Labour Law in Portugal between 2011 and 2014

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Contents

[1] The present paper was written for the "Young Scholars Meeting" of the "XI European Regional Congress 2014", which takes place in Dublin, from 17 to 19 September 2014. The author would like to thank APODIT, through Professor PhD MARIA DO ROSÁRIO PALMA RAMALHO and Professor PhD JOSÉ JOÃO ABRANTES, for its invitation and support.

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1. Introduction

Over the past 11 years Portuguese Labour Law has faced three important moments of reform. In 2003 the first Labour Code was adopted; in 2009 an in-depth review of the Labour Code was adopted; between 2011 and 2014 successive legal acts were adopted, which confirmed the trend to select the employment contract over the collective bargaining agreement as the epicentre of industrial relations. It is our opinion that a progressive weakening of collective Law in favour of individual Law is taking place; negotiation of working conditions per sector of activity or profession is gradually being replaced by negotiation at company level and, in the extreme, by individual negotiation[3].

Let us revisit the period between 2011 and 2014[4].

The *Stability and Growth Programme 2010-2013* (15.3.2010)[5] noted that the Labour Law reform of 2009 had constituted "an important advancement to the functioning of the labour market, allowing greater flexibility and improving the management of human resources in the companies". It was recognised, however, that the effects of the "new legislation" would only be felt "more noticeably" with "the upturn in economic activity".

By way of Council of Ministers Resolution no. 101-B/2010, of 27 December[6], the Portuguese Government adopted the *Initiative for Competitiveness and Employment*, composed of 50 measures in five fundamental areas: (i) competitiveness of the economy and support to exports; (ii) administrative simplification and reduction of red tape costs for companies; (iii) labour market competitiveness; (iv) urban rehabilitation and boosting of the rental market; and (v) fight against informality, fraud and evasion in relation to taxes and social security contributions.

With regard to labour market competitiveness the following measures were set: (i) boosting of collective bargaining; (ii) creation of a new model of severance pay for termination of the employment contract; (iii) review of the legal framework on temporary reduction of the normal working periods and suspension of the employment contract in situations of company crisis; (iv) implementation of active employment policies; (v) promotion of professional qualification of the unemployed; (vi) support to the creation of self-employment; (vii) improvement of employment and professional training services. Less than two years after the entry into force of a new Labour Code, concerns with the review of labour laws (re)appeared.

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[3] About the main features of Portuguese labour law see MARIA DO ROSÁRIO PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis", Working Paper no. 54, ILO (2013), pp. 1-6, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf. About the relation between the labour law and the welfare state see JOSÉ JOÃO ABRANTES, "Welfare State and globalisation of the economic area", Juridical Tribune (Tribuna Juridica) (2013) pp. 197-200, available at: http://www.tribunajuridica.eu/arhiva/An3v1/art9_en.pdf.

[4] Our analysis will focus on the labour law of the private sector.

[5] See http://www.parlamento.pt/OrcamentoEstado/Documents/pec/PEC2010_2013.pdf.

[6] See www.dre.pt.

A year after the praise given to the 2009 review of labour laws – more precisely on 22 March 2011 – the Government and the majority of Social Partners signed, in the framework of the Social Dialogue, the *Competitiveness and Employment Tripartite Agreement*[7], which dealt with three areas: (i) fostering of competitiveness; (ii) reorganization and improvement of active employment policies; and (iii) specific amendments to the regulatory framework on industrial relations.

These "specific amendments" aimed mainly to: (i) boost collective bargaining – *inter alia* by creating an Industrial Relations Centre (*Centro de Relações Laborais* – CRL) and by allowing trade unions to delegate on workers' councils the signing of collective bargaining agreements; (ii) create a new system of severance pay in case of dismissal – which included the reduction of severance pay to 20 days of base salary and seniority payments, the establishment of a double limit to the severance pay value (12 months of wages, insofar as they do not exceed 20 minimum monthly wages), the elimination of the minimum limit to severance pay corresponding to 3 months of wages and the creation of a mechanism to partially guarantee the severance pay; (iii) expedite the instruments for temporary reduction of the normal working periods and suspension of the employment contract in situations of company crisis) – *inter alia* through the shortening of the deadlines for decision-making, the improvement of the prorogation procedure, the establishment of a right of consultation of accounting and financial documents and the setting of a requirement of a status of full compliance with tax and social security obligations, as well as through the requirements for renewal of the measure and through professional training support.

On 17 May 2011 the Portuguese State, the European Commission, the European Central Bank and the International Monetary Fund signed the *Memorandum of Understanding on Specific Economic Policy Conditionality* (*MoU*)[8]. In addition to the measures on budgetary policy, the *MoU* established a broad set of structural measures. With regard to the labour market it envisaged measures relating to protection in case of unemployment, protection of employment, working time, setting of wages and active labour market policies.

Also with an impact on the labour market we can mention the measures concerning regulated professions. The *MoU* envisaged (i) the elimination of restrictions to publicity in regulated professions; (ii) the review and reduction of the number of regulated professions; (iii) the liberalisation of access to and exercise of regulated professions; and (iv) the improvement of the operation of the regulated professions sector (such as chartered accountants, lawyers, notary publics), through the review of the requirements that affect the exercise of that activity with a view to eliminating those that were not justified or proportional.

In broad terms, the social and political framework of Labour Law was based on two fundamental pillars: to ensure budgetary balance and, at the same time, to

[7] See http://www.ces.pt/download/719/AcordoTripCompetEmprego.pdf.
[8] The *MoU* had a quarterly monitoring regime that culminated in twelve regular reviews. See http://www.portugal.gov.pt/pt/os-ministerios/primeiro-ministro/secretarios-de-estado/secretario-de-estado-adjunto-do-primeiro-ministro/documentos-oficiais/memorandos.aspx.

promote the competitiveness of the Portuguese economy. Thus, Labour Law emerged as an obstacle to competitiveness and its review as a crucial economic policy instrument.

The *MoU* set the tone for a new Social Dialogue Agreement, signed on 18.1.2012 by the Government and the majority of Social Partners, and called *Growth, Competitiveness and Employment Commitment* [9] [10]. This Agreement established a wide range of economic policies, active labour market policies and measures relating to labour laws, to the unemployment benefit and to industrial relations. Among others, we would highlight the following points: (i) introduction of flexibility in working time; (ii) reduction of the number of public holidays and vacation days; (iii) review of the legal framework on temporary reduction of the normal working periods and suspension of the employment contract in situations of company crisis (e.g. shortening of deadlines, right of consultation of accounting and financial documents, setting of limits to the recurring use of this regime and to the termination of employment contracts); (iv) amendment of the legal framework on the elimination of position procedure (abolition of the seniority rule for selecting the worker to be dismissed and of the duty to propose an alternative work position); (v) modification of the dismissal due to unsuitability of the worker (elimination of the duty to propose an alternative work position, establishment of the severance pay as a condition for valid dismissal, shortening of deadlines, extension to the cases of inexistence of changes in the work position); (vi) gradual reduction of the severance pay and creation of a severance pay fund; (vii) broadening of the scope of the contract with a very short duration and of the contract of "comissão de serviço"; (viii) promotion of mediation and arbitration in labour matters; (ix) promotion of collective bargaining, by creating an Industrial Relations Centre, allowing certain subjects to be regulated through agreements negotiated between workers' councils and employers and enabling workers' councils in companies with at least 150 workers to negotiate collective bargaining agreements under a delegation of powers; (x) elimination of a set of information duties of the employer to the Authority for Work Conditions (*Autoridade para as Condições do Trabalho* – ACT); and (xi) reduction of the duration and maximum value of the unemployment benefit and reduction of the minimum period of contributions needed to access the aforementioned benefit. At the level of employment policies we can further mention the following point: (i) restructuration of the public service for employment made available by the Institute of Employment and Professional Training (*Instituto do Emprego e da Formação Profissional, I.P.* – IEFP) with a view to reducing the periods of inactivity (more monitoring, training with a view to returning to active life, increased attraction of job offers, improvement of active and passive employment policies); (ii) creation of support to hiring and the establishment of the temporary accumulation of the unemployment benefit with wages; (iii) review of professional training, learning and professional teaching programs.

[9] See http://www.ces.pt/download/1022/Compromisso_Assinaturas_versao_final_18Jan2012.pdf.
[10] It should be said that this Social Dialogue Agreement came about after the third regular review of the Economic and Financial Assistance Program.

We must recognize that Portuguese Labour Law has a contractual nature (or origin)[11], but one constrained by the commitments that the Portuguese State has undertaken at the international level.

Let us now briefly analyse the various legislative amendments.

2. Individual Labour Law

2.1. The *MoU*

The goals set by the *MoU* were clear: (i) to combat labour market segmentation; (ii) to foster the creation of jobs; (iii) to ease adjustments in the labour market.

