

# Marked by invalidations. The consultation period in collective redundancies\*

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**Abstract:** To begin, this article shall critically address the regulation of the consultation procedure as applicable in Spain in regards to collective dismissals. It then assesses this regulation and its controversial application by the courts. Finally, some potential corrections are proposed in response to the failed 2012 labor reform, in light of the numerous collective dismissals that have been annulled by the courts. The first section describes the movement from the system of administrative control to judicial control and reveals some of the problems that have arisen during the different phases of the procedure, as well as some of their shortcomings which have led to the large number of declarations of invalidity. After examining some of the special procedures (dismissals due to force majeure, collective dismissals in public administrations and collective redundancies in bankruptcy proceedings), the analysis concludes by suggesting a series of proposals, including the exclusion of the invalidation of collective dismissals based on formal grounds.

**Keywords:** collective dismissal, invalidation, consultation period, information obligations, good faith negotiation, administrative control, judicial control, bankruptcy, public administrations, force majeure.

“Persistence is not beneficial. An army is like fire:  
If you don’t put it out, it consumes itself”  
Sun Tzu, “The art of war”

## 1. Introduction (1): regarding the importance of procedural problems and their repercussions on declarations of invalidation of collective redundancies

At first glance, the consultation period may appear to be a secondary element in the regulation of collective redundancies, especially in a system such as the Spanish one, where the law offers thorough regulation of this institution, establishing broad guarantees regarding legal control of the causes of terminations and compensation.

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\* In this work, the following abbreviations are used: ET, Spanish Workers Statute (Estatuto de los Trabajadores), approved by Royal Legislative Decree 1/1995 of 24 March; LRJS, Law 36/2011 of 10 October, regulating labor law; LGSS, Royal Legislative Decree 1/1994 of 20 June, approving the restated text of the General Law of Social Security (Ley General de la Seguridad Social); LRJAPC, Law 30/1992 of 26 November, approving the Law of the Legal Regime of Public Administrations and Common Administrative Procedure (Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común) and RPDC, Royal Decree 1483/2012 of 29 October, approving the regulations of collective redundancy proceedings and of contract suspension and work day reduction (Reglamento de los procedimientos de despido colectivo y de suspensión de contratos y reducción de jornada).

In practice however, this period has taken on a special importance, since it is directly related to a series of collective redundancy invalidations<sup>1</sup>, leading to the questioning of compliance with one of the largest goals of the 2012 labor reform: to increase the level of employment and reduce rates of temporary employment (precarious employment), through regulation that permits companies to more easily adapt their staffs to the evolution of the current economic situation. This effect is quite surprising, but it has some quite complex explanations. We shall consider some of these explanations in this work.

Let us begin by citing some data on this phenomenon. Initially upon application of the reform, there was a major trend to declare many of the collective redundancies invalid. According to some estimates, these declarations took place in up to 40% of all cases, perhaps reaching 50%<sup>2</sup>. Furthermore, in the website of the General Council of the Judiciary and in a consultation from the 10<sup>th</sup> of January of 2015, we find information that indicates that between March of 2013 and the 31<sup>st</sup> of December of 2014, Chamber IV of the Supreme Court declared 79 sentences in appeals of collective redundancies, of which, 31 of the redundancies were authorized; 9 were not authorized, and 18 were declared null. This was already a high percentage of invalidations— at 31 %. But it was also noted that the redundancies from Andalusian employment consortiums were calculated as one unique case, since this was a repetitive series based on an identical issue. Therefore, if we add these redundancies to the group, the total number of invalidations climbs to 39, some 49.5% of the overall participation<sup>3</sup>. Our own calculations for 2014 – which are limited to appeals proceedings- suggest a percentage of invalidations that reaches 48.6 %, the majority of which resulted from infractions occurring in the consultation period.

This “explosion” of invalidations raises serious doubts as to certain areas of current regulation, particularly those regarding the reintroduction of the invalidation based on formal causes in this delicate area, in terms of temporary treatment, as is the case with collective redundancy. These doubts also extend to the scope of legal control. But clearly it is agreed that, in the face of what seemed to be the general opinion at the initial moments of the reform, the problems of challenging collective redundancies have gone from focusing on material control of the causes to procedural issues arising during the consultation period<sup>4</sup>. Therefore, despite clarification efforts that have been made in some Supreme Court sentences, there is a legal consensus that is “very likely to establish the declaration of invalidity in the more varied formal breaches”<sup>5</sup>.

Clearly this may not be merely attributed to an excess of legal zeal regarding formal issues. Legislators have a major responsibility in terms of regulation deficiencies; company management during the consultation period may have also been negligent, particularly during the initial moments and, finally, certain trade union defense strategies focus on the systematic allegation of formal vices and procedure, so that at times, the consultation period appears to be a “factory of invalidations” when agreement is not reached.

The reflections that follow attempt to reflect upon some of the causes of this problem in regards to our legal system, while also proposing some potential solutions.

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<sup>1</sup> In Spanish law, a declaration of invalidation of the redundancy implies the obligatory readmission of the worker and the payment of all salaries that were not received between the time at which the redundancy occurred and the time of readmission. From the unlawfulness of the redundancy there is only the need to pay compensation, if the employer decides not to readmit the fired worker.

<sup>2</sup> Likewise for E. PALOMO BALDA (“120 judgments on the area of collective redundancies (and two more): a provisional balance”, *Diario La Ley* no. 8165 /2013) the total number of redundancies considered null as of the 31<sup>st</sup> of July of 2013 reached 49.5 % of the total; the percentage was 39.4%, also of the total, in the cases of invalidity based on formal reasons. According to M.A. FALGUERA BARÓ (“Problematic aspects of collective redundancies as of RDL 11/2013. A year and a half of legal experience”, *Jurisdicción Social Semanal*, n° 494/2014), the estimation for the period ranging between the 23<sup>rd</sup> of May of 2012 and the 25<sup>th</sup> of November of 2013 was 40.7% of the total of which, 70.7% corresponds to that which may be qualified as defects of form and procedure (some 18.7% for not being carried out in the consultation period, some 22.7% for insufficient documentation) and 29.3% due to irregularities in the creation of the negotiating body).

For a panorama of the legal evidence available on the invalidation of collective redundancy, see also the works of C. MAR-TÍNEZ MORENO, “La nulidad del despido colectivo : causas y límites”, *Actum Social*, n° 86/ 2014, and F. DURÁN LÓPEZ, “Exigencias formales y procedimentales en los despidos colectivos”, *Revista del Ministerio de Empleo y Seguridad Social*, no. 109 /2014.

<sup>3</sup> This data is only indicative since it only includes the judgments that have been appealed, but it may serve as a representative sample of the situation, although correction should be made for the case of the Andalusian employment consortium series.

<sup>4</sup> F. DURÁN LÓPEZ, *op. cit.*, p. 136.

<sup>5</sup> F. DURÁN LÓPEZ, *op. cit.*, p. 146.

## **2. Introduction (2): a negotiation process that is based on an administrative procedure without administrative resolution. Administrative intervention based on the suppression of administrative authorization**

### **a) From the system of full administrative control to the system of collective redundancy with limited administrative support and control**

Collective redundancy procedures have been historically linked to a means of termination that is, at the same time, an artificial construction-- the result of the convergence of two elements: the causal (the presence of economic causes in the broadest possible sense<sup>6</sup>) and the numeric, which, through the thresholds of affectation, define the very collective nature of the dismissal<sup>7</sup>. In our legal system, these elements have certain noteworthy variations, whereby we can speak of a progressive displacement of the causal element (“the company crisis”) in terms of the numeric element (the “collective” nature of the dismissals).

But the very nature of the Spanish model implies a leading role of the administration in controlling termination decisions, clearly suggesting that collective redundancy is a political problem.

In Spain, collective redundancy was subject to administrative authorization until 2012<sup>8</sup>.

Based on Royal Decree– Law 17/1977, a channel was opened for the preliminary agreement with the affected workers-- an agreement that may exclude administrative procedure, but not administrative authorization, and which does not bind the labor authorities, who may demand the opening of administrative proceedings, even when a previous agreement was reached. This system is maintained in the initial version of the ET<sup>9</sup>, which, without a doubt, inspired *ante tempus* by the Directive 75/129/EEC, includes a mandatory consultation period in which, when agreement is reached, is subject to the labor authorities, who may ratify the agreement, contest it or, in accordance with regulations<sup>10</sup>, order that authorization procedure be carried out. If agreement is not reached, the administrative procedure begins, which may authorize the termination or deny it.

With the reform of Law 11/1994,<sup>11</sup> there was the full transposition of the Directives 75/129/EEC and 92/56/EEC regarding the definition of collective redundancies as opposed to individual terminations having economic causes and the development of the consultation period. But administrative intervention continues to be decisive when agreement is not reached or when challenging the same.

The administrative authorization system was maintained, even following the reforms of Royal Decree-Law 10/2010 and Law 35/2010<sup>12</sup>, which, among other measures, foresaw the challenging of this authorization before the social order<sup>13</sup>, to be carried out with the LRJS, although with a very limited period of enforcement<sup>14</sup>.

<sup>6</sup> The expression is normally used here in the broadest sense possible, including the technical, organizational and productive causes.

<sup>7</sup> For more on these elements and their evolution in the Spanish system, see the book by J.M RÍOS MESTRE, “*Despido colectivo y concurso de acreedores*”, Civitas, Madrid, 2012, pp. 161 - 166 and 191 - 212.

<sup>8</sup> The milestones of the initial phase of the administrative authorization system are Law of 25 June of 1935 and the Decree from the 29<sup>th</sup> of November of 1935, the Decree from the 26<sup>th</sup> of January of 1944, Decree 3090 /1972 and Law 16/1976 on labor relations. It was an absolute administrative control system without negotiation with the worker representatives.

<sup>9</sup> Law 8/1980.

<sup>10</sup> Approved by Royal Decree 696/1980. In this point, the regulation was of dubious legality.

<sup>11</sup> The new regulation of regulatory development was Royal Decree 43/1996. For a general view of the resulting system, consult the book by A. BLASCO PELLICER, “*Los procedimientos de regulación de empleo*”, Tirant Lo Blanch, Valencia, 2007.

<sup>12</sup> The new law led to procedural regulations based on Royal Decree 801/ 2011.

<sup>13</sup> 15<sup>th</sup> Additional Provision. The reform was inspired by the proposal formulated by T. SALA FRANCO and A. BLASCO PELLICER in “*La supresión de la autorización administrativa en los expedientes de regulación de empleo*”, Actualidad Laboral, no. 8/2009.

<sup>14</sup> LRJS was enforced as of the 12<sup>th</sup> of December of 2011, but the administrative authorization was eliminated by Royal Decree-Law 3/2012 effective as of the 12<sup>th</sup> of February of the same year.

## b) The current role of the administration in collective redundancies: support of the parties' negotiation process and weak control; a search for solutions?

