



***CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW:
PORTUGAL***

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I POLITICAL CONTEXT

POLITICAL CHANGE

I.1

WHAT IS THE POLITICAL CONTEXT OF THE EUROZONE CRISIS PERIOD IN PORTUGAL? HAVE THERE BEEN CHANGES IN GOVERNMENT, ELECTIONS, REFERENDA OR OTHER MAJOR POLITICAL EVENTS DURING THE PERIOD OF 2008-PRESENT?

There were parliamentary elections on 27 September 2009 and on 5 June 2011, as well as presidential elections on 23 January 2011.

The elections in 2009 resulted in the re-election of the Socialist Party (PS), centre-left political formation, as the first party in the country. However, in the context of the Eurozone crisis and the already ongoing unpopular reforms, Socialists lost the majority; José Sócrates formed a minority government (see question X.1).¹

Anibal Cavaco Silva, Portugal's conservative president was re-elected on 23 January 2011.

The Prime Minister resigned on 23 March 2011 after a defeat in a parliamentary vote on a package of austerity measures that came to be known as "PEC IV" (Stability and Growth Pact, SGP 2011-2014). Pedro Passos Coelho, at the time Democratic People's Party/Social Democratic Party (PPD/PSD)'s leader, opposed these measures and strongly advocated for calling for international financial assistance (see question X.1). On 24 March Germany regretted that the austerity measures package was not adopted; it was the Euro's stability that was at stake. Portuguese bonds recorded high after resignation: interest rates went from 7% to 14%. The political void and the financial situation left no alternative but to seek assistance from the European Financial Stability Facility (EFSF), the Eurozone's bail-out fund.

On 5 June PPD-PSD won the elections and formed a coalition with the People's Party (CDS-PP), a centre-right party. The MoU was negotiated before the elections with little public discussion (see question X.3).

The governing coalition came close to collapse in mid-2013 after the minister of finance, Vítor Gaspar, resigned on 1 July. In his resignation letter, Vítor Gaspar stated that his credibility had been undermined by rulings by the constitutional court overturning government policies in October 2012 and in April 2013. He also suggested that his increasing isolation within the cabinet over the implementation of Portugal's EU/IMF austerity programme contributed to his resignation, adding that his departure would reinforce "the cohesion of the government".² Vítor Gaspar had been seen as inflexible by the Popular Party (CDS-PP), and parts of the dominant Social Democratic Party (PSD), particularly in

¹ Socratic Method, 1 October 2009, The Economist at <http://www.economist.com/node/14560974#>.

² Full resignation letter can be read in <http://expresso.sapo.pt/carta-de-demissao-de-vitor-gaspar=f817482>.

response to calls for lower taxes and other measures to support investment and economic growth.³

Minister of Foreign Affairs, Paulo Portas (CDS-PP leader), resigned from the government immediately after Vítor Gaspar was replaced by his deputy, Maria Luis Albuquerque. Paulo Portas stated that the prime minister had chosen the “path of continuity”, a decision he did not support. The prime minister did not accept his resignation and political instability sent interest rates on government debt soaring.⁴

On 21 July, Portugal's president, Aníbal Cavaco Silva, announced that the current government should remain in office until the end of its term (2015). Paulo Portas reintegrated government as Deputy Prime Minister.⁵ The decision followed the failure of negotiations between the three main political parties (PSD, CDS-PP and PS) to agree on a broader parliamentary consensus over the steps necessary to complete the country's EU/IMF programme.⁶

Portugal made a clean exit from its EU/IMF bailout in May 2014.⁷

³ For more details see Country report, the economist intelligence unit, available at <http://country.eiu.com/article.aspx?articleid=1570676341&Country=Portugal&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=762217060&oid=762217060&uid=1>

⁴ For more details see Country report, the economist intelligence unit, available at <http://country.eiu.com/article.aspx?articleid=2020682386&Country=Portugal&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=762217060&oid=762217060&uid=1>

⁵ “Seeking to Repair a Rift in Portugal’s Ruling Coalition”, 6 July 2013, available at <http://www.nytimes.com/2013/07/07/world/europe/seeking-to-repair-a-rift-in-portugals-ruling-coalition.html>

⁶ The Economist Intelligence Unit, Portugal, available at <http://country.eiu.com/article.aspx?articleid=980757082&Country=Portugal&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=762217060&oid=762217060&uid=1>

⁷ The Economist Intelligence Unit, Portugal, <http://country.eiu.com/portugal>; “Portugal bank knocks recovery”, 10 August, The Financial Times,

II CHANGES TO THE BUDGETARY PROCESS

BUDGETARY PROCESS

II.1

DESCRIBE THE MAIN CHARACTERISTICS OF THE BUDGETARY PROCESS (CYCLE, ACTORS, INSTRUMENTS, ETC.) IN PORTUGAL.

Pursuant to art. 105/2 CRP, the budget,⁸ a law with enhanced value, is prepared in accordance with the annual Broad Economic Plan and taking into account obligations determined by law or contracts.⁹ The Plan Options are voted by Parliament (art. 91 ° CRP) and constitute the guidelines for which the Plan itself is organized; they must obey the budget, since they also represent, according to the Constitution, the financial expression of the annual plan. The Government is in charge of submitting the budget proposal to the Parliament. The budget proposal draft is prepared by the Ministry of Finance, and then subject to approval of the Government. By the 15th October of each year, the Government must present the draft State Budget Law to the Parliament. Besides the actual proposal, also budget maps and informative annexes are included.

The Parliament then has to vote the proposed Budget until the 15th of December. This is discussed in a plenary session, being matters such as the creation and extinction of taxes and loans and other financing means taken to a discussion in specialised committees. If one tenth of the deputies so requires, other matters relating to the fiscal regime can also be discussed in committee.

Once the Budget starts being executed, the peculiarity of the system resides with the expenses: each credit cannot be used entirely at once. This means that the expenses should be made and the payments authorized by amounts not exceeding the accrued twelfths. The Parliament, upon approval of the Budget, fixes not only the maximum amount of total expenditure, but also the expenses relating to each chapter and function. The Government cannot, in principle, transfer funds from chapter to chapter/function to function, nor can it open credits which can raise the total expenditure predicted on the Budget. There are some exceptions, amongst which the need for the Government to respond to unforeseen and unavoidable expenses – for such purpose, a reserve fund is annually made in the budget of the Ministry of Finance. One should furthermore note the ‘brake’ provision contained in article 167/2 of the Constitution: no proposals to amend the budget can be submitted during the financial year if they involve an increase in expenditure to a decrease of the State revenue, as provided for in the Budget.

As for the inspection of Budget execution, the control over revenue is made by reference to the duty of the entitled services to collect certain amounts. The expenses’ control is made by reference to the predictions made in the Budget. This control is exercised by the Public

⁸ <http://www.en.parlamento.pt/StateBudgetPublicAccounts/index.html>

⁹ Article 112.º n.º 3 of the Constitution defines laws of enhanced value as those (...) “besides organic laws, the laws that are approved by two thirds majority, as well as those that the Constitution defined as a normative prerequisite for the approval of other laws or that by the latter must be respected”.

Accounts and the Court of Auditors, both *a priori* and *a posteriori*, by considering each service's allocation and the law.¹⁰

GENERAL CHANGE

II.2

HOW HAS THE BUDGETARY PROCESS CHANGED SINCE THE BEGINNING OF THE FINANCIAL/EUROZONE CRISIS?

The budget is applied by means of the so-called LEO, which establishes the framework for budget application. Since 2001 this law (L-91/2001) suffered several amendments during the Eurozone crisis. Its most meaningful amendment is nevertheless the inclusion of the Balanced Budget Rule (so called 'golden rule') (See question IX.5).

The LEO also incorporates new principles, as well as serves as means of implementation of Directive 2011/85/EU. A new budgetary model was proposed, based on a reform to be led by the Ministry of Finance. It predicts a phased approach to the budget, based on a detailed plan of action, with technical support being sought in the Commission and the IMF. A multiannual framework plan is established, with tight control mechanisms for expenditure; this plan was presented by the first time to the Parliament in April 2012, together with the Plan for Stability and Growth (PEG).

Another change was the abolishment of the horizontality in the application of the budget: each Ministry started being responsible for its own share of the budget, which reinforces the control. To enhance control, a new and independent entity was created (see questions VII.4 and II.3): the Portuguese Public Finance Council (CFP), which acts as an advising body to the viability of the budgetary measures and public expenditure.¹¹ The Council's mission is to conduct an independent assessment of the consistency, compliance with the defined objectives and sustainability of public finances, while fostering its transparency.

INSTITUTIONAL CHANGE

II.3

WHAT INSTITUTIONAL CHANGES ARE BROUGHT ABOUT BY THE CHANGES IN THE BUDGETARY PROCESS, E.G. RELATING TO COMPETENCES OF PARLIAMENT, GOVERNMENT, THE JUDICIARY AND INDEPENDENT ADVISORY BODIES?

No main changes are found in the competences of the institutions. However, the role of the judiciary was enhanced, with the Court of Auditors' work gaining prominence; on the other hand, a new entity was created: the CFP.

The Court of Auditors is a sovereign body, which competences are defined in article 214 of

¹⁰ See: http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp91_en.pdf

¹¹ <http://www.cfp.pt/>

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the Portuguese Constitution. Its independency from the Public Administration ensures a free exercise of its judicial and financial control; it has the duty to examine ‘the legality of public expenditure and rules on the accounts which the law has ordered to be submitted to the Court’.

The Court of Auditors might be asked by the Parliament to provide for ‘intercalary reports’ on the budget control results throughout the year, as well as clarifications which might help the evaluation of the budget.

The Government is also entitled to ask this Court to provide it with audits and opinions; in total, around 7500 entities are subject to control by this Court.

The Portuguese Public Finance Council (CFP), created by the Budget Framework Law in 2011, has the mission to assess, in an independent way, ‘the proposed objectives in relation to the macroeconomic and budgetary sceneries, [and] long-term public finance sustainability’. Its main objectives are the transparency and quality of policy decision making. It is to act as an advisor to the Government by enacting reports on the draft Budget law (for more information on CFP see question VII.4).

The parliament’s Budgetary Technical Support Unit (UTAO) prepares technical analyses of government bills on the state budget and amendments thereto, assesses general state accounts, monitors budgetary execution, and analyses revisions to the stability and growth programme. It functions under the Budget committee’s direct guidance. Having been created in 2006 it has seen its powers amplified in 2014 to monitor and control projects involving public investment. This will include public-private partnerships (PPPs) and concessions, paving the way for an approach that is geared to rolling out projects that are technically and financially sustainable.¹²

CHANGE OF TIME-LINE

II.4

HOW HAS THE TIME-LINE OF THE BUDGETARY CYCLE CHANGED AS A RESULT OF THE IMPLEMENTATION OF EURO-CRISIS LAW?

Legislatively, the main change can be found in the law establishing the framework for budget application. Before 2011, its article 39^o established the deadline for presenting the proposal to the Parliament on the 15th of October, except when there is no Government at that date. After the amendment, these deadlines were changed – although the proposal has to be submitted still by the 15th October, the contemplated exceptions changed the date for the 30th of September, according to the new article 12^o-E.

The biggest impact of Euro-crisis law in the budgetary was nevertheless a practical one.

¹² The quotations indicate a free translation of articles 214 of the Constitution and 12^o-I of Law n^o 52/2011, 13 October 2011, respectively.

Pressured by upcoming troika evaluations the government approved – what proved to be - unrealistic budget proposals. Eight rectifications have been approved in the last 3 years, two rectifications per year, breaking a 1977 record (a time of great economical and political instability in Portugal - following the 1974 revolution). The circumstances that lead to this situation have been subject of much discussion. On one hand, the expected time-line of the budgetary cycle was deemed irrelevant – alterations had to be discussed and approved and months were spent on this process -; on the other hand, the budget itself was emptied of its main function, it became, to a certain extent, a formality.¹³

MISCELLANEOUS

II.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND CHANGES TO THE BUDGETARY PROCESS?

No other relevant information.

¹³ On the record rectifications of the budget <http://www.publico.pt/economia/noticia/governo-de-passos-bate-recorde-nas-alteracoes-de-orcamento-1667701>.

III CHANGES TO NATIONAL (CONSTITUTIONAL) LAW

NATURE NATIONAL INSTRUMENTS

III.1

WHAT IS THE CHARACTER OF THE LEGAL INSTRUMENTS ADOPTED AT NATIONAL LEVEL TO IMPLEMENT EURO-CRISIS LAW (CONSTITUTIONAL AMENDMENT, ORGANIC LAWS, ORDINARY LEGISLATION, ETC)?

The measures implementing the guidelines of the Memorandum of Understanding assume, in their majority, the shape of ordinary legislation. In what concerns the measures implementing the Six-Pack, however, they have been mostly enshrined in the recently altered framework budget law, hence gaining the statute of law of enhanced value.

CONSTITUTIONAL AMENDMENT

III.2

HAVE THERE BEEN ANY CONSTITUTIONAL AMENDMENTS IN RESPONSE TO THE EURO-CRISIS OR RELATED TO EURO-CRISIS LAW? OR HAVE ANY AMENDMENTS BEEN PROPOSED?

According to articles 159 and 285 of the Constitution only members of parliament can present amendments.

In June 2014, Members of Parliament from PPD/PSD Madeira presented a proposal for Constitutional amendments. In July 2014 Members of Parliament of CDS/PP Madeira presented a proposal too.

Proposed amendments include the extinction of the Constitutional Court (turning it into a specialised section of the Supreme Court of Justice), the extinction of the figure of the Portuguese Republic's Representative, introduced by the constitutional amendment of 2004, the extinction of the National Electoral Commission, as well as the Regulatory Authority for Media and Communications, extension of the mandate of the President of the Republic to ten years (currently 5 years), the independency of the fiscal and financial system, the creation of regional parties and reduction of the number of members of the Parliament, amongst others.

Parliament has created a commission to analyse and discuss the proposed amendments in late September 2014. The Commission will work for 90 days. It is composed by 23 Members of Parliament: 11 MP from PPD/PSD, 7 PS, 2 CDS/PP, 1 Communist Party (PC), 1 Left Bloc (BE) and 1 Ecologist Party (PEV).

These amendments do not seem to have been proposed as a reaction to the Euro-crisis. Neither PPD/PSD nor CDS/PP have expressed support to neither of the projects. After several failed attempts to create momentum towards a Constitutional revision this particular project will not allow for a deep reform as envisaged by Passos Coelho (see question X.1).

