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Sector-level bargaining and possibilities for deviations at company level: Spain

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Research project: The functioning of sector-level wage bargaining systems and wage-setting mechanisms in adverse labour market conditions

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National legislation on the minimum wage

Every year in Spain, the government, after carrying out consultations with the most representative trade union organisations and employer associations, decides on the ‘minimum interprofessional salary’ (Section 27 of the Workers’ Statute). A number of variables are taken into account in this decision, including the expected inflation rate, productivity growth and the general trend of the national economy. This annually revised minimum wage is the minimum pay that any worker can get and deviations from it are not allowed. It can be revised every six months if the actual inflation rate exceeds the government’s forecast. For 2010, the Royal Decree 2030/2009, of 30 December, fixes the minimum salary at €21.11 per day or €633.30 per month for all sectors. This minimum wage covers the daily wage in each and every activity, except for the proportional wage increase for work on Sundays and national holidays. If the working day is less than full time, the amount will be reduced accordingly on a pro rata basis.

Collective bargaining and wages

The main social partners in Spain are the Spanish Confederation of Employers’ Organisations (CEOE), the Spanish Confederation of Small and Medium-sized Enterprises (CEPYME), the Trade Union Confederation of Workers’ Commissions (CCOO) and the General Workers’ Confederation (UGT). They periodically sign national intersectoral collective agreements (*Acuerdos Inter-confederales para la Negociación Colectiva*, ANCs), the last one of which was signed in February 2010. These agreements include guidelines and recommendations for bargaining at lower levels and promote independent sectoral collective bargaining.

The right to collective bargaining and the binding character of collective agreements is enshrined in the Spanish Constitution (Section 37.1). The system of collective bargaining is thoroughly regulated in Title III of the Workers’ Statute. In particular, Section 82.3 establishes the legally binding character of collective agreements negotiated in conformity with the rules of the Workers’ Statute. However, the same provision stipulates (as an exception to the general rule) that company agreements may deviate from the wages set by a statutory collective agreement negotiated at a higher level, providing certain requirements are fulfilled (see below).

Collective bargaining takes place mainly at sectoral level. Sectoral agreements are made at the national level (for example, in the construction, banking and chemical sectors) or at the provincial level (for example, in the commerce, transport of goods and passengers, and bakery sectors). Company agreements are less common and concern large undertakings (in sectors like gas, oil, car manufacturing, air transport, research and development) and the public sector (Pérez Infante, 2003). Furthermore, all statutory collective agreements have to appoint a Joint Committee, composed of representatives of both parties signing the collective agreement, which will deal with all matters entrusted to them.

Sectoral agreements are binding for all employees under their scope, provided they are signed by the most representative trade unions at that level. A large proportion of public and private sector employees are covered by collective agreements. Calculations using data from the Wage Indicator Survey estimate that the share of the workforce covered by a collective agreement was around 81% for 2007, ranging from 89% in the financial sector and 85% in the public sector to 56% in the construction sector (Van Klaveren and Tjijdens, 2008).

A particular feature of Spanish collective agreements, especially at sectoral level, is the pay review clause. According to data from the Ministry of Labour in 2009, pay review clauses applied to 72% of the workers covered by a collective agreement. They aim to correct wages in the event that actual inflation exceeds the forecast inflation on the basis of which wage increases were negotiated. From 2001 to 2008, the inflation forecast was always lower than the actual one, leading to upward wage adjustments. This situation has changed since 2008 due to the economic crisis, and the inflation

forecast has been higher than the actual inflation rate. In this situation there are growing uncertainties on how to apply the pay review clauses of collective agreements. So far however, the labour courts have ruled that employers cannot request a refund of wages already paid to employees.¹

