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Portuguese labour law and industrial relations during the crisis

Maria do Rosário Palma Ramalho

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Foreword

This paper is part of a series of studies funded by the European Commission in the framework of a project of the International Labour Organization (ILO) on "Promoting a balanced and inclusive recovery from the crisis in Europe through sound industrial relations and social dialogue". The project falls under a recent partnership agreement between the ILO and the European Commission, which aims to study the impact of the crisis and crisis-response policies on national tripartite social dialogue, collective bargaining and labour law in the Member States of the ILO and the European Union (EU), and the role of social dialogue actors and institutions in this context. The project builds on ILO research initiated since 2008 on best practices in the area of crisis responses, and the Global Jobs Pact adopted by the International Labour Conference in June 2009.

This study on Portugal by Professor Maria Do Rosário Palma Ramalho (University of Lisbon, Portugal) analyses the national responses to the crisis, in particular the changes introduced in the labour code. Most of these policies have been based on the Memorandum of Understanding (MoU) concluded in May 2011 between the Portuguese Government and the so-called Troika (IMF, EC, and ECB). The MoU proposed several labour market reforms, in particular changes to unemployment benefits, Employment Protection Legislation (EPL), working-time arrangements, wages, collective bargaining, social dialogue, and Active Labour Market Policies (ALMP).

These measures have four main objectives: 1) to reduce the costs associated to employment contracts; 2) to tackle key points of the legal system either by introducing flexibility or by increasing the flexibility of schemes that are already in place; 3) to re-launch collective bargaining and collective agreements under a new framework intended to be more representative, dynamic and decentralized; and 4) to implement ALMP, and in that context, to promote the employment of specific groups such as youth and long-term unemployed.

This study examines the provisions concerning the administrative extension of collective agreements and argues that extension practices have several disadvantages. In the author's conclusion, she contends that there remains a need to introduce additional changes to the collective bargaining system in order to make it more representative, dynamic and adaptable, a viewpoint strongly challenged by the social partners, especially the trade unions.

An earlier version of the paper was presented and debated at the EC-ILO-ITC/ILO seminar on "Promoting sound industrial relations and social dialogue in times of crisis" (23 May 2013, Lisbon, Portugal).

The responsibility for opinions expressed in this paper rests solely with its author, and its publication does not constitute an endorsement by the Governance and Tripartism Department of the International Labour Office, or the European Commission.

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Executive summary

This paper describes the main trends of Portuguese labour law and industrial relations during the present financial and economic crisis, with a view to promoting crisis recovery in an inclusive way and reinforcing social dialogue and the role of social partners.

The paper is divided into three sections. The first introduces the main features of Portuguese labour law and industrial relations. In addition, it provides a general overview of the entrepreneurial situation and traditional developments in collective bargaining and social dialogue in Portugal prior to the crisis. This presentation establishes the necessary background for understanding the effects of the crisis on employment and industrial relations and to make it possible critically to evaluate the measures already put in place as a result of the crisis.

The second section of this paper describes the anti-crisis measures proposed and already adopted in relation to employment law and industrial relations. These measures are mostly based on the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) concluded in May 2011 between the Portuguese Government and the International Monetary Fund (IMF), European Commission (EC) and European Central Bank (ECB). This section provides a brief description of the main policy objectives of the MoU. It then discusses the different measures implemented at national level, the major changes introduced, and the role of the social partners in this process. Therefore, the section will also focus on the agreements concluded between the social partners and the subsequent changes introduced in the Labour Code (LC) and in the legislation on unemployment benefits and other employment-related issues.

The third section evaluates the impact of the crisis and the implemented anti-crisis measures on employment, social dialogue and collective bargaining. Therefore, employment data as well as other economic and social indicators are presented and the recent evolution of collective bargaining is described, relying on official databases and information provided by the social partners.

Finally, concluding remarks focus on the role of the social partners and the importance of social dialogue in recovering from the crisis.[1]

[1] The research work for this paper benefited from the study prepared at an earlier stage by the late Professor António Dornelas, titled "Portugal under stress: Austerity, labour law and industrial relations" (2012) and from the collaboration of the ILO Office in Portugal, which the author wishes to acknowledge and thank. This paper also relies on the contributions of the Portuguese Secretary of State for Employment and the social partners − CAP (Confederation of Portuguese Farmers), CCP (Confederation of Portuguese Commerce), CGTP (General Confederation of Portuguese Workers), CIP (Confederation of Portuguese Industry), CPT (Confederation of Portuguese Tourism) and UGT (General Workers'Union) − who kindly accepted to answer either orally or in writing the questionnaire formulated for this report, and to whom the author also expresses her gratitude. In this final version, the report also takes advantage of the comments on the draft version presented by the social partners at the ILO-ITC/ILO-EC seminar on "Promoting sound industrial relations and social dialogue in times of crisis (23 May 2013, Lisbon, Portugal) and the written comments sent after the seminar by the social partners. Nonetheless, as in the draft version, the views expressed in this paper are solely those of the author.

Abbreviations*

CAP	Confederation of Portuguese Farmers
CCP	Confederation of Portuguese Commerce
CGTP	General Confederation of Portuguese Workers
CIP	Confederation of Portuguese Industry
CPT	Confederation of Portuguese Tourism
DGERT	Directorate-General for Employment and Work Relations
EC	European Commission
ECB	European Central Bank
GDP	Gross domestic product
ILO	International Labour Office; International Labour Organization
IMF	International Monetary Fund
LC	Labour Code
MoU	Memorandum of Understanding on Specific Economic Policy Conditionality
PC	Portuguese Constitution of 1976
UGT	General Workers' Union

* The English versions of the names of the Portuguese employers' and workers' organizations are those followed by the European Union's European Foundation for the Improvement of Living and Working Conditions (Eurofound).

1. Background of the crisis: Main features of Portuguese labour law, industrial relations and social dialogue

1.1 **Main** features of Portuguese **labour law** in relation to employment contract**s** and industrial relations

Portuguese labour law relies mostly on legal provisions but also on collective agreements concluded between the employers' associations (or the employers per se) and the trade unions, as representatives of the employees.

At the top of the legal system stands the Portuguese Constitution of 1976 (PC) with its complete catalogue of fundamental workers' rights related to employment contracts and industrial relations (Articles 53 and ff.).[2] The Constitution's strictness with regard to fundamental workers' rights contributed to a large degree to the protective evolution of labour law. The strictness of the law in this area is reflected mainly in two points:

- On the one hand, for many years the legal framework of employment contracts was shaped on the model of the "typical labour relation" in industry.[3] Accordingly, the law created protective and rigid schemes in crucial areas such as job description, workplace, working time, remuneration and protection against dismissal. Furthermore, the legal system did not welcome atypical forms of work or tended to cover them in a rather strict way (as in the case of fixed-term and temporary agency work contracts).
- On the other hand, from the mid-1970s onwards, collective bargaining developed largely according to the *favor laboratoris* principle, interpreted in the most traditional way. In this regard, collective agreements were conceived as instruments aimed only to improve legal provisions that were considered the minimum standard of labour protection and a collective agreement in force could only be replaced by a more favourable one.[4] Consequently, collective agreements tended to be more protective than the law and remained in force for a long time.

As a result of these two trends, Portuguese labour law was placed among the more protective labour systems in Europe for many years. In addition, Portuguese legislation has traditionally been reluctant to modernize in terms of making labour market provisions more flexible. This concerns both the admission of atypical forms of work (*external flexibility*) and the softening of the provisions applicable to employment contracts in sensitive areas such as remuneration, workplace, job description, working time or dismissal (*internal flexibility*). It also applies to *deregulation tendencies* (intended to give

[2] In relation to employment rights, the Portuguese Constitution grants free access to a job or profession and rights to good working conditions, equal pay, a balanced reconciliation of family and working life, annual paid holidays, and protection against unfair dismissal and in involuntary unemployment. As regards industrial relations, the Constitution guarantees the freedom to create trade unions and workers' councils, collective bargaining rights and the right to strike. Finally, concerning social security, the Constitution confers social protection in old age or invalidity and in cases of accidents or illnesses related to work.

[3] The term "typical labor relation" refers to an employment relation covered by an open-ended contract for a full-time job, the work being performed always in the same place and within rigid time limits, with the employee well integrated in the company and enjoying benefits including protection against unfair dismissal and social security rights, partially at the expense of the employer. For a further development of this notion, see M. R. Palma Ramalho, *Tratado de Direito do Trabalho*, I, 3rd edition, Coimbra, 2012, 62 ss.

[4] Prior to the Labour Code, these provisions were established in several Acts, the most important for the purpose of this paper being the Labour Contract Act (LCT, approved by Decree-Law No. 49408, of 24 November 1969, Article 13), and the Industrial Relations and Collective Bargaining Act (LRCT, approved by Decree-Law No. 519-C/79, of 29 December 1979, Articles 11 No. 2 and Article 15).

more space for collective agreements to establish new working conditions even if less favourable than those established by the law or by previous collective agreements).[5]

Nevertheless, since the 1990s and during the first decade of the twenty-first century, a significant evolution has been observed. It began with the implementation of special acts on specific issues, then was consolidated with the approval of the first Labour Code in 2003 (LC of 2003, approved by Law No. 99/2003, of 27 August 2003) and maintained in the second Labour Code (LC, approved by Law No. 7/2009, of 12 February 2009), which is currently in force.

During this process, flexibility measures were introduced in the following areas:

i. As to *external flexibility*, special employment contracts were admitted and regulated. They included employment contracts in managerial functions and functions involving personal trust (*comissão de serviço*), part-time work, telework, and work on call (*trabalho intermitente*).

