

Chapter 23

Portugal: reforms and the turn to neoliberal austerity

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The Portuguese system of industrial relations that developed after the 1974 democratic revolution has experienced important changes over the years. This intensified from the late 1980s, with the emergence and institutionalisation of tripartite concertation and its direct and indirect influence on labour legislation and collective bargaining. Since around 2000, however, after the integration in the euro zone and in the new context of global competition, the legal foundations and institutions of collective bargaining have been significantly challenged. In 2003 and 2009 major changes in labour legislation reconfigured the legal framework of collective bargaining, established in late 1970. This paved the way for the erosion of the unions' bargaining power by breaking with the favourability principle, as well as allowing the unilateral termination of collective

Table 23.1 Principal characteristics of collective bargaining in Portugal

Key features	2000	2016
Actors entitled to collective bargaining	Unions and employers/employers' associations at industry and company level. Since 2009, non-union structures with a union mandate can also negotiate company agreements (first in firms with more than 500 employees and since 2012 in firms with more than 150 employees). A union mandate is a constitutional requirement.	
Importance of bargaining levels	The industry level is the most important level in terms of bargaining coverage.	
Favourability principle/ derogation possibilities	The favourability principle, according to which collective agreements may not set worse standards for employees than those laid down in labour legislation, was reversed in 2003 and only partly re-established in 2009.	
Collective bargaining coverage (private sector) (%)	95 (2002)	87*
Extension mechanism (or functional equivalent)	Collective agreements were extended almost automatically until 2011. During the period 2012–2016, extension was conditional on the representativeness of employers' associations. Since 2017 more inclusive criteria have been in place, based on the constitutional principle of 'equal pay for equal work'.	
Trade union density (%)	22	19 (2015)
Employers' association rate (%)	52 (2002)	39 (2014)**

Note:

* Author's calculations based on information (2002–2016) from DGERT/Ministry of Labour, Solidarity and Social Security regarding the agreements in force and the agreements published annually, based on the mandatory questionnaire to all private sector companies (Quadros de Pessoal).

** See Green Paper on Labour Relations 2016, analysis based on data collected through the mandatory questionnaire conducted at all private sector companies for the Relatório Único, implemented by the Ministry of Labour, Solidarity and Social Security (Dray 2016).

Sources: Appendix A1.

agreements. Furthermore, after the intervention of the Troika, consisting of the European Commission, the European Central Bank and the International Monetary Fund, between 2011 and 2014, drastic legislative and other government measures, in particular limiting the extension of collective agreements and reducing agreements' period of validity, have plunged collective bargaining into the greatest crisis seen in 40 years of democracy. This has put Portugal in the category of countries under 'frontal assault' (Marginson 2015). Attempts to reconstruct bargaining dynamics and rebuild its institutions have been on the political agenda since the left returned to power in 2015 (Table 23.1).

Industrial relations context and principal actors

In Portugal, the building of a pluralist democratic society and collective bargaining institutions went hand in hand, following the democratic revolution in 1974 (Ferreira 1993; Barreto and Naumann 1998). The revolution had a long-lasting influence on the emerging labour movement, which was fractured by ideological and political divisions. In the first years of democracy, the hegemony of the General Confederation of Portuguese Workers–Inter-Union National (Confederação Geral dos Trabalhadores Portugueses–Intersindical Nacional, CGTP) was challenged by the creation of the General Union of Workers (União Geral de Trabalhadores, UGT) in 1978. Competition and divergence between the two confederations continued, although mutual recognition and occasional joint action improved as time passed (Campos Lima and Martin Artiles 2011 2014). CGTP has proved able over the years to achieve higher membership¹ and has a much higher mobilisation capacity. UGT has played a crucial role in the emergence and institutionalisation of social pacts in Portugal (Campos Lima and Naumann 2011). The division between the confederations impacted collective bargaining because it created competing unions and, in some industries and occupations, resulted in parallel collective agreements.

Employers have four associations that participate in tripartite concertation: the Confederation of Portuguese Business (Confederação Empresarial de Portugal, CIP, 1974), which is the largest, dominant in manufacturing and at present also important in other industries; the Portuguese Trade and Services Confederation (Confederação do Comércio Português, 1976); the Portuguese Confederation of Farmers (Confederação dos Agricultores de Portugal, 1975); and the Portuguese Tourism Confederation (Confederação do Turismo Português, 1995). Until the turn of the century the state played a crucial role in regulating industrial relations, under the principles defined by the Constitution and the Collective Bargaining Act of 1979. Key principles included: the exclusive prerogative of unions to negotiate collective agreements; application of the favourability principle to the relationship between statutory regulations and

1. According to the latest published data (see Appendix A1), in 2011 CGTP had around 460,000 members, UGT around 193,000 and independent unions around 19,000 members. There is some discrepancy between these data and the union confederations' own assessment, in particular UGT. According to its latest report (13th congress of CGTP /February 2016), CGTP has lost almost 64,000 members in the past four years, one-tenth of the 614,000 members it had in 2012. UGT reported (Expresso, 20 April 2016) that it had lost 80,000 members between 2012 and 2016, estimating at present it has around 420,000 members (Perista *et al.* 2018).

collective agreements; the principle of the continuing validity of collective agreements, whereby an agreement could expire only by joint decision of the signatory parties and when replaced by another agreement; and the principle of extending agreements to all companies and workers. Tripartite concertation added new challenges to collective bargaining in the late 1980s and in the 1990s, in particular regarding wage moderation and working time flexibility (Campos Lima and Naumann 2011; Dornelas 2010). The existing collective bargaining institutions showed sufficient elasticity to accommodate such challenges, however.

The picture changed radically after the turn of the century, when the Labour Code (Código do Trabalho) entered into force in 2003. The new Code, a unilateral initiative of the centre-right coalition between the Social Democratic Party (Partido Social Democrata, PSD) and the Social and Democratic Centre (CDS-Partido Popular, CDS-PP), represented a major shift. First of all it broke with the favourability principle, allowing collective agreements to deviate *in pejus* from statutory regulations; and secondly it broke with the principle of continuity by allowing any signatory party to request unilaterally the expiry (*caducidade*) of existing agreements after a period of unsuccessful negotiations (Pernot 2003; Ramalho 2013; Naumann 2014). In 2004, following the entry into force of the new Code, the government used its prerogative to block the publication of extension ordinances. Collective bargaining entered into crisis with an unprecedented fall in the number of collective agreements that were updated and the proportion of workers covered.