A company in economic difficulties has several options to attempt to adjust wages. One is the opt-out clause that will be discussed in detail below, but there are others. Of these, the first option is the partial revision *ante tempus* of the collective agreement. Normally, the applicability of a collective agreement expires when its final term is reached and the agreement is terminated (Article 86.2 of the Workers' Statute). However, a collective agreement might be denounced before its final term expires if both parties agree on it. If there is no agreement between the parties, a second option is to nullify a collective agreement using the legal clause *rebus sic stantibus*, which allows for agreements to become inapplicable because of a fundamental change of circumstances (Pedrajas Moreno and Sala Franco, 2009). For this clause to apply, it is necessary that 'an absolute and radical change in the circumstances under which the collective agreement was entered into has occurred'.² Furthermore, the National Court (*Audiencia Nacional*) has restrictedly ruled on the applicability of the clause, stating it is not applicable to a legally binding collective agreement negotiated in accordance with the rules of the Workers' Statute (the so-called statutory collective agreements). In that case, the company cannot unilaterally modify the wages system of the collective agreement.³ This refers to a substantive modification of the working conditions due to economic, technical, organisational or production circumstances and always requires the agreement of the workers' representatives (Article 41.4 of the Workers' Statute). Finally, the most common possibility is to depart from agreed wages applying an opt-out clause in conformity with Article 82.3 of the Workers' Statute. The rules and procedures for the use of these opt-out clauses are explained in the following sections.

Regulation of opt-out clauses

Before 1994, it was possible to deviate at a lower level from agreed wages set at a higher level if the signing parties of the higher-level collective agreement included a respective clause in their agreement. For instance, in the intersectoral framework agreements adopted by the social partners from 1980 to 1986, a mechanism for deviating from previously agreed wages was foreseen. The incidence of those deviation clauses at lower bargaining levels was limited at the time. In 1987, only 20% of the collective agreements included such a clause and only in 13% of those cases was the deviation system actually used (Martín Urriza, 1996). The reform of the Workers' Statute by Act 111/1994 of 19 May 1994 more proactively promotes wage bargaining flexibility and the use of derogation clauses (hardship clauses or inability-to-pay clauses).

Since this reform, Article 85.2 (c) of the Workers' Statute contains a mandate to include an opt-out clause in collective agreements at sectoral or intersectoral level allowing companies to deviate from the wages agreed at higher level when they temporarily undergo economic difficulties (Agut García, 1997 and 1999). The inclusion of this deviation mechanism has been considered an extraordinary legal act which modifies the binding content of the collective agreements affected by it (Casas Baamonde, 1995). Article 85.2 (c) of the Workers' Statute states that collective agreements adopted above company level must contain the conditions and procedures for the application of such opt-out

¹ Ruling of 17 July 2007 of the Arbitral Labour Court of Valencia, File No. PAV-43/2009, of 30 March 2009 on the interpretation of the wage revision clause of the collective agreement of the broadcasting sector in Valencia; Ruling of the High Court of Cataluña of 18 October 1993 (Article 4546).

² Ruling of the Constitutional Court STC 11/1981 [RTC 1981, 11].

³ Ruling of the National Court (SAN No. 74 of 24 June 2009).

clauses, which are considered to be part of the minimum content of the collective agreement at that level. In principle, this means that any sectoral collective agreement, whatever its scope, should comply with the obligation to regulate the conditions for using these opt-out clauses affecting wages. However, the lack of a provision regulating the use of this opt-out clause does not render the agreement null and/or void because there is still the traditional ‘subsidiary route’ (Moreno de Vega y Lomo, 2001), allowing parties at company level to deviate from the agreed wages through an agreement (the so-called direct wage deviation of Article 82.3.3 of the Workers’ Statute) (Sanguinetti Raymond, 2000). In case of disagreement, the dispute will be resolved by the Joint Collective Agreement Committee. The determination of the new pay conditions will be set by agreement between the employer and employee representatives or may be entrusted to the Joint Committee.

The aim of Act 111/1994 was to make the regulation of working conditions more flexible so that they could meet the needs of individual companies. However, this flexibility could only be reached when certain requirements were fulfilled:

- it had to be achieved through collective means;
- it had to have a limited material scope (wages);
- it had to be justified by objective criteria (such as serious economic difficulties);
- it was temporary and reversible once such difficulties were overcome.