A break with the administrative authorization system occurred with the introduction of the 2012 reform<sup>15</sup> and this has been one of the greatest innovations of this reform. The preamble of Law 3/2012 includes the reasons for the change, signaling that this system had some very serious inconveniences, both from a timeliness perspective, due to the chain of administrative and judicial challenges<sup>16</sup>, and based on the trend to “ensure” authorization via agreements that were based on the increasing of compensation. It includes, in part, those criticisms that were formulated against a system of dubious constitutionality, attributing the administration with a mandatory arbitrational function<sup>17</sup>, which is mainly jurisdictional, and in which politically opportunistic criteria (as opposed to strictly legal ones) may operate during its exercising. It was also a clearly inefficient system due to the extensive time, uncertainty and procedural costs incurred, leading to staff displacement in favor of other less legal options<sup>18</sup>.

However, administrative authorization had and continues to have its supporters, who value its role of control prior to the termination decision and who propose its legal justification as an administrative limitation activity based on an authorized technique<sup>19</sup>.

However, arguments in favor of administrative authorization have not been conclusive. This is so due to a variety of reasons. First, this is not an administrative limitation activity, in which administrative authorization is necessary to control the limits of exercising a right for reasons of general interest. The exercising of the termination based on economic causes has already been regulated and limited by the law, thereby complying with the demands of ensuring the general interest linked to the protection of the right to work, through a legal system that establishes the causality of the termination and the application of compensation for the dismissal. There is an potential conflict between the company and the workers regarding the application of these regulations; a conflict that should be resolved via negotiation –thus, the consultation period- or by judicial ruling, but not by an administrative act. Second, it is clear that this legal control of the business decision is sufficient in terms of guarantees, but in all cases, it would be possible to configure it as a previous control, as occurs in the so-called collective dismissal based on insolvency. In any case, administrative control becomes excessive and based on the delay of the resolution, if the administrative decision is later subject to judicial control. On the other hand, the administration, having a political management, is not subject to a statute of impartiality such as a judge, and its intervention may be conditioned by opportunistic factors<sup>20</sup>.

<sup>15</sup> Royal Decree-Law 3/2012 and Law 3/2012.

<sup>16</sup> With delays in the final decision that may reach, in some cases, up to seven, nine or more years. See some examples in A. DESDENTADO BONETE, “Introducción a un debate. Los despidos económicos en España: el sistema, su crisis y los límites de la reforma”, in AA.VV. “Despido y crisis económica. Los despidos económicos tras la reforma laboral”, Lex Nova, Valladolid, 2011, pp. 34 and 35; also “Crisis y reforma del despido: puntos críticos seguidos de algunas propuestas”, Actualidad Laboral no. 11 /2010 Until December of 2011, the administrative decision regarding collective redundancy was challenged, first, before the very administration and later, with a contentious administrative order, a jurisdictional order that has traditionally been affected by delays as a result of the overloading of issues.

<sup>17</sup> E. DESDENTADO DAROCA, “La intervención administrativa en los despidos colectivos”, Relaciones Laborales, no. 8/1996.

<sup>18</sup> Therefore it is estimated that during the great staff adjustment occurring during the years of the crisis, only between 11 and 13% of the terminations were carried out through the system anticipated for economic dismissals (collective redundancy and objective economic termination), while a very high percentage – around 75% or 80% - were carried out via terminations without renovation of temporary contracts and the so called “express” termination, a fast dismissal recognized by the employer in the termination act as inappropriate, with a reduction of the procedural salaries (A. DESDENTADO BONETE, “Introducción ...”, cit., pp. 30 to 33). See also M. RODRÍGUEZ PIÑERO, “Despidos colectivos y autorización administrativa”, Relaciones Laborales, nº 2009.

<sup>19</sup> Specifically, E. CASAS BAAMONDE, “Causalidad del despido colectivo, autorización administrativa y negociación colectiva”, Relaciones Laborales, no. 19/ 1996 and F. VALDÉS DAL RÉ, “Intervención administrativa y despidos económicos: funciones, disfunciones y tópicos”, Relaciones Laborales, no. 1994. Para una visión más general, F. NAVARRO NIETO, “Los despidos colectivos”, Civitas, 1996, pp. 195- 200, and J.L. MONEREO PÉREZ and J. A. FERNÁNDEZ AVILÉS, “El despido colectivo en el Derecho español” Aranzadi, Pamplona, 1997, pp. 254- 273.

<sup>20</sup> A. DESDENTADO BONETE, “Crisis y reforma del despido...” cit., 1269 – 1272.

But regardless of this largely historical debate, it should be clarified that even following the reform, administrative intervention persists. First, authorization remains for dismissals due to force majeure, in which no consultation period exists (art. 51.7 ET and art. 31 to 33 of RPDC).

Second, throughout the consultation period, the administration remains extremely present in the parallel administrative procedure framework, which, paradoxically, leads not to administrative resolution<sup>21</sup>, but in which the administrative presence is projected across all phases of said period.

Thus, in the initial phase, the company's communications do not notify only the worker representatives, but also, the "labor authorities"<sup>22</sup>, who are to receive a copy of the explanatory report and all required documentation (art. 51.2. 5<sup>th</sup> and 6<sup>th</sup> ET, art. 6 RPDC). The labor authority proceeds to transmit the communication to the unemployment benefits management entity (art. 51.2. 7<sup>th</sup> ET) and to the Social Security Administration when the projected dismissal of the workers includes the obligation to underwrite a special agreement (art. 51. 9 ET regarding the additional provision 31<sup>st</sup> LGSS and art. 20 of the Order from the 13<sup>th</sup> of October of 2003).

In both cases, this is clearly a control activity.

Information is provided to the State Public Employment Service, making it aware of the existence of a redundancy project that may have major economic consequences. Based on this data, this organism may in turn request that the Labor Administration challenge the agreement reached during the consultation period, when it considers that this agreement may have the goal of obtaining undue unemployment benefits (art. 51.6.2<sup>nd</sup> ET).

At this initial time, the labor authority should also gather the report issued by the Labor Inspectorate, in accordance with the terms of art. 51.2.7 ET and art. 6.4 and 11 RPDC, which we shall refer to later.

During the development of the consultation period, art. 51.2.11<sup>th</sup> ET entrusts the Administration with the function of ensuring its effectiveness, thus it may make recommendations and warnings to the parties, without this resulting in the paralyzing or suspension of the proceedings. This is an administrative support task that does not present binding orders for the parties, but rather, guidelines that may have a practical importance. Warnings are offered in order to highlight any deficiencies or irregularities that may exist- primarily in the initial communication, the explanatory memorandum, the documentation provided or the composition of the negotiating body-, and recommendations are suggestions given in order to overcome the described defect or to improve the effectiveness of the negotiation. Thus, art. 10.2 RPDC also attributes assistance-based work to the Administration.

In arts. 6 and 10 of RPDC, a set of somewhat complex administrative actions are regulated, which, nevertheless, do not seem to be efficient in preventing the declarations of invalidation. As previously mentioned, the creation of warnings and precautions for both parties was foreseen, and the worker (but not company) representatives are empowered to suggest any relevant issues to the Administration<sup>23</sup>. But neither the law nor the regulations- which are clearly overly concerned with the speed of the negotiation process and with deadline compliance- have established a specific proceeding for denouncing and correcting the formal defects, permitting the "closure" of these problems prior to the beginning of the consultation period, without preventing those that were not opportunely denounced from later making a claim<sup>24</sup>.

Therefore, the somewhat inaccurate regulation of the report of the Labor Inspectorate in the ET and of the RPDC should be noted. The report must "be issued in a non-extendable period of fifteen days as of the notification to the labor authority of the termination of the consultation period" and it should be included in the record. However, it must give its opinion whether or not the initial communication

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<sup>21</sup> Thus the true administrative procedure nature has been negated (J. R MERCADER UGUINA and A. DE LA PUEBLA PINILLA, "Los procedimientos de despido colectivo, suspensión de contratos y reducción de jornada", Tirant lo Blanch, Valencia, 2013, pp. 57-60).

<sup>22</sup> For more on the distribution of competencies amongst the different administrations – state and autonomous – that intervene in the collective redundancies, see art. 25 RPDC.

<sup>23</sup> Art. 10. 1 3<sup>rd</sup> RPDC also states that the business owner should respond in writing to the labor authority regarding their warnings and recommendations.

<sup>24</sup> The provisions of art. 6. 4 RPDC on precautions of the labor authority, either direct or upon request of the Labor Inspectorate do not permit the overcoming of this criticism, regarding the possible breach of the requirements of the initial communication, as this is only a warning, not a correction procedure.

complies with the legal requirements and how the consultation period was carried out<sup>25</sup>, with all necessary documentation being provided<sup>26</sup>, including the minutes from meetings during this period that have been “duly signed by all attendees”<sup>27</sup>. But, since the consultation period has already ended, the report will have no effect on the correction of any defects or irregularities occurring during this period, thus it will not be useful in this area, serving merely as a means of assessment to the judicial body through the incorporation of the “administrative record” to the legal actions<sup>28</sup>. This raises the issue of notification of the report to the collective redundancy parties<sup>29</sup>, since, if the report of the Labor Inspectorate is not included in the evidence provided by the secretary to the parties in virtue of art. 124. 10 LRJS, a situation of powerlessness may arise. The report fulfills another function of control in that it “advises” the labor authority of the possible existence of causes for carrying out the official action of art. 51. 6.2<sup>nd</sup> ET.

During the consultation period, the administrative support work also includes the offer to mediate, as referred to in arts. 51. 2. 11<sup>th</sup> ET and 10. 3 RPD. In the last provision, it is stated that “in order to search out solutions to problems suggested by the collective redundancy” the labor authority may “carry out mediation actions upon collective request of the parties”<sup>30</sup>. This mediation may be carried out by both the labor authority and the Labor Inspectorate. In the case of successful mediation, this will lead to an agreement of art.51.9 ET with full legally binding effects.

In the final phase of termination of the consultation period, the Administration shall also take on the functions of information receipt and control. Art. 51.2.12<sup>th</sup> ET establishes that if an agreement is reached, such as if there is a unilateral dismissal decision by the company, the company should communicate the results to the labor authority, including the information detailed in art. 12 RPDC<sup>31</sup>. As for controlling the agreement or decision of the company, only the agreement may be challenged – not the dismissal decision - via the ex-officio (art. 51.6.2<sup>nd</sup> ET and art. 148 LRJS).

What about the function of seeking solutions to problems suggested by collective redundancies that art. 4. 2 of Directive 98/59/EC attributes to the public authority? The lack of references for this function in art. 51 ET and RPDC has been criticized, except for the incidental mention made to the mediation in art. 51.2 .11<sup>th</sup> ET<sup>32</sup>. But the real reference to the search for solutions surpasses that which, in general, the Administration can carry out in accordance with Spanish law. In fact, the “solutions” have been provided by the legislator, establishing the demand for causation of the termination, the invalida-

<sup>25</sup> The report should consider other areas: 1) the possibility of fraud, misconduct, coercion or abuse of right in the conclusion of the agreement, 2) the eventual undue acquisition of unemployment benefits, 3) the possible application of discriminatory criteria in the selection of workers and 4) compliance with the permanence priorities.

