

During the 1980s and 1990s, regulations remained considerably stable, but over the last decade, changes have been quite profound. A Common Position on ways to strengthen collective bargaining

[1] Law of 4 August 1982 concerning employee rights in the enterprise; Law of 28 October 1982 on the development of personnel representation institutions; and in particular, Law of 13 November 1982 on collective bargaining and collective conflict solving.

was signed on July 16th of 2001 by the five trade unions recognized as representative at the intersectoral level and of the principal employer organisations. The Common Position requested additional space for collective bargaining and demanded complementarity between legislation and collective bargaining. Nevertheless, more serious reforms did not appear until 2004 and 2008.

2.1. Content expansion at the enterprise level and its articulation at the sectoral level

The first major reform in collective bargaining was introduced by Act No. 2004-391 of 4 May 2004 on lifelong vocational training and social dialogue. The final goal of the Act was to place enterprise agreements at the centre of the collective bargaining system (Souriac, 2005). The Act had three main objectives: to change rules on the conclusion of the agreements, to transform the articulation and to mitigate the effects of the lack of trade union representatives in enterprises[2].

In regards to articulation, there were three main novelties introduced by the Act of 4 May 2004:

— sectoral agreements could include provisions that were less favourable to workers as compared to those resulting from agreements with wider territorial or functional fields. Nevertheless these wider-scope agreements could prohibit such "revocations".
— enterprise agreements could contain provisions that were less favourable to workers as compared to those resulting from sectoral agreements. The Law also permitted negotiators at the sectoral level to impose bans on enterprise negotiators in regards to these "revocations". Additionally, in this case, some issues were legally excluded from the "revocations". These issues included minimum wages, professional classification and collective guarantees on complementary social protection and mutual funds for professional training.
— enterprise agreements could develop the application or they could "revoke" provisions included in the Labour Code. Until 2004, this power had been reserved to sectoral or broader-scope agreements.

The next (and, to date, the last) step was the passing of Law 2008-789 of 20 August 2008 on the reform of social democracy and working time. This Law was in line with the previous act, permitting "revocations" for a list of issues regarding working time. Like the Act of May 2004, "revocations", regarding less favourable conditions, could be established both by enterprise and sectoral agreements to those of higher level or wider application. However, there is a substantial difference in these laws: from 2008 on, the sectoral collective agreements can no longer ban "revocations" to their regulations concerning most aspects of working time resulting from enterprise or narrower-scope agreements. Certainly these rules affect limited issues, but, according to some authors, the foundations were created in order to broaden the scope of such provisions in the near future (Barthélemy and Cette, 2010).

While articulation has generated intense debate in France –as well as in other European countries–, the progressive consolidation of the enterprise as the central level of bargaining through mandatory content has not been as widely noticed. Legislature, however, has consistently attributed the regulation of numerous issues to enterprise agreements. These functions are not considered to be a possibility –always existing as a result of the parties' freedom of to negotiate– but rather, an obligation.

The Auroux Laws were pioneering in establishing bargaining obligations. They have been widely extended over the past three decades. However, it should be noted that bargaining obligations do not necessarily imply agreement obligations.

As for the frequency of bargaining, some regulations demand yearly negotiations on certain issues, while in other cases they may be tri-annual.

In order to understand the bargaining obligation dimension as a whole, it is necessary to briefly list the issues that must be negotiated at the enterprise level:

[2] It should be noted that in France, trade union representatives have traditionally been the subjects that negotiated at the enterprise level.

— effective wages, including the goal of eliminating any wage differences between men and women.
— working time and its distribution, including paid holidays.
— workplace preventive management.
— professional equality between men and women, particularly in regards to access to employment, training and professional advancement, working conditions in general and reconciliation between work and family life.
— exercising the freedom of expression within the enterprise.
— senior worker positions, specifically, parties must negotiate their access to jobs, maintenance of them and access to training. In this case there is not only a bargaining obligation but also a concluding obligation.
— professional insertion of disabled workers and, specifically, access to jobs, training, professional advancement, working conditions and disability sensitization of other workers.
— complementary social previsions if they are not negotiated at the sectoral level and wage saving systems.
— reconciliation between professional career and trade union activities.

Similarly, the parties are obliged to collectively examine the employment situation in the enterprise and, more specifically, the number of workers with low wages, the number of temporary and agency workers and annual or long-term job prevision in the enterprise.