In this way, it aimed to allow for company-level flexibility in certain specified situations without jeopardising the function of the sectoral collective agreements in setting a minimum standard for labour conditions (Sanguinetti Raymond, 1999 and 2000).

Indeed, strongly increasing flexibility in company-level wage bargaining is seen as undesirable in the Spanish context. Due to the large number of small and medium enterprises operating in Spain, this could undermine the stability of the industrial relations and collective bargaining system. However, the strict regulation of the opt-out clause makes it complex and difficult to apply in practice. Most opt-out clauses require a company to prove that it is experiencing serious economic difficulties that are putting the whole stability and continuity of the business at risk. To prove this, the company usually has to provide detailed accounts. Also, in procedural terms, applying the opt-out clause requires quite a lot of effort. Some argue that these stringent requirements play against the whole aim of more flexibility at company level in case of economic difficulties (Pose Vidal, 2009).

Most recently, Royal Law Decree 10/2010 of 16 June on urgent measures on the reform of the labour market has made it easier to use wage opt-out clauses (however, the ratification of this decree by the Spanish parliament is still pending).⁴ According to a new Article 82.3 in the Workers’ Statute, following a consultation procedure, a company agreement between the employer and the employee representatives might depart from the wages fixed by a collective agreement negotiated at a higher level. This can happen when, as a result of the application of those wages, the economic situation and prospects of the company could be damaged and the level of employment affected. This deviation agreement can only apply for a maximum of three years and while the term of the collective agreement at a higher level has not expired. Moreover, this company agreement must clearly determine the new remuneration to be paid to the employees and a schedule of gradual convergence back to the previously applicable wages.

⁴ On 29 July 2010, the new provisions regulating the use of opt-out clauses in collective agreements were approved by the Second Chamber’s Commission dealing with the transformation of the law on the reform of the labour market introduced by Royal Law Decree 10/2010 into a bill of the parliament. However, this bill still needs to be ratified by the senate (First Chamber).

In case of disagreement between the parties, the mediation procedures established by collective or interprofessional agreements will apply. These agreements may establish an obligation to submit the dispute to a binding arbitration in case no agreement is reached at the mediation procedure. In this last case, the arbitral decision will have the same effect as the agreements reached during a consultation period. In case of a lack of workers' representatives at the company, the workers might appoint a committee of representatives and empower them to negotiate a wage deviation agreement. This committee will be composed of a maximum of three members, chosen among union stewards from the most representative trade unions at sectoral level. The conclusion of this type of agreement will require the favourable vote of the majority of the members of the committee. On the employer side, they might be represented by the most representative employer associations at sectoral level.

In addition, Royal Law Decree 10/2010 amends Article 85.3 (c) of the Workers' Statute. The new provision establishes that statutory collective agreements will deal with the procedures to effectively resolve disputes that may arise in the negotiation of the non-application of the collectively agreed wages in conformity with Article 82.3 of the Workers' Statute.

Conditions and procedures for using opt-out clauses

In order to get a picture of the incidence and content of the opt-out clauses, an analysis was made of a sample of relevant collective agreements.⁵ This examined the content of 32 national-level sectoral agreements containing an opt-out clause to understand the conditions under which they apply, the types of deviations allowed for, the procedures to be followed and the actors involved.

Economic instability

In order to allow deviations from collectively agreed wages, most sectoral agreements define the condition of 'economic instability', although its definition in different collective agreements varies widely.