<sup>26</sup> Initial documentation received by the Labor Inspectorate in accordance with art. 6. 3 RPDC and subsequent documentation regarding the results of the consultation period, the relocation plan and accompanying social measures (arts. 11.1 and 12.2 RPDC).

<sup>27</sup> Art. 12.3 RPDC. It does not specify the way to proceed in the case in which one party refuses to sign the act. It notes that this is not a process, or an administrative procedure in which an official worker may attest to what has occurred, thus except in the case of designation by the negotiating parties, by mutual agreement, of a secretary with these powers, or of an unlikely notary public intervention, it is necessary to resort to general evidence measures.

<sup>28</sup> Regarding the probative value of the Inspectorate report, it is seen in SSTS 18.3. 2014 (r. 114/ 13), 23. 5. 2014 (r. 179/13) and 29. 12. 2014 (r. 93/12). In these, it is established that the report lacks the presumption of certainty, although its conclusions may, when necessary, “serve for orientation... when it comes to resolving”. STS 23. 5. 2014 suggests that “we are not in the presence of a formal act nor are the facts actually verified by the Inspector as the legal rule demands, as the case law upon suggesting that it lacks the probative value, the simple global overviews, value judgments or the legal qualifications by the Inspector”.

<sup>29</sup> J. R. MERCADER UGUINA and A. DE LA PUEBLA, “*Los procedimientos...*” cit., pp. 153 and 154.

<sup>30</sup> It has been criticized that mediation should not be obligatory when it is requested by only one party (J. CABEZA PEREIRO, “*La supresión de la autorización administrativa en los despidos colectivos*”, in AA. VV., “*Políticas de austeridad y crisis en las relaciones laborales: la reforma de 2012*”, Bomarzo, 2012, pp. 284 and 285). But in fact, administrative mediation is only one of many measures that may be selected by the parties (art. 51. 2. 10 ET regarding, for example, art. 4.1. e) of V Agreement on Autonomous Solution of Labor Conflicts), thus it is necessary to permit them. Mandatory administrative mediation may go against other regulations and may also be unadvisable in practice, since if there is no joint determination to reach an agreement it is most likely going to be a waste of time.

<sup>31</sup> The information includes the updated data from the initial communication, the corresponding documentation from the accompanying social measures and the relocation plan and any minutes from meetings held during the consultations.

<sup>32</sup> J. CABEZA PEREIRO, loc. cit, pp. 284 and 285, referring to the irrelevant role of the administration in the new model of collective redundancy and its lack of accommodation to Directive 98/59/EC.

tion or the challenging of collective redundancies, the applicable compensation, the relocation plan, the special agreement for Social Security and the unemployment benefits. The administration cannot prevent these dismissals, as they do not authorize them and their potential challenging is carried out in court; likewise, they cannot “seek” employment for the dismissed workers, other than by carrying out the employment services and accompanying social measures. The possibility of support actions that may permit the reduction or limiting of dismissals depends on the specific case in accordance with the applicable rules and activities involved; logically, they should not include the artificial maintenance of a subsidized employment situation.

### 3. The consultation period: general framework and problems

#### a) The general framework: preliminary phase, initiation and development of consultation period

##### a) *The creation of the negotiation body in the preliminary phase*

The general framework of the consultation period is inspired by the model of Directive 98/59/EC, both regarding its purpose and in the general conception of the initiation phase and the information obligations. It has, however, its own regulation in the phase prior to the creation of the negotiation body and also in the development and termination of the negotiation process.

The preliminary phase has been greatly affected by Royal Decree-Law 11/2013. This new regulation has gone beyond the problem of fragmented negotiation by centers that used the previous regulation<sup>33</sup>. Now it is expressly stated that “the consultation is carried out in the sole negotiating commission”- with a maximum of thirteen members for each party- “however, if there are various work centers, it shall be restricted to those centers that are affected by the procedure”. The allocation principle is not established based on the scope of the cause itself- always the company when the cause is economic, for assessment purposes<sup>34</sup>-, but rather, is based on their personal projection regarding the dismissals (centers affected by these).

The criteria for the creation of the negotiating commission are included in art. 41. 4 ET. The company representation is designated by the company management, although paragraph a) of the 3<sup>rd</sup> section includes, in a restrictive and unnecessary manner, the possibility of delegation in the business organizations. The criteria for the designation of worker representation is more case specific. In principle, this representation tends to be assumed by trade union sections, provided “this is agreed upon and a majority is reached within the unitary representatives of the affected work centers”; a supposition regarding which the regulation clarifies that “they represent all workers from the affected centers”.

If this trade union representation does not occur, the designation is more complex and the regulation distinguishes between two hypotheses:

<sup>33</sup> Art. 11. 2 of the regulation approved by Royal Decree 801 / 2011 and art. 27. 2 RPDC in the initial version of Royal Decree 1483/2012. This last provision stated that when the dismissal affected various work centers, it could be made globally for all of the company’s centers or in a differentiated manner by work center. The Labor Chamber of the Spanish National Court (Audiencia Nacional), in various judgments since SAN 25. 7. 2012 (p. 109/12), dictated in the case of SEGUR IBÉRICA, that the regulation was *ultra vires*, since it broke with the legal unitary concept of dismissal, artificially fragmenting it by centers with the possibility of contradictory qualifications. This reasoning stands, since the economic causes are projected collectively on the company, but it is questionable for the others. Furthermore, it should be considered that in these cases, there is no fragmented collective redundancy, but rather, as many dismissals as affected work centers. Vid. J.R. MERCADER UGUINA and A. DE LA PUEBLA, “*Los procedimientos ...*”, cit., pp. 134 -136. The case is of historical interest, but it should be noted that STS 20. 5. 2014 (r. 166/13) revoked the judgment of the National Audience in the SEGUR IBÉRICA case to maintain that, in compliance with current legislation of the moment, in no way “is it possible that the consultation period and resulting negotiations, in the case in which there is no higher union representation body or when an *ad hoc* negotiation commission has not been created in the same, be carried out by work centers, even when the cause of the business measures coincide”.

<sup>34</sup> Regarding the area of assessment of cause, see RIOS MESTRE, op. cit., pp. 240 and 241, and A. DESDENTADO BONETE and A. DE LA PUEBLA PINILLA, “*Despido y jurisprudencia. La extinción del contrato de trabajo en la unificación de doctrina*”, Lex Nova, Valladolid, 2002 pp. 144-146.

- 1<sup>st</sup>) That the procedure affects a single work center, in which case the representation is attributed to the works council or the staff delegates. If there is no legal representation, workers may opt to attribute their representation to a commission having a maximum of three members “made up of workers from the company and those that have been democratically selected by them” or to a commission, also with the same numeric limit, designated by the trade union (the so-called *ad hoc* commissions)<sup>35</sup>.
- 2<sup>nd</sup>) That the procedure affects more than one work center, in which case the representation corresponds to: 1<sup>st</sup>) the inter-center committee, provided this competence is recognized in the collective agreement upon which its creation was based; 2) if this solution is not possible, a “representative commission” should be created, for which three cases have been distinguished:
- (a) If all of the centers have unitary or elected representatives, the representative commission shall be made up of the same.
  - (b) If some centers have representatives and others do not, the representative commission is made up of unitary or elected representatives, except for the workers from the centers that do not have representation, opting to designate an *ad hoc* commission, whereby the “representative commission is made up collectively of legal representatives of the workers and by members of the commissions described in said paragraph, in proportion to the number of represented workers” (*hybrid commissions*). In the case in which the workers from the centers without representation opt not to designate an *ad hoc* commission, their representation is to be assigned to the legal worker representatives from the affected work centers that have them, in proportion to the number of workers represented.
  - (c) If none of the work centers have legal representatives, the representation shall be made up of those elected by and from the members of the *ad hoc* commissions that have been designated in the affected work centers, in proportion to the number of workers that are represented.

As a final regulation, art. 41. 4. ET 3<sup>rd</sup> b) states that if, as a result of the application of the rules established in this provision, the initial number of representatives is greater than thirteen, they shall select a maximum of thirteen (from and between them) in proportion to the number of workers represented.

On the other hand, art. 51. 2 3<sup>rd</sup> ET regulates a procedure to proceed with the designation of the labor representation. The company management should communicate, in a reliable manner, to its workers or their representatives, its intent to initiate the collective redundancy procedure. As of this time, there is a maximum period of seven days in which the labor representation may be established; this period is extended to fifteen days in the case in which the centers do not have elected representation. If the labor representation is not created within this period, the company may formally communicate the start of the consultation period to the worker representatives and to the labor authorities, which shall continue without the labor representation. If this is later created, it shall not “result in any case, in the extension” of the duration of said period. According to these provisions, it is clear that the responsibility of the creation of the labor representation corresponds to the workers or their representatives, assuming that the company has complied with its information obligations.<sup>36</sup>

<sup>35</sup> The designation is carried out according to representation, by the trade unions that are the most representative of the sector to which the company belongs, and that were authorized to form a part of the negotiating commission of the collective agreement applicable to the same.

<sup>36</sup> Regarding this, see SAN 16. 5. 2014 (PANRICO case, p. 500/13), in which the irregular creation of the labor representation organization did not affect the dismissal decision of the same, but, in this case, did affect the consultation period, except in the case in which the company could be charged for this irregularity, as was the case with STS 25. 11. 2014 (r 87/13). To the contrary- adds the judgment- it would be “both transferring the consequences of the inappropriate behavior of the counterpart to the business partner, giving rise to a situation of manifest injustice and increasing the fraudulent behavior of the establishment of “non-representative” commissions with the ultimate goal of declaring the business decisions invalid in regards to the internal or external flexibility, resulting in the definitive inoperability of the institution”. The Supreme Court judgment establishes, without further distinctions, that “there should be correspondence between the worker representation body that intervenes and ne-



On the other hand, the possibility of the company workers rejecting the intervention of an *ad hoc* commission and opting for a collective negotiation with all of the affected workers should be considered. This is an unlikely situation and is one that is of difficult application in large organizations. But such was the case with the “Lumac” company, having a staff of 17 workers who rejected the appointment of a commission and opted to negotiate with the company in a collective manner and this decision was accepted. SAN 20.12. 2013 (p. 401/13) considered the dismissal invalid since this type of negotiation is not recognized and since the company did not warn the workers of the consequences of not designating representatives. This resolution is questionable since the invalidation only punishes the company, while in fact, both parties were responsible for this and also because the lack of information regarding the legal consequences of the lack of designation – a consultation period without labor representation – does not imply the failure to comply with a business obligation<sup>37</sup> and since this did not occur in an absence of negotiation, but rather, in a collective negotiation as requested by the workers.

### *b) Initiation and development of the consultation period*

#### 1st) Initiation; information duties and document provision

The conclusion of the consultation period is not the mere consultation in terms of collecting and receiving an opinion, but rather, is a process in which the parties should negotiate in good faith “in order to reach an agreement”, as suggested in art. 51.2. 8<sup>th</sup> ET, reiterated in the regulation of art. 2.1 of Directive 98/59/EEC. Later on we shall once again consider the scope of this obligation but it should be noted that the legal concept of this period consists of both preliminary obligations of information provision as well as a specific behavior during the development of the consultations.