According to the Portuguese Constitution the Parliament can amend the Constitution only every five years counting from the date of publication of the last ordinary reform.¹⁴ Before the 5 years term any changes must take place under the auspices of an extraordinary amendment, which requires 4/5 of the MP to vote positively for its approval.

CONSTITUTIONAL CONTEXT

III.3

IF NATIONAL CONSTITUTIONAL LAW ALREADY CONTAINED RELEVANT ELEMENTS, SUCH AS A BALANCED BUDGET RULE OR INDEPENDENT BUDGETARY COUNCILS, BEFORE THE CRISIS THAT ARE NOW PART OF EURO-CRISIS LAW, WHAT IS THE BACKGROUND OF THESE RULES?

Art. 105°/4 of the Portuguese Constitution already enshrines a ‘balanced budget’ rule. It is the most important budgetary rule in terms of substance, both for planning purposes and for purposes of enforcing financial control of the Central Administration. It is nevertheless a substantive - rather than formal - balance budget rule. It means that, in abstract, the planning and implementation of public financial management, the predicted and effective costs must be covered by the predicted and effective revenue provided for in the Budget. This rule was present already in the first version of the Constitution, in 1976.

Moreover, article 167°/2 of the Constitution enshrines, for the purposes of budgetary stability and balance, a ‘break-rule’: MPs, parliamentary groups, the Legislative Assemblies of the autonomous regions and groups of voters may not submit legislative proposals which would involve, in the current financial year in question, increased spending or reduced revenues, as opposed to the ones provided in the Budget. This rule was introduced during the fourth constitutional amendment, in 1997.

The Government did push for a constitutional amendment that would enshrine the “golden-rule” in the Constitution rather than an alteration to the LOE. However, PS made it clear that it would never support it. On the implementation of the Fiscal Compact vis-à-vis article Art. 105°/4 of the Portuguese Constitution see question VII.6.

¹⁴ The last reform was in 2005. See: <http://www.tribunalconstitucional.pt/tc/crp-revisoes.html>

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PURPOSE CONSTITUTIONAL AMENDMENT

III.4

WHAT IS THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND WHAT IS ITS POSITION IN THE CONSTITUTION?

SEE III.2.

RELATIONSHIP WITH EU LAW

III.5

IS THE CONSTITUTIONAL AMENDMENT SEEN AS CHANGING THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN CONSTITUTIONAL LAW?

See III.2.

ORGANIC LAW

III.6

HAVE THERE BEEN CHANGES TO ORGANIC LAWS OR OTHER TYPES OF LEGISLATION THAT ARE OF A DIFFERENT NATURE OR LEVEL THAN ORDINARY LEGISLATION, IN RELATION TO EURO-CRISIS LAW OR THE BUDGETARY PROCESS?

See question VII.6. Shortly before the agreements on the Six-Pack, Portugal had made a change to the law (LEO) establishing the framework for the budgetary procedure (Law 22/2011, 20th May). There were further changes to the LEO, still in 2011 (Law 52/2011, 13th October, and Law 64-C/2011, 30th December. Due to the intense controversy raised by the 'golden-rule', its introduction was postponed until the beginning of 2013. The government's intention was to inscribe the so-called 'golden-rule' directly in the Constitution, so that its amendment would also require a qualified majority; however, it was enshrined instead in the amendment to the law establishing the framework for the budgetary procedure. This Framework law is one of enhanced value, according to article 112^o/3 of the Constitution.

CONSTITUTIONAL AMENDMENT AND ORDINARY LAW

III.7

IF ORDINARY LEGISLATION WAS ADOPTED IN CONJUNCTION WITH A CONSTITUTIONAL AMENDMENT, WHAT IS THE RELATIONSHIP BETWEEN THE TWO?

There was no ordinary legislation adopted in conjunction with a constitutional amendment.

PERCEPTION SOURCE OF LEGAL CHANGE

III.8

IN THE PUBLIC AND POLITICAL DISCUSSIONS ON THE ADOPTION OF ORDINARY LEGISLATION, WHAT WAS THE PERCEPTION ON THE APPROPRIATE LEGAL FRAMEWORK? WAS THE ORDINARY LEGISLATION SEEN AS IMPLEMENTING NATIONAL CONSTITUTIONAL LAW, OR EURO-CRISIS LAW?

Between 2011-2013, ordinary law instruments discussed and approved were seen, in their great majority, as mere consequences of the obligations resulting from the MoU and therefore “Euro-crisis” law.

Parliamentary debates on ordinary legislation are noticeable about MPs interpretation of the MoU. The elimination of golden shares¹⁵, labour law reviews,¹⁶ cancelling intercity railway investments,¹⁷ these were among the very first measures to be discussed right after elections in 2011. However, hundreds of parliamentary debates on approval and alterations of ordinary legislation followed and they all either invoked – as a legal basis -, or discussed - as if to clarify -, the terms in which the MoU bound Portugal to alter its laws. Discussions were heated. The MoU was often referred to as “pact of aggression” by left-wing party PCP.¹⁸ PS, the opposition party with biggest representation in the parliament, rarely agreed on austerity measures.

The Constitutional Court became, since 2011, the centre of public attention (including of the media) having been awarded “national figure of the year” in 2013 by Newspaper “Expresso”. Its decisions have been broadly discussed by the Prime Minister, members of government, opposition parties, economists and the general public. Open criticism by the government has been labelled as defiant of separation of powers.¹⁹ To its rulings have been attributed macroeconomic effects and fiscal alterations – especially the ones on Budget Law. It has deeply influenced the relations between Portugal and the troika. “Idolized and hated” it created Crisis-Jurisprudence, with its rulings sometimes pointing even to alternative political solutions.²⁰ It created a movement pro and against the Court and ignited passionate discussions on the Constitution amongst scholars in the public sphere.²¹

¹⁵ Parliamentary debate 3 August 2011, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n11-0066&type=texto&q=troika&sm=p>.

¹⁶ Parliamentary debate 31 August, 2011, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n13-0056&type=texto&q=troika&sm=p>.

¹⁷ Parliamentary debate 9 September, 2011, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n17-0057&type=texto&q=troika&sm=p>.

¹⁸ As an example Parliamentary debate 8 March 2012, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n82-0046&type=texto&q=troika&sm=p>.

¹⁹ Jorge Reis Novais, “Em defesa do Tribunal Constitucional, Resposta aos críticos”, Almedina, 2014, page 7-17.

²⁰ Alexandre Sousa Pinheiro, “Jurisprudência de Crise: Tribunal Constitucional (2011-2013) in Observatório

²¹ For a view on the clash over the Constitutional Court rulings “O Tribunal Constitucional e a Crise, Ensaios críticos”, Almedina, 2014 and “Em defesa do Tribunal Constitucional, Resposta aos críticos”, Jorge Reis Novais, Almedina, 2014.

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In terms of public opinion, it is quite clear that the changes in legislation are perceived as direct consequence of the Troika's "intervention" (on related public demonstrations see question X.7).²²

MISCELLANEOUS

III.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND TO CHANGES TO NATIONAL (CONSTITUTIONAL) LAW?

No other relevant information.

²² <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n66-0008&type=texto&q=troika&sm=p>

IV EARLY EMERGENCY FUNDING

Prior to 2010, loan assistance to States was made primarily via bilateral agreements (to Latvia, Hungary, Romania, 1st round of Greek loan assistance).

The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) are two temporary emergency funds, both resulting from the turbulent political weekend of 7-9 May 2010. On May 9, a Decision of the Representatives of the Governments of the Euro Area Member States was adopted expressing agreement on both funds.

The EFSM is based on a ‘Council regulation establishing a European financial stabilisation mechanism’ of May 11, 2010 adopted on the basis of article 122(2) TFEU and therefore binding on all 27 member states of the EU.

([http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF))

The EFSF is a special purpose vehicle created under Luxembourgish private law by the 17 member states of the Eurozone. The EFSF Framework Agreement was signed on June 7, 2010. On June 24, 2011, the Heads of State or Government of the Eurozone agreed to increase the EFSF’s scope of activity and increase its guarantee commitments.

(http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf and http://www.efsf.europa.eu/attachments/faq_en.pdf)

NEGOTIATION

IV.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE NEGOTIATION OF THE EFSF AND THE EFSM, IN PARTICULAR IN RELATION TO (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Law n.º 8-A/2010, of 10 May was approved in parliament to enable Portugal’s participation in the programme of financial assistance to Greece. Article 1 and 2 define its object: to allow the government to decide on the concession of loans to Eurozone Member States, in the context of EU coordinated efforts to guarantee the economical and financial stability of the euro.²³

At the time this law was debated in parliament (7 May 2010) no EU mechanism/framework existed yet. It was debated in parliament as part of a “European solution” - which was already underway.

It was adopted with the votes in favour of PS, PPD/PSD, CDS/PP and BE. Against were PCP and PEV. PCP and PEV voted against because of the terms in which the “solidarity” mechanisms were being approved. MP Bernardo Soares’ stated that the conditions of the

²³ Free translation of articles 1 and 8 of Law n.º 8-A/2010, 18 May.

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loan “favoured big enterprises and banks” while “fostering the unaccountability of financial markets”; the MP added that the loan represented a “condemnation [of Greece] to stagnation, recession and poverty” and that it could not accept it was “the only way”.²⁴

The parliamentary plenary debate on the Law n.º 8-A/2010, 10 May, marks the beginning of a new era of debates on the Euro crisis. In the words of Carlos Costa Pina, Secretary of State of Treasury and Finance “never before the EU and the euro had been under such great threat”.

A few days later an agreement was concluded with Greece to coordinate a series of bilateral loans to that country. Immediately afterwards, the Council adopted a Regulation establishing a European financial stabilization mechanism (EFSM), which could be used in future situations similar to that of Greece. In addition, the ministers adopted a Decision in which they committed to support a separate and additional loan and credit mechanism, a European Financial Stability Facility (EFSF).

Under article 1 of Law n.º 8-A/2010, 10 May, the Minister of Finance is responsible for independently negotiating and deciding on Portugal’s (terms of) participation in EFSM and EFSF.

ENTRY INTO FORCE

IV.2

ARTICLE 1(1) EFSF FRAMEWORK AGREEMENT PROVIDES THAT IT WILL ENTER INTO FORCE IF SUFFICIENT EUROZONE MEMBER STATES HAVE CONCLUDED ALL PROCEDURES NECESSARY UNDER THEIR RESPECTIVE NATIONAL LAWS TO ENSURE THAT THEIR OBLIGATIONS SHALL COME INTO IMMEDIATE FORCE AND EFFECT AND PROVIDED WRITTEN CONFIRMATION OF THIS. WHAT DOES THIS PROCEDURE LOOK LIKE IN PORTUGAL AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

Law n.º 8-A/2010, of 18 May gives full power to the Minister of Finance to negotiate and decide on Portugal’s (terms of) participation in EFSM and EFSF (or in any coordinated effort) to guarantee the economical and financial stability of the euro through the concession of loans to Eurozone Member States (MS).

Alike other MS Portugal guaranteed the issue of bonds by EFSF by contemplating the transfer in the State budget law. Although the State Budget Law is approved in parliament the government alone is competent to decide to finance another Eurozone MS. The Government merely has to inform parliament of its decision and keep parliament informed on the progress (article 7, Law n.º 8-A/2010, of 18 May).

²⁴ See <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheDiplomaAprovado.aspx?BID=15920>

GUARANTEES

IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN PORTUGAL? WHAT DEBATES HAVE ARISEN DURING THIS PROCEDURE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE GUARANTEES FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

The approval of the issuance of guarantees under EFSF took place in parliament through the approval of law n.º 8-A/2010, of 18 May. This law approves the framework that enables the government to finance Eurozone MS in the sequence of the launch of the European Financial Stability Fund.²⁵ Alike other MS Portugal guaranteed the issue of bonds by EFSF. Portugal guaranteed 11 035, 384 million euros, the same as its quota in ECB. Guarantees issued under EFSF, and Lei n.º 8-A/2010, accounted for 92% of the total of guarantees issued by Portugal that year.²⁶ In practice, the first and only time Portugal guaranteed the issuance of debt by EFSF was in early 2011 to support Ireland. Soon after the Portuguese government asked to “step out” - request accepted by EU MS.²⁷

ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER DURING THE NATIONAL PROCEDURES RELATED TO THE ENTRY INTO FORCE OF THE EFSF FRAMEWORK AGREEMENT AND/OR THE ISSUANCE AND INCREASE OF GUARANTEES?

Discussions in parliament did not compromise the entry into force of the EFSF Framework. Portugal was – at the time - on the recipient side (see question IV.3).

CASE LAW

IV.5

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ABOUT THE EFSM OR EFSF IN PORTUGAL?

There is no constitutional court judgment concerning the EFSF.

²⁵ Relatório de Orçamento de Estado, Diário da República 16 de Outubro 2010, II Série A, n.º 17, XII Legislatura, 1.ª Sessão legislativa (2011-2012) available at

²⁶ In Conta Geral do Estado 2010, page 205, Diário da Republica 7 de Julho de 2011, II Série A, n.º 8, XII Legislatura, 1.ª Sessão legislativa (2011-2012) available at <http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a5355786c5a79394551564a4a5353394551564a4a5355467963585670646d38764d634b714a5449775532567a63384f6a627955794d45786c5a326c7a6247463061585a684c314e31596e504471584a705a5355794d454576524546534c556c4a4c5545744d4441344c6e426b5a673d3d&fich=dar-ii-a-008.pdf&inline=true>

²⁷ Proposta de Lei n.º 27/XII (1.º) Orçamento de Estado para 2012, Diário da República, 17 de Outubro de 2011, II Série A n.º 47, XII Legislatura, 1.ª Sessão Legislativa (2011-2012).

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IMPLEMENTATION

IV.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE EFSF, FOR EXAMPLE WITH REGARD TO DECISIONS ON AID PACKAGES (LOAN FACILITY AGREEMENT AND MEMORANDUM OF UNDERSTANDING) AND THE DISBURSEMENT OF TRANCHES, BOTH OF WHICH NEED UNANIMOUS APPROVAL BY THE SO-CALLED GUARANTORS, I.E. THE EUROZONE MEMBER STATES?

Law n.º 8-A/2010, of 18 May gives ample power to the Minister of Finance to negotiate and decide on Portugal's (terms of) participation in EFSM and EFSF (or in any other coordinated effort) to guarantee the economical and financial stability of the euro through the concession of loans to Eurozone Member States.

