



Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

Peer Country Comments Paper - France

How to reconcile flexibility and equality in a context of collective bargaining decentralisation

Peer Review "Towards a more dynamic collective bargaining"

Portugal, 23-24 October 2017



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1 Background to collective bargaining in the peer country

The French industrial relations system dates back to the end of the 19th century and to the development of the welfare state after the Second World War. It is characterised by important protection and rights for trade unions, strong involvement from the State (setting the minimum wage, but also legal rules for working time, and taking part in the extension of collective agreements) and an important role for sectoral bargaining (as in other continental European countries). This system succeeded in achieving high coverage rates for workers (97% in 2013) and making important social progress, including a decrease in working time – weekly and annual holidays for all –, a decent level of social protection and increasing wages. Over a long period, inequalities also tended to decrease and have remained relatively stable over the last ten years (despite a small increase following the 2008 crisis).

However, that model is now under pressure of internationalisation (requiring more flexibility for firms) and of a high and persistent unemployment rate. It has undergone important reforms, accelerating over the last years (2016 Labour Act and September 2017 labour ordinances). The main directions for reform are the following: the decentralisation of collective bargaining (towards the firm level); a change in the rules for participating to collective bargaining (including new principles for trade unions' representativeness) and in the institutions for workers' representation at the firm level; a development of tripartism at the national level to achieve national agreements. Beyond the controversial nature of such reforms, the main issues ahead concern its actual implementation. For instance, whether firms will use the new possibilities for decentralised bargaining and the consequences that these reforms will have on inequalities among workers.

2 Assessment of collective bargaining¹

The French industrial relations system is based on multilevel bargaining, involving tripartite social dialogue and cross-industry bargaining at the national level, sector and company level collective bargaining between social partners. The post second World War context has established the sector as the main level for bargaining, together with principles of generalisation and extended coverage (1950 Act)². Two other founding principles are the hierarchy between standards (legislation and regulation prevail over agreements; national cross-industry agreements prevail over sectoral agreements, which in turn prevail over company level agreements), and the so-called principle of most favourable rule, which implies that a lower-ranking rule can take precedence over a higher-ranking rule only if it is more beneficial to the employee.

However several reforms have introduced important changes in this framework over time. First, decentralisation of collective bargaining has been developed since the Auroux Acts in 1982³ that established an obligation to negotiate wages and working time annually. Initially, this company-level negotiation had to comply fully with the favourability principle (unless the law expressly authorises deviations). However, this rule has evolved over time, and especially in the last two years. Indeed, the highly

¹ That paragraph is based on previous syntheses of the recent developments in French industrial relations system: DG Trésor (2016) '30 years of modernising social relations in France', *Tresor Economics*, n° 160; Courtioux P., Erhel (2017), "Social Dialogue in France under Pressure: What Ways towards Worker Security in a Context of Increasing Job Flexibility?", Daniel Vaughan-Whitehead (ed.), *Reducing Inequalities in the World of Work*, Edward Elgar, 2017.

² Loi n° 50-205 du 11 février 1950 relative aux conventions collectives et aux procédures de règlement des conflits collectifs de travail.
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000693160&categorieLien=id>

³ Loi n° 82-689 du 4 août 1982 relative aux libertés des travailleurs dans l'entreprise. Loi dite loi Auroux.
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000504206>

contested 'El Khomri Act' (July 2016)⁴ reforms the hierarchy between standards, establishing the pre-eminence of company agreements on the issues of working time and employment maintenance. Employment maintenance agreements have taken precedence even over individual labour contracts, including wages (the monthly wage is still guaranteed but flexible pay and premiums can be adjusted) and working time. If an employee refuses to accept the new rules, s/he can be dismissed. However, facing the resistance of trade unions and public opinion, the government finally established that a number of important topics constitute 'fundamental issues' in relation to which company agreements cannot undercut sectoral agreements: minimum wages, occupational classifications, private social protection, vocational training, gender equality and hard/dangerous working conditions ('pénibilité').

September 2017 ordinances⁵ have slightly modified these rules. Sectoral agreements still prevail for minimum wages, occupational classifications, vocational training, private social protection, gender equality, but also for job quality standards (part time contracts, fixed term contracts...). For a few other topics (hard working conditions, disability...) sectors will decide if sector level agreements prevail over firm level agreements, but the general rule will be that company level agreements prevail.