After the Socialist Party won an absolute majority in the 2005 national elections, labour market and collective bargaining reforms were back on the political agenda. In 2006 the government and the social partners signed an agreement on a minimum wage increase. This was the first tripartite mid-term agreement (2007–2011) and its explicit goal was to raise lower wages. This agreement influenced collective bargaining developments, in particular in industries in which the collective agreement wage floor corresponded to the statutory minimum wage. When the global financial crisis started in 2008, new labour market reforms were already under way. The government and social partners, with the exception of CGTP, concluded a tripartite agreement in 2008. This served as the basis for the 2009 Labour Code. Important reforms were also launched in the public sector, aligning its regulations to a certain extent with those in the private sector. This included the right to conclude collective agreements in public administration, although with much more limited scope. The 2009 Labour Code did not re-establish the favourability principle but did lay down conditions on which collective agreements could not deviate *in pejus* from statutory regulations. It not only failed to reverse the possibility of cancelling collective agreements unilaterally, but also introduced new rules facilitating the expiry of existing agreements with a ‘survival clause’ (Naumann 2014). On the other hand, guarantees were introduced to protect certain individual rights of workers whose collective agreements expired. It also introduced the possibility for non-union representative structures to conclude agreements at company level, if they have a trade union mandate (Pernot 2009; Távora and González 2016; Campos Lima and Abrantes 2016).

Despite these in-depth reforms, the Memorandum of Understanding (MoU) between the Troika institutions and the interim government of the Socialist Party (Partido Socialista, PS), signed on 17 May 2011, required new far-reaching measures with direct and indirect impacts on collective bargaining. These measures were implemented by the centre-right PSD–CDS coalition, in power between June 2011 and November 2015. This government also took steps beyond what the Troika had demanded, using the crisis to advance its own agenda (Campos Lima and Abrantes 2016; Moury and Standing 2017). The neoliberal austerity package included the following:

- blocking collective bargaining in the public sector, unilateral cuts in nominal wages and working time increases;
- freezing the minimum wage from 2011 to 2014;
- facilitating dismissals and temporary work and reducing unemployment protection;
- reductions in overtime payments and individual working time accounts, circumventing collective bargaining.

The most critical measures with a direct impact on the legal framework of collective bargaining included breaking the principle of general extension of collective agreements; reducing the expiry deadlines of collective agreements; shortening the period of validity of expired agreements; and introducing the possibility for companies in financial difficulties to derogate from collective agreements. The result was an unprecedented and dramatic crisis in collective bargaining (Schulten and Müller 2013; Cruces *et al.* 2015; Campos Lima and Abrantes 2016; Távora and González 2016; ILO 2018).

A new political cycle started in November 2015, with an unprecedented political alliance at national level between the PS government and the left parties, including the Left Block (Bloco de Esquerda, BE), the Portuguese Communist Party (Partido Comunista Português, PCP) and the Ecologist Green Party (Partido Ecologista os Verdes, PEV). The new government enacted a number of new economic and social policies. They included the reversal of cuts in wages, pensions and social benefits, as well as the introduction of an upward trajectory for the national minimum wage and commitments to combat precarious employment. This favoured economic growth and led to a significant fall in unemployment, creating more encouraging conditions for collective bargaining (Campos Lima 2017; ILO 2018). The most important initiatives with a direct focus on collective bargaining since the January 2017 tripartite agreement were implemented, too (CES 2017). They included a bipartite agreement between trade union and employer confederations committing their members to suspend temporarily (for 18 months) resort to unilateral requests to terminate agreements and a government decree replacing the extension criteria based on employer association representativeness with new, more inclusive criteria, based on the constitutional principle of ‘equal pay for equal work’.

Extent of bargaining

The extent of bargaining in Portugal has been characterised by three features that assured high coverage of collective agreements in the private sector over the years (see Table 23.1 and Appendix A1.A). First, the prevalence of multi-employer agreements compensated

for the limited presence of company bargaining. Second, the quasi-automatic extension of high-level agreements compensated for the low employer association rate and union density. Third, the validity and the so-called ‘ultra-activity’ of collective agreements allowed agreements, and extensions, to remain in force until they were replaced by others (Ramalho 2013). For decades, these three features performed a ‘protective role’ with regard to the extent and security of bargaining. Equivalent to the *erga omnes* principle in its consequences, extension depended, however, on a government decision (extension ordinances), when a request was made by one of the signatory parties or both. In the absence of extension, collective agreements would apply only to the members of employer associations and union signatory organisations (requirement of double affiliation). Coverage would be entirely dependent on the organisation rate of employer associations and union density.

The organisation rate of employer associations dropped from 58 per cent in 2002 to 38 per cent in 2011 and union density dropped from 21 per cent in 2002 to 18 per cent in 2012 (see Appendix A1.G). Recent data indicate that in 2014 the employers’ organisation rate was around 39 per cent.² While it has been argued that the decline of trade union density might be related to the incentives for free-riding resulting from the extension of collective agreements, there is no conclusive evidence for a causal link between extension and density levels (Addison *et al.* 2015; Vilares 2015; Naumann 2018). Furthermore, because of extensions, the coverage of collective agreements in force has been much higher than membership rates (of unions and employers’ associations), but did not reflect their intensity of variation, although it has been continuously declining since the early 2000s (see Table 23.1 and Appendix A1). While extensions may have played a role, there are more important reasons for the membership decline. Deindustrialisation and the increase in precarious jobs might have played a role, over the years, in particular since the mid-1990s. Between 1995 and 2001 the share of temporary jobs in Portugal increased by around 10 percentage points, reaching around 20 per cent, a proportion that continues, with slight variations, until today. More recently, the spread of firms’ strategies of externalisation, subcontracting and outsourcing might also have influenced the decline of membership rates. On the other hand, poor outcomes of collective bargaining and the cancellation of collective agreements, sometimes replaced by agreements with lower standards signed by minority unions, might have contributed to workers’ disengagement and exit from unions. In the period of Troika intervention, during which the practice of extension was practically suspended, employer associations were afraid that companies would exit associations, once social dumping was established in the absence of extension of agreements to all companies and workers.