This law was swiftly adopted to enable the participation of Portugal in the bail-out of Greece (May 2010). Although successive mechanisms and instruments have been adopted since then Law n.º 8-A/2010, of 18 May has not been revoked or altered.

IMPLEMENTING PROBLEMS

IV.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE APPLICATION OF THE EFSF?

See above questions IV.1, IV.2, IV.3, IV.4.

BILATERAL SUPPORT

IV.8

IN CASE PORTUGAL PARTICIPATED IN PROVIDING FUNDING ON A BILATERAL BASIS TO OTHER EU MEMBER STATES DURING THE CRISIS, WHAT RELEVANT PARLIAMENTARY DEBATES OR LEGAL ISSUES HAVE ARISEN?

Portugal did not provide funding on a bilateral basis.

MISCELLANEOUS

IV.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE EFSM/EFSF?

Not other relevant information.

V TREATY AMENDMENT ARTICLE 136(3) TFEU

At the 16/17 December 2010 European Council a political decision was taken to amend the Treaties through the simplified revision procedure of article 48(6) TFEU. On March 25, 2011 the European Council adopted the legal decision to amend article 136 TFEU by adding a new third paragraph: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

The process of approval of this decision by the member states in accordance with their respective constitutional requirements as prescribed by article 48(6) has been completed and the amendment has entered into force on 1 May 2013.

NEGOTIATION

V.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

See question V.3.

APPROVAL

V.2

HOW HAS THE 136 TFEU TREATY AMENDMENT BEEN APPROVED IN PORTUGAL AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The approval of the 136 TFEU Treaty in Portugal followed the procedure of ratification of an international treaty. The procedure of ratification of an international treaty in Portugal is part of the Parliament’s political and legislative competence, as is stated on Article 161 of the Constituição da República Portuguesa (hereafter CRP). In what concerns the type of document adopted, accordingly with Article 166 (5) CRP, in the case of an international treaty the Parliament adopts a Resolution.²⁸ Following the approval of the Parliament’s the resolution, by simple majority, in this case about the ratification of the 136 TFEU amendment, the document was signed by the President in accordance with Article 135 b) CRP. Resolution n.º 9/2012 was approved by the Parliament on the 9th December 2011, ratified by the President and published on the 2nd February 2012 and finally the ratification of the amendment was notified to the EU Council on the 6th February 2012.²⁹³⁰

The power of the Portuguese Parliament during the ratification

²⁸ See: DR_136 (3). Pdf.

²⁹ See: DR_136 (3).pdf.

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According to Article 161 (i) Const. the Parliament authorises the ratification of international treaties entailing Portugal's participation in international organisations, friendship, peace, defence, the rectification of borders or military affairs, as well as international agreements that address matters which are the exclusive responsibility of the Assembly, or which the Government deems fit to submit to the Assembly for consideration.

The power of the President and of the Constitutional Court during ratification

In accordance with the wording of Article 135 (b) CRP, the President of the Republic ratifies international treaties once they have been duly passed by the Parliament if so provided for by the Constitution (Article 161 (i) Const.). Nevertheless before the ratification the President may take one of the two following actions: the first is to request a prior review of constitutionality within 8 days, as is stated in Article 278 (1) CRP. The Constitutional Court takes on average 25 days to decide and if it declares the unconstitutionality of any rule laid down by an international treaty, the President cannot enact it and the document has to be returned to the body that passed it. The ratification finally takes place if the unconstitutional norms are expunged from the revised text passed by the Parliament; or if a majority at least equal to two thirds of the members of the Parliament present and higher than the absolute majority of the Parliament's components authorizes this ratification in spite of the Court's ruling.

The second possibility is the veto, which is part of the President's powers, to be exercised within 20 days (in the case of Parliament's documents) if the Constitutional Court has not declared the unconstitutionality of that document. The veto is relative that means that it can be overcome by the Assembly of the Republic by an absolute majority and the President is then obliged to enact it within 8 days. (see Article 136 (2) CRP).

RATIFICATION DIFFICULTIES

V.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER DURING THE RATIFICATION OF THE 136 TFEU TREATY AMENDMENT?

Resolution n.º 9/2012 approved Council's Decision of 25 March 2011 that amended article 136 of TFEU. The decision was approved with the favourable votes of three parties (PSD, PS, CDS-PP) and the votes against of the three remaining parties (PCP, BE, PEV) - December 9th, 2011.³¹³²

BE argued for a referendum on this matter (see the answers to questions IV.1 and IX.2).³³ The amendment was described, by the BE, as out-dated and inefficient; for that reason, both in Germany and France alternatives had been discussed. Instead of ESM, BE suggested the adoption of a mechanism of cooperation that would curb the pressure from speculative markets over sovereign debt. BE reaffirmed that this mechanism interferes with national

³¹ See: Debate_136TFEU.pdf.

³² See: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleIniciativa.aspx?BID=36531>

³³ See BE_referendum_136.

sovereignty and the approval of national budgets by imposing exogenous constraints - which do not result from public election. In the same line, an amendment to the Treaties that define the Union, and that modify the ways and rules by which Portugal participates, should be submitted to a national referendum. The BE proposal was rejected by Parliament on the 9th of December with votes against by PSD, PS and CDS –PP and favourable votes by PCP, BE and PEV.³⁴

CASE LAW

V.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT IN PORTUGAL ON THE 136 TFEU TREATY AMENDMENT?

No.

MISCELLANEOUS

V.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE 136 TFEU TREATY AMENDMENT?

No other relevant information.

³⁴ See: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=365>

VI EURO-PLUS-PACT

On March 11, 2011 the Heads of State or Government of the Eurozone endorsed the Pact for the Euro. At the 24/25 March 2011 European Council, the same Heads of State or Government agreed on the Euro Plus Pact and were joined – hence the ‘Plus’ - by six others: Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (leaving only the UK, Czech Republic, Sweden and Hungary out).

The objective of the pact is to foster competitiveness, foster employment, contribute to the sustainability of public finances and reinforce financial stability. In the Euro-Plus-Pact the Heads of State or Government have entered into commitments on a number of policy areas, in which member states are competent.

(http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)

NEGOTIATION

VI.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE NEGOTIATION OF THE EURO-PLUS-PACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE PACT FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

On 23 March 2011, Prime-Minister José Socrates resigned after the parliament rejected the document that came to be known as PEC IV (SGP 2011-2014).³⁵ Request for external financial assistance followed shortly after.³⁶ Amidst the political turmoil it is not possible to identify a parliamentary debate specifically on the Euro Plus Pact.

As to parliamentary debates that took place later in 2011 and the years that followed, as in other issues, debates in parliament very often alluded to very different measures as part of the same set of mechanisms.³⁷ Criticism multiplied indistinctly too: the Euro-Plus-Pact was a threat to national budgetary sovereignty as much as the six-pack or the TSCG; the terms of the reform of EU’s “economic governance” would attribute the commission the power to indicate what public policies to pursue.

Taking into consideration the overlapping nature and substance of the measures contained in the Euro Plus Pact the government considered that both the adoption of resolution n.º 84/2012, of 3 July, that approved the TSCG (also known as fiscal compact) and resolution 9/2012, of 9 December 2012 that approved the treaty on the ESM “[provided] a more solemn framework to the set of EU coordinated initiatives such as the Euro Plus Pact, European Semester and the Six-Pack”.³⁸

³⁵ See: http://www.parlamento.pt/OrcamentoEstado/Documents/pec/21032011-PEC2011_2014.pdf

³⁶ See: http://ec.europa.eu/economy_finance/articles/financial_operations/2011-04-06-portugal_en.htm

³⁷ See <http://debates.parlamento.pt/search.aspx?cid=r3.dar>

³⁸ See <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0003&type=texto&q=six-pack&sm=p>

MISCELLANEOUS

VI.2

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE EURO-PLUS-PACT?

No other relevant information.

VII SIX-PACK

The ‘Six-Pack’ is a package of six legislative measures (five regulations and one directive) improving the Economic governance in the EU. The Commission made the original proposals in September 2010. After negotiations between the Council and the European Parliament, the package was adopted in November 2011 and entered into force on December 13, 2011. Part of the ‘Six-Pack’ measures applies only to the Eurozone member states (see the individual titles below).

The ‘Six-Pack’ measures reinforce the Stability and Growth Pact (SGP), among others by introducing a new Macroeconomic Imbalances Procedure, new sanctions (for Eurozone member states) and reversed qualified majority voting. Also, there is more attention for the debt-criterion.

(http://ec.europa.eu/economy_finance/economic_governance/index_en.htm)

NEGOTIATION

VII.1

WHAT POSITIONS DID PORTUGAL ADOPT IN THE NEGOTIATION OF THE ‘SIX-PACK’, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE ‘SIX-PACK’ FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Portugal did not oppose to the six-pack within the EU.

The Budget/Finance/Public Administration Parliamentary Committee, the European Affairs Committee and the Portuguese Public Finance Council issued opinions on the Six-Pack. These opinions were not issued as a bulk.³⁹ The Six-Pack is a set of five regulations (1173/2011, 1174/2011, 1175/2011, 1176/2011 and 1177) – which are all directly applicable; and a directive (2011/85/UE) – which requires transposition (and is dealt with in questions VII.2 and VII.5). These issues are at the national level dealt with separately.

On the “Alert Mechanism” - part of the six-pack and forming part of the European Semester and merely as an example - the European Affairs Committee was critical of the “asymmetrical treatment given to external deficits and surpluses” affirming that it “lacks adequate justification. There seems to be a desire to establish that the EU should produce a surplus compared to the rest of the world. However, it is the Commission itself – and indeed the G20 – which states that correcting macroeconomic imbalances is not only a European but also international goal; As stated in the report itself, one of the causes of excessive indebtedness in some Member States was closer financial integration in the EU and the cut in interest rates. A proper diagnosis of macroeconomic imbalances and their subsequent correction must analyse the role of the financial sector and the ECB in the dynamics of

³⁹ See: <http://www.ipex.eu/IPEXL-WEB/scrutiny/CNS20100276/ptass.do> and

<http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20100281/ptass.do>

indebtedness and flows before and during the crisis, especially among the euro zone countries”.⁴⁰

Regardless of the opinions issued by parliamentary committees or CFP it is not possible to assess exactly what was the government’s position assumed, in the exercise of its powers, during the Council meetings – in relation to the six-pack or other measures.⁴¹ In general, the government assumed a positive posture towards the successive packs and pacts; at worst it would often affirm it was the “possible consensus” and reaffirmed Portugal’s diminished leverage to negotiate.

Taking into consideration the overlapping nature and substance of the “six-pack” the government considered that both the adoption of resolution n.º 84/2012, of 3 July, that approved the TSCG (also known as fiscal compact) and resolution n.º 9/2012, of 9 December that approved the treaty on the ESM “[provided] a more solemn framework to the set of EU coordinated initiatives such as the Euro Plus Pact European Semester and the Six-Pack”.⁴²

DIRECTIVE 2011/85/EU

[Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States](#)

IMPLEMENTATION

VII.2

WHAT MEASURES ARE BEING TAKEN TO IMPLEMENT DIRECTIVE 2011/85/EU ON REQUIREMENTS FOR BUDGETARY FRAMEWORKS (REQUIRED BEFORE 31 DECEMBER 2013, ARTICLE 15 DIRECTIVE 2011/85/EU)?

Directive 2011/85/UE was transposed through the adoption of Law n.º 37/2013, 14 June that altered the budgetary framework law; it was proposed on January 10th, 2013 and finally approved, after a long list of reports stemming from different entities, in June 2013.⁴³ It should be noted that the Portuguese Public Finance Council (CFP) made a report stating that it does not consider that the contemplated measures configure a clear implementation of the Directive, for the predictions relating to a contraction of the deficit do not seem to be realistic, and asks for more consultation from the Parliament.⁴⁴ It should be noted, however, that the amendments made are especially focused on a medium-term approach to the budget and mechanisms for correction of potential deviations (amendments were made to articles

⁴⁰ See <http://debates.parlamento.pt/search.aspx?cid=r3.dar>

⁴¹ Written opinion of the Portuguese parliament <http://www.ipex.eu/IPEXL-WEB/scrutiny/COM20120068/ptass.do>

⁴² See <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0003&type=texto&q=six-pack&sm=p>

⁴³ The seventh amendment to the framework budget law was published on 14th July 2013. See <http://www.dgo.pt/legislacao/Paginas/default.aspx>

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12°-C, 12°-D, 36° and 68°; additions count articles 10°-D to –G and 72°-B to –D.)⁴⁵

See question II.2.

IMPLEMENTATION DIFFICULTIES

VII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE IMPLEMENTATION PROCESS, IN PARTICULAR IN RELATION TO IMPLICATIONS OF THE DIRECTIVE FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See questions VII.1, VII.2, VII.4.

MACROECONOMIC AND BUDGETARY FORECASTS

VII.4

WHAT INSTITUTION WILL BE RESPONSIBLE FOR PRODUCING MACROECONOMIC AND BUDGETARY FORECASTS (ARTICLE 4(5) DIRECTIVE 2011/85/EU)? WHAT INSTITUTION WILL CONDUCT AN UNBIASED AND COMPREHENSIVE EVALUATION OF THESE FORECASTS (ARTICLE 4(6) DIRECTIVE 2011/85/EU)?

The Ministry of Finance produces the macroeconomic and budgetary forecasts but it's the Portuguese Public Finance Council (hereinafter CFP) that conducts an independent evaluation of these forecasts.

CFP's legal regime satisfies all the conditions established in the European legislation - Regulation (EU) no. 473/2013 and the Directive 2011/85/EU.

The CFP is an independent body established by the Article n.12.I of the Law n. 91/2001, of 20 August (Budget Framework Law), with wording that was given by the Law n. 22/2011, of 20 May. The Statute of CFP was approved by the Law no. 54/2011 of 19 October, as amended by Law no. 82-B/2014 of 31 December.

According to article 4 of its Statutes, the mission of the CFP is to undertake an independent assessment of the consistency, compliance and sustainability of fiscal policy. The CFP carries out its mission by performing the tasks defined in article 6 of the Statutes: a) assessment of the macroeconomic scenarios adopted by the Government and the consistency of budget projections with these scenarios; b) assessment of whether the fiscal rules laid down are complied with; c) analysis of the dynamics of the public debt and its sustainability; d) Analysis of the dynamics of existing commitments, with special emphasis on the pensions and health systems and on public-private partnerships and concessions, including an

⁴⁴ See the report of the CPF, available at: <http://www.cfp.pt/wp-content/uploads/2012/11/1356109000.pdf>

⁴⁵ Budgetary Framework Law <http://www.en.parlamento.pt/Legislation/LeiEnquadramentoOrcamental.pdf>

assessment of their implications for the sustainability of the public finances; e) assessment of the financial position of the autonomous regions and local governments; f) assessment of the economic and financial situation of public enterprises, and their potential impact on the consolidated public accounts and their sustainability; g) analysis of tax expenditures; h) monitoring of the budget outturn.