   By contrast, legal provisions on fixed-term and temporary agency work contracts were kept very strict.[6]

ii. Regarding *internal flexibility*, more flexible provisions were introduced in relation to job classification and functions (*mobilidade funcional*), workplace and transfers (*mobilidade geográfica*), and working-time arrangements (*horários flexíveis, adaptabilidade individual, grupal e por convenção colectiva, banco de horas, horário concentrado*).[7]

   However, no changes were made to the legal provisions on remuneration and other costs related to employment contracts which remained at the same levels. The same applies to protective provisions on dismissal, including the grounds for dismissal (especially those linked to the unsuitability of the worker and to the elimination of the work position, which until today are rarely applied because of the demanding requirements established by the law), dismissal procedures (which are still very strict), and severance pay for termination of contract (which is high in comparison to those provided by other EU countries).

iii. As regards *deregulation tendencies*, the LC of 2003 adopted new provisions on the relation between legal provisions and collective agreements, allowing for collective agreements to establish less favourable conditions than those prescribed by the law. In addition, it adopted a set of provisions intended to favour the regular replacement of old collective agreements by new ones. If they were not renewed, then after a period of time those agreements would become invalid (*sobrevigência*).[8]

   However, owing to the drastic fall in the number of collective agreements that followed these provisions of the LC of 2003, the LC was revised by Law No.9/2006 of 20 March 2006 and, later on, by the LC of 2009, partially reinstating the former provisions in this area.[9] The revision mainly concerns the replacement of old collective agreements by new ones and allows collective agreements to remain valid even if they are not renewed.

[5] An extensive discussion on these flexibility tendencies can be found in M. R. Palma Ramalho, *Da Autonomia Dogmática do Direito do Trabalho*, Coimbra, 2001, 590 ff. and 605 ff., and *Tratado de Direito do Trabalho cit.*, I, 70 ff.

[6] Introduced at different times and by separate Acts, all these contracts were integrated at a later stage in the LC of 2003 and are now dealt with in the LC of 2009, Articles 139 and ff.

[7] Once again, some of these schemes were introduced prior to the LC, but all of them were later integrated into it.

[8] Article 4 No. 1 and Articles 556 and 557 of the LC of 2003.

[9] Article 3 No. 1 and No. 3 and Articles 501 and 503 of the present LC.

1.2 Main features of industrial relations and social dialogue in Portugal prior to the crisis

To understand the impact of the crisis and the anti-crisis measures, an overview of the entrepreneurial environment and industrial relations in Portugal prior to the crisis is essential. For that purpose, the following points must be taken into account:

i. The majority of Portuguese companies (around 95 per cent)[10] are micro-size companies (with less than 10 workers).

ii. Portugal has a long tradition of social dialogue between the Government and the representatives of the employers and employees (especially at the highest level of representation, e.g. trade unions and employers' national federations). This tradition can be traced back to the 1980s.

   The dialogue consists of regular consultations between parties, and the social partners' active participation in the approval of new legislation on employment and industrial relations (as imposed by the Portuguese Constitution) and in the formulation of the tripartite agreements concluded regularly over the years at the Standing Commission for Social Concertation (Comissão Permanente da Concertação Social),11 the main arena for social dialogue in Portugal. It is at this Commission that legislative proposals are discussed and often agreed, thus promoting social peace.

iii. There is also a long tradition of collective bargaining and collective agreements, branch and professional-level agreements (*contratos colectivos de trabalho*, *acordos colectivos de trabalho*) being much more frequent than plant-level agreements (*acordos de empresa*). In 2002, e.g. prior to the first LC of 2003, 84.1 per cent of the collective agreements were top-level branch agreements (*contratos colectivos de trabalho*).[12]

   To a certain extent, this preference for top-level branch agreements is explained by the small size of most companies, which do not have the technical skills or capacity to negotiate on their own.[13]

iv. Competence to reach collective agreements, at all levels, on behalf of employees is accorded only to the trade unions.[14] However, there are some atypical collective agreements signed at plant level between employers and their workers' councils that have proved successful over the years.[15]

   These atypical collective agreements tend to be more flexible than the top-level agreements in areas such as working time (for instance, flexible working-time arrangements that are not prescribed by law), remuneration (more flexible schemes), and response to the economic crisis (putting in practice alternatives to lay-offs).

v. As to the content of collective agreements, in the last decade they have slowly developed more flexible legal provisions in areas such as job classification, working-time arrangements or the workplace. By contrast, collective agreements

[10] Source: National Institute of Statistics (INE).

[11] According to information provided by the Secretary of State for Employment, since 1987, 19 agreements were signed by the social partners at the Comissão Permanente da Concertação Social. This number shows the dynamism of the social dialogue in Portugal in the last decades.

[12] Source: *Livro Verde das Relações Laborais*, ed. Ministério do Trabalho e da Solidariedade Social, 2006, 84.

[13] This view was expressed by UGT at the interview given for the purposes of this report and also at the ILO-ITC/ILO-EC seminar on "Promoting sound industrial relations and social dialogue in times of crisis (23 May 2013, Lisbon, Portugal).

[14] Article 56 No. 3 of the PC and Article 443 No. 1 of the LC.

[15] For further developments on this issue, see M. R. Palma Ramalho, *Negociação Colectiva Atípica*, Coimbra, 2009.

are still highly protective in regard to remuneration and other work-related costs and the provisions against dismissal.

vi. As to the application of collective agreements, despite the general principle that they apply only to the worker and employer members of the trade union or of the employers' association that signed the agreement (affiliation principle), in practice they apply to non-affiliated workers and employers, because the law allows the administrative extension of those agreements (*portaria de extensão* or PE) and there is a strong tradition of the use of this tool.

This administrative extension of collective agreements fills in the gap caused by the low level of union membership in Portugal (less than 30 per cent).[16] It makes it possible for a large proportion of the labour force (between 71 per cent and 80 per cent[17]) to benefit from collective agreements without being a member of the organizations that signed them.

While such a system provides an advantage in that a high percentage of workers whether affiliated or not to a trade union is covered by collective regulation, promoting equal labour conditions and economies of scale for enterprises, it has some disadvantages. In fact, in the long run these extension practices risk endangering the collective bargaining system as a means of representing employers and employees. In effect, they do not promote affiliation with representative entities, since that affiliation is no longer a condition for benefiting from collective regulation.

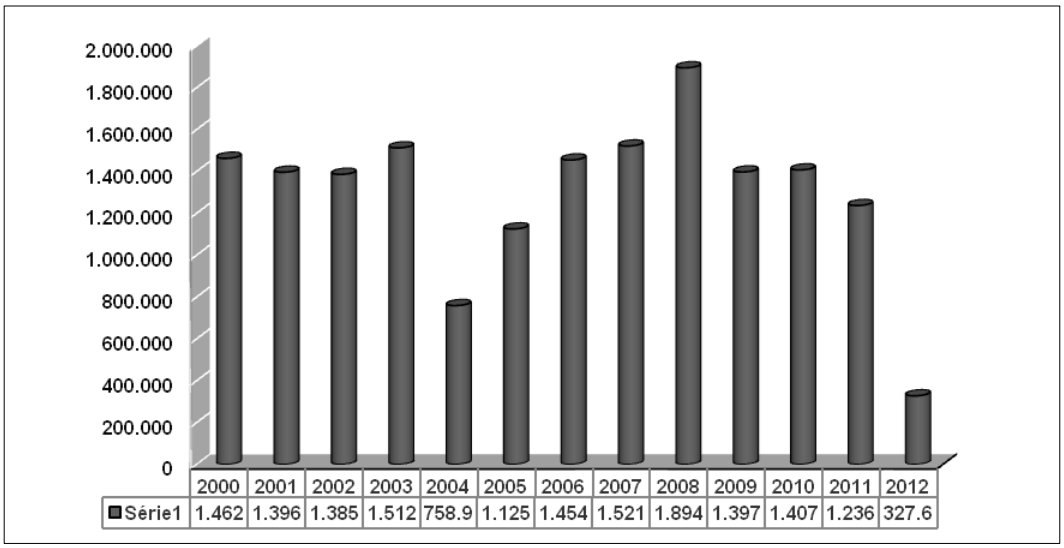
vii. Finally, the dynamics of collective bargaining over the years are poor. There are two reasons for this. The first has to do with the legal provisions mentioned above which allow collective agreements to stay in force until they are replaced. The second is the condition which requires new agreements to be more favourable than the agreements they replace and the law. As a result, collective agreements have remained in force for many years, regularly updated only as regards remunerations, but becoming out of date in relation to the evolving labour law and less and less adapted to a more rigorous economic environment. This situation is commonly recognized as a crisis in collective bargaining.

The solutions adopted over the years to deal with this collective bargaining crisis were not effective. The LC of 2003 tried to manage the situation by stipulating the mandatory cessation of any collective agreement when efforts to replace it failed. However, this only led to the drastic fall in the number of collective agreements in 2004, as shown in figure 1. The measure was partially abandoned in 2006 (Law No. 9/2006, of 20 March 2006, which revised the LC of 2003 on this point). Later, the LC of 2009 allowed agreements to be extended under certain conditions and for certain periods of time.

[16] Source: *Livro Verde das Relações Laborais,* ed. Ministério do Trabalho e da Solidariedade Social, 2006, 68. According to the figures presented in this publication (which have not been updated), the percentage of workers belonging to a trade union decreased from 31.7 per cent in 1990 to 24.3 per cent in 1997 and tended to continue to fall in the succeeding years.

[17] Source: *Livro Verde das Relações Laborais,* ed. Ministério do Trabalho e da Solidariedade Social, 2006, 86.

Figure 1. Number of workers covered by collective agreements in the private sector, 2000−2012



Source: Directorate-General for Employment and Work Relations (DGERT).

