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SPECIAL ISSUE ON REDUNDANCY AN DISMISSAL

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.

* 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[1], 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%[2]. Furthermore, in the website of the General Council of the Judiciary and in a consultation from the 10th of January of 2015, we find information that indicates that between March of 2013 and the 31st 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[3].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[4]. 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"[5].

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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[1] 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.

[2] 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 31st 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, nº 494/2014) , the estimation for the period ranging between the 23rd of May of 2012 and the 25th 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. MARTÍNEZ MORENO, "La nulidad del despido colectivo : causas y límites", Actum Social , nº 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 .

[3] 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.

[4] F. DURÁN LÓPEZ, op. cit., p. 136.

[5] 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[6]) and the numeric, which, through the thresholds of affectation, define the very collective nature of the dismissal[7]. 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[8].

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[9], 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[10], 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,[11] 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[12], which, among other measures, foresaw the challenging of this authorization before the social order[13], to be carried out with the LRJS, although with a very limited period of enforcement[14].

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[6] The expression is normally used here in the broadest sense possible, including the technical, organizational and productive causes.

[7] 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.

[8] The milestones of the initial phase of the administrative authorization system are Law of 25June of 1935 and the Decree from the 29th of November of 1935, the Decree from the 26th 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.

[9] Law 8/1980.

[10] Approved by Royal Decree 696/1980. In this point, the regulation was of dubious legality.

[11] 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.

[12] The new law led to procedural regulations based on Royal Decree 801/ 2011.

[13] 15th 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.

[14] LRJS was enforced as of the 12th of December of 2011, but the administrative authorization was eliminated by Royal Decree-Law 3/2012 effective as of the 12th 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[15] 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[16], 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[17], 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[18] .

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[19].

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[20].

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[15] Royal Decree-Law 3/2012 and Law 3/2012.

[16] 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.

[17] E. DESDENTADO DAROCA, "*La intervención administrativa en los despidos colectivos*", Relaciones Laborales, no. 8/1996.

[18] 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.

[19] 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 tópica*", 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.

[20] 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[21], 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"[22], who are to receive a copy of the explanatory report and all required documentation (art. 51.2. 5th and 6th ET, art. 6 RPDC). The labor authority proceeds to transmit the communication to the unemployment benefits management entity (art. 51.2. 7th 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 31st LGSS and art. 20 of the Order from the 13th 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. 51.6.2nd 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. 51.2.11th 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[23]. 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[24] .

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

[21] 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).

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

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

[24] 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[25], with all necessary documentation being provided[26], including the minutes from meetings during this period that have been "duly signed by all attendees"[27]. 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[28]. This raises the issue of notification of the report to the collective redundancy parties[29], 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. 6.2nd ET.

During the consultation period, the administrative support work also includes the offer to mediate, as referred to in arts. 51. 2. 11th 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"[30]. 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. 51.2.12th 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[31]. 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. 51.6.2nd 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 .11th ET[32]. 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-

[25] 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.

[26] 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).

[27] 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.

[28] 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".

[29] J. R. MERCADER UGUINA and A. DE LA PUEBLA, "*Los procedimientos*…." cit., pp. 153 and 154.

[30] 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.

[31] 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.

[32] 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 98/597/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 it does 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[33]. 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[34]-, 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 3rd 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:

[33] 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".

[34] 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.

1st) 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)[35].

2nd) That the procedure affects more than one work center, in which case the representation corresponds to: 1st) 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 3rd 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 3rd 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.[36]

[35] 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.

[36] 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[37] 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. 8th 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:

1st) Information on the elements making up the projected termination decision and that serves as the basis of negotiation[38], 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 [39] may not be considered during this procedure[40].

2nd) 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

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".

[37] 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. 3rd ET).

[38] According to art. 51.2.5th 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 5th) 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.

[39] 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.

[40] 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).

3rd) 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[41] are to be included, as well as the provisional accounts that are being approved[42]. 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[43]. When the negative economic situation is the result of a consistent decrease in income or equity level, the complementary documentation described in art. 4. 4th RPDC[44] 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"[45]. 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.

2nd) 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[46]. During this period, the parties have the obligation to

[41] 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.

[42] 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).

[43] The technical report should include the volume and permanent nature of this provision of losses established based on the measures mentioned in the provision.

[44] 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. 2nd ET ("in all cases"), but not a requirement for the assessment of a negative situation.

[45] 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".

[46] 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 8th 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 .1st 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[47].

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[48], "unless otherwise agreed"[49]. 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[50]. 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. 9th ET and art. 28 .1 RPDC).

In the meetings, minutes shall be taken, to be signed by all attendees[51], 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. 51.2.12th and 13th, art. 12 RPDC), hindering the appeal of the dismissal which, if carried out, may be annulled[52].

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[47] 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.

[48] 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.

[49] Art. 7.2 and 4 RPDC.

[50] Art. 7.6 RPDC.

[51] Art. 7.7 RPDC. For problems with the signature of the minutes, see note 28.

[52] 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[53]. 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[54]. 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[55].

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.

[53] 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.

[54] 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.

[55] 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)[56].

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[57]. 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[58].

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[59] 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 .3rd, 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[60] or when the dismissal decision is found to include fraud, misconduct, coercion or abuse of rights[61].

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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.

[56] 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.

[57] 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.

[58] More broadly in A. DESDENTADO BONETE and E. DESDENTADO DAROCA, op. cit., pp. 105 to 110.

[59] Compensation for 33 days of service per year, with a transitory increase if the company opts not to readmit.

[60] Includes the failure to deliver the required documents.

[61] 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[62]. Second, the channel of invalidation based on fraud and the like, constituting a clear error[63], which, however, in practice, has permitted a "resurrection" of the so-called "fraudulent dismissal" that the Supreme Court eliminated in the 1990s[64]. 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 4th 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[65]. 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[66], 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

[62] 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 annulation 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.

[63] 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. 6.2nd ET and 148 1st 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 annulation 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.

[64] 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.

[65] R. BODAS and E. PALOMO, op. cit., pp. 122 and 123. See also the 4th 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.

[66] 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[67].

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[68] 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"[69], as recognized in art. 6.3 of the Civil Code[70]. On the other hand, the exceptional nature of the appeal of invalidation with formal causes is the general rule in both the administrative procedure[71] and during proceedings[72].

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

[67] 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.

[68] 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).

[69] F. GALGANO, "*El negocio jurídico*", Tirant lo Blanch, Valencia, 1992, pp. 251- 256.

[70] 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 .

[71] See art. 63. 3 LRJAPC: "*the formal error shall only determine annullabity when the action fails to comply with the requirements necessary in order to achieve its purpose or when it results in defenselessness*".

[72] Art. 238 of Organic Law of the Judiciary reserves invalidation to the breach of essential procedural norms that causes defenselessness.

[73] Arts.7.7 and 8.3 of the *Ley de Infracciones y Sanciones del Orden Social* (Labor Infringements and Penalties Act).

[74] 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[75].

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,[76] in the dismissal notification[77], and in the consultation period[78]. 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 8th 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

[75] 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.

[76] 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.

[77] 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 .11.4th 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.

[78] SSTS 15. 4. 2014, r. 188/13, 23. 5. 2014, r. 179/ 13 and 18. 7. 204 23. 5. 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[79]. 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[80], the difficulties in determining the boundaries of the obligations to negotiate and to agree increase, especially when the negotiation is more "competitive" than "cooperative"[81].

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[82]. 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[83], 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[84]. 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)[85] 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[86] or in those termination situations in which

[79] E. SÁNCHEZ TORRES, "*El deber de negociar y la buena fe en la negociación colectiva*", CES, Madrid, 1999 , pp. 54 and 55.

[80] E. SÁNCHEZ TORRES, op. cit., pp. 136 - 138.

[81] 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.

[82] 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.

[83] 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).

[84] See SSTS 22. 12. 2014 cited in the previous note.

[85] 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.

[86] 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[87].

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 20th 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[88] 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[89] that may be challenged by the procedural means described in arts. 121 to123 LRJS[90], 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 20th 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

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.

[87] 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".

[88] An exclusion that suggests the problem of appropriateness in terms of Directive 98/59/EC.

[89] 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).

[90] 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[91] and on chapter II, Title III of RPDC[92]. These rules establish a consultation procedure[93] for terminations based on economic, technical and organizational causes, having the following noteworthy characteristics:

1st) The initial communication should also be directed to the corresponding Administration with authority in the area of public functions (arts. 37 and 43 RPDC).
2nd) 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)[94] .
3rd) There are special rules for the creation of the negotiating body (art. 46 RPDC)
4th) 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*)[95]. 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[96], highlights the difficulties in making staff adjustments when it is necessary to adapt to changes

[91] The third paragraph should be understood in terms of its general application to the entire public sector in which the regulated event occurs.

[92] 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.

[93] Special provisions for Local Administrations are included in art. 48 RPDC.

[94] 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.

[95] 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. DESDENTDO BONETE and N. ORELLANA CANO, "*Los trabajadores ante el concurso. Una guía práctica para laboralistas*", Bomarzo, 2007, pp. 150- 187.

[96] 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

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[97], 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[98] 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

[97] 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.

[98] 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.

Translator's Notes

RPDC (Reglamento del Procedimiento de Despido Colectivo): Spanish Regulation on Procedures for Collective Redudencies
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

"Cause" in collective dismissals

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Abstract: According to Spanish law, the definition of collective dismissal, as in Directive 98/59, makes reference to three primary elements: the numerical/quantitative element, the temporal element and the causal element. This latter, the identification of the causes that may justify the collective dismissal, has been the most controversial element in Spain. This study analyzes the legal definition of the causes of these collective dismissals, specifically focusing on the economic causes. It also considers the judicial control of these collective redundancies.

Keywords: collective dismissal, number of workers, economic cause, judicial control, reasonable judgment.

1. The legal definition of "cause" in collective dismissals: Community framework and Spanish regulation[1]

According to art. 51 of the Worker's Statute (ET, in accordance with its initials in Spanish), collective dismissal is considered to be the termination of labor contracts based on economic, technical, organizational or production causes which affect, over a period of 90 days, at least:

a) 10 workers, in companies with less than 100 employees.
b) 10% of the total company employees in companies with between 100 and 300 workers.
c) 30 workers in companies having over 300 employees.

Collective dismissal is also understood to be the termination of work contracts that affect the entire company staff, assuming that the number of affected workers exceeds 5, when this is the result of the complete cessation of the company's business activity due to the same economic, technical, organizational or production causes.

Thus, according to Spanish law, three elements must coincide in order for collective dismissals to occur: a) a causal element, implying the existence of an economic, technical, organizational or production cause; b) a numeric element, referring to the number of terminations that are produced, and c) a time-related element, regarding the period of time over which said dismissals occur.

European community regulations, primarily included in Council Directive 98/59/EC of 20 July on collective redundancies, also consider the notion collective redundancies with regards to these three

[1] This study falls within the framework of the Research Project (DER2012-33178) "Substantive evaluation of labor reforms: a new inter-disciplinary methodology", directed by professor Jesús R. Mercader Uguina and funded by the Ministry of Economy and Finance of the National R&D&I Plan.

elements. Specifically, article 1 of the Directive states that "collective redundancies means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

i) either, over a period of 30 days:

— at least 10 in establishments normally employing more than 20 and less than 100 workers,
— at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
— at least 30 in establishments normally employing 300 workers or more;

ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question."

A comparison of the community directive text and article 51 ET reveals some differences between these regulations.

First, Spanish law has opted for a collective dismissal model that is based on the 90 day time reference, but applying the numeric thresholds defined in the Community regulation for the 30 day period. This option has been considered perfectly valid from a European law perspective, given that it offers added benefits to employees.

On the other hand, the scope of reference used in article 51 ET to quantify both the number of dismissals practiced as well as the number of workers on staff is the company and not the establishment, as is typically used in Community-based laws. This regulation has raised some doubts as to whether or not this regulation respects the Directive. Specifically, in a recent judgment[2], the Court of Justice of the European Union (CJEU) declared that, from a European law perspective, the Spanish option is only valid if it proved to be more favorable for employees. Ultimately, this suggests that in order to qualify the dismissal as collective, it is not sufficient to use the company as the reference, as has been done in Spain, but that rather, it is also necessary to verify whether or not the thresholds established in article 51 ET are exceeded in the establishments as well.

Finally, significant differences also exist in the regulation of cause in the Community regulations and article 51 ET. The defining of the cause of the collective dismissal is quite attenuated in Community law, which limits the law to demanding that redundancies be based on "causes that are not inherent in the individual worker"[3]. However, art. 51 ET includes the notion that collective dismissals have economic, technical, organizational or production-based causes.

[2] STJUE of 30 April 2015 (C-80/14, Usdaw case), STJUE of 13 May 2015 (C-182/13, Lyttle case) and particularly in STJUE of 13 May 2015 (C-392/13, Rabal case). See the commentary on this last case by GÓMEZ ABELLEIRA, F.J., "Company, establishment and collective redundancy. Commentary on STJUE of 13 May 2015, Rabal Cañas case (C-392/13)", *Información Laboral,* no. 6, 2015.

[3] Spanish law considers the following to be causes inherent to the individual worker, and not therefore, attributable to causes of collective redundancies: dismissals based on the termination of the time period agreed upon for the completion of the works or service, mutual agreement, dismissals based on circumstances related to the individual worker- death, permanent invalidity and retirement-, it also fails to include dismissals that are based on ineptitude or the inability to adapt to technical developments in the job position, or those that are based on justified absences from work, or dismissals based on the worker's decision or behavior, such as abandon or resignation. Disciplinary dismissals are not considered, nor are terminations caused by the worker such as those resulting from transfers or substantial modifications in job conditions. On the other hand, since they are dismissals due to causes inherent to the employee, the following are considered: dismissals derived from judicial termination of the contract upon request of the worker, due to a company breach (see art. 50 ET), objective dismissals of economic, technical, organizational or production causes, both fair and unfair; disciplinary dismissals and those based on objective causes that are declared or recognized as being fair and, finally, redundancies based on contract termination in the case of fraudulent temporary contracts and *ante tempus* dismissals of temporary contracts.

2. Economic, technical, organizational or production causes: conceptual definition and consequences

Defining cause is of great importance in the regulation of collective dismissals in Spain.

This is the case since, if the company wishes to dismiss a number of employees that equals or exceeds that included in article 51 ET, due to economic, technical, organizational or production causes, it should do so based on the procedures described in art. 51 ET and RD 1483/2012, of 29 October approving the rules of procedures for collective dismissal and contract suspension and work day reduction[4]. This procedure, similar to that regulating Directive 98/59, assumes, among other things, that there should be a negotiation or consultation period carried out with the worker representatives for a period of thirty days, in order to prevent or reduce the number of dismissals and to seek out less traumatic alternate measures (temporary contract suspension, work condition modifications, etc.). The lack of a consultation period or behaviors that are not in accordance with good faith during this negotiation phase may result in the invalidation of the collective dismissal[5]. This has occurred, for example, when the company does not provide worker representatives with all of the necessary documentation to ensure the usefulness of the consultation period[6], or when it is carried out over a shorter period of time than that established by the law[7]. On the other hand, it is also relevant since employers should accredit and prove the economic, technical, organizational and production causes for which the collective dismissal is qualified as justified or lawful[8].

However, the identification of causes justifying collective dismissals is not a simple issue. For a long time, the legal definition of cause has been excessively generic and abstract. Judges have been obligated, on many occasions, to make determinations regarding cause on a case by case basis. This has led to a great legal uncertainty.

Perhaps for this reason, one of the most greatly affected aspects of collective dismissals in the legislative reform of 2012[9] was this defining of causes. This reform had two main purposes: on the one hand, to clearly and precisely define the circumstances resulting from the existence of economic, technical, organizational or production causes; and, on the other hand, to limit the scope of judicial control over the concurrence of the mentioned causes.

As for the definition of causes, article 51 ET identifies four areas of impact of the causes[10]: the area of means of production ("technical causes"), the area of systems and methods of individual work ("organizational causes"), the area of products and services that the company provides to the market ("production causes") and the area of operating results ("economic causes").

Technical causes are those that affect production methods. These causes exist when changes occur in the production means or instruments. Technical cause exists when these changes result in the introduction of new, more technically advanced machinery or systems, in the computerization or automation of a specific production activity or in improved technological or computer-based systems.

Organizational causes exist when changes occur, among others, in the area of personnel work methods and systems or in production organization methods. These causes refer to the management and

[4] If the number of dismissals does not exceed the thresholds described in art. 51 ET, the employer may decide to carry out the dismissals without the need to follow said procedure: it is sufficient to notify the affected worker or workers of the decision and to pay their compensation as calculated based on 20 days of salary per year of services.

[5] According to Spanish law, when the dismissal is null, the employer is obligated to readmit the worker to their job position, and, additionally, to pay their procedural salaries, which are those that the worker has accrued since the time of dismissal until his/her return to the company.

[6] STS of 27 May 2013 (Appeal no. 78/2012) and STS of 21 May 2014 (Appeal no. 182/2013).

[7] STS of 29 December 2014 (Appeal no. 93/2012).

[8] This, in accordance with Spanish law, permits the termination of the work contract with payment to the worker of a compensation that is calculated based on 20 days of salary per year of company service. On the other hand, if cause is not proven, the dismissal shall be declared unfair or unlawful, and thus the employer should either readmit the workers to their job positions or terminate the contracts, paying compensation that is calculated on 33 days of salary per year of service with the company.

[9] In 2012 various laws were approved that incorporated relevant labor market reforms. Specifically, collective redundancy regulation was modified via Royal Decree Law 3/2012, of 10 February on urgent measures for labor market reform (*Real Decreto Ley 3/2012, de 10 de febrero, de Medidas urgentes para la reforma del mercado laboral*), subsequently processed and approved as Law 3/2012, of 6 July on urgent measures for labor market reform (*Ley 3/2012, de 6 de julio, de Medidas urgentes para la reforma del mercado laboral*).

[10] See MERCADER UGUINA, J.R and DE LA PUEBLA PINILLA, A., *Los procedimientos del despido colectivo, suspensión de contratos y reducción de jornada,* Tiran lo Blanch, 2013.

use of the work force or to the combination of production factors in general, resulting in a readjustment of the production organization, even when this is not based on the prior renovation of the capital equipment, differentiating it from technical causes. To summarize, it relates to a new structuring or reordering of the company organization chart, leaving certain job positions vacant. Common examples of this would be the redistribution of staff for optimization purposes, which may or may not be linked to other causes, such as technical ones. Also, situations of company reorganization with new work distributions fall under this type of cause[11].

Production causes exist "when there are changes, among others, in the demand of the products or services that the company aims to offer to the market". They refer to the area of products or services making up the company activity, its production capacity. Included in these are contracting or demand changes, a reduction of orders and, a very common cause, a loss of clients. So, contract loss or reduction is a production cause that may justify collective dismissal[12].

Finally, economic causes are clearly defined in art. 51 ET which states that "economic causes are understood to exist when the company results are in a negative economic situation, in cases such as the existence of current or anticipated losses or the persistent reduction in ordinary income level or sales. In any case, it is understood that the decrease is persistent if, over a period of three consecutive quarters, the level of ordinary income or sales of each quarter is inferior to that recorded from the same quarter of the previous year". The law includes a novel element with respect to the previous legal regulation, as it requires that the negative situation may be determined, amongst other possible assumptions, by "the existence of current or anticipated losses, or the persistent decrease in the level of ordinary income or sales".

The majority of collective dismissals in Spain are justified by economic-based causes[13]. When appealing to technical, organizational or production causes, it is common to also allege economic causes that may reinforce or support the dismissal decision. It is precisely regarding these economic causes that some problems of relevance arise. The first comes from the fact that the law refers to a negative economic situation that may be based upon "anticipated losses". Here, the issue concerns the fact that these anticipated losses refer to future acts that are uncertain and therefore prevent the use of reliable and accurate accounting data. But in practice, the anticipation of losses may be accredited when a major client has been lost or when there has been a progressive decrease in business volume which may not be justified as a changing trend. The second issue is related to the so-called "the automatism clause"[14]: "in any event, it is understood that the decrease is persistent if, over three consecutive quarters, the level of ordinary income or sales from each quarter is lower than that recorded for the same quarter from the previous year", which may cause undesired effects since the law does not quantify or establish a minimum in the decrease in income.

