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ECONOMIC CRISIS AND LABOUR LAW REFORMS IN PORTUGAL

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1. ECONOMIC CRISIS AND CHANGES IN PORTUGUESE LABOUR LAW: AN OVERVIEW

Portugal, it is well known, was subject to a bailout program from May 2011 to May 2014. The conditions under which international financial assistance was granted - stated in the *Memorandum of Understanding on Specific Economic Policy Conditionality (MoU)* - comprised a number of measures aimed at labour market reform, whose adoption prompted the modification of several precepts of the Portuguese Labour Code.

These measures encompassed a variety of subjects, including minimum wage amount (which remains frozen since 2011), public holidays and, of course, dismissals. They ranged from the merely transitory, as the extra two renewals (up to a maximum of 18 months) exceptionally allowed to fixed-term employment contracts that would otherwise end by June 30 2013[1], to the longer lasting, as the new rules on severance pay. And their adoption has had an actual and immediate effect in our individual relations system: such is particularly the case of measures aimed at the major purposes of slashing labour costs and making dismissals more flexible and less expensive. Differently, measures aimed at collective relations reform, mostly intent on giving a new breath to collective bargaining, have had a lesser impact in the short term (as some of them are yet to be concluded) but open new perspectives on long-sensitive issues.

However, if most changes made necessary by the MoU were thoroughly adopted, a few of them fell short of their purpose. And the reason for that lies with the Portuguese Constitutional Court, which throughout this crisis has emerged as an increasingly active and controversial player. Although its better known and more widely discussed stands refer to measures regarding public sector employees (salary cuts, suspension of Christmas and holiday allowances), the Constitutional Court has had a momentous role in the Labour Law reform, through Decision nr. 602/2013 which declared unconstitutional with general binding force six precepts of Law 23/2012, of June 25, that had modified the Portuguese Labour Code in compliance with the MoU. Delivered 15 months after these precepts had become enforceable

[1] Law nr. 3/2012, of January 10.

and with a *fiat justitia et pereat mundo* stand, Decision nr. 602/2013 raises several questions regarding not only its practical effects, but also the narrowing of the scope of measures set by the MoU and the likely violation of the principle of equality resulting from its own doctrine. Moreover, by plainly setting the very strict standards future attempts to modify the law should abide by as far as dismissals are concerned, Decision nr. 602/2013 openly took over the legislative, which had no choice but to comply and, by doing so, to disregard the MoU.

Before proceeding to detail the changes the crisis brought to Portuguese Labour Law, two caveats must be issued regarding this paper's contents. The first, to state that it does not comprise each and every modification made to Portuguese Labour Law in recent years, only those deemed more meaningful. The second to recall that despite the number and importance of the changes made, some crucial modifications were unfortunately overlooked by both the Troika and the legislator - and will as well be left out of this analysis: such is the case, *inter alia*, of salary adjustment, where an unreasonable legal standing has led to a variety of unlawful practices of troubling consequences.

2. THE MAIN CHANGES REGARDING INDIVIDUAL LABOUR RELATIONS

2.1 The slashing of labour costs: getting more work for less money

As previously mentioned, one of the major purposes the new solutions took on was slashing labour costs, in order to enhance the businesses' competitiveness. Such was, in fact, the reason of a variety of measures concerning overtime work and flexible working time arrangement resulting from Law 23/2012, of June 25.

2.1.1 Reduction of overtime work payment

The legally set additional pay for overtime work was reduced to half, from the previous 50%, 75% or 100%, depending on the moment it is performed, to 25%, 37,5% and 50%. In order to increase this measure's effectiveness, by broadening its scope, all collective agreements'

clauses setting higher additional pay for overtime work were suspended *ex lege*, firstly up to August 1 2014[2], more recently up to December 31 2014[3].