The most common practice, included in 60% of cases, is that the concept of economic instability implies a deficit in the company accounts or economic losses in the last two or three years. Other agreements include a generic reference to the concept of 'economic instability' but simply require the undertaking to present its accounts from the last two years. In most cases, there is also a reference to the economic forecast for the current year. In a few cases, one year of economic losses is considered to be sufficient in order to meet the criteria for economic instability.⁶ In 35% of the cases, the collective agreements include a generic deviation clause establishing that all companies within the scope of the agreement that can prove economic instability can make use of the wage deviation system. In some cases, the peculiarities of the sector are taken into account when defining the situation of economic instability. For instance, according to the collective agreement of the lottery retail sector, economic instability occurs when there is a decrease of 3% in the commission received by lottery ticket retailers. Similarly, in the collective agreement for primary schools, a decrease in the registration of new pupils is considered to lead to economic instability for the school concerned.

⁵ Source: Aranzadi collective agreements database by WESTLAW-Spain (broadly used by legal practitioners and scholars). <http://www.aranzadi.es/index.php/catalogo/tipo/bases-datos/dvd/base-de-datos-convenios-colectivos>.

⁶ IV collective agreement on lottery retailers (Code N. 9900075), BOE 5 September 2009.

In all cases, proving economic instability requires the presentation of extensive paperwork, such as explanatory memorandums, company accounts, business plans, overviews of wage and labour costs and productivity developments. In cases where the company employs more than a certain number of workers (normally 50, but some collective agreements set the threshold at 25 or even 10 employees), there is a requirement for the company's books to be externally audited. In most cases, a plan outlining the measures to overcome the economic instability is also required.

Limits to the use of opt-out clauses

Most of the collective agreements examined limit the use of the wage deviation clause to a period of one year. Some of them prohibit its use in successive years (for example, the wood sector), while others limit the deviation period to one year in every three-year period (such as bullfighting). Others allow the extension for one further year conditional on submitting a new application. A certain relaxation of these limits can be observed due to the current economic crisis: some collective agreements (such as the chemicals sector) foresee the applicability of the wage deviation clause for a period exceeding one year as long as the adverse economic circumstances do not change.

Procedures and actors involved

In all the cases examined, the request for using the deviation clause needs to be submitted to the Joint Collective Agreement Committee and, in most cases, also to the employee representatives at company level. In some cases, when there are no employee representatives at company level, the employees themselves and the trade union representatives need to be informed about the company's intention to use the opt-out clause. In most cases, the committee can decide whether to allow a company to make use of the clause. Sometimes, as in the chemical industry, the matter needs to be discussed first at company level between representatives for the workers and employers. If there is no agreement here, the matter will be taken to the Joint Committee. If there is no agreement here either, the matter can be decided by arbitration or by a conciliation committee.

In case of discrepancies with the decision of the Joint Committee or of the arbitration/conciliation body, the majority of the agreements state that the company can go to court following the procedure of collective disputes.⁷ In other cases, the collective agreements forbid challenging the arbitral decision through the courts.

The timetable of application is another matter of concern. The general rule is that undertakings must respect clear time limits when presenting deviation requests. Those collective agreements that were examined show these limits varying from 15 days to three months from the moment of the publication of the collective agreement in the Official State Bulletin. The most common period is one month. Only a few collective agreements, for example those governing the waste management sector, state that the use of the wage deviation clauses can be requested by the undertaking alleging economic difficulties during the whole validity period of the agreement.

New wage agreement

Once there is an agreement on the use of a deviation clause from previously agreed wages, a new wage regime needs to be agreed between the parties. This can be agreed either between representatives of the company and the employees or by the Joint Collective Agreement Committee. In most cases this agreement reduces only the previously agreed wage rise. However, other clauses allow for a broader deviation, such as adjusting the basic salary or the whole salary package (including variable elements like bonuses or profit-sharing elements), or even introducing new wage scales.

⁷ The procedure for collective conflicts/disputes is regulated in Articles 151–160 of the Labour Procedure Act (passed by Royal Legislative Decree 2/1995 of 7 April). The general rule is that those workers' representatives who did not consent on the agreement can initiate legal proceedings against the decision of the company to deviate from wages via the collective conflicts/disputes procedure.