The consultation period begins with the communication of the initiation, to be made in writing and sent to the worker representation and the labor authority. Its completion is mainly informative, in order to prepare for the negotiation and to notify the Administration of the redundancy project. From this point on, its complex content includes the following:

- 1<sup>st</sup>) Information on the elements making up the projected termination decision and that serves as the basis of negotiation<sup>38</sup>, but that is not in itself an agreement offer, but rather, a company action that defines the proposed dismissal, excluding its subsequent *in peius* modification, since if the negotiation has been initiated regarding a specific dismissal, another distinct one<sup>39</sup> may not be considered during this procedure<sup>40</sup>.
- 2<sup>nd</sup>) The basis of the termination decision for which the communication of the initiation is made, is accompanied by an explanatory report listing the causes of the dismissal; an explanation

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gotiates during the consultation period with the company and the area of the personnel that is affected by the procedure”; a rule that has not complied with what “makes up, in compliance with article 124.11 of the LRJS, the declaration of invalidation of the business decision due to lack of legitimacy of the Inter-center Committee that has intervened during the consultation period”.

<sup>37</sup> In general, the company is only obligated to communicate the initiation of the consultation period for purposes of the creation of the labor representation in the negotiation body, indicating the deadline for doing so (art. 51 .2. 3<sup>rd</sup> ET).

<sup>38</sup> According to art. 51.2.5<sup>th</sup> ET, these elements are: 1) the specification of causes of the dismissal, 2) the number and professional classification of the workers affected by the dismissal, 3) the number and professional classification of the workers that are usually employed over the past year, 4) the period anticipated for the carrying out of these dismissals, and 5<sup>th</sup>) the criteria considered for the designation of the workers affected by the dismissals. To this information it is necessary to add a copy of the communication of the intent to initiate the collective redundancy procedure for purposes of the designation of the representation of the social side and a relationship of the representatives making up the labor side of the negotiating body. In the initial communication, the report described in section a) of art. 64.5 ET is requested.

<sup>39</sup> Art.12.1 RPDC refers to the “action” of the extremes of the initiation communication. STS 15. 4. 2014 (r. 136/13) clarifies that the offers formulated by the company during the negotiation are not binding if they are not accepted. But the content of the initial communication is not a negotiating offer; it constitutes a defining act of the dismissal. This does not exclude the fact that in addition to the legally specified determinations, the company may also incorporate offers in the initial communication.

<sup>40</sup> However, this procedure should be abandoned and another should be initiated as occurred in the case of the company Celsa Atlantic which is mentioned in note 63.

that includes the other points of the communication (number of dismissals, selection criteria, application period and, when relevant, the external relocation plan).

- 3<sup>rd</sup>) Complementary documentation that allows the labor representation to verify the situation causing the dismissals and to negotiate with the appropriate level of information regarding the scope of the same and potential alternatives. Art. 51.2.6 refers to the need to provide “accounting and fiscal documentation and the technical reports”, but subjects this determination to regulations, with distinct regulations for economic and other causes.

If the causes are economic in nature, the corresponding audited (if necessary) annual accounts from the last two fiscal years<sup>41</sup> are to be included, as well as the provisional accounts that are being approved<sup>42</sup>. If future losses are alleged, the “criteria used for their estimation” should be provided and a technical report should be attached in accordance with art. 4.3 RPDC<sup>43</sup>. When the negative economic situation is the result of a consistent decrease in income or equity level, the complementary documentation described in art. 4. 4<sup>th</sup> RPDC<sup>44</sup> should be provided.

When the causes are of a technical, organizational or productive nature, art. 5 RPDC establishes that, in addition to the explanatory notes, it is also necessary to attach reports accrediting the concurrence of these alleged causes.

In the case of collective redundancies of over 50 workers, documentation corresponding to an external relocation plan should also be included (art. 9.1 RPDC).

In the regulations, the provision of information and documentation on behalf of the company appears as a closed obligation, consisting of only those elements that have been previously described. But upon examination of art. 2.1 of Directive 98/59, we find that the obligation is broader, including the provision to the worker representatives of not only that which has been expressly described in paragraph b) of this article, but also of anything that may be considered “relevant”<sup>45</sup>. However, this additional information and documentation is not obligatory with the provision of the initiation communication, although it may be requested by the worker representatives.

## 2<sup>nd</sup>) Development of the consultations

The consultation period has a maximum duration of 30 or 15 calendar days, depending on whether or not the staff consists of at least 50 workers<sup>46</sup>. During this period, the parties have the obligation to

<sup>41</sup> Art. 4.2 RPDC details the accounting documentation to be provided, referring to the balance sheet, profit and loss accounts, statement of changes in equity, cash flow statement, notes from each fiscal year and management report or, when relevant, the corresponding abridged accounts. The accounts should be audited unless the company is not required to do so. The lack of an audit obligation requires a declaration of the same by the company representation.

<sup>42</sup> The final accounts are prepared in a maximum period of 3 months as of the close of the fiscal year; the audit extends for at least one month and following the approval of the ordinary General Shareholders Meeting, before the end of the first six months of each fiscal year. The provisional accounts should be signed by the company directors or representatives (art. 4.2 RPDC).

<sup>43</sup> The technical report should include the volume and permanent nature of this provision of losses established based on the measures mentioned in the provision.

<sup>44</sup> This is the fiscal and accounting documentation that accredits the on-going decrease of income and sales, “at least over three consecutive quarters immediately prior to the date of initiation of the procedure, as well as the accrediting documentation of the ordinary income or sales recorded in the same quarters of the previous year”. The reference to the three quarters seems excessive, given that according to the law this is only a condition for the operation of the so-called automaticity clause of art. 51.1. 2<sup>nd</sup> ET (“in all cases”), but not a requirement for the assessment of a negative situation.

<sup>45</sup> For more on this, see STS 20.11. 2014 (r. 114/14), which rejects the existence of an obligation to provide the agreements that the defendant company had entered into with the principal company, not because these agreements are not related in art. 4 RPDC with the documentation to be delivered, but because there is a lack of significance of the order in which the worker representatives had “a clear understanding of the causes of the dismissal, of the economic situation of the company, and of the external services that were provided”. STS 18.7. 2014 (r. 303/13) suggests that the company should supply “all necessary information for not only the accrediting of the motivating causes of the collective redundancy, but also with sufficient clarity and specificity to be able to determine and negotiate, among other things, the number and professional classification of the workers affected by the dismissal, the period anticipated for the dismissal and the selection criteria”.

<sup>46</sup> This is a maximum period, but when it is exceeded, this alone does not imply the invalidation of the negotiations carried out, or of the dismissal (SSTS 15. 4. 2014, r. 188/13 and 23. 5. 2014, r. 179/13). The reduction of the consultation period by mutual agreement of the parties is also incapable of producing this effect (STS 18. 7. 2014, r. 303/13).

“negotiate in good faith in order to reach an agreement” (art. 51.2 8<sup>th</sup> ET) regarding “the possibilities of avoiding or reducing the collective redundancies and of mitigating the consequences through the use of accompanying social measures” (art. 51. 2 .1<sup>st</sup> ET and numbers 1 and 2 of art. 2 of Directive 98/59/EEC). This is an obligation to negotiate, not to reach an agreement, but the determination of the scope of this obligation, as we shall see later on, has led to serious problems in regards to the declarations of invalidation that may result from the assessment of a failure to comply. The goal of the negotiation is linked to the prevention or reduction of dismissals or the mitigation of these consequences based on accompanying social measures, according to the previously mentioned ET provisions and those of Directive 98/59. But the negotiation is extended in a broader sense in certain judgments, until including all of the extremes of the initiation communication and, among others, the selection criteria<sup>47</sup>.

Unless the parties decide otherwise, the first meeting should be held within a period of not less than three days as of the delivery of the initiation communication. In this meeting, the calendar of the others is approved with a broad power of self-organization for the parties, although some minimums are established<sup>48</sup>, “unless otherwise agreed”<sup>49</sup>. At any moment, the parties may decide to substitute the consultation period for the applicable mediation and arbitration system, including administrative mediation, if these procedures are to be carried out within the maximum time period applicable to the consultation period (art. 51.10 and 11 ET, art. 28.2 RPDC).

*c) The termination of the consultation period: the unilateral termination agreement or decision and its challenging*

The consultation period ends when an agreement is reached or “at any moment” when the parties feel that it is not possible to reach any agreement<sup>50</sup>. The agreement on collective redundancy requires “agreement of the majority of the legal worker representatives or, when applicable, of the majority of the members of the representative workers commission, always assuming that, in both cases, this represents a majority of the workers from the affected work center or centers (art. 51. 2. 9<sup>th</sup> ET and art. 28 .1 RPDC).

In the meetings, minutes shall be taken, to be signed by all attendees<sup>51</sup>, leading to a problem of record when no agreement is reached regarding the recording of the minutes or when no authorized individual has been designated to attest to the same.

Termination may occur with or without agreement. In any case, the result is to be communicated to the labor authority, in accordance with the terms established in art. 12 RPDC. If no agreement is reached, the company may proceed with the “the final dismissal decision”, which is to be communicated to the labor authority and to the worker representatives within a period of 15 days as of the date of the last meeting. Failure to comply with the deadline may result in the expiration of the procedure (art. 51.2.12<sup>th</sup> and 13<sup>th</sup>, art. 12 RPDC), hindering the appeal of the dismissal which, if carried out, may be annulled<sup>52</sup>.

<sup>47</sup> The previously cited STS 18.7. 2014 (r. 303/13) suggests that “a real absence of selection criteria shall devalue the negotiation during the consultation period, as the worker representatives shall not be able to counter offer the company measures, making the ultimate objective of the consultation period useless as well as the subsequent and proper judicial control”. This conclusion is debatable since in Spanish law the selection is a company power that is only limited in regards to the legal preferences and the principle of non-discrimination. Thus, although these criticisms should be announced in the initiation communication and may be the object of negotiation, it is doubtful that they constitute an area of mandatory negotiation. See also, regarding the specification of these criteria in the initiation communication, SSTS 18.2. 2014 (r. 79/13) and 20.5. 2014 (r. 276/13) and, regarding its judicial control, STS 25.6.2014 (198/13), which distinguishes between its collective dimension in the initiation communication and its specific application in individual dismissals. A more demanding position on this issue may be seen in the specific vote on this ruling.

<sup>48</sup> Two meetings with an interval of no more than 6 calendar days between them, no less than 3 days, in companies with less than 50 workers; three meetings with an interval of no more than 9 days and no less than 4 in companies with 50 or more workers; in both cases, unless specifically agreed otherwise.

<sup>49</sup> Art. 7.2 and 4 RPDC.

<sup>50</sup> Art. 7.6 RPDC.

<sup>51</sup> Art. 7.7 RPDC. For problems with the signature of the minutes, see note 28.

<sup>52</sup> Controversial STS 19.11.2014 (r. 183/14) declared the invalidation of a dismissal that is not considered to be notified

Collective redundancy is not in fact a dismissal decision, but rather, is a declaration of the will to carry out the dismissal in the future<sup>53</sup>. This declaration of will (collective redundancy) to dismiss individuals (dismissals that may or may not actually occur) is regulated in no. 4 of art. 51 ET, which states that upon “reaching the agreement or communicating the decision to the worker representatives” the company may notify the dismissals individually to the affected workers.