In addition to bargaining obligations, the French Labour Code requires that enterprise agreements include the development of a large number of regulations, even though sectoral agreements may also intervene, which contributes to helping enterprise agreements gaining weight in the bargaining system. Furthermore, in many cases, enterprise agreements may "revoke" regulations established by the Code itself, decisively contributing to the deregulation of working conditions and to the individualisation of industrial relations, as a consequence of the limited bargaining capacity of trade union representatives, particularly in small enterprises. The Labour Code calls for the intervention of enterprise agreements in numerous issues related to working time and working time distribution (night work, overtime for full- and part-time workers, forewarning in the case of working time distribution modifications for part-time workers, modifications in daily rest, regulations on resting time corresponding to part-time workers, introduction of shift replacement teams, regulations on seasonal work, creation of a working/holiday time account, "revoking" of the general principle of two consecutive holidays per week for workers under 18, allowing workers under 18 to work on bank holidays, postponing paid holidays including to the following year). In addition, enterprise agreements may also intervene on other issues such as the regulation of trade union freedoms in the enterprise, certain disabled worker aspects, trial period regulations, indemnity reduction due to the termination of a temporary contract, and certain issues regarding training.

2.2. Accompanying reforms: representing and representativity at enterprise level

Two particularly problematic issues were found in regards to the planned decentralization of collective bargaining: on the one hand, worker representation within the enterprise and rules on conclusion of agreements and, on the other hand, serious defects affecting the fixing of representativity. Worker representation has a dual channel structure, as there are both elected representatives and trade union representatives. Nevertheless, collective bargaining at the enterprise level has always corresponded in large part to trade union representatives. However, the fact is that trade unions have a considerably limited presence in small and medium sized enterprises, so that the lack of a union opposing party to the employer is a frequent reality. The laws from 4 May 2004 and 20 August 2008 established subsidiary sets of rules allowing parties other than union representatives to negotiate at an enterprise level, thus ensure that there are parties capable of negotiation. Such parties include elected representatives and mandated employees.

In addition, the Act of 4 May 2004 introduced profound reforms on the validity of enterprise agreements. Previously, the signature of a single trade union irrespective of its representativity in the enterprise was sufficient to make an agreement applicable to all workers in the enterprise. This possibility

had been strongly questioned, as the legitimacy of the labour signing party to bind all workers was, in many cases, far from being accepted, particularly at the time when enterprise agreements "revocations" were accepted. In fact, the regulations from 2004 were not very demanding, as legitimation was negatively, not positively created: agreements didn't require a majority but rather, a lack of opposition from trade unions representing the majority of workers. These regulations were improved by the Law of 20 August 2008 requiring a certain supporting force to the agreement, although this force need not necessarily be the majority. The objective is to reinforce the questioned legitimacy of enterprise agreements due to a lack of representativity of the signing trade union or unions.

The second problem relates to rules on representativity. The representativity system was established in France in 1966 and had remained unchanged until 2008, despite multiple attempts at reforming it. Persisting doubts regarding the actual representativity of trade unions recognised as such were a long time burden to the development of collective bargaining. The 2008 reform turned the rules on determining representativity upside down: top to bottom legitimation became bottom to the top, i.e. from the enterprise to the national and intersectoral level. Prior to 2008, trade unions meeting certain undefined criteria (essentially to have sufficient members, receive enough fees, gain their independence, have a certain antiquity and be influential in their field) at the national and intersectoral level, were conferred representativity in every enterprise in the country. However, upon application of legislation from 2008, election results at every bargaining level are considered –as well as other criteria– in order to determine who is representative at that level. As a result of certain concrete regulations, the five trade unions recognised as representative in 2008, despite changes that have maintained their overall status, as well as two other unions, are likely to be recognised as representative[3]. Consequently, in the near future, few changes are anticipated, leading to the suspicion that new rules have been excessively tailor-made to the previously representative.

In any case, these reforms have been instrumental in adapting regulations to the ultimate goal of orienting the French legislative initiatives regarding collective labour law. This final objective consists of strengthening enterprise bargaining both by developing it but also, to the detriment of sectoral bargaining.

3. Reforms in Spain: an attempt to introduce accelerated changes

The present structure of collective bargaining in Spain is the result of a process in which historical factors are of great importance. These historical elements and the fact that regulations regarding the articulation of agreements are unnecessarily complicated, has led to an extremely complex system.

