

ANNEX I.1: RULING N. 396/11 OF 21 SEPTEMBER 2011

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20110396.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic according to Art. 281.2 (*f*) of the Constitution (at least one tenth of the Members of the Assembly of the Republic)

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2011 n. 55-A/2010 (LOE 2011), of 31 December 2010, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2011. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on

· Given the peculiar economic, legal and political situation faced by Portugal, these annexes focus on the judgments delivered by the Portuguese Constitutional Court after the entry into force of the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) signed with the European Commission as well as of the Memorandum of Economic and Financial Policies (MEFP) with the IMF. Judgments dealing with austerity measures before the MoU was signed did not deal with the main Euro-crisis measures, like the EFSM Regulation, the EFSF Framework Agreement, the ESM Treaty and the Fiscal Compact (see, for example, Ruling n. 188/2009; Ruling n. 494/2009; Ruling n. 3/2010; Ruling n. 154/2010; Ruling n. 256/2010; Ruling n. 338/2010; Ruling n. 399/2010; Ruling n. 33/2011; Ruling n. 251/2011).

17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.¹

6. LEGAL QUESTIONS

The LOE 2011's norms under the scrutiny of the Court concerned the reduction in the pay of public-sector staff, namely judges and public prosecutors.

7. ARGUMENTS OF THE PARTIES

The allegations submitted by the applicants included the violations of: the right of workers' committees and trade unions to take part in drawing up labour legislation and economic and social plans that address their sector (Articles 54 and 56 of the Constitution); the principle according to which the fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable legal rules, such as Portuguese labour law as codified in various laws (Art. 16 of the Constitution); the right to salary (Art. 59 of the Constitution); the principle of the protection of trust as implied in the principle of a democratic state based on the rule of law (Art. 2 of the Constitution); the principle of equality (Art. 13 of the Constitution).

The norms of LOE 2011 under scrutiny were: Art. 19 (*Redução remuneratória*), Art. 20 (*Alteração à Lei n. 21/85, de 30 de Julho*) and Art. 21 (*Alteração à Lei n.º 47/86, de 15 de Outubro*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court, first of all, dealt with the issue of *ratione temporis* efficacy of the measures contained in LOE 2011 and highlighted that the reductions in the pay of judges and public prosecutors were transitory.

It then considered that the right of trade unions and workers' committees to take part in drawing up labour legislation was respected.

The Court was also clear in denying that there is a right, under the Constitution, according to which salaries are irreducible and thus said that their reduction does not breach either the principle of trust, or the principle of equality. Indeed, the reasons of public interest on which

¹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

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Articles 19-21 of LOE 2011 are grounded, in the opinion of the Court, legitimately prevailed over the (non-absolute) principle that salaries cannot be reduced. In this regard, the Court stressed that the legislator is vested with the power to make choices that fall under its legislative power, as being democratically legitimate.

The judgment was the object of 3 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The judgment did not create additional challenges as it upheld the 2011 State budget Law (LOE 2011).

ANNEX I.2: RULING N. 613/11 OF 13 DECEMBER 2011

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20110613.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

President of the Assembly of the Autonomous Region of Madeira.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality and legality of various norms contained in the State Budget Law for 2011 n. 55-A/2010 (LOE 2011), of 31 December 2010, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2011. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the

public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.²

6. LEGAL QUESTIONS

The LOE 2011's norms under the scrutiny of the Court concerned the reduction in the pay of public-sector staff of the Region of Madeira as well as the system of distribution of competences between the central government and the Autonomous Region of Madeira.

7. ARGUMENTS OF THE PARTIES

The allegations submitted by the applicants included the violations of: the power of the Portuguese autonomous regions to legislate within the ambit of the region on those matters that are set out in the respective political and administrative statute (Articles 227.1 and 228.1, 2 of the Constitution); the autonomy of the Region of Madeira to ensure democratic participation by citizens, economic and social development and the promotion and defence of regional interests, as well as the strengthening of national unity and of the bonds of solidarity between all Portuguese citizens (Art. 225.1, 2 of the Constitution); the principle of exclusive competence of Regional Governments in matters concerning their own organization and *modus operandi* (Art. 231. 6,7 of the Constitution).

The norms of LOE 2011 under scrutiny were: Art. 19.9, h, i, q, r, t and 11 (*Redução remuneratória*), Art. 22.1, b (*Contratos de aquisição de serviços*), Art. 30 (*Alteração ao Decreto -Lei n.º 558/99, de 17 de Dezembro*), Art. 40 (*Trabalhadores de órgãos e serviços das administrações regionais e autárquicas*), Art. 42 (*Dever de informação sobre recrutamento de trabalhadores nas administrações regionais*) and Art. 95.1 (*Necessidades de financiamento das regiões autónomas*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court, firstly, recalled its previous jurisprudence on the issue of constitutionality of Art. 19.9, h and i, of LOE 2011 in light of the distribution of competences between regional governments and the central government as established in Art. 231.7 of the Constitution. In Ruling n. 251/11, in fact, the Court did not find a violation of such rule; now, given the fact that there was no evolution so far on the matter, the Court concluded that, also in this case, that part of LOE 2011 was consistent with Art. 231.7. It then excluded an infringement of Art. 19.9, q, r, t as far as the reductions in the pay of public-sector staff, including those of Autonomous Regions, were concerned. Indeed it is highlighted in the judgment that it is a matter for the national legislature rather than for regional authorities inasmuch as the problem of public debt has a national dimension, thus requiring a response at a national level.

For what concerns Art. 22.1, b and Art. 30 of LOE 2011, the Court was clear in saying that the national legislator can envisage, though the adoption of detailed norms, temporary cuts concerning the staff or a reduction of the economic value of contracts for the procurement of

² See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

services even though they would pertain to areas that fall under the scope of the *Estatuto Político-Administrativo da Região Autónoma da Madeira*.

As to the norm that subjects the mobility of public-sector workers from the regional administration (to the direct and indirect administration of the State) to the preliminary opinion of the members of the government, the Court stressed that such mobility is not prevent but only limited by Art. 40 of LOE 2011. Those limits were considered therefore legitimate inasmuch they were deemed necessary to attain the objective of reduction of costs through a rationalization of human resources.

For what regards the obligation, enshrined in Art. 42 of LOE 2011, imposed upon institutions of autonomous regions, to inform the national government for the recruiting of staff in regional public administrations, the Court found it constitutional especially in light of the principle of solidarity among different Portuguese regions.

Finally, the Court said that it was possible for the national legislator to set limits to the discretionary power of autonomous regions to contract loans forasmuch as this possibility lied in the need to ensure the national financial sustainability of Portugal.

The judgment was the object of 4 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The judgment did not create additional political challenges as it upheld the law in question.

ANNEX I.3: RULING N. 353/12 OF 5 JULY 2012

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html>.

Summary in English: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html>

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic from the Socialist Party (Art. 281.2 (*f*) Const.).

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2012 n. 64-B/2011 (LOE 2012), of 30 December 2011, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2012. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the

public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.³

6. LEGAL QUESTIONS

The LOE 2012's norms under the scrutiny of the Court concerned the suspension of the Christmas and holiday-month allowances.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the principle of a democratic state based on the rule of law (Art. 2 of the Constitution); the principle of equality (Art. 13 of the Constitution); the principle of the protection of trust (Art. 2 of the Constitution); the principle of proportionality (Art. 2 of the Constitution); the right to social security (Ar. 63 of the Constitution).

The norms of LOE 2012 under scrutiny were: Art. 21 (*Suspensão do pagamento de subsídios de férias e de Natal ou equivalentes*) and Art. 25 (*Suspensão de subsídios de férias e de Natal ou equivalentes de aposentados e reformados*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court recalled, first of all, that the cutting of the Christmas and holiday-month payments, or any payments that were equivalent to the so-called 13th and 14th months of pay, was applicable to persons who received a remuneration or pensions worth more than €1,100 euros/month, and came on top of the earlier reductions that had already been imposed in 2011 and were maintained for 2012. Non-payment of the whole of these amounts represented a 14.3% reduction in the annual value of salaries and retirement pensions, in addition to the previous reductions. The Court also took account of the fact that there had been a public-sector pay freeze in 2010, 2011 and 2012, and a freeze on pensions in 2011 and 2012, and that the FAP provided for these freezes to continue in the coming years. All this implies a true fall in the value of such salaries and pensions. The legislator did not opt to impose a Personal surtax on income, as it had done for 2011, nor did it create any specific new extraordinary tax. It preferred to act on the spending side of the equation, by reducing the amount the state paid to persons who received holiday and Christmas-month payments from public funds.

Having said this, the Court observed that the principle of equality with regard to the just distribution of public costs is a necessary legislative parameter which the legislator must consider when it decides to reduce the public deficit in order to safeguard the State's solvency. The fact that the measures contained in the norms before the Court were not universal meant that they did not distribute the sacrifices equally between all citizens, in

³ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

proportion to each one's financial capacity. They affected a specific category of people more than another.

Those measures therefore had to be justified and the grounds for justification lied in their efficacy as well as in the guarantee that the result would be connected with overriding reasons of public interest. The Court highlighted that even within the framework of a serious economic crisis, the legislator's freedom to cut remunerations and pensions of persons who receive them from public funds cannot be unlimited and that the measures were justified only as long as the difficult economic situation remained exceptional and time-constrained. This means that any difference in treatment must be subject to a judgment of proportionality. Unlike what it was said in Ruling 396/11, in which LOE 2011 was deemed to be limited in time and did affect remuneration only up to a reasonable amount, the Court stressed that LOE 2012 had a too strong impact on the level of remuneration of workers, was for a time-span too long to be considered admissible and did not contain other provisions extending this reduction to private workers. In light of this, the Court concluded that the difference in the case was so substantial and significant that the reasons advanced by the government did not prove enough that the measures included in LOE 2012 were to be justified, all the more so in that it was possible to resort to alternative solutions.⁴

Given the fact that the execution of LOE 2012 was already underway, the State's solvency was endangered and the budgetary execution was reaching the middle of the year, the Court said that it was needed a qualified declaration of unconstitutionality, as foreseen in Art. 282.4 of the Constitution, and consequently postponed the effectiveness of the judgment so that the suspension of payment of the Christmas and holiday bonuses or any equivalent payments with regard to 2012 shall be excluded. This means that the cuts will be applicable in 2012 and will only be abolished as of 2013 onwards.

Three Judges dissented from the declaration of unconstitutionality.

Among the judges who decided to declare Articles 21 and 25 of LOE 2012 unconstitutional, three took the view that the effects of the declaration of unconstitutionality should also extend to the current year, i.e., to 2012.

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 282 of the Constitution, the judgment, as for the rules declared unconstitutional, possesses generally binding force. Therefore, Articles 21 and 25 of LOE 2012 were eliminated from the legal system – although with the postponed effects allowed by Art. 282.4 – and can no longer be applied, be it by the courts, the public administration, or private individuals.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The constitutional court struck down one of the government's key austerity measures contained in LOE 2012. However, the court also recognized the difficulties its ruling would create for the government, given that the cuts were included in Portugal's MoU and therefore

⁴ See the Summary.

suggested that the suspension could be maintained during 2012. From the legal standpoint it is unprecedented for the court to restrict the effects of the decision to the future.

Nonetheless, the decision meant that the government still had to find additional measures that would amount to around €2m per year, from 2013, to fill the gap.

In early September 2012, immediately following the fifth troika mission, the government announced an additional set of austerity measures. For 2013/2014 the Minister of Finance announced significant tax raises, both on income tax and VAT. In addition, it declared that workers would pay more social security while employers would pay less - by decreasing "Taxa Social Única" for companies while raising it for employees. The decrease/increase of TSU threatened an already instable government.

The context in which the measures were made public also caused great controversy. The measures were interpreted as an offer put forward by the government as to publicly renew its commitment to the terms of the MoU before the troika. In exchange, the troika granted a postponement of Portugal's obligations, namely on meeting the 4.5% deficit goal for 2013.

ANNEX I.4: RULING N. 412/12 OF 25 SEPTEMBER 2012

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20120412.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Autonomous Region of Azores as well as of Madeira;
The Assembly of the Autonomous Region of Madeira;
Members of the Assembly of the Autonomous Region of Madeira.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality and legality of various norms contained in Law n. 49/2011, of 7 September 2011, in Law n. 91/2001, of 20 August 2001, as amended by Law n. 22/2011, of 20 May 2011, in Law n. 60-A/2011, of 30 December 2011, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in Law n. 49/2011, Law n. 91/2001, Law n. 22/2011, Law n. 60-A/2011. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on

recapitalization and deleveraging aimed at ensuring the financial stability of the country.⁵

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned the application of an extraordinary surtax applied to the personal income tax for 2011.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the competence of the Portuguese autonomous regions to legislate within the ambit of the region on those matters that are set out in the respective political and administrative statute (Articles 227.1 and 238 of the Constitution); the right of the Autonomous Region of Azores as well as of the Autonomous Region of Madeira to be involved in the planning of national fiscal policies (Art. 19 of the *Estatuto Político-Administrativo da Região Autónoma dos Açores*, Art. 15 of the *Lei de Finanças das Regiões Autónomas*, as amended by Law n. 1/2007, of 19 February 2007, Art. 107.3 of *Estatuto Político-Administrativo da Região Autónoma da Madeira*); the competence of the Autonomous Region of Azores to enact norms on the application of extraordinary taxes (Art. 25 of the *Lei de Finanças das Regiões Autónomas*); the principle of distribution of competences in the repartition of taxes between central government and autonomous regions (Art. 227.1, j of the Constitution).

The norms under scrutiny were: Art. 2.4 of Law n. 49/2011 (*Disposições transitórias e finais*), Art. 4 of Law n. 60-A/2011 (*Aditamento à Lei n.º 55 -A/2010, de 31 de Dezembro*), Art. 2 of Law n. 22/2011 (*Alteração à Lei n.º 91/2001, de 20 de Agosto*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court did not find Art. 2.4 of Law n. 49/2011, Art. 141-A, a and Art. 185-A, which was included in LOE 2011 by Art. 4 of Law n. 60-A/2011, in violation of the Constitution. It also declared not to be illegal Art. 2.4 of Law n. 49/2011.

As to the issue of unconstitutionality of Articles 2.4 and 141.-A, a, which establish the reversion of the revenue from the surtax on personal income, the Court said that those norms did not infringe the principles enshrined in Art. 227.1, j and p, as well as in Art. 232.1 of the Constitution. This means that they did not prevent the two regions of Azores and Madeira neither to dispose of the tax revenues collected or generated therein (as well as of a part of the state's tax revenues determined in accordance with a principle that ensures effective national solidarity, and of other revenues that are allocated to them, and to appropriate those revenues to their expenditure) nor to pass the regional economic and social development plan, the regional budget and the region's accounts and to take part in drawing up the National Plans. Indeed the Court stressed that the income coming from the surtax does not fall under Art. 227.1. The same must be said with regard to Art. 254.1 of the Constitution, whereby it is affirmed that municipalities shall share in the revenue from direct taxes by right and as laid down by law.

As to the matter of illegality, the Court denied that Art. 2.4 infringed Art. 19.2, b of the

⁵ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

Estatuto Político-Administrativo da Região Autónoma dos Açores and Art. 108, b, Art. 112.1, a and d, of the *Estatuto Político-Administrativo da Região Autónoma da Madeira* inasmuch those norms, which confer upon regional authorities the right to be involved in the fiscal policies conducted by the central government, must not be considered “*materialmente estatutárias*”.⁶

As to the issue of illegality of the above mentioned norms with the *Lei de Finanças das Regiões Autónomas*, the Court decided not to state on the matter in light of the Constitution. The same has been said with regard to Art. 141-A, b of Law n. 60-A/2011 as well as to Art. 2.4 of Law 49/2011, Articles 141-A and 185-A in light of the *Estatuto Político-Administrativo da Região Autónoma dos Açores* and of the *Estatuto Político-Administrativo da Região Autónoma da Madeira*.

The judgment was the object of 2 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional. The norms on which it decided not to state on the matter also remain in force.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The judgment did not create additional political challenges as it upheld the law in question.