These dismissals have to be made by adjusting to the general rules of art. 53.1 ET. But in addition, art. 51.4 demands that before the dismissal, a minimum waiting period of 30 days must pass between the date of the communication of the initiation of the consultation period to the labor authority and the date of the agreed dismissals. This is a partial and altered reproduction of art. 4 Directive 98/59. In this provision, it states that the extension may extend for 30 days, but as of the notification of the dismissal project to the public authority; notification not of the initiation of the consultation period, as referred to in art. 51.4, but rather, of the final decision to terminate, upon termination of the consultation period<sup>54</sup>. The termination of this extension of the execution, which intersects with that included in art. 53.1. c) ET, is that the public authority take advantage of the period to “seek solutions to the problems suggested in the collective redundancies” (art. 4.2), which, as previously stated, have little sense in our regulation where the Administration has limited competencies.

Nothing is included regarding the maximum time period during which the company may exercise the dismissal decisions, but it must be that which is established in the final dismissal communication - agreement and/or the unilateral decision – as this is a defining element of the collective dismissal that should appear in the initial communication and, when appropriate, should be updated at the final moment.

Both the agreement as well as the unilateral declaration may be the object of the challenge. The agreement for the official procedure (art. 148 LRJS) may be challenged by the Administration, and by the channels of art. 124 LRJS if it is made by any other authorized subject, although the collective process would most likely be applicable if the agreement (and not the dismissal) is challenged. The unilateral decision for the collective redundancy is only challenged via art. 124, which also makes it possible to carry out the action of the company in order to declare the dismissal in accordance with the Law. Finally, the individual dismissals that lead to the collective redundancy are challenged via arts. 120 to 122 LRJS. The rules for coordinating these procedures are included in numbers 7 and 13 of art. 124 LRJS.

#### *d) Some specific features of the consultation period in the company groups*

The creation and development of the consultation period has certain specific details in the company groups. It is important to note, first, that Chamber IV of the Supreme Court has updated its traditional doctrine in this area; a doctrine that distinguishes between the company groups that may be considered normal, in which each company maintains its own independent business position, and the abnormal or *pathological* groups, in which, based on the existence of certain circumstances (confusion of staffs in their diverse modalities, patrimonial confusion and abuse of the legal personality), there is, in entirety or in part of the group, the assumption of a plural and shared employer position, being understood that not even in this case does the group go on to occupy an employer position, but rather, what is produced is an extension of the employer position to the members of the affected group<sup>55</sup>.

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within the legal period, a questionable conclusion if, as suggested by the specific vote, there was notification by an authorized individual with a copy of the documentation sent to the labor authority. On the other hand, it does not appear that the eventual defect in the notification would have impeded the knowledge of the content of the dismissal decision, as the challenge of the dismissal was presented. In any case, it has been argued whether or not we are really considering the extinction of the procedure or rather, before a tacit withdrawal of the company (J.R. MERCADER UGUINA and A. DE LA PUEBLA PINILLA, *op. cit.*, pp. 172 and 173). If this were so, in the mentioned case, it would not be possible to consider it a tacit challenge, as notification was made to the labor authority – but rather, a merely defective notification.

<sup>53</sup> A. DESDENTADO BONETE, “*Despido y proceso. Reflexiones sobre el art. 124 de la Ley Reguladora de la Jurisdicción Social*”, from the upcoming publication of *Actum Social*.

<sup>54</sup> Art. 4.1 of the Directive refers to art. 3, in reference to the notification of a dismissal project that must notify regarding the consultations with worker representations.

<sup>55</sup> In this respect, see STS 27 5. 2013 (ASERPAL case, r. 78/12), followed by many others, including SSTS 25. 9. 2013 (r. 3/13), 19. 12. 2013 (r. 37/13), 28. 1. 2014 (r. 16/13), 29.1. 2014 (r. 121/13), 19. 2. 2014 (r. 45 and 60/13), 26.3. 2014 (r. 158/13), 21.5. 2014 (r. 182/13), although in some specific votes, some of these resolutions consider it a favorable criterion to consider

Collective redundancy in the normal groups is maintained within the framework of each company and the only special factor is the obligation of providing, in addition to the company's accounting documentation, the consolidated group documentation, if specific circumstances so require (art. 4. 5 RPDC)<sup>56</sup>.

If the group is not normal or is considered pathological, the situation is more complex, since in this case, it shall be necessary to negotiate with all of the companies that are in the employer position, but not groups that do not have a business nature or that lack personality<sup>57</sup>. This creates a certain complexity when it comes to integrating the representations in the negotiating commission, both in the business side and in the labor side. The documentation to be provided, other than the consolidated one of the group, is that of each of the companies that have a business nature<sup>58</sup>.

#### 4. The expansion of declarations of invalidation; channels and problems

##### a) A general approach: the formal fragility of the consultation period; information and documentation obligations

We shall now return to the problem of the high percentage of declarations of invalidation. In Spanish law, guarantees in the face of an invalid dismissal are very powerful (mandatory readmission of the fired worker and payment of the salaries that were not received as a result of the dismissal). This high level of protection, in comparison to that applicable to unfair dismissal<sup>59</sup> may be explained by the fact that in its general configuration, it operates as a very qualified penalty in the face of dismissals that damage the fundamental rights of the dismissed workers and also, of their rights of reconciliation between work and family life. The invalidation was eliminated for the remainder of the dismissals with the reforms of 1994 and 2010, although it remained, residually speaking, for individual dismissals, by attempting to elude the administrative authorization applicable to collective redundancy.

With the reform of 2012, a very significant change occurred: the return of the invalidation due to formal causes. In fact, Royal Decree–Law 3/2012, art. 124 LRJS, in its no. 9 .3<sup>rd</sup>, establishes that collective redundancy is invalid when, in addition to in cases of infringement of fundamental rights, the dismissal is carried out without respect for the consultation period<sup>60</sup> or when the dismissal decision is found to include fraud, misconduct, coercion or abuse of rights<sup>61</sup>.

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the group as a business unit when the control has a special intensity. For STS 27. 5. 2013, which follows along these lines the doctrine of STJUE 10. 9. 2009 (c. 44/08, the AKAVAN case), only the concurrence of the additional elements mentioned permits the extension of the business position to other members of the group and the dominant company does not assume this position even when they have imposed the termination decision on the subsidiary company (art. 51. 8 ET and art. 2. 4 of Directive 98/59). However, some posterior judgments (SSTS 26. 3. 2014, r. 86/12 and 25. 6. 2014, r. 165/13) appear to move away from this position in order to recognize the group as a business unit.

<sup>56</sup> A. DESDENTADO BONETE and E. DESDENTADO DAROCA, “*Grupos de empresa y despidos colectivos*”, Lex Nova, Valladolid, 2014, pp. 95 - 103. The convenience of unitary negotiation in the normal business groups has been noted, as it is the dominant company that decides (R. BODAS and E. PALOMO, op. cit., pp. 67 and 68) But, apart from the labor representation it should be the decision of the affected centers although clearly it is the management unit that projects the negotiation without the need for the company having the business position to give way to the dominant company, thus leading to additional problems such as the responsibility of the agreed or the dismissal by another person, distinct from the one that negotiated it.

<sup>57</sup> See the examples provided by R. MERCADER UGUINA and A. DE LA PUEBLA PINILLA (op. cit., pp. 49 and 51): STJS Cataluña (judgment of Catalonia labor court) 23.5. 2012 (p. 10/12), which annulled a dismissal since as there was a pathological group, the dismissal was only suggested for the company acting as the business, and SAN 28. 9. 2012 (p. 152/12), which permits the pathological group to carry out the dismissal as the “real and unitary business”. The same conclusion may be seen in the previously cited SSTS 26. 3. 2014 (r. 86/12) and 25. 6. 2014 (r. 165/1). A critique of this position in A. DESDENTADO BONETE and E. DESDENTADO DAROCA, loc. cit. STS 20. 11. 2014 (r. 73/14) also annuls a dismissal in which six companies promote it but only three negotiate. A supposed anomaly may be seen in SSAN 12. 6. 2014 (Coca Cola Iberia Partners, p. 79/14) and 15. 10. 2014, p. 488/13, Freiremar), in which a collective dismissal that was promoted by companies forming part of a pathological group was not accepted, when they were declared in such in a surprising manner at the start of the negotiation.

<sup>58</sup> More broadly in A. DESDENTADO BONETE and E. DESDENTADO DAROCA, op. cit., pp. 105 to 110.

<sup>59</sup> Compensation for 33 days of service per year, with a transitory increase if the company opts not to readmit.

<sup>60</sup> Includes the failure to deliver the required documents.

<sup>61</sup> Also, when appropriate, when the authorizations required of the insolvent companies and for the situations of force majeure have not been provided.

Therefore, three channels are available for the invalidation. First, there is that which already existed for dismissals infringing upon fundamental rights, of extensive application in some cases<sup>62</sup>. Second, the channel of invalidation based on fraud and the like, constituting a clear error<sup>63</sup>, which, however, in practice, has permitted a “resurrection” of the so-called “fraudulent dismissal” that the Supreme Court eliminated in the 1990s<sup>64</sup>. The third channel has been the most frequently used in producing invalidations, since it aims not only to penalize the complete absence of the consultation period, or the failure to deliver the required documentation, but it also punishes any type of irregularity that the court considers relevant, with the subsequent extensive results, which we shall refer to at a later time, especially, but not only, regarding the obligations of providing information and documentation, as well as the obligation to negotiate.

With Law 3/2012 there was an initial reaction to the proliferation of invalidations, upon the elimination in art. 124. 11 4<sup>th</sup> LRJS, of the reference to fraud, misconduct, coercion and abuse of law. But this change appears to have been ineffective, since in section c) of no. 2 of art. 124, there is still mention of these assumptions as causes of the challenge (fraud, misconduct, coercion and abuse of law), thus it may be sustained that its non-incorporation in the qualification of the dismissal of no. 11 is in reality, a gap that should be overcome, including it in the invalidation<sup>65</sup>. The solution to this problem is quite simple: the cause from section c) of art. 124.2 LRJS is the cause behind the challenging of the agreement and it operates when this is challenged, as a prerequisite, in a prejudicial manner, to fight the dismissal<sup>66</sup>, without the invalidation of the agreement necessarily implying the invalidation of the dismissal. On the other hand, it would be easy to turn an unfair dismissal into an invalid termination, since it is sufficient

<sup>62</sup> See, for example, SAN 12. 6. 2014 (p. 79/13, the Coca Cola Iberia Partners case), which declared the invalidation of the collective dismissal not due to the manner in which the workers were dismissed as retaliation for having participated in a strike during the consultation period, but because during the strike the company used alternative distribution systems that decreased the effectiveness of the strike called against the dismissal project. SAN 11.11. 2014 (p.251/14, Atento case) annuls a dismissal because during the celebration of the referendum called to approve the agreement project of the majority labor unions the rights of freedom of the minority labor unions were damaged. We may observe in this case that the agreement was not annulled but rather, the dismissal that was carried out by the company that had not called the referendum, when the correct manner would have been to annul the agreement and prosecute the legality or illegality of the dismissal. The case of Celsa – Atlantic is even more complex, due to its specific incidences. STS 18. 7. 2014 (r. 11/13) ratifies the invalidation of the dismissal since the company, before a strike called against a partial dismissal project during the consultation period, abandoned this procedure and initiated another in which it dismissed the entire staff. The annulment affected all of the dismissals, without being limited to the dismissals extending beyond those that were initially anticipated, as estimated in a prior annulled judgment, that of STS 20. 9. 2013, declared in the same appeal.