1.3 Conclusions

Some general conclusions can be drawn from the above overview concerning employment law, industrial relations and social dialogue in Portugal immediately before the crisis.

Concerning employment law, increasing flexibility on issues like job classification and functions, working-time arrangements, workplace and transfers and, to some extent, special labour contracts is clearly evident. However, legal provisions remained very strict and protective in regard to remuneration and other work-related costs, objective grounds for dismissal, severance pay on termination of employment contracts, and some special labour contracts, like fixed-term and temporary agency work contracts.

Social dialogue is well-established in Portugal. Over the years it has obtained very fruitful results, in the sense that the evolution of the legal framework is regularly negotiated and pre-approved by the social partners.

Finally, as regards industrial relations, three conclusions are in order.

First, the collective bargaining system is rather rigid since it largely relies on top-level branch or professional agreements rather than on plant-level agreements. Quite often, these top-level agreements provide rigid solutions in areas linked to job descriptions, remuneration or working-time arrangements. Plant-level agreements would adapt more easily and more rapidly to changing economic and market conditions.

Secondly, the system is hampered by the limitations imposed by law on the replacement of collective agreements. The law requires new agreements to impose more favourable conditions than the agreements they are replacing. As a result, collective agreements are revised regularly only in as far as wages are concerned; their other provisions are left untouched for many years. As a result, they have little impact on evolving situations.

Thirdly, the Portuguese system of collective agreements is efficient but, at the same time, artificial. The system is efficient in the sense that it covers a large percentage of workers. However, it is somewhat artificial since this high rate of coverage does not reflect the will of the workers and employers as expressed by their own representative organizations but is an effect of the administrative extension of agreements, which has been the common practice over the years.

The practice offers an advantage in that it makes it possible to counter the low level of participation of workers and employers in trade unions and employers' associations. Also, as emphasized by the social partners (see section 3 of this report), the practice promotes equal labour conditions and enables enterprises to take advantage of economies of scale.

Nonetheless, in the long run these extensions risk endangering the collective bargaining system as a representation system for employers and employees. The extensions do not promote affiliation with representative bodies since affiliation is no longer a condition for benefiting from collective regulations.

In short, these administrative extension practices create tension between the efficiency of the collective bargaining system, an effect of its high coverage, and the fundamentals and fairness of a representation-based system.

2. Measures proposed and already adopted to face the crisis, in relation to labour law and industrial relations

After the review of the general features of labour law and industrial relations prior to the financial and economic crisis, this section now focuses on the anti-crisis measures in the area of employment and labour law.

Since these measures rely mostly on the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) concluded on 3 May 2011 between the Portuguese Government and the International Monetary Fund, European Commission and European Central Bank, a brief description of the policy objectives proposed in the MoU is in order.

However, as most of the measures proposed have already been implemented, this paper will discuss national legislation. It will explore the changes already introduced and the role of the social partners in this process, highlighting the main trends and challenges the partners encountered as it unfolded.

2.1 Measures proposed in the MoU to deal with the crisis under the Financial Assistance Programme to Portugal and the role of the social partners in the definition of those measures

In the context of the Financial Assistance Programme, the MoU defined several labour market measures[18] in the following areas:

i. *Unemployment benefits.* The MoU proposed to reform provisions on unemployment benefits with a view to reducing the amount paid and the duration of the benefit while enlarging access to the allowance and shortening the contributory period needed to access it.

ii. *Employment protection legislation.* Despite recognizing that the minimum international labour standards of employment protection should be respected, the MoU proposed the following measures:

   a. The reduction of severance pay for dismissal or other forms of termination of employment contract, in order to put it in line with the average paid in other European countries. This reduction was to be implemented gradually. The MoU measures also included the elimination of minimum payments and the

[18] These measures are integrated in Section 4 of the MoU. For the purpose of this study, the paper will focus on the first version of the MoU, which largely defined the reform of the labour market and industrial relations. Later versions of the MoU will be taken into consideration only when deemed necessary.

establishment of maximum amounts to be paid, along with the creation of a fund for paying part of the damage compensation.

b. The introduction of more flexibility in the requirements and procedures legally established for dismissals linked with the elimination of work positions (*despedimento por extinção do posto de trabalho*).

c. The introduction of more flexibility in relation to dismissals resulting from the unsuitability of the worker (*despedimento por inadaptação*).

iii. *Working-time arrangements.* In this area, the MoU proposed the following measures:

a. *The expansion of flexible working time arrangements* in the form of working time accounts (*banco de horas*) at individual and plant level (*banco de horas individual e grupal*).

b. *The revision of the legal provisions concerning lay-offs* in case of industrial crisis.

c. *The reduction of the minimum additional pay for overtime work by 50 per cent*, and cuts in the compensatory time off for overtime work, also by 50 per cent.

iv. *Wages.* The MoU established the need to index wage developments to competitiveness and productivity, and made any increase in the minimum wage during the duration of the Programme conditional on economic and labour market developments as well as on the conclusion of an agreement within the framework of the Programme review.

v. *Collective bargaining and social dialogue.* The following measures were proposed by the MoU:

a. The definition of clear criteria for the administrative extension of collective agreements (*portaria de extensão* – PE).[19]

b. Shortening the validity periods (*sobrevigência*) of collective agreements that had expired but were not renewed.

c. The improvement of tripartite dialogue on wages.

d. The decentralization of collective bargaining, by allowing workers' councils to negotiate at plant level in firms with a minimum number of 250 employees, under delegation from the trade union or independently of such a delegation.[20]

e. The creation of a tripartite Labour Relation Centre, to support social dialogue and to provide technical assistance to the parties involved in collective bargaining.

vi. *Active labour market policies.* The MoU recommended that the Portuguese Government should implement policies to support the efforts of unemployed people searching for new jobs, in order to ease the transition of workers across occupations, firms and sectors. It also recommended government employment policies especially directed to more disadvantaged groups like the youth and the long-term unemployed.

When considering these measures as a whole, *four main objectives of the MoU* in the areas of the labour market, employment law and industrial relations can be identified.

The first objective is to reduce the costs associated with employment contracts. This objective is evident in measures such as the reductions in severance and overtime pay and the prohibition on increasing the minimum wage.

[19] In a later update of the MoU, the representativeness criteria were fixed at 50 per cent for the employers' organizations.

[20] This proposal was reinforced in later versions of the MoU.

The second objective is to tackle key points of the legal system either by introducing flexibility (as in the case of the measures on dismissal on the grounds of the worker's unsuitability and the elimination of work positions) or by increasing the flexibility of schemes that are already in place (for instance, the measures that enlarged flexible working-time arrangements).

The third objective is to relaunch collective bargaining and collective agreements under a new framework. The framework is intended to be more representative (the limits imposed on the administrative extension of collective agreements go in this direction), more dynamic (by facilitating the replacement of collective agreements) and more decentralized (the admission of workers' councils as a counterpart in collective agreements at plant level is a case in point).

The fourth objective is to implement active labour policies and, in that context, to promote the employment of specific groups like the youth and the long-term unemployed. (The changes in unemployment benefits legislation seem to be justified in this context, as the reduction of benefits is supposed to force unemployed people to be more active in searching for new jobs.)

Coming back to the general picture of employment law and industrial relations in Portugal prior to the crisis, it becomes evident that the first three objectives of the MoU described above aim to address key points of remaining rigidities in Portuguese employment law through precise measures. This is particularly true of the measures on dismissal, labour costs (not only for dismissal but also in regard to overtime work) and collective bargaining.

In contrast, the MoU defines rather vaguely the objective of implementing active employment policies. No specific measures are proposed, aside from the revision of unemployment benefits.

Another important element to add in this context is the fact that the great majority of the measures proposed in the MoU correspond to the tripartite Agreement concluded between the Government and the majority of the social partners in March 2011. In this regard, the social partners were involved in the process from the beginning.

2.2 The implementation of the MoU and further developments at national level

Most of the measures proposed in the MoU were implemented at national level in several stages. In addition to the MoU, other measures have been proposed; some of these were adopted while others were abandoned as a result of the opposition of the social partners.

Before examining those measures, it is important to mention that, despite being implemented by law (mainly through the LC reform, but also through specific acts on several issues), this process actively involved the social partners from the beginning. The MoU proposals relied significantly on the tripartite Agreement of 22 March 2011 (*Acordo Tripartido para a Competitividade e Emprego*)[21] as mentioned above. Likewise, subsequent changes to the national legislation drew from the tripartite Agreement passed on 18 January 2012 (*Compromisso para o Crescimento, Competividade e Emprego*). Both Agreements were signed by the Government, the General Workers' Union (UGT) and the Confederation of Industry (CIP), the Confederation of Portuguese Commerce (CCP), the Confederation of Portuguese Farmers (CAP) and the Confederation of Portuguese Tourism

[21] This Agreement follows another one, signed on 25 June 2008 (*Acordo Tripartido para um novo Sistema de Regulação das Relações Laborais, das Políticas de Emprego e da Protecção Social em Portugal*), where the social partners already recognized the need to pursue the following objectives: increase flexibility at company level; promote collective bargaining; rationalize dismissal procedures; assess and promote the effectiveness of labour provisions; fight the segmentation of the labour market and promote quality in employment. However, the 2011 Agreement is the origin of the more progressive measures proposed in the MoU.

(CPT). Only the General Confederation of Portuguese Workers (CGTP) refused to sign them, its justification being that some of the measures constituted a step back in workers' rights.