⁶ See para. 8 of the Ruling.

ANNEX I.5: RULING N. 568/12 OF 27 NOVEMBER 2012

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20120568.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Autonomous Region of Azores.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2012 n. 64-B/2011 (LOE 2012), of 30 December 2011, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in LOE 2012. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.⁷

⁷ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

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6. LEGAL QUESTIONS

The norm under the scrutiny of the Court concerned the deduction of 5% of the personal income tax collected from the territory of the Autonomous Region of Azores (and not from the whole Portuguese territory).

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the competence of the Portuguese autonomous regions to legislate within the ambit of the region on those matters that are set out in the respective political and administrative statute (Articles 227.1 and 238 of the Constitution).

The norm under scrutiny was: Art. 212 of LOE 2012 (*Norma interpretativa*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court limited its reasoning by saying that inasmuch as Art. 212 of LOE 2012 reproduces the content of Art. 185-A – which was already at stake in Ruling n. 412/2012 –, the norm must be deemed constitutional.

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norm at stake remains in force. However, the Court could examine it in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The judgment did not create additional political challenges as it upheld the law in question.

ANNEX I.6: RULING N. 187/13 OF 5 APRIL 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>.

Headnotes and summary in English:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187e.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

The President of the Republic;

Members of the Assembly of the Republic from the Socialist Party;

Members of the Assembly of the Republic from the Communist Party, the Left Bloc and the Ecologist Party (they submitted a joint request);

The Ombudsman.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2013 n. 66-B/2012 (LOE 2013), of 31 December 2012, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2013. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78

billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.⁸

6. LEGAL QUESTIONS

The LOE 2013's norms under the scrutiny of the Court concerned: the suspension of the payment of the extra holiday month of salary (or its equivalent); the same suspension for retirees from both the public and the private sectors; the imposition of an extraordinary solidarity contribution payable on pensions; a reduction in the pay of public-sector staff; a reduction in the remuneration, and suspension of the extra holiday month, payable under teaching and research contracts; a reduction in the sums payable as overtime; the imposition of a contribution payable on sickness and unemployment benefits; changes to the personal income tax brackets.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the principle of a state based on the rule of law (Articles 2 of the Constitution); the principle of equality and its corollary, i.e., the principle of proportionality (Articles 13, 18 and 104 of the Constitution); the principle of the dignity of the human person (Articles 1, 62, 63, 105 and 106 of the Constitution); the principle of the protection of trust (Art. 2 of the Constitution); the right to a salary (Art. 59 of the Constitution); the right to social security (Art. 63 of the Constitution); the right to collective bargaining and collective labour agreements (Art. 56 of the Constitution); the right to subsistence with a minimum level of quality (Articles 1 and 63 of the Constitution); the right to property (Articles 18 and 62 of the Constitution); the unitary and progressive nature of income tax (Art. 104 of the Constitution); the principle of the capacity to pay taxes (Articles 13 and 104 of the Constitution).

The norms of LOE 2013 under scrutiny were: Art. 27 (*Redução remuneratória*), Art. 29 (*Suspensão do pagamento de subsídio de férias ou equivalente*), Art. 31 (*Contratos de docência e de investigação*), Art. 45 (*Pagamento do trabalho extraordinário*), Art. 77 (*Suspensão do pagamento do subsídio de férias ou equivalentes de aposentados e reformados*), Art. 78 (*Contribuição extraordinária de solidariedade*), Art. 117 (*Contribuição sobre prestações de doença e de desemprego*), Art. 186 (*Alteração ao Código do Imposto sobre o Rendimento das Pessoas Singulares*), and Art. 187 (*Sobretaxa em sede do IRS*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

As a preliminary reasoning, the Court recalled that the question of knowing how long norms

⁸ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

remain in force when they are contained in budget laws which affect the amount of pay received by public-sector workers (i.e. whether the related reductions are definitive or merely transitory) had already been addressed in the review of the constitutionality of both the State Budget Law for 2011 (LOE 2011) (Ruling n. 396/11) and the State Budget Law for 2012 (LOE 2012) (Ruling n. 353/12).

In the present case the Court concluded that the norms of LOE 2013 were designed to directly reduce the amount of the expenditure and were therefore financial provisions. The Court thus took the position that these norms had a budgetary nature and subsequently that the necessary application of the constitutional principle of annual budgets meant that there was no need to autonomously state the end of the period for which they remained in force.

Having said this, the Court focused on Ruling n. 353/12 where it was held that the suspension of payments required by LOE 2012 should last for at least three years, thus encompassing 2012, 2013 and 2014. The Court ruled that there was no breach of the constitutional principle that budgets must be annual, because although the temporal clause established a time limit for the norm to remain in force that went beyond the current year, this did not result in a revenue or expenditure provision with that duration, and this in turn meant that the legislator was not dispensed from reiterating it in the subsequent budget laws passed during the period in which the FAP remained in force.

In the present case, given that the temporal structure of the norms in LOE 2013 and those in LOE 2012 was the same, the Court stated that there was no reason to diverge from the position on the temporality of the challenged measures already undertaken in its previous jurisprudence.⁹

For what regards the different allegations submitted by the applicants that were deemed well-grounded by the Court, it was firstly said that the suspension of the additional holiday month of salary or equivalent for staff of the public administration (including teachers and researchers) was unconstitutional because in violation of the principle of equality that requires the just distribution of public costs. The Court did not exclude the possibility that, in exceptional economic circumstances and financial constraints, the legislator could lower the income of public administration staff, even if such a measure were to lead to unequal treatment compared to persons who earn income in the private economic sector. However, when not matched by equivalent sacrifices on the part of virtually all the other citizens earning income from other sources, the cumulative, ongoing effects of the sacrifices imposed on people who earn income in the public sector represent a difference of treatment for which the aim of reducing the public deficit does not provide adequate grounds. This does instead constitute a breach of the principle of proportional equality, based on the idea that an inequality derived from a difference between situations must be judged from the point of view of whether it is proportional or not, and cannot go too far. Penalising a given category of people undermines both the principle of equality with regard to public costs and the principle of fiscal justice.¹⁰

Secondly, the Court declared that also the suspension of the holiday month of pensions for public and private-sector retirees should be declared unconstitutional. The reasons for this were *mutatis mutandis* the same given with regard to the salary of public administration's workers since the right to a private or public-sector pension must be considered as being placed on the same level of the right to a salary. Moreover, the Court highlighted that the

⁹ See paras 5-8 of the Summary.

¹⁰ See para. 1 of the Headnotes.

only difference, if present, lies in the fact that pensioners possess a legal position which warrants added protection in terms of the principle that trust must be protected. If there is a difference, it is in the sense that when a person's professional working life ends and he/she is entitled to start receiving the pension benefit, the pensioner no longer enjoys mechanisms that enable him/her to adapt his/her own behaviour to the new circumstances. Consequently, there must be increased trust in the stability of the legal order and the maintenance of the rules that serve to define the content of the right to a pension.

The Court recognised that the different treatment imposed on people who receive pay and pensions that come from public funds, in the form of the suspension of the holiday month, went beyond the limits established by the prohibition on excess where proportional equality is concerned, and that in the case of pensioners the situation of inequality in relation to public costs was even worse.

The imposition of the so-called extraordinary solidarity contribution, which sought to make the reduction in pensions equivalent to that in the monthly pay of public-sector staff, already means that pensioners are experiencing the same fall in disposable income as the latter. The suspension of the holiday month has also further aggravated an already unequal situation, not only in relation to other pensioners whose holiday month was not suspended, but also compared to people with other forms of income.¹¹

Thirdly, the Court found the norm that provided for a contribution payable on unemployment and sickness benefits to be unconstitutional because it violated the principle of proportionality. In the judgment it was clarified, first of all, that the scope of the protection provided by a worker's right to material assistance in situations of unemployment or illness, as it is foreseen in the Constitution, does not mean that it is impossible to reduce the amounts of those benefits. The Court then maintained that in the cases of both the unemployment benefit and the sickness benefit, the new contribution was accompanied by other measures that increased the amount of the payments to which involuntarily unemployed or ill workers are entitled in certain specific situations. Although it is up to the legislator to make the content of the corresponding social right operable by defining the list of situations in which protection is required, the Court took the view that the absence of any safeguard clause meant that in practice it was not impossible for the cash amounts involved to be reduced to a point at which, in some cases, the benefit might fall below the minimum level already established in legislation. Such a solution would violate the principle of proportionality by affecting the beneficiaries in the most vulnerable situations, in that it encompasses social benefits whose function is to replace earned pay a worker has been deprived of and whose amount is supposed to be at least equal to the minimum material assistance already guaranteed by law. In this regard, the Court recalls its previous case law in which the existence of a guarantee of a right to a minimum level of subsistence, grounded on a combination of the principle of the dignity of the human person and the right to social security in situations of need.¹²

The Court decided not to declare the unconstitutionality of several norms of LOE 2013. Firstly, it did so in relation to the reduction in remunerations paid within the scope of the legal public employment relationship. More specifically, the Court confirmed its previous jurisprudence, in which it clarified that the rule under which salaries cannot be reduced is not an absolute one. Therefore the Court denied that there is a right under which salaries are

¹¹ See para. 2 of the Headnotes.

¹² See para. 3 of the Headnotes.

irreducible.¹³

Secondly, the Court said that inasmuch as the reduction in salaries does not breach either the principle of trust, or the principle of equality, the specific reduction of the additional pay for doing overtime, unlike the extra holiday and Christmas-month payments, being that pay variable and unpredictable – i.e., based on managerial decisions –, represents a legitimate measure. Indeed the measure does not cause damage that can be criticised on constitutional grounds.¹⁴

Thirdly, the Court found that the norm which subjects pensions to an extraordinary solidarity contribution was not unconstitutional, considering instead that this contribution was proportional since a para-fiscal contribution to be made by the universe of pensioners is a measure that is appropriate to the goals pursued by the legislator.¹⁵

Fourthly, the Court rejected the argument that the norms concerning a reduction in the number of taxable income brackets, an amendment to the additional solidarity rate, limitations on tax-deductible items, and the creation of Personal Income Tax surtax, were unconstitutional. In particular, on the subject of the reduction in the number of tax brackets and the increase in the normal and average rates applicable to each one, the Court held that the system is still sensitive to differences in levels of income and that, even though the changes do represent a certain reduction in the degree of progressivity, the Court did not consider it to be enough to be unconstitutional. Furthermore, the Court held that the decision as to whether the measures were compatible with the principle of the capacity to pay taxes, which is itself derived from the principle of equality, is included within the scope of the legislator's freedom to shape ordinary legislation. On the problem of whether the Personal Income Tax surtax is capable of breaching the principles of the unitary and progressive nature of income taxes, the Court considered that the norm is enough inspired by a progressive character and thus constitutional.¹⁶

Lastly, the Court declined to pronounce itself on the question of whether the Constitution – and specifically the principle of equality in the distribution of public costs and the principle of fiscal justice – is compatible with the legislator's decision to set rates of tax on income from work and pensions that can exceed 50%, while subjecting capital incomes to a single rate of 28%.¹⁷

The decisions not to declare the unconstitutionality of the norms on the cut in remunerations paid out of public funds and on overtime payments to public-sector workers were unanimous. The others were taken by majority votes that varied between 11-2 and 8-5.

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 282 of the Constitution, the judgment, as for those rules declared unconstitutional, possesses generally binding force. Therefore, Articles 29, 31, 77 and 117.1, of LOE 2013 were eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals.

¹³ See para. 4 of the Headnotes.

¹⁴ See para. 5 of the Headnotes.

¹⁵ See para. 6 of the Headnotes.

¹⁶ See para. 7 of the Headnotes.

¹⁷ See para. 8 of the Headnotes.

As for those rules that the Court found to be consistent with the Constitution, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The judgment struck down austerity measures contained in the 2013 State budget Law (LOE 2013) that amounted to 780 million euro.

In the aftermath of ruling n.º 187/2013 Prime-Minister Pedro Passos Coelho threatened to resign and accused the Constitutional Court of obstructing the compliance with external obligations with creditors. Later on the Minister of Finance resigned and so did the Ministry of Foreign of Affairs (for more details on this particular political crisis see question 85 of the report).

In his official statement after both rulings of 5 April (see below ruling n.º 187/2013) he stated he would not raise taxes further “although it seems that it is a measured favored by the Constitutional Court”. Prime-Minister added that the government would do everything to avoid a second bail-out and the only way would be, without going into detail, to “intensify and accelerate State reforms/restructuring” in healthcare, education and social security (this never happened, see the report for further details).

ANNEX I.7: RULING N. 474/13 OF 5 APRIL 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130474.html>.

Headnotes and summary in English:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20130474s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

The President of the Republic.

3. TYPE OF ACTION/PROCEDURE

Request for *ex ante* review of the constitutionality of various norms contained in the Decree of the Assembly of the Republic¹⁸ n. 177/XII, of , as laid down in Art. 278 of the Constitution (Prior review of constitutionality) and in Articles 51-56 and 57-61 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the Decree of the Assembly of the Republic n. 177/XII. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was

¹⁸ Once the text for initiating legislation, which was admitted by the President of the Assembly and put to a final overall vote, is passed, it becomes known as a Decree of the Assembly of the Republic. The Decree is signed by the President of the Assembly and sent to the President of the Republic for enactment. Once enacted, the Decree is called a Law and is sent to the Government for counter-signature (signature by the Prime Minister), and then on to the National Press for publication in Series 1 of the *Diário da República*. The President of the Republic can exercise the right of veto, either because he or she considers that the text which has been passed by the Assembly of the Republic contains rules that contradict the Constitution (whereupon the President will ask the Constitutional Court for an opinion), or for political reasons, which must be set out in a message that includes the grounds for the President's position.

agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding (MoA) and the Loan Agreement were signed thereafter. It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.¹⁹ The Decree of the Assembly of the Republic n. 177/XII was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the legislator's decision to widen the grounds on which the public employment bond could be terminated for objective reasons, to be examined especially in light of the concept of just cause as well as of the test of proportionality; the application of the new requalification regime to workers who exercise public functions encompassed by Law n. 12-A/2008, of 27 February 2008, that converted the labour bond based on a definitive appointment into a contractual bond.

7. ARGUMENTS OF THE APPLICANT

The allegations submitted by the President of the Republic included the violations of: the principle of a state based on the rule of law and its corollary, i.e., the principle of the protection of trust (Art. 2 of the Constitution); the principle of proportionality (Art. 18 of the Constitution); the right to job security, namely the right not to be dismissed without just cause or for political or ideological reasons (Art. 53 of the Constitution); the principle according to which the Public Administration shall seek the public interest (Art. 266 of the Constitution).

The norms of the Decree of the Assembly of the Republic n. 177/XII under scrutiny were: Art. 4.1 and 2 (*Procedimentos*), Art. 18.2 (*Prazo do processo de requalificação*), Art. 47.b (*Norma revogatória*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Decree of the Assembly of the Republic n. 177/XII covered all the organs, departments and services belonging to the State's direct and indirect administration, public higher education institutions, local authority departments and services, and the organs, departments and services of the administration of the autonomous regions. The addressees of the Decree are all workers who exercise public functions, regardless of the format in which the public employment bond under which they perform them was constituted, including workers

¹⁹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

covered by regimes contained in special laws.

The Court recalled, first of all, that the first question of constitutionality concerned the three new substantial grounds for dismissal for objective reasons. This question must be examined, according to the Court, in light of the right to job security enshrined in the Constitution, which includes a negative right in the form of the prohibition on dismissal without just cause or for political or ideological reasons. For the requirement of just cause to be fulfilled, the Court grounded its reasoning on its previous jurisprudence whereby it was concluded that a labour relationship can be terminated for objective causes only on condition that they make it impossible in practical terms for the labour bond to continue.