<sup>63</sup> These are the causes that have always permitted the challenging of an agreement during the consultation period, but not a dismissal, as seen in arts. 51. 6.2<sup>nd</sup> ET and 148 1<sup>st</sup> b) LRJS. Except for the abuse of rights, which is more difficult to handle, in the case in which the dismissal is appropriate but it is carried out with damages for third parties and with a purpose distinct from that which is attributed to the legal system (art.7.2 CC), it is clearly a case of vices of consent that permit the annulment of the agreement (arts. 1265 and 1300 CC), but that is not necessarily projected on the annulment of the dismissal. Upon referring to these causes of the termination decision, Royal Decree–Law 3/2012 took them out of their usual context, creating a resulting confusion. An interpretation to resolve the error shall be presented later on.

<sup>64</sup> A. DESDENTADO BONETE and A. DE LA PUEBLA PINILLA, “*Despido y jurisprudencia. La extinción del contrato de trabajo en la unificación de doctrina*”, Lex Nova, Valladolid, 202, pp. 82 – 85.

<sup>65</sup> R. BODAS and E. PALOMO, op. cit., pp. 122 and 123. See also the 4<sup>th</sup> legal ground of SAN 12.6.2014 (r. 79 /2014), which states that Chamber IV of the Supreme Court overcame the gap in SSTS 17.2. 2014 (142 and 143 /13), 18.2. 2014 (r. 151/13) and 12. 3. 2014 (151/ 13) “establishing that in these cases, invalidation should also be declared”. This is not the case, for the previously indicated reasons. Furthermore, the referred judgments are the first of a long series in which appeals of the case of the Andalusian consortium dismissals were resolved (UTEDLT). These judgments declared something different: that the dismissals had been carried out to elude legal norms which foresaw the incorporation of the workers of the Andalusian administration. Thus, it was a legal fraud that was being resolved, as established in art. 6.4 CC, applying the norms that were alluded to and not the coverage norm. In this way it confuses “non-truthful and non-righteous action” fraud with the legal technical fraud that is applied in these judgments, in which the invalidation of the dismissal is the guarantee of the application of the norm that is being avoided.

<sup>66</sup> There is a problem with the channels of challenge during the consultation period. The official procedure is an autonomous path, of public nature and with causes of invalidation. It has been stated that the use of ordinary procedures or of collective conflict are possible, going beyond the scope of art. 124 LRJS. But this breaks with the unity of the termination decision underlying the agreement. Regarding this issue, see A. DESDENTADO BONETE, “*Despido y proceso. Reflexiones sobre el art. 124 LRJS*” from the upcoming publication in Actum Social.

that, upon alleging a non-existent cause of dismissal, the company engages in deceptive fraud; thus, the inadmissibility due to inexistence of the alleged cause becomes invalidation<sup>67</sup>.

Along the same restrictive lines in regards to the extension of the invalidations, Royal Decree–Law 11/2013 adds, in the same paragraph of no. 11 of art. 124 LRJS, the term “only” in order to halt the extensive interpretation of the causes of invalidation. This rewording has not been sufficiently clear, since there are still these causes of invalidation such as the failure to comply with the consultation period or the failure to deliver the required documentation, suggesting that when there are defects in information or in the delivery of the documentation, even beyond that which has been demanded by regulations, there was no real consultation period and the dismissal is null.

Clearly, since STS 27.5.2013 (r. 78/12) the information obligations and specifically, the obligation to provide the required documents, have been interpreted in accordance with the final criterion, leaving aside any formality, insisting that “not all failures to comply” with the information obligations “result in the invalidation..., but only those that are significant in regards to permitting a properly informed negotiation”. The sentence, which has been subsequently reiterated by others<sup>68</sup> is found in the general theory of invalidations and cites the previous sentence, STS 20.3.2013 (r.81/2012), that agreed to the invalidation but, in this case, because the company’s breach was so serious as to frustrate «the purpose of the provision... that of the worker representatives being sufficiently informed in order to know the causes of the dismissals and to appropriately tackle the consultation period”. To assess these defects in information, it is necessary to distinguish between disabling and non-disabling irregularities, with the disabling ones being those that are so serious as to impede negotiation.

In this sense, it should be recalled that if invalidation is the penalty that is normally imposed for the infraction of a peremptory norm, this penalty, aside from presenting two modalities – invalidation and cancellation-, is not the only one possible, as the law can ensure the effectiveness of the norm “based on distinct remedies of the invalidation, such as, for example, the application of an administrative penalty”<sup>69</sup>, as recognized in art. 6.3 of the Civil Code<sup>70</sup>. On the other hand, the exceptional nature of the appeal of invalidation with formal causes is the general rule in both the administrative procedure<sup>71</sup> and during proceedings<sup>72</sup>.

These considerations may lead us to reconsider the appeal of invalidation as a general penalty; a conclusion that is supported when we consider that: 1<sup>st</sup>) art. 124. 11.4<sup>th</sup> LRJS reserves the invalidation for those causes in case of failure to include a consultation period and failure to deliver the required documentation; 2<sup>nd</sup>) that the cited provision reinforces this limitation with the term “only” and 3<sup>rd</sup>) that there are administrative penalties that are specifically created for the business breach of these obligations<sup>73</sup>. These are, without a doubt, compatible with the invalidation<sup>74</sup> but art. 124.11. 4<sup>th</sup> LRJS provides a restrictive penalty permitting the appeal of administrative penalties for breaches that are not specifi-

<sup>67</sup> Interestingly, STS 29.12.2014 (r. 93/12, the Halcon Foods case) reveals the effect of the fraud. The fraud here consists of the fact that the company preferentially selected the dismissal of workers who had presented challenges to the contract resolution, clearly motivated by breaches that could be related to the company’s economic situation. The dismissal was annulled, although what should have been annulled in this case was the selection criterion that was used, not in the collective dismissal, but in the acts of individual application. On the other hand, if there was legal fraud, it was produced to prevent the application of the norm regarding compensation described in art. 50 ET, which are the same as those established for unfair dismissal. Thus it is sufficient to declare the dismissal unfair, to ensure the application of the normative effect that was being avoided. The judgment recognizes this, but it maintains the ruling, since an unfair dismissal was not claimed – an arguable claim when a justified dismissal has been claimed - and given that there are other causes of invalidation.

<sup>68</sup> See, among others, SSTS 18.2.2014 (r. 59 and 79 /2013), 26. 3. 2014 (r. 158/13), 21. 5. 2014 (r. 182/13), 18. 7 2014 (r. 303/ 13) and 20. 11. 2014 (r. 114/14).

<sup>69</sup> F. GALGANO, “*El negocio jurídico*”, Tirant lo Blanch, Valencia, 1992, pp. 251- 256.

<sup>70</sup> M. ALBADALEJO, “*Derecho Civil. Introducción y parte general*”, Bosch, Barcelona, 1989, pp. 182 – 187 and A. CARRASCO PERERA, commentary on art. 6.3 of the Civil Code in AA . VV (ALBALADEJO and DÍAZ ALABART, management), “*Comentarios al Código Civil y compilaciones forales*”, EDERSA , Madrid , 1992, specifically, pp. 821 - 828 .

<sup>71</sup> See art. 63. 3 LRJAPC: “*the formal error shall only determine annullability when the action fails to comply with the requirements necessary in order to achieve its purpose or when it results in defenselessness*”.

<sup>72</sup> Art. 238 of Organic Law of the Judiciary reserves invalidation to the breach of essential procedural norms that causes defenselessness.

<sup>73</sup> Arts.7.7 and 8.3 of the *Ley de Infracciones y Sanciones del Orden Social* (Labor Infringements and Penalties Act).

<sup>74</sup> CARRASCO PERERA, op. cit., 823 – 825.

cally contemplated, such as those causing the invalidation of the dismissal. Thus, it is sustained that in these cases, the law has provided for these breaches a “different effect” that the invalidation, as provided in art. 6.3 of the Spanish Civil Code.

It should also be considered that there are possibilities of rectification contemplated by the regulations via the channel of Administrative precautions and the observations of worker representatives (art. 10 RPDC), therefore, the fact that worker representatives adopted a passive position might be relevant to the extent that there is no warning of the existence of defects, thus limiting the possibility of rectification.

Thus, the broad margin of discretion at the time of determining what is relevant creates a certain insecurity; this insecurity increases when attempting to assess information that is not expressly related to art. 51.2 ET or included in the regulations, but that may be considered “relevant” based on art. 2.3 of Directive 98/59/EC. There is also some uncertainty regarding the degree of correction of this information<sup>75</sup>.

On the other hand, the elements that are used to determine a declaration of invalidity of the collective redundancy are not limited to the information obligations or to the requirement to negotiate, as shall be examined later on. There are other violations that may be the cause of invalidation in a broad interpretation: from errors in the constitution of the negotiating body,<sup>76</sup> in the dismissal notification<sup>77</sup>, and in the consultation period<sup>78</sup>. There is also a trend to invalidate collective redundancies in their entirety in the face of infractions that could be overcome with partial invalidations (for example, the invalidation of the selection criterion or of a provision over the period in which the dismissals are carried out, instead of the invalidation of the entire collective dismissal). In summary, the consultation period appears as a broad group of demands that are not always clear in their scope and which, using a rigorous interpretation, are easy to include in the area of invalidation.

### **b) Another channel for invalidation: the obligation to negotiate in good faith during the consultation period**

Despite its name, the consultation period does not have the purpose of making a consultation in the sense of requiring and responding to an opinion. As already mentioned, according to Directive 98/59/EC, as well as paragraphs 2 and 8 of art. 51 ET, it is the duty to negotiate in good faith “in order to come to an agreement” which “should consider, at least, the possibilities of avoiding or reducing collective redundancies and mitigating their consequences via accompanying social measures”.

The legal content of the right to good faith negotiations is problematic. The Court of Justice of the European Union established, in its judgment from the 8<sup>th</sup> of June of 1994 (Commission / United Kingdom, case 383/92), that it is not sufficient for legislation from a member state to obligate the company to «consider» all of the observations formulated by the worker representatives and to “respond to these observations, indicating when relevant, their reasons for rejecting them”. The Directive demands that the consultation be directed in order to reach an agreement to “cover ways and means of avoiding collective redundancies

<sup>75</sup> Such as, for example, SAN 15. 10. 2012 (162/12), which considers that a detailed exposition of the selection criteria for the workers affected by the dismissal is necessary, since it is necessary to argue not only the cause of the dismissal in general, but also “its effects on the work contracts”, since the selection of the affected workers must be “related to the loss of usefulness of the contracts”. But in this way, the control of the collective dismissal becomes a complex justification of each of the individual dismissals that may be derived from the same. See also STS 18. 7. 2014 (r. 303/13) and that mentioned regarding this in note 48.