These goals presupposed a specific diagnose: (i) that Portuguese Labour Law ensured a two-speed protection of workers (external flexibility); and (ii) that companies did not have the necessary legal mechanisms to adapt to the needs of the market (internal flexibility)[12].

In accordance with this diagnose, an adequate treatment for the pathological differentiation between workers with employment contracts of indefinite duration and fixed-term or temporary workers had to be found. On the one hand, workers with employment contracts of indefinite duration enjoyed a stronger protection against dismissal – by way of (i) rigid proceedings and (ii) high severance pay values in case of lawful dismissal – which led to an increase in and rigidity of wage values and to an obstacle to the entry of new workers into the labour market (thus being one of the reasons for the high rates of youth unemployment). On the other hand, workers with fixed-term employment contracts or temporary workers received a weak protection in case of dismissal, faced difficulties in accessing the labour market and received lower wages[13].

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[11] About the relevance of social dialogue in Portugal, see MARIA DO ROSÁRIO PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis", Working Paper no. 54, ILO (2013), p. 5, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf.

[12] See MARIA DO ROSÁRIO PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis", Working Paper no. 54, ILO (2013), pp. 1-2, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf.

[13] Our view is that the elimination of this segmentation also aimed to create a single employment contract, that is, an employment contract of indefinite duration with a broad trial period and greater flexibility as regards termination. About the single employment contract, see NICOLAS LEPAGE-SAUCIER / JULIETTE SCHLEICH / ETIENNE WASMER, "Moving towards a single labour contract: pros, cons and mixed feelings", Economics Department Working Paper no. 1026, OECD (2013), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2013)18&docLanguage=En, J. IGNACIO GARCIA PEREZ / VICTORIA OSUNA-PADILLA, "The Effects of Introducing a Single Open-ended Contract in the Spanish Labour Market" (2012), available at http://www.iza.org/conference_files/dlmsc_2012/garcia_perez_j7547.pdf, PAOLO PORCHIA / PEDRO GETE, "A Real Options Analysis of Dual Labor Markets and the Single Labor Contract" (2012), available at http://www.iza.org/conference_files/dlmsc_2012/porchia_p7548.pdf, CRISTINA TEALDI, "How much flexibility do we really need" (2012), available at http://www.iza.org/conference_files/dlmsc_2012/tealdi_c7549.pdf, ÁLVARO A. NOVO / MÁRIO

2.2. Reduction of the severance pay value and creation of a guarantee system

This measure was implemented in three stages: (i) Law no. 53/2011, of 14 October; (ii) Law no. 23/2012, of 25 June[14]; and (iii) Laws no. 69/2013 and no. 70/2013, of 30 August[15].

The first stage, implemented by Law no. 53/2011, reduced the severance pay for termination of employment contracts signed from 1 November 2011: 20 days of base salary and seniority payments per full year of seniority. Additionally, it eliminated the distinction between the severance pay for expiry of the employment contract and the other cases of severance pay for lawful termination of the employment contract. In the first case, the severance pay was of 3 or 2 days of base salary and seniority payments per month of contract duration, depending on whether or not this duration exceeded 6 months. In the second case, the severance pay due, for instance, in case of collective dismissal or elimination of position corresponded to a month of base salary and seniority payments per full year of seniority.

With regard to new contracts, the minimum limit for the severance pay – corresponding to 3 months of base salary and seniority payments – was also eliminated and a double maximum limit was introduced: (i) the value of the base salary and seniority payments cannot exceed 20 times the minimum monthly wage (€ 9.700,00); (ii) the overall amount of severance pay cannot exceed 12 times the monthly base salary and seniority payments, with a limit of 240 times the value of the minimum monthly wage (€ 116.400,00).

According to the *MoU* of 17.5.2011 the new severance pay value should be supported in equal parts by the employer and by a "fund financed by the employers". It should be recalled that the *Competitiveness and Employment Tripartite Agreement* (2011) made reference to "a company-based financing mechanism" with a financing rate of less than 1% of the wages, which should vary according to the "profile of the employers"; and that the *Growth, Competitiveness and Employment Commitment* (2012) envisaged the creation of a severance pay fund or equivalent mechanism, which should start operating on 1 November 2012. It was a controversial measure, as it meant, inevitably, increased costs for companies at a time of economic activity crunch. Furthermore, the definition of the model was not peaceful. It is not surprising, therefore, that the system of severance pay guarantee has only been created in 2013, as we will see further ahead.

The second stage, implemented by Law no. 23/2012, matched the value of severance pay due for the termination of "old" and "new" employment contracts: from 1.11.2012, the severance pay was set at 20 days of base salary and seniority

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CENTENO, "Excess Worker Turnover and Fixed-term Contracts: Causal Evidence in a Two-tier System" (2012), available at http://www.iza.org/conference_files/dlmsc_2012/novo_a5420.pdf, MARCO LEONARDI / CARLO DELL'ARINGA / LORENZO CAPPELLARI, "Temporary Employment, Job Flows and Productivity: A Tale of Two Reforms" (2012), available at http://www.iza.org/conference_files/dlmsc_2012/leonardi_m952.pdf.

[14] See Rectification no. 38/2012, of 23 de July.

[15] See www.dre.pt.

payments. Additionally, it extended to employment contracts signed before 1.11.2011 the double maximum limit for severance pay[16].

The reduction of the severance pay value also led the legislator to deem void the provisions of collective labour regulation instruments signed before the entry into force of Law no. 23/2012, which established higher amounts than those resulting from the Labour Code. The Constitutional Court validated this decision of the legislator[17].

The third and last stage, implemented by Law no. 69/2013, carried out the goal of matching the severance pay value with the average EU level, established in the *MoU* of 17.5.2011[18]. This legal act partially recovered the distinction between "old" and "new" employment contracts, as well as between the expiry of fixed-term employment contracts and the lawful termination of contracts (e.g. collective dismissal and elimination of position). For the termination of employment contracts signed from 1 October 2013 onwards the following severance pay is due: (i) expiry of fixed-term employment contracts: 18 days in the first 3 years of contract duration and 12 days in the following years[19]; and (ii) lawful termination of employment contracts in the remaining cases: 12 days. In cases of termination of employment contracts signed until 30.09.2013 and with regard to the period of contract duration after that date, the severance pay corresponds to the sum of the following amounts: 18 days in the first 3 years of contract duration and 12 days in the following years[20]. It should be highlighted that this reduction in the severance pay value concerns the duration of the contract after 1.10.2013 and takes into account the previous stages of severance pay reduction.

In return for the reduction of the severance pay value a system of guarantee was created. This system was introduced in tandem with the third stage of severance pay, by way of Law no. 70/2013.

This system of severance pay guarantee is based on three instruments: (i) the severance pay fund (*fundo de compensação do trabalho* – FCT); (ii) the equivalent mechanism (*mecanismo equivalente* – ME); and (iii) the severance pay guarantee

[16] This double limit did not hinder a higher severance pay value that might be due to the worker on 31 December 2012 and allowed the increase of the severance pay value in accordance with seniority, base salary and seniority payments until the aforementioned double limit was reached. The aim was to protect the (legitimate) expectations of workers.

[17] See Constitutional Court judgement no. 602/2013 (PEDRO MACHETE) 20.9.2013, available at www.tribunalconstitucional.pt.

[18] To be noted that the original *MoU* (17.5.2011) did not establish any reference values. In the second regular review the *MoU* came to establish reference values (8 to 12 days); in the sixth regular review (20.12.2012) the *MoU* set the value of 12 days; in the seventh regular review (25.6.2013) the *MoU* set the value of 12 days for new contracts of indefinite duration and of 18 days in the first 3 years and 12 days in the following years for the existing indefinite duration and fixed-term employment contracts. Fluctuations in reference values took into account the negotiations with the Social Partners in the framework of the Social Dialogue.

[19] As a rule, the fixed-term employment contract of determinate duration has a maximum duration of 3 years, while the fixed-term employment contract of uncertain duration may last up to 6 years. However, legal frameworks for the extraordinary renewal of fixed-term and temporary employment contracts were adopted (Laws no. 3/2012 and no. 76/2013).

[20] If on 1.10.2013 the employment contract has reached 3 years of duration, the severance pay will correspond only to 12 days.

fund (*fundo de garantia da compensação do trabalho* – FGCT). This framework is applicable to employment contracts signed from 1.10.2013, with the employer having to adhere to the severance pay fund and the severance pay guarantee fund, without prejudice to the possibility of adhering to an equivalent mechanism instead of the severance pay fund[21], and to communicate the admission of new workers. The employer must deliver to the severance pay fund the value corresponding to 0,925% of the base salary and seniority payments due to each worker concerned; and to the severance pay guarantee fund the value corresponding to 0,075% of the base salary and seniority payments due to each worker concerned[22].

