

The impact of the EU economic governance in Portugal

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Abstract

This article discusses the main changes introduced to the Portuguese labour market following the adoption of the Memorandum of Understanding of 2011. The intent behind the Memorandum's demands was to reduce the costs related to employment contracts, to expand both internal and external flexibility, and to relaunch collective bargaining under a new and more decentralised framework. However, several measures ended up being at odds not only with the Portuguese Constitution, but also with ILO Conventions and the (Revised) European Social Charter. We address the changes to wage policies, working time, employment protection legislation, and collective bargaining, which gave way to a new 'flexibility-oriented' labour relations model, characterised by a global reduction of labour protection levels. We argue that not only were these measures unable to fix the problems of the Portuguese labour market, but they also had crippling effects on social rights in general and, most particularly, on workers' rights. Moreover, despite the overcoming of the economic crisis, as well as the changes to the political scene, the most significant alterations were maintained. This demonstrates that bailout reforms leave their mark, particularly when they correspond to measures previously under discussion and when their implementation is supported by external pressures.

Keywords

Memorandum of Understanding, economic crisis, labour market reforms, flexibilisation

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I. Introduction

Among the several instruments comprising the new EU economic governance,¹ the most notorious, for Portugal, has been the Memorandum of Understanding (which had, as we will demonstrate, a striking impact on the national labour law reforms).

In 2010, a severe economic and financial crisis led the Portuguese State to request financial assistance from the European Commission, the European Central Bank, and the International Monetary Fund (the so-called Troika), which was granted in May 2011 under the terms of the European Financial Stabilisation Mechanism. In exchange, the Government made a commitment to a three-year austerity plan laid out in the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU).²

Aside from budgetary policy measures, the MoU prescribed a set of detailed structural measures, including several labour market reforms in a broad group of areas (e.g., unemployment benefits, employment protection legislation, working time arrangements, wages, collective bargaining, and active labour market policies), with the intent of reducing the costs related to employment contracts, expanding both internal and external flexibility,³ and relaunching collective bargaining under a new and more decentralised framework, since the rigidity of labour the legislation was deemed to be a source of the low national levels of competitiveness, economic growth, and job creation.⁴

Although the MoU stressed the need to consider possible constitutional implications, as well as EU Directives and the Core Labour Standards,⁵ some of the measures contained therein (and the legislation that followed them) breached international conventions ratified by Portugal, such as the ILO Conventions and the Revised European Social Charter (RESC).

In this sequence, the Portuguese Constitutional Court (PCC) ended up having a particularly prominent role, since it declared the unconstitutionality of some of the new rules, invoking, according to the situation, breaches of the principles of equality, proportionality, protection of trust, collective bargaining, and local administration autonomy.

1. For further developments on the instruments of the New European Economic Governance, see C. DEGRYSE, 'The new European economic governance', *Working paper* 2012, ETUI, Brussels (available at <https://www.etui.org/publications/working-papers/the-new-european-economic-governance>); P. PECINOVSKI, 'EU economic governance and the right to collective bargaining', *European Labour Law Journal* 2018, vol. 9(4), 374–388, and M. ROCCA in this Issue.

2. Available at <https://www.historico.portugal.gov.pt/o-governo/arquivo-historico/governos-constitucionais/gc19/os-temas/memorandos/memorandos.aspx>.

3. In this context, internal flexibility is achieved by extending the employers' powers regarding the execution of the employment contract, namely, through working time schemes. External flexibility is accomplished by simplifying the procedures involved in contract termination and reducing the amount of compensations to which employees are entitled in this situation.

4. See M. R. P. RAMALHO, 'Portuguese labour law and industrial relations during the crisis', *Working Paper no. 54* 2013, ILO, 7-8, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---; I. TÁVORA and P. GONZÁLEZ, 'The reform of joint regulation and labour market policy during the current crisis: national report on Portugal' in A. KOUKIADAKI, I. TÁVORA AND M. LUCIO (eds.), *Joint regulation and labour market policy in Europe during the crisis*, ETUI, Brussels, 2016, 332; R. C. SILVA, 'Portuguese labour law reform: developments in 2011-2012', *European labour law journal* 2012, vol. 3, no. 1, 86-87.

5. Surprisingly, the RESC was not mentioned. This charter was approved for ratification by Parliament Resolution no. 64-A/2001, of 21 September, and ratified by Presidential Decree no. 54-A/2001. The instrument of ratification was deposited on 30 May 2002 and entered into force, with respect to Portugal, on 1 July 2002.

It should also be noted that although the MoU recognised the importance of social dialogue, underlining the need to consult social partners, prior to the implementation of legal reforms, there was very little room for real negotiation.⁶

The austerity measures produced a new flexibility-oriented labour relations model, characterised by a global reduction of labour protection levels (both internal and external). Social security protection also decreased (unemployment benefits were reduced), the retirement age was raised, and future pensions will be considerably lower. And while new admissions to public administration were frozen, in the private sector bogus self-employment, internship contracts aimed at young people, extended fixed-term contracts, and other precarious forms of employment thrived, as the only alternative to unemployment.

Many of these changes occurred in 2012, with the reform of the Portuguese labour code⁷ (which, in some cases, went beyond the demands of the MoU). Due to the limitations of this article, we chose to highlight the changes to wage policies, working time, employment protection legislation (termination of the employment contract and dismissals), and collective bargaining, since they had a particular impact on the Portuguese industrial relations system and sparked an interesting debate with the Constitutional Court, as well as with European and international law.

II. The reform of labour legislation under the MoU, the role of the Portuguese Constitutional Court and the disregard for European and international law

I. Wage policies

1.1. The minimum wage

The MoU demanded a ‘wage moderation’ policy, aiming to develop both national competitiveness and productivity and to reduce the unemployment rate. To this effect, the government decided to link the increase of the minimum wage to economic and labour market developments and to an agreement in the context of a review of the financial assistance programme.⁸

As a result, the nominal minimum wage was frozen at EUR 485⁹ from 2011 until 2014 and, consequently, the goals stipulated in the Agreement on the Establishment and Evolution of the Minimum Monthly Wage of 2006,¹⁰ signed by the government and the social partners, were not achieved.

6. I. TÁVORA and P. GONZÁLEZ, ‘The reform of joint regulation...’, cit., 334. The 2012 reform of the Portuguese Labour Code was based on the 2012 tripartite agreement on Growth, Competitiveness, and Employment (*Compromisso para o Crescimento, Competitividade e Emprego*, available at http://www.portugal.gov.pt/media/424132/compromisso_crescimento_competitividade_emprego.pdf), concluded between the government and most social partners, with the notable exception of the General Confederation of Portuguese Workers (CGTP-IN), who refused to sign it, invoking that many of its measures constituted a step back in employees’ rights.