The defining of causes based on economic, technical, organizational or production terms is also relevant when determining the instruments or measures used by employers to accredit their existence. In this regard, RD 1483/2012 differentiates based on whether the alleged cause is economic, technical, or-

[11] As occurred in the decision from STS of 28 January 2015 (Appeal no. 87/2014), which considered that organizational causes exist when, upon the fusion of two business entities, duplicity of work positions exists, leading to the need to simplify and reorder the different departments making up the central services.

[12] So it appears in STS of 21 April 2014 (Appeal no. 126/2013), in the case in which the company lost a client contract, leading to a labor surplus of 44 workers.

[13] There are numerous examples from recent case law on collective dismissals that are based on economic causes. Economic cause is considered to exist when it may be proven that a company has reduced its income over the first three quarters of a specific year by 18.90% as compared to the same period from the previous year. In this case it is concluded that the company is in a negative economic situation, even when it is the case that its performance over the period is beneficial, given that such a substantial reduction in income may irrevocably undermine its results if appropriate measures are not taken (SAN of 11 March 2013, Appeal no. 381/2012; similarly, the following may be cited: STS of 28 January 2014, Appeal no. 46/2013 and STS of 29 December 2014, Appeal no. 83/2014). Economic cause also exists when there is a threat of a major reduction in sales and business volume, negative operating results and financial support at the cost of indebtedness to other companies of the group (STS of 25 February 2015, Appeal no. 145/2014) or when there is a loss of key clients (STS of 25 June 2014, Appeal no. 165/2013). Likewise, economic causes exist when there are major losses in a banking entity, despite receiving public assistance (STS of 18 July 2014, Appeal no. 288/2013).

[14] DESDENTADO BONETE, A., "Los despidos económicos tras la reforma de la Ley 3/2012. Reflexiones sobre algunos problemas sustantivos y procesales", *Actualidad Laboral*, 2012, no. 17.

ganizational or production-based, in each case, imposing different documental obligations. The required documentation is much more demanding and rigorous if the cause is economic (art. 4 RD 1483/2012) but in any case, the omission of relevant information and documentation may lead to the invalidation of the collective dismissal.

Finally, it should be noted that the area in which the alleged cause should be considered differs based on the type of cause. According to repeated doctrine of our courts, economic cause should affect the company as a whole, whereby it is not sufficient to accredit the negative situation of one of the establishments without this situation affecting the entire company[15]. On the other hand, if the causes are technical, organizational or production based, the scope of assessment of the cause is restricted to the establishment, since they are causes that are located in specific points of the business life, normally affecting the functioning of one single unit[16].

3. Scope of judicial control of the existence of causes

Greater problems have arisen in regards to the determination of the scope of the judicial control of the cause. This involves deciding whether, after the worker representatives have refuted the collective dismissal, the judge should limit himself to verifying the existence of the causes alleged by the company or if they should also determine the appropriateness and proportionality of the causes of the specific dismissal measures.

The preamble to Law 3/2012 clearly defined the objectives of the regulation of the collective dismissal: "The law now adheres to defining the economic, technical, organizational or production causes that justify these dismissals, removing other legal references that have introduced elements of uncertainty[17] […] It is now clear that the judicial control of these dismissals should be in accordance with an assessment of the existence of certain acts: causes". Thus the law focuses on the existence or lack of existence of the cause that justifies the business decision. This is simplistic logic that, in theory, does not result in doubts or permit exceptions: if the court determines that the documentation and evidence submitted suggest that there is the cause as alleged by the company, the collective dismissal should be considered lawful; if this is not the case because the alleged cause has not been proven, the decision to dismiss shall be found to be unlawful.

However, in practice, this is not always the case. The courts have not always limited themselves to verifying the existence of cause in the terms described in art. 51 ET but rather, have tended to include assessment elements regarding functionality, appropriateness or proportionality of the dismissal measure in regards to the economic, technical, organizational or production situation.

STS of 17 July2014[18] clearly expresses, according to the court's interpretation, the role of the court in regards to the collective dismissal causes. This judgment affirmed that, despite the forcefulness of the preamble to Law 3/2012, neither the very limited role of the courts as described in this preamble nor the absolute discretion of the employer when alleging the cause should be admitted. And for this reason, judicial control should extend beyond «cause» as a fact, not only considering the existence of constitutional interests and international commitments, but also based on the application of the general principles in the exercising of rights. Based on this premise, the Supreme Court suggested that judicial control considers the reasonable judgment of the termination measures carried out. This judgment "would offer triple projection and successive staggering: 1) On the «existence» of the cause that is legally defined as justifying the collective dismissal, 2) On the «appropriateness» of the measure adopted, in the general sense that the measure complies with the legal purposes at hand: either to correct or confront the referred cause, and 3) On the «rationality» of the measure, with the understanding that this third

[15] STS of 14 May 1998 (Appeal no. 3539/1997).

[16] STS of 13 February 2002 (Appeal no. 1436/2001).

[17] The legislature refers to the requirements included in the wording of art. 51 ET, prior to the reform. According to that provision, collective dismissals should contribute to overcoming company problems or ensuring future company viability, leading the courts, on numerous occasions, to make opportune judgments in regards to company management.

[18] Appeal no. 32/2014.

area means that business measures lacking the proportionality element should be excluded for being considered unlawful. As for the latter, proportionality should be understood as, while the courts may not establish the exact «appropriateness» of the measure to be adopted by the employer or censor «opportunity» in terms of business management, dismissals or modifications that are clearly disproportionate in regards to the legally established purpose and the sacrifices imposed on the workers must be excluded as lacking «reasonableness» and thus, being unlawful.

This technique has been applied to the courts in order to determine[19] whether collective dismissals are "legally valid" –when the concurrence of the legal cause alleged by the company is accredited– or, to the contrary, it is "not legally valid"-when the employer has not proven the existence of cause-.

One example may be found in the Supreme Court judgment of 26 March 2014[20]. In this case, the company, TeleMadrid, a regional television station, proceeded to dismiss the majority of the staff, alleging economic causes. The Supreme Court affirms that "any negative economic situation alone is not sufficient for justifying the dismissals" and, subsequently, considering the criteria of proportionality, reasonableness and even, appropriateness, declared that the alleged causes were not sufficient to justify the collective redundancy. In this case, the company attempted to dismiss 925 workers from a total staff of 1161, alleging as economic cause, the budgetary insufficiency resulting from a reduction in commercial income and from the public items funded by the entity. Furthermore, the company added its large degree of indebtedness to financial entities. The court considered the economic situation of company losses to be accredited, but added that "this is not equivalent to a negative economic situation, and that with the cause of dismissal being alleged by the company, it aimed to achieve the financial balance of the entity through a formula of decentralization, thereby taking advantage of the budgetary reduction imposed by the law, being articulated through an accounting restructuring". Added to this is the fact that the measure, in the opinion of the court, was not proportional. The judgment affirmed that the budgetary reduction which ranges from 5% to 10%, to some extent justifies the dismissal measure, but that it is neither plausible, nor reasonable, nor proportional.

Similar reasoning was applied in the Judgment of the Spanish Supreme Tribunal (STS) from 17 July 2014[21], although in this case the opposite solution was reached. In this case, it was shown that over a one year period, the company, devoted to the manufacturing of heavy machinery, had reduced its billing by 33.05%. However, over this same period, its staff had only decreased by 12.5%. Therefore, the court decided that a collective dismissal of 28.26% of the remaining staff was proportional and reasonable.

Ultimately, defining the causes and judicial control of their existence continues to be a controversial issue in both Spanish law and judicial practice, subject to case-by-case analysis and resolution.

[19] According to art. 124.11 of Law 36/2011, of 10 October, Regulatory Law of Labor Courts.

[20] Appeal no. 158/2013.

[21] Appeal no. 32/2014.

The cost of dismissals in Spain before and after the labor reforms

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Abstract: Several reports and papers about Spanish labour market have focused on the allegedly high dismissal costs and the persistently high rate of temporary work. In fact, the last major reforms on labour regulation have tried to reduce them. In this paper, I will discuss the most relevant expenditure items that any employer is Spain has to face to lay off workers. Implicit, indirect and procedure costs appear to be the main problem, and not severance payments for unfair dismissal. Despite of the efforts on improving the regulations being put forward by this article, there are several dysfunctions caused directly by the law, as it provides incentives to hire temporary workers and to avoid redundancy legal procedures.

Keywords: dismissal, severance payments, temporary workers, labour market reforms.

Introduction[1]

We shall begin this analysis with a truism. Employers (be they individuals or legal entities) seek to earn money and the more, the better. This however, does not mean imply that this is their only goal or that they are without ethics. Workers too are unlikely to offer their services free of charge. Both of these parties adapt their behavior to the specific labor market in which they operate, be it in terms of regulation, judicial interpretation or social habits.

The decision to begin or end a working relationship is, therefore, the result of a cost-benefit analysis. However, the effects of the Employment Protection Legislation (EPL) affect the entire labor relations system. An at will dismissal system grants employers a strong negotiation power to alter the working relationship. Clearly, if workers can be dismissed with no incurring costs, they will have little resistance ability against employer pressure. On the other hand, very restrictive dismissal regulation may make it difficult for employees to voluntarily adapt their working conditions to the needs of the market.

The cost of dismissals, therefore, is a key element in understanding the dynamics of working relations. The effects of the EPL have been widely studied by economics researchers[2], although there are still many aspects left to examine. Thus, the majority of studies are partial, referring only to the impact of some specific issue, failing to offer an overall view of the situation.

The desire to synthesize the EPL into one unique indicator has led diverse institutions to create indices that, though of limited value, offer an objective vision of the issue at hand. The most frequently used and probably the most complete of these indices was created, in several versions, by the OECD. In the most recent version 3 of the Employment protection for regular contracts index, nine elements are

[1] This study falls within the framework of the Research Project (DER2012-33178) "Substantive evaluation of labor reforms: a new inter-disciplinary methodology", directed by professor Jesús R. Mercader Uguina and funded by the Ministry of Economy and Finance of the National R&D&I Plan.

[2] In a review of the current research available on this issue, we find John T. Addison and Paulino Teixeira's «The economics of employment protection», *Journal of Labor Research* 24, no. 1 (March of 2003): 85-128, doi:10.1007/s12122-003-1031-0.

included to determine how restrictive legislation is in regards to the costs of individual dismissals and four others for collective redundancies.

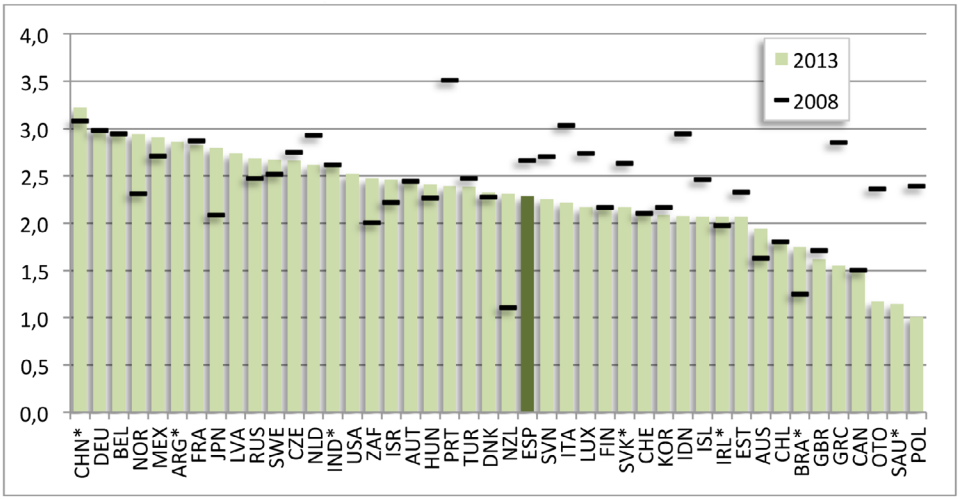
Table 1: OECD Employment protection for regular contracts (v3). Items and weights.

Name		Version 3 weights
Individual dismissals	Notification procedures	1/2
	Delay involved before notice can start	1/2
	Length of the notice period at 9 months tenure	1/7
	Length of the notice period at 4 years tenure	1/7
	Length of the notice period at 20 years tenure	1/7
	Severance pay at 9 months tenure	4/21
	Severance pay at 4 years tenure	4/21
	Severance pay at 20 years tenure	4/21
	Definition of justified or unfair dismissal	1/5
	Length of trial period	1/5
	Compensation following unfair dismissal	1/5
	Possibility of reinstatement following unfair dismissal	1/5
	Maximum time to make a claim of unfair dismissal	1/5
Collective dismissals	Definition of collective dismissal	1/4
	Additional notification requirements in case of collective dismissals	1/4
	Additional delays involved in case of collective dismissals	1/4
	Other special costs to employers in case of collective dismissals	1/4

Source: OECD.

As we shall see later, in a direct or indirect manner, all of the signaled aspects have been the object of modification in Spanish legislation between 2010 and 2014. However, the impact on the aggregate index has been limited, even though certain aspects are not included such as the role of case law. In fact, the set of regulatory modifications has reduced the index for Spain by 14.1% between 2008 and 2013. This reduction is not linear, but rather, it concentrates on two moments: the labor reform of 2010 reduced it by 3.8% and the reform of 2012, by more than ten points.

Figure 1: EPRC.v3 Index for 2013and 2008.



Source: OECD.

However, it is certain that despite the fact that the quantitative change is not as great as it was anticipated a priori, it is certainly not insignificant. The move from 2.660 to 2.284 out of a maximum of six, in relative terms, has had a notable impact. Thus, of the forty four nations for which the OECD created its index, it has moved from the fourteenth to the twenty fourth position.

Aside from the actual impact of cost of the dismissals on the economy or on employment, or even the questionable weighing of the different items that is carried out in this index, clearly these are good starting points to structure the analysis. To correctly contextualize the exhibition, it is necessary to briefly present the starting point of dismissal regulation and its costs, and the management and sense of the latest labor reforms, which are the focus points of the first two sections of this work. The third and fourth sections, respectively, examine individual and collective dismissals, evaluating the elements that generate costs. Finally, and to conclude, the fifth section analyzes the implications of the costs of dismissals in the Spanish system of dismissal on business contracting strategies and indirectly, on the labor market.

1. Basic elements of the historic configuration of costs of work contract termination in Spain

The compensation system for contract termination, as it is currently known in Spain, has its origins in the Statute of Workers approved in 1980. This law, with numerous modifications[3], is the one that still governs labor relations in Spain. In it, for the first time, a fixed system of compensation was established, without a margin of appraisal for the judicial bodies.

It is not necessary to perform an exhibition of the history of the regulation, but it should be understood that this is the moment in which the distinction between the fair dismissal *(despido procedente)*, i.e. which is according to the legal causes and proceedings, and the non-legal one became consolidated, with the latter being qualified as unfair or invalid.

Furthermore, in a discussion of this norm in the Spanish Parliament, the terms of the political and social debate regarding this issue were also established; while some anticipated the failure of this regulation because of its lack of sufficient social support[4] or suggested the risk of the destruction of employment due to the lower dismissal costs[5], others denounced that a rigid termination process impedes hiring[6]. These are very similar arguments to those used today to defend certain positions.

Although we shall not go into the precise content of the legislation established, we shall note the basic elements, which to some extent are also those that are the basis of the current model. First, a distinction should be made between dismissals based on economic or technological causes– typically affecting various workers– and individual dismissals having objective causes. In the first, there was a requirement for a consultation period of 30 calendar days, carried out with worker representatives and, if agreement was not reached here, for an authorization of the Labor Authority. The so-called "termination due to objective causes" is applicable, among other cases, to the "objectively accredited need

[3] The applicable text was redrafted in 1995 (Royal Legislative Decree 1/1995, of 24 March), although it should be noted that a new draft has been authorized. Law 20/2014, of 29 October has provided the government with a period expiring on the 31st of October of 2015.

[4] The Deputy of Euskadiko Ezquerra Bandrés Molet, in the first session of the Labor Commission, declared that the new regulation would be «an absolute failure» as it was approved without the support of workers, as reflected by Gallego-Díaz, S. «*Socialistas y Comunistas, enfrentados respecto al estatuto del trabajador*». *El País*, 7th of September 1979.

[5] Communist leader Carrillo, in the session, referring to the majority and in regards to the text presented, affirmed that «they open the doors to dismissals in this Statute, to objective dismissals, disciplinary dismissals, under multiple forms, without control, that will result in business owners laying off a large number of workers» (Diario de Sesiones del Congreso de los Diputados no. 51, 11 December 1979, p. 3398).

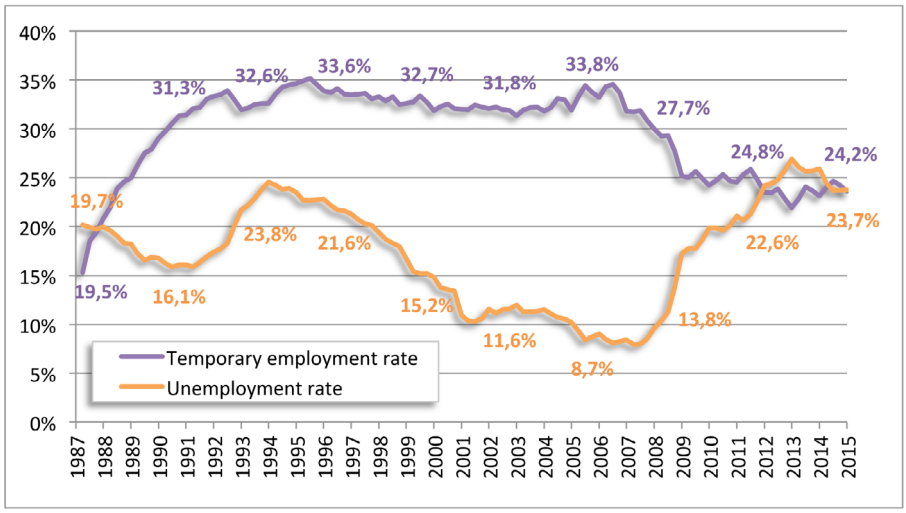
[6] Then deputy and later Labor Minister, Pérez Miyares declared the following: «All of this is no more than a philosophy: Are we here to defend the work positions, position by position? It is about making the worker situation in the company so rigid that it is almost impossible for a worker to be fired, closing the employment market off in a manner that in this country, no one can be hired? Don't we realize that this legislation that we wish to declare the best, among other things, is making the country incapable of exiting the employment crisis that we are in, created by whatever the causes may be, these and others? But this mechanism does not operate in support of the solution to the problem and when we wish to offer solutions to the same, in the end, the qualifications and the sentiments that I clearly respect but do not share, do not seem to be the logical, coherent and valid responses to the problem that we are facing»; an argument that was immediately responded to by the union leader (and Communist deputy) Camacho, negating the idea that «employment is not created by laying off workers more easily». *Ibid.* p. 3747.

to abolish an individual work position", although this was only applicable to companies having less than 50 workers. In this case, the procedure is limited to a written communication of the dismissal, the availability of compensation and the granting of a notice period of up to three months, according to the worker's tenure. Depending on the case, the results of not carrying out the formal requirements was the invalidation of the dismissal, with the obligation to readmit the worker and pay all wages that were not received during this period. In the case in which the content and form of the dismissal was correct, the legal compensation was -and this remains the same, thirty five years later– 20 times the daily salary for every year of worker service, with a one year limit.

Along with this general system, which is quite strict, for the case of temporary contracts, the termination had not further procedures than the prior notice of 15 days for workers with over one year of tenure with the company. In subsequent years, especially after 1984, there was the clear intent to use temporary contracts as an employment mechanism. With the unemployment rate nearing 20% and having increased by two and a half points since the previous year, the so-called temporary employment contract was extended and consolidated. This contract type allows for temporary contracting without cause, with a maximum of three years and a compensation equaling the salary of one day for every month that the contract lasted. Temporary contracting data did not begin to be published until 1987, but the effects of this policy were devastating. Since this time and until 1992 when the problem of temporary work began to be addressed, some two million temporary work contracts were created, while simultaneously eliminating 610,000 permanent jobs.

This situation has become one of the most characteristic features of the Spanish labor market over the past decades. The high degree of temporary contracts, over 30% for the past 28 years, has been reproached by international institutions and has focused on legislative efforts. Over the following decades, numerous reforms were introduced, affecting the cost of dismissals, almost always with the aim of reducing the cost differences between temporary and indefinite contracts.