The severance pay fund is an individual capitalization fund that aims to guarantee the payment of up to half of the severance pay, but it will only be responsible up to the limit of the amounts delivered by the employer and their possible positive valuation. The severance pay guarantee fund is a mutual fund that aims to guarantee the value needed to cover half of the severance pay for termination of the employment contract. The severance pay fund and the severance pay guarantee fund are managed by public entities[23]. In turn, the employer may create the equivalent mechanism with the institutions subject to the supervision of the Bank of Portugal (*Banco de Portugal* – BdP) and of the Portuguese Insurance Institute (*Instituto de Seguros de Portugal* – ISP).

Labour reform has strongly reduced the value of severance pay for the lawful termination of employment contracts. However, the will to protect the expectations of workers led to the creation of a set of complex temporary provisions and, therefore, the economic effects of this measure should only be felt in the medium and long run.

In our opinion, the severance pay value would not be one of the significant factors of competitive disadvantage of the Portuguese economy. In fact, severance pay in Portugal is low and its amount was not – and is not – calculated on the basis of the overall value of the wage, but only on the basis of the base salary and seniority payments; that is, vacation allowances and Christmas bonuses, shift work benefits and meal allowances or productivity rewards are not taken into account. In any case, we must wait for the (possible) positive effects of this measure as regards the creation of employment.

We must, in fact, ask whether the lack of competitiveness is not due, in a stronger manner, to the so-called "red tape costs" (for instance, energy costs, difficulties for companies in accessing credit or a judicial system that does not allow a swift resolution of disputes) and other labour costs, *inter alia* the value of Social Security payments (as a rule, 23,75% for the employer and 11% for the worker) and the contribution towards the new severance payment funds (1% for the employer).

[21] We admit that the equivalent mechanism may guarantee a value higher than half of the severance pay.

[22] Deliveries are paid 12 times a year, monthly, and correspond to 12 monthly base salaries and seniority payments, per worker.

[23] The severance pay fund is managed by the Institute for the Financial Management of Social Security Capitalization Funds (*Instituto de Gestão de Fundos de Capitalização da Segurança Social, I.P.* – IGFCSS) and the severance pay guarantee fund is managed by the Institute for the Financial Management of Social Security (Instituto de Gestão Financeira da Segurança Social, I.P. – IGFSS).

2.3. Dismissal

Under the *MoU*, combating labour market segmentation also meant reviewing the legal framework on lawful dismissal. The initial version of the *MoU* (17.5.2011) provided the following measures: (i) establish the dismissal due to unsuitability of the worker regardless of the introduction of new technologies or changes to the work position; (ii) establish the dismissal due to unsuitability of the worker when the goals set by agreement between the employer and the employee were not reached; (iii) replace the seniority criterion (*last in, first out*) with relevant and non-discriminatory criteria defined by the employer in order to determine which worker will be dismissed due to the elimination of position, when there were multiple work positions with a similar functional content; (iv) eliminate the duty to propose an available and compatible work position in case of dismissal due to the elimination of position and dismissal due to unsuitability of the worker.

The *Growth, Competitiveness and Employment Commitment* (18.1.2012) elaborated on these measures, in particular the dismissal due to unsuitability of the worker, which should comply with the following principles: (i) be based on a substantive modification of the work performance resulting in a continued decrease in productivity or quality, repeated break-downs in the means affected to the work position or hazards to the safety and health of the worker, of other workers or of third parties, which is caused by the way the work is carried out and which, given the circumstances, can be reasonably assumed to be definitive; (ii) follow a procedure that ensures the defence of the worker and allows him or her to eliminate the situation of unsuitability (through professional training); (iii) ensure the participation of workers' representatives; and (iv) admit the possibility of terminating the contract with a right to severance pay for the worker in question.

Thus, the existence of two types of unsuitability was envisaged: with and without modifications to the work position. For both types the *Growth, Competitiveness and Employment Commitment* (18.1.2012) established the following measures: (i) to shorten the deadline for consultations; and (ii) to establish a deadline for the employer to issue a written and reasoned decision on the dismissal.

Law no. 23/2012 implemented the measures that had been internationally negotiated and elaborated on with the participation of the Social Partners.

In the procedure for the dismissal due to the elimination of position, the legislator gave the employer the right to choose relevant and non-discriminatory criteria, bringing it closer to the collective dismissal[24]. Also, the duty to propose an

[24] The collective dismissal and the dismissal due to the elimination of position share the same grounds – that is, market-related, structural or technological grounds –, but they follow different procedures, with a higher demand existing in the dismissal due to the elimination of position, as it shows a more individual character. However, in our opinion, the distinction should be abolished, as dismissals due to the elimination of position can occur which are more collective than collective dismissals. Let us consider the following example: company X with 49 workers may initiate a collective dismissal with 2 workers; but company Y with 51 workers should follow the procedure for the elimination of position if it intends to cover 4 workers. Until the Labour Reform of 2012, the employer could chose the criteria to select the workers covered by a collective dismissal, but he or she should comply with the seniority criterion in the case of a dismissal due to the elimination of position.

available and compatible work position to the worker to be dismissed to the elimination of position was abolished.

With regard to the dismissal due to unsuitability of the worker, it became admissible also in the case where there were no modifications to the work position, with defence guarantees for the worker, which enable him or her, if possible, to correct the performance of work and eliminate the situation of unsuitability.

The Constitutional Court decided that the replacement of the seniority criterion with relevant and non-discriminatory criteria to be chosen by the employer was unconstitutional, as they would be "vague and undefined concepts, lacking a minimum of precision and effectiveness" and, as such, could not limit the margin of discretion and remove the possibility of an arbitrary decision by the employer. However, we should take into account the following: (i) collective dismissal coexists, from the outset, with the possibility of the employer determining the criteria for selecting the workers to be dismissed, taking into account the reasons specifically alleged to justify the need to reduce the number of workers; (ii) about 90% of the companies in Portugal have up to 50 workers and employ over 50% of the workers; (iii) in these cases, the employer may choose the selection criteria for dismissal based on objective grounds, the procedure for collective dismissal being applied without raising any issues of constitutionality. Moreover, the courts have been able to assess, with a high level of demand, the implementation of the criteria chosen by the employer in regard to collective dismissals and to consider the dismissal unlawful when the criteria are vague, undefined or incoherent with the grounds invoked to reduce the number of workers.

Additionally, the Constitutional Court declared unconstitutional the elimination of the duty to replace the worker in question in a compatible and available work position. In this we follow the view of the Constitutional Court, given that the dismissal on objective grounds should be seen as "*ultima ratio*": if there is a compatible and available position in the company, the employer should propose to the worker the new work position; should the worker refuse, the impossibility to maintain the work relation is shown.

It bears mentioning, also, that the Constitutional Court did not declare unconstitutional the changes to the dismissal due to unsuitability of the worker, since the legislator established adequate measures of protection of the worker in question and ensured an adequate balance between the fundamental rights to job security and free economic initiative[25].

Law no. 27/2014, of 8 May[26], adapted the Labour Code to the judgements of the Constitutional Court. Thus, it established for the employer a duty to propose a compatible and available work position to the worker concerned in a case of dismissal due to the elimination of position or due to unsuitability.

[25] See Constitutional Court judgement no. 602/2013 (PEDRO MACHETE) 20.9.2013, available at www.tribunalconstitucional.pt.
[26] See www.dre.pt.

In addition, this Law further defined the notion of "relevant and non-discriminatory criteria", by identifying the following order of criteria: (i) worst performance assessment, in accordance with parameters known in advance by the worker; (ii) fewer academic and professional qualifications; (iii) greater cost for the company to maintain the work relation with the worker; (iv) less experience on the job; and (v) less seniority in the company.

The new order of criteria respects the concerns of the Constitutional Court, although it does not dispense with a careful analysis of the circumstances of the specific case. In any case, it seems to us a step in the right direction with a view to bringing the dismissal due to the elimination of position closer to the collective dismissal. The blind seniority criteria (*last in, first out*) led to unfair results: the more productive or qualified worker could be dismissed, while the other worker would be protected merely because of his greater seniority. The new criteria show a better weighing of all interests: prohibition of unjustified dismissal and protection of free economic initiative.

2.4. Working time

The *MoU* (17.5.2011) aimed also at introducing flexibility with regard to working time with the goal of providing to the employer the necessary tools to respond to the fluctuations of the economic cycle and increase the competitiveness of the companies. To that effect, the working time bank by agreement between the employer and the worker[27] was established.

The *Growth, Competitiveness and Employment Commitment* (2012) furthered the obligations undertaken in the *MoU*. Thus, the Government and the majority of Social Partners established: (i) the individual working time bank: by agreement between the employer and the worker it would be possible to extend the normal working period for up to 2 hours a day, respecting a normal weekly working period of, at the most, 50 hours and an accrual limit of 150 hours per year; (ii) the group working time bank: as long as a majority of 60% or 75% of the workers is covered by a working time bank scheme established by a collective bargaining instrument or agreement between the parties, the employer could extend it to the remaining workers; and (iii) the rest break in a working periods exceeding 10 hours a day should not be inferior to one hour nor superior to two hours, so as to avoid the worker performing over six hours of consecutive work.