In accordance with the MoU's proposals, the following changes to the legislation on employment and industrial relations have already been introduced:

i. *Unemployment benefits*. Decree-Law No. 64/2012, of 15 March 2012, revised the legal provisions on unemployment benefits, as proposed in the MoU. It reduces the amount of benefits paid and the length of the payment period but widens access to the benefit for some categories of independent workers and shortens the necessary contributory period to have access to it.

ii. *Employment protection legislation.* In this area the main changes were introduced in the LC by Law No. 53/2011, of 14 October 2011, and by Law No. 23/2012, of 25 June 2012, in line with the MoU. The following measures were adopted:

   a. *The severance pay for dismissals or other forms of termination of the labour contract was reduced* from an average of 30 to 20 days for each year of service, with no minimum limits and an upper limit of 12 months. This reduction applied first to new hires (Law No. 53/2011, of 14 October 2011) but was extended afterwards to all employment contracts (by Law No. 23/2012, of 25 June 2012, which changed Article 366 of the LC).

      The law grants accrued-to-date entitlements by stipulating that, for contractual periods elapsing before the approval of the law (Article 6 of Law No. 23/2012), the new formula for calculating compensation was not applicable; instead the former and more favourable formula would remain in force. In all other cases, the law prescribes the immediate application of the new rules and establishes its pre-eminence over any collective agreement or labour contract with more favourable clauses (Article 7 of Law 23/2012), declaring null and void clauses providing higher compensations.

   b. *Dismissal due to the elimination of work positions* (*despedimento por extinção do posto de trabalho*) *became easier* with the introduction of the following changes to Articles 368 and ff. of the LC by Law No. 23/2012: the removal of the employers' duty to offer another job to the worker as an alternative to dismissal; and the replacement of seniority criteria with objective and non-discriminatory criteria in the choice of workers to dismiss when there are several equivalent positions to be made redundant.

   c. *The grounds for dismissal linked to unsuitability of the worker* (*despedimento por inadaptação*») *were extended* (Articles 374 and ff. of the LC, as changed by Law No. 23/2012): dismissals for this reason became admissible without the traditional requirement that the job had undergone technological or other significant changes in the course of the employment contract. Such dismissals also became easier with the elimination of the employers' duty to offer another job to the worker as an alternative to dismissal.

iii. *Working time*. In this area the following measures were adopted in the LC, through Law No. 23/2012, again in accordance with the MoU:

   a. *Expansion of flexible working-time arrangements* in the form of working time accounts (banco de horas) at individual and plant level (*banco de horas individual e grupal* − Articles 208, 208-A and 208-B of the LC).

   b. *Revision of the provisions on lay-offs* during periods of industrial crisis (Articles 298 and ff. of the LC).

   c. *Reduction of the minimum additional pay for overtime work by 50 per cent*, and a cut in the compensatory time off for overtime work also by 50 per cent

(Articles 229, 230, 268 and 269 of the LC). Here again, the law establishes the primacy of the new rules over any collective agreement or employment contract with more favourable clauses by suspending such clauses for a period of two years (Article 7 of Law 23/2012).

iv. *Collective bargaining and social dialogue*. In this area, among the several measures proposed by the MoU only the following were adopted:

a. *Definition of clear criteria for the administrative extension of collective agreements*, taking into account the representativeness of the negotiating organizations and the implications of such extension for non-affiliated firms. This measure was adopted by Resolution No. 90/2012 of 10 October 2012 of the Council of Ministers.

b. *Promotion of decentralized collective bargaining*, by allowing workers' councils to negotiate at plant level in firms with a minimum number of 150 employees though this must be authorized by the trade unions (Article 491 No. 3 of the LC, with the changes introduced by Law No. 23/2012).

c. *Creation of the Labour Relations Centre (*Centro das Relações Laborais*)*, intended to provide information and technical assistance to the parties involved in collective bargaining. Created by Decree-Law No. 189/2012, of 22 August 2012, the Centre consists of representatives of the Government and social partners.

Aside from provisions flowing from the MoU, other legal provisions were approved during the reform of the LC. The following are worth mentioning for the purposes of this study:

- The renewal of fixed-term labour contracts, as a transitional measure to prevent unemployment in the short term (approved by Law No. 3/2012, of 10 January 2012).
- The elimination of four national holidays (a revision of Article 234 No. 1 of the LC; introduced by Law No. 23/2012, of 25 June 2012), which corresponds to four additional working days per year.
- The elimination of extra annual holiday time (*majoração de férias*) granted by the law as a premium to workers with no leave of absence in the previous year (changing Article 238 of the LC; introduced by Law No. 23/2012, of 25 June 2012). This also increases working time.

As stated above, these measures were discussed and agreed upon with the social partners who signed the tripartite Agreement of January 2012 at the Comissão Permanente da Concertação Social.

Some government proposals met the opposition of the social partners (either the employers' representatives or the workers representatives' or both) and were rejected. These included the proposal to increase the daily maximum working time by half an hour.[22] Also opposed was the move to change the amount of the compulsory social security contributions (TSU) and the respective shares of the employers and employees, with the employees contributing more and the employers less than they are now.[23]

[22] Bill Proposal No. 36/XII.

[23] The proposal of the Government was to raise the compulsory social security contributions of all workers (public and private sector) from 11 per cent to 18 per cent, and to decrease the companies' contributions from 25 per cent to 18 per cent. The Government defended this proposal as an incentive to create more jobs, stating that it would bring about an increase of 1 per cent in employment in 2013. However, as mentioned above, this proposal was strongly opposed by the social partners and the general public and was abandoned.

In addition to the LC reform and according to information provided by the Government,[24] specific measures are being put in place with four objectives: fight unemployment; facilitate the recapitalization and access of enterprises to credit; support investment; and promote entrepreneurship and innovation.

i. In order to fight unemployment, the following measures are being instituted:

- Measures intended to promote professional training and the creation of self-employment (under the programmes Impulso Jovem, Passaporte Emprego, Estímulo 2012, and more recently the programme Estímulo 2013, approved by Portaria nº 106/2013, of 14 March 2013 and developed by Portaria No. 203/2013, of 17 June 2013).
- Measure to relaunch public services for employment (Council of Ministers Resolution No. 20/2012, of 9 March 2012), aiming to support the efforts of unemployed persons in their search for new jobs.

ii. To facilitate the recapitalization and access of enterprises to credit, and to support investment, entrepreneurship and innovation, the following initiatives are being set up:

- The opening of credit lines for small and medium-sized companies (Linha de Crédito a PME, Linha PME Capitalização, Linha Obrigações PME – Emissões Primárias no Alternext, Recapitalização de PME).
- The adoption of more favourable tax provisions in certain situations (IVA de Caixa para Pequenas Empresas and Novo Regime Fiscal de Apoio ao Investimento e Dedução de Lucros Retidos e Reinvestidos).
- Programmes intended to promote investment and exports (Investe QREN and Investe QREN Exportações, among other programmes).
- Measures promoting innovation and new projects (Passaporte para o Empreendorismo and other similar measures).

Finally, at the time of the writing this report, a new set of measures aimed to stimulate the economy and to support enterprises was announced by the Government.[25] These measures will include the opening of new credit lines, the introduction of a more favourable tax system for companies, the reduction in bureaucratic and other business costs (especially export costs), and the promotion of investment, including the creation of a public investment bank.

2.3 Conclusions

To conclude this part of the report, a comparison is made between the changes already introduced in national law and the objectives and measures proposed in the MoU. This analysis is important not only to anticipate succeeding developments but also to identify the more challenging areas.

When comparing the changes to the national Law and the MoU Programme, it becomes evident that much of Programme, as far as employment and industrial relations law is concerned, is already in place. Nevertheless, some gaps still remain.

In the area of dismissal, the first gap concerns the creation of the fund from which partial payments for severance are to be made. Although the necessary provisions have

[24] Information provided in response to the questionnaire issued for the purpose of this paper by the Secretary of State for Employment, p. 2 ff.

[25] Council of Ministers of 23 April 2013.

been inserted into the LC, these provisions can be implemented only under specific regulations which are still being prepared.[26]

Furthermore, a second reduction in severance payments seems to be in order. However, as will be seen in the next section of this paper, this is currently an area of contention between the social partners and the Government.

The second gap in the application of the Programme concerns wage policies.

No legal measures have yet been taken as regards the relation between salaries and productivity. This is probably due to the traditional reluctance of the trade unions to accept the indexation of salaries to productivity as a general rule, although they do not oppose the premiums or other side benefits arising from productivity.[27]

In this area the Government limited its action to minimum wages, respecting the compromise inscribed in the MoU not to increase these wages. However, as will be discussed later, this is also a point of disagreement between the social partners and the Government.

However, the most sensitive aspect of the MoU's orientation seems to be industrial relations, e.g. collective bargaining. No measures have been taken at national level to shorten the validity (*sobrevigência*) periods of expired collective agreements that have not been renewed. Additionally, measures to promote decentralized collective bargaining by allowing workers' councils to negotiate at plant level have only been partially implemented since these measures require the acquiescence of the trade unions. Finally, the Council of Ministers' Resolution limiting the administrative extension of collective agreements, in line with the MoU, is now being challenged by the social partners.

As regards active employment and investment policies, only a closer look at the current employment and entrepreneurial situation will provide a basis for any conclusions on the subject. The next section of this paper goes deeper into it.

3. Effects of the crisis and of the measures approved to deal with it on employment, social dialogue and collective bargaining

This section will evaluate the impact of the crisis and of anti-crisis measures on employment, social dialogue and collective bargaining.

To make this evaluation possible, statistical data on the crisis and the situation of the enterprises are presented. The paper will then elaborate on the impact of the crisis and of anti-crisis measures on the employment rate and employment relations. Finally, it will discuss the impact of the crisis and anti-crisis measures on industrial relations, social dialogue and collective bargaining.[28]

It should also be noted that, in some cases, it is still too soon to evaluate the results of the measures adopted to address the crisis. Given this fact, the findings of this study reflect only the author's personal opinion on the current state of affairs and must be considered provisional.