Figure 2: Unemployment rate vs temporary employment rate.



Source: Spanish National Statistics Institute.

At this point, we shall now take a leap across time and consider the year 2008, prior to the onset of the harshest effects of the economic crisis. At this time, the dismissal system was established in the following manner:

- Collective redundancies are distinguished from individual ones in regards to the total number of workers affected in the company. Thus, collective dismissals affect more than 10 workers in a company of under one hundred employees, ten percent of the staff in companies of between

one hundred and three hundred employees, and over thirty employees in larger companies. It should be noted that, although a scheme is followed that is similar to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, it is more protective. This is because the reference to dismissals is not taken in the work center but in the entire enterprise, which generally speaking, offers a greater degree of protection to the workers[7].

- In the case of collective redundancy, there was a mandatory worker consultation lasting for a period of no less than 15 days (companies of less than 50 workers) or 30 days (larger companies). Regardless, the labor authority intervened in the final phase of the proceedings. If agreement was reached between the worker representatives, only in exceptional cases was the dismissal prohibited. If agreement was not reached, the labor authority was entitled to evaluate the proposed measures in regards to the alleged causes and, when relevant, did not allow the contract termination. This labor authority is an administrative body which, according to the scope of the dismissal, may be either state-based or a regional administration (*autonomous communities*). Regardless, although it was a motivated decision based on the law, it always had a certain political nature.
- As for the causes of collective redundancy, it was indicated that the economic causes are given if the measures proposed by the company contributed to its overcoming the company's negative situation. If the alleged causes were technical, organizational or production based, the measures should contribute to ensuring the company's future viability and employment in the same via a more appropriate resource organization.
- In the case of individual dismissal, in addition to these causes, the business owner may terminate the worker for inadequacy, lack of adaptation to the work position, and justified but repeated lack of attendance, always when this absenteeism had certain repercussions in the company. In all cases, as we shall see, legislation has introduced modifications over the past years.
- Regarding the individual dismissal, advance notice of thirty days is required, as of the written communication and the availability of the corresponding compensation.
- In both cases, compensation is calculated at twenty times the worker's daily salary per year of company service. In the case of a failure to respect the procedure, the legal consequences include the invalidation of the termination decision. Therefore, the business owner is obligated to readmit the workers.
- In individual dismissals, the general rule is that if the judicial body does not find the cause of the dismissal to be proven, the termination is declared unfair. In this case, the compensation to be paid by the employer was of 45 days of salary per year of service, with a duration limit of 42 months. Only in specific cases may invalidation be declared (protection of fundamental rights or some other causes related to maternity and family). As a special regulation, since 1997 and as result of an agreement of the social agents, there is the so-called "Contract for Encouraging Indefinite Hiring", initially directed at workers having job placement difficulties. The main characteristic –apart from public bonuses– was the reduction of the improper dismissal compensation of 33 days of salary per year, with a limit of twenty four months. This decreased compensation was only applicable in the case in which the dismissal was based on objective termination causes, but not in the case in which the unfair dismissal was initiated due to disciplinary causes. In some cases, another amount must be added to this quantity, corresponding to the salaries that were not received since the date of the dismissal until the notification of the court judgment.
- In practice however, the most frequently used channel for dismissals was the so-called "express dismissal" (*despido exprés*). In 2002, the possibility of avoiding the second part of the

[7] In this regard, we should consider the recent Judgment of the Court of Justice of the European Union (Fifth Chamber) of 13 May 2015 (Case C-392/13), that concludes "Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in Articles 2 to 4 of that directive, when the dismissals in question would have been considered 'collective redundancies', under the definition in Article 1(1)(a) of that directive, had the establishment been used as the reference unit".

compensation (the so-called "salarios de tramitación", procedural salary) was introduced. Specifically, this may not be accrued based on a deposit (or worker payment) of the corresponding compensation. If this deposit was made over the first 48 hours, there was no generated entitlement to any quantity. Given the normal delays occurring in the process, and although the State returned these quantities to the company after sixty working days, this amount often exceeded the amount corresponding to the compensation for loss of employment. Therefore, in 2010, approximately sixty five percent of all indefinite contract holders who were eligible for unemployment benefits[8] lost their employment in this manner. Thus, the most typical manner of dismissing workers was by recognizing the unfair nature of the dismissal, with the payment of compensation of 33 or 45 days of salary per year of service. The employer thereby tended to opt for a certain cost, preventing the risk of indefinite legal processes; furthermore, by assuming the unfair nature of the dismissal from the beginning, often it was considered to be a disciplinary dismissal, as in this case there was no legal obligation to advise the worker, making the decision immediate, with the resulting cost savings.

This set of regulations, applicable to all types of contracts, follows the same rules as those established for temporary hiring. These are formally causal, and may be caused by structural causes related to company production (for a specific work or service or in response to a special work quantity need–the so-called temporary contract), for the need to substitute interim employees. Although there are more instruments in legislation (such as training contracts), the three mentioned instruments make up approximately 98% of the temporary contracts that are registered in Spain, which may be omitted for the purposes of this work.

In 2010, before the start of the crisis reforms, no maximum period was established for contracts for a specific project or service, and in the case of the temporary contract for production circumstances, art. 15 of the Worker's Statute established it at six months, although it could be carried out over the 12 months following the initiation of the alleged cause of the temporary hiring. In various cases, collective negotiation had a specific action period; in the first, to determine what activities could be covered by the same, and in the second, to extend the periods of duration (up to twelve months) as well as reference. The formal requirements for terminating a temporary contract are certainly reduced; it is only necessary to offer advance notice of 15 days when the working relation has extended for over one year.

These types of temporary contracts represent some 80% of all recorded contracts– with no major changes having occurred in different moments of the economic cycle– leading us to believe that, in large part, they might be being used improperly. Thus, in response to these situations, in 2001 compensation was established for the termination of these contracts, equaling eight days of wages per year worked. In the case of the provisional contract, as well as training contracts, the law does not consider it necessary to introduce this penalization.

Despite the suspicion of the existence of a high level of fraud or at least, of improper use of these temporary contracts, neither the administrative nor the judicial channels have reported increased rates of litigation. As for the former, the extension of problem may hinder its control. Regarding the scarce judicial sentences regarding the indefinite nature of temporary relations, the explanation for this may be found in the relationship between worker risks and benefits. Given that the employer is not obligated to readmit the worker who was incorrectly contracted as a temporary employee; it is most likely that they shall simply receive the corresponding compensation, which will be little given their short tenure.

In practice, the greatest limitation of recurrent temporary hiring is probably the automatic conversion of indefinite contracts of employees hired two or more times by a company once the total reaches twenty four months out of a thirty month period. This rule, introduced in 2006, does not prevent increased temporary contracting, but it does prevent employees from remaining in situations of permanent precariousness.

[8] They are almost the entirety. The only others are those workers that do not request the benefits (due to finding other employment or for other reasons) and those who have not accrued this right due to not having been employed for sufficient time.

2. The great reforms of the crisis and their context

According to the previous section, it can be deduced that, in regards to dismissal and redundancies costs, the labor relations system continues to follow the same logic regardless of the contract type. Thus, we can easily compare the elements described by the OECD in its index. On the one hand, business owners should offer compensation that is always calculated in compliance with the same scheme; employee service time with the company is multiplied by the value of the daily salary of the same. This amount is multiplied by a different module, depending on whether the employee contract is temporary or indefinite, and within these, in accordance with the appropriateness or inappropriateness of the dismissal.

A series of costs must be added to this amount. In some cases, they are quite simple to quantify (such as advance notice or the following of a specific procedure), but, in other cases, they are not so clear (such as process risk, based on its duration and due to the scope of the judgment). Furthermore, over recent years, there has been an increase in some of the payments to be made by companies in the case of collective redundancy, although, according to legislative technique, this increase is not necessarily appropriate.

To put the reforms into context (and also, therefore, their assessment), it is useful to look at some relevant data from the Spanish labor market. In 2007, Spain reached its lowest unemployment rate since 1979, at 7.93%, having historically high maximum employment levels, with over 20 million job positions. At this time, three out of every ten salaried employees were temporary and fourteen percent of these were in the construction sector. On a broader scale, in the European Union, unemployment rates were similar (7.1%) but temporary contracts (14.6%) and the construction sector weight (8.4%) were substantially lower. Only three years later, at the start of 2010, some 2.1 million jobs had been lost, the unemployment rate neared 19% and the construction sector only made up 8.4% of all employment. The temporary contract rate had fallen to 24.2%, unheard levels in Spain since the late 1980s.

In 2010 the government of Rodríguez Zapatero, supported by the social democratic party (PSOE), initiated a labor reform process, consisting of several laws that were approved over this year and the following year. Regarding the costs of dismissals, it should be noted that the first of the objectives declared by the government[9] were to reduce duality. The hypothesis suggested that excessive temporary contracting is caused by the difference in termination costs between the permanent and temporary contracts. Thus, it acted directly on the compensation costs, progressively increasing the factor that determines compensation in the temporary contracts and immediately reducing–with certain nuances– those corresponding to the indefinite contracts. For this, it opted to notably increase the collective of workers receiving a Contract to Promote Indefinite Hiring, and at the same time, some of the compensation for the dismissal of indefinite employees hired following the reform was subsidized by the Wage Guarantee Fund[10].

The reform also attempted to reduce the less clear costs incurred through different channels. On the one hand, formal defects in individual dismissal were considered to be the cause of impropriety and not of invalidation, thereby considerably decreasing risk. On the other hand, causes were modified, reformulating numerous assumptions in which the employer could legally dismiss employees. In regards to the negotiation of collective redundancies, following the parliamentary proceedings of the Government Decree,[11] it aimed to facilitate the procedure in cases of companies (or work centers) lacking legally elected representatives, and reduced the duration of the consultations. Thus, the previous minimum (thirty or fifteen days), was now a maximum.

Almost two years later, in December of 2011, Rajoy Brey took control of the Spanish government, receiving absolute majority support of the conservative party, the PP (*Partido Popular*). A few

[9] Here we refer to the Memorandum from Royal Decree Law 10/2010, of 16 June, of urgent measures for labor market reform (BOE from 17 June).

[10] This is a public organism financed by mandatory employer shares, whose main function is to ensure employees in the face of company insolvency. Traditionally, it has also financed some of the dismissals in companies with less than 25 workers.

[11] In the Spanish constitutional system, in the case of extreme cause and urgent need, the government may approve provisions having the status of a law, so-called "Decree-Law". They must be approved or rejected by the Spanish Parliament which can decide to proceed as if they were projects of the law, introducing modifications. The socialist government needed the parliamentary support of other parties, so diverse changes were made. The result was Law 35/2010, from 17 September, of urgent measures for labor market reform.

months later, an intense labor reform measure was approved, which, among many other areas, attempted to affect dismissal costs. Although it is beyond the scope of this work, it should be noted that the extensiveness of these reforms, which greatly facilitated the adoption of all sorts of measures by companies, hindered this analysis. The study of dismissal as a cost should be carried out with the understanding that at times, the employer has distinct options. For this, they shall "purchase" the most profitable option, thus the lowering of direct and indirect costs of dismissal does not necessarily generate more decisions of this type if the difficulties in adopting other relaxation measures are also reduced (restructurings, salary reductions, workday changes…).

At the time of the governmental change, unemployment rate had reached 24.2%, and the percentage of temporary contracts had decreased to 23.5%. The previous measures were either insufficient or useless. Based on the legal system adopted in the 2012 reform, it appears that the new government considered them insufficient, since essentially it expanded upon some already adopted measures. The legal causes of dismissal were reformulated in an even broader manner. Compensation for unfair dismissal was generalized to thirty three days of salary per year of service (compared to the forty five days of the general system), and was limited to twenty four monthly installments (as compared to the forty two that were applicable up to this point). Regarding the procedure, aside from the successive modifications that were made to clarify some issues presented before the courts, one of the most notable elements was the suppression of administrative authorization in collective redundancies. In practice, this meant a decreased negotiating power for the worker representation, while at the same time, approval by the administrative authority runs the risk of being subject to political interests.

3. Costs associated with individual dismissals

The decision to terminate is ultimately an economic decision. Aside from irrational attitudes, it may be assumed that an employer shall terminate his/her relationship with an employee once it is profitable to do so. On the one hand, the general rule is that dismissal should be individual. Over the last eight years, the weight of these individual dismissals has led to indefinite workers receiving unemployment benefits in some 80% of the cases of these terminations. In Figure 3 we see that not even during the worst moments of the recession were collective dismissals the majority. Over forty percent of all workers are employed in companies having less than fifty employees, while an additional twenty percent work in companies with less than 250 workers. Therefore, staff reductions are often carried out little by little, as inevitably the companies can do without some workers. Therefore, it is difficult to reach the necessary thresholds in order for the dismissals to be collective, which are calculated in ninety day intervals. Therefore, the cost of individual terminations is quite relevant from a quantitative perspective. In the OECD index, to which we have made reference, it has a weight of 71 percent (5/7).

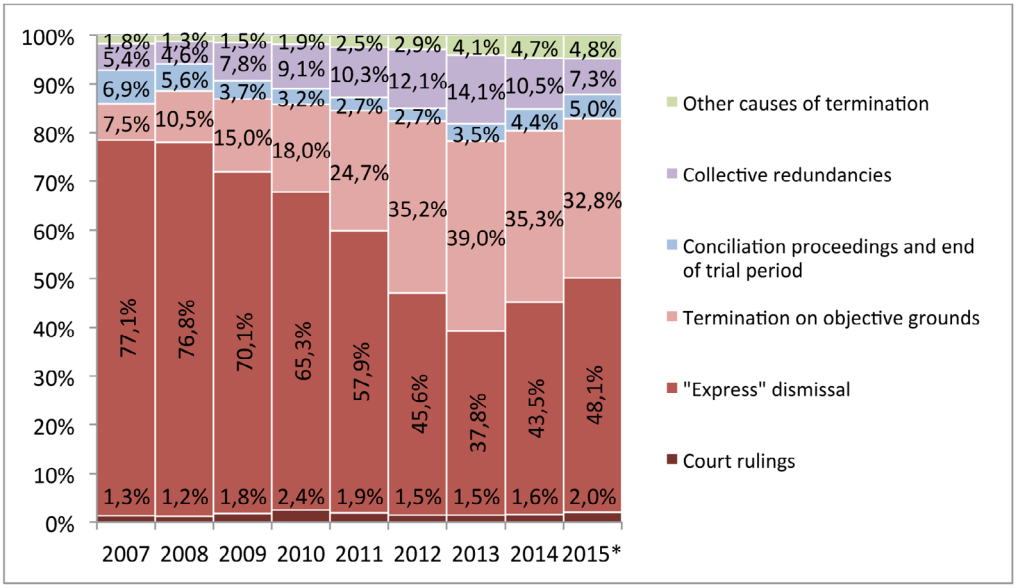
Following the order proposed by this institution, the first element that should be considered is that of the so-called procedural inconvenience, including "notification procedures" and the "delay involved before notice can start". In general, the Worker's Statute (art. 53) demands written notice to the worker, an element that is common in many countries.

The importance of this notice is not negligible; other than the fact that the notice period runs from that moment (there is, therefore, no delay), in an eventual judicial appeal, the acts included in this document are the only ones that may be alleged by the business owner in his defense. Along with this notice, the law requests the availability of employee compensation based on their salary and time of service with the company. This payment or its availability serves as a legal requirement of the dismissal except when the cause is "economic" and a lack of liquidity has been proven. Thus, the mere lack of cash in the company is not sufficient justification if the alleged cause is not "economic" but rather, is "technical, organizational or production-based". And even when the cause is economic, if payment measures are available for (such as a credit policy[12]), this payment or availability of the corresponding employee compensation is imperative. Thus, relative dismissal cost is added to the company's financial manage-

ment. The employer may not prioritize certain payments over others, except when having the means to do so and they should pay the compensation to ensure that the dismissal is fair. Therefore the fact that the failure to pay subsequent debts may have serious consequences on the company and the employment that it generates is irrelevant. Company fears that a provider may fail to service them or that there is risk of realization of essential assets for the company operation, are not sufficient causes for considering employer failure to deposit the owed compensation as fair.

However, in one of the recent reforms, there has been a major resulting cost reduction, albeit indirectly. Until the reform of 2010, the formal defects meant the invalidation of the dismissal, whereby an inadequate expression of causes or an inexcusable error in the compensation amount could result in mandatory employee readmission with the corresponding payment of missed salaries. However, as of this year, it only results in an unfair dismissal, with the employer deciding whether to pay the compensation or to assume a greater debt with the employee.

Figure 3: New unemployment benefit recipients losing a permanent job, by cause of termination.



Source: Spanish Ministry of Employment and Social Security.

The second group of costs included by the OECD is related to compensation and duration of the notice period. Unlike that which occurred previously (until 1994[13]), Spanish law does not differentiate the notice period based on the worker's tenure with the company. In all cases, fifteen days must pass between the date of notification and the execution of the same. Once again, here these recent reforms have cheapened dismissals, as before 2010, the required period was double this amount. Regardless, it should be noted that this period may be replaced by the payment of the corresponding salaries, thus it often serves as a mere fifteen day increase of the compensation payment. As for the compensation, it has already been suggested that this is calculated by multiplying the daily salary by twenty and the years of the employee's service to the company. The determination of each of these factors has led to numerous legal problems, which have been resolved by case law. Thus, the fact that the daily salary was calculated as the ratio of annual retribution divided by 365 or 366[14], the inclusion in this calculation of complementary payment or irregular or salary accrual payments and the use of stock options as benefits[15] all

[13] Law 11/1994, of 19 May, modifying specific articles of the Worker's Statute and of the text included in the Labor Protection Act and the Law on Social Oder Infractions and Fines, BOE from 23 May.

[14] Judgments of the Spanish Supreme Court from 27 October 2005 (Rº 2531/04), 30 June 2008 (Rº 2639/2007) and 24 January 2011 (Rº 2018/2010).

[15] Judgments of the Spanish Supreme Court from 1 October 2002 (Rº 1309/2001), 26 January 2006 (Rº. 3813/2004), 3 June 2008 (Rº 2532/2006).

served to complicate the calculation of the first factor. The inclusion of previous temporary contracts to the indefinite[16] or business subrogation[17] type, or the assessment of the periods of leave all hindered the estimation of the second. These issues are not particularly relevant if they merely alter the amount of the employer debt with the employee. However, as previously suggested, the non-excusable error–and not those issues that have already been resolved by the Supreme Court[18]– in the calculation of compensation that is recognized at the time of the notification, determines the qualification of the dismissal as unfair. Therefore, given the technical complexity of the compensation calculation, the need for appropriation suggests a source of judicial uncertainty and additional cost, which may increase the compensation.

The third and final group referred to in the OECD is the difficulty of dismissal. Here, there are a series of heterogeneous concepts that are related only in an indirect manner.

First, there is the definition of the causes justifying the dismissal. In Spanish law, this is a closed set of assumptions and not the mere "reasonableness" of the business measure. This is one of the areas where the 2012 reform suggested a major change. These are some specific causes of individual dismissals, and in the next section we shall present the economic, technical organizational and production-based causes that are common in collective redundancies. The first alleged employer cause is that of unexpected inadequacy (in its existence or in its knowledge), which may refer to the physical capacities of the worker or the legal ones, as in the case of a loss of licenses.

There is an even greater interest in the lack of worker adaptation to technical modifications in the work position. In this case, it has traditionally been demanded that two months pass from the time of the introduction of the change, thus there is an implicit delay before notice can begin, with no proof of the impossibility of adapting to said moment. Along with this delay, the 2012 reforms added another additional cost, obliging the employer to offer employees a course to facilitate their adaptation. Apart from the cost of the same being covered by the company and the fact that the employer continues to receive his/her salary during the course period, without providing services, this implies an additional delay in the effectiveness of the dismissal.