The CFP presents reports on: the Stability and Growth Programme and other procedures within the regulatory European framework of the Stability and Growth Pact; the Multiannual budgetary framework programming; the State Budget draft. The CFP produces also regular reports concerning public finances' sustainability and others that may consider relevant, including on the budget outturn of the previous year. All reports produced by the CFP are sent to the President of the Republic, to the Assembly of the Republic, to the Government, to the Tribunal de Contas (Court of Auditors) and to the Banco de Portugal (Bank of Portugal).

See also question II.3.

FISCAL COUNCIL

VII.5

DOES PORTUGAL HAVE IN PLACE AN INDEPENDENT FISCAL COUNCIL (ARTICLE 6(1) DIRECTIVE 2011/85/EU: 'INDEPENDENT BODIES OR BODIES ENDOWED WITH FUNCTIONAL AUTONOMY VIS-À-VIS THE FISCAL AUTHORITIES OF THE MEMBER STATES')? WHAT ARE ITS MAIN CHARACTERISTICS? DOES PORTUGAL HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

The Portuguese Public Finance Council (CFP). See question VII.4.

REGULATION NO 1176/2011 ON THE PREVENTION AND CORRECTION OF MACROECONOMIC IMBALANCES

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1176:EN:NOT>

MEIP DIFFICULTIES

VII.6

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

In September 2011, shortly before the enactment of the abovementioned Regulation,

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Portugal had made a change to the law establishing the framework for the budgetary procedure (i.e. the framework budget law cited above, see question VII.2). This naturally led to the creation of a new proposal, post-Regulation, so as to encompass the changes required by the Six-Pack.

The new proposal would end up being made only in January 2013 and approved in June 2013 (see above, question VII.2); it was heavily debated due to the inclusion of the Balanced Budget Rule (so-called ‘golden rule’): this rule provides that the structural deficit (different from the budget deficit for it excludes the impact of extraordinary measures and adjusts the indicators to the evolution of the economic cycle) may not exceed 0.5% of the GDP and the debt ratio must not exceed 60% of GDP.

See also question IX.4.

REGULATION No 1175/2011 ON STRENGTHENING BUDGETARY SURVEILLANCE POSITIONS

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF>

MTO PROCEDURE

VII.7

WHAT CHANGES TO THE RULES ON THE BUDGETARY PROCESS ARE MADE TO ACCOMMODATE THE AMENDED MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) PROCEDURE?

The terms in which the MTO was included in the national budgetary framework result first from the goals established in the Stability and Growth Pact SGP/BDS, from the financial assistance programme obligations and later on from the inclusion of the balanced budget rule in the framework budget law.⁴⁶

EUROPEAN SEMESTER

VII.8

WHAT CHANGES HAVE TO BE MADE TO THE RULES AND PRACTICES ON THE NATIONAL BUDGETARY TIMELINE TO IMPLEMENT THE NEW RULES ON A EUROPEAN SEMESTER FOR ECONOMIC POLICY COORDINATION (SECTION 1-A, ARTICLE 2-A CONSOLIDATED REGULATION 1466/97)?

⁴⁶ See Documento de Estratégia Orçamental 2013-2017 (BDS) http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheActividadeParlamentar.aspx?BID=95126&A_CT_TP=PEC and the Documento de Estratégia Orçamental 2014-2018 (BDS) http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheActividadeParlamentar.aspx?BID=97647&A_CT_TP=PEC

The analysis of the impact of the European Semester in national economic policy coordination is limited by the fact that Portugal was under financial assistance. The assisted country does not have, for instance, to submit NPRs. Portugal has nonetheless produced an updated version. As a follow-up the Commission recommended pursuing the commitments “established in 2011/344/EU and detailed in the MoU”⁴⁷ - which prevail over the provisions and instruments of the European Semester.

Nevertheless it should be noted that both the Budget/Finance/Public Administration Parliamentary Committee and the European Affairs Committee play a prominent role in debating and issuing opinions on European Semester related instruments⁴⁸: the NRP is debated in the European Affairs Committee; the SCP is debated in the budget/finance/Public Administration Committee; the Annual Growth Survey (AGS) is discussed in 5 different parliamentary Committees, with the European Affairs issuing the final opinion.⁴⁹

MTO DIFFICULTIES

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No political or legal difficulties were encountered nor were there debates specific to Regulation 1175/2011/EU outside the general debate on the six pack.

RESPECT MTO

VII.10

HOW IS RESPECT OF THE MEDIUM-TERM BUDGETARY OBJECTIVE INCLUDED IN THE NATIONAL BUDGETARY FRAMEWORK (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)?

The medium term budgetary objective was initially incorporated through references in the

⁴⁷ See: http://ec.europa.eu/europe2020/pdf/nd/swd2012_portugal_pt.pdf

⁴⁸

See:
http://www.parlamento.pt/sites/COM/XIILEG/5COFAP/Paginas/XIIL1S_SemestreEuropeu.aspx?t=553256745a584e30636d5567525856796233426c645341794d44457a&Path=6148523063446f764c324679626d56304c334e706447567a4c31684a5355786c5a793944543030764e554e50526b46514c30467963585670646d39446232317063334e686279394562334e7a61575679637955794d46526c6253566a4d7956684d5852705932397a4a544a6d553256745a584e30636d556c4d6a424664584a76634756314c314e6c6257567a64484a6c49455631636d39775a5855674d6a41784d773d3d

⁴⁹

See:
<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a5355786c5a793944543030764e554e50526b46514c30467963585670646d39446232317063334e686279394562334e7a61575679637955794d46526c62634f6864476c6a62334d76553256745a584e30636d556c4d6a424664584a76634756314c314e6c6257567a64484a6c4a544977525856796233426c645355794d4449774d544d7651584e7a5a584e7a6257567564455631636d39775a574675553256745a584e305a58496c4d6a41744a5449775a584e30645752764c6e426b5a673d3d&fich=AssessmentEuropeanSemester+-+estudo.pdf&Inline=true>

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framework budget law, but more specifically through the Growth and Stability Pact and the national Budgetary Strategy Documents (SGP/BSD). It is now in article 12.º C of the framework budgetary law.

CURRENT MTO

VII.11

WHAT IS PORTUGAL'S CURRENT MEDIUM-TERM BUDGETARY OBJECTIVE (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)? WHEN WILL IT BE REVISED?

In the SGP/BDS of 2011-2014 (March 2011) the MTO was of 0% GDP.

Currently the Medium-Term budgetary objective for Portugal is to reach a structural deficit of 0.5% GDP by 2017 (year in which the structural primary balance would be circa 0.4% GDP).⁵⁰ According to the Ministry of Finance, this would require the implementation of measures resulting in approximately 2,800 million euro in 2014, 700 million euro in 2015 and 1,200 million euro in 2016. . It is expected that already in 2015 the excessive deficit can be corrected in the light of the so far achieved objectives.

The MTO is revised every year with the adoption of a new updated SGP/BDS. Moreover, the SGP establishes the requirement for a subsequent correction whenever deviations from the budget balance rule occur.

ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS PORTUGAL'S MEDIUM-TERM BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

The medium term budgetary objective is adopted through the Growth and Stability Pact and the Budgetary Strategy Documents (BSD). It is also yearly included in the State Budget Law.

The GSP/BDS is discussed and approved in parliament. Hearings include members of government, the Economic and Social Council and the Portuguese Public Finance Council (CFP). In addition, opinions are also issued by the parliamentary committee on European affairs, the Budget/Finance/Public Administration parliamentary Committee and the Budgetary Technical Support Unit (UTAO).⁵¹

⁵⁰ See <http://www.parlamento.pt/OrcamentoEstado/Paginas/ProgramaEstabilidadeCrescimento.aspx>

⁵¹

See: http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheActividadeParlamentar.aspx?BID=97647&ACT_TP=PEC

REGULATION NO 1177/2011 ON THE EXCESSIVE DEFICIT PROCEDURE

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF)

EDP DIFFICULTIES

VII.13

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No political or legal difficulties were encountered nor were there debates specific to Regulation 1177/2011/EU outside the general debate on the six pack.

REGULATION NO 1173/2011 ON EFFECTIVE ENFORCEMENT OF BUDGETARY SURVEILLANCE

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT)

SANCTIONS

VII.14

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No legal or political difficulties were encountered nor did any significant debates specific to Regulation 1173/2011/EU arise outside the general debate on the six pack.

GENERAL CHANGES

VII.15

WHAT FURTHER CHANGES HAVE TO BE MADE TO THE RULES ON THE BUDGETARY PROCESS IN ORDER TO COMPLY WITH THE SIX-PACK RULES?

There were no further changes to the rules on budgetary process to comply with the Six-Pack rules.

MISCELLANEOUS

VII.16

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE SIX-PACK?

No other relevant information

VIII ESM TREATY

The European Stability Mechanism (ESM) Treaty was signed on July 11 2011. It was later renegotiated and a new ESM Treaty was signed on February 2, 2012. The Treaty provides a permanent emergency fund that is intended to succeed the temporary emergency funds. It entered into force on September 27, 2012 for 16 contracting parties (Estonia completed ratification on October 3). The 17 contracting parties are the member states of the Eurozone, but the ESM Treaty is concluded outside EU law.

(<http://www.european-council.europa.eu/eurozone-governance/esm-treaty-signature?lang=it> and <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>)

NEGOTIATION

VIII.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE NEGOTIATION OF THE ESM TREATY, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Portugal did not oppose the ESM within the EU.

At the time in which ESM started being discussed in parliament, Prime-Minister José Socrates was still in office. Foreign Affairs Minister Luís Amado presented both the ESM and the amendment to article 136.^o TFEU as an important step towards the stability of the euro. Discussions in parliament in December 2010 and January 2011 reveal that there was an overall agreement over the ESM. However, PPD/PSD raised serious concerns about what would be the consequences of non-complying with the commitments imposed by the new mechanism; whether resorting to the IMF would be the “solution”.⁵²

In July 2011, the Minister of Finance signed the Treaty approving the ESM. Portugal was both a member and a beneficiary of ESM. At that point a new government, composed by a PPD/PSD and CDS/PP coalition was already in power too. Pedro Passos Coelho was Prime-minister. A modified version of the Treaty, incorporating amendments aimed at improving the effectiveness of the mechanism, was signed in Brussels on 2 February 2012.

RATIFICATION

VIII.2

HOW HAS THE ESM TREATY BEEN RATIFIED IN PORTUGAL AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The procedure of ratification of an international treaty in Portugal is part of the Parliament's

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<http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n31-0059&type=texto&q=Mecanismo%20Europeu%20de%20Estabilidade&sm=p>

political and legislative competence, as is stated on Article 161 of the CRP.⁵³ In what concerns the type of document adopted, accordingly with Article 166 (5) CRP, in the case of an international treaty the Parliament adopts a Resolution. Following the approval of the Parliament's the resolution, by simple majority, in this case about the ESM Treaty, the document was signed by the President in accordance with Article 135 b) CRP. The Resolution on the ESM Treaty ratification was approved by the Parliament on the 13th of April with votes against of PCP, BE, PE, abstention of Pedro Delgado Alves (PS), Rui Pedro Duarte (PS) and favorable votes of PSD, PS, CDS-PP, which were the same votes of the approval of the Fiscal Compact.⁵⁴

The ESM Treaty was approved first by *Resolução da Assembleia da República* n.º 80/2012 and finally ratified by the Decree of the President of the Republic n.º 93/2012 (published on the *Diário da República I*, n.º 117, 19 June 2012). The ratification then was notified to the EU Council on the 4th of July 2012.⁵⁵

RATIFICATION DIFFICULTIES

VIII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER DURING THE RATIFICATION OF THE ESM TREATY?

Resolução da Assembleia da República n.º 80/2012 (see question VIII.2) was approved with votes against of PCP, BE, PE, abstention of Pedro Delgado Alves (PS), Rui Pedro Duarte (PS) and favorable votes of PSD, PS, CDS-PP. Overall, the Parliament approved it by 204 votes (PSD, PS and CDS-PP) to 24 (PEV, PCP, BE), with 2 abstentions (two PS MP against 96 MP PS).⁵⁶

Most of the political and legal quarrels during the debate coincide with those of the ratification of the TSCG (see question IX.1 onwards). On the same day (13 April 2012) the parliament discussed/voted two proposals of resolutions on the ratification of two international treaties (respectively on ESM and TSCG); three projects of resolution proposing a referendum about the TSCG and finally one project proposing new rules on a renewed national consensus about the EU (TSCG-related). Specifically on the negotiation of the ESM, the government was criticised for not having pushed for a higher financing capacity during negotiations - beyond the 500 000 millions euros.⁵⁷

⁵³ Same procedure mention on question V.2.

⁵⁴ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=36836>.

⁵⁵ See. DR_ESM.pdf and Ratification Tables. Pdf.

⁵⁶ See: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=36836>

⁵⁷ <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl1n95->

[0020&type=texto&q=regra%20de%20ouro,](http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl1n95-0020&type=texto&q=regra%20de%20ouro) and

<http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n34-0048&type=texto&q=Mecanismo%20Europeu%20de%20Estabilidade&sm=p>

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The Socialists regretted that the discussion and approval of all these initiatives was taking place at the same time therefore preventing a deeper analysis of implications. PS accused the government of being too hasty – Portugal would be the first EU MS to ratify the TSCG.⁵⁸ The Prime-Minister highlighted the importance of the swift approval for the external credibility of the State; the stability of the Eurozone and the maintenance of the single currency. The will to be the first Member State to ratify the Treaties was reiterated several times during the debate, as a way to “show that Portugal is compromised with its own recovery and that of the EU”.