Paid compensatory time off following overtime work ceased to be granted as a rule and was limited to certain situations where the employee's right to daily and weekly rest would otherwise be at stake. As a result of Constitutional Court's decision nr. 602/2013 - which judged unconstitutional a legal precept that, to increase this measure's width, targeted collective agreements' clauses previous to August 1 2012 granting paid compensatory time off beyond these situations (even if by merely echoing the legal wording) - this novelty applies only to employees not benefitting from a clause of that sort. Such limitation, which may ultimately jeopardize the measure's efficiency, has raised doubts concerning equality among employees.

2.1.2 Enhancement of the bank of hours flexible working time arrangement system

New solutions were adopted regarding the bank of hours - a flexible working time arrangement scheme that enables the employer to increase, within legally set limits, the number of daily and weekly working hours as a response to production cycle fluctuations or variable work patterns, and that stands as a cheaper alternative to overtime work, for the extra hours are either treated as plain working time, hence paid according to the ordinary hourly rate (*i.e.*, with no additional pay) or otherwise compensated.

The most significant novelties refer to the bank of hours' scope of application, which was widely broadened, as its adoption, formerly limited to collective agreements and thus to the employees covered by them, is now permitted by employer's decision, whenever the collective agreement setting the bank of hours system allows its extension to all employees within the section or the unit, should at least 60% of them be originally comprised by it or should a minimum of 75% of those employees agree on such application. Also, the bank of hours can be set by mere agreement between employer and employee - which can be attained by the latter's

[2] Article 7, nr. 4, of Law 23/2012, of June 25.
[3] Article 2 of Law 48-A/2014, of July 31.

non refusal (in written and within the two weeks subsequent to the addressing of a written proposal by the first) - aimed at establishing the so-called individual bank of hours whose terms and conditions are legally set.

Another innovation concerned the compensation of the work increase – which can amount to 4 hours a day, up to a maximum of 200 hours a year (or to 2 hours a day up to a maximum of 150 hours a year, in case of individual bank of hours) – and consisted of a third possibility, besides payment and time off: enlargement of the annual vacation period.

2.2 Increasing productivity by increasing assiduity

A less apparent yet indisputable motive inspiring some of the adopted measures was the assumption that an increase in the number of worked days would necessarily result in increased productivity levels, which led to reducing the number of public holidays, deemed excessive, and to a new strategy towards leaves of absence.

2.2.1 Elimination of public holidays

Four public holidays (two religious and two political) out of the existing thirteen were suppressed. This measure, effective from January 1 2013, is subject to reevaluation within a 5 year period[4].

2.2.2 A new approach on absenteeism: replacing the carrot with the stick

A solution aimed at rewarding assiduous employees (who in the previous year had taken no leaves or only a limited number of justified leaves) - the legally granted annual vacation period increase from 1 up to 3 days - was abolished. As a result of Constitutional Court's decision nr. 602/2013 ruling unconstitutional the legal precept that, in order to increase this measure's width, targeted collective agreements' clauses previous to August 1 2012 granting extra

[4] Article 10, nr. 1, of Law nr. 23/2013, of June 25.

vacation days (even if by mere replication of the legal wording), this suppression affects only employees which do not benefit from a clause of the type. As previously noticed, such limitation, that ultimately endangers the measure's effectiveness, has raised doubts concerning equality among employees.

At the same time, a long-abandoned norm was resumed, stating that unjustified leaves adjacent to weekly rest days or public holidays will result in a more than proportional salary loss comprising all the corresponding period (and not just the leave days). This change of course is questionable, not only for reigniting a debate on the likely detriment of employees' defense rights, but also because by targeting unjustified leaves the new solution clearly misses the point, as the numbers related to absenteeism show an undisputable predominance of (supposedly) justified leaves.

2.3 Cheaper and more flexible dismissals

The measures concerning dismissals range from the conspicuous reduction of severance pay, affecting all dismissals based on employer related grounds (*i.e.*, for reasons other than the disciplinary), to solutions specifically intent on making dismissals for extinction of work position and for unsuitability more adjustable to the employer's interests.