To fight absenteeism, Spanish legislation has traditionally permitted the dismissal of an employee even for justified and intermittent absences, when this represents a real problem in the company. The specification of these two levels of "relevance" of absenteeism were made towards the end of the last reforms established in compliance with objective parameters that in practice, made its application difficult: 20 percent of the working days in two consecutive months or 25 percent in four months within a one year period; at the same time, in order for these absences to be considered sufficient cause, the absenteeism in the work center must have reached five percent during the same reference period. Given that the average absenteeism in Spain is only slightly higher than three percent, this additional condition is a notable restriction on the effectiveness of this cause of dismissal. Thus, in order to strengthen employer powers, in 2010, there was a reduction in the required percentage of absenteeism in the work center to only two and a half percent. Finally, in the 2012 reform, this requirement was suppressed, but it was made stricter in regards to employees. Thus, currently, it is irrelevant if the work center has a real absenteeism problem or not, in order for the worker to be dismissed, the intermittent absences, although justified, should simultaneously reach twenty percent in two months and five percent in the two previous months. This last demand, however, is not added to the assumption that the reference should be four alternate months within a period of twelve months.

The second element within this third group is the duration of the trial period. In Spanish law, this has been left to the will of the parties–always having to be agreed upon in writing before beginning the contract– within the limits established by the collective redundancy. When the collective agreement is silent in regards to this area, its maximum duration shall be six months for degree holding technical workers and two months for the other workers (three months in companies with less than twenty five employees). According to the most recent data available (2013), 47.47 percent of the workers covered

[16] STS of 15 November 2007, Rº3344/2006.

[17] For example, the failure to include the previous company in tenure in a case of business subrogation, STS of 15 April 2011, Rº 3726/2010.

[18] Such as, for example, STS from 6 May 2014 on the manner of calculating the tenure of the worker in regards to prior periods of less than a month; despite the fact that the error generates a relatively small difference, this is considered to be inexcusable.

by collective agreements have a specific arrangement; however, it should be noted that a decrease in duration is more frequent than an extension in the collective agreements. Thus, in only 23.5 percent of the workers covered by collective agreements in 2013 was the trial period longer.

It is clear that termination during the trial period has virtually no cost; to terminate a contract, it is not even necessary to have any specific procedure or cause and it is not necessary to pay any compensation; employer risks are minimal as challenging is only possible when there has been some infringement of fundamental rights[19]. Furthermore, the effects are immediate and there are no limitations of any sort. Thus, one of the clearest goals of the 2012 labor reform is the attempt to reduce costs. This created the "indefinite contract supporting entrepreneurs". Despite its name, it is aimed at strengthening employment in SMEs and it does not in fact attend to the direct or indirect creation of new activities, but only to the size of the company (less than 50 workers). The only peculiarity of the legal system regarding this contract is the duration of the trial period, which is "one year, in all cases". Despite establishing the possibility of requesting bonuses related to employee permanence, this modality has been used infrequently. Only 11.8% ofall indefinite contracts used this channel, suggesting that the extensive trial period is not a relevant element affecting permanent hiring.

The next element included in the OECD index relates to the consequences of unfair dismissal. As previously suggested, compensation is increased by thirteen days of the salary per year of company tenure, for a total of 33 days, and a maximum of two years. This is the compensation that, since 1997 was recognized only by the Contract to Promote Indefinite Hiring and that today extends to all workers. The direct costs of unfair dismissals have been greatly reduced from forty five days per year and a maximum of forty two monthly installments to the previously mentioned figures. But furthermore, procedural salaries have been suppressed, except in case of readmission, since either the employer or the employee decides to do so.

Thus, in practice, readmission is considered to be a clearly exceptional event, only being mandatory in the case in which the dismissal infringes upon the fundamental rights or other especially protected rights. Thus, in the case in which the worker who is dismissed without sufficient cause or without respect for the procedures is pregnant (even if the employer ignores this) or is receiving or has received certain parenthood benefits, the dismissal is considered null and readmission is thereby mandatory.

In the case in which a legal worker representative is dismissed, the unfair dismissal costs increase notably, since in addition to the need to pay the salaries that have not been received since the time of notification of the ruling, the option between readmission and compensation corresponds to this individual.

Finally, to end the discussion of the elements considered for this index on dismissal costs, we shall make reference to the challenge period against this dismissal. In this case, changes have not occurred, as it was already clearly reduced. The challenge should be made by the employee within a period of 20 working days (excluding Saturdays, Sundays and holidays), a period that is suspended when the mandatory preliminary conciliation is processed.

Along with this element, it is necessary to include as a cost the time passing until receiving a response from the judicial body. Apart from the duration of the process which means the payment of attorney fees and dedicating resources to the legal defense, uncertainty is a relevant factor. For this, it is necessary to highlight that even though no change in regulations has been produced, the average duration of the dismissal process has notably increased over recent years. In compliance with the Annual Report of the General Council of the Judiciary, until 2008 the dismissals were resolved in less than three months. This duration grew slowly until 3.8 months in 2011, but in the last two years (until 2013) it has extended to 6.5 months. On the other hand, it should be noted that only five percent of the judgments are altered by higher courts. Therefore, adding together all of the procedures, the average time passing since the dismissal until the court decision is approximately eight months.

We should mention another distorting element introduced by the latest reforms. Until 2012, the Worker's Statute established the possibility of the employer recognizing the unfair nature of the dismissal at the time of its communication. As this prevented the generation of procedural salaries, it became a

[19] Such as, for example, the notification to the employee of her failure to pass the trial period, when evidence suggests that this was due to her pregnancy (STSJ of Madrid from 20 May of 2008 (Rº 1170/2008)

frequent practice. The elimination of said compensation also meant not mentioning this possibility in the law. On the other hand, compensation for this dismissal is exempt from employee taxation until the time established by the law. Therefore, the Tax Authority interpreted that the employer acting in this manner, without legal support, is recognizing a compensation that is greater than the legal one. This is permitted, however, the difference is considered to be work output for fiscal purposes. Therefore, artificial costs were added, since the company and the dismissed employee were forced to stage a reconciliation act when there was no disagreement since the beginning. Thus, in 2013 there were 66 percent more preliminary conciliations than in 2011.

On the other hand, although it may be superficial, it is necessary to mention the legal system of disciplinary dismissal. The OECD excluded it from its index precisely because it is more agile[20], yet, when it may be unfair, it should not be ignored. Thus, except in the case of a worker representative or when establishing a collective agreement, it should be sufficient to notify the worker regarding the acts motivating the dismissal and their date of effectiveness. If there was labor union affiliation, union representatives should be heard. The dismissal has no notice whatsoever, so if the employer intends to recognize its unfair nature, it would be advantageous to classify it as disciplinary.

4. Collective redundancies and business costs

The definition of collective redundancy–which is the first element used in the OECD index–, as described in the first section, is an adaptation of Community law. Its qualifying element is that it affects a specific number of workers: ten in a company of up to one hundred workers, ten percent for companies between one and three hundred workers and thirty workers in larger companies. In order to prevent that through continuous individual dismissals the more demanding regulation of collective redundancies is avoided, two corrections are made. On the one hand, all of the dismissals that are made in a ninety day period (and eventually more) are taken into account and on the other hand, always when it is less than five, it should also include "terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned".

To complete the definition of collective redundancy, it is necessary to analyze the causes leading to it. Here, the efforts made by the law to reduce dismissal costs have been notable. The objective declared in both the 2010 and 2012 reform, was to improve the legal certainty. So, it seeks to facilitate the terminations and to reduce the role of legal bodies. Thus, in the first, the measures were considered acceptable when the causes were deduced as "the reasonableness of the termination decision". This reasonableness, when involving decreases in income or the existence of losses (current or anticipated) was linked to the preservation or favoring of its competitive position. In the other causes, the goal of the dismissals was to "contribute to preventing a negative evolution of the company or to improving the situation of the same through a more appropriate organization of resources that favors its competitive position in the market or an improved response to market demands".

This definition, according to the government elected at the end of 2011, gave an excessive role to the jurisdictional bodies, allowing them to evaluate whether or not the business decision was "reasonable", which is beyond legal scope. Thus, the current definition aims to establish strictly objective parameters. In the regulations, it is the economic situation that permits the dismissal, not the appropriateness of the measures used to fight them; furthermore, any assessment capacity of the judge is eliminated when there are three consecutive months of decreased sales or income (as compared to the same period from the previous year). As for the other cases, likewise, only the current and real situation is described so that, in the present definition, there is no reference made to the anticipated effects of the dismissals on the financial situation or competitiveness of the company.

The second and third elements of this index on the restriction of collective redundancies refer, respectively, to communications and delays made by the employer when making the decision to terminate until this dismissal goes into effect.

[20] OECD, *OECD Employment Outlook 2013.* (Paris: Organization for Economic Cooperation & Development, 2013), 76.

Current regulation has aimed to grant legal certainty to the procedure, establishing clear criteria of who, what and how the negotiation should be carried out. So, after some problems in the interpretation of the rule, in August of 2013, it was clarified that the negotiation should take place in a unique negotiating commission (and not in work centers)[21]. The manner by which this commission is created was precisely regulated, as well as the fact that it is made up of both legal representatives from each work center, when relevant, as well as those designated (or delegated) by the workers when there are no select representation bodies. As shall be described later, the very existence of multiple labor reforms has meant a non-negligible cost, given the lack of legal certainty in the negotiation procedure which has provoked the declaration of invalidation of various collective redundancies.

Focusing on the duration of the proceedings, it has been established that its duration should be no longer than thirty calendar days, or fifteen days in the case of companies having less than fifty workers. However, before the start of the same, it is necessary that a worker representative commission has been created. This should be carried out within a maximum period of seven days if there were legal representatives in all of the affected centers, or within fifteen days if the designation of ad hoc representatives is necessary.

The obligation to negotiate in good faith has been revealed as a major source of company costs. Before the almost absolute flexibility of the causes of the dismissal, the judicial bodies have greatly increased the requirements for this point. Thus, if the court considers that this good faith has been violated, the entire process may be annulled, having to start over (if the company decides to do so), readmitting the employees during the meanwhile. For example, having separated a specific union from a referendum between workers to ratify the agreement[22], or the infringement of the right to strike during negotiation[23].

Although agreement or subsequent authorization by any public authority is not required, the labor authority does intervene, making warnings and recommendations or assisting if any party so requests. In any case, it should be noted that although the percentage of dismissal processes with agreement has lowered since the elimination of administrative authorization in 2012, in eight out of ten cases, agreement is reached with the worker representatives.

Having completed the consultation procedure, in which a list of documentation has been established, as considered minimal by the case law, the company has fifteen days to notify of its decision. As of this time, the employer may individually notify the workers of the dismissal, which may not take place before thirty days as of the date of communication to the labor authority of the start of the procedure. Furthermore, the formal aspects of the individual dismissals should be respected as previously noted, including the fifteen days of notice.

Thus, the delay occurring between the company decision to initiate the procedure and the occurrence of the same may range between thirty one (if the negotiating commission is created immediately and agreement is reached within fifteen days) and sixty days, if all of the periods take the maximum amount of time. The present agreement therefore, offers clear cost savings, as it not only shortens the process but also offers legal certainty to the decision, by preventing challenges against the oexistence of legal causes except in clearly exceptional cases.

The final item used in the index is the so-called "Other special costs to employers in case of collective dismissals". Here, it is surprising to see that over recent years, the trend has been to increase these, going against the general dynamic. Aside from some immaterial or difficult to assess items, such as impact on corporate image or cost of uncertainty, three additional costs may be supported by companies. Each of these has a great complexity and requires a specific analysis; therefore here we shall simply discuss their main features.

[21] In fact, the regulation of development of the previous law provided negotiation by work center. Case law considers that this regulation was illegal and annulled dismissals for not having created a unique commission (SAN (*Sentencia de la Audiencia Nacional*): Judgment of the Spanish National High Court (plural SSAN) from 1 and 4 June of 2013 (Proc. 17/2013 and 1/2013, respectively).

[22] Atento case, SAN of 11 November 2014 (Proc. 251/2014).

[23] Coca Cola Iberian Partners case, STS from 20 April 2015, in this case, the strike coincided with the negotiation period with one of the plants affected by the dismissal. The company moved production to other manufacturing plants to cover area demand.

First, and the oldest of the extra costs arises when there are employees over the age of 55 in the dismissals, obligating the company to sign a special agreement with the Social Security administration, ensuring the sufficiency of their pensions when reaching the corresponding age. As the payment amount is related to the age of early retirement, reforms in this area have indirectly impacted dismissal costs. By extending the age of retirement to 67 years (progressively), this also increases the cost of this agreement for the company.

Second, when the dismissal affects over fifty workers, the company should be responsible for an external relocation plan. This plan must extend for a period of at least six months and should include training and requalification measures. To some extent, this allows for the company (and not the general public) to take up some of the costs that are generated from the creation of new unemployed individuals.

Finally, and having a similar purpose, in 2011, in response to the collective dismissal of a large telecommunications company that had earned large profits, the company was obligated to make a contribution to the Public Treasury when this dismissal affected workers of over the age of fifty. Following some variation, the final determination of this obligation was limited to companies having profits with over one hundred employees in which the proportion of dismissed employees of over fifty years of age is greater than the percentage of workers of that age remaining in the company.

The notion of a company with profits has been surprising as it includes not only the fiscal year in which the dismissal was executed and the previous year, but also the four subsequent years, requiring that the positive results occurred in at least two consecutive years. The cost of this measure is quantified based on the imbalance of the proportion of workers over the age of fifty and the profits ratio. These elements are used to determine the coefficient by which the cost of the unemployment benefits must be multiplied.

5. Some final thoughts: dismissal cost and business strategy

Over recent years, dismissal costs have been the subject of great debate; recently, the International Monetary Fund, in its annual report on Spain from Article IV once again suggested the problem of duality and its relationship with this area. Aside from the multiple criticisms that may be made of simplistic analyses such as those suggested by experts from this institution, inefficiencies clearly exist. This is not a problem of excessive costs or rigidness. Figure 1, at the beginning of this work, clearly reveals that rigidness has not only seriously decreased over recent years, but is also lower than many of the large European economic powers such as France or Germany. The issue lies in the incentives offered by the system.

The Spanish legal system believes that hiring should be indefinite and that dismissals should be based on cause. In practice however, employers often fail to consider the reasons established by the law when hiring for a limited amount of time or when making dismissals.

To clearly understand this issue, it should be noted that in the cost of dismissals, there are essentially two elements. On the one hand, there is the compensation that should be paid directly by the company to the employee. On the other hand, there is a series of more or less defined economic costs that the business should incur.

In the termination of a temporary contract, the formal will of the parties is not required. There simply must be compliance with the original purpose of the contract. As described in the first section, since 2015, compensation shall be of 12 days of salary per year of service, with no further restrictions. As previously described, the extensive use of service and temporary contracts leads to the conclusion that temporary contracts are not limited to the scenarios envisaged by the law. In fact, during the economic recession, the destruction of employment focused on temporary contracts, given that its function in companies tends to be a fast and procedure-less staff adjustment to market needs.

Thus the employer decision may be summarized based on three options. They may hire a temporary worker (or various, successively). They may hire a permanent worker and when this employee is no longer necessary, comply with all of the procedures to carry out an objective (justified) dismissal. And finally, they may ignore the legal procedure by carrying out an unfair dismissal.

The difference in compensation is not very great between these three options, with the employer paying twelve, twenty or thirty three days per year of worker service. For five years of company service,

they must pay sixty days of the temporary worker's salary (or successive workers), one hundred days of the indefinite worker's salary when they are correctly dismissed and one hundred and sixty five days of the unfairly dismissed worker's salary. In the first two cases, it is necessary to provide (or pay for) the corresponding period of notice.

But furthermore, in the case of legally established dismissals, the series of costs described in this study must also be paid. To these, it is necessary to also add the risk that despite having attempted to comply with all of these procedures, the dismissal shall be considered unfair or in worse case, may be ruled invalid. Thus, the anticipated cost of the dismissal shall be the sum of the compensation, the procedural costs, and the delay in the execution of the measure, plus the probability of paying compensation for an unfair dismissal.

If the employer opts to breach these regulations, there are two possibilities. The first is to renounce stable workers and to use temporary contracts from the get-go. This results in very low termination costs, given that compensation is quite low and the procedure is virtually inexistent. Theoretically, there is the risk that the worker may sue for unfair dismissal, alleging fraud based on the temporary hiring. However, given the short duration of these contracts, it is not likely that the worker shall sue for a few euros, in the hope of a new contract or at least some good work references. On the other hand, employers using this strategy shall have workers who are not overly experienced or committed in their work positions. So they should only act in this way if the employment positions require limited learning and if there are sufficient workers to cover their needs.

The second inappropriate alternative is to hire permanently but, as soon as the worker is no longer necessary, renounce justified termination. Here, there is legality at a very low cost. Formalizing the termination as a disciplinary dismissal and recognizing the unfair nature of this, the dismissal cost increases by thirteen days per year of service, but this prevents the notice and justification of cause requirements and the uncertainty regarding the judgment.

Ultimately, it is necessary to reform the system of dismissal costs, but the problem does not lie in the compensation level or rigidness, which it not excessively high, or in the number of types of work contracts. The problem stems from the cost differences for the different behaviors. Legislation is actually resulting in the support of less profitable behavior. Furthermore, constant legislative changes occurring with these frequent reforms, has led to legal uncertainty, which in itself is a cost.

Indeed, there has been an attempt to decrease the difference between termination costs for temporary and indefinite contracts. The occurrence of the causes of termination has been facilitated and the cost of collective redundancies has been reduced; procedural salaries have also been eliminated in order to reduce the risks associated with the challenges, increasing compensation for terminating a temporary contract. However, the difference continues to be excessive, as seen in the hiring data, with a lack of effective channels. Therefore, it is necessary to consider this topic from a new perspective, searching for improved techniques and using a broader consensus. The reform should not only be positive, it should also be stable. Various alternatives have been suggested, with their respective advantages and disadvantages, but their analysis extends beyond the scope of this study.

The new legal framework of the thresholds of dismissals, following the judgment of the Court of Justice of the European Union, fifth chamber, of 13 may 2015, Case C-392/13.

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Abstract: The application of the term "workplace" in Spanish labor law has been a very controversial issue over recent years in the legal field of collective redundancies. The determination of this concept acquires importance when establishing the parameters to be followed in order to establish thresholds for individual or collective dismissals. The ECJ has established a performance criterion with which member states must comply when developing their domestic legislation in order to clarify and unify criteria.

Keywords: workplace, collective redundancies, The European Court of Justice, Spanish labor Law.

Introduction

The difference between individual and collective dismissal is based on determining whether or not the thresholds specified in the law have been reached.

The thresholds required by Spanish law in order to determine whether a dismissal is collective or individual have been particularly controversial in the Spanish labor courts over recent years.

Specifically, it has been questioned whether, to understand that those thresholds had been reached, it was necessary to consider the entire company as a whole or each separate work center as the reference unit.

This report considers the different positions, national and European, that have emerged in regards to this issue and explains the position of the Court of Justice of the European Union (hereinafter ECJ), Fifth Chamber, supported by its judgment ruling Case C-392 / 13.

This judgment, issued on the past May 13th 2015, can put an end to a period of doubts and contradictions regarding how to determine the thresholds considered when deciding if a dismissal was a "collective dismissal", affecting, therefore, different ways of processing dismissals, since it is not the same to process a single dismissal as collective dismissal, as explained below.

The judgment from May 13th relates Article 51 of the Legislative Royal Decree 1/1995, 24th March, which adopted the rewritten text of the Statute of Workers Rights Law (Spanish national legislation) to the legal framework established by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, which codified Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

Regulatory framework

As for collective dismissals, we shall consider the two relevant regulations.

On the one hand, European regulation is applicable, which establishes the regulatory framework to be adapted to the laws of each member state; and, on the other hand, there are the internal regulations of each state.

In the case of European legislation, this issue is regulated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereinafter, the Directive).

This Directive, in its Article 1.1, paragraph a), defines "collective redundancies" as follows:

> «"collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:
>
> (i) either, over a period of 30 days:
>
> – at least 10 in establishments normally employing more than 20 and less than 100 workers,
>
> – at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,
>
> – at least 30 in establishments normally employing 300 workers or more,
>
> (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.»

The aim of the Directive, described in its preamble, is the approximation of the laws of the Member States on collective redundancies, on the road to progress, in order to strengthen worker protection and, in this respect, to overcome the differences existing between the provisions enforced in the Member States, given their direct impact on the functioning of the internal market.

In the case of the specific internal regulations of Spain, this issue is regulated by Legislative Royal Decree 1/1995, 24th March, which adopted the rewritten text of the Statute of Workers Rights Law (hereinafter, ET).