The guarantee applicable to the termination of employment conditions lies in the respect of two conditions: there must be one or more situations for which the employer itself is not responsible and whose nature means that it cannot be required to continue the labour relationship; the worker must be adequately compensated for the end of the labour relationship as the result of a fact for which he/she is not responsible. The Court highlighted that in its previous jurisprudence has already said that dismissal of workers *ope legis* directly conflicts with the right to job security. The State can dismiss its staff only if it does so in compliance with the means identified in the Constitution. Indeed any reorganisation of the Public Administration must always take account the constitutional principles and rules that enshrine and guarantee the rights of public servants: any compression of the constitutional guarantee of job security must be necessary, suitable and proportional and must respect the essential core of the corresponding right to job security.

In the light of the special regime to which restrictions on constitutional rights, freedoms and guarantees are subject, the legislator must furnish the Administration with rules of conduct which include criteria that safeguard the essential core of the guarantee of those rights and interests of private individuals to which the Constitution affords its protection. The legislator must do this by defining the scope of the content of the precept it is creating, and must do so in a way that allows the courts to exercise an effective objective control over whether the concrete actions of the Administration are appropriate or not.

The Constitutional Court was of the opinion that, as they stood, the norms before it did not allow the courts tasked with deciding ensuing conflicts to control whether the Public Administration acted legally when it ordered the beginning of a requalification process. The norms did not contain safe criteria for taking decisions. The decision to restrict an entity's budget was especially removed from judicial control, because it was of a political nature, and yet conditioned and determined the whole downstream decision-making chain, which would thus have been bound by a pre-existing fact.

The Court said that the budgetary factor that already exists in current legislation must certainly be the object of specific consideration, but making it one of the valuation criteria that must be weighed up is not the same thing as adopting it as an entirely open criterion for rationalising staff numbers and subsequently terminating public legal employment relationships.

The norms attached additional weight to budget-based reasons for decisions, but did not simultaneously provide criteria that would make it possible to understand and control whether those reasons are being adequately balanced against the affected workers' right to job security.

In the private sector, workers cannot be fired on the grounds that their positions have been eliminated – be it in the collective dismissal format, or in that of dismissal because specific jobs have been abolished – due solely to a reduction in the employer's income, either because transfers from outside (e.g. between units in complex business organisations) have decreased,

or because the employer's own revenues have fallen. In order to use these instruments, private employers must show that something has occurred on a general level – reasons linked to the market or to structural or technological factors. These reasons must represent an adequate cause for the desired dismissal, and must constitute a fair and appropriate response to it.

The other norm whose constitutionality was under review in the judgment concerned the application of the new requalification regime to public servants who, when the law on the regimes governing the labour bond, careers and remunerations of workers who exercise public functions came into force, saw their public-employment relationship converted into a contractual one. These workers were attributed a mixed status, because the legislator wanted to safeguard their specific labour-law status, the main distinguishing element of which is the regime governing termination of their employment relationship. This safeguard norm has been eliminated by the new 2013 legislation and this was the main issue at stake before the Court.

The Constitutional Court's jurisprudence on the principle of trust has been firmly established primarily in cases in which the Court was called on to control the constitutional conformity of retrospective norms. This principle postulates the idea that the trust which citizens and the community have in the protection of the law and the actions of the state must itself be protected, and this in turn implies a minimum degree of certainty and legal security in relation to people's rights and their legally created expectations. This does not mean that the legislator, as pointed out by the Court, does not possess the freedom to shape the public service regime in such a way as to adapt it to the public-interest needs that are experienced at any given moment in time.

Now, as underlined by the Court, although there is a trend to bring the public service bond and the employment bond pertaining to private workers closer to one another, the specificity of the public service bond with regard to the termination, for objective reasons not linked to their behaviour, of the labour relationship of workers who had acquired that bond based on their definitive appointment in the past still remains. All the legislation that preceded the norm under review in the present case has contained a norm safeguarding workers whose public labour bond was originally derived from a definitive appointment, but was changed to a contractual one *ope legis*, from the possible causes of a termination of their public employment relationship applicable in the latter situation (and the minutes of the preparatory work for the earlier legislation confirm that this was always the intention). It is safe to say that the workers who were the object of the safeguard norm formed expectations based on a behaviour that was positively demonstrated by the State.

As concluding remark, the Court affirmed that there is no contradiction between the need to weigh up the efficiency and efficacy of the Public Administration on the one hand and the requirement to respect private individuals' rights and guarantees on the other. Both the principle that the State must pursue the public interest and that derived from the principle of good administration also call on values and parameters that lie outside the legal sphere and include the principles of good management and economic/financial rationality, none of which does away with the primacy of legality. In fact, respect for the rights of private individuals must be seen as one of the dimensions of good administration in a democratic state based on the rule of law. The Court said that the legislator had to demonstrate on the levels of adequacy, necessity and just measure that its far-reaching and non-transitional intervention responded to needs of the Public Administration, especially in the light of the command derived from the constitutional norm that requires the Administration to pursue the public interest while respecting citizens' legally protected rights and interests. In light of all this, the

Court was unable to find grounds that would have enabled it to consider that there were public-interest reasons whose importance made them prevail over the trust generated by the legitimate and positively reinforced expectation that the workers in question here would be protected from the possibility of dismissal without subjective just cause.

As a result, the Court struck down both the new norm on the new objective reasons for the dismissal of the public employment and the norm on the so-called “requalification” of public employees.

The judgment was the object of one concurring and one dissenting opinion.

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 278 of the Constitution, the Assembly of the Republic – which has passed the Decree – must expunge the norms that were declared unconstitutional (Articles 4.1 and 2, 18.2 and 47.b) so that the Decree may be enacted, or, if applicable, it must confirm the norms by a majority that is at least equal to two thirds of all Members who are present and is greater than an absolute majority of all the Members in full exercise of their office.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

See question 10 of the annex pertinent to ruling n.º 187/2013, also from 5 April. The Prime-Minister Pedro Passos Coelho initially reacted to the ruling by stating in an official announcement: “Has anyone ever asked the 900 thousand unemployed what has the Constitution ever done for them?”

ANNEX I.8: RULING N. 602/13 OF 20 SEPTEMBER 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130602.html>.

Headnotes and summary in English:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20130602e.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic from the Socialist Party.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the Law n. 23/2012, of 25 June 2012, that made the third set of amendments to the Law n. 7/2009 (Labour Code), of 12 February 2009 – after those introduced by the Law n. 105/2009, of 14 September 2009, and the Law n. 53/2011, of 14 October 2011 –, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the so-called 2009 Labour Code. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It aimed not only at reducing the public debt and deficit, thus

ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.²⁰

The Law n. 23/2012 that amended substantially the 2009 Labour Code was one of the responses given by the Portuguese government and legislator to the international/EU constraints made within the Memorandum of Understanding on Specific Economic Policy Conditionality as well as to the objectives identified in the Commitment for Growth, Competitiveness and Employment, that was signed in 2012 by the government and the majority of the social partners with seats on the Standing Commission for Social Concertation (which is a committee of the Economic and Social Council).

6. LEGAL QUESTIONS

The 2009 Labour Code's norms under the scrutiny of the Court concerned: the change of the requisites for dismissing workers in case of elimination of their jobs; the deletion of the requirement that, for an employer to be able to dismiss a worker whose existing job is eliminated, there cannot be another position at the same employer that is available and compatible with the worker's qualifications; the nullification of certain provisions of collective labour regulation instruments and clauses of labour contracts that were entered into before the entry into effect of the 2012 amendments to the Labour Code, with particular regard to rest periods as compensation for working overtime on normal working days, compensatory weekly rest days or public holidays; the change of the individual hour bank format as well as of the group hour bank format; the abolition of certain mandatory public holidays; the elimination of a mechanism whereby the number of days of annual holiday could be increased (as a reward for the worker's assiduity); the change of requisites for dismissing workers on the grounds that they are unsuited to their work; the insertion of provisions regarding certain aspects of relations between regulatory sources (Labour Code and collective labour regulation instruments); a two-year suspension of some collective labour regulation instruments provisions and labour-contract clauses containing regulations on additional overtime rates above those laid down in the Labour Code and on payment or compensatory rest periods for normal work done on public holidays at companies that are not required to suspend operations on such days.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the principle of a democratic state based on the rule of law and, as its corollary, the principle of the protection of trust (Art. 2 of the Constitution); the right to the development of personality (Art. 26 of the Constitution); the freedom to form, belong to and operate trade unions (Art. 55 of the Constitution); the right that the work shall be organized under conditions of social dignity and in such a way as to provide personal fulfilment and to make it possible to reconcile work and family life (Art. 59 of the Constitution); the right to the protection of health (Art. 64 of the Constitution); the right to the protection of family (Art. 67 of the Constitution).

²⁰ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm.

The norms of the amended Labour Code under scrutiny were: Art. 7 (*Relações entre fontes de regulação*), Art. 208 A (*Banco de horas individual*), Art. 208 B (*Banco de horas grupal*), Art. 229.1, 2, 6, 7, Art. 234.1, Art. 238.3, 4, 6, Art. 268.1, 3, Art. 269.2, Art. 368.2, Art. 375.1 (b, d, e), 2, 3, 4, 5, 6, 7, 8.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court, first of all, highlighted that the rationale of the reform of the Labour Code lies in making the Portuguese labour law system more flexible, with the aim of restraining salaries, reducing costs linked to work done outside normal hours, making the regimes governing suspending working or reducing staff numbers more suited to the vicissitudes of both the economic cycle and the employer's production cycles, and modifying the preconditions for dismissing workers on objective grounds.²¹

For what regards the different allegations submitted by the applicants that were not deemed well-grounded in the judgment, the Court begun by clarifying that hour banks are part of a range of measures intended to increase the flexibility of the ways in which working time is organised, by counting that time in average terms with reference to periods of more than a day or a week. They are working-time organisation mechanisms that are different from the weekly scheme based on eight hours a day or forty hours a week, and make it possible to match working hours to companies' needs.

By creating hour banks, the legislator sought to address the additional cost of overtime, the limitations on its use, and the varying and unpredictable nature of production cycles.

In almost every case the extra hours worked in one period are compensated for by a correlative reduction in the hours worked at another time, within a fixed reference period that cannot exceed twelve months. As a rule, a worker can work more hours on a given day or in a given week, on condition that he/she works less hours on another day or in another week and the result is that the average for a predefined period is at most eight hours a day and forty hours a week. The employer can use this 'bank account', in which it and the worker have a credit or debit balance in hours, under the terms and conditions laid down in a collective or individual instrument to require the worker to work more or less than the standard number of hours in the company's formal work schedule, without having to change the latter each time.

The 2012 Law permits three hour bank formats: an hour bank created by a collective labour regulation instruments; the individual hour bank (created by *ad hoc* agreement or prearranged in the individual labour contract between the employer and the employee); and the group hour bank (an extension of one of the other two regimes, but applicable to a group of workers within a company).

An individual hour bank can be created by agreement between the employer and the worker. The question that was brought before the Court in this respect concerned the legal presumption that if an employer proposes the creation of such a bank, the worker is deemed to accept it unless he/she actually opposes it in writing. This presumption of agreement on the part of the worker is thus based on attaching value to the latter's silence (or inaction), which is deemed to constitute a declaration of acceptance.

The Court considered that although there are real obstacles that can make it difficult for the worker in a labour relationship to enjoy a true freedom of decision, a requirement for express consent would not eliminate or significantly lessen the factual constraints on him/her.

²¹ See General remarks of the Summary.

The petitioners to the Court argued that this type of hour bank could be imposed on workers who have expressed their refusal of it; and that a unilateral extension by an employer of an hour bank that is provided for in a collective labour agreement (CCT) to workers who do not belong to a union, or who do belong to one, but that union is not a party to the agreement, constitutes a breach of the principle of the freedom to belong to a trade union or not.

The group hour bank (like the other mechanisms for increasing flexibility) is shaped by a rationale that justifies the option which the law makes available to the employer and under which the latter can unilaterally require certain workers to work within the framework of a working-time modulation scheme that they had no part in defining, or may even have expressly opposed.

The Court was of the opinion that this norm does not even interfere with the negative dimension of the freedom to choose whether or not to belong to a trade union.

In the case of the group hour bank, workers are not directly encompassed by the efficacy of collective labour agreements entered into by trade unions to which they do not belong or in relation to which they have not exercised their right to choose. The concrete application of this regime is instead based on the employer's power to direct, subject to certain preconditions and assumptions that are laid down by law.

The Constitution of the Portuguese Republic (CRP) also admits the possibility that the ordinary law can, when based on reasons with suitable material grounds, expand the scope of the personal application of collective agreements to workers who are not members of the trade unions that signed the agreements in question. There is no doubt in constitutional terms that an individual worker can be bound by a collective labour agreement founded on a collective autonomy, without the need for him/her to specifically accept that instrument.

The Court admitted the possibility that a number of other issues might also be at stake: the right to rest (given the existence of biological cycles that affect physical and intellectual tiredness, which mean that concentrating work into a given period of time is not arithmetically compensated for by a correlative reduction in time worked later on); the reconciliation of work and family life; and minimum fulfilment of the right that work be organised under socially dignifying conditions, in such a way as to permit personal self-fulfilment. It considered that these limitations on the rights of workers who have not adhered to, or are opposed to the concrete implementation of, the group hour bank regime are indispensable to the operationalisation of this working-time format, inasmuch as it is only practicable when applied to the whole of a given organisational unit. When this uniformity is not necessary, employers can always resort to less intrusive formats based solely on collective regulations or individual agreement.

The Court held that these limitations on the individual rights of workers who do not directly or indirectly consent to the implementation of the group hour bank regime are merely those needed in order to ensure the exercise of the employer's power to direct in the common interest of the workers in question, and that, in their own right and because they do not represent a more damaging sacrifice than that which might result if one were not to consider the interests which the regime protects in this way, the limitations are not excessive.²²

As to the constitutionality of the Labour Code's norms that cancelled some forms of compensatory rest and halved the extra payment for overtime and for work done on public holidays, the Court recalled the petitioners' argument that the reduction in overtime payments means that workers are no longer paid for an annual equivalent of 93.75 hours, which is a significant drop in salary and the value of their labour. The Court clarified that overtime

²² See para. 1 of the Summary.

means work “done outside working hours” as well as an increase in the time in which a worker is available to his/her employer, to the prejudice of his/her right to daily rest. Resorting to overtime is conditioned by a range of legal requirements. If a certain set of those conditions is in place, workers must obligatorily do overtime unless they give a reason which the law says the employer is required to accept for dispensing them; certain categories of worker are prohibited (minors) or dispensed (workers who are pregnant, have a child below the age of one, or are disabled) from doing overtime; and the amount of overtime is subject to both daily and annual limits.

The Court was also of the view that there is no place here for a finding of unconstitutionality on the grounds that the norms breach workers’ rights to rest, the reconciliation of work and family life, and/or the protection of the family. Paid compensatory rest still exists in the situations that most deeply undermine the right to rest. The legislative amendments that were questioned by the petitioners, according to the Court, do not expand the legal grounds on which employers can require people to work overtime (although the number of situations that are deemed to fall within the concept of overtime has been cut); nor have the exceptions to the obligation to work overtime been restricted, and the daily and annual time limits on the amount of overtime worked have not been raised.

The Court accepted that doing away with compensatory rest is clearly one more measure designed to reduce labour costs, inasmuch as the time spent taking compensatory rest is paid. The Court therefore considered that the first line of defence of workers’ rights to rest, the reconciliation of work and family life and the protection of the latter has been preserved and that the new rules still ensure workers are not in situations in which they must be unrestrictedly available to provide their employer with work outside the stipulated time schedule.²³

The Court then examined the question of whether the abolition of four mandatory public holidays as well as of a mechanism whereby the number of days of annual holiday could be increased (by up to three days, as a reward for the worker’s assiduity) were legitimate.

The Court said that abolishing mandatory public holidays is not an offence against workers’ rights, because the purpose of creating public holidays is not directly to protect workers’ rights, but rather to pursue public objectives on the social, political, religious or cultural levels. This is not a right which the worker possesses in relation to his/her employer (right to rest), but a duty that employers have to the state – a duty that is in turn articulated with a subjective public right on the part of workers to have free time in which to take part in the commemoration in question.