Collective bargaining as a system, as in other European countries, was created in the early 1980s, after the passing of the Workers' Statute (1980). The freedom of social actors to choose a bargaining unit was then recognized. However, this rule created conflicts, as more than one agreement could be applicable to a group of labour relationships. Thus rules had to be created in order to solve these conflicts. In this point, Spanish law differs significantly from French law. In France, such conflicts were traditionally solved by the favour principle. But in Spain, a general principle of chronological preference was adopted, so that the agreement to be applied was that which had been first signed, irrespective of the conditions contained in the different conflicting agreements. Nevertheless, lower-level agreements that improved the conditions of higher-level accords were always generally accepted.

These rules led to a certain degree of fossilization of bargaining units, as the chronological preference made it extremely difficult to create new units. In addition, bargaining units were frequently derived from labour regulations dating back to the Franco era, as those units covered a territorial and sectoral regulatory field that were previously covered by Francoist labour regulations (identification of sectors and subsectors on a provincial basis). Moreover, jurisprudence has always tended to protect previously-created units.

The structure of collective bargaining became even more complicated after a reform that occurred in 1994. This reform, as well as other subsequent ones (1997, 2011 and 2012), was introduced via a deplorable legislative technique, through the addition of new paragraphs to article 84 of the Workers' Stat-

[3] The Law of 20 August 2008 establishes a very long transitory period (generally until mid-2013 and in some cases until 2017) during which the reform is to be progressively applied. Consequently, the final picture of representativity is not yet apparent.

ute. These new paragraphs were in some cases contradictory –in their philosophy and sometimes even in their literality– to the previous regulations that remained unchanged. This technique, defined as *alluvial*, has been strongly criticized (Cruz Villalón, 2007). The aim of the reform, which was demanded by the Catalan and the Basque nationalist parties, was to enable the creation of industrial relations frameworks in autonomous regions, which was hindered by the "occupation" of bargaining units by national sectoral collective agreements. However, the new regulations permitted any agreement at the supra-enterprise level to affect a higher-level agreement. In fact, these regulations invigorated provincial sectoral agreements, which became the most common bargaining units until 2011, when said affecting agreements were limited to the regional (Autonomous Communities) level, so that provincial agreements could no longer regulate matters regulated by higher-level agreements.

At the same time, the 1994 reform introduced the possibility that an agreement at the enterprise level could establish that salaries set by the sectoral agreement were not to be applied if certain conditions regarding economic difficulties of the enterprise were met. Likewise, an agreement between worker representatives and employers could change working conditions established in the sectoral agreement. In this case, the verification of certain circumstances was also required.

These regulations remained essentially unchanged until the passing of a very significant reform in June 2011. In fact, the main employers' association had repeatedly demanded a relaxation of the norms on articulation of collective agreements in order to allow for a wider breadth in agreements at the enterprise level.

These demands were broadly incorporated into the Royal Legislative Decree 7/2011, of 15 June, on Collective Bargaining Reform. This decree, passed by the Spanish Government and subsequently approved by Parliament, introduced crucial changes in the articulation of collective bargaining. Article 84.2 of the Workers' Statute stipulated that the application of working condition regulations established in an enterprise agreement would have priority over those working condition regulations established at the sectoral level for certain issues, including:

- the amount of the basic salary and extra allowances; allowances related to the company's situation and results included.
- the payment or compensation for extra working hours and specific shift work payment.
- working time and working time distribution; regulations on shift work and annual holiday planning.
- enterprise adaptation to the professional classification of the worker system.
- enterprise adaptation to various aspects of the types of contract to be used.
- and measures employed to reconcile work, family and personal life.

Clearly, enterprise agreements can affect (e.g. regulate in less favourable terms for workers) sectoral agreements in terms of various areas. Sectoral agreements shall no longer establish the level at which working conditions are primarily negotiated. It is impossible to ignore the likely consequences of this change in terms of working conditions in Spain. Needless to say, these new regulations turn the priority-in-time rule as a plurality of agreements' solving rule into an empty clause.