2.3.1 Reduction of severance pay

Severance pay was dramatically reduced through a gradual plan put to practice between 2011 and 2013[5]. The long-adopted rule of 1 month of base salary per seniority year gave way firstly to 20 days of base salary per seniority year and subsequently to the current 12 days of base salary per seniority year. Also, maximum amounts were set to both the base salary to take into account in the severance pay determination and to its total sum, resulting from the applicable calculus rules.

[5] Law nr. 53/2011, of October 10, Law nr. 23/2012, of June 25, and Law nr. 69/2012, of August 30.

Although formally referred to collective redundancies, the new rules set the standard for the compensation the employee is granted in a wide range of situations of contract termination on the employer's behalf: dismissals for extinction of work position, for unsuitability, due to the closing of the undertaking and in the context of a bankruptcy procedure, *inter alia*.

Nevertheless, and to secure the legitimate expectations of the long-employed, a specific transitory regime was set, by means of which the seniority years up to October 31 2011, as well as the periods between November 1 2011 and October 1 2013 abide by the then enforceable rules, when it comes to compute the due severance pay.

2.3.2 New criteria to select employees to dismiss for extinction of work position

Dismissal for extinction of work position - based on the same grounds as collective redundancies and following a similar procedure, but affecting a smaller number of employees (1 if the undertaking has less than 50, up to 4 if the undertaking has 50 or more) - often calls for a selection among employees within the same section or unit.

The long-adopted solution for such selection, based on a legally pre-defined seniority order, was replaced by a rank of five criteria - worst performance evaluation, lesser academic and professional skills, greater cost due to employment contract's maintenance, lesser experience in the job, lesser seniority in the undertaking[6]. The employer is bound to follow their legally set range, moving ahead to the next only when the previous proves inoperative.

Tailor-made to meet the very strict standards set by the Constitutional Court, this solution waivers the Mou's intention of entrusting the employer with the choice of the selection criteria, thus strengthening the parallel with collective redundancies. In fact, Decision nr. 602/2013, which rejected a first attempt to bring forward such change, expressed an adamantly adverse view towards letting the employer determine the selection criteria, stating that "only the strict

[6] Law nr. 27/2014, of May 8.

legal setting of conditioning and limiting boundaries can prevent the possibility of a subjective choice"[7] and be, therefore, acceptable. This stand left the Portuguese legislator torn between sticking to the Mou and facing a second (and more than certain) refusal by the Constitutional Court, or following its doctrine to obtain its approval. The choice of this last path granted constitutional conformity, but at the price of giving up a long demanded paradigm change.

2.3.3 Widening of unsuitability as cause for dismissal

Unsuitability was redefined on broader terms, no longer requiring that the events displaying its occurrence (as the continued productivity decrease or the failure to attain previously set targets) were subsequent, thus supposedly related, to changes (technological or other) made to the work position.

Dismissal for unsuitability's scope of application was consequently enlarged and it can now take place in case of continued productivity or work's quality decrease, repeated equipment damage or risk for the employee's own safety and health (as well as for other employees or third parties' safety and health) - so long as it results merely from the way the employee performs his work (*i.e.*, not from any wrongdoing of any party). Employees placed in technically complex or management positions can also be deemed unsuitable for failing to attain targets previously set by written agreement - again, as long as such failure results merely from the way the employee performs his work (*i.e.*, with no wrongdoing of any party). In both situations the employer is nonetheless bound to offer the affected employee replacement in a matching position, for dismissal should be the *ultima ratio, i.e.,* the last resort[8].

3. THE MAIN CHANGES REGARDING COLLECTIVE LABOUR RELATIONS

Measures concerning collective relations are, with a crisis-dictated exception, of a more structural kind and aimed at the revival of collective bargaining - either by bringing it to a

[7] Portuguese Constitutional Court's Decision nr. 602/2013, nr. 31.
[8] Portuguese Constitutional Court's Decision nr. 602/2013, nr. 32.

different level and entrusting it to a new player, or by removing one of the most prominent obstacles to the parties resorting to negotiation, the tendency to perpetuate collective agreements far beyond their term - and also at increasing the consistency of administrative decisions to extend collective agreements.