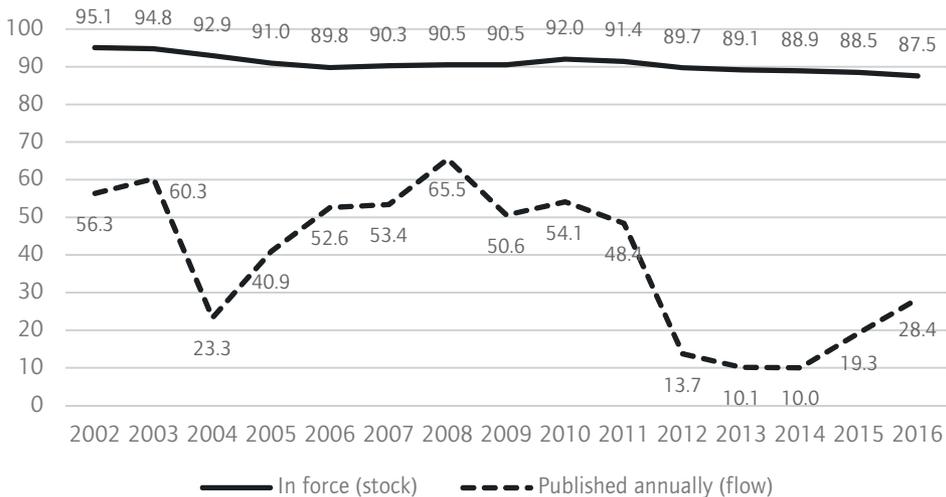
The negative impact of the new conditions and regulations on the extent of bargaining between 2011 and 2014, in particular the drastic reduction of extension ordinances, should be measured not only in terms of the decline of the overall coverage of agreements in force or the ‘stock of agreements’, which is the indicator normally used in international comparisons, but also in terms of the ‘flow’ of agreements, that is, newly concluded and renewed agreements (Adison *et al.* 2015; 2017; OECD 2017; ILO 2018).

2. According to the Green Paper on Labour Relations 2016 (Dray 2016) companies in Portugal claiming to be affiliated to employers’ associations (19 per cent of the total) employed 39 per cent of all workers.

This is because the ‘stock’ of agreements comprises all agreements that have not been updated but remain in force plus the ‘flow’ of agreements concluded or renewed each year. While the stock of agreements gives an idea of the proportion of employees legally protected by collective agreements, it does not reflect bargaining dynamics, which can be captured only by looking separately at the ‘flow’ of agreements. This distinction is very important because annually concluded and published agreements can be new, but more often, in relation to wages and other conditions, are updates or amendments of existing agreements. Also, many agreements can be in force for several years without change, when negotiations fail to update them and their regulatory capacity diminishes (and no action is taken to terminate such agreements).

The implications of this distinction are particularly clear in relation to wage bargaining. In Portugal, wage bargaining is supposed to take place annually, and there is no practice of negotiations covering wage updates for successive years. Consequently, when negotiations fail and agreements remain in force, the nominal agreed wage levels, in absolute terms, remain identical to what was settled in the last agreed update, no matter how many years previously. Often, particularly in times of crisis, employers refuse to sign wage agreements. In effect, this strategy corresponds to wage devaluation (Campos Lima and Jørgensen 2016). This means that analysis of the ‘flow’ of agreements not only provides a picture of who is covered by wage updates or other conditions in that year but also of who were not covered. This is even more important because updates refer mainly to wages. Based on official administrative data,³ Figure 23.1 compares the

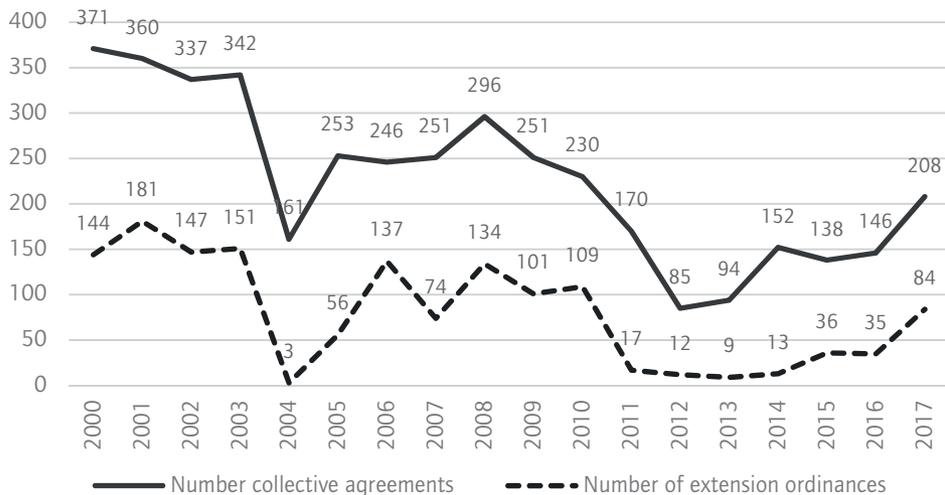
Figure 23.1 Coverage rates of collective agreements in force and those published annually, 2000–2016 (%)



Source: Author’s calculations based on DGERT/MTSS (2002–2016).

3. Author’s calculations based on information (2002–2016) from DGERT/Ministry of Labour, Solidarity and Social Security regarding the agreements in force and the agreements published annually and based on the mandatory questionnaire to all private sector companies (Quadros de Pessoal).

Figure 23.2 Number of collective agreements and extension ordinances annually published, 2000–2017



Source: DGERT/MTSS (2002–2017) (www.dgert.gov.pt).

development of both indicators: the coverage of agreements in force and the potential coverage of annually published agreements since 2000. Furthermore, the case is even more critical, if the expression ‘potential’ coverage is taken to mean the theoretical coverage of ‘flow’ agreements if they are extended. In the period between 2011 and 2014 this was extremely rare (Figure 23.1 and Figure 23.2).