The Court observed that calendar days (except for weekly rest days and annual holidays) are *ab initio* working days, unless the law suspends work because it says that the day is a public holiday. It is up to the legislator, in pursuit of the public interest, to determine which days are public holidays. Nor was there any violation of the principle of trust, because there is no expectation deserving of legal protection – let alone a right – that the legal list of mandatory public holidays will never change.

Turning to the abolition of the norm that used to increase the length of an assiduous worker’s annual holiday, the Court said that this legal mechanism was not directly intended to increase the duration of the holiday period, but rather to fight absenteeism. This is a choice that implies making considered judgements that fall within the scope of the legislator’s power to act and whose correctness it is not the Court’s place to assess. Besides which, there is nothing to stop collective agreements or individual contracts from establishing holidays that are

²³ See para. 2 of the Summary.

longer than the legal minimum.²⁴

The Court was also asked to review the constitutionality of a norm that sets out the requisites for the format under which employees can be dismissed because they have become unsuited to their job. The reasons of such unsuitability are: an ongoing drop in productivity or quality; repeated malfunctions in the resources allocated to the worker's position; risks to the health and safety of the worker, his/her colleagues and/or third parties. Such situations can come about when changes have been made to the worker's job or job station or, if this is not the case, if there has been a substantial change in the worker's performance and it is reasonably foreseeable that this change will be permanent.

The new norm did away with two requisites for dismissal due to unsuitability following changes to the employee's job or job station: that the employer not have another vacant position that is compatible with his/her professional qualifications; and that the unsuitability not be derived from a lack of health and safety conditions at work for which the employer was responsible. The petitioners also questioned the constitutionality of the revocation of these preconditions for dismissal on the grounds of unsuitability.

On the question of the constitutional conformity of the format under which a worker can be dismissed because he/she is unsuited to his/her job and this is revealed by a substantial and permanent change in the way in which he/she performs his/her functions, the Court recalled that although the legal concept of unsuitability concerns an objective, definitive fact in relation to the worker, it is not the kind of subjective impossibility which would mean that the labour contract would have to end under the general provisions of contract law.

The fact that this substantial change in the worker's performance is not a consequence of alterations in the context in which he/she works means that it is deemed to be linked to the way in which he/she does his/her job, as reflected in a range of objective elements that reveal a professional performance which possesses less quality or produces less output, but in which there is no fault on the worker's part.

The cause that underlies this dismissal format is objective, in that the decision to dismiss is based on facts linked to the worker's behaviour. The requisites imposed by the norm are fulfilled if the worker behaves in ways that lead to an ongoing reduction in the quality or productivity of his/her work. The reason for dismissal is related solely to the worker and the way in which he/she performs his/her functions, and the only requisites are that the unsuitability demonstrated by the poor results of his/her performance at work cannot be attributed to fault on his/her part (when another format would be applicable) and that it is reasonably foreseeable that this unsuitability will be permanent.

In light of the above, the Court concluded that dismissal on the grounds of unsuitability demonstrated solely by a reduction in the quality of the work done as reflected in either of the above situations and in cases in which it is reasonable to predict that that reduction will be permanent is not unconstitutional. There is no violation of the prohibition on dismissal without just cause, because these grounds for dismissal fall within the possible scope of the criterion 'just cause', whose definition the constitutional legislator has left to the ordinary legislator.

On the absence of an alternative job as a requisite for dismissal to be permissible, the Court said that the finding of unconstitutionality with regard to the norm that revoked the requisite that there be no other available job also applied to the question of dismissal on the grounds of unsuitability.

If one can say that in order not to be required to keep an employee whose unsuitability has

²⁴ See para. 3 of the Summary.

been revealed following changes in his/her job or job station, it is essential that the employer not have another position at the company that is compatible with the worker's professional qualifications, then the same conclusion must be reached with regard to a situation in which the worker's unsuitability becomes apparent regardless of any alterations in the working environment. The criterion for not requiring the employer to give the employee another job is that it be impossible in practical terms for the labour relationship to continue to exist, and this criterion is the same in both situations. The issue here is the collision between the right to job security and the right to free economic initiative, and the former can only justifiably be sacrificed to the strict extent needed to safeguard the latter. The 'prohibition on excess' aspect of the principle of proportionality means that if there is another job available at the company that is compatible with the worker's professional qualifications and present ability to work, then he/she must be offered that position.

This requisite is not fulfilled if such another job does exist. The Court thus said that dismissal on the grounds of the worker's unsuitability can only occur if no alternative position is available.²⁵

As to the declaration of unconstitutionality, for what concerns the format under which a worker can be dismissed because his/her job is eliminated, the Court underlined that it is invoked at the employer's initiative and is justifiable when it is due to market, structural and/or technological reasons that are affecting the company. The problem raised before the Court was the nature of the requisites for this form of dismissal. As underlined in the judgment, the reasons were market-related (i.e., the company is reducing its activities due to a predicted fall in the demand for goods or services or to a supervening practical or legal change that is making it impossible to place those goods or services in the marketplace), structural (i.e., an economic/financial imbalance, a change of business, a restructuring of the company's production organisation, or the replacement of dominant products), technological (changes in manufacturing techniques or processes, the automation of production, control or loading equipment, or the computerisation of services or the automation of means of communication).

The Court highlighted that the regime governing dismissal because a worker's job has been eliminated is based on two fundamental decisions to be taken by the employer: the decision to abolish a position and that to dismiss a particular worker. In order for the employer's final decision to terminate a specific employment contract to be lawful, the regime must remain within the limits identified through the principle of job security, which precludes dismissal without just cause or for political or ideological reasons. As to the notion of just cause, the Court took the stance that it includes both subjective just cause (disciplinary situations in which fault exists) and objective just cause, in which the situation is one in which the employer cannot be required to continue the labour relationship.

As long as the criterion for selecting which job to eliminate is concerned – which is the same thing as choosing which worker to dismiss –, the new norm replaced a seniority-based criterion with sub-criteria that were defined by the employer and had to be relevant and non-discriminatory in the light of the objectives that underlay the elimination of the position. The Court said that the new norm delegated the task of defining the criterion(a) that must govern the selection of which worker to dismiss to the employer, who was only given a number of directives to follow. This means that it was now the entity with the interest in dismissing someone that formulated the criteria for justifying that dismissal. The new norm only

²⁵ See para. 5 of Summary.

required the criteria for choosing which job is to be eliminated to be relevant and non-discriminatory, and that these characteristics be weighed up against the objectives underlying the abolition of the position in question. The Court found these concepts to be vague and indeterminate and lacking the efficacy which would make it possible to adequately set goalposts within which the employer must make its choice, and which would thus prevent the employer from being able to arbitrarily decide which worker to dismiss. Moreover, whereas the old version of the Labour Code required the employer to show that it does not have another position which is compatible with the dismissed worker's professional category and which is open for the worker to occupy, the new text stated that this requisite was automatically fulfilled when the employer showed that it had adopted criteria that were relevant and non-discriminatory in the light of the objectives underlying the abolition of the position.

The regime challenged by the petitioners made it possible to dismiss workers within a framework of circumstances in which the company has another vacant position which the worker who would otherwise be dismissed might want to take up. The Court held that by freeing the employer from the obligation to propose a different position, the new regime caused unnecessary and excessive harm to the right to job security and was therefore unconstitutional.

Furthermore, this unconstitutional flaw was worsened by the inappropriateness of the criterion that was adopted by the legislator to replace the employer's duty and encompassed concepts that were so indeterminate and vague that they were effectively equivalent to the absence of any legal criterion at all, with the employer free to choose them at will.²⁶

For what regards the matter of the compliance with the Constitution of the new amendments concerning certain aspects of relations between regulatory sources (Labour Code and collective labour regulation instruments), the Court found some norms constitutional while others unconstitutional. It recalled, first of all, that the issue is that of the right to inter into collective labour agreements – whose scope was limited due to the exclusion of various issues from their ambit of application – in relation to which the Court observed, on one hand, that this exercise is guaranteed “under the terms laid down by law” and, on the other, the fact that the details are left to “the terms laid down by law” cannot mean that the guarantee itself is placed in the hands of the ordinary legislator. In the opinion of the Court, the law must at least guarantee that an ability to enter into collective agreements be reserved to workers, because this is a right that is directly derived from the Constitution and not from the ordinary law. The ordinary law, indeed, can only regulate the right to collective bargaining and agreements in such a way as to delimit it while simultaneously leaving a minimally significant range of matters open to collective negotiation. In particular, the legislator nullified, suspended or reduced the scope of collective agreements' provisions (that were more favourable to workers than the equivalent legal provisions) on a significant set of matters.

On the subject of the compensation for collective dismissals and the amounts of and criteria for defining the compensation due for the termination of labour contracts, the Court was of the view that it is not possible to exclude the compensation due for the termination of labour contracts from the scope of collective bargaining, but that, given the interests in play, nor can one exclude the legislator's competence to set limits – higher or lower – on the amounts payable under this heading. It said that in the concrete case before it, the issue was the

²⁶ See para. 4 of the Summary.

delimitation of the material scope of the exercise of the right concerned, and not an intrusion into the so-called reservation of certain matters to collective labour agreements. Because what was at stake is only the setting of goalposts and not the total elimination of the exercise of collective autonomy in the field of the termination of labour contracts, the regime governing which tends to be imperative due to the fact that it possesses guarantee-based characteristics, the Court held that the norm does not go beyond the simple regulation of the right to enter into collective labour agreements and does not impinge on the scope of the protection afforded to the latter. Therefore, the Court considered the norm to be justified because it only seeks to equalise the financial compensation that employers must pay to workers when the latter's labour contracts are terminated on certain grounds. This equalisation is warranted from the perspective of both the costs for the enterprises and the benefits for the workers, given that it ensures that the reduction in compensation deemed appropriate in the 2012 Law applies to all identical situations of this kind.

On the part of the 2012 Law that revoked the compensatory rest due for overtime worked on normal working days, complementary weekly rest days or public holidays, and the increases in the length of annual holidays, the Court said that these matters do not come within the scope of an imperative regime: there is thus nothing imperative that would limit the permissible content of collective labour regulation instruments and would justify their nullity, be it supervening or from the start.

The Court also took the stance that the law models the right to enter into collective agreements in the material domains addressed by the norms whose constitutionality was being reviewed by the Court under this heading. The norms meant that matters concerning compensatory rest for overtime done on normal working days, complementary weekly rest days or public holidays and up to three-day increases in the length of annual holidays that were freely agreed by workers and employers before the entry into effect of the 2012 Law, ceased to be valid, and that the negotiations for and entry into new collective labour agreements on these matters should not consider the threshold those provisions had already reached in earlier agreements.

The Court emphasised that the solution adopted by the Law was not fit for the purpose behind the standardisation of the applicable collective-agreement regimes – that of achieving a reduction in the costs associated with the factor 'labour'. By entering into new collective agreements, workers and employers could once again agree exactly the same solutions (or even more favourable ones) as the ones that the 2012 precepts sought to do away with. The Court said that this possibility showed that achieving the law's proposed goal did not depend on the efficacy of the legislative measures in question, but rather on the actions of third parties. The measures were neither a necessary nor a sufficient condition for bringing about the labour-cost reduction results intended by the legislator. The fact that the measures were not fit in turn proved that they were unnecessary, regardless of any assessment as to whether the purposes targeted by the law matched constitutionally protected rights or interests which the legislator is required to safeguard by restricting the right to enter into collective labour agreements.

The Court therefore declared these norms unconstitutional.

As to the two-year suspension on increased overtime rates above those set out in the Labour Code and on the pay or compensatory rest due for normal work done on public holidays at companies that are not obliged to suspend operations on such days, the Court highlighted that this suspension constitutes an interference by the legislator within the scope of the protection due to the right to enter into collective labour agreements. However, in the light of the desired

purpose and of the norm's temporary nature, the Court took the view that the measure is appropriate, necessary and balanced in terms of the safeguarding of constitutionally important interests.

Concerning the automatic reduction by law imposed in the event that the relevant collective labour regulation instruments provisions (overtime rates, and pay or compensatory rest for normal work on public holidays) were not revised by the end of the two-year period, the Court said that in this case the Law was modelling the contents of contracts by replacing solutions that were created by means of collective autonomy and interfering with matters that are reserved to collective bargaining. This represents a direct interference with the balance decided by the parties, and applying the norm would have produced a variable result (and not a standardisation), depending on the exact terms of each provision agreed by collective negotiation. With regard to the provisions dated before 1 August 2014, the Court was unable to see any constitutionally protected right or interest that might have justified the halving *ope legis* of the value of the additional rates paid for overtime and normal work on public holidays, when greater than the amounts laid down in the Labour Code. This solution by the Law was not fit for the purpose behind the standardisation of the applicable collective-agreement regimes once the suspension ended, and the goal of stimulating collective bargaining does not correspond to any constitutionally important interest and therefore cannot justify interfering in a field that is reserved to collective bargaining. The norm was therefore declared unconstitutional.

As to the problem of the relations between sources of regulation, from the perspective of whether they were constitutionally compatible with the principles of legal certainty and the protection of trust, the Court did not find a breach of the Constitution.²⁷

The judgment was the object of 13 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 282 of the Constitution, the judgment, as for those rules declared unconstitutional, possesses generally binding force. Therefore, Articles 368.2, 368.4 of the amended Labour Code as well as Articles 7.2 of Law 23/2012, 7.3 of Law 23/102, 7.5 of Law 23/2012, 9.2 of Law 23/2012 were eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals.

As for those rules that the Court did find consistent with the Constitution, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The nature of the norms that were struck down and the fact that the decision produced effects since August 2012 led to an increase in legal uncertainty surrounding the implementation of austerity measures and a possible structural reform of labor laws. However, it did not have immediate political consequences separate from the ones already resulting from rulings n.º 187/2013 and n.º 474/2013.

²⁷ See para. 16 of the Summary.

ANNEX I.9: RULING N. 767/13 OF 11 NOVEMBER 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130767.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Autonomous Region of Azores.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2013 n. 66-B/2012 (LOE 2013), of 31 December 2011, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2013. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on

recapitalization and deleveraging aimed at ensuring the financial stability of the country.²⁸

6. LEGAL QUESTIONS

The LOE 2013's norms under the scrutiny of the Court concerned: the distribution of competences between central government and the Autonomous Region of Azores.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the principle of regional political-administrative autonomy, in its various forms, with regard especially to the distribution of competences between central government and the Autonomous Region of Azores in the fiscal policy (Articles 227.1, 228, 229.3, 232.1 of the Constitution and Articles 19.1, 125, 126, 127 of the *Estatuto Político-Administrativo da Região Autónoma dos Açores*); the principles of equality, universality and the right to healthcare (Articles 6, 12, 13 and 64 of the Constitution and Art. 12.1 and 2 of the *Estatuto Político-Administrativo da Região Autónoma dos Açores*).

The norms of LOE 2013 under scrutiny were: Art. 149.2 and 3 (*Receitas do Serviço Nacional de Saúde*), Art. 59.1, 2, 8 and 9, Art. 188.3 (*Disposições transitórias no âmbito do IRS*), Art. 262 (*Norma interpretativa*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court decided not to state on the matter of constitutionality of Art. 149.2 and 3 with LOE 2013 inasmuch as the possible violation of the principles of universality and equality as well as the restriction of the right to healthcare on the basis of the access to the National Health System are not a question of regional autonomy. The Court did not decide neither on the matter of illegality of Articles 188.3 and 262 with Art. 19.1 of the *Estatuto Político-Administrativo da Região Autónoma dos Açores* given the fact that the latter provision is not “materialmente estatutária”.²⁹

As to the issue of constitutionality of Articles 59.1, 2, 8 and 9 and 68, the Court said that the legislative powers established therein do not put into question the administrative autonomy of the autonomous regions, as protected by Art. 227.1, g, o, p of the Constitution, For what concerns the issue of legality of Art. 149.2 and 3 – according to which the health services rendered by the National Service System to residents in the autonomous regions shall be preceded by a number of commitment and a purchase receipt issued by the Regional Service System – in light of Art. 12.1 and 2 of the *Estatuto Político-Administrativo da Região Autónoma dos Açores*, which set up the principle of national solidarity, the Court concluded that Art. 149 concerned only how administrative and accounting procedures must be undertaken and how the distribution of funds can be transferred from the State to the regions. For this reason, it did not infringe Art. 12 of the *Estatuto*.