<sup>76</sup> Frequently occurring, for example, in company groups, which are moved from the normal group to the pathological group, as seen in the examples referred to in note 58.

<sup>77</sup> A controversial case may be seen in STS19.11. 2014, r. 183/14, which were already mentioned. Also of interest is STSJ Murcia 9.7. 2012 (p. 3/12 ), declaring the invalidation, amongst other causes, due to not having respected the 30 day period established in art. 51.4, as of the date of the initial communication. This is a questionable assumption for invalidation based on art. 124 .11.4<sup>th</sup> LRJS, as it appears that this infraction should only determine the partial invalidation if the legal period is not complied with in the collective redundancy decision. If there is no provision with respect to the agreement of the collective dismissal, it shall be an infraction that should be examined when challenging the individual dismissals based on the date on which each of them was carried out. The judgment of the Social Chamber of the High Court of Justice of Murcia was confirmed by STS 29.12. 2014, previously examined in note 68.

<sup>78</sup> SSTs 15. 4. 2014, r. 188/13, 23. 5. 2014, r. 179/ 13 and 18. 7. 2014, r. 303/13), which, as already stated, exclude the invalidation based on the period extension or reduction although its application remains open in specific circumstances when fraudulent results are pursued through “an excessive delay”.



or reducing the number of workers affected, and of mitigating the consequences». Subsequently, the Judgment of the ECJ 21.1. 2005 (C 188/ 2003, the Junk case) reiterates that the Directive imposes an obligation of true negotiation, whose usefulness has already been indicated and which should occur prior to the dismissal decision. Meanwhile, as has been frequently reiterated both in the scientific doctrine and the case law, the obligation to negotiate is not the same as the obligation to reach an agreement or to contract<sup>79</sup>. However, the limits between these two obligations are not as clear as necessary, given that the previously mentioned Judgment of the ECJ 8.6.1994 states that this obligation is not met by merely requesting the opinion of the worker representatives, taking their proposals “into consideration” and responding to them with reasons when they are not accepted. If this is the case, with the proposals and counterproposals that are offered not sufficing<sup>80</sup>, the difficulties in determining the boundaries of the obligations to negotiate and to agree increase, especially when the negotiation is more “competitive” than “cooperative”<sup>81</sup>.

Upon examining the judicial decisions delivered following the labor reform, we find a clear trend to conceive the duty to negotiate as an open willingness above the legal minimums and as an obligation of not adopting *fixed* positions<sup>82</sup>. Without a doubt, the Supreme Court has clearly stated that the obligation to negotiate is not the same as the obligation to reach an agreement. This is emphatically confirmed in the aforementioned STS 27.5.2013 (r. 78/12): “the consultations existed, the proposals are on the record, but the absence of agreements means nothing since the regulations require negotiation, not agreement”; this criterion has been reiterated in subsequent sentences<sup>83</sup>, some of which consider the reduction of the negotiation margin or the impossibility of the same, in the case of difficult company situations or a “closed” attitude of the other party<sup>84</sup>. On other occasions, however, the level of requirement is increased in order to appreciate the need to “move” through the negotiation process, which is approximated to the obligation to contract. In this regard, STS 21. 5. 2014 (r. 162/13)<sup>85</sup> may be cited, regarding a case of a public entity that was eliminated due to the demands of budgetary stability, a lack of good faith was found during the consultation period, since “the company’s position did not vary even one millimeter throughout the entire negotiation period”. Another ruling from the same date, included in the appeal 249/13, found good faith in the negotiations, declaring that “it could not be stated that the company remained immovable”, but it had to be clarified that “bad faith cannot be specifically inferred from the fact that the company further reduced the number of affected workers – from 439 to 394, following the unilateral decision to proceed with the dismissal, due to a lack of agreement”.

In this way, the duty to negotiate in good faith remains imprecise and offers little security when significantly modifying the initial communication proposal<sup>86</sup> or in those termination situations in which

<sup>79</sup> E. SÁNCHEZ TORRES, “*El deber de negociar y la buena fe en la negociación colectiva*”, CES, Madrid, 1999, pp. 54 and 55.

<sup>80</sup> E. SÁNCHEZ TORRES, *op. cit.*, pp. 136 - 138.

<sup>81</sup> J. COLLADO JIMÉNEZ, “*Negociar en las Administraciones públicas*”, Ediciones GPS, Madrid, 2010, pp. 41- 43. The opposition of interests in negotiation is clear: one party aims to reduce dismissals and increase compensations; the other aims to achieve optimal reduction of the staff at the lowest cost. There may however, be an element of cooperation when the dismissal is directed at maintaining the activity of a company that is in a crisis situation.

<sup>82</sup> J. R. MERCADER UGINA and A. DE LA PUEBLA PINILLA, *op. cit.*, pp. 142 – 147; F. DURÁN LÓPEZ, *op. cit.* 137 - 139, R. BODAS and E. PALOMO, *op. cit.*, pp. 88- 97. Quite expressive regarding this position on immobility is STSJ Asturias 14.2.2014 (p. 3/ 14, the Tenneco case) in which it is stated that the company “initiated the consultation period with the firm and unchanging will to not change the claims contained in the start of the redundancy procedure, and that they adjusted to the legal minimums with the least cost possible, implying a lack of good faith in the duty to negotiate that is imposed by article 51.2 of the Worker’s Statute”. In fact, to make declarations regarding good faith it is necessary to determine if the position of the company was justified or not in regards to the demands of productive reorganization and to determine why the accompanying social measures were insufficient. The former requires an examination of the justification of the dismissal; the second, an analysis that probably exceeds the normal boundaries of judicial arbitration.

<sup>83</sup> See, among others, SSTs 25. 9. 2013 (r. 3/13), 18.2. 2014 (r. 59/13) and 22. 12. 2014 (r. 316/13 and 185/ 14).

<sup>84</sup> See SSTs 22. 12. 2014 cited in the previous note.

<sup>85</sup> With a specific vote in disagreement suggesting that it is a public entity that has restrictions on its powers of negotiation due to limitations that are derived from its being subject to the principle of legality and of budgetary constraints, also highlighting that, although “the positions of the two parties were immovable in regards to the number of contractual terminations”, the employer “did negotiate, offering some training courses for the obtaining of a certificate of professional skill” and a linear allocation of 108,000 euros for the 31 affected workers.

<sup>86</sup> Which otherwise is an invitation to fraud by creating artificial negotiation borders: the dismissal of 100 workers is announced to later be decreased to 75 in order to offer the appearance that its position “has changed”. Thus here we have the

the seriousness of the company's situation limits the possibility of negotiation for both maintaining employment as well as for improving compensation<sup>87</sup>.

## **5. Special procedures for collective redundancy: terminations based on force majeure, collective redundancy in the public administrations and collective dismissals in insolvency situations**

### **a) General considerations; termination based on force majeure**

Along with the general procedure that we have just described, legislation considers other special cases whose regulation is included in the labor standards (art. 51.7 and additional provision 20<sup>th</sup> ET, arts. 31 to 48 RPDC) and in art.64 of the Bankruptcy Law). These include dismissals based on force majeure, those produced in public administrations and those taking place in companies that are in situations of insolvency. We shall take a quick look at these, suggesting some of their potential problems.

Termination based on force majeure is not necessarily collective redundancy, as the norms that regulate it (art. 51.7 ET and arts. 31 to 33 RPDC) are applied regardless of the number of workers that are affected. Its fundamental characteristic is the questionable maintenance of administrative authorization and the elimination of the consultation period<sup>88</sup> within the administrative procedure in which worker representatives intervene as the interested party. The request for authorization is formalized by the company and it is followed by a brief instruction period with the worker representation "when they are involved in the procedure and may be taken into consideration in the resolution of other acts, allegations and evidence beyond that which was provided by the company in the request", implying that there was a previous allegations procedure for this representation (art. 79 LRJAPC). Administrative decision is limited to declaring the existence of the alleged force majeure as declared by the company, which is responsible for making "the decision regarding the termination of contracts". The termination is therefore, a subsequent business act and is not treated as a collective dismissal, but rather, as individual redundancies<sup>89</sup> that may be challenged by the procedural means described in arts. 121 to 123 LRJS<sup>90</sup>, while their authorization or denial is carried out in accordance with art. 151 LRJS. This leads to another problem that we shall now only state: the need to coordinate these challenges, taking into consideration that no. 11 of art. 151 LRJS establishes that the judgment that invalidated the effect of an administrative decision based on which terminations based on force majeure were produced, shall declare the right of the affected workers to be reincorporated in their job positions.

### **b) Collective redundancy in public administrations**

The procedure for collective redundancy in public administrations is based on the distinction established in the additional provision 20<sup>th</sup> ET on economic dismissals from these administrations and those that are produced in the remaining entities within the public sector. The latter are governed by

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appearance of another source of invalidation: the reduction in the number of dismissals that were initially planned. See STSJ Valencia Community 23. 4. 2013 (p. 4/2013), treated in STS 21. 5. 2014, r. 249/13; also SAN 28.3. 2014 (p. 499/13, Tragsa) for the reduction from 836 to 726 workers in the consultation period without an updating of the causes. STSJ Valencia Community 4.11. 2013 (r. 17/12) also found the invalidation of the dismissal, among other reasons, for the exclusion of a major number of the affected workers when executing the termination measures.

<sup>87</sup> F. DURÁN LÓPEZ, *op.cit.*, pp. 137 – 139, regarding SSAN 20. 3. 2013 (p 219/12) and 13. 5. 2013, p.89/13. In the first, it is stated that "debating is not the same as reaching an agreement, given that if the company situation is so dire that the only way out is settlement, it should not be considered an expression of bad faith to defend the only alternative which is closing and dismissing all of the workers".

<sup>88</sup> An exclusion that suggests the problem of appropriateness in terms of Directive 98/59/EC.

<sup>89</sup> Collective redundancy is eliminated, except when an administrative decision has not proven force majeure and then it may be carried out by ordinary consultation procedures (art. 33. 4 RPDC).

<sup>90</sup> However, art. 33. 6 RPDC, regarding the effects of the business challenge, refers to arts. 15 and 24 of the same regulation but the first of these provisions simply redirects to that included in LRJS and the second refers to the challenging based on collective redundancies, which is no applicable, since there was no collective dismissal, even though numerically speaking, it occurs in some cases.

general rules, while those of the public administrations are based upon the rules of the second paragraph of the referred additional provision<sup>91</sup> and on chapter II, Title III of RPDC<sup>92</sup>. These rules establish a consultation procedure<sup>93</sup> for terminations based on economic, technical and organizational causes, having the following noteworthy characteristics:

- 1<sup>st</sup>) The initial communication should also be directed to the corresponding Administration with authority in the area of public functions (arts. 37 and 43 RPDC).
- 2<sup>nd</sup>) Obligations regarding information and documentation have special regulations, linked in part, to the projection of the principles of budgetary stability and to the special preferences of permanence based on income (art. 38) and, on the other hand, on the specifications of the causes, especially the economic ones (arts. 39 and 40 RPDC)<sup>94</sup>.
- 3<sup>rd</sup>) There are special rules for the creation of the negotiating body (art. 46 RPDC)
- 4<sup>th</sup>) The termination of the procedure is more complex, since before underwriting the agreement or adopting the termination decision, it is necessary to collect information from the public authorities; the report must be binding for the negotiating administrative body including the penalty of invalidation for their breach (art. 47 RPDC).