The variation of the flow, which displayed a sharp decline in 2004 and an unprecedentedly dramatic decline during the Troika period (2011–2014), is profoundly connected to the impact of the economic crisis and, even more, to the ensuing crisis management. This resulted in a reduction of both the number of collective agreements concluded each year and the number of extensions (Figure 23.2). In fact, the most critical challenges to the extent of bargaining occurred in these two distinct periods of the 2000s, marked by economic crisis. In both cases it was the consequence of anti-labour legislation introduced by a centre-right coalition government: the 2003 Labour Code and the 2012 amendments to the 2009 Labour Code.

While in 2004 the centre-right government’s strategy was to block the publication of extension ordinances, since 2011 the same story has been repeated but with three major differences. First, the austerity policies that were implemented, prolonged and amplified the crisis; second, the collapse of negotiations was prolonged; and third, the new regulations introduced stricter criteria for the extension of agreements. Resolution 90/2012 established two central conditions for the extension of collective agreements: first, employers’ associations had to represent at least 50 per cent of the employees in the industry; and second, the implications of extension for the industry’s competitiveness had to be taken into consideration. These more restrictive criteria not only led to a sharp

decline in the number of extensions but also blocked the negotiation of agreements, in particular at industry level. Employers were reluctant to enter into new agreements that would not be extended. Over the years, the critical importance of the extension regime in compensating for the increasing organisational weakness of bargaining actors became apparent (Naumann 2017; ILO 2018). Both employers' associations and unions opposed the restrictive extension regime because it did not prevent unfair competition and did not acknowledge their organisational difficulties in an economy dominated by small and micro companies. In 2014, new criteria were added that allowed extensions also when employers' associations consisted at least of 30 per cent of micro, small and medium-sized enterprises (Resolution 43/2014).

As a consequence, from 2015 the extent of bargaining measured by the flow of collective agreements started to recover, although not yet reaching the pre-crisis level. In the following years, there was a political turn to the left, breaking with austerity and leading to economic recovery and falling unemployment. Other favourable conditions also encouraged the recovery of collective bargaining. Following the January 2017 tripartite agreement (CES 2017), Resolution 82/2017 introduced new and more favourable criteria for the extension of agreements. In particular it removed the representativeness criteria and introduced more inclusive criteria based on the constitutional principle of 'equal pay for equal work', with the explicit aim of promoting social and gender equality.⁴ The resumption of extension ordinances went hand in hand with the recovery of the number of collective agreements registered in 2017, although it was still below the level of the pre-crisis years (Campos Lima 2017) (see Figure 23.2).

While in the private sector steps were taken to improve the extent of bargaining, in public administration the blockade of collective bargaining that occurred in response to the 2008 crisis is still in place. The crisis and austerity policies implemented froze bargaining on wages, career development or other statutory matters, as well as, from 2012, the entry into force of the new types of collective agreement focused on working time envisaged by the 2008 legislation⁵ (Stoleroff 2007, 2013; Campos Lima and Abrantes 2016; Campos Lima 2017). Furthermore, in the domain of wages and working time the centre-right government's unilateral decision to cut nominal wages and increase weekly working time from 35 to 40 hours led to a social backlash. When the PS government came to power at the end of 2015, the public sector cuts were reversed and the 35-hour week and bargaining on working time were restored. Collective bargaining on wages and career development, subject to statutory regulation, remain blocked, however. The government continues to pursue a restrictive budgetary policy in order to fulfil the requirements of the new European economic governance.

4. Resolution 82/2017 includes the following, more inclusive criteria: the impact on the wage scale and on the reduction of inequality, the percentage of workers to be covered and the share of women that will benefit.

5. Law 12-A / 2008 and Law 59/2008 extended to all public employees the possibility to be covered by collective agreements. This is very limited in scope, however, as part of a move to align public administration regulations with those in the private sector.

Security of bargaining

Security of bargaining refers to the factors that determine the bargaining role of trade unions, such as legislation on trade union recognition and strikes or any other forms of support offered to trade unions by employers or the state. Since 1976, the Constitution has recognised workers' freedom of association and trade union rights, including their exclusive right to enter into collective agreements. The 2009 Labour Code introduced the possibility for non-union representative structures to conclude collective agreements at company level on condition they have a union mandate, and only in companies with at least 500 workers. In 2012, in line with the Troika memorandum of understanding, legislation lowered this threshold to 150 workers, but did not follow the requirement for negotiations at company level without a union mandate, because this contradicted the constitutional principle of an exclusive trade union prerogative for collective bargaining.

The Constitution guarantees the right to strike and prohibits lockouts. It establishes that workers can define the scope of the interests that are to be asserted by a strike and that the law may not limit that scope. These constitutional principles survived to the following revisions of the Constitution, including the latest revision in 2005, and to legislative attempts to limit the right to strike.⁶ The decision to organise strikes remains the prerogative of unions, with a particular exception at company level: if the majority of workers are not represented by unions, an assembly called by 20 per cent of the workers can decide to resort to strike action, provided the vote is approved by the majority of voters in a secret ballot. This has been a rare occurrence, however. The only restrictions on strikes are the need to provide minimum services during a strike, in certain industries,⁷ and a notice period, at present five days in general and ten days for 'public utility services'.

The legal framework integrated, until 2003, two protective principles that provided security of bargaining over the years. First, the favourability principle, according to which collective agreements were forbidden to go lower than legally guaranteed minimums and could only exchange them for better working conditions; that is, changes *in pejus* were prohibited (Leite 2004; Amado 2012). Second, the principle of continuity of collective agreements, according to which collective agreements could expire only by joint decision of all signatory parties or when replaced by another collective agreement between the same signatories (Naumann 2014). These two protective principles, which the neoliberal model perceives as 'labour market rigidities' preventing adaptation to globalisation, were broken by the 2003 Labour Code. It established that collective agreements could contradict unfavourably (*in pejus*) any provisions of labour legislation and allowed unilateral cancellation (*caducidade*) of collective agreements by any of the signatories, after a period of ineffective negotiations. The combination of these provisions enhanced employers' power to press the unions to concession bargaining by threatening to withdraw from, and eliminate, agreements considered outdated,

6. The 2003 Labour Code tried to introduce a 'peace clause' to prevent strike action while collective agreements were in force. This attempt was ruled out by the Constitutional Court; Judgment 306/2003, 18 July.