For what regards the issue of constitutionality of Art. 188.3, the Court, having said that the

²⁸ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

²⁹ See para. 24 of the Ruling.

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question was dential to that already settled in Ruling n. 412/12, with reference to the reversion of the revenue from the surtax on personal income for 2013, concluded that the norm was not in breach of Art. 227 of the Constitution.

The judgment was the object of 5 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional. The norms on which it decided not to state on the matter also remain in force.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No specific political implications as the constitutionality of the norms challenged was upheld.

ANNEX I.10: RULING N. 793/13 OF 21 NOVEMBER 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130793.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Autonomous Region of Azores.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the Decree n. 22/2013 approved by the Assembly of the Autonomous Region of Azores, of 21 October 2013, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in the Decree n. 22/2013 approved by the Assembly of the Autonomous Region of Azores. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on

recapitalization and deleveraging aimed at ensuring the financial stability of the country.³⁰

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the distribution of competences between central government and the Autonomous Region of Azores as to the duration of the normal period of work for regional public-sector staff.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the partially exclusive legislative competence of the Assembly of the Republic in relation to the regime governing, and the scope of, the public service (Art. 165.1, t, of the Constitution); the partially exclusive legislative competence of the Assembly of the Republic in the area of fundamental rights of an analogous nature to those rights, freedoms and guarantees set out in Title II of the Constitution (Articles 17, 59.1, d, and 165.1, b of the Constitution); the rule according to which it is only the State in charge with ensuring the working, remuneratory and rest-related conditions to which workers are entitled, particularly by setting national limits on working hours (Art. 59.2, b, of the Constitution); the principle of equality, especially in so far as it gives every worker the right to a maximum limit on the working day, established at national level (Articles. 59.1, d and 2, b, of the Constitution).

The norms of the Decree n. 22/2013 were: Art. 1 (*Objeto*), Art. 2 (*Ambito*), Art. 3 (*Período normal de trabalho dos trabalhadores da Administração Pública Regional*), Art. 4 (*Disposições finais*) and Art. 5 (*Entrada em vigor*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court, first of all, focuses its analysis on Law n. 68/2013, which, in Art. 2.1, identified the normal duration of work for public-sector staff in 8 hours per day and 40 per week. Court took the view that the norm established a “princípio estruturante do regime da função pública”, under the terms of Art. 165.1, t, of the Constitution. Therefore the principle is the expression of the partially exclusive legislative competence of the national legislator. For this reason, Art. 3 of the Decree n. 22/2013 (and the other rules of said Decree), according to which the normal duration shall be of 7 hours per day and 35 hours per week, is unconstitutional.

The judgment was unanimous.

9. LEGAL EFFECTS OF THE JUDGMENT

³⁰ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

According to Art. 282 of the Constitution, the judgment possesses generally binding force. Therefore, Articles 1-5 of the Decree n. 22/2013, which were declared unconstitutional, were eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No specific political implications arising from this ruling.

ANNEX I.11: RULING N. 794/13 OF 21 NOVEMBER 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130794.html>.

Headnotes and summary in English:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20130794s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic from the Socialist Party;
Members of the Assembly of the Republic from the Communist Party, the Left Bloc and the Ecologist Party (they submitted a joint request).

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in Law n. 68/2013, of 29 August 2013, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in the Law n. 68/2013. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs

and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.³¹

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the increase in normal working hours for public-sector staff.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the right to a maximum limit on the working day, to be established only at a national level (Articles 59.1, d and 2, b, of the Constitution); the principle of a state based on the rule of law and its corollaries, i.e. the principle of equality, the protection of trust and the principle of proportionality (Articles 2, 13.1 and 18.2 of the Constitution); the right to a salary (Art. 59.1 of the Constitution).

The norms of the Law n. 68/2013 were: Art. 2 (*Período normal de trabalho dos trabalhadores em funções públicas*), Art. 3 (*Alteração ao Regime do Contrato de Trabalho em Funções Públicas*), Art. 4 (*Alteração ao Decreto-Lei n.º 259/98, de 18 de agosto*), Art. 10 (*Prevalência*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

At stake were various norms contained in a Law that set the normal working hours of public sector workers at eight hours a day and forty hours a week, thereby amending the norm that had been in force until the new Law took effect, under which the working day could not exceed seven hours and the working week thirty-five hours.

The petitioners argued that this increase in normal working hours was unconstitutional in its own right.

The Court accepted that an increase in normal working hours that encompasses the entire universe of public sector workers is not a form of behaviour which the targets of the legislative decision had thought foreseeable. Until this new Law was published, the clear reduction in the past of the normal working day in the public sector – a reduction that had been consolidated over the previous twenty-five years – legitimated a consistent expectation that the length of that day would remain the same. This expectation may have served as the grounds for life choices and the formation of life plans based on the continuity of the situation.

The increase in working hours was significant and capable of causing difficulties in conjugating people's private and family lives and their work, or in the exercise of fundamental rights, such as the right to culture.

However, the Court was of the opinion that the tendency towards subjecting the regime

³¹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

governing Public Administration workers to the general labour rules made it possible to say that it was not entirely impossible to foresee a change like this one. The Court also said that the idea of the protection of trust can only be seen as a constitutional parameter in situations in which its breach is contrary to the very idea of the state based on the rule of law.

In the present case the Court emphasised that increases in normal working hours in the public sector generally have a positive impact, both on labour costs and in terms of cutting public spending. Given the successive measures that were taken between 2010 and 2013 in order to restrain expenditure, and the evolution in the working conditions of Public Administration staff and the legislation governing them, the Court felt that any expectations as to the continuity of past practices were not adequately founded on consistent reasons.

The Court pointed out that the challenged measures formed part of a “package of measures” designed to contain public spending included in the Seventh Revision of the Adjustment Programme for Portugal set out in the 2011 Memorandum of Understanding on Specific Economic Policy Conditionality (MUSEPC). Given the economic/financial crisis situation facing the country, it was correct to attach substantial weight to these objectives of reducing overtime pay and ensuring pay restraint.

The Court was not unaware of the depth of the sacrifice which the legislative changes imposed on public sector workers, but said that it was not clear that any legitimate expectations on their part should prevail over the need to protect the public interests underlying those legislative amendments.

The allegation of a violation of the principles of equality and proportionality was based on the assumption that the working-time regime applicable to private sector workers under the Labour Code establishes a sub-regime in which there are maximum limits, but these can be derogated from by collective labour agreements (IRCTs), whereas the regime approved by the Law containing the norms before the Court created a sub-regime of imperative minimum limits from which there could be no such derogation.

The Court was of the opinion that these amendments did not in fact change the solution involving maximum limits subject to derogation. The maximum limits on normal working hours can still be reduced by IRCTs, without any cut in the workers’ pay.³²

On the alleged breach of the right to be paid for one’s work, the Court considered that there was an obvious decrease in hourly pay (because more hours are now worked for the same salary), and that this has implications for overtime pay, but that there was no change in the amount of money full-time public sector workers receive in basic pay each month. Even where part-time work (seen as a fraction or percentage of normal full-time working hours) is concerned, the changes have meant an increase in the normal daily and weekly time that part-time workers spend working. This increase is proportional to that laid down for full-time public sector workers and, as is the case for full-time staff, does not imply a nominal pay cut, but does mean an increase in the number of hours worked.

The Constitutional Court recalled its own jurisprudence on the question of the right to be paid, particularly with regard to Public Administration workers. That jurisprudence particularly notes that the Constitution does not contain any rule establishing a guarantee that salaries cannot be reduced *per se*. The Court said it was aware that increasing normal daily working hours can lead to additional expenses for workers (transport, caring for elderly or young dependents, etc.), but that the main disadvantage they suffer as a result of the norms in question is in terms of the time they have available for themselves, their families and the

³² See the Summary.

exercise of a range of other fundamental rights (the right to the free development of one's personality, the freedom to create and enjoy culture, and so on).

The Court considered that the real loss of pay was limited to that earned by doing overtime. It attached value to this fact, given the various effective pay cuts the universe of public sector workers had suffered in recent years. However, it said that the payment of overtime is not included in the qualitative concept of remuneration, and so the constitutional guarantee that salaries cannot be reduced does not apply.

In conclusion, the Court held that the reduction in the amounts of money effectively received in payment for overtime work was not a decisive element that would cause the norms to be unconstitutional.³³

The judgment was the object of six dissenting opinions.

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No specific political implications as the constitutionality of the norms challenged was upheld.

³³ See the Summary.

ANNEX I.12: RULING N. 862/13 OF 19 DECEMBER 2013

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20130862.html>.

Headnotes and summary in English:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

President of the Republic.

3. TYPE OF ACTION/PROCEDURE

Request for *ex ante* review of the constitutionality of various norms contained in the Decree of the Assembly of the Republic³⁴ n. 187/XII, as laid down in Art. 278 of the Constitution (Prior review of constitutionality) and in Articles 51-56 and 57-61 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the Decree of the Assembly of the Republic n. 187/XII. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European

³⁴ Once the text for initiating legislation, which was admitted by the President of the Assembly and put to a final overall vote, is passed, it becomes known as a Decree of the Assembly of the Republic. The Decree is signed by the President of the Assembly and sent to the President of the Republic for enactment. Once enacted, the Decree is called a Law and is sent to the Government for counter-signature (signature by the Prime Minister), and then on to the National Press for publication in Series 1 of the *Diário da República*. The President of the Republic can exercise the right of veto, either because he or she considers that the text which has been passed by the Assembly of the Republic contains rules that contradict the Constitution (whereupon the President will ask the Constitutional Court for an opinion), or for political reasons, which must be set out in a message that includes the grounds for the President's position.

Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding (MoU) and the Loan Agreement were signed thereafter. It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.³⁵ The Decree of the Assembly of the Republic n. 187/XII was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the amendment of the Statute governing the Retirement of Public Sector Staff as well as the revocation of norms adding extra time to the length of service for people have actually worked in certain especially demanding situations, for the purposes of calculating their retirement entitlements in cases in which pensions are paid by *Caixa Geral de Aposentações* (CGA, the public sector pension fund).

7. ARGUMENTS OF THE APPLICANT

The allegations submitted by the President of the Republic included the violations of: the principles according to which personal income tax shall aim to reduce inequalities, shall be single and progressive and shall pay due regard to the needs and incomes of households (Art. 104 of the Constitution); the principle of equality (Art. 13 of the Constitution); the principle of the protection of trust, in conjunction with the principle of proportionality (Art. 2 of the Constitution).

The norm of the Decree of the Assembly of the Republic n. 187/XII under scrutiny was: Art. 7.1, a, b, c, d.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court, first of all, recalled that the Decree of the Assembly of the Republic n. 187/XII containing the norms before the Court for review was designed to deepen social-protection convergence mechanisms by bringing in measures regarding CGA old-age, retirement, invalidity and survivor's pensions with a gross monthly amount of more than 600€. It cut the value of pensions subject to the regime set out in the Statute governing the Retirement of Public Sector Staff by 10% and provided for the application of a new formula for calculating the pensions. It formed part of the general reform intended to ensure convergence between the general social security system and that protecting Public Administration staff.

³⁵ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

The Court took the view that the measures contained in the norms questioned would have resulted in an abrupt cut in the pensions concerned, and did not form part of a framework of structural cross-cutting measures designed to ensure across-the-board progress in fulfilling the interest of convergence on other levels.

The President of the Republic argued that these norms brought about a coercive, unilateral and definitive reduction in pensions by cutting them by a fixed percentage of their gross amount. He said that this meant they should be seen as norms that created taxes. In this respect the Court was of the opinion that the norms affected social rights which are part of legal 'institutes' that inform the social security system. Classifying the norms as being covered by social security law would not in itself preclude them from possessing a fiscal nature, but some of the fundamental elements needed to categorise this cut in pensions as a tax were missing. There would be no direct payment to the state of the amount by which the pensions were reduced, inasmuch as within the legal relationship involved in public sector pensions, the entity with the duty to pay those pensions is the same as the one charged by the norms with cutting them. A cut in a pension is itself founded on a legal bond under which there is an obligation to pay that pension; whereas the legal precondition for the formation of the obligation to pay a tax is not linked to any relationship between the taxpayer and the Administration. A tax is a payment that is required of persons who possess the capacity to contribute, within the overall framework of the relationship between the fiscal state and citizens as a whole. This was not the case here, in addition to which the purpose of taxes is to provide general funding for public spending, and not to finance specific public expenses. On the alleged violation of the principle of protection against reverses in fundamental social rights, the Court emphasised that purely forbidding going backwards in social terms is impracticable, because it would presuppose the idea that the available resources are always going to grow. It may be necessary to lower levels of essential benefits in order to maintain the essential core of the social right in question. From this perspective, guaranteeing the minimum content of the right to a pension may itself mean reducing the amount of that pension.

The Court noted that although the norms before it were intended to have effect in the future – the legal effects of the pension cut would only apply from 1 January 2014 onwards – they addressed legal relations regarding public sector retirement that were formed under an earlier regime. This was a situation of inauthentic or retrospective retroactivity, in which the force of the norms is *ex nunc*, but they affect rights that were constituted in the past and whose effects are ongoing at the present time. The Court highlighted that there are no constitutional rules that would preclude retrospective laws which reduce the *quantum* of pensions that have already been recognised, but one must gauge whether such laws do respect a number of constitutional principles – namely the principle of the protection of trust, which itself arises out of the principle of legal certainty, which is in turn a material element of the state based on the rule of law.

The Court had already said in the past that from the point of view of the principle of the protection of trust, it is not unconstitutional to decrease the amount of the pensions of CGA beneficiaries. However, it held that the reasons underlying its earlier findings did not apply in the present case.

The budgetary consolidation reflected in these norms only addressed one part of the public pension system (the CGA social protection regime), not all of it. This meant it was the protection of the trust of certain pensioners that had to be considered and weighed against the

position of the rest of the country's public pensioners. At the same time, the new measure was not temporary, but indefinite, given that while reversing it at some time in the future was seen as a possibility, this would depend on a favourable evolution in macroeconomic variables directly linked to an increase in the capacity to fund the structural deficit of the CGA pension system by means of transfers from the State Budget.³⁶

The Court said it was necessary to evaluate whether the public interest in reducing the transfers from the State Budget used to finance the CGA's structural deficit justified cutting the pensions of the CGA's beneficiaries. The outcome of that evaluation was negative. Firstly, because the CGA pension system was closed to new beneficiaries as of 1 January 2006. The legislator accepted the burden of the system's financial unsustainability – to which the explanatory preamble to the Decree containing the norms in question specifically refers – as one of the costs of the convergence of the benefit regimes included in the overall public social security system. This is why the Decree said that public sector retirement and survivor's pensions payable under the CGA regime would be co-funded by “transfers from the State Budget”. The Court noted that in the medium and long terms, a benefit system that no longer accepts new subscribers inevitably ceases to be self-financing and self-sustaining. The numerical ratio of subscribers to beneficiaries will gradually decrease as the former retire, until one eventually reaches the extreme situation in which there are no subscribers left. The continuous fall in this ratio will end up causing the CGA to be funded by transfers from the State Budget, and the contributory regime will turn into a non-contributory one. The future horizon for such a system can never be one of self-sustainability. The Court said that in a system that is closed to new subscribers, cutting pensions is not in itself a measure with the capability to safeguard the system's sustainability. By itself, a closed system is unsustainable in the medium and long terms. This characteristic means that such a system must necessarily resort to funding from taxation and/or forms of capitalisation, in that it will no longer be viable to resort solely to techniques for sharing out the money that is already in the system. Secondly, one cannot sacrifice the rights of CGA pensioners and no one else for these budgetary consolidation reasons, inasmuch as it is legitimate for the pensioners in both regimes (the general social security system and the protection system applicable to Public Administration staff) to be considered holders of rights to a pension that possess equal legal consistency: from the constitutional viewpoint, the pensioners in both systems are simply state pensioners, and it is up to the state to guarantee the system under which both types of pensioner have contributed as required to by law. Any inequalities between them at the level of the legal rules governing the two public regimes that have come from the past and have financial consequences in the present cannot be corrected solely on the basis of difficulties experienced by one of the two regimes and by exclusively sacrificing the constituted rights of the beneficiaries of that regime.