7. Approved by Act no. 7/2009, of 12 February. All Portuguese legislation can be consulted at: www.dre.pt. All the amendments to the Portuguese Labour Code can be consulted at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1047&tabela=leis.

8. MoU – measure 4.7 (version of May 2011).

9. Decree-law no. 143/2010, of 31 December.

10. *Acordo Sobre a Fixação e Evolução da Remuneração Mínima Mensal Garantida* – available at: <http://www.ces.pt/download/203/FixEvolRMMG2006.pdf> – which established the minimum wage at EUR 500 in 2011.

The minimum wage was updated to EUR 505¹¹ only in 2014, the year before parliamentary elections, following a new tripartite agreement between the government and most social partners.¹² The adjustment of the minimum wage continued through 2016 (EUR 530), 2017 (EUR 557), 2018 (EUR 580), 2019 (EUR 600), 2020 (EUR 635), 2021 (EUR 665), and 2022 (EUR 705) with the left-wing government that came out of the 2015 elections and was later re-elected in 2019 (and once again in 2022).

This evolution was not endorsed by the EU. The Country Specific Recommendations (CSR) under the European Semester¹³ have stated that minimum wage developments should be consistent with the objectives of promoting employment and competitiveness across sectors, which means aligning wages and productivity (2014, 2015, 2016) and ensuring that they do not harm the employment of the low-skilled (2017).¹⁴

Nevertheless, at the end of the adjustment programme (in 2014), the Portuguese minimum wage was far from the level in force in most EU Member States, even when compared to those covered by Economic Assistance Programmes, and it remains one of the lowest today, despite the recent adjustments.

Regarding the effects of the adjustment programme in terms of equality and poverty, studies show a considerable social impact. Between 2009 and 2014, the poverty rate increased by 6.3% (from 17.9% to 24.2%), and the gap between richest and poorest has widened.¹⁵

Furthermore, it should be stressed that at international level, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), in an observation concerning Portugal adopted in 2012,¹⁶ regarding Convention No. 131 on Minimum Wage Fixing (1970), noting the lack of implementation of the aforementioned Agreement on the Establishment and Evolution of the Minimum Monthly Wage of 2006, recalled the importance of respecting social dialogue before taking any decisions.

The CEACR also urged the government to consider ‘in its decision-making as much of the needs of workers and their families as of economic policy objectives’. In fact, Article 3 of the Convention stresses that the determination of minimum wages must attend not only to economic factors, such as employment policy objectives, but also to ‘the needs of workers and their families, taking into

11. Decree-law no. 144/2014, of 30 September.

12. *Acordo Relativo à Atualização da Remuneração Mínima Mensal Garantida, Competitividade e Promoção do Emprego* – available at: http://www.ces.pt/download/1687/2014_Acordo_Atualizacao_RMG.pdf.

13. See M. ROCCA, ‘Introduction: The EU New Economic Governance, Labour Law and Labour Lawyers’, in this issue.

14. ‘The last increase, above expected inflation and average productivity increases, is expected to make the minimum wage increasingly binding, as the share of employees covered already amounted to a fifth of the total in 2016. Minimum wage increases contribute to reducing high in-work poverty and may positively impact aggregate demand. However, they may entail employment risks, notably for the low-skilled. These risks did not materialise in the current context of recovery, but remain a challenge’. For a comparative analysis of the CSR until 2017, see S. CLAUWAERT, *The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2017-2018*, ETUI, Brussels, 2017, available at: <https://www.etui.org/publications/background-analysis/the-country-specific-recommendations-csrs-in-the-social-field-an-overview-and-comparison-update-including-the-csrs-2017-2018>. It should be noted that the CSR for Portugal, concerning 2018, 2019, and 2020, do not allude to this matter.

15. Study of the FUNDAÇÃO FRANCISCO MANUEL DOS SANTOS, *Desigualdades do Rendimentos e Pobreza em Portugal*, available at: <https://www.ffms.pt/publicacoes/grupo-estudos/1700/desigualdade-do-rendimento-e-pobreza-em-portugal>. Which is also highlighted in the CSR regarding Portugal (see, e.g., 2019 and 2020).

16. Published in the 102th ILC Session (2013), available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3077936. Convention No. 131 was ratified by Portugal through Decree No. 77/81, of 19 June.

account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups’.

Finally, the CEACR evoked the Global Jobs Pact – adopted by the ILO Conference in June 2009, in response to the global economic crisis – to assert that ‘minimum wages should be regularly reviewed and adapted’ with the aim of avoiding deflationary wage spirals.

In addition, the Portuguese minimum wage policy also infringed the RESC. In fact, according to the European Committee of Social Rights (ECSR), this minimum wage was not in conformity with Article 4§1 of the RESC, since it ‘was manifestly unfair’ and did ‘not ensure a decent standard of living’ (Conclusions 2010 and 2014).

As the ECSR underlined, to ensure a decent standard of living within the meaning of Article 4§1 of the RESC, ‘wages must be no lower than the minimum threshold, set at 50% of the net average wage’. However, according to the figures of EUROSTAT and Statistics Portugal (INE), the minimum wage stayed below that threshold.¹⁷

1.2 Pay cuts in the public sector

The measures concerning the public sector aimed, mostly, at reducing the budget deficit by reducing the wage bill for public sector employees, cutting pensions, and limiting welfare benefits. The MoU contained several conditionalities, namely, ensuring that ‘the aggregate public sector wage bill as a share of GDP decreases in 2012 and 2013’. This was to be done by, *inter alia*, ‘Freez[ing] wages in the government sector in nominal terms in 2012 and 2013 and constrain[ing] promotions’ and reducing pensions above EUR 1500.

Consequently, not only were nominal wages frozen, but salaries were also reduced, and annual holiday and Christmas allowances (13th and 14th months’ pay) were cut off. Moreover, working time was expanded (from 35 to 40 hours per week) without an increase in wages (see below).

Some of these measures were later analysed and reversed, on grounds of unconstitutionality, by the PCC.¹⁸ These decisions were criticised as being ‘judicial activism’¹⁹ and led to political-constitutional friction.²⁰ However, despite a consensus that the PCC played an important role in

17. On this subject, see L. T. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios – Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, Atelier, Barcelona, 2014, 76–86.

18. The full texts of the decisions are available at: <http://www.tribunalconstitucional.pt/tc/acordaos/>. Extended summaries in English are also available at: <http://www.tribunalconstitucional.pt/tc/en/acordaos/>.