[26] Law Proposal No. 147/2013, of 16 May 2013.

[27] This was the opinion expressed by the UGT in the interview carried out for this paper.

[28] The figures and other statistical information provided in this part of the paper came mainly from the staff of the ILO Office in Lisbon, to whom the author wishes to express her gratitude.

3.1 The current dimension of the crisis: Some indicators

When this paper was being written, the Portuguese financial and economic crisis seemed to be worse than it had ever been and was worsening.. This is evident from the figures shown in table 1 below on the evolution of the public deficit and public debt.

Table 1. Portugal: Evolution of public deficit, public debt and GDP, [a/] 2008–2012

Year	Public deficit (percentage of GDP)	Public debt (percentage of GDP)	GDP (volume change rate, %)
2008	3.7	71.7	0.0
2009	10.2	83.7	–2.9
2010	9.8	94	1.9
2011	4.4	108.3	–1.6 (preliminary)
2012	6.4	123.6	–3.2 (preliminary)

Source: National Institute of Statistics (INE).

[a/] Gross domestic product.

In addition, table 2 below shows that investment decreased over the period covered, despite a parallel drop in unit labour costs. In contrast, exports of goods increased in the two years to 2012, while the annual rate of productivity is now rising, after falling in previous years.

Table 2. Portugal: Evolution of investments, labour costs, exports, productivity, 2008–2012

Year	Investments (million euro)	Unit labour costs (annual rate of change)	Exports of goods a/ (euros)	Productivity (annual rate of change)
2008	38 634.6	3.6	38 847 346 198	–0.5
2009	34 629.4	3.1	31 696 763 402	–0.3
2010	33 829.9	–1.4	37 267 906 508	3.5
2011	30 533.6 (preliminary)	–0.6	42 870 150 688 (provisional)	0.0
2012	26 146.6 (preliminary	–3.8	45 358 875 894 (preliminary)	1.1

Sources: National Institute of Statistics (INE); and Banco de Portugal (BdP), *Statistical Bulletin* 12/2011, 12/2012, 3/2013.

[a/] According to information provided by the Secretary of State for Employment, in answering the questionnaire sent out for this study, Portuguese exports increased 13.2 per cent in 2011.

3.2 The effects of the crisis and of austerity policies on employment

3.2.1 Employment rate

One of the more significant impacts of the crisis is on employment. Here the effects of the crisis have been felt in three main areas: unemployment, type of labour contracts, and internal configuration of labour relations.

The first and most evident impact of the economic crisis is the quick rise of unemployment. Traditionally low in Portugal, the unemployment rate has risen consistently from 2008 onward, reaching 15.5 per cent in 2012 (see table 3) and 17.5 per cent in 2013.[29]

The rise of the unemployment rate affects men and women equally, but it is consistently higher among young workers (below 25 years old). Table 4 shows that unemployment tends to be structural, since long-term unemployment is highly significant.

Table 3. Portugal: Employment and unemployment rates, 2008–2012

Year	Employment rates (%)			Unemployment rates (%)		
	Total	Youth (15-24 years)	Women	Total	Youth (15-24 years)	Women
2008	57.8	34.7	51.2	7.6	16.4	8.8
2009	56.0	31.3	50.3	9.5	20.0	10.2
2010	55.2	28.5	49.6	10.8	22.4	11.9
2011	53.5	27.2	48.0	12.7	30.1	13.1
2012	51.4	23.6	46.7	15.5	37.7	15.6

Source: National Institute of Statistics (INE).

Table 4. Portugal: Long-term unemployment, 2008–2011

Year	Long-term unemployment (12 months or longer)	
	Number of individuals ('000)	Percentage of active population
2008	212.6	3.8
2009	245.8	4.4
2010	327.0	5.9
2011	374.9	6.8
2012	465.8	8.5

Source: National Institute of Statistics (INE).

[29] Source: Eurostat.

As to migration trends, between 2008 and 2011 approximately a third of the immigrants working in Portugal had left the country,[30] a clear indication that less jobs were available. This is confirmed by the figures in table 5, which shows that the job creation rate was much lower than the job destruction rate between 2008 and 2011.

Table 5. Portugal: Job creation and job destruction rates, 2008–2011

Year	Job creation rate (%)	Job destruction rate (%)
2008	5.66	6.32
2009	4.80	6.93
2010	4.52	7.52 (provisional)
2011	4.70	Not available

Source: National Institute of Statistics (INE).

The figures provided above indicate that the crisis and the subsequent austerity policies contributed greatly to the rapid rise in unemployment (note that the unemployment rate started to increase in 2008−2009). They also show that the active employment policies already in place during the period had no significant impact either in general or in relation to more vulnerable groups, such as the young and long-term unemployed workers.

The figures also demonstrate that the changes already introduced in employment legislation (namely the measures reducing labour costs and the reform of unemployment benefits), which were expected to have a positive effect on the employment rate, have so far not fulfilled that promise.

Finally, as regards informal employment, Portugal is usually placed among the European countries with a high average for informal work (usually accounting for above 20 per cent of GDP). However, information on this situation is uncertain and dates back to before the economic crisis. As it is still too soon to see to what extent the measures adopted to deal with the crisis have affected informal employment, this aspect will not be discussed in this study.

3.2.2 Employment relations: Effects of the crisis and of the measures already adopted to deal with it on employment relations and specific points of tension

The crisis and the measures tackling it have been expected to affect labour relations as well as the forms and termination provisions of labour contracts.

No significant changes took place in regard to atypical employment contracts. In fact, as shown in table 6, fixed-term and temporary agency work contracts did not increase in the past few years, while part-time work has slightly risen.

[30] Based on information provided by the Secretary of State for Employment, in an answer to the research questionnaire for this study.

Table 6. Portugal: Status of atypical work, 2008–2012

Year	Part-time workers as percentage of the employed population	Employees with temporary contracts as percentage of all employees
2008	11.9	18.4
2009	11.6	18.0
2010	11.6	19.2
2011	13.3	18.5
2012	14.3	17.0

Source: National Institute of Statistics (INE).

These figures can be the result of the strictness of Portuguese law on atypical labour relations, as explained in section 1 of this paper. However, it should be noted that the LC (Article 140, No. 4b) allows the wide use of fixed-term contracts to promote the employment of young workers and the long-term unemployed. The figures could therefore also indicate that this measure is not being utilized as a tool to mitigate the effects of the crisis on these particular groups of workers, at least not to a significant extent.

The drop in the percentage of temporary contracts specifically in 2012 is even more significant if one takes into account the fact that that year coincided with the temporary extension of fixed-term employment contracts already in place under Law No. 3/2012, of 10 January 2012. In effect, the figures show that either the employers are not taking advantage of the possibility of extending the contracts already in place, or that no new hires are being made under those extensions.

No specific measures were taken on other possible models of labour contract. It can thus be concluded that the predominant model of labour contract is the traditional open-ended and full-time contract.

Under the above circumstances, it can be argued that atypical labour forms are not being used as a tool to fight unemployment.

As regards the internal configuration of labour relations, some indicators show that enterprises as well as the labour market may already be adapting to the economic crisis and shaping the labour relationship.

On the one hand, unit labour costs are decreasing, as already shown above. This reduction may be the result of unemployment, but it can also mean the drop in the cost per worker, for instance in overtime payments, severance pay or in salaries.

Also, increasing productivity in 2012, after a negative evolution in previous years, may indicate that enterprises are managing labour relations and the labour force more efficiently.

Finally, the average monthly income, calculated on the basis of employment contracts for full-time jobs, as shown in table 7, confirms the declining trend for salaries in 2012.[31]

[31] This study does take into account the public sector, where salaries have been significantly reduced by law in recent years, from 3.5 per cent to 10 per cent; other employment benefits have been cut as well.

Table 7. Portugal: Average monthly income of full-time workers in the private sector, in euros, 2008–2012

2008	2009	2010	2011	2012 (1st semester)
1 192.43	1 195.36	1 257.29	1 246.93	1 207.39

Sources: Information provided by the ILO Bureau in Lisbon, and confirmed by the social partners (for instance, in the written response to the research questionnaire for this paper from CGTP, p. 5).

Worth mentioning is the difference of opinion between the Government and the social partners on the minimum wage, which has been set at €485 a month since 2011. While the Government is refusing to increase the minimum wage on the basis of the MoU, the social partners are now pressing for a wage increase, as foreseen in previous tripartite agreements.

This demand is being raised by the trade unions and there seems to be no opposition to it from the employers, who justify the measure as a tool for increasing private expenditure, thereby helping to stimulate the economy. The exception is the Confederation of Portuguese Farmers (CAP), which considers the demand unrealistic.[32]

The Government has, until now, maintained its position on this matter. However, the final resolution of this tension point is still to be seen.

As to termination of employment, the figures provided by the Secretary of State for Employment show that collective dismissal is still the more common form of dismissal. In fact, a great number of collective dismissal procedures (affecting 82 555 workers in 2012 alone) have taken place, thus confirming the closing down or the downsizing of many companies as a result of the crisis.

As regards enlargement to other types of dismissal on objective grounds (dismissal linked to the elimination of a work position or to the unsuitability of the worker) provided for in the 2012 LC reform, it is yet too soon to evaluate the actual effects of the changes introduced.

In relation to termination of employment, the current point of conflict between the trade unions and the Government concerns the reduction in severance pay for dismissal from 20 days' pay to 12 or 18 days for each year of the contract. The Government considers that the MoU imposes this new reduction on the grounds that the amounts paid in Portugal are higher than the European average. However, the trade unions disagree. They argue that other countries calculate this compensation differently, in that they base it on effective remuneration rather than on basic remuneration, which is what the LC does. Compensation based on effective remuneration would be better for Portuguese workers than the one now foreseen by the Government.