It is important to note that this new wage agreement is considered to be an exceptional arrangement that finishes once a company has recovered from its economic instability. In most cases, the new agreement has to fix:

- the maximum duration of the use of the deviation clause;
- mechanisms to determine when a firm has recovered from its economic instability;
- the conditions under which the original agreement becomes valid again.

In some cases, the deviation clause obliges a company, once recovered, to reimburse workers for their suspended wage increases. One agreement, that of the bullfighting sector, even sets out that this payment should take place within three years after the wage deviation clause was applied.

Use of opt-out clauses and social partner views

Use of opt-out clauses

Wage opt-out clauses were included in 51% of sectoral agreements, covering 74% of workers in 2009.⁸ As the Economic and Social Committee points out in its provisional memorandum of activities for 2009, there is great uncertainty about the actual use of wage opt-out clauses at company level in terms of the number of companies and workers affected by them.⁹ From the scarce data available, it emerges that there are not many companies using the opt-out clauses to achieve a reduction of wages or labour costs. A report from the Bank of Spain shows that when facing economic difficulties, only 4.6% choose to use the opt-out clause.¹⁰ This may seem surprising, especially considering the present economic crisis, which is spurring companies to reduce labour costs. However, there are a number of factors that may explain this reluctance.

The Bank of Spain report also points out that 70% of companies decide to dismiss workers when they face economic difficulties instead of trying to reduce wages. Sacking permanent workers would mean opposition from workers' representatives and judicial procedures that they are likely to lose.¹¹ However, there is a high level of workers on fixed-term or temporary contracts and it is these that the employers, with few exceptions,¹² have opted to dismiss (Pose Vidal, 2009; Pérez Infante, 2003). Hence, instead of decreasing wages and preserving employment, the main strategy has been reducing employment and sticking to the wages negotiated at sectoral level.¹³

⁸ Source: Statistics Bulletin of the Ministry of Labour and Immigration, consulted on 25 May 2009, <http://www.mtin.es/estadisticas/cct/CCT09OctAv/cc1/index.htm>.

⁹ <http://www.ces.es/listaPrensa.jsp?last=S>, consulted on 30 May 2010.

¹⁰ Report of the Bank of Spain of 2009, cited by Pose Vidal, 2009, *op. cit.*, p. 2.

¹¹ See Courts' rulings condemning several undertakings for unilaterally modifying the retribution systems laid down in applicable collective agreements: Ruling of the High Court of the Basque Region, 20 July 2004, rec. 841/2004; Ruling of the High Court of the Balear Islands, 15 June 2002, rec. 271/2002; and Ruling of the National Court (*Audiencia Nacional*) of 12 March 2003, proc. 210/2002.

¹² An exception is the agreement reached in 2009 between the management and the workers' representatives of the company SEAT in Catalonia, who have negotiated a temporary reduction on wages in exchange for the assurance of the continuity of activity in the factories in that region with the production of a new car model; see Pose Vidal, 2009, *op. cit.*, p. 1.

¹³ Opinion shared by Professor Wilfredo Sanguinetti Raymond (University of Salamanca and Member of the Observatory for Collective Bargaining of the trade union confederation CCOO).

Because of the crisis, wage moderation has already been widespread in the sectoral wage negotiations and is also at the centre of the recently adopted agreement on employment and collective bargaining of 2010, signed by the main employer organisations and trade unions (Valdés Dal-Ré, 2010). According to the Labour Statistics Bulletin of the Ministry of Labour and Social Affairs (updated on 5 May 2010), the average nominal pay rise agreed in Spain has been declining, from 3.6% in 2008 to 2.41 % in 2009 and to 1.27% in the first four months of 2010.¹⁴ Such wage moderation reduces the interest in using opt-out clauses, especially since these clauses often focus on lowering the rate with which wages grow.

Finally, the formal requirements for the use of the opt-out clauses may also be seen as an obstacle to their use.