This legal text, in its Article 51, indicates what is meant by "collective redundancies" as follows:

> *"Article 51. Collective dismissal.*
>
> 1. For the purpose of this Act, a collective dismissal shall refer to the termination of employment contracts based on economic, technical, structural or production reasons, if at least the following number of workers are affected over a ninety-day period:
>
> a) Ten workers in companies employing less than one hundred workers.
>
> b) 10% of the company's workers if the company employs between one hundred and three hundred workers.
>
> c) Thirty workers in companies employing three hundred or more workers.
>
> Collective dismissals shall also include the termination of employment contracts that affect all of the company's staff, provided that the number of workers affected exceeds five, if the dismissal arises from the total cessation of the company's activity also based on the aforementioned reasons.
>
> In order to calculate the number of contractual terminations referred to in paragraph one above, any other termination that has taken place during this period at the employer's request for other reasons not inherent to the individual worker shall also be taken into account, except for the reasons foreseen in Article 49.1.c) herein, amounting to at least five."

It is evident that differences exist between the two norms in terms of determining when a dismissal or redundancy is considered collective.

Among these differences, it is seen that while the European regulation distinguishes between dismissals in periods of 30 and 90 days, the Spanish legislation only refers to redundancies in 90 day periods.

Also, while European legislation refers to specific amounts of workers in order to determine the thresholds of dismissal in that period of ninety days (20 workers), the Spanish regulation deter-

mines certain thresholds based on amounts and percentages that are less than the figure issued by the Directive.

There is also the additional distinction in that the Spanish norm refers to redundancies affecting the entire company's staff, providing that the number of affected workers exceeds five; thus granting increased protection to the collective redundancy figure.

Despite all of these differences, the most relevant of these is the reference unit referred to in both legal norms when establishing their determination thresholds, since, while the Directive refers to "*establishments in question*", the ET refers to "*companies*" and this is the basis of the conflict that is discussed in this study. That is, this determines whether the mentioned thresholds should be considered with respect to the overall number of workers in the company (including all company establishments) or, on the contrary, if only the number of workers within the affected center should be considered.

This issue has been discussed with regards to the reference units relating to the company or group of companies in cases where there is a group of companies for labor purposes, or even for commercial purposes. However, this issue shall not be considered in our analysis.

Question referred to the ECJ

As for the reference units to which both norms refer both standards (the reference unit of the affected company or work center), according to these regulatory differences, there is the Reference for a preliminary ruling of Case C392/13, requesting a preliminary ruling based on Article 267 TFEU from the Labour Court Nº 33 of Barcelona (Spain), according to the Court's decision from 9 July 2013.

In a preliminary ruling, the Court of Appeal (England and Wales) (Civil Division) raises two questions to the ECJ.

On the one hand, it requests clarification as to what is meant by "establishment" and, on the other hand, it asks whether the threshold required by the norm must be met in reference to the workers affected in a workplace or in the whole company.

Thus, the question was posed as follows: *"Does the concept of "establishment", as an essential Community law concept for the purposes of defining "collective redundancies" in the context of Article 1(1) of Directive 98/59, and, in view of the nature of the directive of a minimum standard as provided in Article 5 thereof, lend itself to an interpretation that allows the national provision implementing or transposing that text into the national legal order — Article 51(1) of the [ET] in the case of the Kingdom of Spain — to relate the ambit of the calculation of the numerical threshold exclusively to the "undertaking" as a whole, thereby excluding situations in which, had the "establishment" been taken as the reference unit, the numerical threshold laid down in that article would have been exceeded?"*

1) As for **determining what is meant by "establishment"**, it should first be assessed if the workplace is the company as a whole, since in this case, the objectives of the Directive may be infringed, since this is not the sense that the rule attempts to give to this concept.

Furthermore, this interpretation would mean that a dismissed worker who was assigned to a workplace of a company other than that in which there was an unquestionable collective redundancy (e.g. dismissal of 80 workers), would have the same protection that is conferred to each worker of the unquestionably affected workplace, thus violating the meaning given by the Directive to the concept of "collective dismissal" in the traditional sense of the term.

Secondly, it should be considered that, if it is understood that the workplace does not refer to the whole company but to the entire part in which the redundant workers are assigned, the protective purpose of the Directive on the rights of information and consultation of the affected workers may also be hindered. This is the case since, as there is a risk of not attaining the minimum number of 20 affected workers, the protection mechanisms providing for the rule would not be initiated.

The ECJ considers that the term "establishment" is a concept of European Union law that should be understood as *"the entity to which the workers made redundant are assigned to carry out their duties."*

2) As for the determination of the benchmark to interpret whether or not the threshold required by the law should be the company or the establishment, the following should be considered:

The EU law is a norm of minimums, that is, its protection is extendable in favor of the workers, so that the States are entitled to adopt more favorable provisions for workers based on their national laws.

Article 5 of the directive states: *This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.* Thus, the European legislator grants the member states the power to extend the level of protection that is established by the European standard.

Therefore, the wording of the European norm should not be interpreted so as to hinder or limit more favorable rights granted by Member States, such as the right to information and consultation or national legislation that provides for the application of mechanisms of worker protection when the dismissal affects, over a period of 90 days, less than 20 workers from a single establishment, including: rights to information, the open consultation period, severance and other contracts and collective agreements that might be applicable as recognized by the law.

Indeed, this more favorable transposition of the European norm has already materialized in the threshold required by the Spanish state to consider the dismissal to be collective, since, while the European Directive requires at least 20 workers over a period of 90 days, the Spanish regulation requires only 10 workers in companies with fewer than 100 workers; 10% for companies having between 100 and 300 workers; and 30 workers in companies with more than 300 workers; as seen previously. Thereby, the minimum required by the ET is established at 10 affected workers (10% of 100) instead of 20, and even the entire staff, when the number of affected workers is greater than five.

Differences between individual and collective dismissal in Spain:

The practical difference between an individual and a collective dismissal in Spain is how it is processed and the rights and duties that each processing procedure grants the companies and workers, with the procedure to be carried out for collective redundancy being more protectionist towards the workers than the procedure to be carried out in the case of individual redundancy.

The collective dismissal must be preceded by a **period of consultation** with the legal representatives of the workers that must cover at least the possibilities of avoiding or reducing the collective redundancies and of mitigating its consequences by including **accompanying social measures,** such as outplacement, training or retraining to improve employability.

During this consultation period, very precise information is available in regards to the dismissal, the company situation, the affected employees, the reasons for the dismissal, etc. All of this facilitates the possibility of workers being better informed and being able to file claims in his defense if arguing that the dismissal was not valid.

Furthermore, the company that carries out a collective redundancy affecting more than fifty employees must provide the affected workers with an **outplacement plan** through authorized outplacement firms for a minimum period of six months, including training measures and vocational guidance, personalized attention for the affected worker and an active job search.

Another of the advantages offered to workers of collective dismissal is that they may take collective legal actions in one unique procedure.

Thereby, we conclude that the protection granted to dismissed workers as part of a collective action is greater than that offered to workers who are dismissed in an individual dismissal.

Relevant aspects to resolve the issue

Considering all of the above, it is now essential to **determine two aspects** in order to resolve the matter. First, it should be determined if it is more favorable to consider the company instead of the es-

tablishment as the reference unit, otherwise, there would be no reasons to have regulation differing from that of the EU. And, second, it should be determined whether, having alleged that the Spanish legislation is more favorable, the ECJ ruling in favor of interpreting the establishment as a reference unit results in the establishment being considered as the reference unit; because the ECJ considers that the rule is not more favorable, because the ECJ considers that this should not be the nature or object of the rule, or because of any other reason that the ECJ considers relevant and determinant in resolving the question.

As for the first point, we shall consider two alternate ways of thinking.

1) On the one hand, there is the stream of thought that considers that using the workplace as opposed to the entire company as the reference is more favorable to workers. This possibility is based, mainly, on the fact that, with the workplace, the application of the information and consultation procedure as required by the Directive is not hindered.

Some also justify this by alleging that, in considering the "establishment" and not the company as the reference unit, the protection of the affected workers is greater since it is easier to reach the thresholds required of collective dismissal when considering a single workplace and not the company as a whole, since the reference number of workers is lower, and, therefore, the number of affected workers is simply more expandable. Thereby, since it is easier to reach the minimum threshold required of a collective dismissal, there shall be more cases in which the dismissals are considered collective and the protective mechanisms shall be applicable in more cases.

In accordance with this viewpoint, three judgments have been issued by the Court of Justice of the European Communities (hereinafter ECJ) [Statements December 7, 1995, (Rockfon case), of September 7, 2006 (ECJ 2006 235) (Agorastoudis case) and February 15, 2007 (ECJ 2007, 33) (Chartopoiia case)], confirming that, for the purposes of the Directive, the relevant concept with regards to this calculation is the workplace, and not the company, also insisting that such criterion is of European law, namely, without the individual State having the possibility of accommodating it to its peculiarities.

2) On the other hand, there also a viewpoint that considers that using the company as the reference is more favorable to workers.

This is the interpretation advocated by the Spanish state to support the use of the company as the reference, focusing that argument around the understand that their internal rule is valid in so far as it confers more favorable rights than the European Union rule.

Specifically, Spanish case law considers that the rules found in the ET are more favorable to workers, not only in regards to the physical reference unit (company rather than establishment) for the calculation of affected workers, but also by requiring that the company justify the cause for termination and the need for prior administrative authorization in order to proceed with the collective redundancy (requirements not required by the specified Community legislation).

In this sense, numerous judgments have been issued, both by the Supreme Court and lower courts. In these judgments, the idea that it is more favorable to understand the company as a reference unit remains. This idea is based on a specific scientific doctrine that has determined that it is so. Thereby, statements such as the STS (Labor Chambers, 1st Section) of 18 March 2009, appeal of the unification of doctrine no. 1878/2008; STSJ of Galicia (Labor Chambers, 1st Section), no. 3087/2014 of 30 May, appeal of supplication no. 855/2014; STSJ of Andalusia, Seville (Labor Chambers, 1st Section), no. 173/2015 of 21 January, appeal of supplication no. 3361/2013; or the STJS of Catalonia, (Labor Chambers, 1st Section), no. 4844/2014 of 3 July, appeal of supplication no. 2049/2014; among others, indicate the following: *"establishing the company and organizational framework within which the staff must be accounted for; computing unit that best serves to guarantee, as pointed out by the whole practice of scientific doctrine."*

There have also been numerous judgments in regards to both rules (national and international) 20Since the Directive has a minimum standard nature that may be improved by national legislations in favor of workers; because the object of the Directive is to strengthen worker protection in the event of collective redundancy, and because Spanish legislation is more favorable to workers regulation. Thus, There are sentences such as: STS (Labor Chambers, 1st Section) of 18 March 2009, appeal for the

unification of doctrine no. 1878/2008; STS of 8 July 2012, appeal for the unification of doctrine no. 2341/2011; STSJ of Castilla y León, Burgos (Labor Chambers, 1st Section), no. 558/2010 of 7 October, appeal no. 526/2010; STSJ of Castilla-La Mancha, (Labor Chambers, 1st Section), no. 204/2013 of 14 February, appeal of supplication no. 681/2012; STSJ of Castilla-La Mancha, (Labor Chambers, 1st Section) no. 649/2012 of 6 June, appeal of supplication no. 445/2012; STSJ of Madrid, (Labor Chambers, 5th Section) no. 593/2014 of 7 July, appeal of supplication no. 271/2014; STSJ of Catalonia, (Labor Chambers, 1st Section) no. 5735/2014 of 1 September, appeal of supplication no. 1837/2014.

The judgment by the TSJ de Castilla-La Mancha, (Labor Chamber, 1st Section) no. 649/2012 of 6 June, appealing judgment no. 445/2012 also notes that *"the wording of Article 51.1 of the Statute of Workers Rights [...] does not provide any interpretative doubt as to the intention of the legislator on any alternative solution such as the workplace or even group of companies for labor purposes."*

3) As a third viewpoint, we may consider the STSJCE of December 7, 1995 (ECJ 1995, 218) which refers to the **relative nature** of the Community concept of "establishment" recalling that this is a Community concept in which each translation to a national language incorporates distinct notions, and thereby concluding that the establishment concept **must be interpreted according to the specific circumstances** allowing flexible treatment.

ECJ position:

In the proceedings from Case C 392/13, Spain argues that its national legislation is in conformity with Community law given that its rules are more favorable. In this respect, paragraph 37 of the ECJ judgment states the following: *"The Spanish Government submits that it made use of the right granted in Article 5 of Directive 98/59 by introducing legislative provisions intended to be more favourable to workers. Amongst other things, it specified as the reference unit not the establishment, but the undertaking. Since calculating the thresholds at the level of the undertaking may preclude the application of the information and consultation procedure provided for in that directive to the dismissals at issue in the main proceedings, the referring court raises the question whether the national legislation in question is compatible with that directive."*

Regarding this issue, and despite the preceding paragraph, in its judgment from May 13th, the ECJ spoke out in favor of the following: to determine whether a dismissal is collective or individual the "establishment" must be used as the reference unit.

Thus, the Court itself established the following "*Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in Articles 2 to 4 of that directive […]"*

Conclusion

After all these interpretations, and considering the position of the ECJ, we shall now determine how this ruling has affected policy and practice in Spain. Should we start using the term "establishment" or "workplace" instead of "company", as we have done up until now?

Clearly the judgment is not opposed to the reason of greater favoring by Spanish legislation and this is the cause for the internal regulations to continue to be interpreted as usual, since this offers more favorable results. That is, using the company as the reference unit instead of the establishment.

However, it seems logical to understand that the solution provided by the ECJ judgment from May 13th must be respected above the position held by the Spanish state since this ECJ decision was issued after, and despite, assessing the argumentation carried out in the Spanish courts. Thus, the solution to the problem appears to lie in the use of the "establishment" as the reference unit.

As such, the ECJ judgment from May 13th shall be considered a turning point in this matter in Spanish legislation and the term "company" as mentioned in Article 51 ET may have seen its end with the "*establishment*" being considered *as "the entity to which the workers made redundant are assigned to carry out their duties"*, thereby changing the parameters used to determine each type of dismissal.

Therefore, the study of this subject, its rules, case law and the ECJ's position in this respect, leads us to conclude that it is more appropriate to consider that the thresholds of Article 51 ET must be interpreted as meaning that the "establishment" instead of the "company" as a whole should be considered the reference in the case of companies having more than one establishment; and regardless, the solution would be to interpret whether or not the ECJ judgment rejects the Spanish argument that its rule which considers the company as a benchmark, is more favorable.

ARTICLES

Post-crisis social rights and social security law in Spain

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Abstract: The last crisis had a strong impact in Spanish economy. As a consequence, and under recommendation of the EU, the successive Governments since 2008 till the end of 2014 have passed "emergency legislation" that affected social rights and Social Security System, introducing amendments and "cuts" on them. Contrary to what occurred in other countries (that have made Finance Acts, the budget, or even Parliamentary Acts the fundamental ways to conduct such reforms) in Spain, the Royal Decree-Law (RDL), a "legislative" type text (serving as an Act of Parliament) has prevailed. The reforms, amendments and "cuts" (in some cases) caused by the crisis have highlighted the weakness of the theory of supra-legal character of the Spanish Constitution (whose writing would be compulsory for the public authorities, and even for the Parliament). The main amendments and "cuts" have focused on fight against fraud in Social Security, unemployment benefits (contributive and non contributive levels), the revaluation or increase of pensions ("Sustainability factor in the pension System" formula has been passed by Act), retirement agreements with workers affected by redundancy plans (economic dismissal), age of retirement (that will get 67 progressively in the next years), early retirement and partial retirement, the tax burden which affects the contribution base in the general scheme (Régimen General); the technique used for rising this consist of including in the quoted base concepts (monetary, benefits in kind) that were traditionally excluded from taxation. It is true that during these years 2008 to 2014 protective measures for the unemployed and to promote self-employment have been passed by the Spanish Governments and Parliament, but they cannot dodge the fact that the social rights have been seriously affected.

Keywords: social rights, Social Security System, unemployment benefits, age of retirement, "cuts".

1. The crisis' impact on social rights

The following initial consideration should be made when examining the impact of the economic crisis on social rights in Spain: legislative amendments and related "cuts" did not begin with the present economic difficulties; in fact, they accelerate a process that already has precedents. Over the past decades, this has been common practice in our country's laws. As the ILO noted, over the mid-nineties (the last century), it was apparent that most countries had begun a period of Social Security reform schemes of unprecedented scope, affecting all of its branches.

In Spain, examples of social rights reform immediately preceding the onset of the crisis may be seen in Royal Decree-Law (*Real Decreto Ley*, hereinafter RDL) 3/2004 of June 25 and Act (*Ley*, Law) 40/2007, of December 4.

The first of these, Royal Decree-Law 3/2004, changed the calculating basis of minimum and maximum limits of contributory and non contributory unemployment benefits, which was formerly the national minimum wage (*Salario Mínimo Interprofesional*, hereinafter SMI, as determined by the Government every year, taking into account variables such as inflation), for an index called IPREM (Índice

Público de Rentas de Efectos Múltiples, hereinafter IPREM), whose amount (always lower than the minimum wage) is established yearly in Budgetary Law. This indirectly led to a quantitative reduction of those unemployment benefits.

The 40/2007 Act, the last major amendment of the Social Security System prior to recognition of the crisis by the Spanish Government, although apparently improved social rights (it incorporated the so called "situations created by new family realities" into the protection of the Social Security System) brought about major reform of the contributory pension for permanent disability due to common illnesses. Until then, the basis for calculation of such pension (general formula) was to divide the contribution bases of the potential beneficiary by 112, corresponding to the 96 months prior to the contingency; the percentages would be applied to the resulting quotient based on the declared type of disability (total or absolute, the latter receiving 100 per cent of base); to summarize, the pension that was calculated prior to the reform considered the worker´s contributions to the system (PAYE, *cotizaciones*) during the period (in general) of the last eight years of activity (prior to updating the contingency) and the type of disability.

But as of the enforcement of said Act (January 2008), the determination of the pension has an additional requirement (which was already considered in the calculation of the contributory retirement pension): the total number of years that the worker contributed to the system; all of this, in order to reduce the ratio of the previously described operation [for example, in the case that the pension applicant at the date of the declaration of the disability did not reach at least fifteen years of contributions to the system, the percentage of calculation base would be 50 per 100 of the above quotient, and to this base, the percentages established for various disabilities (total or absolute) would be applied]; this amendment has been somewhat "moderated" by the so-called 40/2007 Act which considers the years that the concerned individual needs to reach the age of 65 as contributions (65 was the traditional retirement age in Spain that has been recently changed, as shall be examined in another part of this paper).

A second point to be considered before starting to examine the impact of the economic crisis on social rights is the source used to interpret and implement the reforms or "cuts" in Spain. Contrary to what occurred in other countries (that have made Finance Acts, the budget, or even Parliamentary Acts the fundamental ways to conduct such reforms) in Spain, the Royal Decree-Law (RDL), a "legislative" type text (serving as an Act of Parliament) has prevailed. These may be passed by the Government (Executive Power), but are constitutionally reserved for emergency situations (although the generous interpretation by the Spanish Constitutional Court of "emergency" or "urgency" means in the considered cases has removed some of the "immediacy").

Moreover, the regulations approved by Royal Decree Law would be imposed on any other laws, including those passed by the different Parliaments of the Autonomic Regions (*Comunidades Autónomas*; Spain is divided into 17 administrative regions that have competence in executing their own Labour Law), which could not contradict the provisions therein; this has been affirmed by the Spanish Constitutional Court (Sentences 219/2013, of December 19, and 5/2014, of January 16).

It is true that the frequent use of this rigorous legislative technique has been tempered by two means: a) (occasionally) prior negotiation with the social partners of all or part of the contents of a potential RDL and b) subsequent acceptance by the Parliament of the Royal Decree Act as a bill in order to consider its contents, enrich them and pass the improved text as a subsequent law. It should be noted that a) they have been used by the Spanish Governments to implement a number of changes in Social Security Law, where the intervention of social partners was relevant; this has not occurred in the case of changes in Employment Law, where the agreement was the exception and the executive decision was the rule.