19. This so-called judicial activism was supported by some in legal literature (e.g., J. R. NOVAIS, *Em defesa do Tribunal Constitucional*, Almedina, Coimbra, 2014) and condemned by others (e.g., R. MEDEIROS, ‘A jurisprudência constitucional portuguesa sobre a crise: entre a ilusão de um problema conjuntural e a tentação de um novo dirigismo constitucional’, in G. A. RIBEIRO/ L. P. COUTINHO, *O Tribunal Constitucional e a crise – Ensaios críticos*, Almedina, Coimbra, 2014, 263–288). In turn, R. CISOTTA/D. GALLO (‘The impact of the Troika’s austerity measures on the Portuguese labour law system: a general assessment of the scope of social sovereignty in the light of the Constitutional Tribunal Case Law’, *European Journal of Social Law* 2014, nos. 1-2, 112-113) consider that the Court has not called into question the legislature’s prerogatives. In fact, in Judgment no. 187/2013, the PCC expressly recognised that the imposition of restrictions on the right to a pension falls within the legislature’s discretion, having no intention in claiming for itself the power to determine the minimum level of benefits the State must guarantee its citizens. So much that the reduction of pensions was not considered unconstitutional in itself, but rather due to the indiscriminate application of such a measure (which conflicted with the principle of equality, that, in fiscal matters, is linked to a progressive income tax system).

20. Two interrelated episodes that illustrate this political and institutional tensions are described by I. TÁVORA and P. GONZÁLEZ, *op. cit.*, 338-339.

protecting social fundamental rights, that label seems excessive, since, as we will point out, many other austerity policies were upheld.

That was the case with the Budget Law of 2011, which provided for progressive wage cuts at rates from 3.5% to 10% for public sector employees with monthly wages above EUR 1500. The PCC (Judgment no. 396/11) enabled these pay cuts, subscribing to the argument of economic crisis, accepting that the current scenario justified some jurisprudential self-restraint.²¹

The situation partially changed with the Budget Law of 2012, which not only maintained the previous cuts but also increased them (the annual holiday and Christmas allowances were reduced or suspended for all public sector employees on a wage of between EUR 600 and EUR 1100 or over EUR 1100 per month, respectively).²²

When reviewing the suspension of the extra pay, the PCC (Judgment no. 353/2012) warned the legislator that its tolerance for the crisis argument would reduce as time went by. Furthermore, the PCC stressed that ‘the sacrifices imposed to achieve the reduction of public deficit are not equal to all categories of citizens, in the proportion of their financial capacity; they do not have universal character, and only bear upon people that receive a wage or a pension paid with public money. Therefore, there is an additional effort in favour of the whole community that is only requested to some’.

Consequently, the suspension of the annual holiday and Christmas allowances was found to be in breach of the principles of equality (between public employees, on the one hand, and employees of the private sector and other taxpayers, on the other hand) and proportionality (since ‘one could devise alternative solutions to the consolidation of the deficit, both on the expenditure (...) and on the revenue side (...)’) and was deemed unconstitutional.²³

However, the PCC made the controversial decision – based on Article 282(4) of the Portuguese Constitution²⁴ – to limit *ex nunc* the effects of its own judgment, allowing the application of those norms during 2012. ‘The Court took this pragmatic action in order to protect the budget’s execution, which had been going on for half a year already’ and to not jeopardise the Troika’s financing.²⁵

In 2013, the Budget Law maintained the initial pay cuts (allowed by the PCC since 2011) and augmented them with the reduction or suspension of the annual holiday and Christmas allowances for public employees receiving between EUR 600 and EUR 1100 or over EUR 1100 a month,

21. C. BOTELHO, ‘40 Anos de Direitos Sociais: uma reflexão sobre o papel dos direitos fundamentais sociais no século XXI’, *Julgar* 2016, no. 29, 214; M. CANOTILHO/ T. VIOLANTE/ R. LANCEIRO, *Weak rights, strong principles: Social rights in the Portuguese constitutional jurisprudence during the economic crisis*, paper presented at the *World Congress of Constitutional Law 2014 – Constitutional Challenges: Global and Local, Workshop 4: Social rights and the challenges of economic crisis*, available at: <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-canoltilho,%20violante%20&%20lanceiro.pdf>; J. L. AMADO, ‘La protección jurisdiccional de los derechos fundamentales de los trabajadores en Portugal: tópicos sobre el caso de las reducciones salariales en el sector público’, *Revista de Derecho Social* 2015, no. 69, 174-175.

22. The annual holiday and Christmas allowances (13th and 14th months’ pay) are part of the yearly wage, so their reduction or suspension increased the pay cuts.

23. C. BOTELHO, ‘40 Anos...’, cit., 214-215; M. CANOTILHO/ T. VIOLANTE/ R. LANCEIRO, *op. cit.*, 8-9; J. L. AMADO, *op. cit.*, 175.

24. ‘4. When required for the purposes of legal security, reasons of fairness or an exceptionally important public interest, the grounds for which must be given, the Constitutional Court may determine a scope for the effects of the unconstitutionality or illegality that is more restricted than that provided for in paragraphs (1) and (2)’.

25. M. LUCAS PIRES, ‘Public versus private or State versus Europe? A Portuguese constitutional tale’, *Michigan Journal of International Law (Emerging Scholarship Project)* 2013, vol. 1, 105, available at: <http://www.mjilonline.org/wordpress/wp-content/uploads/2013/07/Pires.pdf>.

respectively. Again, these last measures were considered unconstitutional on the ground that they violated the fundamental principle of equality and fair division of public charges (Judgment no. 187/2013).

Finally, the Budget Law of 2014 intensified the austerity measures by increasing the number of employees affected by the pay cuts (the minimum threshold would start at EUR 675 instead of EUR 1500) and, at the same time, increased the progressive rate applicable to pay cuts up to 12% for public employees earning more than EUR 2000 per month. Unsurprisingly, the PCC considered these measures to be unconstitutional for breaching the principle of equality (Judgment no. 413/2014), although with *ex nunc* effects starting from the judgment date.²⁶

It should be noted that the CSR 2014 under the European Semester focused on the deficit reduction (to 2.5% of GDP) and recommended the fast replacement of the consolidation measures that the PCC considered unconstitutional by actions of similar size and quality.

The pay cuts implemented by the 2011 and 2012 Budget Laws were challenged in the Portuguese courts, which referred several questions to the Court of Justice (of the European Union),²⁷ namely:

1. Are the pay cuts made by the Budget Law applicable only to public sector employees contrary to the principle of prohibition of discrimination in that they discriminate on the basis of the public nature of the employment relationship?
2. Must the right to working conditions that respect dignity, laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union (CFREU), be interpreted as meaning that it is unlawful to make pay cuts without the employee's consent, if the contract of employment remains unaltered?

The Court of Justice refused to answer any of these questions.