7. These include postal service and telecommunications; medical services and public health; power supply, mines and fuel; water supply; firefighting; public transport of cattle, public perishable foods and essential goods.

irrespective of the level at which they were concluded. The unilateral cancellation of agreements was furthermore facilitated by ‘collective agreement parallelism’,⁸ a unique feature of the Portuguese collective bargaining system (Leitão 2001). This permitted employers to cancel an agreement with one union if they had a parallel agreement with a competing union.

Under the PS government, the 2009 Labour Code re-established the favourability principle in certain domains. They included limits on normal daily and weekly working; the minimum duration of rest periods, including the annual holiday period; the maximum duration of night work; forms of compliance and guarantees of remuneration; prevention and repair of occupational accidents and diseases; and the rights of elected employee representatives. Nevertheless, the favourability principle was not fully re-established as a universal principle. For example, the level of overtime payments and the range of reasons for hiring employees on short-term contracts were not explicitly covered by the favourability principle. Despite introducing some measures to protect the individual rights of workers whose collective agreements had expired, the 2009 Labour Code did not reverse the possibility that collective agreements could be terminated by unilateral decision. Furthermore, it also extended unilateral termination to agreements that included a ‘survival clause’, a measure not foreseen by the 2003 Labour Code. Until the 2009 Labour Code came into force, agreements with a ‘survival clause’ were protected against unilateral termination. The clause stipulated that they could be terminated only by joint decision of the signatory parties and when replaced by a new agreement signed by the same partners. With the 2009 Labour Code, however, they also became subject to the possibility of unilateral cancellation, under certain conditions, after a period of five years (Naumann 2014).

Security of bargaining worsened when, in line with Troika requirements, in addition to the restrictions on extension, the legislation in 2014 reduced the period after which collective agreements could be terminated unilaterally from five to three years and cut their period of validity after expiry from eighteen to twelve months. It also established the possibility of temporarily suspending part of or an entire collective agreement in companies in crisis, although on condition of a written agreement between the employers’ associations and unions. The 2017 Tripartite Commitment to a Medium-term Concertation Agreement included a bipartite agreement between unions and employers’ associations (extended also to the state as an employer) to commit their members not to unilaterally require the expiry of collective agreements for a period of eighteen months. It did not require a change in legislation to introduce a joint decision of the collective agreement signatories as a prerequisite for terminating agreements. A tripartite agreement signed in May 2018 (CES 2018) envisages reinforcing mediation and arbitration procedures but does not break with the possibility of unilateral termination of agreements. That is one of the main reasons CGTP did not sign the agreements.

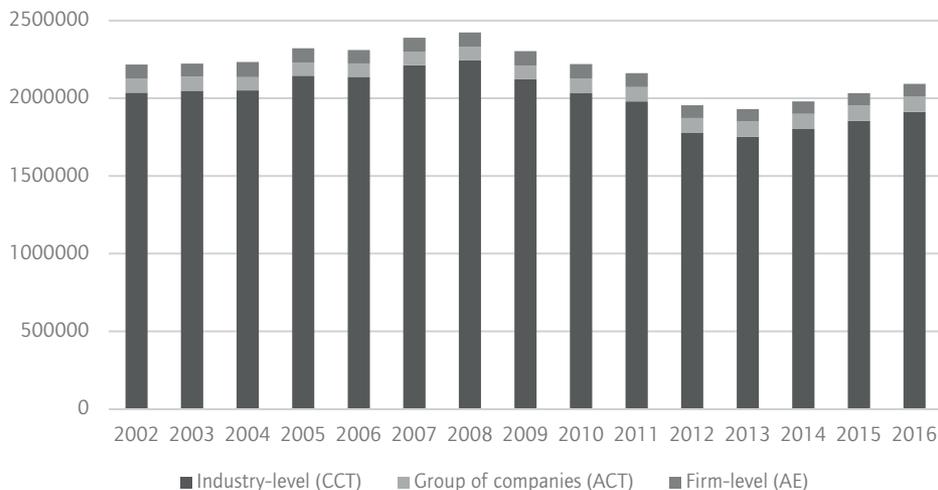
8. ‘Collective agreement parallelism’ refers to a situation in which two or more collective agreements have ‘industry, professional and territorial scopes which are totally or partially coincidental’ (Leitão 2001: 457). In contrast to Spain and France, in Portugal union pluralism translates into ‘parallel agreements’ that mirror trade union divisions, mainly between those affiliated to CGTP and UGT.

Level of bargaining

Cross-industry collective agreements signed by unions and employers' confederations, covering the whole economy or at least the private sector, do not exist in Portugal. Collective bargaining therefore takes place at industry and firm level. As Figure 23.3 illustrates, the former is far more important in terms of coverage. The legislation concerns two types of multi-employer agreement: the collective labour contract (Contrato coletivo de trabalho, CCT) and the collective labour agreement (Acordo coletivo de trabalho, ACT). Collective labour contracts are signed by one or more employers' associations and unions. This applies to the large majority of industry-level agreements in the private sector. Collective labour agreements are signed by unions and by a group of companies, as in banking. Firm-level agreements (Acordos de Empresa, AE) could be signed only by unions and individual employers until 2009, irrespective of company size. Now firm-level agreements can also be signed by non-union representative structures at company level, provided they have a union mandate, and depending on company size: from 2009 this concerned companies with at least 500 employees and from 2012 companies with at least 150 employees, in line with the memorandum of understanding. Over the years (2002–2016), AEs have accounted only for around 4 to 5 per cent of workers covered by collective agreements. Industry agreements (CCTs) have accounted for around 92 to 93 per cent of workers, and collective labour agreements (ACT) have accounted for around 4 per cent of the workers covered.