Second, reforms have also modified the institutional framework for collective bargaining (sectors' structure, company level workers' representation...) as well as the rules for trade unions' and employers' organisations' representativeness. Concerning sectors, given their importance in the collective bargaining process, it appears necessary to reduce the number of sectors to reinforce them and avoid fragmentation. Indeed, among a total of 687 sectors in 2017 (excluding the agricultural sectors), some of them cover a particular job function (for instance journalists), or a geographical area or a socio-professional category, which results in fragmentation and lack of dynamism in some sectors. Since 2015 the reduction of the number of sectors has become a policy goal, and the target was set at the level of 200 sectors in the El Khomri law of 2016. The two criteria for sectoral restructuring are the size (sectors should cover at least 5000 workers) and the bargaining activity (sectors that have not concluded any agreement for the last ten years have to merge with other sectors).

The objective of recent policies has also been to reinforce trade unions legitimacy and therefore to base union representativeness on their results at the staff elections (rather than on the traditional presumption of representativeness that was established in 1966 for five trade unions and three employers' organisations). Since 2008, unions must reach at least 10 % of votes at company level and 8 % of votes at sectoral or national multi-sectoral level (in staff elections) to be considered representative. Elections were organised in 2013 and 2017, in which the five traditional unions maintained their position at the national level, but not in all sectors, whereas two smaller unions have been enabled to set up shop in some sectors, which promoted multiple union representation at the sectoral level.

Concerning employers' federations, an Act of 2014⁶ has introduced a rule for measuring representativeness on the basis of membership, which has become effective in 2017: at least 8% of companies⁷ must be member of a federation to allow it to be considered

⁴ Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032983213&categorieLien=id>

⁵ Ordonnance n° 2017-1386 du 22 septembre 2017 relative à la nouvelle organisation du dialogue social et économique dans l'entreprise et favorisant l'exercice et la valorisation des responsabilités syndicales. <https://www.legifrance.gouv.fr/eli/ordonnance/2017/9/22/MTRT1724789R/jo/texte>

⁶ Loi n° 2014-288 du 5 mars 2014 relative à la formation professionnelle, à l'emploi et à la démocratie sociale. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028683576&categorieLien=id>

⁷ Or 8% of employees must belong to firms that are member of a federation.

representative. In practice three employers' federation meet that criterion and have been declared representative by the Ministry of Labour (June 2017).

In parallel, the rules of validity for collective bargaining agreements (at company and sector levels) have also changed in 2008 and in 2016 and now make reference to the elections' results to increase their legitimacy. Since July 2016 El Khomri Act⁸, to be valid, a company-level agreement must be signed by union representatives representing one or more organisations accounting for at least 50% of the votes and by at least one employers' federation recognised as representative. At the sector level the threshold for representativeness is 30% of the votes. If trade unions do not reach the majority threshold they have the right to claim a referendum. According to the recent Labour ordinances employers can also organize a referendum if trade unions do not oppose to it.

Employees' representation in France is traditionally related to the size of the firms, on the basis of size thresholds. Between 11 and 50 employees, staff representatives are compulsory, and over 50 employers must accept union delegates. Company level dialogue between employers and employees takes place in the works council and in the health and safety committee for firms of 50 employees and over. However, according to recent ordinances and in order to simplify employees' representation, staff representatives, works council and health and safety committee will merge into a single institution called "*conseil social et économique*" (CSE, social and economic council). A health and safety commission remains compulsory for firms employing more than 3000 employees or involving specific health risks. They also open the possibility for employers in firms with less than 50 employees to bargain with staff representatives even if they are not mandated by a trade union, and to submit an agreement directly to employees' vote in the case of firms with less than 11 employees (20 if there are no staff representatives).

Finally, in terms of topics for social dialogue and collective bargaining, some new issues have been introduced and have contributed to bargaining dynamics. At the firm level, there has been an extension to some new issues like hard working conditions, gender equality and employment, beyond wages and working time. These topics are strongly influenced by obligations or incentives that are stated at the national level through national tripartite agreements or through the law. For instance, in 2013 the "Generation contract" (a job subsidy for firms maintaining a senior in employment and employing youth) was conditioned to having signed an agreement about youth and senior employment.

Tripartite social dialogue has also been developing in recent years. The social partners are traditionally heavily involved in the management of social security, especially public health insurance and unemployment benefits, and participate in the design and delivery of vocational training. Some specific tripartite bodies must also be consulted by the Government when proposing reforms: *Conseil Economique Social et Environnemental* (CESE) for issues related to economic policy, public health, finance, *Commission nationale de la négociation collective* (CNNC) for collective bargaining, *Conseil National de l'Emploi* (CNE) for employment and *Conseil National pour la Formation Professionnelle Tout au Long de la Vie* (CNFPTLV) for vocational training. Over the last ten years the new developments of tripartite social dialogue focus on "flexicurity" and have accepted several measures flexibilising standard labour contracts (collective dismissal rules, employers-employees mutual agreements...) in exchange of new rights to training or social protection (transferability): several acts in 2008, 2013 and 2015 were based on the transposition of national agreements. However, the most recent reforms (2016 and 2017) were decided by the Government and were not based on national agreements.