Firstly, it recalled the limits to the application of the CFREU laid down in Article 51(1), namely, that these provisions are addressed 'to the Member States only when they are implementing Union law'. Secondly, the Court evoked Article 6(1) of the Treaty on European Union, stating that 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. Thirdly, it declared that, notwithstanding the doubts expressed by the Portuguese Court as to whether the Budget Law complied with the principles and objectives laid down in the Treaties, there was no specific evidence to support that the Member State was implementing EU law. The main idea was that the MoU was not grounded on EU law, but rather on instruments that were agreed between Portugal and its creditors, preventing the invocation of the Charter.

26. As pointed out by R. CISOTTA/D. GALLO (*op. cit.*, 110), in these cases, there was a 'quest for a fair balance between the financial and economic objectives of the reduction of public spending required by international and European institutions on the one hand, and the application of national constitutional principles concerning the protection of fundamental social rights on the other'. With its judgements, "the PCT [PCC] case law gives a concrete dimension to these principles, rather than one merely based on theoretical speculations on the relationship between external obligations contracted by the country at international and European level and fundamental rights recognised and safeguarded by the national legal order".

27. Case C-128/12, Order of the Court of 7 March 2013 (*Sindicato dos Bancários do Norte, Sindicato dos Bancários do Centro, Sindicato dos Bancários do Sul e Ilhas, Luís Miguel Rodrigues Teixeira de Melo v. BPN — Banco Português de Negócios, SA*); Case C-264/12, Order of the Court of 26 June 2014 (*Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial — Companhia de Seguros, SA*). These Orders are available only in Portuguese and French.

Consequently, the Court of Justice ruled that it lacked competence to respond to the questions referred.²⁸

Although one understands the Court's reluctance in hearing these cases (due to the risk they posed for Economic and Monetary Union project),²⁹ its reasoning is debatable. As Catherine Barnard stressed, 'The Court could (...) have found that, given the link between the EFSM Regulation, the MoU, Decision 2011/344/EU and Lei do Orçamento do Estado para 2011, Portugal was acting in the scope of EU law and so the Charter should apply'.³⁰

In fact, part of the financial assistance received by Portugal under the bailout programme came from the European Financial Stabilisation Mechanism (EFSM), adopted under Regulation no. 407/2010, of 11 May. Article 3(3) of this Regulation requires that the decision to grant a loan contains provisions on conditionality, while Article 3(5) adds that the Commission and the beneficiary Member State shall conclude a Memorandum of Understanding, 'detailing the general economic policy conditions laid down by the Council'. Such conditions were established by the MoU and later developed by the Portuguese Budget Law. The Council of the EU adopted Implementing Decision no. 2011/344/EU of 30 May, granting Union financial assistance to Portugal, which expressly refers to the MoU in Article 1(4).³¹ At the same time, Article 3(5) of the Decision expressly refers to the 2011 Budget, Article 3(6) to the 2012 Budget and Article 3(6) to the 2013 Budget.³²

As Catherine Barnard explains,³³ the Court of Justice could have followed the *Åkerberg Fransson* case law, in which it stated that 'Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable'.³⁴

Finally, in the Judgment of 13 June 2017,³⁵ the Court recognised that the Romanian MoU was an act of the EU institutions, emitted under Article 267 TFEU, since it was legally based on Article 143 TFEU, Regulation 332/2002 and Decision 2009/459. Consequently, it declared the applicability of the CFREU to the MoU and to the acts aiming at its implementation. Nevertheless, the Court

28. On this issue, see C. KILPATRICK, 'Are the bailouts immune to EU social challenge because they are not EU law?', *European Constitutional Law Review* 2014, vol. 10, issue 3, 394 ff.

29. C. BARNARD, 'The silence of the Charter: social rights and the Court of Justice', in S. DE VRIES/ U. BERNITZ/ S. WEATHERILL (eds.), *The EU Charter of Fundamental Rights as a binding instrument – Five years old and growing*, Oxford, Hart Publishing, 2015, 175. The author adds another reason for the Court's reluctance: 'national labour standards are at issue, matters which, as part of the original settlement of the Treaty of Rome, were to be delivered at Member State level'.

30. *Ibid.*, 177-178. Similarly, C. KILPATRICK (*op. cit.*, 400-401) stresses that 'EU sources (...) encase loan conditions (...) for Portugal and Ireland where (...) the bailouts have an EU-leg (the EFSM) and an intergovernmental-leg (the EFSF). Where the financial assistance has an EU-foundational component, alongside a non-EU foundational component, it is the EU component which is systematically and explicitly used to legally encase the loan conditionality in the MoUs'. See also KILPATRICK, *op. cit.*, 406. In turn, S. ROBIN-OLIVIER, 'Les normes sociales internationales et européennes et le développement du droit par les juges en Europe', *Droit Social* 2016, no. 3, 222, states that the Court's refusal privileged economic choices and political powers to the detriment of legal arguments and judicial power.

31. 'The first instalment shall be released subject to the entry into force of the Loan Facility Agreement and the Memorandum of Understanding. Any subsequent loan releases shall be conditional upon a favourable review by the Commission, in consultation with the ECB, of Portugal's compliance with the general economic policy conditions as defined by this Decision and the Memorandum of Understanding'.

32. C. BARNARD, *op. cit.*, 175-178.

33. *Ibid.*, 177.

34. Case C-617/10, Judgment of the Court of 26 February 2013 (*Åklagaren v. Hans Åkerberg Fransson*), § 21.

35. C-258/14, *Florescu*.

considered that the restrictive measures that had been adopted to ensure its implementation were valid, since they were justified by objectives of general interest.³⁶

2. Working time

2.1 *The extension of public employees' working time*

In the public sector, working time was expanded from 35 to 40 hours per week and from seven to eight hours per day, without a pay increase (Act no. 68/2013, of 29 August). This change was unsuccessfully challenged before the PCC (Judgment no. 794/2013).

Even so, about 500 collective public sector labour agreements for local government employees reduced the new maximum working time limit to the previous 35 hours per week. But the members of government responsible for finance and public administration refused the approval of these collective agreements, blocking their entry into force. This was an interference which, according to the PCC, compressed of the principle of local autonomy in a manner that was contrary to the Constitution (Judgment no. 494/2015).

When the new government took office in November 2015, this measure was reversed and the maximum working time for public employees returned to the previous 35 hours per week.

2.2. *The expansion of working time arrangements: the time bank*

Another demand from the MoU was increased flexibility regarding working time arrangements, through the implementation of 'working time banks' or 'working time accounts' (*bancos de horas*) at company level, negotiated between employers and employees. The aim was to provide employers with more suitable instruments, 'to contain employment fluctuations over the cycle, better accommodate differences in work patterns across sectors and firms, and enhance firms' competitiveness', without the costs associated with overtime.³⁷

To this effect, the 2012 revision of the Labour Code (Act no. 23/2012, of 25 June) enshrined the possibility of creating individual and group time banks (Articles 208-A and 208-B of the Labour Code, respectively).