With a view to the competitiveness of companies, the *Growth, Competitiveness and Employment Commitment* (2012) established: (i) the elimination of 3 to 4 mandatory public holidays; (ii) the possibility to close the facilities during bridge days (*pontes*) and to compensate these with vacation days of the workers; (iii) the elimination of the increase in the annual vacation period by up to 3 days when there were no justified absences or a limited number of justified absences existed; and (iv) the elimination of compensatory rest periods, while maintaining the daily rest between work days and the mandatory weekly rest. Law no. 23/2012 introduced these measures.

[27] See, in particular, the *MoU* (9.12.2011).

With regard to public holidays, we note the elimination of 2 religious holidays and 2 civil holidays, with a reduction from 13 to 9 mandatory public holidays[28]. Law no. 69/2013 imposed the obligation to reassess the elimination of the public holidays within a period no longer than 5 years, that is, until 31.12.2017[29].

In addition, the goal of eliminating the increase in vacation days led to an equivalent reduction of the provisions contained in collective labour regulation instruments. With regard to collective labour regulation instruments, the Constitutional Court declared this amendment to be unconstitutional, as it did not take into consideration the results reached through collective bargaining and constituted a disproportionate limitation of the right of collective bargaining[30] [31].

To that effect, the legislator deemed void the provisions of collective labour regulation instruments and employment contracts signed prior to the entry into force of Law no. 23/2012 that regulated the matter of compensatory rest for overtime work performed on a working day, supplementary weekly rest day or public holiday[32].

Regarding compensatory rest, the paid compensatory rest for overtime work performed on a working day, supplementary weekly rest day or public holiday was eliminated.

The following, however, were maintained: (i) paid compensatory rest equivalent to the number of hours of rest missed, in the case of overtime work that prevented the daily rest[33] from being enjoyed; (ii) day of paid compensatory rest for work performed on a mandatory weekly rest day[34]; (iii) paid compensatory rest equivalent to the number of hours missed, in the case of overtime work on a mandatory weekly rest day not exceeding two hours and due to an unforeseen absence of the worker who should occupy the post the following day[35].

With regard to regular work performed on a public holiday in a company with no obligation to suspend its operation on that day, there was a reduction of the compensatory rest time from 100% to 50% of the amount of hours of work performed. As an alternative, the employer could choose to pay for that work. With the Labour Reform of 2012 the value of the increase was also reduced from 100% to 50% of the corresponding remuneration.

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[28] The public holidays of Corpus Christi, 5 October, 1 November and 1 December were eliminated.
[29] It should be recalled that the public holidays of Corpus Christi (movable) and All Saints' Day (1 November) are established in the Concordat between the Portuguese Republic and the Holy See (18 May 2004). We admit, therefore, that the reduction of public holidays might be only temporary, as the reappearance of the religious holidays cannot but determine the return of the civil holidays: 5th October (establishment of the Portuguese Republic) and 1 December (restoration of independence).
[30] See Constitutional Court judgement no. 602/2013 (PEDRO MACHETE) 20.9.2013, available at www.tribunalconstitucional.pt.
[31] See Decree no. 247/XII, available at www.parlamento.pt, sent for promulgation by the President of the Republic on 29 July 2014, which envisages the repeal of this provision.
[32] This additional rest corresponded to 25% of the overtime work hours performed.
[33] This additional rest is equivalent to the number of hours of rest missed.
[34] This additional rest is equivalent to one rest day.
[35] This additional rest is equivalent to the number of hours of rest missed.

The Constitutional Court did not find the new working time banks, the elimination of compensatory rests and the increase of the vacation period unconstitutional, even if it did recognise that an increase of unpaid working time had occurred, that is, the Constitutional Court validated a reduction of wages for an increase in annual working time[36].

2.5. Combating absenteeism: a new approach?

As we have mentioned above, the *Growth, Competitiveness and Employment Commitment* (2012) sought to increase the number of annual days of work without changing the global remuneration paid to workers. To that effect, it set the goal of eliminating the increase in the annual vacation period in cases where there are no unjustified absences from work or there are only a limited number of justified absences.

In return for the elimination of the increase of up to 3 work days a year in the vacation period, the *Growth, Competitiveness and Employment Commitment* (2012) established a penalty for the unjustified absence to one or half of a regular period of daily work immediately before or after a rest day or public holiday, through the loss of remuneration regarding the immediately preceding and succeeding rest days or holidays. Law no. 23/2012 implemented these measures. We must mention that the penalty applied in case of unjustified absences stayed in force in Portugal until the entry into force of the 2003 Labour Code [37]. It remains to be seen whether the fight against absenteeism will be more effective by penalizing than by granting a reward in free days.

2.6. Wages moderation policy

2.6.1. Minimum monthly wage (*remuneração mínima mensal garantida* – RMMG)

In 2006, the Government and the Social Partners signed the *Agreement on the Establishment and Evolution of the Minimum Monthly Wage*, in which they established the following evolution goals[38]:

Year	RMMG value
2007	€ 403,00
2009	€ 450,00
2011	€ 500,00

[36] The working time bank does envisage the compensation of overtime work performed in at least one of the following ways: (i) equivalent reduction of working time; (ii) increase of the vacation period; (iii) payment in cash. However, in theory this instrument allows to remunerate overtime work without complying with the legal framework on overtime work (value of the work performed and, in limited cases, right to compensatory rest).

[37] It is a return to the legal framework established by Decree-Law no. 874/76 (legal framework on vacation, public holidays and absences), which had been eliminated with the 2003 Labour Code.

[38] See http://www.ces.pt/download/203/FixEvolRMMG2006.pdf.

The value envisaged for 2011 has not been reached yet. After a period of an average increase of 4,7% a year, the nominal minimum monthly wage has been frozen since 2011.

In the following table we can see the evolution, over the 2006-2013 period, of the minimum monthly wage in comparison with the inflation rate[39]:

Year	RMMG value	Variation	Inflation rate
2006	€ 385,90	2,99%	3,11%
2007	€ 403,00	4,43%	2,45%
2008	€ 426,00	5,7%	2,59%
2009	€ 450,00	5,6%	- 0,83%
2010	€ 475,00	5,6%	1,4%
2011	€ 485,00	2,1%	3,65%
2012	€ 485,00	=	2,77%
2013	€ 485,00	=	0,27%

These data show that the minimum monthly wage has registered an increase above the inflation rate for the 2007-2010 period, having suffered an increase inferior to inflation in 2006 and 2011 and remaining frozen during the Adjustment Programme (2012-2014).

For this analysis it is convenient to have in mind the unemployment rate in the 2006-2013 period[40] [41]:

Year	Rate
2006	7,7%
2007	8,0%
2008	7,6%
2009	9,5%
2010	10,8%
2011	12,7%
2012	15,7%
2013	16,3%

In addition to the increase of unpaid annual working days, the *MoU* (17.5.2011) established a policy of "wages moderation" – that is, of reduction of real wages – to foster the creation of employment and company competitiveness. Therefore, the following compromises were not a surprise: (i) subjecting any increase

[39] Source: http://www.pordata.pt.
[40] Source: http://www.pordata.pt.
[41] As stated by the International Labour Organization, *it must be stressed that economic recovery without jobs is neither satisfactory nor sustainable, nor until it has translated into an impact on employment and on living standards* (International Labour Organization, *Tackling the job crisis in Portugal* (2014), p. v. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_235618.pdf).
About the increase of the unemployment rate, see ANABELA CARNEIRO / PEDRO PORTUGAL / JOSÉ VAREJÃO, "Catastrophic Job Destruction During the Portuguese Economic Crises", Bank of Greece, 2013, available at: http://www.bankofgreece.gr/BogEkdoseis/SCP201324.pdf.

in the minimum monthly wage to the improvement of economic conditions and the labour market and to an agreement in the framework of the Adjustment Programme; (ii) restricting the issuing of Ordinances of Extension of Collective Bargaining Agreements (see below) [42]; and (iii) reducing the extended validity period of collective bargaining agreements (see below).

It should be recalled that in the period immediately preceding the *MoU* (17.5.2011) – that is, between 2007 and 2010 – there was an increase of the minimum monthly wage above the inflation rate of the unemployment rate.

The minimum monthly wage aims to ensure a minimum standard of dignified living, that is, to ensure to the workers the minimum profit from their labour necessary to their survival and that of the members of their household. The evolution at stake points to a reduction of real wages without avoiding the increase of the unemployment rate. However, one may always say that it is due to the policy of "wages moderation" that the unemployment rate has not increased even more.