⁸ Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, see above.

To sum up, the French industrial relations model remains characterised by multilevel collective bargaining with an important role for the sector. However, it has undergone important reforms aiming at institutional simplification and decentralisation.

Extension mechanisms have not been removed and should remain very important in the new context for collective bargaining following 2017 ordinances, which maintain an important role for the sector. In France extension mechanisms involve the services of the Ministry of Labour (*Direction Générale du Travail, Direction Générale à l'Emploi et à la Formation Professionnelle*) that first control the legality of the agreement to be extended (in reference to laws, decrees, etc.). Then the CNNC (involving social partners, see above) provides validation of the extension, before the Ministry of Labour takes the extension decree.

3 Assessment of the success factors and transferability

3.1 General success factors for reforms in Portugal

The Portuguese discussion paper presents different measures implemented in Portugal to promote a more dynamic collective bargaining (from the Labour Code in 2003 to the MoU from 2011 to 2014, and most recent reforms after the end of MoU). It also suggests three directions for reform in Portugal: the continuation of the unconditional administrative extension of collective agreements; decentralisation of collective bargaining towards the company level (through opening-clauses); introduction of new topics for collective bargaining.

The French experience suggests some factors that are important for the success of such measures in Portugal. First, concerning extension, the evidence presented in the Portuguese discussion paper as well the French experience suggest that it is a powerful mechanism to achieve a high coverage rate (despite low unionisation in the French case) and to guarantee some common rights for workers. Besides it is also a way to avoid some unequal competition between firms in a given industry, as all firms have to comply with the same rule. However, in France as in other countries, it has been criticised by economists as a mechanism favouring big firms and generally "insiders" (including the most stable workers) at the expense of small and/or new and innovating firms (which may need to employ more flexible workers). Some scholars therefore advocate⁹ putting an end to extension procedures (a way that has not been followed by the French Government until now). For Portugal the relatively high level of income inequalities (as measured by the Gini coefficient or the inter-decile ratio¹⁰), which may cumulate with other types of inequalities (job quality etc.), is a strong argument for some wage bargaining at an aggregate level (national, branch...) in addition to minimum wage and for the reintroduction of extension procedures.

Second, decentralisation towards the firm level cannot be decided from the top. In France, over the recent years, firms have reacted to some incentives or obligations to bargain and conclude agreements on some new issues (like employment of senior employees) but the content of these agreements remain often very formal and does not change human resource management practices. Despite some efforts to promote "flexicurity" agreements at the company level, especially in the context of the crisis (through employment maintenance agreements, competitiveness pacts...) the number of such agreements has remained relatively low in the French context (very far from the German situation for instance, despite some interesting examples -for instance in the car industry-). French firms have mainly adjusted through traditional internal flexibility (short time unemployment, annualisation of working time...) external flexibility (and not

⁹ <https://www.lesechos.fr/idees-debats/cercle/030410877994-halte-a-lextension-des-conventions-de-branche-2097594.php>

¹⁰ Inter-decile ratio is 4.7 in 2014 in Portugal, and 3.5 in France, Gini coefficient is 0.338 in Portugal and 0.297 in France (OECD data, 2014, <https://data.oecd.org/fr/inequality/inegalite-de-revenu.htm>).

internal flexibility of working time or even wages). Although "flexicurity" has been at the forefront of national social dialogue and could be beneficial to both employers and employees it does not belong to the tradition of firm level bargaining in France –and in comparison to Germany, employees' representatives might be too weak or absent (in the case of smaller firms) at the company level to engage in this type of negotiations. If Portugal wants to promote firm level bargaining as well as some kind of flexicurity, it should be aware of the importance of having powerful social partners at the firm level –both on employees' and employers' side. Although it is higher than in France, unionisation rate of Portugal is relatively low (18.9% in 2012 according to OECD) and has been decreasing over the last ten years¹¹, which could compromise dynamic collective bargaining at the firm level.