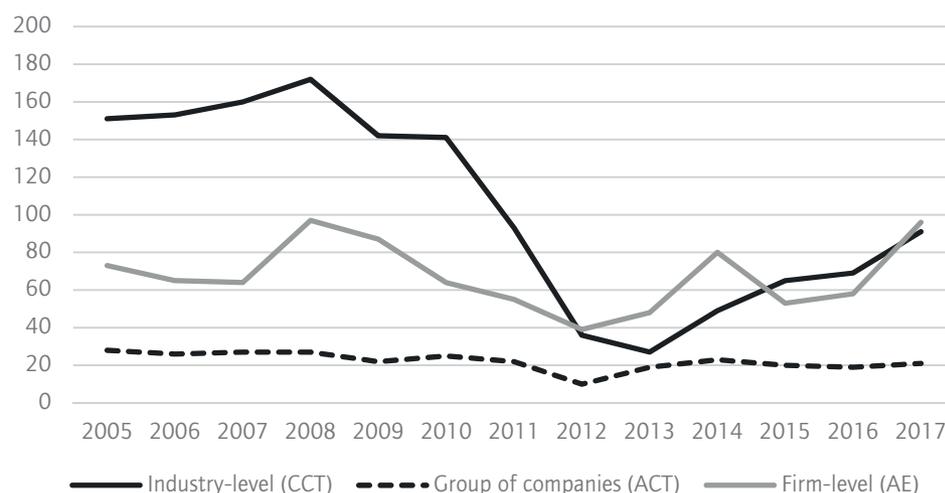
In practice, the reforms introduced since 2012, following the requirements of the memorandum of understanding that limited the extension of agreements and favoured non-union bargaining at firm level, have allegedly been 'aimed at making collective bargaining more decentralised, dynamic and representative' (OECD 2017: 53). These

Figure 23.3 Number of workers covered by type of collective agreement (2002–2016)



Source: DGERT/MTSS (2002–2017).

Figure 23.4 Number of updated collective agreements by type (2005–2017)



Source: DGERT/MTSS (2005–2017).

goals have not been achieved, however. While at the beginning of the crisis, in 2008, the number of updated industry-level agreements was almost double the number of company agreements, in 2017 the number of updated company agreements was almost the same as the number of industry-level agreements (see Figure 23.4). These dynamics were less the result of an increase in the number of company agreements than of the dramatic decline in the number of updated industry-level agreements. This was caused by the crisis and austerity measures and by the blocking of extension procedures.

Furthermore, a number of studies examining collective bargaining trends do not report any cases of company agreements negotiated by non-union actors (CRL 2016, 2017, 2018; Dray 2016). It seems that the crisis context did not favour the emergence of company-level bargaining. The main reason for this is low union density and the extremely low level of employee representation at the workplace. In fact, according to the European Company Survey, Portugal has the lowest level of employee representation in the EU: only 8 per cent of establishments with more than ten employees have official employee representation (Eurofound 2015: 98).

Another difficulty concerning company bargaining by non-union actors results from the dual-channel system of workplace representation in Portugal. Union delegates represent unionised workers and works councils (workers' commissions) represent all workers and are formally independent of unions. While in many countries with dual systems works councils are linked to unions at least informally, in Portugal there is no such tradition. For instance, there are no candidate lists linked, explicitly or implicitly, to unions at elections for workers' commissions. This Portuguese particularity goes back to the 'revolutionary period' (Stoleroff 2016) when the dual system and the distinctive competences or prerogatives of unions and workers' commissions emerged and were enshrined in the Constitution.

Depth of bargaining

Depth of bargaining, understood as the extent of involvement of local employee representatives or the rank and file in the formulation of claims and the implementation of agreements, varies depending on the level and type of agreement. In practice, although there is no formal articulation between bargaining levels, industry or occupational unions or federations conduct negotiations at both industry and firm level. In that way coordination and input from members are assured. Union members are more deeply involved in the negotiation of firm-level agreements (AE). They are also in a better position to monitor compliance. For instance, the gap between agreed and actual wages is likely to be narrower in companies with firm-level agreements. Union delegates at firm level (*delegados sindicais*) ensure articulation with union officials at the industry level. Often informal cooperation between unions and workers' commissions (*Comissões de Trabalhadores*) helps to improve employees' participation in negotiating and implementing agreements. This practice is most common in large companies.

In general, conditions are not particularly favourable for in-depth bargaining. First, firm-level bargaining is fairly exceptional; second, union density has been declining (Appendix A1.H); and third, union representation at the workplace is not widespread. There are, however, significant differences between industries in relation to union density and local representation and between union strategies to involve local representatives or their rank and file in bargaining.

The rank and file are involved in industry-level negotiations in a number of ways, formulating demands and implementing agreements. Participation varies depending on a number of factors. First, the characteristics of the industry, for instance, the degree to which it is dominated by large or small firms; second, trade union membership and resources; and third, union strategies favouring more or less top-down or bottom-up approaches and organising strategies. Variation is illustrated by the contrast between banking and the metal industry. In banking, bargaining depth has been favoured over the years by high levels of union density, currently above 50 per cent, strong workplace union representation and union resources, largely because of industry-specific health provision run by the unions. On this basis, the negotiation of collective labour agreements (ACTs), directly involving groups of large companies, favours the influence of local union representatives. The implementation of agreements in banking is also favoured by the fact that there are no 'parallel' collective agreements.⁹

In the metal industry, by contrast, bargaining is shallower because its heterogeneity makes it harder to manage. This concerns the size of the companies and technological developments, but also the uneven distribution of union representation at the workplace. Moreover, severe deindustrialisation, escalating from the early 1990s, resulted in the decline of union membership and the dismantling of powerful workplace union structures in some companies. In manufacturing, metalworking has been one of the industries most affected by the combined effects of 'parallelism' and unilateral employer

9. It is one of the few industries in which union pluralism and ideological differences, namely between UGT, here in the majority, and CGTP unions, were not translated into competing 'parallel' collective agreements.

cancellation of collective agreements (Naumann 2014: 11; Távora and Gonzalez 2016). While the collective agreements signed by CGTP unions, the most representative in the metal industry, were cancelled when this option was made available to employers' associations, most parallel agreements signed by minority unions were kept in place. The strategy of CGTP unions in the metal industry to counteract the blockade was to negotiate ad hoc company agreements in companies in which they were stronger. Industry collective agreements signed by minority unions rely very little on the input of members.

Certainly, employers' strategies so far have not favoured the improvement of depth of bargaining through company-level bargaining. The reason is not only the lack of local union structures, as industry-level union officials have repeatedly tried to establish firm-level agreements but without success. In fact, industry bargaining has given more freedom to employers by defining minimal rules. In particular regarding wages, industry-level agreements give them more room for flexibility at company level than the rhetoric of 'industry rigidity' suggests (Naumann 2018).