Other several negative aspects were also raised: the fiercest critiques were directed to the lack of a social agenda accompanying the Treaties, to combat the increase in unemployment rates. The PS put forward the possibility of creating an additional protocol to the Treaties, which would add a ‘social dimension’ – mainly focused on the correlation between economic growth and combating unemployment. The BE was particularly fierce in criticising the lack of ‘democratic participation’ in the whole process, with the denial of a referendum (see the answer to question IX.2). The PCP, on the other hand, claimed that the process presented a threat to the national sovereignty in political, economic and budgetary terms, adding that even the Constitutional Court was menaced and subdued to the Court of Justice of the European Union. The ‘golden rule’ was seen as a way to violate the Constitution, by imposing budgetary rules with a permanent and mandatory character, which will lead to the impoverishment of the country and loss of the democratic and free exercise of the people’s will. This party proposed no additional protocol, but rather a clear rejection of the ratification – and a referendum (see the answer to question IX.2).

The Prime Minister replied that the Government had the democratic legitimacy to present the ratification proposals, since it was elected by the people, and, as such, a discussion in the Parliament would amount to the most transparent way of ratifying the Treaties.

CASE LAW

VIII.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE ESM TREATY?

No.

CAPITAL PAYMENT

VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

⁵⁸ <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0020&type=texto&q=regra%20de%20ouro>

The payment of the first instalment required by the ESM is part of the law approving the Budget for 2013.⁵⁹ The procedure to approve the Budget is posited in Article 161 g) of the CRP, which states that the Parliament passes into law the laws on the most important options of national plans and the Budget, after proposal of the Government. Concerning the particular issue of the payment of part of the capital of the ESM, Article 130 of the Lei 66B 2012 (budgetary law) determines that the Government is authorized to proceed to it until the limit of € 803 000 000.⁶⁰

APPLICATION & PARLIAMENT

VIII.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE ESM TREATY, FOR EXAMPLE WITH REGARD TO DECISIONS TO GRANT FINANCIAL ASSISTANCE AND THE DISBURSEMENT OF TRANCHES, WHICH BOTH REQUIRE UNANIMOUS ADOPTION BY THE BOARD OF GOVERNORS COMPOSED OF THE NATIONAL FINANCE MINISTERS?

Article 1 and 2 of Law n.º 8-A/2010, of 18 May gives full power to the Minister of Finance to negotiate and decide on Portugal's (terms of) participation in any EU coordinated effort to guarantee the economical and financial stability of the euro through the concession of loans to Eurozone Member States. Parliament only has to be informed and updated (article 7).

APPLICATION DIFFICULTIES

VIII.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE APPLICATION OF THE ESM TREATY?

See questions VIII.1, VIII.2, VIII.3.

IMPLEMENTATION

VIII.8

HAVE THERE BEEN ANY RELEVANT CHANGES IN NATIONAL LEGISLATION IN ORDER TO IMPLEMENT OR TO COMPLY WITH REQUIREMENTS SET BY THE ESM-TREATY?

See question VIII.5.

MISCELLANEOUS

VIII.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE ESM TREATY?

⁵⁹ See: LEI-66B-2012_OE2013_DR.pdf.

⁶⁰ See: Article 130 of LEI-66B-2012_OE2013_DR.pdf, also, http://debates.parlamento.pt/page.aspx?cid=r3.dar_s2&diary=s2al12sl2n16-0103&type=texto&q=mecanismo%20europeu%20de%20estabilidade&sm=p

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No relevant information available to report.

IX FISCAL COMPACT

The Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed on March 2, 2012. Negotiations on this Treaty began between 26 member states of the EU (all but the UK) after the 8/9 December 2011 European Council. 25 contracting parties eventually decided to sign the Treaty (not the Czech Republic). After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. For several contracting parties the ratification is still on-going.

(<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)

NEGOTIATION

IX.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER IN THE NEGOTIATION OF THE FISCAL COMPACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

As previously mentioned, the parliamentary debates about both the Fiscal Compact and the ESM took place at the same time. This per se raised much confusion and did not allow the parliament to tackle distinctively the implications that each instrument raised by itself. Nevertheless, it was possible to identify five main issues debated in parliament: 1) the loss of parliamentary sovereignty and submission of the national courts to the European courts;⁶¹ 2) Governments' (PSD/CDS-PP) willingness to amend the Constitution in order to include the Balanced Budget Rule vis-à-vis PS proposal to amend the framework budgetary law instead; 3) the clear disagreement with the 0,5% rule by the BE, PCP and the PEV, 4) the referendum proposals (discussed below) and 5) the additional protocol to the Fiscal Compact and a conditional ratification of the treaty by the government, in particular the Minister of foreign affairs.⁶²

RATIFICATION

IX.2

HOW HAS THE FISCAL COMPACT BEEN RATIFIED IN PORTUGAL AND ON WHAT LEGAL BASIS/ARGUMENTATION?

Portugal was the first countries to ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.⁶³ Resolution n.º 84/2012, 3 July was

⁶¹ <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0017&type=texto&q=regra%20de%20ouro>

⁶² <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0035&type=texto&q=regra%20de%20ouro>.and AdditionalProtocol_PS.pdf.

⁶³ See: <http://www.bbc.co.uk/news/world-europe-17700059>

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approved by the Parliament on the 13th of April with votes against of PCP, BE, PE, abstention of Pedro Delgado Alves (PS), Rui Pedro Duarte (PS) and favorable votes of PSD, PS, CDS-PP. Overall, the Parliament approved it by 204 votes (PSD, PS and CDS-PP) to 24 (PEV, PCP, BE), with 2 abstentions (two PS MP against 96 MP PS).⁶⁴

The procedure of ratification of an international treaty in Portugal is part of the Parliament's political and legislative competence, as is stated on Article 161 of the CRP.⁶⁵ According with Article 166 (5) CRP, in the case of an international treaty, the Parliament adopts a Resolution. Following the approval of the Parliament's the resolution, by simple majority, the document is signed by the President in accordance with Article 135 b) CRP.

Three proposals for a referendum on the approval of the Fiscal Compact were presented by BE, PCP and PEV (left-wing parties). All of them based their proposal on article 295 of the Portuguese Constitution which predicts the realisation of referendums on the ratification and approval of a treaty that deals with the construction and integration of the EU.

The proposed "question" was: *Do you agree with the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union?*⁶⁶

The Portuguese Constitution provides the possibility of a referendum in Article 115 (1) CRP stating that citizens may be asked to answer directly on matters of competence of the Parliament and the Government. The procedure of referendum starts with the parliament or the government presenting a proposal of the question to be asked for the President's approval. The referendum may only relate with topics of national interest. In addition, the question object of referendum has to be a question that needs to be decided by the parliament or government through the approval of international convention or a legislative act.⁶⁷ In case there is a referendum its outcome is binding only when the number of people who voted is superior to half of the electorate.⁶⁸

All proposals were rejected by PSD (central right), CDS (right wing) and PS (central left) votes. PS voted against after PSD and CDS-PP backed-down from their initial position and agreed to, following ratification, amend the framework budget law and not the Constitution (see question IX.1).

Arguments from the different parties for a referendum:

1. BE referendum proposal:

⁶⁴

See:

<http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=36873><http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=36873>.

⁶⁵

Same procedure mentioned on question V.2.

⁶⁶

See: pev_referendum, be_referendum, pcp_referendum and referendum notes pdfs.

⁶⁷

See. Article 115 (3).

⁶⁸

See: Article 115 (11).

A budget deficit with a invariant ceiling of 0.5% consequently results in economic disaster, unemployment and social cuts in public protection, especially in times of crisis. The sanctions for non-compliance, the fees and the persecution of Member State against Member State at the ECJ and the loss of national parliamentary sovereignty, were arguments presented in favour of the referendum and not ratifying the treaty.

2. PEV

The Fiscal Compact is a treaty that fits perfectly in the cases contemplated by article 295 CRP. In PEV's views the treaty affects strongly the sovereign power of Member States and implies the submission to rules drafted and imposed by Germany with extremely direct impact in the Portuguese economy and society. The fact that Fiscal Compact establishes ceilings for the budget deficit, which are possible for some of the Member States, but not for other in different development stages with sanctions of non-compliance that might compromise the future of a particular Member State, justifies the need for referendum.

3. PCP

The PCP considered the Fiscal Compact an unacceptable imposition against countries like Portugal serving only the interests of capital and potencies like Germany. It was also by the PCP defended that this imposition is part of a economic blackmail that constitutes a serious threat to national sovereignty and independence and it also represents the institutionalization of austerity measures and colonial type relationships within the EU. The PCP affirmed that not only by its content but also by the way the Portuguese government is imposing it, there is not in accordance with the Constitution and the principles of sovereignty protection and national independence, legitimacy to ratify this submission pact.

Thirdly, the PSD, the CDS-PP and the PS presented the arguments against referendum. The PS did not agree with the proposals of referendum, but that did not prevent them to present to the Parliament an additional protocol to the Fiscal Compact, which was not approved, for being considered a conditional ratification of the treaty.⁶⁹ The government defended that the Fiscal Compact would promote the conditions leading to stronger economic growth in the European Union, which is, in fact, essential for closer coordination of economic policies and safeguard financial stability. In the PSD's view the Treaty answers the need for governments to maintain sound and sustainable public finances and avoid excessive government deficits, to preserve the stability of the entire euro area. Consequently, in line with the management of fiscal policy, it was defended by the PSD the necessity for the introduction of specific rules, including a balanced budget rule and an automatic mechanism for the adoption of corrective measures in case of deviation.

⁶⁹ See question IX.1.

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RATIFICATION DIFFICULTIES

IX.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID PORTUGAL ENCOUNTER DURING THE RATIFICATION OF THE FISCAL COMPACT?

See the answers to questions IX.1 and IX.2.

BALANCED BUDGET RULE

IX.4

ARTICLE 3(2) FISCAL COMPACT PRESCRIBES THAT THE BALANCED BUDGET RULES SHALL TAKE EFFECT IN NATIONAL LAW THROUGH “PROVISIONS OF BINDING FORCE AND PERMANENT CHARACTER, PREFERABLY CONSTITUTIONAL, OR OTHERWISE GUARANTEED TO BE FULLY RESPECTED AND ADHERED TO THROUGHOUT THE NATIONAL BUDGETARY PROCESSES.” HOW IS THE BALANCED BUDGET RULE (INTENDED TO BE) IMPLEMENTED IN PORTUGAL? WILL THERE BE AN AMENDMENT OF THE CONSTITUTION? IF NOT, DESCRIBE THE RELATION BETWEEN THE LAW IMPLEMENTING THE BALANCED BUDGET RULE AND THE CONSTITUTION. IF THE CONSTITUTION ALREADY CONTAINED A BALANCED BUDGET RULE, DESCRIBE THE POSSIBLE CHANGES MADE/REQUIRED, IF ANY.

The Portuguese Constitution was not amended in order to implement the Balanced Budget Rule.

The Balanced Budget Rule was included in the budgetary framework law in 2013.⁷⁰ The Lei 37/2013 is an alteration to the budgetary framework that concretizes in the national law what was imposed by EU law in the area of budgetary framework and public finances, in particular the transposition of the Directive 2011/85 EU and the internal implementation of the Fiscal Compact.⁷¹ New rules of quantitative nature were included, which are the concretization of the Balanced Budget Rule.

The fact that this change was introduced in the Framework law is especially relevant, for this law has a special status, or “enhanced value”; it’s an organic law that prevails over others ordinary laws according to article 112º/3 of the Constitution.

The LEO states that the medium-term budgetary objectives (3-5 years) will be defined according to the Stability and Growth Pact (SGP) for the euro area. The structural balance can never be lower than the annual goal set in the SGP. While these goals are not met, annual

⁷⁰ Article 10º C and G and H of the Lei n.º 37/2013 de 14 de junho que procede à sétima alteração à lei de enquadramento orçamental, aprovada pela Lei n.º 91/2001, de 20 de agosto, e transpõe para a ordem jurídica interna a Diretiva n.º 2011/85/UE, do Conselho, de 8 de novembro, que estabelece requisitos aplicáveis aos quadros orçamentais dos Estados membros. (See: http://www.crup.pt/images/documentos/Financiamento/Lei_37-2013.PDF)

⁷¹ http://www.ideff.pt/xms/files/Iniciativas/varios_2013/Apresentacao_Prof._Dr._NCC.pdf

adjustments will have to be of at least 0.5% of the GDP, and the growth rate of public expenditure, net of extraordinary measures on the revenue side, must not exceed the reference rate of the medium-term growth of potential GDP, as defined in the SGP. The Public Administration is subject to the principle of sustainability, being able to fund all commitments with respect for the rule of structural budget balance and the public debt limit. The limit of public debt (ratio of debt to GDP) is set at 60% - as agreed in the SGP -; the State is forced to cut the value above 60% at average of one-twentieth per year, in an average of three years. The new law predicts as well that the payment of interests and amortization of debt takes priority over other expenses.

Article 10° G as revised – Limits of the Public Debt (Free translation from the original text of the law)

1 - When the ratio of government debt to gross domestic product (GDP) exceeds the reference value of 60%, the Government is obliged to reduce the amount of the debt, on the excess at a rate of one twentieth per year , measured an average of three years.

2 - For the purposes of determining the amount of the reduction in debt is considered the influence of the economic cycle, in accordance with EU Regulation 1177/2011 of 8 November. 3 - The annual debt is adjusted for the effects of a change of the perimeter of the Public Administrations performed by statistical authorities, in accordance with paragraph 5 of Article 2.

DEBATE BALANCED BUDGET RULE

IX.5

DESCRIBE THE NATIONAL DEBATE ON THE IMPLEMENTATION OF THE FISCAL COMPACT/BALANCED BUDGET RULE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

On 12 April 2012 the Prime Minister Pedro Passos Coelho argued in Parliament for the need to ratify the Fiscal Compact and the ESM.⁷² It was stressed that the Balance Budget Rule guarantees a principle of balance for generations since the lack of budgetary balance and excessive debt accumulation are caused by the choices made by one generation, which consequently binds the next ones. In favour of the Fiscal rules Pedro Passos Coelho added some points. Firstly, these rules do not betray any government’s identity nor do they betray

⁷² See PM *declarations_FC.pdf* and also:
<http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0005&type=texto&q=regra%20de%20ouro>
 and
<http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n95-0025&type=texto&q=regra%20de%20ouro>

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its program. Secondly, it was defended that the Balance Budget Rule – (the golden rule), is a realist rule that differentiates what is temporary and what is structural a rule which corrects structural problems, but it is compatible with a reasonable accommodation to business cycle fluctuations. Thirdly, the government added that the Balance Budget Rule and the provisions related to debt have more than just financial consequences and play a determinant role in enhancing the quality of Portugal's democracy. The Prime Minister clarified that in Portuguese democracy the golden rule is not an ideological rule and it will solely contribute to raise the transparency of the public debate.