But still, the indiscriminate use by the Spanish Government (of any ideology, left or right) of RDL may suggest a lack of democracy when adopting measures to mitigate the crisis situation (the Constitution only reserves the possibility of validating the RDL text adopted by the Executive to the Congress of Deputies); the frequent and indiscriminate resource of RDL by the Government may suggest that the important issue of recognition and extension of social rights has often been "stolen" in parliamentary debate. Regarding this, possibly the only defense that may be made by the Spanish executive branch in response to the continuous legislative urgency to channel the restrictive reforms or "cuts" on social rights is to recall that the EU often acts similarly, with the guidelines for the "fight" against the crisis

mainly coming from their executive (and not particularly democratically designed) agencies (in fact, from the Commission).

A third consideration when studying the impact of the crisis on social rights in Spain relates to the "changes" that the different measures adopted (which we shall examine in the following pages) have had on our legal system. For a particular sector of Spanish Labor Law experts, we are on a "de-constitutionalization" process (see for example, based on the work of Professor Baylos Grau, the contribution of Leticia Díez Sánchez in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Paper Law 2014/05). We do not agree with this approach to the issue, at least with its radical exposition. Yet we consider it important to note that the reforms, amendments and "cuts" (in some cases) caused by the crisis have highlighted the weakness of the theory of the supra-legal nature of the Spanish Constitution (whose writing would be compulsory for the public authorities, and even for the Parliament), a theory that years ago was successfully formulated by an important jurist (Eduardo García Enterría). The crisis has also "discovered" the problem that the members of the Judiciary Power must control the adjustment of Acts and public rules to the same Constitution. In this time of crisis, the sovereignty of the Parliament and even of the Government has become a main principle in Spanish Law. In resolution, the crisis has also highlighted the "programmatic" nature of many of the constitutional articles, or at least has showed that the regulation on social rights is carried out in terms of "minimum and maximum". Obviously, it is an urgent task to solve these "problems" so as to reinforce the Constitutional rules, and clearly, these solutions must be "legal" (that is, technical).

Finally, in this paper we shall not discuss the numerous changes that have been introduced or attempted to be introduced in the Spanish healthcare system. First, because they would require another doctrinal article and secondly because Spain's competence in healthcare issues lies in the Autonomous Communities (the Constitution reserves the State the determination of its healthcare system "foundation"), which increases the chances of reform in different directions. We only note that these changes have been generally directed in the following directions: to "cuts" in medication subsidies and in the number of financed medications; in reducing outpatient clinics and services and towards the introduction by some Autonomic Regions of fees (in reduced amounts) for the use of healthcare services, an initiative which has been slowed down by the Constitutional Court (see for example Sentence 136/2012 of June 19, 71/2014, of May 6). It should be noted that the changes referred to in the Spanish healthcare system have been studied in some doctrinal assessments, that quote several sentences of the courts (e.g., Maribel González Pascual, in *Social Rights in Times Crisis in the Eurozone of: The Role of Fundamental Rights' Challenges*, op cit pgs 98/100).

2. Unemployment protection system

An initial set of legislative measures taken in connection with the economic crisis has affected unemployment protection. At this point we shall distinguish between those measures taken to ameliorate the situation of the unemployed, measures to impulse self-employment, and "cuts" approved to reduce (at least, but not solely quantitatively) the rights of the unemployed to benefits and allowances. For clarification purposes, we shall divide this section into two distinct points.

2.1. *Protective measures for the unemployed and to promote self-employment*

On the eve of the crisis, several measures were adopted to protect the unemployed. The first, included in Royal Decree-Law 2/2008, of April 21, was a plan of action for those not entitled to additional unemployment benefits and an income below the IPREM figure; under the framework of the plan quoted above, they could receive a subsidy of 350 euros per month for a maximum of three months. A second example of a protective measurement for the unemployed (although in this case with some doubt), was included in Royal Decree Law 4/2008, of September 19, and consisted of offering the opportunity of receiving, in advance, the total amount of the unemployment benefit (normally, this benefit is paid monthly) to non-EU foreign workers for voluntarily returning to their countries of origin; the return

must be made within 30 calendar days (presumably as of the payment of the recognized amount) and their return to Spain is blocked for three years. But, we insist, these measures were adopted on the eve of the crisis and were only "messengers" for numerous others that would come later, as we shall explain in the paragraphs below.

In the context of the crisis, unemployment protection for dependent workers was channeled through different legislative measures that basically temporarily extended (short-term) unemployment benefits. It should be noted that the claim of some members of the socialist government of President Rodriguez Zapatero to extend the protection for the mentioned issue for a third year failed and even led to a governmental crisis (with the resignation of the Minister for Economics). Also, the aforementioned legislative texts for the protection of dependent workers attempted to make unemployment benefits compatible with wages in order to reduce the unemployment rate and to promote labor contracts.

Royal Decree Law 2/2009 of March 6 (later Law 27/2009 of December 30), disposed the renewal the unemployment benefit and social security contribution (paid by the State Organism in charge of the unemployment protection) of those who were affected first by suspension or temporary reduction in their employment contract and subsequently by suspension or termination of thereof. The measure (renewal of unemployment benefits) was continued through several subsequent legal texts that even improved it and increased the time of the benefit till 180 days in the event of termination of the employment contract. Finally, Royal Decree Law 3/2012, of February 10 (later Act 3/2012 of July 6) extended the measure we are examining to the end of last year, 2013.

In line with the above, Royal Decree Law 10/2009, of August 13 (later Law 14/2009 of November 11) is another interesting text for the protection of dependent workers. In its Preamble, the Government stated that it considered "appropriate, urgent and pressing articulate mechanisms to expand coverage to protect those workers who have exhausted their unemployment benefits to prevent or mitigate the risk of social exclusion". This was the aim of the Temporary Program for Protection in case of Unemployment and for Integration (*Programa Temporal de Protección por Desempleo e Inserción*); this program contained an extraordinary unemployment benefit equal to 80 per 100 of the regulated monthly IPREM, with a maximum duration of 180 days.

This line of protection for workers who have exhausted unemployment benefits and allowances was furthered by Royal Decree-Law 1/2011 of February 11. It is based on the Social and Economic Agreement signed by the Government and the social partners on February 2, 2011. In this RDL, economic help is provided, ranging from an initial 75 per 100 of the IPREM and to the subsequent 85 per 100 (for beneficiaries with three or more dependents), for a maximum duration of six months. This assistance may be accessed by those having a monthly income of less than 75 per 100 of the minimum wage (SMI). As in the case referred to in the preceding paragraph, the described measure was subsequently extended expressly, until Royal Decree 1/2013, of January 25, which foresaw its automatic extension "whenever the employment rate is above 20 per 100…".

Royal Decree 3/2012, of February 10 (later Act 3/2012 of July 6) regulates the new indefinite contract of employment to support entrepreneurs (*contrato por tiempo indefinido de apoyo a emprendedores*), under which was authorized to a worker to make compatible with the salary the 25 per 100 of the amount of unemployment benefit that has been recognized for previous work.

As for the measures to promote and protect self-employment, we shall first address the one contained in Law 32/2010 of August 5, creating a specific protection system for the cease of activity of self-employed people. It is true that this measure was announced by the Self-Employed Workers Statute (Law 20/2007 of July 11, passed by the Parliament prior to the economic crisis), but in the Preamble of the mentioned Law 32/2010 it is also explained that its approval was due to the effects provoked by the crisis on this type of workers (especially in certain sectors, such as construction and trade).

Worker protection and promotion of self-employment are the goals that justify the adoption of Royal Decree 1300/2009, of July 31, through which (with time frame) the payment of unemployment benefits is provided in their mode of single payment to those wishing to join cooperatives and other labor companies as partners (in a stable form). Similarly, another interesting legal text should also be mentioned: Royal Decree Law 4/2013 of February 22 (subsequently, Act 11/2013 of July 26), which adjusts the described measure to the unemployed under the age of 30.

Finally, with respect to self-employment, Royal Decree Law 4/2013 of February 22 (subsequently Act 11/2013 of July 26), also reformed the General Social Security Act, establishing a program designed to promote employment for groups with greater difficulties in accessing the labor market, making it possible to reconcile the perception of pending unemployment benefit with the economical professional fees for self-employment.

2.2. *The legislative reform of unemployment benefits and their provision.*

The rules governing contributory and non-contributory unemployment benefits are settled on the General Social Security Act (hereinafter LGSS, *Ley General de la Seguridad Social*), approved by Royal Legislative Decree 1/1994 of June 20; specifically, Title III (Articles 203 et seq.) This legislation, as we shall see, has been significantly affected by the austerity measures taken during the economic crisis. It is in this area (and in the pensions system, as we shall soon see) where the so called "cuts" in social rights have been made, an expression that is generally used in the media by the trade unions, politicians and other public opinion social bodies. All of these "cuts" have amended the LGSS.

The first regulation to be examined is Royal Decree Law 10/2010 of June 16 (subsequently Act 35/2010 of September 17). Through it, the concept of protected unemployment was changed, but we are more interested in those measures against fraud that were inserted in this text. Specifically, the so called *"compromiso de actividad"* (a sort of agreement that the unemployed had to sign before the Labour authorities compelling him/her to seek employment while without work) was regulated (to strengthen it). The new amendment reduced the voluntary period to participate in the training activities directed to improve "employability" (corresponding to the usual occupations or skills of the unemployed) to 30 days as of receipt of benefits (prior to this amendment it was 100 days). According to the previous text, Royal Decree Law 20/2012 of July 13, (of great importance, and which we shall later reconsider) established the duty of the beneficiaries of unemployment benefits to prove before the Public Service of Employment of the autonomous communities or before the federal employment services, when they required it, that they have taken action to actively employment, to reinsert themselves in the work market or to improve their "employability"; if this is not done at the required moment, it is considered that those beneficiaries are in default of the so called *"compromiso de actividad"* (activity commitment). Finally, another text that must be considered is Royal Decree Law 11/2013 of August 2, which introduces the obligation of being registered in the competent public service office as a "job-seeker" within the duties to be fulfilled in order to access unemployment benefits. This registration must be maintained until reintegration in the labor market.

Anyway, for now, the fight against Social Security fraud is culminated in Law 13/2012 of December 26, allowing for the fight against irregular employment and social security fraud. According to its Preamble, the Social Security Law (and other important laws, such as the Social Offences and Sanctions Act) has been amended in order to prosecute illegal practices on the labor "black market", to correct fraud in the perception of unemployment benefits and to block the undue payment of employer discounts for public contributions to work promotion.

But the most important text to be studied is the previously mentioned Royal Decree Law 20/2012 of July 13, on measures to ensure fiscal stability and the promotion of competitiveness; this text modifies the unemployment benefit scheme. Prior to it, the percentages applied to the basic amount of the unemployment contributory benefit were 70 per 100 for the first one hundred and eighty days of unemployment and 60 per 100 as of the one hundred and eighty-first day. Since enforcement of the text, the first percentage has been maintained, but not the second, which has dropped to 50 per 100 ("... 50 per 100 as of day 181 of unemployment"). In the Preamble to the quoted text, the amendment is explained, appealing to several arguments, of which, only two are of interest to us:

"Measures to promote employment respond ... to great objectives… impulse the unemployed actions in order to ensure their return to the labor market … generate the necessary incentives to ensure the sustainability of the public unemployment benefits system... In short, the adopted measures reinforce the future viability of the protection system and contribute to the fulfillment of the objectives for budgetary stability…".

As for the unemployment non-contributory benefits, Royal Decree Law 20/2012 of July 13, introduces major modifications. So, as noted in the Preamble to the present rule law, "the link between the right of access to subsidies and the personal assets of the beneficiaries is strengthened… the special subsidy for unemployed over 45 years of age who have perceived their contributory benefit has been removed; this measure only affects new potential recipients"; in this Preamble, it is clarified that the "the elimination of this subsidy doesn't cause a lack of protection for the unemployed who may be entitled to the regular subsidy".

We believe that the most significant change (based on its consequences) is the one affecting subjects entitled to receive long-term non-contributory unemployment benefit. Before the reform, it was possible for individuals over the age of fifty-two to access this allowance. Now, one must be over the age of fifty-five in order to obtain it; the text that we are following literally states that in order "to obtain the allowance, the employee must have reached the age of fifty-five years on the date of the contributory unemployment benefit expiring…".

At times, the reform of the unemployment scheme has worked to strengthen social rights and at times it has worked against them. A good example of this is seen in Royal Decree Law 4/2013 of February 22 (subsequently Act 11/2013 of July 26) amending the provisions included in the Social Security Law regulating the suspension and termination of the right to contributory unemployment benefits. To estimate the direction of this amendment of the quoted Act, we should consider that the right to unemployment benefit is suspended when the holder performed a job (employment contract) for less than 60 months time (previously the limit was established at 24 months) in the case of self-employed individuals under the age of 30 years who have initially entered the Social Security Special Scheme for the self-employed for the first time (RETA, *Régimen Especial para los Trabajadores por Cuenta Propia o Autónomos*).

3. **Negative reforms or "cuts" of social rights**

We shall now consider the potential "setbacks" in social rights (Social Security) and social protection in general. As previously mentioned, these have been called "cuts" for the media, trade unions and sectors of the political class. Some of these "cuts" are temporary while others have clearly amended Spanish Law. Of the temporary ones, we can include the delays to the extension of the paternity allowance to four weeks (currently 13 days), as previewed by Law 9/2009 of October 6, delays determined in the successive General Budgets Acts, after 2009 (including the latest delays approved at the time of the writing: Law 22/2013 of December 23).

Royal Decree Law 8/2010, of May 20, is the origin of the first systematic "cuts" in social rights (Social Security). This RDL temporarily neutralized the federal pension increases as of 2011 by suspending the LGSS provisions (this Act normally established the annual revaluation of contributory pensions based on inflation, or, the Spanish IPC (Índice *de Precios al Consumo*)). This measure was extended by subsequent legal texts passed by the Government (for example, Royal Decree Law 28/2012 of November 30, and the related Royal Decree Law 29/2012 of December 28). During the crisis, increasing pensions, when occurring, was on a "discrecionary" basis (that is, without adjusting them to variables that were previously determined by Law) in the State Budget Acts, such as in the last published, Law 22/2013 of December 23 (which revalues 0.25 per 100). At this point, and regarding pension increases, we should mention the recent passing of Act 23/2013 of December 23, focusing on the *"Factor de sostenibilidad del sistema de pensiones"* (Sustainability factor in the pension system), whose Preamble states that, through it, generally speaking, the amount of pensions shall be adapted to the amount of the pensioner contributions.

But, as we can seen, with the exception of 23/2013 Act, this set of dispositions (the neutralization of the legal increase of the State pensions) is considered temporary and circumstantial. However, the measure contained in Royal Decree Law 8/2010, forbidding the possibility of partial retirement agreements with workers affected by redundancy plans (economic dismissal) or stipulated in company collective agreements is definitive.

The often quoted Royal Decree 8/2010 is also the source of a structural modification (not temporary) affecting family protection law schemes. First, we should note that Spanish law (unlike other EU legal systems, for example, that of the Republic of Ireland) has never contemplated a systematic set of rules to protect and support the family, and this reform serves to worsen the situation. With this text, the economic benefits (single payment) offered for the birth or adoption of a child (€ 2,500 for each child born or adopted) was removed. Furthermore, the new regulation of child allowance under 18 has abolished the different "stretches" contemplated in LGSS and has unified their amount (set for every year) attending to the lowest figure stipulated in the LGSS. This policy has been continued in successive Budgets Acts, until the present one: Act 22/2013 of December 23 (the 2014 Budget).

In our study we must recall the important Act 27/2011 of August 1, on updating, improvement and modernization of the social security system. We anticipate that such legislation shall deal mainly with the regulation of the Spanish pension of retirement scheme, but it also contains some other interesting "cuts" in relevant aspects from the pensions system. The text's Preamble reflects the commitments found in the Agreement between the social partners and the Government as signed on 2 February of that year.

To facilitate the comprehension of this reform, we shall briefly explain how retirement pension has been traditionally calculated in Spain. For years, the applied age has been 65 years. Upon completion of that age, in order to obtain the amount of the pension, the applicant contributions to the system from the previous fifteen years worked must be added; as contributions are paid monthly, and there are 14 every year (1 per month and 2 extra payments at Christmas and normally in summertime), the obtained result is divided by 210 (the result of multiplying the months corresponding to fifteen years, that is 180, by 14). A scale of progressive percentages related to the number of contributions is applied to the obtained quotient; these percentages determine the amount of the pension: the quoted percentages are 15 years, 50 per 100; as of the sixteenth year onwards, the percentage increased by 3 and 2 per 100, up to 100 per 100 with 35 years of contributions.

Act 27/2011 and its Preamble explain that the reform of the retirement pension is necessary due to the continuous increase in life expectancy and the strengthening of the "contributory" system. All of this has led to the establishment of the retirement age at 67 years (for decades, 65 years); however, the new age shall only be applicable after a long transitory period. According to the new version of LGSS, workers "shall be entitled to contributory retirement pension regime if they… fulfill the following requirements… are 67 years of age, or 65 when reaching 38 years and six months of contributions" (to the public system).

On the other hand, the quoted Act 27/2011 has considerably increased the dividend and the divisor of the base stipulated for calculating the contributory retirement pension (thus it shall now be calculated taking into account the contributions to the system not for the last fifteen years worked, as was the case before the reform, but for the last twenty years). As stipulated in the LGSS (amended), the regulatory basis of the retirement pension under the contributory regimen shall be the quotient obtained by dividing the contributions of the applicant to the system during the 300 months immediately previous to the last month before the retirement by 350. In this case, as with the case described in the preceding paragraph, the new rule for calculating the base of the pension shall be enforceable after a long transitory period. The new rule also adjusts the system for the integration of "gaps" in the regulatory base of the pension.

Finally, Act 27/2011 partially modifies the percentages used to calculate the pension amount according to the years of contribution that must be taken into account for this purpose (prior to the reform, this percentage was 3 and 2 per 100); according to the 27/2011 Act: "as of the sixteenth year, for each additional month of trading, between 1 and 248, 0.19 per 100 shall be added and as of the month in which 248 is exceeded, 0.18 per 100 is added; in any case, the percentage applicable to the regulatory base shall exceed 100 per 100…".

The Act goes on to reform Social Security Law in the case of early and partial retirement, but at this point its regulations have been first suspended and later amended, as we shall see. In both cases, early and partial retirement, reduction coefficients are considered.

As for early retirement, Act 27/2011 clearly distinguishes between that derived from worker termination that is not attributable to a personal cause (for example, by redundancy) and that derived from the employee's will and interest in voluntarily leaving. However, the text was amended (in large part) by Royal Decree Law 5/2013 of March 15, having the following significant title (literally translated): "measures to

promote the continuity of the working lives of older workers and to promote active aging". In its Preamble, the Act initially justifies its content to the publication of the European Commission's 2012 White Paper: An Agenda for Adequate, Safe and Sustainable Pensions (Brussels, 16.2.2012). Next, the quoted Act from its Preamble summarizes the "philosophy" that inspired it based on the following sentences: "the increase in the retirement age, the continuation of working life and the increasing participation of older workers in the labor market represent basic elements for the adequacy and sustainability of pensions…". Royal Decree Law 5/2013 affected ages and significantly increased the reduction coefficients in the case of early retirement, coefficients that were linked to relevant periods of proven contributions.

As for partial retirement, Act 27/2011 requires that workers be at least 63 years of age (prior to this reform, it was sufficient to be 61) and have at least 33 years (previously 30) of proven minimum effective contributions. On the other hand, the Act, inter alia, states that "notwithstanding the reduction in working hours ... during the period of partial retirement, employer and employee shall pay contributions based on the current contribution base, as if the worker would have continued working full-time…". These provisions were later supplemented by other rules; thus, when employer and employee would have agreed to the early retirement of the latter, following a part-time (or even indefinite) replacement contract with another worker, Royal Decree Law 5/2013 provides an age-scale in order to access the mentioned retirement, linked to the previous contribution periods (from 2013-2027), which must be at least 33 at the time of the event; the RDL also provides that the reduction of working hours of a full-time worker who retires must be "between a minimum of 25 per 100 and a maximum of 50 per 100 or even 75 per 100 for cases in which the substitute worker (who takes the position that was partially left by the retired individual) has been hired with an indefinite duration employment contract…".