A resolution of this conflict is still pending.

3.2.3 Conclusions

As far as employment law is concerned, the social partners tend to agree that there is not much more to do in this area. They also recognize that the reasons for the crisis do not rely on employment law but on other factors affecting the competitiveness and productivity of companies.[33]

The employers' representatives believe that there are many factors hindering the recovery of the economy and employment rate. These include the taxes imposed on

[32] CAP's written response to the questionnaire, p. 1.

[33] This was the opinion the UGT expressed in the interview given for the purposes of this paper. CIP expressed the same opinion in their written response (p.s 5 and ff.) to the questionnaire, as did CCP (p. 3).

enterprises, the costs of doing business (e.g. the costs of exporting, electricity and red tape), restrictive public expenditure policies, and financial policies that reduce the credit available to enterprises. The trade unions agree that some of these factors are the main obstacles to economic recovery.[34]

As mentioned in section 1, there are two traditional areas of flexibility: internal flexibility, which aims to soften provisions applicable to employment contracts in sensitive areas like remuneration, workplace and transfers, job descriptions, working time and dismissal; and external flexibility, which refers to wider acceptance of atypical forms of work. This paper agrees with the social partners that nothing much more can be done on internal flexibility, but disagrees with them on external flexibility.

In the area of internal flexibility, the 2012 LC reform has tackled some of the traditional key points of rigidity in provisions in employment contracts. These mainly concern dismissal on objective grounds,[35] and the costs of severance and over-time work. Legal provisions are already very flexible[36] in regard to other matters like the workplace and working time. In other words, aside from minor points in relation to dismissal and remuneration, the Portuguese labour system can no longer be considered a highly rigid system.

However, the situation is not the same as regards external flexibility. Atypical forms of employment (e.g. fixed-term and temporary agency contracts) are still covered by strict rules despite the fact that they could be used as tools to increase employment.

3.3 The effects of the crisis and austerity policies on social dialogue

With the exception of the General Confederation of Portuguese Workers (CGTP),[37] the social partners have been actively involved in the design of public austerity policies, namely changes in the laws on employment contracts and collective bargaining. These changes were discussed at the Comissão Permanente da Concertação Social and were concluded in tripartite agreements (only CGTP refused to sign). Such agreements are the basis of major changes to the employment law.

Nevertheless, the social partners say that either they were not consulted or their opinions were not taken into account on policies affecting areas other than employment. They claim that the latter include policies focused on stimulating the economy, investment, the tax system, and active employment policies, despite the fact that the tripartite agreements of 2011 and 2012 address those areas.[38]

[34] CIP, in its response to the questionnaire (pp. 6 and ff.); UGT, in the interview given for the purposes of this paper; and CPT, p. 10 of the written contribution.

[35] Nonetheless, in the area of dismissal, CIP, in its response to the questionnaire (p. 12), stated that it considers it important to make dismissal more flexible, and proposes a change to Article 53 of the Portuguese Constitution. CCP (written contribution, p. 1) considers that while the reduction in severance payments is positive, it will have a significant impact only in the long term owing to the transitional period prescribed by the law, during which the previous level of compensation is to be respected. CPT considers that there is some work to be done on dismissal for reasons other than economic grounds and on unlawful dismissal (written contribution of the CPT, p. 8). Furthermore, both CCP and CPT consider that the changes already introduced in regard to dismissal arising from the worker's unsuitability are risky and difficult to implement in practice.

[36] As regards flexibility measures on working time, the CCP expressed the view during the seminar it organized that these measures were over-flexible.

[37] In their written response to the questionnaire (pp. 2–3), CGTP said that although social dialogue took place, the solutions had already been agreed between the Government and the troika and were not open to discussion.

[38] In the interview given for the purposes of this paper, UGT declared that the Government discussed policies other than those on employment law only with the employers' representatives. CIP, in its written response to the questionnaire (p. 3), also stated that there was no social dialogue prior to the adoption of important measures, such as the revision of the judicial system and legislation on export costs (specifically legislation affecting the country's ports). CCP also believes that the dialogue has sometimes been a mere formality (written statement, p. 3).

It should be pointed out that in the past two years social peace has been breached several times. Four general strikes have taken place. Two were organized by UGT and CGTP, and the others by CGTP. Also, there have been many sectorial strikes (especially in the transport sector) as well as massive demonstrations which did not always formally involve the trade unions.

As a result of these collective actions, some measures proposed by the Government and opposed by the social partners were withdrawn. These included the proposal to extend the maximum length of daily working time by half an hour and the proposal to change the social security tax (TSU).

However, the employers' organizations consider that the social tension is largely due to tax policies and the deterioration of living conditions in recent years rather than to the changes in labour law.[39]

It can be concluded from the above discussion that the social partners are playing a significant role in the process of defining the responses to the crisis and that their strength has not been significantly reduced. Nevertheless, their answers to questions raised during the investigations for this study suggest that the social dialogue should go more deeply in areas beyond employment law.

3.4 The effects of the crisis and of the austerity policies on collective bargaining

As to collective bargaining and collective agreements, it is, first of all, important to check the evolution of collective bargaining and collective agreements in recent years, not only as regards the number and type of agreements concluded, but also their content in view of the crisis. Second, a brief analysis of the effects of the legal reforms already introduced concerning collective agreements and of persisting tension points is in order.

3.4.1 The evolution of collective bargaining and collective agreements under the crisis

The figures in table 8 show the evolution in collective agreements over the period 2008 to 2012 in terms of the number of agreements concluded, the types of agreement and the administrative extension of collective agreements.

[39] This is the opinion expressed in their written responses to the questionnaire by CIP (p. 4) and CCP (p. 3).

Table 8. Evolution of collective agreements, 2008–2012 (second trimester)

IRCT	2008	2009	2010	2011	2012
	Number of agreements				
CCT	45	52	78	33	10
ACT	12	7	10	10	4
AE	44	34	22	27	12
AA	3	2	0	7	2
DAV	0	0	0	0	0
Negotiated instruments (total)	**104**	**95**	**110**	**77**	**28**
DAO	0	0	0	1	1
PE	11	10	28	9	12
PCT	0	0	1	0	0
Total IRCT	**115**	**105**	**139**	**87**	**41**

Source: DGERT.

Notes:

IRCT (instrumento de regulamentação colectiva do trabalho) – Collective instruments, including collective agreements and administrative instruments

CCT/ACT (contrato colectivo de trabalho/acordo colectivo de trabalho) – Collective agreements at branch and professional level

AE (acordo de empresa) – Collective agreement at plant level

AA (acordo de adesão) – Extension of a collective agreement, agreed between the parties

DAV (decisão de arbitragem voluntária) – Arbitral decision on a collective agreement decided by the parties

DAO (decisão de arbitragem voluntária) – Administrative arbitral decision on a collective agreement

PE (portaria de extensão) – Administrative extension of collective agreements

PCT (portaria de condições de trabalho) – Administrative regulation of employment conditions

As shown in table 8, *the number of collective agreements has declined consistently since 2008 (except in 2010), but fell drastically in 2012*, when only 28 agreements were published, in contrast with the 104 collective agreements reached in 2008.[40] According to the *Report on Collective Bargaining for 2012*, prepared by UGT,[41] a comparison between the figures for 2011 and 2012 show that the fall in the number of collective agreements started in the second semester of 2011 (e.g. after the implementation of the Assistance Programme) and went on in 2012, when the number of agreements (referred to as "Total ICRT" in the table) fell by 50 per cent.

The social partners indicate two reasons for this drastic fall in the number of collective agreements. The first is the economic crisis and subsequent difficulties in negotiating wages (this remains the main subject of collective agreements[42]) which make collective bargaining less attractive. The second concerns the new practices restraining the use of the administrative extension of collective agreements. The limits imposed on the extension supposedly make collective bargaining less attractive because the parties know that the agreements will not be widely applied.[43]

The crisis in collective bargaining is therefore evident, and its importance is recognized by the Government and by all the social partners.

Another significant conclusion that can be derived from the above figures is *the change in the predominant type of collective agreements*. The traditionally preponderant top-level branch and professional agreements (CCT and ACT), pointed out in section 1 of

[40] Source: Ministry of Economy and Employment, DGERT.

[41] *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 5.

[42] *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 11.

[43] This was the opinion expressed by UGT, in the interview given for the purposes of this paper, and also in *Relatório Anual da Negociação Colectiva*, 2012, p. 9. CIP expressed the same opinion in response to the research questionnaire (pp. 9 and 10).

this paper, have given way to plant-level agreements (AE), especially in 2012, where 12 AEs were issued as against 10 CCTs.

This may indicate a new tendency towards a more decentralized and specialized level of collective bargaining. However, the social partners tend to think that this situation has also something to do with the negative effects of the limitations imposed on the administrative extension of collective agreements, since the limitations only affect branch and professional level agreements.[44].

No articulated collective bargaining[45] has taken place despite the fact that the LC allows articulation.[46]

There also appears to be *no tradition of resolving differences of opinion between parties in regard to collective agreements and collective bargaining by means of mediation and arbitration*. No voluntary arbitration procedures in relation to collective agreements took place during the 2008 − 2012 period; administrative mediation occurred in only one case.

Finally, concerning administrative ruling on labour conditions, two conclusions are in order.

First, *the administrative direct regulation of labour conditions (PCT) is exceptional*, as a natural consequence of the development of collective bargaining over the years. Secondly, and more importantly, *the administrative extension of collective agreements, which was intensively used in the past, fell in the two years to 2012*, thus showing that even prior to the Government Resolution on that issue (in October 2012) the Government was already adopting more restrictive criteria on extension in accordance with the MoU prescriptions.