3.1 Collective agreement negotiation by workers committees

Workers committees - an employees' representation structure that refers to the undertaking as a whole and *ex lege* includes all its work force, but plays no part in both collective bargaining and strike (which belong exclusively to trade unions) - were from 2012 given a chance to negotiate collective agreements at firm-level, within legally defined and rather restrictive terms. Such terms include a delegation-like empowerment by trade unions, granted in the context (and stated in the text) of a collective agreement of broader scope and a firm-size threshold of 150 or more workers. Since these firm-level collective agreements are supposed to either adjust or develop the broader collective agreement discipline, their contents will comprise only the designate subjects where such tasks are deemed necessary.

2.2 Prompting collective agreements' expiry

The Portuguese collective relations system has long dreaded the regulatory void that may occur when a collective agreement reaches its end and is not immediately followed by another. This concern has generated solutions that stretch collective agreements long past their intended term, often against one of its parties' will and with blatant detriment to collective bargaining's normal development. A new set of rules, effective from September 1 2014 on[9] deals with two critical issues concerning collective agreements' expiry: the cessation of clauses stating that the collective agreement remains in force until it is replaced by a new or revised one and the collective agreement's *ex lege* prolongation whenever negotiations are in course (and for a time fit to permit their conclusion).

[9] Law nr. 55/2014, of August 25.

Collective agreement clauses establishing it will remain in force up to its replacement have long caused entropy in our collective bargaining system. Adopted in most cases as mere clauses of style (or *obiter dicta),* the practice came nevertheless to take them literally, as a way to avert the abovementioned void, thus prevailing over end dates set by the parties and supporting the collective agreement's continuation beyond the originally intended. As this situation benefits the party uninterested in changing past arrangements (even if set in a totally different context), which feels no urge to negotiate and to attain new compromises, these clauses became an excuse to block and drag collective bargaining procedures. The Portuguese Labour Code's 2009 version submitted them to a five year expiry period (from a series of events such as the collective agreement's last full publication), but this deadline proved too long and ineffective to urge the parties to negotiate. Therefore, the new rules cut the expiry period to three years and open the door to a further reduction (to two years) within a year from their enforcement.

To prevent the same regulatory void the Portuguese Labour Code's 2009 version set a period, following the collective agreement's assigned term, during which, should negotiations aimed at its replacement or revision be taking place, its rules would remain enforceable. Such prolongation period (named "sobrevigência") lasts for 18 months plus 2 months following communications between the parties and the government on the failure of negotiations, after which the collective agreement finally comes to an end. As this period has proved excessive, the new rules reduce it to 12 months *plus* 45 days (and anticipate a further reduction to six months in one-year's-time).

3.3 Collective agreement suspension in the context of a business crisis or other events affecting the firm

A recently enforceable norm[10] allows the collective agreement parties can to totally or partially suspend it in the context of a business crisis or whenever due to market, structural or technological motives (the same that justify collective redundancies and dismissals for extinction of work position), the occurrence of a catastrophe or other reason, the firm's normal

[10] Law nr. 55/2014, of August 25.

operation is seriously affected and such measure is appropriate to both ensure the business's survival and to prevent dismissals. Such decision must point the suspension grounds and determine its length and has to abide by collective agreements' deposit and publication rules. Also the suspension agreement can set its effects, which will otherwise be the total or partial non enforcement of the collective agreement's rules.

3.4 Extension of collective agreements

Extension of collective agreements to nonaffiliated employers and employees by administrative decision was subject to a number of criteria aimed at ensuring the representativeness of the respective parties (with particular regard to employers' organizations representativeness, because of the extension's implications on the nonaffiliated competitive position)[11].

[11] Cabinet resolutions nr. 90/2012, of October 31, and nr. 43/2014, of June 27.