Degree of control of collective agreements

The degree of control of collective agreements is not very high in Portugal. In general, the agreed terms and conditions do not correspond to the actual terms and conditions. The conditions that undermine depth of bargaining also play a significant role in the degree of control of collective agreements. Low union density and weak workplace representation limit trade unions' capacity to control the implementation of collective agreements. The 'parallelism' of collective agreements, together with individual non-unionised workers' right to choose between competing agreements also contribute to eroding trade union control.

This low degree of control is expressed in two ways. First, industry agreements do not lay down actual conditions but set minimum standards. These industry minimum standards have deteriorated over the years as companies have acquired more discretion, in particular in relation to wage setting and working time flexibility. For instance, the actual wages of highly skilled workers tend to be higher than what is defined in collective agreements. Second, lack of compliance with minimum standards. Detection of illegal practices that circumvent collective agreements has become increasingly difficult because of mounting union weakness at the workplace and, as a result of austerity, cuts in the resources available to the labour inspectorate. Furthermore, the majority of industry-level agreements concluded during the Troika years were not subject to extension. As a result, the gap between agreed minimum and actual conditions has increased and the control of collective agreements has been undermined. This is particularly obvious with regard to wage bargaining, as the few industry agreements that updated wages were not extended to all companies and employees. This also helps to explain why gross wages have fallen substantially, diverging from agreed wages (Cruces *et al.* 2015).

Other legislative developments during the Troika period that reduced the control of collective agreements comprise the inclusion of 'opening' or 'derogation clauses', on issues such as functional and geographical mobility, working time and wages; the possibility of

temporarily suspending collective agreements in companies in financial difficulties; and the reduction of the period of validity of agreements after expiry. Finally, new legislation on working time management in 2009 and, in particular, in 2012 created new challenges regarding the control of collective agreements. Individual agreements between employers and individual employees on the adaptability of working time (2009) and on working time accounts (2012) circumvented collective agreements (Campos Lima and Abrantes 2016; Campos Lima 2017).

Scope of agreements

In the private sector and state-owned companies alike, collective agreements include detailed provisions on the regulation of employment relations and working conditions. They may include additional social and health benefits, on top of those provided by the welfare system, although that is exceptional. Collective agreements cannot remove mandatory legal provisions, however.¹⁰

The issues regulated by industry and company agreements are the same. When there is no articulation between bargaining levels, the range of issues regulated applies equally to all levels. This has been common practice. Also, the possibility of ‘opening’ or ‘derogation clauses’ on issues such as working time and wages, introduced in 2012, has been used extremely rarely in practice.

Basically, the tendency over the years has been to enlarge the scope of issues to be regulated by collective agreements. Often a change in legislation triggered the inclusion of new issues, as did the adoption of European directives. Domestic regulations on health and safety in the workplace, employees’ information rights, working time duration and flexibility, parental rights and combating various forms of discrimination were integrated into collective agreements, sometimes just repeating the text of the supervening law, less often integrating some innovation.

The wave of reforms in 2009 and subsequently in 2012 challenged the scope of collective agreements in different ways as regards the relation between the law and collective agreement provisions. One of the most contentious themes has been the management of working time. The 2009 Labour Code defined the limits of the ‘adaptability of working time’ and ‘working time accounts’, establishing that such regimes can be established only through collective agreements. This enlarged the scope of the terms of employment to be defined exclusively by collective bargaining (Campos Lima and Abrantes 2016; Naumann 2018). Nevertheless, it also established the possibility of ‘individual adaptability’, based on individual agreements between employer and employee. Legislation from 2012 introduced the possibility of ‘individual working time accounts’, also based on individual agreements. The assumption was that an employee

10. Such provisions include the following: identification of reasons justifying employees’ absence from work and their consequences in terms of disciplinary procedures unless they refer to worker representatives; almost all the provisions on the termination of employment contracts, with the exception of criteria and amount of severance pay; and some regulations on short-term contracts. In addition, collective agreements cannot regulate the exercise of temporary employment agencies, including temporary contracts of employment and they cannot give retrospective effect to non-pecuniary clauses.

‘accepts’ the employer request if they do not oppose the proposal in writing. In practice this created a mechanism to bypass collective bargaining through a particular form of employer unilateralism (Campos Lima and Abrantes 2016).

The scope of agreements was also challenged by imposing imperative rules in domains in which previously they had not been imperative; this included the amount of severance pay and overtime pay, as required by the MoU. The same legislation, adopted in 2012, also established that the more favourable provisions of collective agreements were null and void in the case of severance pay and suspended for a period of two years in the case of overtime payments (Campos Lima and Abrantes 2016).

The social backlash as regards the Troika memorandum of understanding imposed in the public sector blocked collective bargaining on any issue. Unilateralism prevailed, cutting nominal wages and increasing working time. Moreover, the government blocked the registration and entry into force of the collective agreements signed since 2013 between unions and local administrations re-establishing the 35-hour week. In 2015, however, the Constitutional Court overturned this.¹¹ The new PS government, however, introduced measures to reverse nominal wage cuts in the public sector (Campos Lima 2017) and to re-establish the 35-hour working week. Wage increases were not on the government agenda, however, and even the promised wage updates related to workers’ wage scales (frozen for a decade) were called into question, allegedly because of the need to meet EU deficit criteria. Tensions with unions have mounted as a consequence.

Conclusions

In Portugal, collective bargaining institutions were shaped by three major legislative reforms in 2003, 2009 and 2012–2014. The regulations of the 2003 Labour Code, a centre-right initiative, launched the dismantling of the institutional pillars that provided for high levels of bargaining security in the decades following the 1974 democratic revolution. The reversal of the favourability principle and the possibility of unilateral termination of collective agreements represented a paradigmatic shift that would redefine the rules of the game and the balance of power for years to come. The 2009 Labour Code, despite re-introducing the favourability principle in some domains and securing some rights for workers whose agreements expired, did not fundamentally challenge this. The option of unilateral termination even strengthened it. Furthermore, in tripartite concertation employers’ associations showed that they were not willing to give up their newly won prerogatives to withdraw from agreements that they viewed as excessively protective of labour and instead to sign new agreements with other unions, including minority ones, which were more open to concessions. In 2009 therefore the era of collective bargaining under the threat of unilateral termination was in full swing. It coincided with the dramatic economic and social impact of the early years of the international crisis. The retreat of collective bargaining until 2011 manifested a particular conjunction of extremely unfavourable economic conditions and deep

11. Law 18/2016, second amendment to Law 35/2014.

institutional changes, accumulated over the years, which shifted the balance of power towards the employers.