The Court also observed that the possible solutions to the problem of the system's lack of financial sustainability must be looked at in terms of the public system as a whole. The problem requires answers that safeguard the system's fairness on both the intragenerational and the intergenerational levels.

Sacrificial solutions motivated by reasons linked to financial unsustainability are asymmetric or one-off measures, and are intended to achieve goals (avoiding increases in transfers from the State Budget by sacrificing CGA pensioners and no one else) that have no place in the constitutional design of a unified public pension system. The criterion underlying such

³⁶ See the Summary.

solutions – the convergence of the systems – objectively contradicts the legitimacy of, and the good reasons for, the trust that had previously been engendered among those beneficiaries in terms of the amount of the pensions that were awarded to them.

The existence at a given moment in time of legal regimes that differ in terms of the conditions required for retirement and the calculation of the ensuing pension undoubtedly resulted from recognition that there were sufficient material grounds to justify the difference between them. One cannot consider the Statute governing the Retirement of Public Sector Staff and the legal rules that complemented it to have been arbitrary pieces of legislation without a legitimate sense and lacking in serious and reasonable grounds. The staff and other agents of the Public Administration who retired under this regime could not but trust that these rules existed in order to protect them in old age and/or invalidity, and that the rules' ultimate objective was to make the fundamental right to retirement a concrete reality. The existence of a different regime for calculating pensions is entirely the responsibility of the state, which felt it necessary to ensure the protection of Public Administration workers in old age and invalidity in a different way. The principle of trust becomes particularly important in connection with the state's responsibility for its own actions, in that the increase in the expectation of trustworthiness can only be attributed to the legislator's own behaviour. The current beneficiaries of the CGA regime fulfilled all the legal obligations that were imposed on them in order to benefit from their pension; they could not have chosen otherwise, so now they cannot be the only ones to pay the price for the difference, on the pretext of the need to restore equality.³⁷

As a result, the Court held all norms under review in breach of the Constitution

The judgment was unanimous.

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 278 of the Constitution, the Assembly of the Republic – which has passed the Decree – must expunge the norms that were declared unconstitutional (Art. 7.1, a, b, c, d) so that the Decree may be enacted, or, if applicable, it must confirm the norms by a majority that is at least equal to two thirds of all Members who are present and is greater than an absolute majority of all the Members in full exercise of their office.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

Anticipating the ruling Christine Lagarde affirmed that Portugal has an additional problem which is the “view of the Constitutional Court about what it is and what it is not constitutional”. A letter of the Permanent Representative of the European Union to the Commission in October 2013 stated that “further activism” from the Constitutional Court in declaring unconstitutional measures recently adopted by the budget for 2014 would result in a second bail-out. The government publicly affirmed it did not have a “plan B” for the 400 million euro in case the Constitutional Court ruled the budget (or parts thereof)

³⁷ See the Summary.

unconstitutional (as in fact did).

ANNEX I.13: RULING N. 55/14 OF 20 JANUARY 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140055.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

Representative of the Republic for the Autonomous Region of Azores.

3. TYPE OF ACTION/PROCEDURE

Request for *ex ante* review of the constitutionality of various norms contained in the Decree of the Assembly of the Republic³⁸ n. 24/2013, as laid down in Art. 278 of the Constitution (Prior review of constitutionality) and in Articles 51-56 and 57-61 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the Decree of the Assembly of the Republic n. 24/2013. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding (MoA) and the Loan Agreement were signed thereafter.

³⁸ Once the text for initiating legislation, which was admitted by the President of the Assembly and put to a final overall vote, is passed, it becomes known as a Decree of the Assembly of the Republic. The Decree is signed by the President of the Assembly and sent to the President of the Republic for enactment. Once enacted, the Decree is called a Law and is sent to the Government for counter-signature (signature by the Prime Minister), and then on to the National Press for publication in Series 1 of the *Diário da República*. The President of the Republic can exercise the right of veto, either because he or she considers that the text which has been passed by the Assembly of the Republic contains rules that contradict the Constitution (whereupon the President will ask the Constitutional Court for an opinion), or for political reasons, which must be set out in a message that includes the grounds for the President's position.

It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.³⁹ The Decree of the Assembly of the Republic n. 24/2013 was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the reduction of the minimum salary as well as of the regional complementary pensions and remunerations for the public-service staff.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the Representative of the Republic for the Autonomous Region of Azores included the violations of: the legislative reservation of the Republic implied in the principle of the unitary state (Art. 6 of the Constitution) as well as in the principle of national solidarity (Art. 225.2 and 3 of the Constitution); the principle of equality (Articles 13 and 229.1 of the Constitution).

The differentiation regarding the treatment of the civil servants working for the regional administration compared to the other civil servants of the national public administration in the continent is grounded on the exercise of the powers deriving from the status of autonomy enjoyed by the Autonomous Region of Azores and is justified by the peculiar situation of insularity.

The norms of the Decree of the Assembly of the Republic n. 24/2013 under scrutiny were: Art. 43.1 and 2.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court found that the legislative reservation upon the Republic was not infringed inasmuch as the creation and legal framing of the regional system of complementary remuneration falls under the legislative power of the Autonomous Region of Azores. The Court, in fact, highlighted that this power has been exercised in the context of the regional financial autonomy.

Furthermore the Court said that the principle of equality, as far as the employment differentiation between public workers of the regional administration and those of the state administration – being the first granted better employment conditions – was concerned, was not violated. The main reason lies in the insular status of the Azores, which justified a special treatment for its employees.

³⁹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

PORTUGAL

The judgment was the object of 3 dissenting opinions.

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No specific political implications as the constitutionality of the norms challenged was upheld.

ANNEX I.14: RULING N. 252/14 OF 18 MARCH 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140252.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

President of the Assembly of the Autonomous Region of Madeira.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in Law n. 66-B/2012, of 31 December 2012 (LOE 2013), as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in LOE 2013. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding (MoU) and the Loan Agreement were signed thereafter. It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.⁴⁰ The Decree of the Assembly of the Republic n. 24/2013 was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

⁴⁰ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned the application of an extraordinary surtax applied to the personal income tax for 2011.

7. ARGUMENTS OF THE APPLICANT

The allegations submitted by the applicant included the violations of: the competence of the Portuguese autonomous regions to legislate within the ambit of the region on those matters that are set out in the respective political and administrative statute (Articles 227.1 and 238 of the Constitution); the principle of distribution of competences in the repartition of taxes between central government and autonomous regions (Art. 227.1, j of the Constitution); the principle of national solidarity (Art. 225.2 of the Constitution).

The norm under the scrutiny of the Court was: Art. 188.3 of LOE 2013.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court largely relied upon its precedent set in Ruling n. 412/2012 as to uphold the validity Art. 188.3 of LOE 2013. In particular the Court argued that that provision introducing a surtax could be justified in the light of its extraordinary and temporary nature in a situation of financial crisis and emergency. Moreover, the Court added that a limitation to the regional autonomy by LOE 2013 was considered in compliance with the Constitution as long as it fulfilled an obligation arising from the principle of national solidarity (§5.3), whereby all Portuguese people are asked to contribute regardless from where they live (continent or islands).

The judgment was the object of 3 dissenting opinions.

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No peculiar political implications arisen from this ruling.

ANNEX I.15: RULING N. 413/14 OF 30 MAY 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140413.html>.

Summary in English: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic from the Socialist Party;
Members of the Assembly of the Republic from the Communist Party, the Left Bloc and the Ecologist Party (they submitted a joint request);
The Ombudsman.

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law for 2014 n. 83-C/2013 (LOE 2014), of 31 December 2013, as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2014. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs

and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.⁴¹

6. LEGAL QUESTIONS

The LOE 2014's norms under the scrutiny of the Court concerned: a reduction in the pay of public-sector staff; the imposition of a contribution payable on sickness and unemployment benefits; the determination of new methods of calculation as well as the reduction of survivors pensions which cumulate with the reception of other pensions; the suspension of the payment of pension supplements with regard to public undertakings with negative net losses in the last three financial years.

7. ARGUMENTS OF THE PARTIES

The allegations submitted by the applicants included the violations of: the principle of equality (Art. 13 of the Constitution); the principle of a state based on the rule of law and its corollaries, i.e. the principle of the protection of trust and the principle of proportionality (Art. 2 of the Constitution); the right to collective bargaining (Art. 56 of the Constitution); the right to a salary (Art. 59 of the Constitution); the right to social security (Art. 63 of the Constitution).

The norms of LOE 2014 under scrutiny were: Art. 33 (*Redução remuneratória*); Art. 75 (*Complementos de pensão*); 115 (*Contribuição sobre prestações de doença e de desemprego*); Art. 117 (*Pensões de sobrevivência dos cônjuges e ex -cônjuges*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

As to the issue of constitutionality of the reduction in the pay of public-sector staff, the Court grounded its ruling on the reasoning that was developed in the previous ruling n. 187/13. At the core of the decision lies the principle of equality. On this regard, the Court highlighted that the method of calculation of the new fees foreseen in Art. 33 of LOE 2014 violated Art. 13.1 of the Constitution inasmuch as it creates an excessive burden for public-sector staff whose monthly remunerations were between € 675 and € 1500.

For what concerns the constitutionality of the imposition of a 5% and 6% contribution payable, respectively, on sickness and on unemployment benefits, the Court, on the basis of the principle of proportionality enshrined in Art. 2 of the Constitution, found Art. 115 of LOE 2014 unconstitutional. It did so by clarifying that, since the benefits concerned shall be considered as a substitute form of a salary remuneration – that workers were not entitled to because of their sickness or unemployment –, the aims identified in that norm did not justify those sacrifices, being the reduction a measure of *extrema ratio*.

The Court also struck down Art. 117 of LOE 2014 in accordance with Art. 13 of the Constitution (principle of equality), which determined new methods of calculation and envisaged a reduction of survivors pensions in cases in which they are accumulated with

⁴¹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

income from other pensions. The Court noted that individual pensioners covered by this regime who receive the same overall monthly income from pensions and with the same rate of formation of a survivor's pension could see the latter reduced by different amounts, depending on the proportion of the total value of the pensions concerned that came from the survivor's pension. Given that the legislator said the reason for the measure was to restrict the accumulation of multiple pensions, the Court was unable to discern material grounds that would have justified differentiating between subjective legal positions whose nature was exactly the same. This differentiation was not warranted by the stated purpose of the legal regime, inasmuch as the latter was said to seek to limit the amounts payable under survivors' pensions when accumulated with other social benefits awarded to the same recipient for reasons of infirmity or old age. The Court held that since the measure affected the overall amount recipients were paid, but without fundamental grounds for this different treatment, the regime could raise several problems of legitimacy from the point of view of the principle of equality.

For what regards the issue of constitutionality of the suspension of the payment of pension supplements for public undertakings with negative net losses in the last three financial years, the Court said that the related norm (Art. 75 of the Constitution) does not infringe the principle of protection of trust inasmuch the individual or collective bargaining in this field in the frame of each undertaking is a matter for the latter, not for the legislator, who as a consequence could not cause legitimate expectations. Moreover, the objectives of budget consolidation clearly justified Art. 117 of LOE 2014.

Given the reasons of exceptionally important public interest implied in the adoption of LOE 2014, the Court said that it was needed a qualified declaration of unconstitutionality, as foreseen in Art. 282.4 of the Constitution, and consequently postponed the effectiveness of the judgment from the date of its delivery.

The judgment was the object of 13 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 282 of the Constitution, the judgment, as for those rules declared unconstitutional, possesses generally binding force. Therefore, Articles 33, 115.1 and 2 and 117.1-7 and 10-15 of LOE 2014 were eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals.

As for those rules that the Court did find consistent with the Constitution, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

Prime Minister Pedro Passos Coelho declared that Constitutional Court judges "need to be better chosen" and did not discard the need to increase taxes again.

Opposition parties call for elections.

PORTUGAL

A few days later Portugal makes a clean exit from the financial assistance program.

ANNEX I.16: RULING N. 572/14 OF 30 JUNE 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140572.html>.

Summary in English: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140572s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANTS

Members of the Assembly of the Republic from the Socialist Party;
Members of the Assembly of the Republic from the Communist Party, the Left Bloc and the Ecologist Party (they submitted a joint request);

3. TYPE OF ACTION/PROCEDURE

Request for *ex post facto* review of the constitutionality of various norms contained in the State Budget Law n. 83-C/2013, of 31 December 2013 (LOE 2014), as laid down in Art. 281 of the Constitution (Abstract review of constitutionality and legality) and Articles 51-56 and 62-66 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some budget measures set out in LOE 2014. Those measures were adopted in order to implement the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) with the European Commission and the Memorandum of Economic and Financial Policies (MEFP) with the IMF as well as the Loan Agreement were signed thereafter.

The FAP covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism

(EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. It provided structural reforms to promote growth, create jobs and improve competitiveness; a fiscal consolidation strategy to reduce substantially the public debt and deficit (below 3% of GDP by 2014); a financial sector strategy based on recapitalization and deleveraging aimed at ensuring the financial stability of the country.⁴²

6. LEGAL QUESTIONS

The LOE 2014's norms under the scrutiny of the Court concerned: the extension of the scope of application of the existing Extraordinary Solidarity Contribution (CES) with regard to pensions, reducing both the threshold below which pensions are exempt and the points at which the applicable CES rates are 15% and 40% respectively; the 50% reversion of the income received from employers' contributions to ADSE (Directorate-General for the Social Protection of Public Servants) to the State purse.

7. ARGUMENTS OF THE APPLICANTS

The allegations submitted by the applicants included the violations of: the principle of trust (legal certainty) and the principle of proportionality (Art. 2 of the Constitution); the principle of the unitary and progressive nature of income tax (Art. 104 of the Constitution); the principle of equality (Art. 13 of the Constitution).

The norms of LOE 2014 under scrutiny were: Art. 14 (*Transferências orçamentais*); Art. 76 (*Contribuição extraordinária de solidariedade*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

In the present case the Court combined two requests for *ex post facto* abstract reviews of two norms of Law n. 13/2014 of 14 March 2014 (*Primeira Alteração à Lei n.º 83-C/2013, de 31 de dezembro*) that amended LOE 2014: one on the CES and the other on the reversion to the State of half the revenues from employers' contributions to ADSE (a fund that provides social healthcare protection for public servants).

The Court found that the first of the two norms was not in breach of the principle of the protection of trust (legal certainty). It considered that pensioners do possess a legal position that enjoys a special degree of protection. However, despite the fact that as an acquired right, the right to a pension deserves greater protection from subsequent changes in legislation than rights that are currently under formation, the need to safeguard other constitutionally protected rights and/or interests that must be deemed to prevail over it can legitimate measures which affect pensioners' legitimately justified rights and expectations. Even if the other requisites for the applicability of the principle of the protection of trust (legal certainty) are in place, there are public-interest reasons which, when weighed against this principle, can justify the discontinuation of the behaviour that generated the expectations.

⁴² See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

The CES was designed to work in combination with other measures, in order to respond to the economic/financial crisis situation that has temporarily also required the political authorities to make choices involving an urgent strengthening of the social security system at the expense of its own beneficiaries.

Faced with a combination of a reduction in the social security system's revenues (due to rising unemployment, falling wages, and new emigratory trends) and an increase in the cost of supporting people in unemployment and poverty, with the ensuing need for the state to subsidise the system and a resulting worsening of the public deficit, the legislator opted to extend the requirement to pay social security system contributions to pensioners.

The Court recalled that three cumulative prerequisites are needed for there to be a situation in which one is legitimately entitled to trust in the existence of a constitutionally protected legal certainty: the expectations that the legal regime in question will be stable must have been induced by the behaviour of the public authorities; those expectations must be based on good reasons, which must be evaluated as such within the constitutional-law axiological framework; and the affected citizens must have oriented their lives and made decisive choices based on expectations that this particular legal regime would be maintained.