It should be noted that Act 27/2011 also provides compatibility of certain pensions with the income earned by the retired; specifically, it states that "the charge of the retirement pension shall be compatible with the development of self-employment whose total annual income does not exceed the minimum wage, on a yearly basis." But this possibility of receiving the retirement pension at the same time that employment income definitively opens with the already mentioned Royal Decree Law 5/2013, in which it is alleged that this option was "highly restricted under current Spanish legislation" (Preamble). Finally, according to the text, the contributory retirement pension shall be compatible with the performance of any paid employment by a company (or other employer) or any self-employment, either full or part time, but it also warns that "the amount of the retirement pension compatible with work shall be equivalent to 50 per 100 of the resulting amount of the pension on its initial recognition ...", and that, although during the course of that work, the Social Security contributions shall only be enforceable for temporary disability, working accident and professional sickness, it introduced "a special contribution for solidarity of 8 per 100 of the base that shall not be computed for future pensions or benefits".

4. A reference to the regulation of Social Security contributions during the economic crisis.

In conclusion, we shall consider how the rules governing Social Security contributions have evolved. The temporary rules (those typically appearing in Budget Law, usually lasting one year), shall not be considered in this paper, including the "structural" ones (relating to the structure of the contribution system), that are found in the Social Security Act (LGSS) and Royal Decree 2064/1995 of December 22, which is a statute law (whose Article 23 which now interests us the most, has been amended several times since it its initial publication in the Official Gazette or *Boletín Oficial del Estado*).

To facilitate the understanding of the following paragraphs, we shall briefly explain the Spanish Social Security Law contribution system. First, we should mention that the system is divided into various schemes, so-called *"Regímenes"* (regimes); the most important of these is the "General Regime" for workers employed in industries, services and agriculture; aside from this regime, among others which are less relevant, there is the "Special Regime" (or Scheme) for the self-employed or "freelancers" (who do freelance work).

In the general scheme, the workers' contribution is calculated based on three variables: a) the contribution base, which is comprised of the salary or wages (cash and benefits in kind) and payments

extending beyond those economic concepts that are exempt according to Social Security Law; b) contribution rates (percentages), which are rates that apply to the base by the "contingencies" that are covered or protected by the system: accidents in the workplace, common accidents, common or professional diseases, and unemployment, *"Fondo de Garantía Salarial"* (salary or wage guarantee Fund), and professional formation or training; c) the fee (or *"cuota"* in Spanish, that corresponds to payment made partially by the employer and partially by the worker), which is what enters the State Social Security Treasury (*Tesorería General de la Seguridad Social*). In the autonomous regime (*Régimen de Trabajadores por Cuenta Propia o Autónomos*), contributions are made on a "tariffed basis", that is, following a scale of bases that were previously determined by Law (normally within the Budget Acts).

Focusing on the structural rules on this item, Royal Decree Law 20/2012 of July 13, which was referred to previously, introduces some reforms that actually result in an increase in the tax burden affecting the contribution base of the general scheme (*Régimen General*). The technique used for increasing this consists of including concepts (monetary, benefits in kind) that were traditionally excluded from taxation in the quoted base.

Royal Decree Law 20/2012 offers a new version of Article 109 of the Social Security Act (LGSS), which is the most important norm on this item (contribution); this article has been extended with the mentioned statute, Royal Decree 2064/1995, specifically in its art. 23. This rule of the LGSS and the one of the RD 2064/1995, regulate the composition of the contribution base, which since the 1990s, has been closer to the regulation on income tax. Its amendments, which we shall now examine, almost complete the process of integration of different laws (tax Law and Social Security Law).

Until 2012, the total amount of compensations for death of the worker, transfers of workplace, suspensions of contract, and especially termination or cessation of the employment contract, redundancy or dismissal was not included in the contribution base. Until then, this exemption affected the 100 per 100 of the mentioned concept. There were important arguments to justify this disposition: among others, it should be considered that these compensations are generated over the years of work (and for this reason, they are affected by rates of contribution fixed in successive budgets for different periods: these rates can change from one year to another); on the other hand, the contribution base has a monthly (but not an annual maximum "ceiling"); the period for paying the contribution is every month ... With the reform that we are examining, the income tax regulation criteria have been imported to the Social Security Law, as previously mentioned, and the exemptions of contributions are reduced by the amount for death, transfer, contract suspension, redundancy, dismissal, compensations fixed in sectoral rules (that is, rules governing a branch of industry, services…), collective agreements (for death, transfer and suspension of contract), the Statute of Workers (*Estatuto de los Trabajadores*, the main employment Act in Spain), statutory rules, or in the procedure Acts. That is, the contribution exemptions have been reduced to the amounts of compensation established in the rules and do not affect the amounts agreed upon in company agreements or contracts of employment when they exceed the legal o statutory limits. As stated above, it is inevitable to see an increased federal tax burden in the reforms of Royal Decree Law 20/2012, although the explanation of it given in the Preamble of the text (explaining that we have advanced) is purely technical: "homogenize tax rules with Social Security issues".

For now, the process of increasing the contribution base culminates in Royal Decree Law 16/2013 of December 20, which once again amended the wording of the Social Security Act (LGSS), art. 109. Its Preamble announces that its provisions regulating contributions to Social Security "reflect upon the need for urgent action in order to ensure sustainability in the Social Security system", meaning that it is necessary to gather additional means (more money, anyway) to attend to their multiple aims or objectives. The referred text strictly announces that "only (the concepts outlined therein) are exempted in the contribution base". As a result of this latest reform, the following concepts go on to make up the contribution base: the total amount of transport and distance bonuses (previously only that exceeding 20 per 100 of IPREM was taxable); deposits in private pension plans; promotional gifts; worker donations (for business promotions) (previously only that exceeding 20 per 100 of IPREM was taxable); vouchers for lunch and dinner; school support provided by companies for the education of their employee's children; grants for nursery schools; premiums for liability insurance; premiums for private medical insurance… As evidenced by their mere mention, some of these new reforms are not going to favor the social rights of workers.

Stock options: critical points within the Spanish labour legal framework

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Abstract: Macroeconomic indicators are showing a progressive improvement in Spain. Hopefully, companies will cease to implement traumatic measures for their employees (collective redundancies, substantial amendment of working conditions, etc.) and will re-focus on compensation policies. Amongst the most best-known variable remuneration tools stock options (hereinafter, "stock options") stand out. This paper aims to revisit the stock options most controversial features from a legal Spanish standpoint.

Keywords: stock options, variable remuneration, severance, court ruling.

1. Introduction

In Spain, the legal analysis of stock options arises from the nonexistence of a specific regulatory framework regarding employee remuneration models linked to the stakes that they hold in the company's equity stock. This lack of legal regulation leads to a clear relevance of the stock option plans in which the companies set forth their regulations, as well as the decisions passed by Spanish courts and their doctrinal interpretation.

Notwithstanding the fact that Spanish labour court rulings refer, necessarily, to the customised study of the stock option plan, there has been consensus based on jurisprudence[1] and most applicable doctrines in regards to the stock options concept. A stock option plan is devised as a right in which an onerous and voluntary conveyance confers employees the right, within a determined timeframe, to acquire stocks in the company itself or in another related company, at a price that is duly established for this process.

Each stock option plan contains its own specific regulations. However, there are elementary concepts that must be considered in order to understand how standard stock option plans operate within the Spanish legal framework:

— **Stock vesting period**. This is the period of time that participant in the stock option plan must wait before being able to exercise their rights regarding the stock options, which, consequently, have reached maturity.

  The maturity of stock options varies according to the specific plan. There are three year plans that determine a similar three year vesting period for the entirety of the stock options, whereas other plans establish partial maturity periods. Considering the previous example, a third of all stock options would mature at the end of the first year of the plan, the second third would ma-

[1] Sentence passed by the Labour Chamber of the Supreme Court on 24th October 2001 (RJ 2002/2363).

ture at the end of the second year of the plan and the final third would accomplish their vesting upon the third anniversary of the initial concession for the three year stock option plans.

— **Exercising stock options** (strike price and exercising period). Once the vesting period has elapsed for the stock, they are duly released so that employees may exercise their preferential option rights on said stock. Therefore, the stockholder may acquire the corresponding stock at the strike price established in the stock option plan and in the timeframe that is stipulated in this plan.

  Generally speaking, the strike price tends to be the value of the stock quoted on the stock exchange on the day that the right is granted, therefore, following the vesting period for the maturity of the aforesaid stock, and once exercised, the employee may receive either of the following:

  • An economic amount resulting from the difference between the stock price quoted on the market at the moment of the acquisition of said right (once the maturity of the option has elapsed) and the strike price for the right established in the plan;
  • Or the stock itself, valued at the price established in each plan at the time the right was granted. In this case, the employee shall be free to sell the aforesaid stock on the market and receive the value that the aforesaid stock held at that time, in exchange.

— **Earnings derived from the sale of acquired stock**. Obviously, the higher the quoted price, the greater the earnings, since the difference between the strike price established in the plan (and at which the employee acquired the stock exercising their option) and the price at which the employee manages to sell the stock shall be higher[2].

Apart from the delivery of stock options, other similar remuneration instruments exist (e.g., phantom shares, restricted stock units, etc.). There is a common philosophy and purpose of all of these tools: to offer incentives to increase employee performance by linking a variable salaried remuneration to the behaviour of stocks on the markets from the employer's company (or a company in its company group).

The syllogism is simple: when employees contribute more and better to optimise the company's position (measured in terms of the stock performance in the stock exchange), they shall receive more remuneration in the form of stock options.

2. Foreign elements in stock option plans

The parent company of an international corporation is usually the one that appears as part of the stock option plans. In other words, it is the foreign parent stock's value in the corresponding stock exchange market (e.g, New York, London or Amsterdam) which is taken as the reference point to instrument the stock option plans.

The head company of the group designs a single stock option plan which is designed to be applicable to all jurisdictions in which its subsidiaries operate and which the executives offer the possibility of participation.

This presents some legal issues of significant interest. Often times, the aforementioned stock option plans are addressed in foreign courts in order to elucidate on the discrepancies involving their interpretation or application and they are subject to local foreign law (for example, the substantive laws of New York, the United Kingdom or the Netherlands) in any disputes arising from these plans.

[2] For example, if the stock has a fixed strike price of 20 euros per share in the plan, when the employee may exercise his stock options, he/she may acquire (purchase) the stock at the established strike price, i.e., 20 per share. Regardless of the quoted price on the stock exchange for this stock, at the time of purchase, the employee shall acquire these for 20 euros per share.

2.1. Inapplicability of the submission clauses in foreign courts

It has been possible for Spanish courts to analyse their jurisdiction regarding stock option plans submitted in foreign courts[3].

The ruling of the High Court of Justice of Catalonia, Labour Chamber, on the 19th of September 2008 (AS 2008\2965), is perhaps one of rulings that most rigorously analyses this issue. The Catalonia High Court of Justice settled a claim filed by a Spanish executive regarding stock options granted by the French parent company of the Spanish employer (hereinafter referred to as, the **"Bouygues case**"). This ruling does not mention whether the discussed stock option plan anticipated express submission in the French courts[4].

The employee is allowed to select the forum from one in which the defendant companies has its registered address, according to the provisions of the Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, subsequently modified by the accession conventions for new member states adjoining said convention and in accordance with stipulations of European Council Regulation (EC) No. 44/2001 of 22 December 2000 (now amended as Regulation (EU) number. 1215/2012, from 12 December 2012)[5]. This, in addition to the fact that in the Bouygues case the employee had habitually provided his services in Spain, allowed the High Court of Justice of Catalonia to conclude that the Spanish courts had jurisdiction for this *litis*.

Notwithstanding the express submission of foreign jurisdiction that are commonplace in stock option plans, the protective nature of Spanish labour laws which are also reflected in international legislation on applicable jurisdiction, enables employees who bring the actions to select the *forum*.

This, in practice, means that disputes are resolved in the Spanish courts, insomuch as that Spain is typically the place where employees have their residence and the member state in which they offer their services[6]. In the majority of cases, this element concurs as the corresponding subsidiary, and the plaintiff's employers tend to be registered in Spain.

2.2. Submission clauses in foreign law

Once the legal jurisdiction of the Spanish courts has been admitted for labour matters, further doubts may arise, in view of the rulings of Spanish courts, regarding the substantive law to be applied in order to clarify the lawsuits in terms of the rights derived from a stock option plan that is submitted expressly in favour of foreign law.

The reference judgment in this matter was passed by the Spanish Supreme Court, Labour Chamber, on the 26th of January 2006 (RJ\2006\2227), -the "**Microsoft case**"- analysing a scenario in which the plaintiff signed *"the acceptance document for the adjudication of stock options in Microsoft Corporation containing 1,800 shares*" at a specific price, expressly declaring in the aforesaid document "*that*

[3] Article 22.1 of Organic Law 6/1985, passed on the 1st of July on Judicial Power (hereinafter referred to as the "**LOPJ**") determines that "*The Spanish Courts and Tribunals will hear the cases brought before them in the Spanish territories between Spanish citizens, between foreigners and Spanish citizens and foreigners in agreement with the terms of this Law and in the international conventions and treaties to which Spain is a party*".

[4] Even for express submission clauses before foreign courts, none of the reviewed rulings states legal inadequacy on behalf of the Spanish courts (specifically for employment matters) in this type of cases.

[5] EU regulation 1215/2012 of the European Parliament and Council from 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

Even in the case in which the parent company (not the plaintiff's direct employer) that grants the stock option plan is not registered in any member state of the European Union, Article 21 of the aforementioned regulation states that "*An employer domiciled in a Member State may be sued'*" in "another Member State" in "the courts for the place where or from where *the employee habitually carries out his work*".

[6] Article 2.1 of LOPJ establishes that "*for labour matters, the Spanish Courts and Tribunals will have powers in: (i) Matters of rights and obligations derived from employment contracts, when the services have been provided in Spain or the contract was underwritten in Spanish territories; when the defendant is registered in Spanish territories or has an agency, branch, delegation or any other representation in Spain; when the worker and employer are of Spanish nationality, wherever the services are provided or the contract was held, as well as in the case of shipment contracts, if the contract was preceded by an offer received in Spain by a Spanish employee.*"

the exercising of this right be submitted before the laws of Washington (USA), as this is the place in which the Microsoft Corporation's headquarters is located".

Notwithstanding the express submission before foreign substantive law, the Spanish Supreme Court opted for the application of the Spanish regulations and not those from the state of Washington (USA), due to the general principle of "*freedom of choice*" of the contracting parties for the applicable substantive law. The Rome Convention[7] establishes the limitation in not contravening the mandatory provisions of a country (i.e., Spain) "*when all of the elements in relationship are located in a single country at the time when the choice was made*" (i.e., Spain).

As for employment relations, the Spanish Supreme Court concludes that, in accordance with the Rome Convention "*the choice of the parties in terms of applicable Law may not result in the privation of the employee from the protection afforded to them by the mandatory provisions of the Law that would be applicable, should no choice be made available*".

Notwithstanding this ruling passed by the Spanish Supreme Court, other rulings are also especially significant as they have quite similar legal scenarios and have concluded that the applicable law was foreign law, or because the Tribunals agree that Spanish law is applicable based on reasoning other than that used by the Spanish Supreme Court.

2.2.1. Effectiveness of submission clauses before foreign law

The most paradigmatic scenario regarding the application of foreign legislation in matters of stock options is probably the Bouygues case, in which it is concluded that French substantive law governs the stock option plan and, therefore, is enforceable.

The High Court of Justice of Catalonia settles the dispute by applying French substantive law in compliance with the provisions of Article 10.6 of the Civil Code[8] and the previous version of the Rome Convention, now transferred to Article 3 of the Rome Regulations I[9].

Among other issues, this relevant ruling evaluates that (i) the notifications made by the President of the Bouygues Group to the plaintiff regarding the stock option plan were sent from France, where the main company in the group had its headquarters, (ii) said notifications were written in French (although they were accompanied by their Spanish translation) and (iii) in said notifications, reference was made to Article 163 bis C of the "French General Taxation Code" and Article 443-6 of the French "Labour Legislation".

This evidence allows the court to conclude that the "*the will of whomsoever unilaterally makes the offer on stock options is that French laws govern"* the stock option plan.

The High Court of Justice of Catalonia completes the argument by stating that "*whoever accepts the offer* [the employee] *without any exceptions, also accepts the application of the legislation of the country in which the company group is registered*". This statement is somewhat surprising in the Spanish labour sphere, when considering how it diluted the Spanish labour jurisdiction of the principle of "*autonomy of freewill*" stated in Article 1255 and concordant articles of the Civil Code.

The Supreme Court writ of the 8th September 2009 (JUR 2009\451721) dismissed the judicial review of the unification of the doctrine lodged by the employee, declaring the firm nature of the judgment passed by the High Court of Justice of Catalonia regarding the Bouygues case.

To conclude this section, we shall quote the judgments passed by the Labour Chamber of the High Court of Justice of Madrid, from the 12th and 30th of May 2008 (JUR 2008/295045 and JUR 2008/233547) -the "**Steria case**"-, in which the first instance ruling is declared invalid due to the *a quo*

[7] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[8] Article 10.6 of the Royal Decree passed on the 24th of June 1889 by which the Civil Code was published (henceforth referred to as, the "**Civil Code**") establishes that "*the obligations derived from the professional employment contract, in lieu of express submission on the part of the parties and notwithstanding the provisions of Section 1 of Article 8, shall be legally bound by the Law of the site in which the services are provided*".

[9] Article 3.1 of regulation (EC) number 593/2008 of the European Parliament and Council passed on the 17th of June 2008 on the law applicable to contractual regulations (henceforth referred to as, "**Rome Regulation I**") determines that "*The contract shall be governed by the law chosen by the parties*".

judge rejecting the practice of evidence intended to demonstrate that the applicable law to a stock option plan was French substantive law.

Specifically, the companies contributed with two "*opinions*" drafted by French legal scholars to certify the material content of foreign legislation and the interpretation which, according to them, could be made ("*affidavit*").

The High Court of Justice of Madrid concludes that, regardless of the legal conviction that the *a quo* judge reached on the enforceability of the Spanish law, "*there may be no doubt that such means of evidence collects all of the necessary premises to be admitted, moreover when the criteria for the "judex a quo"* [origin judge] *on this issue is not shared by the Court entrusted with the role of reviewing its decision (...), that would be deprived of the possibility of knowing the foreign jurisdiction that one of the parties considers applicable, thereby placing the proposer of the evidence in a true state of legal powerlessness*".

2.2.2. Inapplicability of submission clauses in foreign law

The decision passed by the Labour Chamber of the High Court of Justice of the Community of Valencia, on the 16th of May 2005 (AS 2005/2234) -henceforth referred to as the "**Hasbro case**"-, is also significant since, although it does not deny the prioritisation of the application of a foreign law to resolve a lawsuit dealing with stock options, it does establish this when the company does not fulfil its obligation to evidence foreign law, in compliance with Article 281 of Law 1/2000, from the 7th of January, for the Civil Procedure Code (henceforth referred to as "**LEC**")[10].

Similar rulings were passed by the Civil Chamber of the Supreme Court on the 10th of June 2005 (RJ 2005/6491) and the 4th of July 2006 (RJ 2006/6080) as well as those passed by the Labour Chamber of the Supreme Court on the 4th of November 2004 (RJ 2005/1056).

The (posterior) Hasbro and Microsoft cases reached similar conclusions based on different reasoning.

That said, the decision of the Hasbro case concluded that, based on the lack of evidence presented regarding the laws of Rhode Island (USA), to which the disputed stock option plan was subject, the laws of "*lex fori*" (i.e. Spanish labour legislation) were deemed applicable in regards to the doctrine foreseen in the ruling passed by the Labour Chamber of the Supreme Court on the 4th of November 2004 (RJ 2005/1056), according to which the absence of foreign law did not offer grounds for the case to be dismissed, but rather, it was more compliant with Article 24 of the Spanish Constitution (effective judicial protection), to make an exhaustive examination but applying subsidiary Spanish legislation.

Another argument that is used from time to time by the Spanish courts involved with labour matters in order to end up applying Spanish legislation in detriment to foreign law, is that the benefits derived from the stock option plan, even when they originated from foreign stock, are an integral part of the employment relationship between the employee and the employer and therefore, they are "*inherent to the employment contract*" subject to Spanish labour laws.