The opposition party (PS) started by affirming full support to the ratification of the treaties, in order to keep their tradition of protection and encouragement of the European project.⁷³ However, António José Seguro MP added that, although the ESM and the Fiscal Compact might answer to the markets, they do not answer the essential problems that the Portuguese people is living, such as the need to fight unemployment. As a way of overcoming this flaw the PS proposed an additional protocol to the treaty then debated with the purpose of giving a social and economic dimension to the Fiscal Compact.⁷⁴

See questions VII.6 and IX.4 for further information on the Balanced Budget Rule (also known as the golden rule).

RELATIONSHIP BBR AND MTO

IX.6

WHAT POSITIONS, IF ANY, ARE TAKEN IN THE NATIONAL DEBATE ABOUT THE RELATIONSHIP BETWEEN THE BALANCED BUDGET RULE OF ARTICLE 3(1)(B) FISCAL COMPACT AND THE MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) RULE IN THE SIX-PACK (SECTION 1A, ARTICLE 2A REGULATION 1466/97, ON WHICH SEE ABOVE QUESTION VII.10)?

The budgetary interdependence between the balanced budget rule, the TSCG and the MTO has been clarified through the successive alterations of the budgetary framework law since 2011. Article 12.º C/1 presently stipulates that the MTO is the one defined in the SGP/BDS (see question VII.10). Article 12.º C/3 stipulates that the structural balance cannot be inferior to the MTO so as to respect the Balanced Budget Rule.

⁷³ <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl1n95-0006&type=texto&q=regra%20de%20ouro>

⁷⁴ <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl1n95-0009&type=texto&q=regra%20de%20ouro>

CASE LAW

IX.7

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE FISCAL COMPACT/IMPLEMENTATION OF THE BALANCED BUDGET RULE?

No.

NON-EUROZONE AND BINDING FORCE

IX.8

HAS PORTUGAL DECIDED TO BE BOUND BY PARTS OF THE FISCAL COMPACT ON THE BASIS OF ARTICLE 14(5) FISCAL COMPACT ALREADY BEFORE JOINING THE EURO AREA, OR HAS THIS OPTION BEEN DEBATED?

Not applicable.

MISCELLANEOUS

IX.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND THE FISCAL COMPACT?

No other relevant information.

X QUESTIONS ABOUT MEMBER STATES RECEIVING FINANCIAL SUPPORT

A number of member states have received direct financial assistance through balance of payments support (Hungary, Rumania, Latvia), bilateral agreements/IMF (Greece), the temporary emergency funds/IMF (Ireland, Portugal, Greece), and the permanent emergency fund (Spain and Cyprus).

(http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm)

Several member states have (also) indirectly benefited through the Securities Markets Programme (SMP) created in May 2010, a bond-buying programme of the European Central Bank that was replaced in September 2012 by the Outright Monetary Transactions (OMT) programme (Greece, Ireland, Portugal, Italy, Spain).

(<http://www.ecb.int/mopo/liq/html/index.en.html#portfolios>)

CONTEXT

X.1

IF RELEVANT, DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT OF THE FORMAL REQUEST OF DIRECT FINANCIAL ASSISTANCE.

The event that triggered the request for international financial assistance was the rejection in parliament of what came to be known as “PEC IV” (SGP/BDS 2011-2014)⁷⁵ in March 2011. At the same time ECOFIN’s reform of SGP was up for debate in parliament too. The package included measures such as the freezing and cutting in pensions and the review and limitation of benefits and tax deductions on IRS and IRC.⁷⁶ These measures had been previously negotiated with Germany, the Commission and the ECB.⁷⁷ Later on, former Finance Minister Teixeira dos Santos affirmed that the approval of PEC-IV and SGP would have allowed the ECB to buy Portugal’s sovereign debt, helping it to finance itself and alleviating the pressure of the markets; it would have enabled Portugal to benefit of similar conditions that permitted Spain to avoid a bail-out of the economic sector.⁷⁸ Instead, its rejection left Prime Minister José Socrates without legitimacy or mandate to represent Portugal in ECOFIN’s meeting of 23 March - during which SGP ought to be approved. This conducted to his resignation; on the same day Portuguese debt interests rate went from 7% to 14%. In 16 April 2011 Portugal’s inability to finance itself led to the request for financial assistance.

⁷⁵ PEC is the acronym for the Stability Programme in Portuguese and it sets set of national measures to try to curb the crisis. In previous years PEC I, II and III had already been approved.

⁷⁶ “Behold PEC IV” by Pedro Carvalho, 10 December 2010, in Económico available at http://economico.sapo.pt/noticias/eis-o-pec-iv_106885.html

⁷⁷ For further details on the negotiation v. Interview with José Socrates in Revista Expresso, 19.10.2013, p.24ss

⁷⁸ Intervention of Finance Minister Teixeira dos Santos in Parliament available at http://www.tsf.pt/PaginaInicial/Economia/Interior.aspx?content_id=2989526. See also “Teixeira dos Santos states proposals of the government for OE 2014 go too far”, 24 October 2013 available at http://www.jornaldenegocios.pt/economia/politica/detalhe/teixeira_dos_santos_diz_que_propostas_do_governo_para_o_oe2014_vao_longe_demais.html

Nevertheless, and regardless of the series of events that in early 2011 precipitated the request for financial assistance, already in early 2009, close to the end of term of José Socrates' first government, Portugal's overall economic performance was classified as "poor". That year, the GDP was expected to contract by 3.5%, rising unemployment by 8.5%. Eurobarometer also showed that 92% of the Portuguese saw the economy as "bad" and 95% were depressed about their job situation. A decade of slow growth and the economic and financial crisis exposed Portugal's frailties

To tackle the escalation of the deficit the government had put into practice a series of public reforms in the sectors of social security, public administration, health, amongst others. These reforms proved hard to impose and most of them did not go through. In attempt to increase competitiveness the government had also pushed for other measures already in 2006 such as the adoption of the "Technological Plan",⁷⁹ "Simplex",⁸⁰ and pushing for greater investment in renewable energies. On renewable energies, Portugal was described as "a model of how to stimulate the economy and fight climate change". Portugal was expected to create 22.000 new jobs in 2020, by producing over 60% of its electricity.⁸¹

However, the elections, in late 2009, created a minority PS government (with only 36,55% of the votes). Lack of political consensus and popular support either froze or cancelled the reforms that had been planned or initiated. It must be highlighted that the minority government had little margin of manoeuvre to approve what were already identified as austerity measures aimed at avoiding that Portugal would become the third EU country under financial assistance. Opposition challenged measures presented by the Government to combat the financial crisis; the deficit continued rising and as the measures applied were mostly connected with an increase in taxes their approval was also accompanied of public discontentment.

On 11 March 2011, the Left Block (BE) presented a motion against the government. BE opposed any austerity measures, manifested concern over growing unemployment, potential recession and argued that elections were the "democratic answer" to the crisis.⁸² With the support of centre-right wing party PPD-PSD the motion was approved.

A few days later it becomes clear that PEC IV, will be rejected. BE repeatedly accused the government of wanting the parliament to approve a package of measures that put Portugal

⁷⁹ For more information on the "Technological Plan", see <http://www.cnel.gov.pt/en/technological-plan/about-the-plan/list.aspx>.

⁸⁰ For more information on "Simplex" see <http://www.simplex.pt/english.html> and <http://www.oecd.org/regreform/policyconference/46312938.pdf>.

⁸¹ "Socratic Method", 1 July, 2009, available at <http://www.economist.com/node/14560974>.

⁸² Parliamentary debate of 16 March 2011, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n64-0009&type=texto&q=moção%20de%20censura>

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closer to the “IMF recipe”, closer to Greece and Ireland.⁸³ MPs from PPD-PSD accused the government of presenting yet another “brutal package” of austerity measures and inquired that if after the first PEC came another and another when would it end.⁸⁴ Passos Coelho, at the time leader of PPD-PSD announced that PDS would not legitimise PEC IV.

On 23 March, the Parliament adopted five resolutions rejecting PEC IV, coming from PSD, CDS-PP, PCP, BE and Os Verdes. These resolutions blocked the approval of PEC IV and hence left the Government without a mandate to represent Portugal towards EU institutions. As a consequence the President announces that the Prime Minister has presented his resignation. In public declarations the Prime Minister states that “what happened today in Parliament has nothing to do with [him] or the Government but with the country – the country has lost”. The following day, Angela Merkel underlines that the PEC IV was about the “stability of the euro”, for which any government must be responsible, and regrets that the Portuguese parliament did not support the reforms proposed by Socrates’.⁸⁵

In the end of March, the President announced anticipated parliamentary elections for June 5th. Pressure for requesting financial aid increases amidst political turmoil: left wing parties state they will not legitimize the request for financial aid, which they consider a “threat” and “aggravation of circumstances”; Government stated that any request for external aid entailed the negotiation of conditions that exceed the powers of a caretaker government; PSD disputed the latter and stated its support for a request of financial aid - Pedro Passos Coelho ensured that, if he were to be elected prime minister, he would not hesitate to request external aid.

Portugal’s banks were threatening a “bond-buyers’ go-slow” unless the caretaker government sought financial help from other European Union countries.⁸⁶ On 6 April 2011 the ratings agency Moody’s lowered the 'rating' of the bonds of six Portuguese banks,⁸⁷ following the lowering of Portugal's rating in three levels by Fitch. The State put on the market 1,005 million euros in debt maturing in October 2011 and March 2012, the latter paying an interest rate 5.902%, 1.571 percentage points more than the last similar issue.⁸⁸ On the same day, José Sócrates announces he has addressed a request for financial assistance to the European Commission; the request was formalized on 7 April 2011.

⁸³ Parliamentary debate of 16 March 2011, at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n64-0009&type=texto&q=moção%20de%20censura>

⁸⁴ Parliamentary debate 16 March 2011 <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n64-0014&type=texto&q=moção%20de%20censura>

⁸⁵ “Portugal’s Crisis Hijacks EU Summit” 23 March 2011, available at <http://www.nytimes.com/video/business/100000000741912/crisis-o.html> and “The death of Socrates”, 23 March 2011, available at http://www.economist.com/blogs/newsbook/2011/03/portugals_government_collapses

⁸⁶ “Banks 1 Portugal 0”, 6 April 2011, Financial Times, available at <http://www.ft.com/intl/cms/s/0/a52a5c16-6085-11e0-9fcb-00144feab49a.html?siteedition=intl#axzz3FyPVxBOW>.

⁸⁷ See *Economia Expresso of 6th April 2011*, <http://expresso.sapo.pt/moodys-baixa-iratingi-de-7-bancos-portugueses=f642082>

⁸⁸ Source: http://www.tsf.pt/PaginaInicial/Economia/Interior.aspx?content_id=1823753&page=1

NEGOTIATION

X.2

DESCRIBE THE PUBLIC AND POLITICAL DEBATE DURING THE NEGOTIATIONS ON THE FINANCIAL ASSISTANCE INSTRUMENTS, NOTABLY THE MEMORANDUM OF UNDERSTANDING (MoU) AND FINANCIAL ASSISTANCE FACILITY AGREEMENT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

The period during which the MoU was negotiated was politically complex: there was an outgoing government and no agreement even between opposition parties. International press labelled it an “undemocratic bailout”, advocating rather for the concession of a temporary bridge loan and for waiting for a new government, with full legitimacy to be elected.⁸⁹ Instead, the Memorandum was agreed within a ‘mixed’ team of experts pertaining to the former government and the opposition – there is, however, little information available on these debates. MoU was signed on 17th May 2011.

A slightly different version of the MoU had been signed on 3rd May 2011 between the Government and the main parties of the opposition (PPD/PSD and CDS/PP). As the government was outgoing this resulted from a demand of the EU and Eurogroup that claimed that negotiations should involve all parties calling for a broad spectrum of agreement among all political parties particularly on the measures of fiscal consolidation and structural reforms. Of course this demand, that took place before elections, can be interpreted as an intervention on national affairs.⁹⁰

Following the elections that took place on 5 June, the newly elected prime-minister Pedro Passos Coelho (leader of PSD) vowed to be “more ambitious” than the MoU, outlining plans for social security, health and education reforms that would go beyond the rescue package.⁹¹ Passos Coelho intended to forge a “social contract” between government, employers and unions, some say following a neo-liberal agenda rather than an economic recovery plan. Its programme for government was described as embracing all measures contained in PEC IV, the MoU and going much beyond⁹² But he faced growing resistance from Unions, opposition and public in general.

The government's plans for a “pragmatic constitutional revision” to ease reforms would have

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<http://www.nytimes.com/2011/04/15/opinion/15fri2.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A5%22%7D>

⁹⁰ Francisco Pereira Coutinho, “A natureza jurídica dos memorandos da “troika”” in Themis, ano XIII, n.ºs 24/25, 165..

⁹¹ A grim inheritance, 9 June 2009, The Economist at <http://www.economist.com/node/18805349>, “Politicians battle over Portuguese bail-out”, 16 May 2011, Financial Times.

⁹² Parliamentary debate 19 May, 2011, <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1111sl2n75-0012&type=texto&q=memorando%20de%20entendimento&sm=p>

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needed support from the Socialist opposition, which did not happen.

Prime-Minister Passos Coelho's ambitions to go further than the established in the MoU were partly intended to demarcate Portugal from Greece.⁹³ But his election manifesto carried an element of liberal thinking that was new to the dominant political consensus, based on a strong welfare state.⁹⁴ He wanted to see the private sector run national health clinics, for example, and to allow companies to offer alternatives to publicly financed social security. Passos Coelho was often accused of using the IMF/EU bail-out as a pretext for putting forward the most conservative right-wing programme in Portugal since 1974.

In parliamentary debates the MoU is often - and early into the new government's term - referred to as "pact of aggression" by opposition MPs.⁹⁵ Also as early as June 2011 left wing opposition accuses the PPD/PSD and CDS/PP coalition government – that had voted against PEC IV, and therefore overthrowing the previous government – of now putting forward what materially could be described as "PEC V" and "PEC VI" (see question X.1).⁹⁶ In mid-2012 parliamentary debates around the MoU already focused on the consequences of the MoU in Portuguese society.⁹⁷ PCP stated that the recession was deeper than before because Portugal now counted 1,2 million unemployed; and the salaries of those that remained employed were cut, as were holiday and Christmas subsidies, all accompanied by sequential tax increases. CDS-PP intervened to say that the situation was not derived from external financial aid, but a mere product of the previous years' excessive fiscal weight of the State. It added that the Government was, however, taking measures to protect the poorer, by creating the Social Emergency programme (see question X.12). Counter-accusations included the potential destruction of middle class, replacing welfare state for charity and the deep recession.⁹⁸ Verdes (PEV) noted that, since the Troika's intervention, the economy had receded 3,3% and that the results relating to GDP and deficit would not be attained. The PSD intervened stating that the MoU was being respected and successful, noting the legislative measures taken in the areas of Competition, Labour and Insolvency, the successful transposition of EU

⁹³ As an example on why the PM considered that it was necessary to go "beyond" the MoU, parliamentary debate 30 June 2011, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n3-0027&type=texto&q=memorando%20de%20entendimento&sm=p>.