Views of the social partners

In 2009, the main trade union confederations, CCOO and UGT, declared that companies should use the wage opt-out clauses set by sectoral collective agreements only if they were really not able to pay the estimated 2% wage increase for that year. The employer association CEOE instead proposed that the mere expectation that there will be an economic deficit in a company in a given year should be sufficient to trigger the mechanism of the wage opt-out clauses. That possibility has always been rejected by the trade unions (Pose Vidal, 2009). The employers also proposed that the pay review clauses should lead to additional wage payments when the actual inflation is higher than the foreseen one, but that it should lead to negative wage adjustments in case the actual inflation is lower than that forecast (which was the case in 2008 and 2009).

Finally, in February 2010, the social partners reached an ANC for 2010–2012. This agreement fixes the guidelines that social partners should follow when negotiating collective agreements at a lower level and is binding for the signing parties. However, the government is entitled to pass legislation that does not strictly follow those guidelines, as explained below.

The ANC 2010–2012 is driven by increased wage moderation. The social partners agreed on a wage increase of 1% in 2010, between 1% and 2% for 2011 and between 1.5% and 2.5% for 2012. According to this framework agreement, the foreseen increase in wages will not apply to those companies that are undergoing financial difficulties. Following the ANC, the requirements for a company to make use of wage opt-out clauses are that the undertaking provides sufficient information proving its economic instability and communicates the intention to make use of the deviation clause to the Joint Collective Agreement Committee. In case of conflict between the parties, the recommendation is that the committee will apply the mediation or disputes settlement procedures foreseen in the collective agreement. The ANC agreement also stipulates that in order to benefit from this opt-out mechanism, companies need to draw up a detailed plan on how to resume compliance with the agreed wage increases and the information mechanisms designed to monitor that compliance. UGT, in its comments on the ANC, states that the wage opt-out clauses should always be used in order to improve the viability of the undertaking and not its competitive position in the market. It also emphasises the reversibility of the measure and the need for future compensation to the employees for the lost wages. The employer associations have welcomed the ANC's conclusion. Nevertheless, their position was more ambitious regarding the flexible use of opt-out clauses. CEOE has strongly argued for the increase of the possibilities for negotiated deviations from the working conditions fixed by sector-level collective agreements for companies undergoing an economic downturn.¹⁵

¹⁴ Boletín de estadísticas laborales, May 2010, <http://www.mtin.es/estadisticas/bel/index.htm>.

¹⁵ See CEOE document: 'Recuperar la competitividad, el crecimiento y el empleo en España', December 2009, consulted on 29 July 2010, <http://www.ceoe.es/ceoe/contenidos.item.action?id=7916784&type=7916784&menuId=7916784>.

Ongoing reform of legal framework

The aim of the reform introduced by Royal Law Decree 10/2010 discussed above (but pending ratification by the parliament) is to modify the conditions for the use of wage opt-outs by companies and the procedures for solving the disputes related to that use through arbitration. It is hoped this will avoid deadlocks in negotiations that may jeopardise the viability of the companies involved. The temporary and exceptional character of these deviations is preserved, with their use limited to companies undergoing financial problems. The legal reform follows the guidelines of the ANC 2010–2012 regarding the increased role given to conciliation and/or mediation procedures set up by collective agreements in case of disputes between the parties regarding the use of wage opt-outs. It also addresses the need for drawing a detailed plan of gradual convergence towards the previously applicable wages. However, the key role of the Joint Collective Agreement Committee is diminished, as the new regulation allows for ad hoc workers' committees to negotiate these opt-out arrangements with the employer representatives. This approach clashes with the union's point of view.

The Ministry of Labour and Immigration stresses that the new provisions of the Workers' Statute seek to avoid layoffs in times of crisis by providing temporary adjustments via wages. On the one hand, CEOE says it is not completely satisfied with the reform, describing it as not ambitious enough to overcome all the problems that companies face during an economic crisis. On the other hand, CCOO and UGT oppose the reform and are organising a general strike in protest. They fear the reform will lead to a fragmentation of the collective bargaining system and to a higher individualisation of employment relationships.

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