It is also necessary to consider whether there are public-interest reasons which, when weighed up against the other relevant factors, justify discontinuing the behaviour that generated the expectations concerned. In the present case the Court had to consider the relative importance of the public interest that served as grounds for the creation of the CES: the need to achieve a budgetary balance and reduce the public deficit in a relatively short period of time. This weighing-up process, which must be undertaken using the criteria imposed by the principle that excess is prohibited, is what makes it possible to gauge whether or not the damage done to the trust and certainty is reasonable or justified.

The Court said that when it gauges the applicability of the principle of the protection of trust (legal certainty), it must consider two opposing sets of interests: the private subjects' expectations that the current legislative framework will persist; and the public-interest reasons that justify discontinuing these legislative solutions. The Constitution recognises these two groups of interest on an equal footing, so it is necessary to confront them with one another and place them on the scales in order to determine each one's variable weight and draw a conclusion as to which of them should prevail. The method for doing this is the same as the one used to judge the proportionality or substantial adequacy of a measure that restricts rights. Even if one concludes that the public interest in changing and adapting the current legislative framework is an urgent one, it is still necessary to use material and axiological parameters to determine whether the extent of the sacrifice is inadmissible, arbitrary or too heavy a burden.

The public interest pursued by broadening the base for the subjective incidence of the CES was of key importance to the nation and possessed an urgency that manifestly made it prevalent. The expectations of the pensioners affected by the legislative amendment were incapable of resisting the social security system's need for additional funding in the 2014 budget year, in the exceptional situation invoked by the legislator.

The CES is an exceptional, transitional measure imposed in a budgetary norm and designed to respond to a situation of economic and financial emergency and budgetary imbalance. As such, the Court was of the opinion that from the specific perspective of the principle of the protection of trust (legal certainty), the renewed and amended version of the CES included in LOE 2014 deserved a substantially different assessment from the one the Court had made of the analogous measure in LOE 2013.

The Court also said that there was no breach of the principle of proportionality, and that there was no reason in the present case to differ from its previous finding on the appropriateness of and need for a CES, within the overall framework of a programme intended to achieve a balanced budget.

In abstract terms, broadening the base of CES contributors is not an inappropriate way to achieve budgetary balance, and where the need for the chosen option is concerned, it cannot be said that expanding the CES's objective scope is not the instrument that is least burdensome for the interests that are negatively affected in pursuit of that goal.

The Court said it was necessary to ask whether the amount of time that had passed since the Financial Assistance Programme for Portugal began and the measures taken alongside the CES were introduced, required the legislator to find alternatives to prevent the prolonging of the differentiated treatment from becoming clearly excessive for its targets. The legislator was not dispensed from looking for alternative measures that would make it possible to lessen the severity of the demands made on retirees and pensioners in the last few years, thereby sharing public costs out fairly between the recipients of every different type of income. However, this fact was not enough to exclude the possibility of renewing and reformulating a CES-type measure for 2014 from the legislator's ability to shape the country's budget legislation.

The Court considered that notwithstanding the intensity of the sacrifice suffered by the private spheres affected by the new Contribution, the public interest at stake was of such key importance and urgency that it manifestly prevailed in this case. It said that one must accept that the combination of the temporary and exceptional nature of the norms underlying the monthly payment demanded of the social security beneficiaries now covered as a result of the expansion of the CES base, and the goals those norms are designed to pursue, means that this sacrifice is not a particularly excessive and unreasonable one that would imply a violation of the principle of proportionality which could be criticised on constitutional grounds.⁴³

On the question of the norm that reverts 50% of the revenue from employers' ADSE contributions to the state purse, the Court recalled that under the current legal regime the social protection subsystem linked to healthcare provided by ADSE is characterised by: the fact that membership of the scheme is voluntary and that any public servant can join as a beneficiary, regardless of the form of legal public employment relationship under which they work; and also by the freedom to continue to belong to the scheme or not, given that beneficiaries can leave it at any time.

This norm does not seek to permanently institute a new legal regime governing employers or equivalents' contributions to ADSE. It instead represents a typical budget transfer measure that only remains in force for one year at a time.

The challenged norm reverts 50% of the income from employers' contributions to the state purse, but it does not so revert any other ADSE revenues – namely those derived from the deductions made from beneficiaries' basic pay and retirement pensions. All these other revenues are consigned to payment of the benefits that ADSE awards its beneficiaries in the fields of promoting health, preventing illness, and treating and rehabilitating patients. The norm does not directly or indirectly allocate these revenues to any other ends; in particular, it has not transferred them to the state purse in order to fund the state's general activities.

The precept established by the norm does not affect the contributions that public servants or other beneficiaries pay to ADSE, but rather the contributions paid by the state's own

⁴³ See the Summary.

integrated and autonomous departments, services and funds. The norm itself does not provide for payments or asset-related sacrifices to be made by private individuals. It limits itself to transferring revenues from contributions paid to ADSE by public integrated and autonomous departments, services and funds – revenues that come from the public coffers in the first place. The norm's scope of application is entirely outside the scope of applicability of the principles of the so-called 'Fiscal Constitution', such as the principle of the unitary nature of the personal income tax (i.e. that there can only be one such tax) or the principle of equality. These principles operate in cases in which the state acts by affecting or imposing sacrifices on private incomes. This is not the case with this norm, which limits itself to changing the destination of the revenues obtained from the contributions paid to ADSE by the various integrated and autonomous departments, services and funds. These contributions do not constitute personal income that would demonstrate ADSE beneficiaries' capacity to contribute.

The legislator has been expressly stating the objective of making the social protection subsystem linked to ADSE healthcare self-sustaining – i.e. that it should be funded solely by its beneficiaries' contributions; and that this is to be achieved by progressively increasing the deductions from their pay packets or pensions and progressively decreasing the employers' contributions.

The fact that the norm does not require part of the income from deductions from pay and pensions to be transferred to the state purse means that it is impossible to conclude that the norm has created a personal income tax (one that would be different from the IRS Personal Income Tax) that affects ADSE beneficiaries, and there is thus no breach of the principle of the unitary nature of the personal income tax.

The reversion to the State purse of funds that would otherwise serve to finance ADSE represents a taking back – at least in the current budget year – of the public funding of a social security system designed to protect beneficiaries against illness. However, the Court said that this does not mean one can question the state's fulfilment of the duty to subsidise a social security healthcare system, inasmuch as the state can comply with this duty just by organising and maintaining the public social security system – something that is not affected by this measure.⁴⁴

The judgment was the object of 7 dissenting opinions.

9. LEGAL EFFECTS OF THE JUDGMENT

Given the fact that the Court did not find any violation of the Constitution, the norms at stake remain in force. However, the Court could examine them in different cases and decide that they are in fact unconstitutional.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No peculiar political implications can be detected, also because the constitutionality of the norms challenged was upheld.

⁴⁴ See the Summary.

ANNEX I.17: RULING N. 574/14 OF 14 AUGUST 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140574.html>.

Summary in English: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140574s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

President of the Republic.

3. TYPE OF ACTION/PROCEDURE

Request for *ex ante* review of the constitutionality of various norms contained in the Decree of the Assembly of the Republic⁴⁵ n. 264/XII, as laid down in Art. 278 of the Constitution (Prior review of constitutionality) and in Articles 51-56 and 57-61 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the Decree of the Assembly of the Republic n. 264/XII. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in

⁴⁵ Once the text for initiating legislation, which was admitted by the President of the Assembly and put to a final overall vote, is passed, it becomes known as a Decree of the Assembly of the Republic. The Decree is signed by the President of the Assembly and sent to the President of the Republic for enactment. Once enacted, the Decree is called a Law and is sent to the Government for counter-signature (signature by the Prime Minister), and then on to the National Press for publication in Series 1 of the *Diário da República*. The President of the Republic can exercise the right of veto, either because he or she considers that the text which has been passed by the Assembly of the Republic contains rules that contradict the Constitution (whereupon the President will ask the Constitutional Court for an opinion), or for political reasons, which must be set out in a message that includes the grounds for the President's position.

Brussels.

The Memorandum of Understanding (MoU) and the Loan Agreement were signed thereafter. It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM), €26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.⁴⁶ The Decree of the Assembly of the Republic n. 264/XII was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the maintenance of pay cuts for 2016-2018 for all staff paid out of public funds; the imposition of pay cuts in 2014-2015 for staff paid out of public funds.

7. ARGUMENTS OF THE APPLICANT

The allegations submitted by the President of the Republic included the violations of: the principle of trust (legal certainty) (Article 2 of the Constitution); the principle of equality (Article 13 of the Constitution).

The norms under scrutiny were: Art. 2.1-15 (*Redução remuneratória*); Art. 4.1-3 (*Reversão gradual da redução remuneratória temporária*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Decree included various mechanisms: a pay cut in 2014 for staff paid out of public funds (similar to the one that had already been created in the State Budget Law for 2011 – LOE 2011); a pay cut in 2015 worth 80% of the 2014 equivalent; and the inclusion in the law of provisions under which similar cuts would apply in the subsequent years up until 2018. Together, these measures added a further five years to past cuts, thus bringing the total consecutive number of years with such cuts to eight (2011-2018). Unlike 2014 and 2015, the Decree did not specify the amount of the reductions that would apply in each of the years between 2016 and 2018.

The Court recalled the essential requisites it has used in its jurisprudence to determine when the Constitution protects the principle of trust (legal certainty), which include the existence of relevant legitimate expectations. It said that in the present case it was credible to think that the fact that the successive pay-cut measures imposed since 2011 had been systematically presented as transitional – i.e. that they would be reversed – had generated such expectations – that their remuneratory situation would improve with time – on the part of workers paid out of public funds.

⁴⁶ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

This expectation that the situation would improve was legitimated by the fact that the Portuguese State had already fulfilled the terms of the Financial Assistance Programme for Portugal (FAP), as well as by the improvement in the economic and financial situation reflected in various indicators, in the government forecasts included in the Budgetary Strategy Document 2014-2018 (DEO), and in the reduction in the Corporate Income Tax (IRC) paid by large enterprises.

The Court acknowledged that admitting the expectations that the pay situation will improve are legitimate cannot eliminate the constraints derived from the state's international commitments – particularly those arising out of the Treaty on the Functioning of the European Union (TFEU) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known in Portuguese as the 'Budget Treaty'). The effects of the FAP will still be felt in 2015, given that it sets Portugal's budget deficit for that year at 2.5% of GDP, as will the effect of the excessive deficit procedure. The logical consequence of these circumstances, which increase the relevance of the underlying public interest, is that the pay cuts provided for in 2015 remain within the limits of that which can be said to be expectable and therefore permitted by the principle of the protection of trust (legal certainty).

Turning to 2016-2018, however, a variety of indicators and above all the government forecasts set out in the DEO reflect an economic scenario in which there will be an improvement in the economic and financial situation, and this can be expected to have an effect on the situation of workers who are paid out of public funds. One can take the stance that this improvement should include more than just a mechanism under which it would still be possible for there to be no reversal of the previous pay cuts between 2016 and 2018.

The Court pointed to its own case law, in which it has taken the view that the pay-cutting measures adopted since 2011 were designed to safeguard a public interest that should be considered to prevail over other factors, and that this was the decisive reason why the Court rejected the argument that the situation involved a constitutionally unacceptable lack of protection of trust (certainty). These are basically conjunctural financial-policy measures chosen by the country's legislative organ – itself legitimated by the principle of democracy seen as representation of the people – and also rooted in the need to respect the international commitments the Portuguese State made when it signed the FAP.

However, once the country reaches 2016, the FAP is over and the present excessive deficit procedure has been finalised, there would have to be other grounds in order to again conclude that the pay-cut measures were not unconstitutional because they were justified for very important public-interest reasons weighty enough to prevail over expectations of a return to a framework of stability in the law.

Portugal's participation in the EU and the Eurozone obliges it to fulfil a range of demanding requisites in the budgetary field. One of the main obligations of Member States is to avoid excessive budget deficits, and the Union has the competence to monitor each Member State's budgetary situation and the amount of its public debt.

Norms contained in the EU's founding law have been implemented by means of derivative-law rules – particularly regulations, especially those in the Stability and Growth Pact. The Court emphasised that the 'Budget Treaty' is not part of EU Law, and is only applicable to the extent that it is compatible with the founding Treaties and the legal provisions they contain. From a Portuguese Constitutional Law point of view, the 'Budget Treaty' does not enjoy the status the Constitution affords to the Treaties governing the European Union and the norms issued by EU institutions in the exercise of their competences. The latter are applicable in Portuguese Law, subject to respect for the fundamental principles of a

democratic state based on the rule of law. The ‘Budget Treaty’, on the other hand, is a source of Public International Law of the type that is governed by the constitutional norm according to which norms contained in duly ratified or approved international conventions have effect in domestic law once they have officially been published in Portugal and only for as long as they are binding on the Portuguese State.

Portugal is subject to an excessive deficit procedure under which various European Council recommendations have been approved. Setting aside doubts as to how binding such recommendations are, in any case they do not require Portugal to take specific concrete measures to control public spending and reduce the deficit. They instead limit themselves to listing the objectives which must obligatorily be achieved under EU norms that are indeed binding – those included in the founding law of the EU and the derivative law referred to above. The binding nature of European Union Law in this domain does not apply to the means by which the individual Member States actually achieve the goals imposed on them.

This signifies that the fact that one must accept that the norms which the national legislator has adopted in the past and will adopt in the future in pursuit of the aforementioned objectives must comply with European Union rules, has no consequences from the point of view of the application of national constitutional rules. In a multilevel constitutional system in which various legal systems interact with one another, domestic Portuguese legislative norms must necessarily comply with the Constitution and it falls to the country’s Constitutional Court to administer justice in constitutional-law matters. European Union Law itself requires the Union to respect the national identities of the different Member States, as reflected in each one’s fundamental political and constitutional structures.

The constitutional principles of equality, proportionality and the protection of trust (legal certainty), which have served as parameters by which the Constitutional Court gauges the constitutionality of national norms regarding the issues linked to those before it in the present case, form part of the central core of the state based on the rule of law and are included in the common European legal heritage, which is also binding on the European Union.

As set out in the norms before the Court, the pay cuts imposed on workers paid out of public funds since 2011 could have remained in effect until 2018 – i.e. for eight consecutive years. There was no guarantee whatsoever that this would not be the case.

The Court said that if this were to happen, it would be within a context in which the consequences of the overall remuneratory treatment of such workers – once again hit by pay cuts – would be much more negative than just the results of these cuts. The latter would again come on top of the permanent effects of the increase in their working hours (which has effectively cut hourly rates of pay), the increase in their contributions to ADSE (Directorate-General for the Social Protection of Public Servants), the freeze on promotions and advancements in the career structure, and the programmes for reducing staff numbers and for limiting the intake of new recruits, with both the latter potentially increasing the effective number of hours worked by existing/remaining staff.

The norms did not establish any percentage by which pay would be cut in 2016-2018; this would instead be dependent on “budgetary availability” (for another three years). On top of this, the DEO sets the goal of conditioning the reversal of the pay cut measure “to the reduction in the overall wage bill by means of a quantity effect” – i.e. by cutting the number of public servants. The Court was of the opinion that when seen in the light of the principle of equality, these reasons were not capable of justifying continued cuts in the pay of staff who are paid from public funds, and their pay alone, for another three years. Given the constitutional requirement that public costs must be shared out equally, it is not

constitutionally permissible for the strategy for balancing the public finances to be based on cutting spending by continuing to sacrifice those workers in particular. As such, the Court found that the norms applicable to 2016-2018 would be unconstitutional.⁴⁷

The judgment was the object of 8 dissenting opinions (on different issues and norms).

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 278 of the Constitution, the Assembly of the Republic – which has passed the Decree – must expunge the norms that were declared unconstitutional (Articles 2 and 4.2 and 3) so that the Decree may be enacted, or, if applicable, it must confirm the norms by a majority that is at least equal to two thirds of all Members who are present and is greater than an absolute majority of all the Members in full exercise of their office.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

No peculiar political implications of this ruling can be detected.