The worst was yet to come, however. In May 2011, when Troika austerity and neoliberal measures implemented by the centre-right PSD-CDS coalition plunged the country into the most dramatic crisis of collective bargaining in four decades of democracy. The package combined freezing the minimum wage and legislative measures downgrading labour standards, in domains such as overtime pay, severance pay, working time accounts, dismissals and temporary work. The legal framework of collective bargaining was also directly targeted. The later included major challenges to the security and extent of bargaining; legal restrictions on the extension of agreements; the possibility for companies to withdraw from agreements (at any level) on the grounds of economic crisis; and speeding up the termination of agreements by further reducing their period of validity. Structural measures designed to be permanent were added to measures designed to be temporary, all of them 'justified' in the name of financial adjustment, competitiveness, alignment with productivity at firm level and 'internal devaluation'. Instead of the proclaimed 'organised' decentralisation, in the absence of workplace bargaining structures and with the introduction of restrictions on extension based on employers' representativeness, the result was a historical decline in the number of newly signed industrial agreements and in the proportion of workers covered by updated agreements.

In contrast to Greece and Romania, however, where industry-level collective agreements collapsed paving the way to disorganised decentralisation, in Portugal the retreat of industry-level bargaining during the Troika intervention did not entail a significant reduction of industry-level agreements or an increase in company agreements (ILO 2018). Rather there was large-scale erosion of the number of updated industrial agreements and the proportion of workers covered by bargaining updates at industry level. But even in the worst years, the number of workers covered by updated company agreements never equalled the number of those covered by updated industry-level ones. Employers did not massively withdraw from collective agreements, neither was there a sharp increase in companies signing agreements. There were two main reasons for this Portuguese peculiarity. First of all, contrary to the requirements of the memorandum of understanding, the possibility for employers to negotiate with non-union structures at company level was conditional on a trade union mandate. According to the Portuguese Constitution trade unions have the exclusive bargaining prerogative and non-union structures representing workers have to have a trade union mandate. Second, in general, Portuguese employers and employers' associations have never been enthusiastic about company-level negotiations. In general, their preference is to negotiate minimum standards at industry level, giving them enough room to exercise discretion at company level, using unilateral prerogatives. This preference is the most important explanation of the low percentage of company agreements in Portugal, in addition to low union density and lack of trade union resources at the workplace level (Naumann 2018).

After the PS came to power in November 2015, with the support from the far-left parties (BE, PCP and PEV), there was a break with austerity policies, followed by economic recovery and falling unemployment. This established favourable conditions

for the recovery of collective bargaining. Concerning the legal framework of collective bargaining most important was the change in the regulations on extension of collective agreements in 2017. The goal was to increase the extent of bargaining based on inclusiveness and equality principles. Also, a temporary measure included in the tripartite agreement of January 2017 included a recommendation to temporarily suspend any unilateral requests to terminate agreements for a period of 18 months to promote the recovery of collective bargaining. The three years of the socialist mandate also showed the difficulties involved in re-establishing a minimal balance of power between the bargaining actors through modifications in the legal framework. Once again, as in 2009, the PS does not envisage fully restoring the favourability principle, nor reversing unilateral termination. The left-wing parties that support the government and the CGTP demanded the re-establishment of the favourability principle and joint decisions to cancel agreements, which employers' associations firmly oppose. Instead, the PS government's intention, as expressed in the tripartite agreement 2018 (CES 2018) and in proposed legislation under discussion, is to promote incremental changes on the expiry of agreements and favourability (Campos Lima 2018; ILO 2018; Perista *et al.* 2018). These incremental changes refer to the creation of an arbitration court within the framework of the Economic and Social Council (Conselho Económico e Social), as a last instance before the expiry of collective agreements, and a proposal to widen the scope of rights that workers retain when collective agreements expire, adding parental rights and rights to health and safety at work. It also adds overtime payments to the range of matters to which the favourability principle will apply.

The 2018 tripartite agreement also includes new threats to collective bargaining and trade unions in connection with new proposals on working time regulation. On one hand, the proposed measures, aimed at combating the individualisation of labour relations, would eliminate individual working time accounts, created in 2012, which could circumvent the provisions of collective agreements. On the other hand, the proposed measures determine that working time accounts¹² can be decided *either* by collective bargaining *or* by 'group agreements' resulting from the consultation of workers in company votes organised by the employers. The proposed measure lays down that such votes would be supervised by workers' committees (non-union structures), by trade union delegates at company level or by other worker representation structures, in that order. This not only denies real negotiating power to these bodies but gives precedence to non-union structures as regards supervision. This means that if collective agreements do not include any provisions on a given matter a company 'referendum' may in practice substitute for collective bargaining. The proposed regulation may turn out to be a Trojan horse to subvert collective bargaining and trade union prerogatives. Implementation of the 2018 tripartite agreement is currently being debated in parliament (April 2019). Only in the wake of that are we likely to find out what the impact of these proposed changes will be.

12. A regime that made it possible to increase normal working time by two hours a day, up to a maximum of 50 hours a week, with a maximum of 150 hours a year.

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All links were checked on 14 March 2019.

Abbreviations

ACT	Acordo coletivo de trabalho (Collective labour agreement)
AE	Acordos de Empresa (firm-level agreements)
BE	Bloco de Esquerda (Left Block)
CCT	Contrato coletivo de trabalho (Collective labour contract)
CGTP-IN	Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional (General Confederation of Portuguese Workers – Inter-Union National)
CDSPP	CDS-Partido Popular (Social and Democratic Centre)
CIP	Confederação Empresarial de Portugal (Confederation of Portuguese Business)
CPCS	Comissão Permanente de Concertação Social (Standing Committee for Social Concertation)
MoU	Memorandum of Understanding on Specific Economic Policy Conditionality
PCP	Partido Comunista Português (Portuguese Communist Party)
PS	Partido Socialista (Socialist Party)
PEV	Partido Ecologista os Verdes (Ecologist Green Party)
PSD	Partido Social Democrata (Social Democratic Party)
UGT	União Geral de Trabalhadores (General Union of Workers)