We must also make a brief comparative analysis of the level of minimum monthly wage (yearly) in some Member States in the 2006-2013 period[43]:

Year	LU	BE	NL	IE	FR	UK	SI	ES	MT	GR	PT	HR	PL	EE	SK	HU	CZ	LV	LT	RO	BG
2006	1.503	1.234	1.278	1.292	1.236	1.206	511	631	584	709	**449**	N/A	227	191	181	233	270	129	166	91	81
2007	1.570	1.271	1.308	1.432	1.267	1.312	521	665	601	748	**470**	N/A	246	230	223	263	284	172	188	119	92
2008	1.589	1.322	1.345	1.461	1.300	1.196	552	700	617	794	**497**	379	324	278	254	282	317	228	231	137	112
2009	1.662	1.387	1.389	1.461	1.329	1.053	589	728	634	840	**525**	380	296	278	295	265	303	254	231	145	122
2010	1.703	1.387	1.411	1.461	1.343	1.122	665	738	659	862	**554**	388	319	278	307	264	306	253	231	139	122
2011	1.757	1.429	1.429	1.461	1.365	1.109	748	748	664	869	**565**	380	348	278	317	286	323	281	231	157	122
2012	1.801	1.457	1.451	1.461	1.412	1.223	763	748	679	780	**565**	373	344	290	327	309	311	286	231	159	143
2013	1.874	1.501	1.473	1.461	1.430	1.227	783	752	697	683	**565**	386	380	320	337	333	310	285	289	168	158
2014	1.921	1.501	1.485	1.461	1.445	1.216	789	752	717	N/A	**565**	405	387	355	352	344	327	320	289	190	173

From these data result the following considerations with regard to the 2011-2014 period:

a) Nominal increase in the minimum monthly wage in most Member States (Luxembourg (LU), Belgium (BE), Netherlands (NL), France (FR), United Kingdom (UK), Slovenia (SI), Spain (ES), Malta (MT), Croatia (HR), Poland (PL), Estonia (EE), Slovakia (SK), Hungary (HU), Czech Republic (CZ)[44], Latvia (LV), Lithuania (LT), Romania (RO) and Bulgaria (BG);

[42] The Portuguese collective bargaining system is based on the affiliation principle, that is, collective bargaining agreements are applicable so long as the workers are affiliated with signatory trade unions and, in addition, the employers are affiliated with employers' associations or are a party to the collective bargaining agreement. The Extension Ordinance is an administrative act that aims to extend the scope of a collective bargaining agreement to those not affiliated within a sector of activity or profession.

[43] Source: http://www.pordata.pt.

[44] Although in this case a reduction has occurred in 2012 and 2013.

b) Nominal freezing of the minimum monthly wage in Ireland (IE) and Portugal (PT);
c) (Significant) reduction of the minimum monthly wage in Greece (GR);
d) Devaluation by 13,76% of the minimum monthly wage in Portugal in comparison with the highest minimum monthly wage (LU);
e) Approximation of the minimum monthly wage in Portugal by about 11,5% to the lowest one (BG).

At the end of the Adjustment Programme (2011-2014) the value of the minimum monthly wage in Portugal is still far from those practiced in a significant number of Member States – even if compared to those that were covered by Adjustment Programmes (Ireland and Greece), having come close to the lowest value in the European Union.

The value of the minimum monthly wage has an influence on the overall level of wages, as it constitutes the minimum value to enter the market, that is, the wage tables of collective bargaining agreements are structured on the basis of that value. In other words, the wages of higher professional categories are built on the basis of differentials in comparison with the remuneration of the lower categories and, therefore, if the minimum monthly wage is not raised, a strong incentive to the review of wage tables disappears[45].

This scenario of decrease of the minimum monthly wage – and therefore of wage levels in Portugal – should be altered slightly in 2015, since the Government and the Social Partners are negotiating their increase in the framework of the Social Dialogue. To this date, no social dialogue agreement has been signed with the Social Partners[46]. However, we must mention that, as a rule, the minimum monthly wage is set by a legal act published in the Official Journal every year, on the last days of December.

2.6.2. Payment of Christmas bonuses and vacation allowances in twelfths

By virtue of a significant increase in taxation over families established in the 2013 State Budget, Law no. 11/2013, of 28 January[47], was adopted, establishing a temporary legal framework for payment of Christmas bonuses and vacation allowances, which would be in force throughout 2013.

Essentially, this legal act presents the following characteristics:

a) Voluntary application to fixed-term and temporary employment contracts, the written agreement of the parties being necessary;

[45] As stated by the International Labour Organization, the [a]*verage monthly earnings were € 1,123 in October 2012, which is 4.3 per cent lower in real terms than a year earlier, and 1.9 per cent lower in real terms than in 2008 before the crisis. Wage cuts have been especially severe since 2011 when wages fell in nominal terms, not just in real terms*. See International Labour Organization, *Tackling the job crisis in Portugal* (2014), pp. 21. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_235618.pdf.
[46] In 2012, the percentage of full time workers covered by the minimum monthly wage was of 12,9 %.
[47] See www.dre.pt.

b) Mandatory application to employment contracts of indefinite duration, except in cases of explicit opposition of the worker within 5 working days counting from the date of entry into force of the law;
c) The Christmas bonus should be paid as follows: (i) 50% until 15.12.2013; and (ii) 50% in twelfths throughout 2013;
d) The vacation allowance should be paid as follows: (i) 50% until the beginning of the vacation period; and (ii) 50% in twelfths throughout 2013.

The 2014 State Budget kept this temporary legal framework for the current year (Law no. 83-/2013, of 31 December[48]) and no intention to keep it for next year is known. We admit, however, that this may happen, since taxation levels will remain high next year, meaning, the grounds on which this legal framework is based will still exist.

We should mention that, due to its dual nature (voluntary to some, mandatory to others), this legal framework has brought about an increase in the administrative load associated with human resources management (red tape cost).

2.6.3. Wages reduction established by a collective bargaining instrument or employment contract

As was mentioned above, the *MoU* (17.5.2011) established a policy of wages moderation that was consolidated by the *Growth, Competitiveness and Employment Commitment*. As such, the following goals were set:

a) To eliminate compensatory rest, mandatorily as regards collective labour regulation instruments or employment contracts, but without prejudice to the mandatory daily and weekly rest periods (see below);
b) Cut by half the additional pay for overtime work established in the law[49];
c) Cut by half the additional pay for overtime work established in a labour regulation instruments or employment contract;
d) Determine the mandatory application of the legal limits for two years after the reduction in relation to any collective labour regulation instrument or employment contract; past that deadline, the limits resulting from the reduction mentioned in the previous indent are applicable, provided there has not been an amendment to the collective labour regulation instrument or employment contract.
e) Cut by half the remuneration of normal work performed on a public holiday in a company that is not obligated to suspend its operation, without prejudice to the possibility of the employer choosing to grant compensatory rest[50].

[48] See www.dre.pt.
[49] After the reduction, the increase in remuneration for overtime work was the following: (i) working day: 25% on the first hour or fraction and 37,5% per subsequent hour or fraction; (ii) weekly rest day, mandatory or supplementary, or public holiday: 50% per hour or fraction.
[50] After the reduction, the worker has the right to a compensatory rest lasting half of the number of hours performed or to a 50% increase in the corresponding remuneration, the choice belonging to the employer.

These meant an amendment to the 2009 Labour Code – which happened with Law no. 23/2012 –, to collective labour regulation instruments and to employment contracts.

To that effect, the legislator deemed void the provisions of collective labour regulation instruments and employment contracts signed prior to the entry into force of Law no. 23/2012 that regulated the matter of compensatory rest for overtime work performed on a working day, supplementary weekly rest day or public holiday. With regard to the collective labour regulation instruments, the Constitutional Court declared this amendment to be unconstitutional, as it did not take into consideration the results reached through collective bargaining and constituted a disproportionate limitation on the right of collective bargaining[51] [52].

In addition, Law no. 23/2012 suspended for 2 years – that is, until 31 July 2014 – the provisions of collective labour regulation instruments and employment contracts that regulated the following matters:

a) Additional pay for overtime work, insofar as it is higher than the values set in the 2009 Labour Code;
b) Remuneration of normal work carried out on a public holiday, or granting of compensatory rest in its place.

After this deadline has expired without amendments being made to the provisions of the collective labour regulation instrument or employment contract, the amounts they set are cut by half, but cannot be lower than those set by the Labour Code.

The Constitutional Court validated the suspension of collective labour regulation instrument provisions, even if it affects the right to collective bargaining, as it is a temporary, necessary and balanced measure, taking into account the goals set by the *MoU* and the competitiveness of the national economy in a difficult situation for national companies. However, the Constitutional Court declared unconstitutional the automatic reduction of the values set in a collective labour regulation instrument after the expiry of the 2-year deadline[53].