In this way, for example, the High Court of Justice of Madrid, Labour Chamber, in its ruling from the 20th December 2005 (AS 2006\606) -the "**Hewlett Packard case**"- concluded that the indivisible consequence of said integration in the employment contract is that the stock options must be governed by the same laws governing the employment contract, regardless of whether the stock option plan was subject to foreign law.

In the Hewlett Packard case, the ruling of the High Court of Justice of Madrid contains the following literal text, which is of immense illustrative value:

[10] The LEC article states the following: "*The foreign law and customs shall also be subject to evidence. The provision of evidence of customs shall not be necessary should the parties be in agreement regarding its existence and content and its norms did not affect public order. Foreign law must be proven insomuch as it is relevant based on content and validity, being deemed valid the courts of however many means of inquiry were considered necessary for its application.*"

"*Although it is true that effectively the stakeholder underwrote the acceptance documents for the awarding of the stock options from the Packard Company, (...), and that (...) it was established that the plan, as well as all of the decisions and actions adopted based on the same, would be regulated by the legislation of the State of California and would consequently would be interpreted in this manner, and, even though this could result in such legislation being applicable to any dispute that had been caused in the interpretation or compliance of the plans to which to the documents reference, the clause may not, certainly, be extended to the legal consideration that the benefits derived from the stock that was obtained by the stakeholder must hold, which are considered to be of a salary nature, and which, are consequently inherent to the employment contract. And since these are included in the same, they are bound by the rules that the latter is governed by, which certainly must be unique, and the legislation of two or more states is not applicable to the same employment relationship, but rather, exclusively, it is applicable that which is to be determined, in this case, to be a non-contentious issue, the Spanish legislation. Therefore, this legislation is the one that must be applied to any amount received by the stakeholder as a consequence of their employment contract and, as such, the income derived from the stock options (...)*"

3. Salary and the inclusion in the "regulatory salary" for employment termination severance calculation

3.1 Salary

The doctrine of the Spanish Labour Chamber of the Supreme Court is non-contentious[11] in regards to the salary-based items of one of the potential uses of stock options. Judicial rulings have established that the stock purchase options may derive two different advantages or uses:

— The first usage is that in which the consideration of salary is given if payment is made for the work performed. This is "*the difference between the share price quoted on the stock exchange at the moment of purchase and the agreed strike price for the right*" given on the plan when the stock option plan is granted. The quantification of this first usage may be included, therefore, in the calculation of compensation owing from dismissal.
— The second use ("*patrimony*", according to certain rulings[12]) consists of the sale of the stock acquired as a consequence of the exercising of rights, which is a commercial transaction outside of the employment relationship, and therefore, is not affected in terms of the "salary".

Focusing on the first of the two mentioned stock options uses, it is worth highlighting that in order to determine salary-based nature, it is not a hindrance for the underwritten stock to be the subject of stock of a foreign-based parent company, distinct from the local employer company (the Spanish subsidiary), which is, legally speaking, the employing company.

In compliance with the most consolidated case law, the relevant issue to determine the remuneration nature of the economic amount is the benefit attributed to the worker, and "*not the initial ownership of assigned goods or perks*"[13].

3.2. Inclusion of stock options in the regulatory salary as severance payment, following their vesting period

The most common scenario for stock option plans is the multi-annual plan (e.g., three years), a condition that adjusts better to the spirit of retaining and maintaining the beneficiary motivated over

[11] Judgments of the Supreme Court (Labour Chamber) made on the 3rd of June 2008 (RJ 2008/3300), 26th of January 2006 (RJ 2006/2227) and the 1st of October 2002 (RJ 2002/10666).

[12] Judgment of the High Court of Justice of Madrid (Labour Chamber) from the 15th of December 2014 (JUR 2015/43216).

[13] Ruling passed by the Supreme Court, Labour Chamber, on the 26th of January 2006 (RJ 2006/2227).

the medium or long-term, such that their individual performance results in an increased yield for the company.

These multi-annual plans for stock options create the doubt as to whether the benefits of these stock options are to be included in the computation of the "regulatory salary" (*salario regulador*), used to calculate severance payments in Spain. In short, Spain severance payments resulting from employment terminations are calculated taking into account two parameters: (i) the employee's length of services and (ii) the employee's "regulatory salary", which includes the total (fixed, variable, in kind, etc.) gross yearly salary for the twelve-month period prior to the termination of the employment contract.

The absence of express regulations regarding stock option plans has led to a doctrinal and jurisprudential discussion as to the means of quantifying the benefits derived from the participation in this type of retributive programmes for the purpose of calculating severance pay for dismissals.

In general, the benefits derived from these multi-annual plans are usually payable at the end of the established period (e.g., at the end of the third year). However, these amounts reward the professional activity over the entire period of multi-annual vesting of the stock options and not solely performance over the last year.

The judgment of the Labour Chamber of the Supreme Court, the 3rd of June 2008 (RJ 2008/3300) is the reference decision and up to the present time the only one the Supreme Court has issued in this matter. The core of the decision for this ruling included the analysis of how benefits derived from exercising stock options must be calculated for severance calculation purposes. It may be concluded that, for the purpose of the severance payment calculation, only the prorated benefit corresponding to the 12 months prior to the dismissal date should be considered, notwithstanding the multi-annual nature of the stock option plans.

The Supreme Court reached this conclusion based on the fact that the remuneration period for the employee is that which extends from the date of granting until the date of exercising, and therefore the obtained benefit must not be calculated for only a single year, but must be prorated throughout the entire remuneration period.

The "prorata" criterion has been used by several Spanish High Courts of Justice[14] to determine the regulatory salary for severance payment purposes. To quote some of the most recent rulings, one which was passed by the High Court of Justice of Catalonia on the 24th of May 2013 (JUR 2013/26032) analysed a stock option plan and concluded that "*to summarize, the difference between the share price quoted on the market at the moment of exercising the stock and the strike price of such right must be distributed proportionally between the number of years of the vesting period* [generation period], *including* [in the "regulatory salary"] *only the part corresponding to the last year worked by the dismissed employee*".

Likewise, the recently mentioned judgment determines that "*the options remunerate the work performed during the vesting period of the stock from the moment they are granted, in such a way that only the part of the stock options accruing as a consequence of the provision of services during the year immediately prior to dismissal should be considered, rejecting accruals that were settled in the previous financial year prior to the dismissal but which are compensation for service provision from periods prior to that year.*"

Similarly, the ruling of the Labour Chamber of the High Court of the Basque Country from the 16th of September 2014 (JUR 2014/288044), quoted the judgment of the Labour Chamber of the Supreme Court on the 3rd of June 2008 (RJ 2008/3300), in which it is established that "*the period for remuneration must be determined […] and must be therefore distributed across said period if this is greater than one year (…)".*

[14] Some of these rulings are (all from the corresponding Labour Chamber): the SHCJ ("**Sentence of the High Court of Justice**") of Catalonia from the 24th of May 2013 (JUR 2013/26032), the SHCJ of Castile and León, Burgos, passed on the 22nd of April 2010 (JUR 2010/193454), the SHCJ of Navarre passed on the 20th of March 2009 (AS 2009\2052), the SHCJ of Madrid passed on the 27th of November 2009 (AS 2010/452) or the SHCJ of Madrid passed on the 30th of September 2008 (JUR 2009/39484).

3.3. Inclusion of stock options in the regulatory salary as severance payment before reaching maturity

One of the issues leading to numerous lawsuits is the interpretation of the clauses in stock option plans in regards to the following:

— The inclusion of dismissals acknowledged as being unfair for the regulated scenarios in plans such as those issued as "*unbeknown to the will of the employee*" (situations such as retirement, invalidity, etc.); and
— The relevance of the date on which said unfair dismissal takes place with respect to the date of maturity of the stock options and the link to the employer's fraudulent behaviour to prevent the accrual of the benefits associated with the stock options.

3.3.1 Inclusion of stock options in the regulatory salary as compensation severance payment in cases of fair dismissal

It is common for stock option plans to establish that fair dismissals do not lead to the right to receive stock options for employees in cases of fair dismissals. No interpretive doubts have arisen in regards to this aspect.

3.3.2. Inclusion of stock options in the regulatory salary for compensation severance payment purposes in cases of unfair dismissal

3.3.2.1. Approximation of the unfair dismissal to the causes leading to the termination of the employment relationship unbeknown to the will of the employee

Stock option plans generally establish that in order to have the right to exercise the stock options, it is a requirement to be actively employed by the company at the time in which the aforementioned shares reach maturity, and consequently, may be exercised. This content is coherent with the ultimate goal of these remuneration systems in the medium-term. *Sensu contrario* (to the contrary*)*, employees would lose their right to receive benefits for stock options that had not matured prior to the finalisation of their employment relationship (e.g., voluntary resignation).

As an exception to the previous, stock option plans may include a "rescue" clause according to which, if employees do not continue to work in the company due to a specific set of circumstances (i.e., retirement, invalidity, death, etc.) those non-mature stock options shall not be automatically be lost, but rather, they may be exercised (i.e., "rescued") within the timeframe established in each plan.

Disputes arise in those scenarios in which the corresponding plan **does not** include any specific regulatory provision for contractual termination.

In these cases, the debate consists of deciding whether, a dismissal acknowledged as unfair by the employer is a case in which the employee is denied the benefits of the unvested stock options or, in the opposite case, if this "illegal" termination (unfair, as acknowledged by the company) could be considered "unbeknown to the will of the employee", as it is caused by circumstances such as retirement, invalidity or death of the employee.

Until the highly relevant judgment of the Supreme Court from the 3rd of May 2012 (RJ 2012/6290), which shall be considered in greater detail later on, both companies and employees assumed a type of automatism in the granting of benefits for the stock option plans that the employer denied with the argument that the unfair dismissal took place prior to the full vesting of the requested stock options.

This reasoning is based on the fact that the employer cannot prevail in the case of illicit circumstances (such as the acknowledgment of an unfair dismissal practice) in order to reject the

accrual of these amounts associated with the stock option plans which, through unlawful actions, were not received by the employee[15].

As a response to these company practices, numerous rulings[16] have concluded that unfair dismissals must equate to those regulated situations in the stock option plans such as "contract termination for reasons unbeknown to the will of the employee" (e.g., retirement, invalidity, death, etc.), that granted the employee the possibility of obtaining the benefits associated with the plan, whenever these were exercised within a certain timeframe (i.e., "rescue" clause). This has been duly stated in some of the most relevant rulings (see previous footnote):

> *"For this reason, this situation* [unfair dismissal] *must equate to those others provided for in the agreed stipulations in which, for reasons unbeknown to the will of the employee, such as death, invalidity and to a lesser extent retirement, allow for the stakeholder or their heirs to exercise the right, leaving it always clearly stated that there is only the option to exercise it when the term has reached maturity, not at the time when the contemplated contingency occurs. The reason for this is based on the fact that the company may not unilaterally neutralise, meaning that the validly underwritten option contract became void, without a legally valid reason, and even less so with grounds that are not admitted by the Law, thereby infringing Article 1256 of the Civil Code[17]."*

The financial impact of the acknowledgement of the right to receive benefits from the linked stock option plan, specifically, with the termination of the employment relationship, may have a highly significant impact on the calculation of the regulatory salary for severance payment purposes arising from dismissal.

3.3.2.2. The relevant ruling of the Supreme Court, Labour Chamber from the 3rd of May 2012 (RJ 2012/6290). The relevance of the literality of the stock option plan and the valuation of the "fraudulent" nature of the company depending on the nearness over time of the unfair dismissal and the maturity of the stock options

The decision from the 3rd of May 2012, issued to derive doctrine unification by the Labour Chamber of the Supreme Court (RJ 2012/6290) -the "**Alstom case**"- reinterpreted the consolidated jurisprudential doctrine based on the rulings from 2001 and 2009 by the very Supreme Court (see footnote 15).

The Alstom case analysed whether an employee had the right to exercise stock options whose vesting period had yet to elapse when he was dismissed by the company in a dismissal that was acknowledged as unfair on behalf of the employer. The purchase option for the stock could not be exercised until more than two years had elapsed as of the date in which the dismissal took place.

It should be noted that in the stock option plan, it was established that the right to exercise the stock options was **lost** for employees who, amongst other reasons, had had their "*employment contracts terminated"* by the company.

It must be pointed out that the Supreme Court grants significant relevance to the **literality** of the stock option plan in the Alstom case, in which the loss of right was established for "*beneficiaries whose*

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[15] The reasoning of the reference rulings with respect to this, from the Labour Chamber passed by the Supreme Court on the 24th of October 2001 (RJ 2002/2363) and on the 15th of July 2009 (RJ 2009/6104) is as follows:

"*as the obligation was subject to a fixed term* [the stock options]*, their materialisation shall only be possible once the term is over, as it will be the deed holder of the right who at this time decides whether or not to exercise them. The problem arises when, as seen in this case, the employee is no longer in the company. Though unlike the case of voluntary redundancy or fair dismissal, unfair dismissal admitted as such by the company and effectuated some months before the employee could exercise their right to the option, may not constitute a different event and for these purposes must be evaluated as unilateral conduct on behalf of the obliged party through the offering of the option* [the company] *to situate itself in such conditions so as to prevent, or at least try to prevent, the exercising of this right, (...) attempting to withdraw the contracted obligations at the time of underwriting the contract on the option.*

[16] The most representative being those mentioned in the previous footnote.

[17] Article 1256 of the Civil Code establishes the following: "*The validity and compliance of the contracts must not be left to the arbitrary governance of one of the contracting parties*"

employment contract is rescinded or revoked by the group (...)". This literality, as acknowledged by the Supreme Court itself, includes cessations that have been recognised as being unfair.

Therefore, according to the doctrine of the Alstom case, it cannot be understood that, in compliance with the provisions of the plan, the unfair dismissal was an unregulated scenario in the plan and was comparable to the scenarios of "termination due to causes unbeknown to the will of the employee" which generally grant the possibility of exercising stock options (accelerated vesting or rescue clause). Insomuch as being expressly contemplated in the stock option plan, its literal nature would have to be considered.

Thus, in the Alstom case, the declaration concluded that the company acted in compliance with the stock option plan when it denied the dismissed employee (acknowledged as being unfair) the exercising of the stock options that had yet to reach maturity on the date of the latter's termination.

Likewise, it should also be noted that in the Alstom case the infraction of article 1256 of the Civil Code was rejected, as alleged by the employee, since it was not considered that the company acted in a way that would affect the validity or the compliance with the contract on behalf of the arbiter of one of the contracting parties.

On the one hand, the stock option plan demanded that employees should be employed and providing services to the company when they wished to exercise their stock options. On the other hand, as in the present case, it was considered that there was no willingness on the part of the company to prevent the exercising of the stock options with the dismissal, since the aforementioned dismissal took place seven months *after* the granting of the plan and more than two years *prior to* the exercising date of those stock options. In light of these events, the Supreme Court concluded that, in the Alstom case, the employee lost the possibility of exercising his/her right to the option for the acquisition of the stock following the termination of his employment contract.

The main **conclusions** that may be drawn from the Alstom case are:

— The "automatism" that links unfair dismissal with the consequent exercising of the non-mature stock options (mentioned in the foregoing section 3.3.2) is duly qualified.
— Significant relevance is granted to the literality of the stock option plan, acknowledging the validity of clauses as part of the plan that enables the company to deny the right to exercise the *stock options* even if the contract termination is knowingly illicit (unfair dismissal).

  For these purposes, it is relevant that the employers protect their interests by expressly incorporating the loss of the right to exercise options in the stock option plan for those beneficiaries whose "*employment contract is rescinded or revoked*", in terms similar to those of the Labour Chamber of the Supreme Court judgment from the 3rd of May 2012 (2012/6290).

— All employment terminations of employees that had been granted stock options shall demand the analysis of the willingness of the company to prevent their exercising of the same, in accordance with the time in which the dismissal was caused, with respect to the maturity of the stock options.

  Therefore, in those cases in which the regulation of the stock option plan expressly determines the loss of the right to exercise options for beneficiaries "*whose employment contract is rescinded or revoked*", (such as those in the Alstom case) it is possible to consider how the courts would react if an unfair dismissal occurs just "*a few months before*" the employee can exercise his right of option.

  This circumstance may be considered evidence of the fact that the company dismissed the employee in order to prevent him/her from exercising his/her stock options. This situation could be seen as unilateral conduct on behalf of the company to make it impossible to exercise the right of stock option, and, therefore, would contravene Article 1256 of the Civil Code.

3.4. Recent judicial decisions applying the most recent doctrine of the ruling passed by the Supreme Court on the 3rd of May 2012 (Alstom case)

In the following section, a reflection on the relevant judgment of the Supreme Court in the Alstom case is synthesised in minor case law:

— The judgment of the Labour Chamber of the High Court of Justice of Madrid, from the 7th of February 2014 (JUR 2014/60939) considered a case in which the Human Resources Manager of a company was dismissed in a process that was acknowledged as being unfair. During the employment relationship, stock options were granted to this individual, based on stock option plans that expressly established that "*options that had been granted at the time of the termination of the employment relationship but that had not yet reached maturity are subsequently expired and may never be exercised (...)*".

The court concluded that the company upheld the option agreement that includes elements that regulate the carrying out of the right on stock options, "*without providing evidence* [from the company] *that expressly or fraudulently thwart the stakeholder's right, since, if we observe the facts, those options which at the time of the termination of the professional contract, 30th of June 2008, had been granted, though they had not reached their maturity date, in compliance with clause 7 of the master plan, and therefore expired, never to be exercised."*

— The ruling of the Labour Chamber of the High Court of Justice of Andalusia from the 20th of December 2012 (JUR 2013/151411) analysed the request of a group of employees who had resigned voluntarily and who had been previously granted stock options rights.

The plan that regulated the operating of the stock options stated that, in the case of a beneficiary with a purchase option who is "*no longer an employee of the company for any reason, the balance of the option that had not been exercised at the date on the certificate in which the decision relating to their departure, means that after said date, these rights may not be exercised and the interested party shall have no grounds to claim compensation*".

The Andalusian courts quoted the Supreme Court decision from the Alstom case, and reaches the conviction that this clause is enforceable since the stakeholders had voluntarily left the company, and therefore, "*there is no volition on the part of the company to prevent them from exercising their purchase right on the option (...); the right does not have the chance to reach fruition due to the non-compliance of one of the necessary requirements for accrual which is the continuance of the link between the company and employee, as this right to preferential purchase option for the stock rewarded employee loyalty with the company, and their participation in the proper functioning of the company and its obtaining profits, which in this case disappears with the voluntary departure of the plaintiffs from the company (...)*".

— The ruling of the High Court of Justice of Madrid (Labour Chamber) from the 9th of January 2015 (JUR 2015\41208) references the Alstom case doctrine in regards to the delivery of three stock option plans granted consecutively reaching maturity, also, in consecutive years.

The court considers that, in light of the lack of specific regulation for the stock option plan regarding the exercising of options in the case of unfair dismissals, the aforementioned situation must be assimilated to the scenarios involving the termination of the employment relationships as foreseen in the stock option plans for reasons not attributable to the will of the employee (retirement, death, professional invalidity or incapacitation), according to which the right of option on the non-mature stock is not lost provided that these rights are exercised within the three months following departure from the company on these grounds. Without

denying the exercising of the stock options, the court concludes that the stakeholder should have exercised these rights within the three months following his/her departure.

On the other hand, the court recognized that the fact that the stakeholder's dismissal took place eight months *prior to* the vesting of the corresponding stock (in other words, two years and eight months *had passed since* the plan had been granted) does not constitute grounds to prove the willingness of the company to prevent the exercising of the employee's stock options.

As for this specific matter, the consistency of this decision may be questioned with regards to Alstom case doctrine, given that the limited timeframe between the unfair dismissal and the date of maturity for the plan may be interpreted as fraudulent behaviour on behalf of the employer. Thus, in the Alstom case, the employment relationship ended only once *six months had elapsed* following the underwriting of the plan and when there were still *two years and 6 months remaining* before the stock reached maturity. However, the previously mentioned ruling of the Labour Chamber of the High Court of Justice of Madrid considers a scenario in which *two years and six months had already lapsed* between the stock option plan being granted and only *eight months were remaining* until the corresponding stock of the aforesaid plan would mature and the options could be exercised.

In light of the foregoing, it may be worthwhile to consider the issue of when is the "limit" date after which a company is considered to be intending to prevent its employees from exercising their rights regarding a stock option plan.

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