

# OUTSOURCING AND PORTUGUESE COLLECTIVE BARGAINING

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## ABSTRACT

*The globalization, the technological innovations, the pressures of the market means that enterprises have to face new challenges that to surmount them, has to adopt new business processes, increase the productivity and innovation at all the levels, namely organizational. The new forms of business organization are based on network cooperation, and often achieved by outsourcing. The outsourcing and network programs have important effects on the rates of Union affiliation, on the collective bargaining structure, and effects on the effectiveness of Union collective bargaining as an instrument to regulate labour relations. The effects of outsourcing and network cooperation in working relationships can and should be regulated in collective bargaining. Thus, we will examine how Portuguese collective bargaining considers the complex nature of corporate employers, analyze if collective agreements consider the new working forms and the diversification of employees status, analyze the dispositions that aim to protect the employees of the outsourcer and analyze the dispositions that aim to protect the employees of contracted enterprises. So, this work aims to study, in a critical perspective, the response of Portuguese collective bargaining to the effects of outsourcing and business networks in industrial relations.*

**KEYWORDS:** collective bargaining; outsourcing; Portugal.

## INTRODUCTION

Outsourcing has important effects in the individual and collective employment relationships. We aim, in this presentation, to appoint the effects of that organizational form in collective employment relationships and figure how Portuguese collective bargaining regulates it. However, attempting on the differences between Portuguese and English or Spanish collective relations and collective bargaining system, we thought it appropriate to outline the Portuguese framework.

## BRIEF NOTES ON THE SYSTEM OF COLLECTIVE BARGAINING IN PORTUGAL

The study about the consequences of the *outsourcing in Portuguese collective bargaining* presumes the knowledge of the Portuguese collective bargaining system, so we will first outline the framework of the Portuguese collective bargaining.

### The Consecration Of The Constitutional Right To Collective Bargaining

Collective bargaining is an employee's fundamental right, consecrated in article 56., n 3, of the Portuguese Constitution. According to this article, the collective bargaining is a right that can only be exercised by trade unions, a right of the trade union, which has to be assured by law.

The 2009 Labour Code innovated the collective bargaining capacity: now the trade union can delegate its power to sign collective agreements to the enterprise's representative structures, such as workers' councils (article 404., al. b) e c), *Código do Trabalho*), if the enterprise has, at least, 500 employees (article 491., n. 3, *Código do Trabalho*). Legally, it is a delegation of powers and not a recognition of an autonomous capacity of the structures of collective representation, at the enterprise level, to negotiate.

### The Scope Of Personal Effectiveness Of The Collective Bargaining

In Portugal, the collective bargaining framework establishes a limited personal effectiveness of the collective agreements. By the affiliation principle (article 496. *Código do Trabalho*), the collective agreements are applied to employees who are affiliated in a union that signed the convention and work in the company that signed the convention, or also work in companies, which are members of the association of employers that signed it. Since we need two conditions for the collective agreement to be applied to an employee, there are authors that call this principle “principal of dual affiliation”.

### **EFFECTS OF OUTSOURCING IN COLLECTIVE BARGAINING**

#### Effects on The Rates Of Union Affiliation.

In Portugal, the rate of unionization has fallen from 52% in the period 1974/78 to about 18.4%, in 2007. Outsourcing break the bonds of solidarity between the workers and, consequently, the ability to take industrial action. We can point historical (in 1974, as a result of revolutionary fervor, Portugal had a union membership rate above average; with the stabilization of democracy there was a decrease in the natural impulse of union membership) and economic factors (such as the decrease in the importance of the secondary sector and the growth of the tertiary reduced the field where the unions traditionally operated; the enterprises in the tertiary sector are often smaller or the activities are done by independent workers; reducing the size of the enterprises contributed to the spread of false feelings of familiarity between employer and employees; **the fixed term contracts and other atypical contracts increase job insecurity**; the multiplicity of legal ties under which people work, reduces the quantity of workers in the same situation, and that complicates trade union actions because employees do not identify themselves with other workers; the outsourcing implicates the geographical dispersion of the workers when they work in a place that belongs to another entrepreneur and it makes more difficult to create a common identity and objectives for all employees of a company and between them and a union; the increase of independent work also contributes to the decreasing of union affiliation; the pluralism of unions and of employers' associations, together with the absence of a system of trade union and employer representativeness, contribute to the dispersion of the collective strength, which penalizes the unions mostly).