The time bank regime had first been introduced by the 2009 Labour Code, but it could only be enacted through collective agreement (allowing, in this case, the increase of the normal working period by four hours per day with maximum limits of 60 hours per week and 200 hours per year. The additional hours could be compensated via remuneration, an equivalent reduction in working time or a combination of both).

In 2012, it became possible for this regime to be negotiated at the firm level directly between management and individual employees without the involvement of trade unions or other employees' representatives (enabling, in this situation, the increment of the normal working period up to two hours a day, with the maximum limits of 50 hours per week and 150 hours per year).³⁸

This change was part of a noticeable trend, present in the Portuguese labour regime, towards the decentralisation to firm level, increasing managerial prerogatives, namely, by promoting the

36. For a critical analysis of this decision, see M. ROCCA, 'Florescu: A Memorandum of Understanding Finally before the Court', *International Labor Rights Case Law* 2018, 4, 98–102.

37. MoU – measure 4.6 (version of May 2011).

38. Additionally, if the employee did not refuse the creation of a time bank within 14 days, her/his acceptance would be presumed, which was severely criticised by a significant part of the literature.

employment contract over collective bargaining agreements. Nonetheless, the individual time bank was recently revoked by Act no. 93/2019, of 4 September,³⁹ and substituted by a referendum model (Article 208-B of the Labour Code).

Also in 2012, the legislator, aiming to enhance the scope of both time bank systems (individual and collective agreement), allowed employers to unilaterally impose these regimes on employees who had not consented to them, through a 'group time bank' (*banco de horas grupal*).⁴⁰ This category permits the application of a time bank, regulated by collective agreement, to all the employees of a team, economic unity, or section, when at least 60% of those employees are covered by such collective agreement.⁴¹ As a result, that collective agreement has a partial (and *in pejus*) *erga omnes* effect.⁴²

This scheme raised many constitutional questions, since it conflicts⁴³ with the (both positive and negative) freedom of association enshrined in Article 55 of the Portuguese Constitution.⁴⁴ However, the PCC (Judgment no. 602/2013) declined to declare the unconstitutionality of this norm, albeit by a very small majority (with the support of seven of its 13 judges).⁴⁵ Still, it should be noted that according to the CEACR, the time bank seems to encroach on ILO Convention No. 1.⁴⁶

Furthermore, since this scheme does not include overtime pay, it may also breach Article 4§2 of the RESC, despite some tolerance shown by the ECSR in this regard (see Conclusions 2014).

In addition, the reasoning of the ECSR in Collective Complaints nos. 55/2009 and 56/2009,⁴⁷ regarding the French annual working days system (*le système de forfait en jours sur l'année*), can be partially applicable to the Portuguese time bank. In this case, the ECSR considered the French regime to be in violation of the right to reasonable working hours provided by Article 2§1 of the RESC.⁴⁸ Although there are visible differences between the French and the

39. Available at: <https://dre.pt/dre/detalhe/lei/93-2019-124417106>.

40. Concerning this regime, see A. T. RIBEIRO, 'Recent legislative advances on working times: the Portuguese regime', *Well-being at and through work*, Eleven International Publishing (Collana Fondazione Marco Biagi), The Hague, 2017, 201–219.

41. The Portuguese collective bargaining system is based on the principle of affiliation, that is, as a rule, collective agreements are only applicable to employees affiliated to the signatory trade unions and to the employers that are part of the collective agreement or that are affiliated to the employers' associations that signed the agreement (Article 496 of the Labour Code).

42. The application of the group time bank to individual time banks ceased when the latter were removed from the Portuguese legislation.

43. Other constitutional rights potentially affected are the rights to work-life balance, rest and leisure time, and personality development. See C. O. CARVALHO, 'A organização e a remuneração dos tempos de trabalho: em especial o banco de horas', *Direito e Justiça (volume especial) – Estudos dedicados ao Professor Doutor Bernardo da Gama Lobo Xavier*, vol. I, Universidade Católica Editora, Lisboa, 2015, 505–507.

44. *Ibid.*, 495–508.

45. The large number of dissenting opinions, many of them accompanied by explanatory texts, reflects the extremely complex nature of this matter. They are available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20130602.html>.

46. ILO, C001 – Hours of Work (Industry) Convention, 1919 (No. 1), ratified by Portugal through Decree no. 15361, of 3 March 1928. See the Report of the CEACR, 104th Session of the International Labour Conference, 2015, 408–409, available at: http://www.ilo.org/ilc/ILCSessions/104/reports/reports-to-the-conference/WCMS_343022/lang-en/index.htm.

47. ECSR, decision on the merits, 23 June 2010, *Confédération Générale du Travail (CGT) v. France*, Complaint No. 55/2009; and decision on the merits, 23 June 2010, *Confédération Française de l'Encadrement (CFE-CGC) v. France*, Complaint No. 56/2009.

48. See J.-F. AKANDJI-KOMBÉ, 'Réflexions sur l'efficacité de la Charte sociale européenne à propos de la décision du Comité européen des droits sociaux du 23 juin 2010', *Revue de Droit du Travail* 2011, no. 4, 233 ff.; S. LAULOM, 'L'organisation du temps de travail sous l'influence des droits sociaux européens', *Revue de Droit du Travail* 2011, no. 5, 298 ff.; M. MINÉ, 'Le droit du temps de travail à la lumière de la Charte Sociale Européenne', *Semaine Social Lamy* 2011, no. 1575.

Portuguese annual working days system (e.g., the Portuguese framework defines maximum daily and weekly limits), in some aspects, the Portuguese regime is more flexible than the French one (e.g., it has a wider scope, since it can be applied to any employee; it does not require a collective agreement, nor payment at a higher rate).

For this reason, the ECSR has reserved its position on this point, waiting for further information concerning the fulfilment of some conditions by the Portuguese flexible working time regimes (Conclusions 2014). In fact, the legal framework should 'clearly circumscribe the discretion left to employers and employees to vary, by means of collective agreement, working time' and provide a 'a reasonable reference period for the calculation of average working time'.