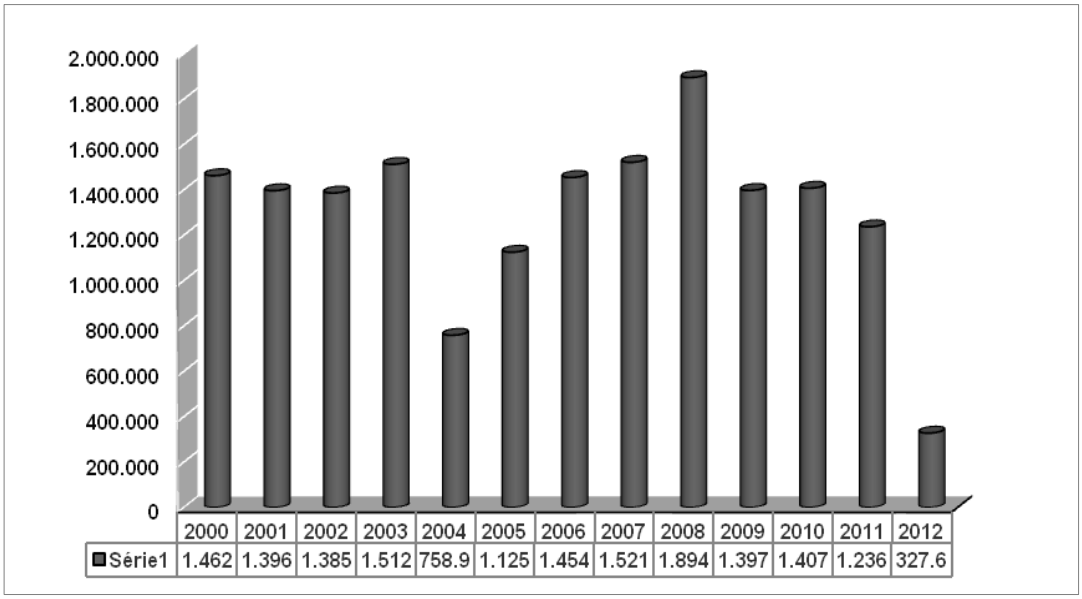
The results of this dramatic fall in the number of collective agreements and of the new approach to the administrative extension of collective agreements are more clearly shown in figures 2 and 3. The graphs present the number of workers covered by collective agreements and the evolution in the relationship between collective agreements and administrative extension procedures.

[44] *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 9

[45] Eurofound defines "articulated bargaining" as a "bargaining system which implies a form of linking between collective agreements concluded at different bargaining levels, such that a higher-level agreement (e.g. the national agreement for a given sector) delegates detailed implementation to lower-level agreements (company agreements).

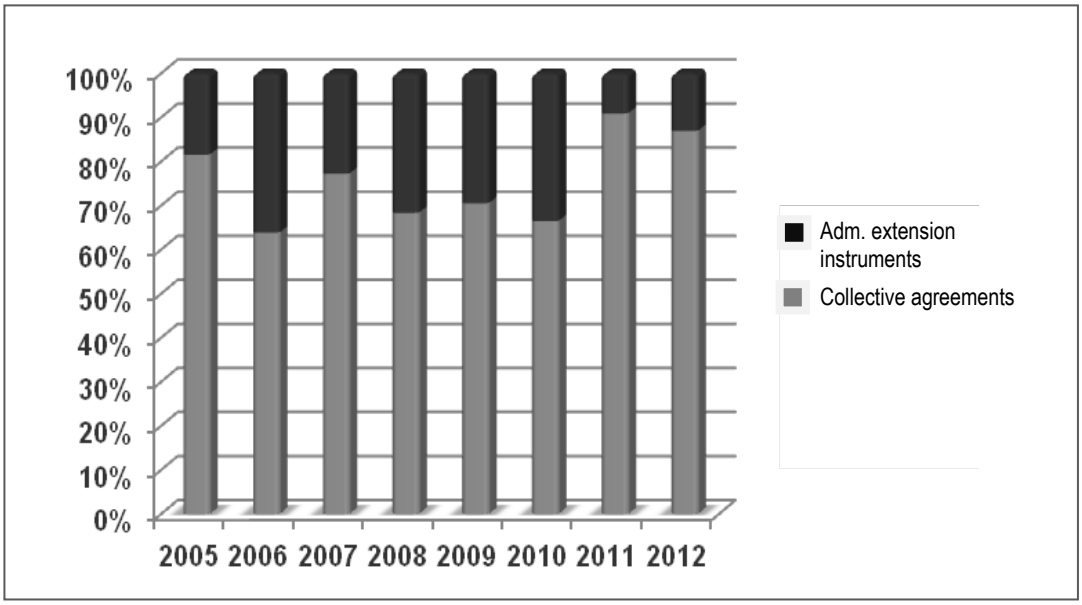
[46] CPT has proposed other measures for inclusion in collective agreements in order to make them more flexible such as procedural clauses and opt-out clauses (written contribution, p. 13).

Figure 2. Number of workers covered by collective agreements in the private sector



Sources: DGERT; *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 4; CGTP: written response to questionnaire, p. 11.

Figure 3. Collective agreements and administrative extension instruments, 2005–2012



Sources: Ministry of Labour, *Boletin do Trabalho e Emprego* (BTE); *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 12.

As can be seen in figure 2, the number of workers covered by collective agreements declined immensely from 2011 to 2012. According to information provided by the Secretary of State for Employment, the number of workers covered by collective agreements fell 67.4 per cent and the number of workers affected by remuneration changes in collective agreements was -74.5 per cent lower in 2012 than in the previous year. Similarly, the UGT has indicated that in 2012 the number of workers under collective agreements was 26.5 per cent of the equivalent number in 2011.[47]

[47] *UGT: Relatório Anual da Negociação Colectiva*, 2012, p. 3.

It is not necessary to point out that these declines coincided with the drop in the number of administrative extensions of collective agreements, as can be seen in figure 3. If the low level of union membership in Portugal (below 30 per cent) is taken into consideration, it has to be concluded that the drastic fall in collective bargaining coverage arises from the fact that the administrative extension of those agreements no longer plays its traditional role in filling in the gap caused by the low level of union affiliation.

An analysis of the *content of collective agreements* can indicate how these agreements are addressing the crisis.

The small number of agreements reached in the two years to 2012 is a clear sign that collective agreements are not being used as instruments for tackling the crisis. This conclusion is reinforced by the fact that no collective bargaining took place in important sectors of the economy, such as the construction, textiles and clothing, shoes and leather, and paper industries[48] over the period.

Given the above situation, the field of investigation in this area is quite limited. Nevertheless, relying on information provided by the Government and by the social partners based on the analysis of collective agreements published in 2012 (including seven new agreements and 16 global revisions of collective agreements already in force),[49] some clauses on various issues can be highlighted.

i. *Security in employment and dismissal*. There are clauses establishing preference criteria for readmissions to new jobs in favour of dismissed workers during the year following the dismissal.

ii. *Atypical work*. In this area, one collective agreement goes further than the LC as regards situations where fixed-term contracts are allowed.

iii. *Working-time arrangements*. Clauses reinstating or changing flexible working-time arrangements in the form of working-time adaptability or working time accounts (*banco de horas*) can be noted. In one collective agreement, where flexible working-time arrangements rely upon the agreement of the worker and the employer, an enterprise in crisis is allowed unilaterally to decide to apply a working time accounts scheme.

iv. *Workplace and mobility*. In this area, some collective agreements have more flexible solutions than the LC.

v. *Wages*. In this area, the economic crisis resulted in the freezing of salary adjustments in all collective agreements in 2012, but in the few collective agreements that introduced changes to wages, salaries were reduced.50 In addition, the absence of negotiations has the effect of reducing salaries because wage tables are usually fixed for a period of 12 months, becoming out of date after that time.51

The above examples support the conclusion that *collective agreements are not being used as a tool to mitigate the crisis.* This is true in regard to such crucial issues as retaining employment (by wage moderation, reductions in working time or temporary lay-offs), improving productivity (for instance by strengthening the link between wages and productivity or by introducing changes in work organization, job definitions and classifications), or fighting unemployment (for instance by promoting atypical forms of work).

Under these circumstances, another conclusion is in order. Since the data shows that productivity is increasing, unit labour costs and the monthly average income of employees

[48] Source: information provided by Secretary of State for Employment, in response to the questionnaire.

[49] Source: information provided by the Secretary of State for Employment, in response to the questionnaire.

[50] *UGT: Relatório Anual da Negociação Colectiva*, 2012, pp. 7−8.

[51] More details can be found in the response of the Secretary of State for Employment to the questionnaire. *UGT: Relatório Anual da Negociação Colectiva*, 2012, pp. 8 and 9, provides the same information.

are decreasing, and part-time work is growing, it must be concluded that *enterprises are adapting to the crisis not through collective bargaining but either at the level of employment contracts or, more likely, at an informal level*.

In any case, collective agreements and the collective actors in labour relations are not in control of this process.

3.4.2 Effects of the reforms already introduced on collective agreements and some related tension points

In regard to collective agreements, a brief analysis of the effects of the reforms already introduced in the law and the tension points that still exist is in order.

As stated at the end of section 2 of this paper, the main points of the MoU that were not implemented at national level are in the area of collective bargaining and collective agreements.