⁹⁴ Parliamentary debate 1 July 2011 on which the "restructuring of the State" in the scope of the MoU is discussed <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n3-0012&type=texto&q=memorando%20de%20entendimento&sm=p>. "A grim inheritance", 9 June 2011 available at <http://www.economist.com/node/18805349>.

⁹⁵ Parliamentary debate 20 October 2011. <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n34-0036&type=texto&q=memorando%20de%20entendimento&sm=p>

⁹⁶ Parliamentary debate 30 June 2011, <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n3-0027&type=texto&q=memorando%20de%20entendimento&sm=p>

⁹⁷ *Report of Parliament intervention of March 21st, 2012* – http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheActividadeParlamentar.aspx?BID=92411&ACT_TP=ITG

⁹⁸ As examples of interventions in Parliament in which the government was accused of replacing rights with charity see debate of 30 June 2011, <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s11n3-0055&type=texto&q=caridade&sm=p> and debate of 14 February 2014 <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112s12n54-0005&type=texto&q=caridade&sm=p>.

Directives, the reform of the law relating to local and regional financing and the privatizations of EDP and REN; it further underlined the enhancement of social protection and support to enterprises, as well as measures to combat unemployment.

Overall, parliament debates all through the present government’s term are strongly marked by exchange of accusations on whose responsibility is it for the signing of the MoU, over who negotiated the MoU and who has been responsible for the aggravation of its demands after each troika mission.

In the end of 2012 Prime Minister Pedro Passos Coelho initiated a campaign for the “refoundation” of the MoU and the “refoundation” of the (Welfare) State. This was as an attempt to again use the MoU to push for Constitutional amendment. In October 2013 a “Script for State Reform was approved in Council of Ministers”.⁹⁹ Despite efforts, it did not find any echo among opposition parties or popular support. All parties in opposition blocked the creation of a Parliamentary Commission for State Reform – blocking the reform itself - by refusing to indicate MPs to integrate it.¹⁰⁰

STATUS INSTRUMENTS

X.3

WHAT IS THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS IN THE NATIONAL LEGAL ORDER (POLITICAL AGREEMENT, INTERNATIONAL TREATY, ETC.)?

On 5 May 2011, the Council of Ministers approved, through a resolution, both the Memorandum of Understanding on Specific Economic Policy Conditionality, negotiated with the EC in collaboration with the ECB,¹⁰¹ and the Memorandum of Economic and Financial Policies negotiated with IMF¹⁰². In the same resolution the Council of Ministers delegated on the Ministry of Finance the competence to sign the Memorandums and any other instruments deemed necessary for the implementation of these instruments. The legal basis for the approval were articles 186º, n.º 5 and 199.º of the Constitution (Council of Ministers Resolution – nº8/2011, 17 May 2011).¹⁰³ Both documents were sent respectively to the EU and the IMF by letters signed by the Minister of Finance and the Governor of the

⁹⁹ Document entitled “A Better State”
<http://www.portugal.gov.pt/media/1228115/20131030%20guiao%20reforma%20estado.pdf>

¹⁰⁰ Merely as an example see parliamentary debate 30 January 2013, during which CDS/PP MP insists that restructuring of the Welfare State results from the MoU, available at <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl2n47-0006&type=texto&q=memorando%20de%20entendimento&sm=p>. In June 2014 a parliamentary debate during which the government insists on the “State reform” and alluding to the refusal of the opposition to integrate a Commission to discuss it <http://debates.parlamento.pt/page.aspx?cid=r3.dar&diary=s1112sl3n93-0031&type=texto&q=reforma%20do%20estado&sm=p>.

¹⁰¹ http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf

¹⁰² <http://imf.org/external/np/loi/2011/prt/051711.pdf>

¹⁰³ <https://dre.pt/application/dir/pdf2sdip/2011/05/095000000/2116421164.pdf>

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Bank of Portugal. The letter to the IMF solicited for financial support from the Extended Fund Facility. Moreover, throughout public debate these two instruments are almost always referred to as one single Memorandum of Understanding (MoU). Their legal status in the national legal order is also not necessarily the same.

Their internal approval procedure would suggest their strict political nature but this is far from being unchallenged in the national legal order.¹⁰⁴ For starters, the Constitutional Court has considered them to be “legally binding acts”.¹⁰⁵ In addition, most scholars are inclined to support this view by classifying them as International Treaties. Yet others consider that the one with IMF consists of two unilateral acts and the one with the EU consists of some version of EU law, but both with merely political obligations.¹⁰⁶ In addition, there are those that consider that the instruments cannot be considered neither International Treaties nor unilateral acts but international contracts; these scholars also consider that this has been the interpretation of the Constitutional Court.¹⁰⁷ In reality, there is a plurality of views on the nature of the MoU.¹⁰⁸

The Memorandum of Economic and Financial Policies negotiated with IMF can be considered “a sui generis agreement with both legal and political commitments more suitable to have been approved as an international treaty rather than a mere political agreement”, an international treaty between a State and an International Organization whose object is a loan, which is dependent of a fixed-term and a condition precedent¹⁰⁹ The international growing trend to consider it as a set of two unilateral acts was rejected by several scholars based on the assumption that both parties are legally bound to its execution, even if it contains political obligations. Among other considerations, neither Portugal could unilaterally decide not to pay back the loan nor could IMF unilaterally alter conditions under which the loan would be granted. Both actions would be a basis for exception of compliance.

Nevertheless, the parties (PT and IMF) do seem to have tried to keep it as a mere political agreement i.e. it was never signed by the IMF; And in addition, IMF defines it as an

¹⁰⁴ Eduardo Correia Baptista in “Natureza Jurídica dos memorandos de FMI e a UE”, *Revista da Ordem dos Advogados*, 71, 2, 2011, p. 480.

¹⁰⁵ Acórdão do Tribunal Constitucional n.º 353/2012, de 5 de Junho.

¹⁰⁶ Francisco Pereira Coutinho, “A natureza jurídica dos memorandos da “troika”” in *Themis*, ano XIII, n.ºs 24/25, 147-179.

¹⁰⁷ Francisco Pereira Coutinho in “A natureza jurídica dos memorandos da Troika”, *Themis*, 24/25, pag. 147 ss. Carlos Blanco de Moraes in “Curso de Direito Constitucional, Teoria da Constituição em Tempo de Crise do Estado Social” Coimbra Editora, 2014, 724-726.

¹⁰⁸ For an overview of the plurality of views on the MoU see “O Memorando da Troika em análise”, da *Revista de Finanças Públicas e Direito Fiscal*, 4, 2, 2011, pp. 15-70 and “Troika Ano II. Uma avaliação de 66 cidadãos”, *Edições 70*, 2013, coordinated by Eduardo Paz Ferreira.

¹⁰⁹ Eduardo Correia Baptista in “Natureza Jurídica dos memorandos de FMI e a UE”, *Revista da Ordem dos Advogados*, 71, 2, 2011, pág. 483. Of the same opinion Filipa Lemos Caldas and Tomás Arantes e Oliveira, “A vinculatividade do Memorando de Entendimento da Troika”, *Revista de Direito Público e Finanças*, 4, 4, 2011, pp. 173-176, André Moz Caldas, “A desinteressantíssima Trindade ou a Troika revisitada”, Eduardo Paz Ferreira (coord.), “Troika Ano II. Uma avaliação de 66 cidadãos”, *Edições 70*, 2013, pp. 88 e 89, and Nuno Cunha Rodrigues, “O memorando da Troika em análise – apreciação geral”, *Revista de Finanças Públicas e Direito Fiscal*, 4, 2, 2011, p. 16, que considera ser discutível se o memorando configura “um acordo internacional ou um contrato de direito privado”.

unilateral act of acceptance of the request and IMF also explicitly defines that contractual language is to be avoided in MoU.¹¹⁰ The above mentioned scholars have labelled these efforts as “fictional”. Adding that the non-compliance of this agreement by one of the parties would always have legal consequences i.e. if conditions were not met IMF would not continue to transfer the loan and if IMF would stop transferring Portugal would stop pursuing the execution of the political commitments previously assumed. Oddly enough it seems to be exactly in the interested of flexibility that IMF has fostered its nature of unilateral act, so that deadlines and measures could be easily adapted to the ever changing conditions in bailed-out countries. In PT, an aggravating economical recession accompanied the implementation of the MoU. As previously mentioned this is a highly controversial issue and other scholars are more conservative and consider IMF’s financing to be what IMF says it is “the result of an unilateral decision by IMF”, the MoU working strictly as a sort of “loan guarantee”.¹¹¹

Similar considerations have been subject of debate on the Memorandum of Understanding on Specific Economic Policy Conditionality, negotiated with the EC in collaboration with the ECB. The later is however less controversial as to its legal nature. First, it was also signed by the counterpart, in this case the EC. Second, it is easier to identify it as legally binding because its text invokes legally binding European Law, it uses language used by ECOFIN such as the elements of “strict conditionality” and makes systematic reference to the existence of an “agreement”. In addition, because many of its provisions are budgetary they can be interpreted as deriving from the SGP and the excessive deficit procedure. The non-compliance with the later would of course result in the application of legal sanctions.¹¹²

(see questions IV.6, X.1 and X.2)

¹¹⁰ Guidance etc, ECB calls it “fictional” due to intensive negotiations that translate into a contract to which both parties are bound.

¹¹¹ Francisco Pereira Coutinho, “A natureza jurídica dos memorandos da troika”, p. 161.

¹¹² Eduardo Correia Baptista, pp. 489. Similarly, Francisco Pereira Coutinho called it “a non-typified act of European Union Law” pp. 167. However, the later also concludes that both MoU are not legally binding instruments, adding that whether they are or not legally binding is “irrelevante” vis-à-vis the social, political and economical consequences if PT would not comply with their terms; the regular functioning of state institutions depends on the loan transfers what transforms the country, for all practical purposes, into a “international protectorate”.

TRANSPOSITION NATIONAL LEGAL ORDER

X.4

CONSIDERING THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS, WHAT PROCEDURE DOES THE CONSTITUTION PRESCRIBE FOR THEIR ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER?

At the national level, and as it was mentioned above, it has been subject of great discussion the terms in which the MoU was drafted and approved. Some scholars consider it to have been adequately approved by the government within its contractual and therefore administrative competences.¹¹³ Many doubt the extent to which its approval respected the Constitution (see question X.3 and question X.8). A few describe its approval as a “clear proof of how reality’s brutality disrupted the law and Constitution”.¹¹⁴

A strict interpretation would prevent any Portuguese court from applying it or for it to have effects in the national legal order.¹¹⁵ Notwithstanding, this would not per se be a basis for challenging it in international courts. There is an undeniable strong political commitment behind the approval of the MoU. For these reasons, it is widely accepted that in reality it does produce effects in national legal order.

The MoU was approved by a caretaker government within its residual administrative powers – article 186.º, n.º 5 and article 199º, g) of the Constitution. For the purpose of clarification, and if we accept that the MoU is a sui generis agreement between a State and an International organization, that includes political obligations of legal consequences (see question X.3), then it should have followed the regime of approval of international treaties. Even if we would abstract from the fact that it was a caretaker government approving it, the MoU could have only been approved within its political powers – articles 197.º, c) and j) as well as 200.º, n.º 1, f) of the Constitution. Notwithstanding, in the present case, as the obligations included in the MoU fall into Parliament competences, it should have been actually approved by the Parliament – as to validate special “general conditions” of the agreement – article 161.º, h).¹¹⁶ Even if the parliament had been dissolved on 7 April, MPs mandate was still valid and the powers of the Parliament’s permanent commission remained intact – article 172.º n.º 3 of the Constitution.¹¹⁷ It is therefore doubtful that it could have been merely approved by the Council of Ministers.

In perspective, and as a question to pose to those that do consider the MoU to have been

¹¹³ Such as Carlos Blanco de Moraes in “Curso de Direito Constitucional, Teoria da Constituição em Tempo de Crise do Estado Social” Coimbra Editora, 2014, 724-726.

¹¹⁴ José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 53.

¹¹⁵ ECB does not consider it to fulfill article 8/2 of the Constitution; it would not produce effects in the national legal order.

¹¹⁶ Eduardo Correia Baptista in “Natureza Jurídica dos memorandos de FMI e a UE”, Revista da Ordem dos Advogados, 71, 2, 2011, pág. 485 and José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 54.

¹¹⁷ José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 55.

appropriately approved by the government: how would it be justifiable that the SGP and various PECs require parliament approval but not an instrument that contains more grave consequences to the legal order such as the MoU (Ruling n.º 396/2011, 353/2012, 187/2013: see the Annex).¹¹⁸

In addition, it is arguable whether it should have been adopted as an International Treaty or in the form of International “Agreement”.¹¹⁹ In the Portuguese national legal order there is a difference between International Treaty and International “Agreement”. This is irrelevant for International Public Law, as both are, for all possible purposes, an International Treaty.¹²⁰ This difference amounts only to who is competent for its approval at domestic level. While the treaty is ratified by the President of the Republic, the “Agreement” (in Portuguese “Acordo”) is signed by the President of the Republic (according to article 161, i) and 197, 1, c) of the Constitution.). After its approval in the Council of Ministers the MoU was only signed by the Minister of Finance (the latter under Law Decree n.º 321/2009, 11 of December).¹²¹

ROLE PARLIAMENT

X.5

WHAT IS THE ACTUAL ROLE OF PARLIAMENT WITH REGARD TO THE ADOPTION/TRANSPPOSITION INTO THE NATIONAL LEGAL ORDER OF THE FINANCIAL ASSISTANCE INSTRUMENTS?

Parliament’s role is to legislate within the powers conferred by the Constitution in the terms described in articles 161.º to 170 of the Constitution. Therefore it discussed, approved/disapproved bills intended to implement the measures agreed in the MoU (i.e., every bill which transposes the measures in the MoU is discussed in the Parliament and therein approved or rejected).