⁴⁷ See the Summary.

ANNEX I.18: RULING N. 575/14 OF 14 AUGUST 2014

Text of the judgment: <http://www.tribunalconstitucional.pt/tc/acordaos/20140575.html>.

Summary in English: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140575s.html>.

1. NAME OF THE COURT

Portuguese Constitutional Court.

2. APPLICANT

President of the Republic.

3. TYPE OF ACTION/PROCEDURE

Request for *ex ante* review of the constitutionality of various norms contained in the Decree of the Assembly of the Republic⁴⁸ n. 262/XII, as laid down in Art. 278 of the Constitution (Prior review of constitutionality) and in Articles 51-56 and 57-61 of the Law Governing the Constitutional Court (Law n. 28/82 of 15 November 1982).

4. ADMISSIBILITY ISSUES

None.

5. LEGAL RELEVANT FACTUAL SITUATION

The issue at stake in the judgment was the constitutionality of some norms contained in the Decree of the Assembly of the Republic n. 262/XII. Those norms were adopted in the framework of the commitments made by the Portuguese government as part of the budget consolidation objectives identified in the Financial Assistance Programme (FAP), which was agreed by the government and the so-called *troika* (IMF, European Commission, European Central Bank) and formally adopted on 17 May 2011 at the Eurogroup/ECOFIN meeting in Brussels.

The Memorandum of Understanding (MoA) and the Loan Agreement were signed thereafter. It covered the period 2011 to mid-2014 and included a joint financing package of €78 billion, €26 billion of which provided by the European Financial Stabilisation Mechanism (EFSM),

⁴⁸ Once the text for initiating legislation, which was admitted by the President of the Assembly and put to a final overall vote, is passed, it becomes known as a Decree of the Assembly of the Republic. The Decree is signed by the President of the Assembly and sent to the President of the Republic for enactment. Once enacted, the Decree is called a Law and is sent to the Government for counter-signature (signature by the Prime Minister), and then on to the National Press for publication in Series 1 of the *Diário da República*. The President of the Republic can exercise the right of veto, either because he or she considers that the text which has been passed by the Assembly of the Republic contains rules that contradict the Constitution (whereupon the President will ask the Constitutional Court for an opinion), or for political reasons, which must be set out in a message that includes the grounds for the President's position.

€26 billion by the European Financial Stability Facility (EFSF) and about €26 billion provided by the IMF. The Programme aimed not only at reducing the public debt and deficit, thus ensuring the financial stability of Portugal, but also at providing structural reforms to promote growth, create jobs and improve competitiveness.⁴⁹ The Decree of the Assembly of the Republic n. 262/XII was one of the responses given by the Portuguese legislature to the objectives identified in such Programme.

6. LEGAL QUESTIONS

The norms under the scrutiny of the Court concerned: the application of a proposed Sustainability Contribution (CS) and the formula for calculating it; .

7. ARGUMENTS OF THE APPLICANT

The allegations submitted by the President of the Republic included the violations of: the principle of trust (legal certainty), the principle of a state based on the rule of law and the principle of proportionality (Article 2 of the Constitution); the right to social security (Ar. 63 of the Constitution).

The norms under scrutiny were: Art. 2 (*Âmbito de aplicação da contribuição de sustentabilidade*); Art. 4 (*Cálculo da contribuição de sustentabilidade*); Art. 6 (*Atualização das pensões*).

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The norms before the Constitutional Court in this prior review case concerned the proposed creation of a Sustainability Contribution (CS).

The Court rejected outright both the idea that the CS was comparable to the earlier CES, and the allegation that the people affected by the former would be better off in terms of the amount of their pensions than they had been under the latter. Given its transitional nature (which implied the need for it to be renewed in each Budget Law), the CES did not produce legal effects that modelled the content of people's subjective legal positions with regard to the applicable benefits they received from the public social security system. The CS, on the other hand, would have had a lasting negative effect on the strictly legal plane on legal positions held by the current beneficiaries of that system.

When, in the past, the Constitutional Court was asked to pronounce itself on the constitutionality of the CES as configured in the State Budget Law for 2013 (LOE 2013), and then in the Amending Budget for 2014, it found that its nature was that of an exceptional and temporary budgetary measure designed to remain in force for a year and directly related to the immediate objectives of achieving a budgetary balance and ensuring the sustainability of the country's public finances. The Court legitimated the CES's constitutional conformity in the light of the parameters derived from the principles of the protection of trust (legal certainty) and proportionality, but solely on the basis that it possessed the aforesaid nature.

⁴⁹ See the European Commission's website at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

In addition to the difference between their material and temporal scope as referred to above, the specific difference between the CS and CES lay in the fact that the former sought to cut pensions by less than the latter, thus leading the author of the government bill to say in the accompanying explanatory statement that: “pensioners will have a higher income than that which would result from the application of the CES, thereby substantially recovering purchasing power”.

The Court considered that merely reducing the applicable rates was not capable of changing a measure that was typical of a budgetary rule designed to immediately save on public spending (CES) into a structural measure (CS) intended to ensure the medium and long-term sustainability of the public pension system.

Notwithstanding the fact that the term ‘contribution’ might suggest that the CS was a revenue-type measure, all it actually did was to consubstantiate a cut in the nominal amount of pensions. It worked by deducting the amount of the Sustainability Contribution from the amount of the pension, with the former calculated by applying a percentage to the latter and with the operation carried out by the entity that processed the pension. There was no transfer of funds outside the public pension system.

The Constitutional Court recalled its jurisprudence on both the meaning and scope of the right to a pension and the fact that the state is required by the right to social security to organise and maintain a social security system. The Constitution does not directly determine the details of the pension system and other social security system benefits, or the criteria for awarding them or deciding their monetary value. It is up to the ordinary legislator to specifically model these elements of the content of pensions, with a freedom of decision that varies depending on the determinability of each of the relevant constitutional rules.

Recognising the right to a pension is not the same as recognising the right to a pension of a given amount. Neither recognition of the right to a pension, nor the specific protection afforded to that right, by themselves eliminate the possibility that the concrete amount of the pension can be reduced. The right to that amount only takes on precise content through ordinary legislation, which means that its value is infra-constitutional. The right to a certain pension depends on the state’s financial possibilities – i.e. is subject to that which is possible – and is permeable to conjunctural pressures. However, it does also enjoy the specific protection derived from the key structural principles of a state based on the rule of law, such as the protection of trust (legal certainty) and proportionality.

The vulnerability of this right to a pension of a certain amount is also derived from the way in which the right itself is structured. Its formation possesses a medium and long-term temporal structure, and the fact is that the socioeconomic contexts which form the framework for the work of the legislative authorities can change radically over the benefit’s lifetime.

Here in Portugal, the right to a pension is acquired in accordance with the contributory principle, under which the recipient and other entities must fulfil certain obligations over time, which are the necessary precondition for the formation, also over time, of the right to receive a “monetary benefit that replaces the income earned from work” once one’s active life is over. These payments that replace labour income must be funded by contributions from both workers and employers. The amount of the benefit to which each recipient is entitled is a *quantum* that is both defined (principle of defined benefits), and is determined in accordance with the workers’ and the employers’ contributions that have been paid (contributory principle).

The Court rejected an idea that is sometimes invoked: that there is a general prohibition on going backwards in terms of social rights, such as to prohibit any new legal regimes that might affect legal situations encompassed by earlier laws. This would run the risk of

destroying the autonomy of the legislative function, whose typical characteristics, such as the freedom to create measures without regard to precedent and the freedom to reverse one's own legislative acts, would be practically eliminated. The Court said that it is necessary ensure a harmony between the stability of the legislative *acquis* that has already been achieved in the social rights field on the one hand, with the legislator's freedom to shape legislation on the other. This harmonisation implies distinguishing between situations in which the Constitution gives a sufficiently precise order to legislate, when the ordinary legislator's freedom to take backward steps in the degree of protection that has already been attained is necessarily quite minimal, from those in which the prohibition on social retrogression is limited by the principle of democratic alternation and operates only when the change that reduces the content of a social right either affects the guarantee of fulfilment of the minimum imperative content of the constitutional precept, or implies violation of the principle of the protection of trust (legal certainty) because of the arbitrariness of the retrograde step. The legislator's power to reverse its own laws is based on the principle of democratic pluralism and is not unlimited, but must instead coexist with other constitutional principles.

A state based on the rule of law is one in which there is legal certainty, which requires that citizens be able to know what they can count on. The legislator's ability, in the light of different historical demands, to change options that were adopted in the past is unrestricted (subject to compliance with the applicable constitutional norms) when the new legislative solutions are designed to only have effect in the future; that ability is, however, subject to limits whenever the legislator decides that the effects of its choices will have certain repercussions for the past.

The Constitution does not impose a general prohibition on the ordinary legislator from making new legislative choices whose effects include repercussions on the past. These effects weaken one of the abilities that citizens of a state based on the rule of law must enjoy – to know what they can count on. This is precisely why the Constitution expressly forbids retroactivity in the case of restrictions on constitutional rights, freedoms and guarantees, the definition of forms of behaviour that are punishable under the criminal law, and the creation of taxes and the definition of their key elements. The fact that there is no express constitutional prohibition on resorting to gradual and very variable forms of “true” or “pseudo” retroactivity in other cases does not mean the ordinary legislator can use them in every other type of situation. The principle whereby the Constitution generically enables the legislative power to make its decisions affect the past, in different ways and to different extents, is subject to limits derived from the necessary coexistence of this principle and the legal certainty dimension of the principle of a state based on the rule of law.

The problem is more delicate when, albeit the new legal norm is only designed to have effects for the future, it in fact touches on existing legal relationships formed under earlier law. In such cases it is necessary to weigh up the certainty and good faith in which citizens who were legitimately counting on the continued existence of the legal discipline under which their legal situation was defined in the eyes of the law are entitled to trust on the one hand, against the reasons why the legislator made the changes that are going to affect those citizens' legitimate expectations on the other.

The Court restated its view that for a constitutional-law protection of trust (certainty) to exist, the state (particularly the legislator) must have engaged in behaviour capable of generating expectations of continuity in the minds of private subjects; these expectations must be legitimate, justified and based on good reasons; the private subjects must have made life plans that took the prospect of continuity in the state's behaviour into account; and there

cannot be public-interest reasons which, when weighed up against the private interests, justify discontinuing the behaviour that led to the situation involving the expectations.

The Constitution does not leave the ordinary legislator free to decide whether or not there should be some social or solidary form of protection for the elderly, at a time in their lives when earning income from labour is no longer existentially possible. Notwithstanding the fact that this right is created by reversible ordinary law, in this domain the issue involves both the same value choices as those that justify the constitutional requirement for the existence of a social security system which Constitution obliges the state to organise, and the same value choices as those that are present in the norms which define the state programmes and tasks inherent in a Republic committed to the construction of a solidary society.

The explanatory statement included in the bill submitted to the Assembly of the Republic justified definitively cutting the amount of pensions that were currently being paid out, precisely because of the demands imposed by the so-called ‘intergenerational contract’. The author of the bill called this cut a ‘Sustainability Contribution’.

The Court recognised the important weight these grounds possess under the Constitution. If the consistency of the affected rights is heightened, so is that of the need for them to be affected, given the importance of the rights and interests –themselves also protected by the Constitution – which the explanatory statement said justified them. If the extent to which a constitutional principle (here, the principle whereby pensioners’ legitimate expectations that they are indeed going to receive a defined benefit which was acquired under earlier law) is not fulfilled is great, the reason justifying that non-fulfilment must be greater still. In the present case and in the light of the Constitution, the effect on pensioners’ rights could only be downplayed if it was shown to be necessary in order to satisfy “constitutionally protected rights and interests that must be deemed to prevail”.

A legal model that rigidly maintains the solutions which were thought out under law defined in the past can lead to an unjust treatment of both the existing generations of welfare-system beneficiaries, and the generations who currently make up the active Portuguese population and whose “contributions” ensure the welfare model’s funding at the moment. In circumstances like the present ones, one must bear in mind that the trust (certainty) of those who modelled their life plans on a law that was in force at a given moment in time cannot be protected at any cost. It must be counterbalanced by the expectations – uncertain by the nature of things – that the present generations of workers, taxpayers and social-security contributors have that they will benefit from the same system in the future.

In the light of the manifest imbalances of a social security system which, if it carries on as it is, could end up forcing the Republic to disrespect the budgetary discipline commitments it has made to its partners in the EU – a failure that could then in turn imply sacrificing the constitutionally protected rights and interests of future generations in order to fulfil the (also constitutionally protected) rights and interests of current generations – the Constitution can be said to give the ordinary legislator the power to modify the system and adapt it to present-day demands.

The Court said that the measure before it was not arbitrary or unintelligible. However, it remained to be determined whether it would be excessively burdensome for the persons it affected, to a point at which it would not be possible to conclude that the constitutionally protected rights and interests justifying it were prevalent in this case.

The question was whether, given the degree of intensity with which requirements of legal certainty and the protection of people’s legitimate trust in the continuity of the law were damaged, the Court was in a position to say that the rights and interests also enshrined in the

Constitution and invoked in order to justify such damage prevailed over the sacrificed rights and interests.

At issue was the fulfilment of an objective principle – in general that of a state based on the rule of law, and specifically of the right to social security derived from value judgements that structure the whole constitutional system and are of interest to the entire community. The measure undermined the contributory principle and the tendency for there to be at least some match between the contributions a beneficiary makes and the amount of the pension he/she may later receive following retirement.

Over the years, the successive legislation on the pension system has gradually imposed harsher conditions for subscribers and beneficiaries of both the CGA welfare system and the general social security regime; but in all the situations in which conditions worsened, the legislator either restricted the effects of its measures to the future, or created a transitional law with a clause designed to safeguard existing rights.

The Court said that although the norms before it constituted a modification of the normative treatment of a certain category of situations, albeit one determined by legislative policy reasons that justified the definition of a new legal regime, in the present case and with the declared objective of fulfilling the public interest in the sustainability of the social security system, the legislator was seeking to affect rights that had already been formed under earlier legislation.

If the legislator creates a new legal regime designed to affect any legal situation encompassed by earlier law (here, by definitively reducing pensions that have already been awarded), it must consider the unequal situations that may arise in the universe of the measure's targets. If it fails to take these inequalities into account, it is not possible to say that the differences between the old and new regimes are the result of a normal succession of laws. The new law sought to undermine the principle of non-retroactivity and to apply to realities that had already been regulated – realities that would be marked by unequal treatment under the new legal regime.

As such, a measure of this type raises serious difficulties on the level of both equality and internal fairness and intra-generational justice.

Nor did the measure resolve any problem on the inter-generational justice level, because it did not configure a reform model that was consistent and coherent and in which citizens could trust.

The norms accentuated both the situation of inequality applicable to existing pensioners, and that regarding the current contributors to and beneficiaries of the pension system. The Sustainability Contribution would have been a definitive measure, and one that would also affect recipients of future pensions, but without any weighing up of the serious effects that the successive changes in the pension calculation regime and the introduction of the sustainability factor would immediately mean for the determination of the amount of pensions and even of the age at which people can gain access to pensioner status.

The Sustainability Contribution would have been completely indifferent to both the effort made by future pensioners and the cut that the legislative amendment would have imposed on pensions *ab initio*.

The Constitutional Court therefore pronounced the unconstitutionality of the norms before it.⁵⁰

The judgment was the object of 3 dissenting opinions.

⁵⁰ See the Summary.

9. LEGAL EFFECTS OF THE JUDGMENT

According to Art. 278 of the Constitution, the Assembly of the Republic – which has passed the Decree – must expunge the norms that were declared unconstitutional (Articles 2 and 4) so that the Decree may be enacted, or, if applicable, it must confirm the norms by a majority that is at least equal to two thirds of all Members who are present and is greater than an absolute majority of all the Members in full exercise of their office.

10. SHORTLY DESCRIBE THE MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The Prime Minister affirmed that alternatives to the structural reform of the pension system would be found.