2.3 *The reduction of additional pay for overtime work*

Even though the previously analysed working time arrangements reduced the need for overtime work, the 2012 labour reform also halved the increases in hourly pay for overtime work (Article 268 of the Labour Code)⁴⁹ and abolished the right to compensatory rest for overtime performed on regular working days, weekly rest days or public holidays equal to 25% of the rendered overtime hours (Article 229 of the Labour Code).⁵⁰

With the aim to immediately 'neutralise' all clauses of both collective agreements and employment contracts signed prior to the entry into force of this change and containing better pay conditions, the legislator established the primacy of the new rules over any of those clauses (Article 7 of Act no. 23/2012). This was not a requirement of the MoU, since it specifically indicated that these norms could 'be revised, upwards or downwards, by collective agreement'.⁵¹ It was achieved: i) by declaring the clauses that established compensatory rest for overtime rendered in regular working days, weekly rest days or public holidays to be null and void; ii) by suspending for two years all clauses setting more favourable conditions for overtime pay; iii) and, after this two-year period, by reducing by 50% the pay for overtime work (with the minimum limit of the rates laid down in the Labour Code), if such clauses had not been renegotiated.

The PCC (Judgment no. 602/2013) declared, in relation to collective agreement clauses, the provision which nullified clauses providing the aforementioned compensatory rest to be unconstitutional. In fact, since these issues are not regulated in an imperative manner, new collective agreements (entered into force after the 2012 Act) would be able to prescribe more favourable regimes. Therefore, this provision was deemed neither necessary nor sufficient for achieving the labour cost reduction results intended by the legislator. Therefore, it incorporated a disproportionate limitation on the right to collective bargaining (Articles 56 and 18 of the Constitution). For similar reasons, the Constitutional Court also considered the automatic reduction of the amounts set in a collective agreement, after the expiry of the two-year deadline, to be unconstitutional (iii).⁵²

49. From the previous level of 50% for the first overtime hour, 75% for additional hours and 100% for overtime done during weekly rest days or public holidays.

50. These measures were not considered unconstitutional by the PCC. The 2012 Act only maintained the right to paid compensatory rest for work performed on mandatory weekly rest days and during the daily rest period, and for normal work done on public holidays at companies not required to close on such days (albeit, in this last case, the employer could choose to give extra pay as an alternative).

51. MoU – measure 4.6 (version of May 2011).

52. The Court stated that the Act was modelling the contents of contracts by replacing solutions that were created by means of collective autonomy and interfering with matters reserved to collective bargaining.

However, the Court validated the suspension of collective agreement clauses (ii), since this was a temporary, appropriate, necessary and balanced measure, taking into account the goals set by the MoU and the competitiveness of the national economy in a difficult situation.

2.4 *The reduction of the number of annual leave days*

In addition to the measures required by the MoU, Act no. 23/2012 also eliminated the extra annual leave entitlements that rewarded workers with low absenteeism with up to three days' extra leave, when there were no unjustified absences or when there was only a limited number of justified absences (Article 238 of the Labour Code).

To better enforce this measure, there was also an equivalent reduction of provisions contained in collective agreements and employment contracts (Article 7 of Act no. 23/2012). Concerning collective agreements, the PCC declared this norm to be unconstitutional for the same reasons it upheld regarding the clauses previously mentioned in point i): the encroachment on the right to collective bargaining.

2.5 *Public holidays*

In addition to the measures required by the MoU, Act no. 23/2012 eliminated four national public holidays (Article 234 of the Labour Code).

Furthermore, employers were given the possibility of closing the undertaking when the public holiday fell on a Tuesday or a Thursday, which may count as a holiday or else be compensated by the employees with extra work, which would not be considered overtime (Articles 242(2)(b) and 226(3) of the Labour Code).

Moreover, the payment of regular work performed on a public holiday in an undertaking not required to suspend operations on such days was cut by half, while the alternative compensatory rest was reduced to half a day (Article 269 of the Labour Code) – the choice between these two options belonging to the employer. Finally, as occurred with overtime pay (ii), Article 7 of Act no. 23/2012 suspended, for two years, all clauses setting more favourable conditions regarding payment or compensatory rest periods for normal work performed on public holidays. For the same reasons we previously stated, the PCC declined to declare the unconstitutionality of the norm.

According to the ECSR, this regime is not compatible with Article 2§2 of the RESC, since work performed on a public holiday is not adequately compensated (Conclusions 2014).

3. *Termination of the employment contract: severance payment*

The MoU determined the need to review severance payments for dismissal or other forms of termination of employment contracts.⁵³ This adjustment had two main objectives: i) to align (by reducing) severance payments to the EU average,⁵⁴ preserving accrued rights to date; and ii) to provide for a common legal framework for severance payments concerning open-ended and fixed-term contracts (by applying similar rules to both situations). The MoU measures also advocated for the

53. MoU – measure 4.4 (version of May 2011).

54. The Portuguese authorities published a study in 2012 which compared different EU rules on the severance payments due in each system for the termination of employment contracts – MINISTÉRIO DA ECONOMIA E DO EMPREGO, SECRETARIA DE ESTADO DO EMPREGO, *Análise comparativa dos regimes de compensações no caso de cessação do contrato de trabalho na União Europeia*, 2012.

elimination of minimum payments and the establishment of maximum amounts, along with the creation of a fund to support part of the severance payments.

These changes were implemented progressively.

The severance payment was originally reduced from 30 to 20 days of base salary and seniority payments per full year of seniority, with no minimum limits and an upper double cap: i) the value of the base salary and seniority payments could not exceed 20 times the minimum monthly wage; ii) the overall amount of severance pay could not exceed 12 times the monthly base salary and seniority payments, with a limit of 240 times the value of the minimum monthly wage. This reduction applied firstly to new hires (Act no. 53/2011, of 14 October), but was afterwards extended to all employment contracts (Act no. 23/2012).

The Law granted accrued-to-date entitlements by stipulating that, for previous contractual periods, the former and more favourable formula for calculating severance pay would remain in force.⁵⁵ As a result, the amount of severance payment for the same seniority can be very different depending on the date of the conclusion of the employment contract.

The subsequent reform of the Labour Code, operated by Act no. 69/2013 of 30 August, further reduced severance payments to 12 days of base salary and seniority payments per full year of tenure. As a consequence, the severance pay amount was brought below the EU average.

Finally, in return for the reduction in the severance payments, a severance pay fund was created (Act no. 70/2013, of 30 August).⁵⁶

As it did in respect of working time arrangements, Article 7 of Act no. 23/2012 also prescribed the pre-eminence of the new severance pay rules over more favourable provisions from collective agreements or employment contracts. Thus, it declared such clauses to be null and void when providing higher compensation. It also prescribed that any subsequent collective agreements had to comply with the Labour Code in this respect.