#### Effects of Outsourcing in the Structure of Collective Bargaining

In Portugal, the highest number of collective agreements is celebrated between trade unions and employer associations regarding an activity sector.

We can notice a significant increase of collective agreements between one enterprise and one or more Unions. However, this kind of collective bargaining is not the one which can regulate outsourcing in an efficient way. To do that, collective bargaining needs to be applied to all the involved enterprises, and that can only be achieved if the union negotiates with all the involved enterprises at the same time.

The formation of business networks can be done by groups of companies. Hence, it would be expectable that these groups would be an operational area for collective bargaining negotiation. However, we cannot find many group collective agreements. This may be due to the fact that it is not in the interest of the group to have this kind of collective bargaining, preferring to take advantage of all the benefits of the juridical independence among enterprises, namely the possibility to treat employees with the same functions, differently, without breaching the principle of equality.

The absence, in Portuguese Labour Law, of a legal definition of “group of enterprises”, in order to define the field of its application effects, and the inexistence of employee-representative structures at this level are two factors that, we believe, contribute to the poverty of collective bargaining at this level.

But the networking organization can also be constituted by other types of relations between enterprises, besides company groups. In that case, the diversity of sectors and professions covered by the network brings more difficulties to collective bargaining regulation.

Outsourcing also has effects in the employees’ collective representation in each enterprise that composes the network, and brings the necessity of a collective representation of the employees network.

#### Effects of Outsourcing and Business Networking Organization on the Effectiveness of Collective Bargaining as a Means to Regulate Labour Relations

We can find multiple factors that, in our days, are able to contribute to the impoverishment of the content of collective bargaining and, consequently, of its possible failure as a normative instrument:

- The small size of enterprises hinders the promotion of collective bargaining.
- The dependent position of the network enterprises from a bigger enterprise.
- When the outsourcing determine that the work is done in the outsourcer enterprise, the integration of such workers in a specific field of negotiation becomes more difficult.
- Outsourcing cause a weakening of unions and, in general, of the structures of employee representation.
- Outsourcing contributes to the increase of the number of economically dependent workers and autonomous workers. A large number of activities which took place under juridical subordination are now done in an autonomous way. The independent work, in Portugal, is not regulated by Labour Law. So the collective bargaining does not apply to this group of workers. Outsourcing and business networking organization contribute to the “escape” of a large number of workers from Labour Law.
- Through the legal transference of undertaking it is also possible to escape from the application of a collective agreement.

It is inevitable to conclude that outsourcing and business networking organization undermine the efficiency of the instruments, traditionally used, to neutralize employers’ abuses, especially union action and the collective bargaining.

#### **OUTSOURCING AND ANSWERS FROM THE PORTUGUESE COLLECTIVE BARGAINING: BETWEEN DISREGARD AND SHY REGULATION**

We focused our study on the following aspects: *i)* how collective agreements considers the complex nature of corporate employers; *ii)* analyze how collective agreements consider the new working forms and the diversification of employees status; *iii)* analyze the dispositions that aim to protect the employees of outsourcer; *iv)* analyze the dispositions that aim to protect the employees of contracted enterprises.

##### The Complex Nature of Corporate Employers

Besides the fact that the Portuguese structure of collective bargaining does not reflect the effect of outsourcing and of business networking organization, its content is not very full of solutions in order to solve the problems caused by this kind of business organization.

Some collective agreements consider the relations of cooperation established between enterprises through the recognition of employee seniority, especially when employees are transferred from one enterprise to another.

The collective bargaining also considers enterprise cooperation relations in terms of holidays. In the considered sample we found one collective agreement that establishes that employees of the same household working in enterprises to which the collective agreement is applied, the right to have holidays in the same period.

Portuguese collective bargaining also considers cooperation relations between enterprises, allowing that, between two enterprises with common organizational structures, one enterprise lends to another employees. It is what we call occasional lending of employees.

About this issue, we can find collective agreements that: *i)* only remit to the Labour Code; *ii)* forbid the lend of employees between enterprises; *iii)* establish more permissive rules for the lending employee, especially concerning the term of the lending.

#### The Consideration of The New Working Forms

Despite the fact that the Portuguese doctrine does not discuss the problem of the rights of independent workers to celebrate collective agreements and the lack of jurisprudence about it, the truth is that the collective agreements, in the construction sector, mention those who work in an independent way. The mentioned collective agreements establish a hiring preference (under a labour contract) when the worker already works for the enterprise under a service contract. These kind of clauses brings us to the problem of their juridical nature, applicability and legality.