On the past 29 July, the Parliament sent for promulgation by the President of the Republic the extension of the aforementioned suspension until the 31 December 2014. This amendment was introduced by Law no. 48-A/2014, of 31 July[54], and entered into force on 1.8.2014. To our mind, the temporarily restricted nature of this amendment will not be able to change the assessment made by the Constitutional Court. This legal act also repeals the provision that was declared unconstitutional,

[51] See Constitutional Court judgement no. 602/2013 (PEDRO MACHETE) 20.9.2013, available at www.tribunalconstitucional.pt.
[52] See Decree no. 247/XII, available at www.parlamento.pt, sent for promulgation by the President of the Republic on 29 July 2014, which envisages the revocation of that provision.
[53] See Constitutional Court judgment no. 602/2013 (PEDRO MACHETE) 20.9.2013, available at www.tribunalconstitucional.pt.
[54] See www.dre.pt and the Letter of Intent (26.5.2014) to the International Monetary Fund, available at http://www.portugal.gov.pt/media/1452387/LoI%2012R%20PT.pdf.

which related to the automatic reduction of the values set by a provision of a collective labour regulation instrument[55].

Essentially, the Constitutional Court was sensitive to the arguments of promoting the competitiveness of companies and of the need to reduce work remuneration.

2.7. Reduction of the normal working period and suspension of the employment contract in situations of company crisis

The *Competitiveness and Employment Tripartite Agreement* (2011) envisaged the need to speed up the instruments for temporary reduction of the normal working periods and suspension of the employment contract in situations of company crisis. To that effect it established the following goals: (i) reduction of procedural deadlines; (ii) establishment of a right of consultation of the accounting and financial documents with which the company justifies its situation of crisis; (iii) making the procedure electronic; (iv) establishment of an automatic concession in case of agreement between the company and the workers' representatives with regard to the measures of reduction and suspension of the employment contracts; (v) establishment of a requirement of a status of full compliance with tax and social security obligations, except if the company has been declared to be in a difficult economic situation or is undergoing a recovery procedure[56]; (vi) establishment of rules to avoid the abusive use of this procedure and to avoid the dismissal of the workers concerned during the period immediately following the end of the reduction or suspension measure; and (vii) establishment of an increase in pay to the worker in case of attendance of a professional training course during the reduction or suspension period.

The *MoU* (17.5.2011) and the *Growth, Competitiveness and Employment Commitment* (2012) included the goal of implementing the measures envisaged in the aforementioned Tripartite Agreement, which happened with Law no. 23/2012.

2.8. Extraordinary renewal of fixed-term employment contracts of determinate duration and temporary employment contracts

The *Competitiveness and Employment Tripartite Agreement* (2011) established, as a measure to reduce precariousness, the creation of a transitional legal framework – until 2013 – that allowed two renewals in addition to the ones legally established, keeping the maximum 3-year duration as legally established. The first renewal could not last less than 6 months; the second not less than the overall prior duration of the contract, if the total of months was less than 18, and extending to 3 years in the remaining cases.

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[55] See Decree no. 247/XII, available at www.parlamento.pt.

[56] It can be asked whether this additional requirement, established by Law no. 23/2012, may be set aside when the employer has assumed the full costs of the reduction or suspension measure, without resorting to public subsidies. In our opinion, the answer should be in the affirmative, as the *ratio legis* is to avoid that people with debts towards the State benefit from public funds. In this case, the employer that does not have a status of full compliance with tax and social security obligations should not be barred from accessing the measure if he or she obtains – for instance, through a bank loan or shareholders loans – the necessary financial resources to assume the full costs of the reduction or suspension.

Law no. 3/2012, of 10 January[57], established the first legal framework for the extraordinary renewal of fixed-term contracts of determinate duration. Essentially, this legal act presents the following characteristics:

a) Applicability to employment contracts that reached their maximum duration limit until 30.6.2013;
b) Admissibility of two extraordinary renewals until 30.6.2013;
c) The total duration of the renewals could not exceed 18 months[58];
d) Each extraordinary renewals cannot be inferior to a 1/6 of the maximum duration of the fixed-term employment contract of determinate duration or of its effective duration, depending on which is lower;
e) The limit to the validity period of the fixed-term employment contract of determinate duration subject to extraordinary renewal is 31.12.2014.

Law no. 76/2013, of 10 January[59], established the second legal framework for the extraordinary renewal of fixed-term employment contracts of determinate duration. Essentially, this legal act presents the following characteristics:

a) Applicability to the employment contracts that reached their maximum duration limit – established in the Labour Code or in the first exceptional legal framework – of up to 2 years after the entry into force of this law (that is, 7.11.2015);
b) Admissibility of two extraordinary renewals until 30.6.2013;
c) The total duration of the renewals could not exceed 12 months;
d) Each extraordinary renewal cannot be inferior to a 1/6 of the maximum duration of the fixed-term employment contract of determinate duration or of its effective duration, depending on which is lower;
e) The limit to the duration of the fixed-term employment contract of determinate duration subject to extraordinary renewal is 31.12.2016.

Between the end of the admissibility of the last extraordinary renewal carried out under the first legal framework (30.6.2013) and the entry into force of the second extraordinary legal framework (8.11.2013) there was a hiatus that must have led to the termination of countless fixed-term employment contracts due to their expiration.

However, the partial accumulation of extraordinary renewal frameworks may lead, in the extreme, to a fixed-term employment contract of determinate duration with a total duration of 5 years and a half (precarious employment as way to avoid the increase of the unemployment rate)[60].

[57] See www.dre.pt.
[58] In accordance with the 2009 Labour Code, the fixed-term employment contract of determinate duration has a maximum duration of 3 years.
[59] See www.dre.pt.
[60] In accordance with the 2009 Labour Code, the fixed-term employment contract of uncertain duration, which is not covered by the exceptional legal framework, has a maximum duration of 6 years. In turn, the temporary employment contract has a maximum duration of 2 years.

2.9. Employment contract with a very short duration

In Portugal, the standard contract is the employment contract of indefinite duration, the form of which is not subject to any requirement. The fixed-term employment contract or the temporary employment contract are both subject to written form and should contain a detailed description of the temporary need on which they are based; otherwise they will be converted into an employment contract of indefinite duration. It is relevant point, taking into account the rigidity of disciplinary dismissal proceedings (in contrast, for instance, with the flexibility of the collective dismissal based on market-related, structural or technological grounds).

Our legal framework establishes a special type of fixed-term contract: the employment contract with a very short duration. This contract presents the following characteristics:

a) It is applicable only to seasonal agricultural activities or to the realization of a touristic event;
b) Its duration cannot exceed a week, with a limit of 60 days of work in a civil year; and
c) It is not subject to written form, although an electronic form should be used to communicate its signature to Social Security.

The *Growth, Competitiveness and Employment Commitment* (2012) intended to increase the possibility to resort to this type of contract. Therefore, the increase of its duration from one week to 15 days was envisaged, as was the increase of the annual limit from 60 to 70 days of work in each civil year. Taking into account its duration, the Government and the Social Partners aimed to exclude this type of contract from the service pay fund. Laws no. 23/2012 and no. 70/2013 introduced these changes.

2.10. Contract of *comissão de serviço*

The *comissão de serviço* is a special type of employment contract with a flexible termination regime. Essentially, the *comissão de serviço* can be used for the performance of managerial functions (e.g. administrator, director), as well as for the position of personal secretary to a holder of such managerial functions.

In addition to these cases, the collective labour regulation instrument may extend its scope to functions presupposing a special relation of trust with the holder of the managerial functions.

The *Growth, Competitiveness and Employment Commitment* (2012) set the goal of extending this type of contract, provided that this is established in a collective labour regulation instrument, to the exercise of new leadership functions. Law 23/2012 introduced this change.

2.11. Port labour

The *MoU* (17.5.2011) established some goals regarding port activity. Among them we would point out the review of the legal framework on port labour in order to make it more flexible, reduce its scope and bring it closer to the legal framework set in the Labour Code. The ultimate goal was to significantly cut down costs – that is, wages.

The Labour Reforms that we have been looking at have been received without strong opposition (that is, organized protests and strikes). In our opinion, the exception was precisely the case of port work.

However, Law no. 3/2013, of 14 January[61], established the following changes:

a) Increase of the situations excluded from the legal framework on port labour, *inter alia* by reducing the activities of handling of loads;
b) Elimination of the need for a professional card and of the requirement of an employment contract of indefinite duration to the workers that integrate the "port personnel";
c) Applicability of the very short duration contract to port labour and increase of its annual duration to 120 days;
d) Applicability of the contract of intermittent employment to port labour with a shortening of the advance notice deadline from 20 to 10 days, without prejudice to the shorter deadline established in a collective labour regulation instrument;
e) The fixed-term employment contract for the handling of loads is not subject to renewals and has a maximum limit of 3 years;
f) Admissibility of overtime work of up to 250 hours a year, without prejudice to another limit defined in a collective labour regulation instrument and homologated by the Government[62];
g) Admissibility of the assignment of workers by port labour companies, regardless of whether they were hired directly or, under the terms to be defined by collective labour instrument, by resorting to temporary work companies.