The PCC (Judgment no. 602/2013) 'validated' this decision. In fact, the Court considered that it is not possible to exclude the compensation due for the termination of employment contracts from the scope of collective bargaining. Yet, and given the interests in play, one cannot also exclude the legislator's competence to set limits – whether higher or lower – on the amounts payable under this heading.⁵⁷

4. Lawful dismissals

Another of the MoU's objectives was to tackle the labour market segmentation and increase the use of open-ended contracts by introducing additional flexibility into the legal framework on lawful dismissal.⁵⁸

Since the Portuguese Constitution grants a strong protection against unfair dismissal (Article 53), namely, disciplinary-related dismissal, the legal adjustments were applied to the individual

55. For further developments on the legal regime, see R. C. SILVA, *op. cit.*, 90-91; D. MARTINS, 'Labour law in Portugal between 2011 and 2014', in *Young Scholars Meeting of the XI European Regional Congress 2014*, Dublin, 7, available at: <http://isrls.org/wp-content/uploads/2014/08/Portuguese-National-Report.pdf>.

56. See D. MARTINS, *op. cit.*, 7-8.

57. This reasoning was criticised by some legal literature (e.g., A. T. RIBEIRO, 'O art. 7.º da Lei n.º 23/2012 e o Acórdão do Tribunal Constitucional n.º 602/2013 – Análise dos efeitos da Lei nova sobre as convenções coletivas em aplicação à data da sua entrada em vigor', *Questões Laborais* 2013, no. 43, 217-219).

58. MoU – measure 4.5 (version of May 2011).

dismissal linked to the extinction of the post (*despedimento por extinção do posto de trabalho*) and to the dismissal due to unsuitability (*despedimento por inadaptação*).

Yet, as we will see, a significant number of the measures implemented were later reversed by the PCC.

Basically, both dismissal regimes became less demanding. Firstly, because the employers' duty to offer the employee an available and suitable position, as an alternative to the dismissal, was removed (through a modification of Articles 368 and 375 of the Labour Code by Act no. 23/2012).

However, the PCC ruled that the measure was unconstitutional (Judgment no. 602/2013), believing it to be a disproportional restriction of the constitutional right to job security (prohibition on dismissal without just cause). Subsequently, Act no. 27/2014 of 8 May amended Article 368 of the Labour Code, reinstating the aforementioned duty.

Secondly, the legislator endeavoured to facilitate dismissal through the extinction of work posts⁵⁹ by abolishing the seniority rule when selecting the employee(s) to be dismissed.⁶⁰ The employer could now follow alternative criteria, if relevant and non-discriminatory, when there were several equivalent positions to be made redundant (through a change of Article 368 of the Labour Code by Act no. 23/2012).

Once again, the PCC ruled that the measure was unconstitutional (Judgment no. 602/2013), since the new criteria were deemed to be too vague and imprecise to allow an effective judicial control of the employer's choice, giving way to arbitrary and judicially uncontrollable dismissals which breached the constitutional prohibition on dismissal without just cause (Article 53). Consequently, Act no. 27/2014 amended once more Article 368 of the Labour Code, setting out the following order of criteria: i) worst performance assessment (in accordance with parameters previously known by the employee); ii) lower academic and professional qualifications; iii) higher cost of maintenance of employment for the company; iv) less experience on the job; v) less seniority in the company.

Finally, the grounds for dismissal due to the unsuitability of the employee were extended (through the modification of Article 375 of the Labour Code by Act no. 23/2012), since this mechanism became admissible without the traditional requirement that the work post had undergone technological or other significant changes in the course of the employment contract. The procedure was also shortened. It bears mentioning that the PCC did not declare such changes to be unconstitutional, given that the legislator established adequate measures regarding the protection of the affected employee(s) and ensured an adequate balance between the fundamental rights to job security and economic freedom.

III. The effects of the austerity policies under the MoU on collective bargaining and extension procedures

1. General remarks

The reform of the Portuguese collective bargaining system had started before the crisis and continued during this period.

59. This dismissal takes place in cases where there is no room for collective redundancy on account of the number of employees encompassed by the measure.

60. The Labour Code originally established the following legally binding criteria to select employees for dismissal: least seniority at the work position; least seniority in the professional category; professional category of lower rank; least seniority in the company.

Collective bargaining witnessed an important retrenchment during the crisis, mostly due to the labour law reforms,⁶¹ namely, those prescribed by the MoU.

Firstly, as previously explained, there was direct legislative interference in collective bargaining agreements, where collective agreement clauses that established a more favourable regime than the one enshrined in the new reformed law were either declared null and void or suspended.

In addition, the reforms gave a new and remarkable status to the employment contract, namely, allowing it to regulate some issues *in pejus*, when previously that could only be done by collective agreement (e.g., through the time bank regime).⁶² In the words of Júlio Gomes, it seems that the Portuguese legislator was aiming at a 'guided system of collective bargaining' and since the desired results were not being obtained through this mechanism, new avenues were opened to individual negotiation. Therefore, 'respect for collective private autonomy exists only when and if it produces certain outcomes desired by the legislator'.⁶³

Finally, as we will see, the implementation of other measures prescribed by the MoU, with the intent of boosting collective bargaining, had the adverse effect of 'paralysing' it.

The MoU proposed the following measures:⁶⁴ i) the definition of clear criteria for the administrative extension of collective agreements (*portarias de extensão*), which should include the 'representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms' 'assessed on the basis of both quantitative and qualitative indicators'; ii) the shortening of the validity periods (*sobrevigência*) of collective agreements that had expired and were not renewed; iii) the decentralisation of collective bargaining; and iv) the creation of a Labour Relations Centre to support social dialogue and to provide technical assistance to the parties involved in collective bargaining.⁶⁵

The CSR 2014 reaffirmed the need to revise the survival of the collective agreement regime and added the request to introduce 'the possibility of mutually agreed firm-level temporary suspension of collective agreements', giving way to a new reform of the Labour Code in 2014.

61. The effects of the crisis and the austerity measures on collective bargaining are analysed by M. P. CAMPOS LIMA, 'O desmantelamento do regime de negociação coletiva em Portugal, os desafios e as alternativas', *Cadernos do Observatório* 2016, no. 8, 29 ff., available at: <http://www.ces.uc.pt/observatorios/crisalt/?id=6522&pag=9331>.

62. The 2003 Labour Code adopted new provisions on the relation between law and collective agreements, allowing for the latter, as a rule, to establish less favourable conditions than those prescribed by the law (it was the end of the traditional *favor laboratoris* principle as a rule). Nevertheless, this principle is applicable, as a rule, in the relation between the law or collective agreements and the employment contract (see, respectively, Articles 3 and 476 of the Labour Code).

63. J. GOMES, 'Algumas reflexões sobre as alterações introduzidas no Código do Trabalho pela Lei n.º 23/2012 de 15 de Junho', *Revista da Ordem dos Advogados* 2012, II/III, 607, available at: <https://portal.oa.pt/upl/%7B40d78a50-3ecd-41a1-a4b1-a298f00f43d%7D.pdf>.