#### The Protective Clauses of The Outsourcers' Employees

Some clauses about contract transmission in case of closure of the undertaking protects the outsourcer's employees through the promotion of contract stability. If, as an outsourcing consequence, the undertaking must close we have a group of employees that have to be dismissed, if another solution is not established. Thus, the collective bargaining can regulate the integration of the outsourcers' employees in another undertaking belonging to the same enterprise or to another that is obliged by the collective agreement.

One problem caused by the legal rule of automatic contract transference in case of undertaking transference, and which is increased by outsourcing and business network organization, is the fact that Portuguese Labour Law does not have an article conferring the transferred employee the right to oppose that employer transference. The collective bargaining can fulfill the lack of regulation and establish not only that right, but specially the consequences of its exercise.

In our research we found clauses that stipulate the maintenance of employees in case of succession of companies in the provision of the same activity. The Spanish doctrine calls them "clauses of subrogation." In those clauses, the enterprise that will develop the activity assumes the obligation of keeping the employees of the enterprise that, to that date, was developing the activity. In the described cases, we can have two different realities: *i)* a real transference of undertakings – if we can prove that the transmitted employees, in that specific context, consubstantiate the economic unit; *ii)* a simple sequence of enterprises in the same activity. In that second case, the maintenance of the employees is only due to that established in the collective agreement and cannot be confused with an undertaking transference.

These clauses bring juridical problems. The Court of Justice of the European Union has already pronounced that the maintenance, by the enterprise that won the concession to develop an activity, of some employees of the former enterprise, could determinate a transference of undertakings in the Council Directive sense. Consequently, the new enterprise has to keep all the employees and cannot keep only a few. This interpretation will, certainly, inhibit the social partners to negotiate such clauses.

In terms of collective redundancies, the collective bargaining could establish a more detailed procedure or measures that employer should provide, despite the fact the system of termination of employment contract in Portugal has, in principle, an absolute mandatory requirement. Although the collective agreements could provide/foresee other kinds of protective clauses, such as: *i*) active employer contribution in the search for a new job, such as the payment of an amount to help the public employment services support the higher costs resulting from a larger number of users or the hiring of new human resources professional to help the workers find new jobs; *ii*) in the case of groups of enterprises, the collective agreements could institute a preferential right in the employees' access to employment in other companies of the group.

We only found clauses that limit outsourcing in one collective agreement, although they are permitted by our legal and constitutional system. We think that the collective bargaining should establish rules to protect employees from the consequences of outsourcing, rather than forbidding it.

#### The Protective Clauses of The Employees of The Hired Enterprise

One of the biggest problems of the outsourcing and business networking organization is the increase of the number of fixed term contract, which contributes to labour instability. We studied several collective agreements in order to find how social partners solve this problem. In the sample of collective bargaining, we found the following kinds of clauses related to fixed-term contracts: *i*) clauses about the link between the term and its cause (we found collective agreements, which do not require the employer to establish the causal link between the reason for the hiring and term relied; these clauses are illegal and unconstitutional; we did not find any conventional clause about the employers' possibility to hire through a fixed-term contract based on a cooperation contract he had firmed with another enterprise, however, this possibility seems to be allowed in those clauses that dispensed the employer to invoke the cause of the contract); *ii*) the majority of the conventional clauses allow the celebration of fixed-term contracts in more prejudicial conditions for the employees (for instance, extending the statutory number of years for the contract); *iii*) only a few collective agreements stipulate advantages for employees concerning this item, generally to give them a better compensation in case of contract termination.

One of the motives to outsource an activity is cost reduction. When this motive is only related to labour costs, it becomes an issue to be regulated by collective bargaining. However, we did not find any collective agreement that, for instance, linked payment conditions of the outsourcer' employees and the employees of the hired enterprise, at least, when they work in the same place.

The coexistence of workers, belonging to different employers in the same physical space, is recognized as a key enabler of accidents. However, we only found one collective agreement with clauses about labour health and security in a business networking context. Thus, this is also an issue to be explored in Portuguese collective bargaining.

One of the negative consequences of outsourcing and business networking organization is the general prejudice of collective rights, namely because of the increasing of employees representation of the network. In the sample, we only found one collective agreement that regulates reunion right and right to installations of the employees' representatives when the employees work in the enterprise owned by the person who celebrated the cooperation contract with the employer.

#### **BIOGRAPHY**

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