2.12. Duties of communication to the Authority for Work Conditions

The *Growth, Competitiveness and Employment Commitment* (2012) established the elimination of a wide set of duties of communication by the employer to the Authority for Work Conditions, taking into account the heavy administrative work it meant for both parties, without significant consequences as regards the supervision of work conditions. These changes were included in Law no. 23/2012.

[61] See www.dre.pt.
[62] It should be recalled that the general legal framework allows for a maximum of 150 hours a year, without prejudice to the possibility of increasing up to 200 hours a year by way of a collective labour regulation instrument.

3. Combating the "dependent" self-employment

The rigidity of the Portuguese labour law – notably the dismissal regime – lead to the increasing relevance of fixed-term employment contracts, of temporary employment contracts and of "dependent" self-employment. As stated by the International Labour Organization, the "dependent" self-employment *is a phenomenon known as contractual arrangements where the worker is formally self-employed, but the conditions of work are de facto similar to those of employees*[63]. Nonetheless, this "self-employed" worker faces significant difficulties to be covered by the employment protection legislation.

Therefore, the Law no. 63/2013, of 27 of august, implemented a new and *ex-officio* procedure to combat the misuse of service provider contracts. The Authority for Work Conditions and the Public Prosecution Service will be the key-players.

4. Alternative dispute resolution mechanisms: mediation and arbitration

The *Growth, Competitiveness and Employment Commitment* (2012) also envisaged a compromise between the Government and the Social Partners towards the promotion of individual alternative dispute resolution mechanisms – that is, resulting from the signature, execution or termination of the employment contract –, namely arbitration in labour matters as a swift way to settle labour disputes. A deadline was set: end of 2012. To this date, there has been no further news.

5. Collective labour law

5.1. General aspects

As we have seen above, the Labour Reform has affected the collective labour regulation instruments with varying intensity. As a rule the Constitutional Court allowed it, provided that they were affected temporarily and in a manner justified by the economic and financial situation. Let us briefly analyse other changes to Collective Law.

5.2. Restriction of Extension Ordinances

As we have mentioned, the *MoU* (17.5.2011) set the goal of defining criteria for the issuing of Extension Ordinances that took into account the representation of the parties to collective bargaining agreements and their consequences to companies not covered by the collective bargaining agreement.

The *Growth, Competitiveness and Employment Commitment* (2012) promotes the idea of boosting collective bargaining, but does not address this issue in particular.

[63] International Labour Organization, *Tackling the job crisis in Portugal* (2014), pp. 17. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_235618.pdf.

After the third regular revision the *MoU* (15.3.2012) set the goal of not allowing the extension of collective bargaining agreements signed by employers' associations representing less than 50% of the workers in that sector of activity; however, even if that limit was reached, the Government should always assess the consequences for the competitiveness of companies in that sector.

Council of Ministers Resolution no. 90/2012, of 31 October[64], defined the following criterion for the issuing of Extension Ordinances: the employer that had signed the collective bargaining agreement should have in its service at least 50 % of the workers of that sector of activity, within the envisaged geographic, personal and professional scope, except if the request for extension excludes micro, small and medium companies.

This decision had important effects: (i) significant reduction of collective labour regulation instruments; and (ii) substantial decrease of workers covered.

Number of collective labour regulation instruments in the 2010-2014 period[65]

Year	CLRI	CBA	EO
2010	352	230	116
2011	200	170	17
2012	107	85	12
2013	106	94	9
2014 1st half	82	72	6

Number of workers covered[66]

Year	CLRIs	CBA
2010	1.485.950	1.407.066
2011	1.242.181	1.236.919
2012	404.756	327.622
2013	241.539	241.539

After the end of the Adjustment Programme, Council of Ministers Resolution 43/2014, of 27 June[67], was adopted to introduce flexibility in the criterion for issuing Extension Ordinances. Thus, the employer will need only to comply with one of the following criteria:

a) To have in its service at least 50% of the workers of that sector of activity, within the envisaged geographic, personal and professional scope;

[64] See www.dre.pt.
[65] Data provided by the Directorate-General on Employment and Industrial Relations.
[66] Data provided by the Directorate-General on Employment and Industrial Relations.
[67] See www.dre.pt. The adjustment of the criteria was mentioned in the Letter of Intent (26.5.2014) to the International Monetary Fund, available at http://www.portugal.gov.pt/media/1452387/LoI%2012R%20PT.pdf.

b) Its associates must include at least 30% of micro, small and medium companies.

In our opinion, the new criterion will allow a significant increase in the issuing of Extension Ordinances, without this meaning a return to the past, when Extension Ordinances were issued on a case-by-case basis and (almost) automatically.

5.3. Extended validity period ("sobrevigência") of collective bargaining agreements

The *MoU* (17.5.2011) established the need to evaluate the legal framework on the extended validity period ("sobrevigência") of collective bargaining agreements[68] [69].

On the past 30 June, the Parliament sent for promulgation by the President of the Republic the amendments to the legal framework on the extended validity period with the following general lines:

a) Shortening of the validity period of convention provisions that makes its termination dependent on the replacement by another collective labour regulation instrument: from 5 to 3 years;
b) Reduction of the extended validity period after termination: from 18 to 12 months;
c) Possibility of suspending the extended validity period, without prejudice to a maximum limit of 18 months[70].

This legal act also established the review of the Labour Code within a period of 2 years to shorten the aforementioned deadlines from 3 to 2 years and from 12 to 6 months.

It is a measure that aims to boost collective bargaining by reducing work conditions through the expiry of collective bargaining agreements. A system that sets in stone the negotiated collective bargaining agreements will not be favourable to the negotiation and review because one of the parties (the employer) would not have an interest in doing it to be in a worse-off situation than before.

[68] As stated by PALMA RAMALHO, *the Portuguese collective bargaining system has always faced a structural dilemma between avoiding unregulated situations caused by the expiry of a collective agreement without a replacement and the need to promote the regular renewal of these agreements in order to make them more adaptable to new* circumstances (MARIA DO ROSÁRIO PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis", Working Paper no. 54, ILO (2013), p. 25, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf).
[69] See the Letter of Intent (26.5.2014) to the International Monetary Fund, available at http://www.portugal.gov.pt/media/1452387/LoI%2012R%20PT.pdf.
[70] See Decree no. 246/XII, available at www.parlamento.pt.

5.4. Decentralisation of collective bargaining

The issue of decentralization of collective bargaining, bringing it closer to company level, is present in the *Competitiveness and Employment Tripartite Agreement* (2011), the *MoU* (17.5.2011) and the *Growth, Competitiveness and Employment Commitment* (2012). Law no. 23/2012 implemented it, essentially by allowing trade unions to delegate on workers' councils the powers to negotiate in relation to their associates with companies with at least 150 workers.

5.5. Suspension of collective bargaining agreements in situations of company crisis

On the past 30 July, the Parliament sent for promulgation by the President of the Republic a new legal framework on the suspension of the validity period of a collective bargaining agreement with the following general lines[71]:

a) Possibility to temporarily suspend the application of a collective bargaining agreement in a situation of company crisis, based on market-related, structural or technological grounds, disasters and other occurrences that have gravely affect the normal operation of the company and the keeping of work positions;
b) The suspension is dependent on a written agreement between the contracting employers' associations and the trade unions, without prejudice to the possibility of delegation of powers;
c) The agreement should be reasoned and indicate the period of suspension and its effects;
d) The suspension is subject to the rules on deposit and publication of the collective bargaining agreement[72].

It is a measure with some merits that can be an alternative to the reduction of the normal working period and the suspension of the employment contract in situations of company crisis or even to the dismissal on economic grounds.

5.6. The Industrial Relations Centre

The Industrial Relations Centre is an old claim of the Social Partners, dating from 1996/1999. Therefore, it is not surprising to find references to it in the *Competitiveness and Employment Tripartite Agreement* (2011) and in the *Growth, Competitiveness and Employment Commitment* (2012).

Decree-Law no. 189/2012, of 22 August[73], has created the Industrial Relations Centre as a collective tripartite body, with technical functions, administrative autonomy and legal personality, which operates under the Ministry for Economy and Employment. Its mission is to support collective bargaining and monitor the evolution of employment and professional training.

[71] See the Letter of Intent (26.5.2014) to the International Monetary Fund, available at http://www.portugal.gov.pt/media/1452387/LoI%2012R%20PT.pdf.
[72] See Decree no. 246/XII, available at www.parlamento.pt
[73] See www.dre.pt.

We have some doubts as regards a possible overlap of competences with the Directorate-General on Employment and Industrial Relations (*Direção-Geral do Emprego e das Relações de Trabalho* – DGERT), which is also competent to promote and monitor collective bargaining proceedings and to support the definition and execution of policies relating to employment and to professional training and professional, as well as to industrial relations and general work conditions.