Third, evaluation of actual implementation of decentralised collective bargaining is important, and should take into account the heterogeneity of collective bargaining according to firms' characteristics, like for instance firm size or industry. In France, size appears as a very important differentiating factor in social bargaining. Union presence (which is low on average, 8%) increases with size, as well as the presence of staff representatives (in relationship with legal thresholds). For instance, in 2011, 63% of small workplaces (between 11 and 19 employees) and 35% of workplaces having 20 to 49 employees had no staff representative, whereas that proportion drops to 9% of workplaces with 50 to 99 employees (and even 1% over 200 employees)¹² The bigger firms are the most involved in social bargaining: 94.4% of firms with at least 200 employees are concerned by social bargaining in 2013, against 7,9% for firms with 10 to 49 employees¹³. In very small firms (2 to 9 employees) the majority of decisions in such firms are taken by management without any consultation: this is the case of 92% of decisions concerning wages, 87% of decisions concerning employment, 79% of decisions concerning working time and 68% of decisions concerning working conditions¹⁴. Although it might take different forms in relationship with national regulations, heterogeneity of social dialogue across firms certainly exists in Portugal and should be taken into account. Indeed, in such a context of heterogeneity inequality across workers might be increased by reforms that give more weight to the firm level: it is a crucial issue for evaluation of current and future reforms.

Finally, concerning new contents for tripartite bargaining it may belong to the ways to improve the dynamism of collective bargaining. However, as mentioned above, new contents (gender equality, age, working conditions...) should then be appropriated by social partners at a more decentralised level to build innovative agreements and improve workers' situation. Here also some evaluation of the use of these new contents by social partners is necessary.

3.2 Transferability

The directions for reform that are presented as priorities for Portugal are also on the French political agenda, that is promoting decentralisation of collective bargaining, as well as new topics for collective bargaining. However, contrary to Portugal, a rising minimum wage combined with branch level wage bargaining has maintained some wage growth and limited the rise in inequalities. Besides, extension of collective agreements has also been maintained and the coverage rate is very high (as mentioned above).

Interestingly, the Portuguese discussion paper underlines the role of two main factors in the achievement of a more dynamic collective bargaining that appear also relevant

¹¹ http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN&Lang=fr

¹² *Enquête Relations professionnelles et négociations d'entreprise* (REPONSE, Industrial relations and company level bargaining survey) : 2010-2011. DARES, INSEE, <https://www.insee.fr/fr/metadonnees/definition/c1728>

¹³ ACEMO survey, 2013. DARES, INSEE <https://www.insee.fr/fr/metadonnees/definition/c2067>

¹⁴ ACEMO TPE survey, 2013

for the French case: measures should meet the interests of the main actors and build on existing structures in the industrial relations system.

More generally participation of social partners to the design of the reforms is a crucial issue to improve their content and their implementation. In the case of the recent ordinances in France their participation to a bargaining process during Summer may suggest better implementation and less social contestation (to be confirmed in the next months) in comparison to 2016 reform that was highly controversial. However, to meet trade unions interests, the Government still needs to build the counterparts for increased flexibility in labour market and collective bargaining regulations (better access to further training for all employees, reform of unemployment insurance to extend coverage etc.).

4 Questions to the host country in the Peer Review

- What is the current situation (in 2017) regarding the extension procedures?
- How is the minimum wage determined and does it concern all workers? Do the sectors also set conventional minimum wages in addition to the legal minimum wage?
- Are there any flexicurity agreements that have been discussed at the national level?
- Were there any negotiations about internal flexibility following the crisis (at the company level)?
- Is firm size a differentiating factor in collective bargaining dynamism in Portugal?

Annex 1 Summary table

Background to collective bargaining in the peer country

- Multi-level collective bargaining with an important role of the sector level
- Extension procedure leads to a very high coverage rate
- Reforms have promoted decentralisation of collective bargaining to the company level...
- ...as well as a change in rules and institutions for workers' representation

Assessment of collective bargaining

- Extension of agreements contributes to workers' equality
- Some flexibility at the firm level is needed but providing flexibility does not mechanically increase bargaining activity, it depends on local actors' interests

Assessment of success factors and transferability

- Participation and consistency with industrial relations system are definitively success factors
- There is also a need for evaluation of reforms and their implementation
- The situation of smaller firms should be a specific concern, as they often have no workers' representation

Questions to the host country in the Peer Review

- What is the current situation regarding the extension procedures?
- How is the minimum wage determined and does it concern all workers?
- Are there any flexicurity agreements that have been discussed at the national level?
- Were there any negotiations about internal flexibility following the crisis (at the company level)?
- Does firm size play an important role in firm level collective bargaining dynamism? What other factors play a role?