In addition, in the scope of the parliamentary discussions and legislative work, inquiry commissions were created to accompany not only the application of the MoU per se, but also the implementation of some of the measures provided for in the instrument (i.e., the Parliament creates specialized inquiry commissions designed to make sure the MoU is duly implemented in general – that is, that the measures taken are effectively transposing the MoU – and also to accompany the implementation of these measures).

¹¹⁸ José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 55.

¹¹⁹ Eduardo Correia Baptista in “Natureza Jurídica dos memorandos de FMI e a UE”, Revista da Ordem dos Advogados, 71, 2, 2011, pág. 485.

¹²⁰ Overall, Determining whether the government or the parliament are competent to bind Portugal to International Treaties, as well as if whether the appropriate form is Treaty or “Agreement” depends of the combined analysis of articles 161.º, 164.º, 197.º, 198.º and 200.º of the Constitution.

¹²¹ Eduardo Correia Baptista in “Natureza Jurídica dos memorandos de FMI e a UE”, Revista da Ordem dos Advogados, 71, 2, 2011, pág. 485.

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In reference to the latter, several parliamentary committees were created: inquiry committee to analyse the facts that led to the financial crisis; committee to accompany the financial assistance programme;¹²² inquiry committee on the process of nationalization, management and sale of BPN bank (bailed-out bank); inquiry committee on public-private partnerships; inquiry committee on high-risk activities by public companies, committee on the reform of the Portuguese Central Bank amongst others.

As to role the Parliament should have assumed in the adoption of financial assistance instruments see question X.4.

ADJUSTMENT REQUIREMENTS

X.6

DESCRIBE THE RELEVANT CONTENT OF THE FINANCIAL ASSISTANCE INSTRUMENTS.

The Memorandum of Understanding was signed on 6 May 2011 by the European Commission, the International Monetary Fund and the European Central Bank and for Portugal by the Minister of Finance after having been approved by the Council of Ministers. It consists of a series of measures, amongst which the following can be counted:¹²³

- Numerous reductions, the first one being that of the deficit. The Government debt-to-GDP ratio is to be decreased as of 2013, with reductions of the deficit to 5.9% GDP in 2011, 4.5% GDP in 2012 and 3.0% GDP in 2013. These reductions will also reflect in the reorganisation of the local government municipalities and civil parishes, as well as in what refers to positions in the central administration. This should be accompanied by a decrease in the staff admissions for that same central administration, together with constraints in both wages and promotions, with mobility being encouraged.
- In what concerns health benefits, systems such as ADSE, ADM and SAD (the so-called public employment schemes) will see their budgets constrained; the National healthcare system fees will be increased.
- The pensions of the public sector which amount is above 1500€ will be reduced according to progressive rates and indexation rules are not to be applied.
- Public enterprises, ie which owner is the State, will suffer a number of changes in order to decrease the operating costs and increase revenues. Their tariff structure is to be reviewed so as to reduce any subsidies.
- The tax deductions in the corporate system, together with personal income tax benefits, will be reduced. Different caps will be applied to the existing categories.

¹²² <http://www.parlamento.pt/sites/com/XIIILeg/CEAMP/AFP/Paginas/default.aspx>

¹²³ These measures result from a reading and free translation of the measures contained in the explanations to the MoU, in its Portuguese version.

Cash social transfers will now be subject to individual taxes. As for the VAT revenues, they shall be raised, with a correspondent reduction of exemptions and modifications to the current categories.

- As regards the banking system, Caixa Geral de Depósitos (CGD) will reduce the activities outside the country and focus on reduction of the subsidiaries and investments in the insurance arm of the group. Banco Português de Negócios (BPN) is to be sold.
- ANA, TAP and the freight branch of CP, in transports, GALP, EDP and REN, in energy, and Caixa de Seguros, in insurance, will be subject to an accelerated privatisation process.
- Golden shares and other special rights are to be eliminated.
- Gas and electricity tariffs will be phased out by January 2013.
- There shall be no increase in the minimum wage, unless justified by notable exceptions.
- In what concerns the judicial system, new court management models are to be applied, amongst which an encouragement of settlement mechanisms.

MISSIONS

X.7

WHAT LEGAL CHANGES, IF ANY, HAD TO BE MADE TO ACCOMMODATE ‘TROIKA’ REVIEW MISSIONS, POST-PROGRAMME SURVEILLANCE MISSIONS, ETC?

The main structure created to accompany troika review missions was the ESAME (*Estrutura para o Acompanhamento da Execução do Memorando de Entendimento*). ESAME integrated the cabinet of the Deputy State Secretary to the Prime-Minister, its mission was to monitor, in conjunction with the Ministry of Finance, the full and timely compliance of the measures agreed at the signing of the MoU. It also enabled permanent communication and collaboration between the Government, the representatives of the European Union, International Monetary Fund and European Central Bank, on all matters relating to the technical implementation of the agreed measures.¹²⁴ ESAME was extinct in 30 June 2014.

All Troika missions were anticipated of great public uproar and programmatic discussions.

As to public demonstrations, protests were leaded both by short-lived anti-austerity organizations and unions and started as early as 2010/2011. On 12 March 2011, around 300.000 people demonstrated in Lisbon and 80.000 in Oporto. The demonstration was

¹²⁴ Resolução de Conselho de Ministros n.º 112/2011, 11 Julho 2011, defined its mission and composition. For more information see <http://www.portugal.gov.pt/pt/os-ministerios/primeiro-ministro/secretarios-de-estado/secretario-de-estado-adjunto-do-primeiro-ministro/sobre-o-secretario-de-estado-adjunto-do-primeiro-ministro.aspx>

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organized by “Geração à Rasca” (“Desperate Generation”), an organization similar to Spanish Indignados. The following month, the organizers of the Geração à Rasca demonstration created the platform M12M: Movimento 12 de Março (‘12 March Movement’). The platform Que se Lixe a Troika (“Screw the Troika”) organized subsequent series of protests that lasted until late 2013, early 2014 most of them in anticipation of Troika mission. These type of organizations got a lot of media attention but - lacking clear ideology and long term goals - their ability to mobilize declined.

Between 2011 and 2014 there has been a revival of icons of the 1974 revolution such as the song of “Grândola Vila Morena”, “FMI” (IMF) and “Vampiros”. Production of resistance music has peaked - such as “Parva que sou” of the band “Deolinda”, or the Eurovision satirical song “Homens da Luta”.¹²⁵ Contemporary artists have used the public space to create crisis-related artwork. As an example, a painting portraying Prime-Minister Passos Coelho and Vice-Prime Minister Paulo Portas as Angela’s Merkel puppets has become a symbol, not only making the headlines upon its creation but from then on many times accompanying crisis-related news. It has, as others, come to incorporate the visual memory of the crisis.¹²⁶

In the parliament, troika and troika missions were mentioned in respect to the adoption of legislation. In addition, the parliamentary commission created for accompanying the implementation of the programme (CEAMP/AFP) would meet before/after each troika evaluation. Government often met with social partners and unions¹²⁷ Lengthy discussions touched upon which measures were being adopted to comply with the MoU, the deficit, or the overall state-of-play regarding the budget.¹²⁸

Support for the present government declined. Public demonstrations of discontent were organised gathering thousands of people. Troika missions became associated with institutional democratic deficit, impoverishment of the population and the country’s long-term economical decline.

In general, public debates started focusing on how the successive changes of the programme (as a consequence of every troika mission) felt to be aimed at PT paying back the loan - at

¹²⁵ European Parliament MP Rui Tavares on Deolinda’s song in Blitz, 4 February 2011, available at <http://blitz.sapo.pt/ainda-os-deolinda-depois-da-geracao-rasca-a-geracao-parva=f70478> . “Deolinda, the band that gives voice to Geração à rasca” in Diário de Notícias, 12 March 2011, available at http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1804652. On the song “Luta is Alegria” by “Homens da Luta” in Blitz, 11 March 2011, <http://blitz.sapo.pt/jel-responde-a-miguel-sousa-tavares-os-homens-da-luta-sao-muito-mais-que-demagogicos=f71591>. See “Old songs return to the streets” in Público, 10 April 2011, available at <http://www.publico.pt/sup-publica/jornal/as-velhas-cancoes-voltaram-a-rua-21740426>

¹²⁶ Diário de Notícias, 24 October 2012, available at http://www.dn.pt/inicio/portugal/interior.aspx?content_id=2844550 Jornal de Notícias, 26 October 2012, available at http://www.jn.pt/PaginaInicial/Politica/Interior.aspx?content_id=2849539

¹²⁷ For more information on the CEAMP/AFP (2011-07-06 a 2014-09-25) and reports of its meetings see <http://www.parlamento.pt/sites/com/XIILeg/CEAMP/AFP/Paginas/default.aspx>. Diário de Notícias, 11 July 2011, available at http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1903989.

¹²⁸ Merely as an example see Jornal i, 11 September 2013, available at <http://www.ionline.pt/artigos/dinheiro/programa-cautelar-segundo-resgate-sao-factos-antagonicos>.

the cost -, and not towards boosting its economy. Tension within the government also grew as CDS-PP for more than once manifested publicly its availability to re-negotiate the MoU in terms less damaging for PT.

On the legal change see also the annexes about the case law.

CASE LAW INTERNATIONAL INSTRUMENTS

X.8

HAVE THERE BEEN DIRECT OR INDIRECT LEGAL CHALLENGES AGAINST THE FINANCIAL ASSISTANCE INSTRUMENTS BEFORE A NATIONAL (CONSTITUTIONAL) COURT?

There have been no direct challenges against the financial instruments. In its rulings 396/2011, 353/2012, 187/2013, 494/2013 and 602/2013 the Constitutional Court takes note of the MoU and acknowledges its “legally binding nature”. The Constitutional Court recognizes that the financial assistance programme establishes “firm commitments” for Portugal; that these commitments are “more binding than the SGP”; and that “Portugal should adopt a set of measures and legislative initiatives, including structural ones, in connection with public finance, financial stability and competitiveness, during 3 years” – Ruling n.º 396/2011¹²⁹. As mentioned above, the Constitutional Court considers the MoU to be legally binding as their legal basis are international treaties – ruling n.º 396/2011, 353/2012, 187/2013, 494/2013, 602/2013.

The Constitutional Court did not, at any point in time, pronounce itself on the MoU constitutionality. Could the Constitutional Court have recognized its legally binding nature with pronouncing itself on its constitutionality? Some scholars have stated that it is a far too serious breach of the Constitution to have been ignored. Besides not having declared that the MoU would not have been applicable in the national legal order the Court has also been criticised for not pronouncing on the clear breach of rules of form and competence under which the MoU should have been approved (see questions X.3, X.4 and X.5). However, as it was a *fait accompli* - and as the MoU was binding in the international legal order - the same scholars consider that the Constitutional Court should acknowledge that too - without, nevertheless, disregarding the breaches to the Constitution by “the political system”.¹³⁰ Scholars that do not consider the MoU should have been approved as an International Treaty also do not consider the Constitutional Court had any reason to pronounce on its conformity

¹²⁹ José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 51-68.

¹³⁰ José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 51-68.

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with the Constitution.¹³¹

All scholars, regardless of their views on the actual nature of the MoU are unanimous on the extent to which the executive, the political parties and the political system as a whole was, at the time, constrained by “the reality of the facts and the “control of the global financial capitalism system”.¹³²

Please check also the annexes with the description of relevant case law of the Portuguese Constitutional Court.

CASE LAW IMPLEMENTING MEASURES

X.9

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON NATIONAL POLICY MEASURES ADOPTED IN RELATION TO THE MEMORANDA OF UNDERSTANDING?

For more information see the description of rulings n.º 396/2011, n.º 353/2012, n.º 187/2013, n.º 474/2013, n.º 602/2013, n.º 862/2013 and n.º 413/2014 in the annexes regarding case law.

BOND PURCHASES ECB

X.10

DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT WHERE THE EUROPEAN CENTRAL BANKS STARTED BUYING GOVERNMENT BONDS ON THE SECONDARY MARKET (THROUGH THE SECURITIES MARKETS PROGRAMME, SMP).

The ECB bought bonds under the SMP during 2010 and 2011. Information about the level of ECB’s exposure is almost non-existent. In 2013, the ECB declared that in the Portuguese case it was up to 22800 million euros.¹³³

In September 2012 it was announced that the ECB would buy bonds from the Portuguese Republic in the scope of OMT (outright monetary transactions); however, due to the fact that the Portuguese crisis was being held under the IMF/temporary emergency funds, the ECB made clear that such would be expected to happen only when the country regained access to the markets.

¹³¹ Carlos Blanco de Morais in “Curso de Direito Constitucional, Teoria da Constituição em Tempo de Crise do Estado Social” Coimbra Editora, 2014, 724.

¹³² José de Melo Alexandrino in “Jurisprudência da Crise. Das questões prévias às perplexidades” in “O Tribunal Constitucional e a Crise, ensaios críticos, Almedina, 2014, pp. 51-68. Constitutional Court Ruling n.º 65/2002 and the circumstances of “necessity” and “urgency” vis-à-vis “financial rupture” legitimize its approval by a caretaker government, in this sense Carlos Blanco de Morais in “Curso de Direito Constitucional, Teoria da Constituição em Tempo de Crise do Estado Social” Coimbra Editora, 2014, 725.

¹³³ In Jornal de Negócios, 28 February 2014 available at http://www.jornaldenegocios.pt/mercados/detalhe/bancos_voltam_a_apostar_na_divida_nacional_apos_fotografia_do_bce.html

Portugal has in the meantime exited the financial assistance programme and OMT was so far never used by the ECB.

CONDITIONALITY BOND PURCHASES ECB

X.11

WHAT NATIONAL POLICY MEASURES HAVE BEEN REQUESTED BY THE ECB IN EXCHANGE FOR THE ACQUISITION OF GOVERNMENT BONDS ON THE SECONDARY MARKET? HOW HAVE THESE REQUESTS BEEN SUBJECT TO DEBATE IN LIGHT OF THEIR IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See question X.10.

MISCELLANEOUS

X.12

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO PORTUGAL AND FINANCIAL SUPPORT?

According to official data from the European Commission Portugal is now under post-Programme surveillance (PPS) until at least 75% of the financial assistance received has been repaid. PPS may last at least until 2026.¹³⁴

¹³⁴ For more information see http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm

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

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 (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.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 (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.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 (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.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 (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),

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.