6. Social Security

6.1. Unemployment benefit

The *MoU* (17.5.2011) set some goals relating to the unemployment benefit. They are:

a) Reduction of the maximum duration of the unemployment benefit to no more than 18 months;
b) Setting of a maximum limit for the unemployment benefit corresponding to 2,5 times the Social Support Indexation (*Indexante de Apoios Sociais* – IAS), that is, € 1.048,05;
c) Envisaging the reduction by at least 10% of the unemployment benefit after 6 months of unemployment;
d) Reduction of the minimum period of contributions necessary to access the unemployment benefit from 15 to 12 months;
e) Extension of the unemployment benefit to some categories of independent workers.

The *Growth, Competitiveness and Employment Commitment* (2012) established also the temporary increase in the unemployment benefit in those cases were both members of the couple are entitled to the unemployment benefit and have children under their care, including single-parent families.

Decree-Law no. 64/2012, of 15 March[74], implemented the aforementioned measures:

a) Reduction of the maximum duration of the unemployment benefit to 540 days, without prejudice to its extension if the workers have long contributory careers (especially over 50 years of age);
b) Reduction of the maximum unemployment benefit value from 3 times to 2,5 times the Social Support Indexation, that is, from € 1.257,66 to € 1.048,05;
c) Establishment of a reduction of 10% in the unemployment benefit value after 6 months of unemployment, with the goal of providing an incentive to job seeking;
d) Reduction of the minimum period of contributions necessary to access the unemployment benefit from 450 days to 360 days;

[74] See www.dre.pt.

e) Temporary increase by 10% in the unemployment benefit value in cases where both family members are entitled to the unemployment benefit and have children under their care, including single-parent families.

In turn, Decree-Law no. 13/2013, of 25 January[75], extended the situations of involuntary unemployment with access to the unemployment benefit to include the cessation of the employment contract by agreement for the strengthening of the qualification and technical capacity of companies, insofar as this does not lead to the reduction of the level of employment. Furthermore, there was an amendment to the legal framework on the social protection of independent workers providing services mainly to one contracting party, to eliminate the condition that contracting parties comply with contributory obligations in order for the benefit for the termination of activity to be received[76].

6.2. Active labour market policies

Active labour market policies are relevant instruments for opening the labour market to those groups of people that, as a rule, face greater difficulties when meeting that challenge, *inter alia* young people, the long-term unemployed and the workers with reduced work capacity. As a rule they are associated also with professional training and qualification policies.

Therefore, it is not surprising that this is a subject successively covered in the *Competitiveness and Employment Tripartite Agreement* (2011), the *MoU* (17.5.2011) [77] and the *Growth, Competitiveness and Employment Commitment* (2012).

Over the last few years have been cyclical and temporary. Therefore, we will indicate only a few more recent examples:

a) *Medida Estímulo Emprego* (Ordinance no. 149-A/2014, of 24 July[78]): financial support to the signature of an employment contract with a person who is unemployed and registered in the IEFP;
b) *Medida Estágios-Emprego* (Ordinance no. 204-B/2013, of 18 June, amended by Ordinance 149-B/2014, of 24 July[79]): financial support to the performance of professional traineeships that do not exceed 9 months and, in certain cases, 12 months;
c) Medida Emprego Jovem Ativo (Ordinance no. 150/2014, of 30 July[80]): financial support to the hiring of young people between 18 and 29 years of age who are registered as unemployed in the Institute for Employment and Professional Training with low levels of education;

[75] See www.dre.pt.
[76] In this case, for equity reasons, the retroactive application from the date of entry into force of Decree-Law 65/2012 was determined.
[77] The MoU defined vaguely this topic. See MARIA DO ROSÁRIO PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis", Working Paper no. 54, ILO (2013), p. 8, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf.
[78] See www.dre.pt.
[79] See www.dre.pt.
[80] See www.dre.pt.

d) Programa Investe Jovem (Ordinance 151/2014, of 30 July[81]): aiming to promote the creation of new companies by young people who are unemployed, by supporting the creation of self-employment and micro-businesses.

7. Regulated professions: in particular, public professional associations

The *MoU* (17.5.2011) established a set of measures to (i) eliminate the barriers to access the market and, with that, to increase competitiveness in the service sector; (ii) lighten the authorisation requirements that render labour mobility more difficult; and (iii) reduce the administrative load for companies.

Essentially, the issue related to the correct transposition of the Services Directive [82] and of the Professional Qualification Directive [83], as well as to the elimination of unjustified restrictions within regulated professions – that is, professions in which access is conditioned to holding certain professional qualifications.

With regard to regulated professions, the *MoU* (17.5.2011) set the goal that each regulated profession by public professional associations shall be revised. Taking into account that there were 18 public professionals associations in Portugal, it would be adequate to promote the adoption of a framework-law to guide the amendment of each professional statute. Thus, the goal of adopting a framework-law on public professional associations naturally appears on the second regular revision of the *MoU* (9.12.2011).

Law no. 2/2013, of 10 January (Framework-Law on Public Professional Associations)[84], established for the first time a horizontal framework applicable to all the public professional associations, which aims to regulate the creation, organization and operation of these entities, as well as to discipline the exercise of the professions they regulate.

Among other innovations, we highlight the following:

a) Transparency and information. The public professional association should have a website with information about: (i) the framework for accessing and performing the profession; (ii) principles and rules of deontology and technical rules applicable to their associates; (iii) updated records of their members and of firms of professionals; (iv) procedure to submit a complaint or claim; and (v) job offers;
b) Reduction of requirements for access to the profession. Definitive registration depends only upon holding the legally required qualification

[81] See www.dre.pt.
[82] Directive 2006/123/EC of the European Parliament and the Council, of 12 December 2006. This Directive was transposed into internal law by Decree-Law no. 92/2010, of 26 July, and by various sectorial legal acts.
[83] Directive 2005/36/EC of the European Parliament and the Council, of 7 September 2005. This Directive was transposed into internal law by Law no. 9/2009, of 4 March, which was amended by Law no. 41/2012, of 28 August, and by Law no. 25/2014, of 2 May.
[84] See www.dre.pt.

to exercise the profession and, in case it is justified, the performance of a traineeship and verification of deontology knowledge or taking of a final traineeship exam.

c) Traineeship. The traineeship to access the profession, in case it is required, cannot have a duration superior to 18 months;
d) Firms of professionals. Multidisciplinary firms are allowed, as is the opening of the social capital and of the administration to people who do not hold the necessary qualifications to exercise of the profession;
e) Publicity. Elimination of restrictions with regard to publicity.

This Framework-Law set demanding deadlines for the amendment of the professional statutes. However, almost 2 years on, no projects or proposals to that effect have been disclosed[85].

8. Private agencies for the placement of jobseekers

The Services Directive also imposed a few changes to the legal framework on private agencies for the placement of jobseekers. Indeed, Law no. 5/2014, of 12 February[86], replaced the requirement of prior authorization to carry out that activity with a mere prior communication. Additionally, it eliminated the incompatibility between the activities of temporary work company and private agency for the placement of jobseekers.

9. Temporary work companies

Law no. 5/2014 also lightened the legal framework applicable to temporary work companies. Thus, the deposit required in order to perform an activity was cut by half – from € 130.707,50 to € 65.353,75 –, without prejudice to the possibility of increase in accordance with the number of workers – up to a maximum of € 163.384,38.

10. Global assessment

As stated by the International Labour Organization, *Portugal is facing the most critical economic and social crisis in its recent economic history. Since the start of the global crises in 2008, one in seven jobs has been lost – the most significant labour market deterioration among European countries after Greece and Spain*[87]. It is too early to assess the global and real effects of the aforementioned Labour Reforms. Nevertheless, they have promoted the flexibility of the labour market[88] and

[85] According to the Letter of Intent (26.5.2014) to the International Monetary Fund, available at http://www.portugal.gov.pt/media/1452387/LoI%2012R%20PT.pdf, the new professional statutes shall be submitted to the Parliament "by the end of the summer".
[86] See www.dre.pt.
[87] See International Labour Organization, *Tackling the job crisis in Portugal* (2014), p. 1. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_235618.pdf
[88] According to the Portuguese Government, Portugal moved from a OCDE index value regarding individual and collective dismissals of 3.5 in 2008 to 2.7 in 2013, *lower than the value of Germany, Belgium and France*. See *The Road to Growth: a medium-term strategy for Portugal* (2014) p. 15, available at http://www.portugal.gov.pt/media/1424212/20140517%20Road%20Growth.pdf.

reveal the contractual nature (or origin) and character of compromise of Portuguese labour and social protection legislation. The specificity of the period 2011-2014 lies in the interposition of a third element – the *Troika* – between the Government and the Social Partners. In our opinion, the Social Partners have proven to be absolutely crucial, for two reasons: first, they have allowed the obligations internationally undertaken by the Portuguese State to be accommodated without a level of social conflict as was observed in other places; second, their "political" weight has constituted an important break on further deregulation of the labour legislation and on a more intense erosion of the right of collective bargaining.

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