### c) Collective redundancy in insolvency situations

Finally, we shall consider layoff plans as regulated by art. 64 of the Spanish Bankruptcy Act (*Ley Concursal*)<sup>95</sup>. This is a long and complex provision that is based on the allocation of jurisdiction to the commercial courts (*juzgados de lo mercantil*) to hear – in a role that is similar to that of the labor authority in the prior system – of the claims of collective dismissals when filing for bankruptcy. The consultation period is carried out within the bankruptcy proceedings -i.e., within a judicial framework- and during this period, the bankruptcy administration, the worker representatives and the bankrupt company intervene, although only the first two negotiate and reach agreements. The period may terminate with or without an agreement, but regardless, it is the commercial judge who makes the decision by order. If an agreement is reached, the judge should accept it in the order, unless concluding that there is fraud, misconduct, coercion or abuse of rights; in this case, as when no agreement is reached, it shall decide “whatever is applicable according to labor law”. The order is challengeable before a Court of Justice with jurisdiction to hear labor claims.

## 6. Final reflections and proposals

The critical reflections made here reveal that the current regulations regarding collective redundancy procedures generate a high risk of invalidation of the collective dismissals. This is negative since the threat of invalidation, adding high economic costs which may exceed those of normal improper dismissals<sup>96</sup>, highlights the difficulties in making staff adjustments when it is necessary to adapt to changes

<sup>91</sup> The third paragraph should be understood in terms of its general application to the entire public sector in which the regulated event occurs.

<sup>92</sup> See, regarding this, in general, A. DESDENTADO BONETE, “*Los despidos económicos en el empleo público. Algunas reflexiones sobre la jurisprudencia reciente*”, Revista Jurisprudencia El Derecho no. 2, March 2015.

<sup>93</sup> Special provisions for Local Administrations are included in art. 48 RPDC.

<sup>94</sup> Thus, in the economic causes, other than information on the budgetary insufficiency, it is necessary to provide budgets from the last two years, certification from the relevant authority in regards to budget or accounting information, labor staff and, when relevant, the HR management plan.

<sup>95</sup> Law 22/2003, with subsequent modifications in this area by Law 38/2011 and 1/2004. Regarding this procedure, see J. M. RÍOS MESTRE, op. cit.; also A. DESDENTADO BONETE and N. ORELLANA CANO, “*Los trabajadores ante el concurso. Una guía práctica para laboristas*”, Bomarzo, 2007, pp. 150- 187.

<sup>96</sup> A. DESDENTADO BONETE, “*Los despidos económicos tras la reforma laboral de la Ley 3/2012. Reflexiones sobre algunos problemas sustantivos y procesales*”, Actualidad Laboral, no. 17-18/ 2012 and A. DE LA PUEBLA PINILLA, “*Las paradojas del despido colectivo tras la supresión de la autorización administrativa*”, Teoría y Derecho no. 13/2013. The high cost of the collective redundancy is a result of the accumulation of legal reparations (compensation of 20 days per year

in the economic situation or technical or organizational changes. Therefore, the objective of the reform to achieve appropriate exit flexibility appears to have been unsuccessful and therefore, in contrast to the goals of the reform, precarious and low quality employment continues to be promoted.

The result continues to be surprising, since it offers a disproportionately high degree of protection for the formal aspects of collective redundancy that is not found in any other termination modalities, in which infringements of this type do not determine the mandatory readmission with payment of lost wages. The cost of invalidation is very high and when there really is a negative situation, consequences may be quite serious for both the company as well as the workers, since in many cases, it forces liquidation with complete cease of activity, preventing less traumatic solutions. If the causes are technical or organizational, the consequences shall not be so serious, but the invalidation implies the beginning of another procedure or the continuation of a situation that means a decrease in the competitive position of the company.

On the other hand, the rigidity introduced by the invalidation serves to maintain the historic incentive towards more precarious forms of employment, including those having more flexible exit measures, measures which should be avoided.

In fact, it should be considered that unlike that which occurs during collective redundancy which is directed towards the creation of new regulations, the negotiation in collective redundancy is carried out in Spanish law within a framework in which not only is the very negotiation process regulated, but also the company's termination decision, whereby the law determines the causes that make it appropriate and the applicable compensation and reparations. Recall that Directive 98/59 /EC is not based on the existence of substantive regulations, thus in it, negotiation operates as an essential element to achieve termination standardization, which clearly does not exist in Spanish law, in which the consultation period does not operate in a vacuum. In the absence of agreement in this period, the broad legal system of guarantees is applied.

At this point we must ask the larger questions: Subject to invalidation, if certain minimal conditions are met, can the law force the negotiation of other conditions to those to whom the same law has already recognized with the right to proceed with justified dismissals? Can an employer be forced to agree to not lay off employees or to reduce the number of dismissals when the very law has initially qualified the dismissal as being justified? Can they be obligated to agree to compensation that exceeds that established by the law?

There is something quite paradoxical in all of this, given that negotiation points to an *improvement* of the legal system that is not always possible and in any case, that clashes with the penalties that may be placed on whoever fails to reach an agreement that is beyond the obligations of the law and that they are willing to comply with. This contradiction may be witnessed on occasions: a termination that would be appropriate, but that is declared null because it is believed to breach the duty to negotiate in order to reach an agreement. In this case, wouldn't it be better to start by establishing whether or not the dismissal is justified, and by determining whether or not the company is in a condition to grant more than that which the law requires? On the other hand, in terms of equality, is it fair that collective redundancy receives greater protection than individual terminations that are carried out based on the same causes?

In this situation, and based on the proliferation of invalidations, certain measures may be taken.

First, there are procedural measures. Here, it is necessary that the law more clearly defines the areas of negotiation during the consultation period, particularly in regards to the company groups in a plural employer position, suggesting, in the face of any restrictive criteria, that within the group negotiations during the consultation period can be carried out both by companies of normal groups and those in the plural employer position (sometimes improperly referred to as pathological groups). The former

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when that of the standard dismissal is of 33 days, the relocation plan charged to the company, financing of the special agreement with the Social Security of the workers aged 55 or older and the possible contribution to the Treasury to compensate for social expenses of this, as a result of the redundancies), to which it is necessary to add the procedural costs and those of the approved accompanying social measures.

shall do so on their own, since the company position is unique. The companies making up part of a pathological group do so as a collective that shares the plural employer position<sup>97</sup>, designing a specific system for this case, either for the channel of adapting to the procedures of art. 51 .2 and of art. 41. 4 ET or to adapt to the standards regarding collective negotiation in the group of companies.

It is also necessary to more concretely specify the obligations of information and documentation, establishing the need for the provision of additional provision requests to be reasoned and in writing.

It is necessary to establish a procedure for the notification at the beginning of the consultation period and when relevant, correction of the defects that may affect the relevant negotiation and the information and documentation provided by the company in the initiation communication. This procedure consists of the establishment of a brief period in which the worker representatives or the very administration, via report from the Labor Inspectorate, claim the existence of defects in the information or documentation that was presented and file the corresponding requests. The company should proceed with the correction or otherwise, should justify the failure to do so. A failure to protest shall end the possibility of later denouncing the defects that may arise in this procedure. It is also necessary to solve the problem of discrepancies regarding the content of the meeting minutes.

Second, it is necessary to resolve the problem of fraudulent dismissals, clarifying that the causes of the current paragraph c) of art. 124 LRJS do not refer to the dismissal decision, but rather, to the agreement that may be obtained during the consultation period. The cancellation of the agreement does not imply the invalidation of the dismissal, which should be discussed in court in this case, as a unilateral termination decision of the business, subject to the consequences that the cancellation of the agreement may have on the effective completion of the consultation period and, therefore, on the very qualification of the dismissal.

Finally, the penalty of the invalidation of the dismissal based on formal causes should be reconsidered. This proposal has already been made by Durán López<sup>98</sup> and is compatible with Directive 98/59/EC, which establishes the obligation to carry out the consultations in an effective manner, but does not establish the applicable penalties in the case of a failure to comply. Judgment of the ECJ 8.6.1994 (case 383/92, Commission vs. the United Kingdom) states that “the choice of penalties remains within their [member states’] discretion”, although “they must ensure in particular that infringements of Community law are penalized under both procedural and substantive conditions, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive”.

This penalty may be the refusal of the collective redundancy based on formal causes, which is the penalty that applies to the rest of the dismissals, thus ensuring that the terminated workers are compensated for the unfair dismissal, at least when there is a total omission of the consultation period. However, lesser breaches (non-essential defects in obligations of information and documentation, rigid positions in negotiation, etc.) shall only require administrative penalties, adjusting the existing ones, if necessary, or recurring to extra charges beyond the legal compensation.

This treatment may be justified for a variety of reasons. The first is that in the case in which there really is cause for the dismissal and the company is in a negative economic situation, the readmission rulings or the application of high compensations, as previously stated, may be ineffective both from an economic and social perspective, given that these rulings may transform a partial crisis into a full blown one, destroying more employment than necessary at the previous time, in order to attempt to correct the situation. The second reason is related to the already mentioned fact that, in Spanish law, negotiation during the consultation period does not offer a coverage role to fill a legal vacuum in collective redundancies, but rather, operates in a legal system that establishes the causes justifying dismissals and the resulting remedial actions. The failure to enforce a consultation period or its defective execution does not establish a lack of worker protection, but rather, the application of the legal protection system. Finally, in Spanish law, collective dismissal is subject to strict legal control, obligating the business to

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<sup>97</sup> It is understood that the business is not the group of companies, but rather, the members of the same, included in a plural business position.

<sup>98</sup> F. DURÁN LÓPEZ, *op. cit.*, p. 150 and 151.

justify the existence of the cause of dismissal and guaranteeing that it has applied the legally required compensations.

These measures may possibly help us to exit the circle of invalidations resulting from these collective redundancies, as occurred with the armies of Sun Tzu, therefore no longer resembling fire; a fire which serves to destroy companies and with them, employment. By blocking collective redundancies, when they are founded on real and proportionate causes, the law does not serve to ensure employment, but rather, increases the potential rates of unemployment and precariousness.

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Translator's Notes

RPDC (Reglamento del Procedimiento de Despido Colectivo): Spanish Regulation on Procedures for Collective Redundancies  
SAN (Sentencia de la Audiencia Nacional): Judgment of the Spanish National High Court  
STS (Sentencia del Tribunal Supremo): Judgment of the Spanish Supreme Court (plural: SSTs)  
STSJ (Sentencia del Tribunal Superior de Justicia, in footnotes). Judgment of a Regional High Court