Article 84.2 of 2011 allowed for the possibility that an agreement, at the national or regional (Autonomous Community) level, would not permit such "derogations". However, as these agreements had to be necessarily negotiated at the top levels by representative employer associations (which are those that had, for a long time, pressured for the reform) and representative trade unions, this appeared to be unlikely. It should be highlighted however, that the social partners maintained the possibility of articulate bargaining from the sectoral level. The Decree-Law 3/2012 of 10 February and Law 3/2012 of 8 July removed any possibility of social partners articulating bargaining by forcing them to accept the priority given to the enterprise level, in all cases. The 2012 reform also introduced very significant changes: to a large extent, it facilitated opt-outs and strongly limited applicability of collective agreements after their expiration and during renewal negotiations.

Reform implies a serious risk of collective bargaining atomization, as well as wage dispersal, making it difficult to maintain sectoral base wages and, consequentially, resulting in a generalized wage

decrease as has already been shown (ILO 2013). It enables different enterprises in the same sector to compete by worsening working conditions in general and wage conditions, specifically.

4. Conclusions

The study and comparison of the French and Spanish cases leads to numerous conclusions that should be considered.

First, the French and Spanish collective bargaining systems are not substantially different. For decades, both were based on the sectoral bargaining level, which provided a certain degree of equalization to working conditions within every sector. Until recently, enterprise collective agreements existed almost exclusively in large enterprises and aimed to improve wages and working conditions as stipulated by the sectoral agreement.

However, historical factors have led to differing evolutions of the two systems. In post-World War II France, the favour principle was enshrined as a "social public order" principle, admitting no exceptions and establishing that no lower-level agreement could contain less favourable conditions than those corresponding to higher-level agreements. This was fine-tuned by the gradual introduction of other possibilities, based on which enterprise agreements could "adapt" sectoral regulations to the needs of the enterprises.

And in Spain, the structure of collective bargaining has been strongly conditioned by forty years of Francoist dictatorship, during which time trade unions were banned and collective bargaining (in terms of article 4 of the ILO Convention number 98 on the Right to Organise and Collective Bargaining), did not exist. However, clandestine trade unions developed a certain activity within the compulsory labour structures of the State. This, as well as the territorial and sectoral structure of Francoist labour regulations, influenced the development of the collective bargaining structure during the 1980s. This structure was strongly modified, as of 1994, with the so-called sectoral decentralising of collective bargaining. The decentralization was very strong, but it essentially remained within the sectoral level, reaching the enterprise level in a limited fashion (only under certain circumstances –namely, economic difficulties of the enterprise–).

One very clear difference between France and Spain is evident in regards to the development of enterprise collective bargaining through the expansion of its content. French legislature has created a large number of the so-called "bargaining obligations", e.g. the identification of fields in which negotiating at enterprise level became compulsory on a regular time basis (1 to 3 years) over the past thirty years (but especially during the last decade). Although the results of bargaining obligations have been less satisfactory than expected, they have nevertheless contributed to the spread of the enterprise agreement content. However, in Spain no such bargaining obligations have been established and therefore, the contents of enterprise agreements remains extremely poor and is rarely innovative.

As for the decentralising of collective bargaining in favour of the enterprise level, this began timidly in France in 1982 with the Auroux laws, which allowed for "revocations" in a particular issue (overtime). However, the real legislative revolution in French collective bargaining occurred in 2004 and 2008, with the creation of two closely-linked reforms. As a result of these reforms, today, enterprise collective agreements may "revoke" conditions established by a sectoral collective agreement (only if the latter has not banned it, which is quite often the case). But for many issues regarding working time and working time distribution, this banning has no longer been possible, since 2008.

The Spanish reforms are much more recent (2011 and 2012). They enable enterprise agreements to "revoke" conditions established by sectoral agreements for a large number of issues (wages, working time and working time distribution, overtime, professional classification, etc.). Their results, though highly predictable, remain to be seen.

The evolution of both the Spanish and the French collective bargaining systems, and specifically, their very recent developments, are meaningful examples and are indicative of very profound reforms made in European industrial relations that will undoubtedly occur over the coming years. A very clear trend to re-individualise working relationships may be seen, which may easily lead to the loss of acquired rights and the worsening of working conditions throughout Europe.

Despite strong parallels between both countries, there are also clear differences regarding how these changes are being applied. In the French case, changes are being implemented slowly and the effects of each implemented change may be evaluated to some degree prior to introduction of the subsequent change. Furthermore, employers and their associations are being quite cautious in order to prevent system destabilization from occurring due to the forced change. In Spain, however, the instigators of these changes want them to be applied very rapidly, leading to potentially devastating effects on the bargaining system.

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