These gaps are noticeable in two areas:

- The recognition of workers' councils as legitimate counterparts in collective bargaining. National legislation accords this legitimacy only to councils empowered by the trade unions (Article 491, No. 3 of the LC). The reform of the LC following the MoU simply increased the number of enterprises by lowering the size requirement for that empowerment to enterprises with more than 150 workers (instead of the previous 500).
- The adoption of measures to promote the regular replacement of expired but not renewed collective agreements, mainly by shortening the validity periods of these agreements. In this area no measures were taken at national level.

The Council of Ministers Resolution No. 90/2012 which imposed representative criteria as conditions for the administrative extension of collective agreements (PE), thereby applying one of the MoU proposals, is facing strong opposition from the social partners.

It might not come as a surprise that the above two areas are at the core of the Portuguese collective bargaining system and have raised many doubts and differences of opinion over the years.

As to the *granting of competence to workers' councils or other workers' representatives to conclude collective agreements* independently of trade unions, this is a problem that came to light at the time of the approval of the first LC (in 2003)[52] and divided the opinions of the authorities, social partners and experts. Some were in favour of this solution, considering it an adequate tool for promoting plant-level collective agreements and for legalizing the atypical collective agreements already in place. Others considered the solution a breach of the Portuguese Constitution. Their reason for this arises from the fact that the Constitution accords competence to conclude collective agreements only to the trade unions; their view is that the Constitution has to be changed for this solution to be implemented.[53]

The problem has not been solved since, and the solution now laid by the LC does not solve it either, because agreements are often reached without a delegation of competence from the trade unions or even against the wishes of these unions. Nevertheless, workers' councils and employers at plant level continue to sign atypical collective agreements and

[52] The Project for the LC of 2003 contemplated a new type of collective agreement (*acordo geral de empresa*) that could be signed at plant level by the workers' council independently of the trade union. However, this proposal faced the strong opposition of the national federations of trade unions at the Conselho Permanente da Concertação Social (Council for Social Concertation) and was abandoned.

[53] For more details on this discussion, see Maria Do Rosário Palma Ramalho, *Negociação Colectiva Atípica cit.*, 73 and ff.

these are often more flexible than regular collective agreements, especially top-level branch and professional agreements.[54]

Under these circumstances, a more dynamic collective bargaining should be promoted at plant level. Otherwise, the situation risks continuing to be beyond the control of the trade unions.[55]

The second problem is also related to the *dynamics of collective bargaining in connection with the renewal of collective agreements*. Here again, the Portuguese collective bargaining system has always faced a structural dilemma between avoiding unregulated situations caused by the expiry of a collective agreement without a replacement and the need to promote the regular renewal of these agreements in order to make them more adaptable to new circumstances.

In this regard, the LC has already established some measures to prevent collective agreements from being kept in force for too long (Article 501). These measures were reinforced by the MoU and should be considered for implementation in order to ensure the regular renewal of collective agreements.

As regards the *new limits imposed on the administrative extension of collective agreements* (PE), as stated earlier, the new rules are now facing strong opposition from the social partners, with the exception of CAP.

The opposition has two arguments. First, the PEs are considered by the social partners an essential instrument for promoting equal employment conditions in a branch or profession, thus promoting competitiveness between companies. Second, the partners think that the limits imposed on the PEs have a negative effect on collective agreements as they weaken interest in concluding agreements that would not be applicable to the entire sector.[56]

CAP is the exception among the social partners. It approves of the limits to the extension practices now imposed. For CAP, extension practices make the collective bargaining system artificial, since it relies on administrative decisions rather than on the will of the relevant partners.[57]

The opposition of the social partners to the imposition of limits is understandable because of its immediate and drastic effect on the world of workers, as figures 2 and 3 clearly show. Nevertheless, it is up to the social partners to choose whether to keep in force a system which makes the high coverage of collective agreements possible by an administrative provision (though it does not promote affiliation with representative organizations, since affiliation is not necessary for benefiting from collective regulations) or whether to develop a system more based on the participation of stakeholders in their respective associations.

A final point of tension is the opposition of the social partners to the methods used by the law when imposing austerity measures, such as reducing severance payments for dismissal or lessening compensation for overtime work. The law gives immediate effect to these measures over collective agreements and even contractual clauses providing more favourable conditions. As stated in section 2 of this report in regard to Article 7 of Law

[54] Some comparative examples of the two kinds of regulation are given in Maria Do Rosário Palma Ramalho, *Negociação Colectiva Atípica cit.*, 62 and ff.

[55] In this context the CIP, in its response (p. 12) to the questionnaire for this paper proposes a change in Article 56, Nos. 3 and No. 4 of the Portuguese Constitution to allow workers' representatives other than trade unions to conclude collective agreements. As is to be expected, the federations of trade unions strongly oppose giving workers' councils this right (CGTP's written response to the questionnaire, p. 12 and opinion expressed by the UGT at the interview for this paper).

[56] See *UGT: Relatório Anual da Negociação Colectiva*, 2012 pp. 12 and ff. In their responses to the ILO questionnaire, CIP (pp. 9–10), CCP (p. 5), CTP (p. 4), and CGTP (p. 13) also expressed the same opinion.

[57] CAP's written response to the ILO questionnaire, p. 2.

No. 23/2012, the law declared more favourable collective and contractual clauses null and void or suspended.

The above has led the trade union federation CGTP to announce that it will argue before the ILO that the provision does not comply with ILO Conventions 87, 98 and 151.[58]

4. Closing remarks

Some conclusions on various aspects of employment law and collective bargaining in relation to Portugal's current crisis and austerity policies have been presented earlier in this paper. These closing remarks are therefore deliberately concise and are especially intended to generate discussion on the subjects covered. As in the other sections of this paper, the opinions expressed are entirely those of the author.

As regards employment law in the strict sense, this paper agrees with the social partners that the reason for the current crisis does not stem from the legal provisions on employment contracts but from other factors. Properly addressing these other factors will have a positive impact on the employment rate and the dynamics of employment relations.

However, the situation is not the same in regard to the regulation of labour contracts and to atypical work forms. Where the employment contract is concerned, the Portuguese regulatory system is already flexible and in line with those of other European countries in sensitive and important areas like job classification and workplace, transfers and working time arrangements.

There is, of course, always room for improvement, especially in regard to dismissal and remuneration schemes, and some tension points have to be dealt with (such as minimum wages). However, all in all, the most important tools to deal with the crisis are already in place.

However, where atypical labour contracts, i.e. fixed-term and temporary agency work contracts, are concerned, the legal provisions are still very strict. This strictness reflects the traditional opposition of workers to precarious labour arrangements.

Nonetheless, it is not necessary to underline the importance of atypical work forms as a tool for fighting unemployment. The introduction of more flexibility in the provisions for atypical forms of work and especially fixed-term contracts should be considered, as well as other measures to promote the use of these contracts by the employers (for instance, fiscal or social security benefits).[59]

The Portuguese employment rate at present (17.5 per cent) and the lack of success of the active employment policies implemented so far, as evidenced by the statistical data presented above, make this action imperative.

Where industrial relations and more specifically collective bargaining and collective agreements are concerned, the legal system still needs some changes in order to become more representative, more dynamic and more adaptable. Possible measures to attain those objectives are discussed below.

The importance of a more representative collective agreement system is undeniable. The strong legitimacy of both parties in negotiations is material to the success of those negotiations and a guarantee of social peace in the implementation of the agreements reached through them.

The legitimacy of the parties in collective bargaining can be promoted by restricting the administrative extension of collective agreements, a measure that is already in place but which has generated so much resistance from the social partners. However, the

[58] http://www.cgtp.pt//images/images/2013/02/QUEIXAOIT_2_.pdf

[59] This view was also expressed in the written contribution of CCP (p. 6).

restriction can be made more attractive by combining it with other measures like introducing legitimacy requirements for the parties in collective bargaining at the beginning of the process to guarantee the general applicability of any agreement reached. Alternative systems for controlling the extension of collective agreements could also be put in place, such as one giving the partners the right to oppose the extension not only formally but also with practical effect. Provided they are in conformity with national and international legislation, these and other measures should be considered.

As to the promotion of adaptable collective agreements, capable of rapidly adjusting to changes in the labour market or in economic or financial conditions, it can, in fact, be achieved (if the constitutional obstacle is removed) by the admission of other workers' representatives aside from the trade unions into the system, as proposed in the MoU. Being at the plant level, such representatives would be closer to the enterprise and its management and therefore better prepared to accept temporary changes and arrangements in collective agreements.

However, the same results could be achieved by other means such as collective bargaining at various levels, including the plant level, while remaining under the control of the trade unions and therefore more independent of the employers. Such means should also be considered.

Finally, as to the dynamics of collective agreements, the problems related to the continuing validity of expired but not replaced collective agreements still have to be dealt with by the law.

In fact, means must be found to ensure the regular replacement of collective agreements by new ones. New agreements must also be given the freedom to change the level of protection granted by previous ones, either by increasing that protection, if the conditions allow it, or by reducing accrued rights if necessary. If this does not happen, collective bargaining is at risk of going into paralysis. Similarly, collective agreements will be in danger of becoming obstacles to labour relations rather than useful instruments for regulating them. It is the author's view that in this area there is still a great deal to be done.

Finally, it is essential to underline the importance of the participation of the social partners in all procedures dealing with the crisis and at various levels. These include the tripartite mechanisms for social dialogue to discuss and negotiate measures to deal with the crisis; collective bargaining at all levels; and arbitral procedures to settle industrial disputes.

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The following workers' and employers' organizations and Government representative provided input to the report by answering a questionnaire:

- Confederation of Portuguese Farmers (CAP)
- Confederation of Portuguese Commerce (CCP)
- General Confederation of Portuguese Workers (CGTP)
- Confederation of Portuguese Industry (CIP)
- Confederation of Portuguese Tourism (CPT)
- Portuguese Secretary of State for Employment
- General Workers' Union (UGT)