64. MoU – measures 4.7 and 4.8 (version of May 2011).

65. As stressed by P. PECINOSVSKI ('EU Economic Governance and the Right to Collective Bargaining: Part 2. From imposed restrictions of the right by EU Member States towards a social economic governance', *European Labour Law Journal* 2019, vol. 10(1), 44), the recommendations from EU institutions (stemming from the CSR – 2011 onwards, the MoU and the Economic Adjustment Programmes) were often focused on the national wage-setting systems and (forced) decentralisation - the latter aiming particularly at ensuring that collective bargaining on wages or other working conditions would be set at company level, rather than at national or sectoral levels. This 'is problematic, as trade unions are often less well represented (or not at all) at company level or less strong than at sector or national level, which can lead to employers henceforth being able to impose unilaterally certain measures which previously had to be laid down jointly in collective negotiations'.

2. Decentralisation trends

The promotion of a decentralised collective bargaining regime strived to facilitate flexible arrangements and to promote wage adjustments in line with productivity at company level.

For this purpose, Act no. 23/2012 changed Article 491(3) of the Labour Code, allowing trade unions⁶⁶ to delegate to works councils the power to negotiate collective agreements at company level in firms with a minimum of 150 employees,⁶⁷ thus reducing the previous threshold of 500 employees.⁶⁸

On the other hand, Act No. 23/2012 encouraged the inclusion of articulation clauses between different levels of bargaining (Article 482(5) of the Labour Code). However, these measures have hardly ever been used.

3. The extended validity period of collective agreements

In 2003, intending to deliver a more dynamic collective bargaining system, the Portuguese legislator introduced the expiration of collective agreements (facilitating the replacement of old agreements with new ones). This means that when an agreement is not renewed, after a period of time – the extended validity period (*sobrevigência*) – it will then expire.

Act no. 55/2014 of 25 August modified Article 501 of the Labour Code, reducing all periods connected with the *sobrevigência* of collective agreements, so that these will expire more rapidly if not renewed. This goal was obtained through: i) the reduction from five to three years of the validity period of clauses that make the termination of the collective agreement dependent on its replacement by a new one; ii) the reduction of the *sobrevigência* period from 18 to 12 months.

4. Suspension of collective agreements

Act no. 55/2014 of 25 August also modified Article 502 of the Labour Code, allowing the temporary suspension of collective agreements in the case of a business crisis due to market, structural or technological reasons, catastrophes or other occurrences that seriously affect the normal operation of the undertaking, when that becomes necessary to ensure the viability of the undertaking and the preservation of the work posts.

The suspension is dependent on a written agreement between the parties that signed the collective agreement, which needs to be substantiated and must indicate the period of suspension and its effects.

This mechanism was used for the first time during the pandemic in respect of collective agreements entered into by Tap Air Portugal and its subsidiaries.⁶⁹

66. In the Portuguese industrial relations system, the competence to conclude collective agreements, at all levels, on behalf of the employees, is given only to the trade unions (Article 56(3) of the Constitution and Article 443 of the Labour Code).

67. The MoU prescribed the lowering of the firm size minimum threshold to 250 employees (4.8 – version of May 2011).

68. Nevertheless, and despite this change, so far, this prerogative remains unused – see CENTRO DE RELAÇÕES LABORAIS (CRL), *Relatório anual sobre a evolução da negociação coletiva em 2020*, 79 (available at <https://www.crlaborais.pt/documents/10182/13326/Relat%C3%B3rio+Anual+Negocia%C3%A7%C3%A3o+Coletiva+em+2020/28ecbe79-0b9d-4910-bb16-1a45a5ba8e98>).

69. On this issue, see <https://www.publico.pt/2021/02/26/economia/noticia/pilotos-aprovam-acordo-emergencia-tap-1952378>. Some examples of these agreements can be found at: http://bte.gep.msess.gov.pt/completos/2021/bte9_2021.pdf.

5. Constraint of the administrative extension of collective agreements

Portuguese law allows the administrative extension of collective agreements (*portarias de extensão*), which were commonly used before 2012.

This administrative extension allows for a very wide application of collective agreements in Portugal, which would not, otherwise, be possible, due to the low union density and the principle of affiliation⁷⁰ (which determines how these instruments are applied).⁷¹

Before 2012, the Ministry of Labour had a discretionary power regarding both the decision to grant an extension and the agreements it would target. However, the MoU imposed the definition of criteria for this effect. This regime was implemented through the Resolution of the Council of Ministers no. 90/2012 of 31 October, according to which, from then on, collective agreements could only be extended if the companies represented by the signatory employers' association employed at least 50% of the employees of that sector of activity, within the envisaged geographic, personal, and professional scope, except if the request for the extension excluded micro, small, and medium undertakings.⁷²

The main social partners with a seat on the Standing Committee for Social Concertation opposed this change, stating that it undermined collective bargaining, since it 'favours disloyal competition, desegregates employers and removes incentives for their affiliation, fosters informal economic activity and deadly hurts collective bargaining' (quotation from CIP – Confederation of Portuguese Industry).⁷³

The enactment of this Resolution led to blockages in sectoral bargaining and the subsequent drastic fall in the number of new collective agreements concluded, as well as in the number of employees they covered. This outcome might indicate that social partners are less inclined to conclude agreements when there are no guarantees that these commitments will, later on, also apply to their competitors.⁷⁴

Conversely, there was an increase in the number of collective agreements concluded at company level (which, in some years - such as 2012, 2013, or 2017 - surpassed the number of sectoral level agreements).⁷⁵

70. See footnote 43.

71. There are no official statistics concerning union density in Portugal. Nevertheless, according to the estimation provided by the Ministry of Labour, in the private sector, trade union affiliation in 2016 was around 8.3%. In that same year, collective agreements covered around 87.5% of the employees of the private sector. Data available at MINISTÉRIO DO TRABALHO, SOLIDARIEDADE E SEGURANÇA SOCIAL, *Atualização do Livro Verde sobre as Relações Laborais* 2016, 13-14 (available at <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBAAB%2bLCAAAAAABAAZMTA3AgDOPLYiBAAAAA%3d%3d>).

72. For further developments on this issue, see A. T. RIBEIRO, 'The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs', in *Employment relations and transformation of the enterprise in the global economy. Proceedings of the thirteenth international conference in commemoration of Marco Biagi*, Giappichelli Editore, Torino, 2016, 247-262.

73. See I. TÁVORA/ P. GONZÁLEZ, *op. cit.*, 347-349.

74. M. P. CAMPOS LIMA/M. ABRANTES (*Diadse – Dialogue for advancing social Europe. Country report: Portugal* 2016, 25-26, available at https://www.cesis.org/admin/modulo_projects/upload/files/DIADSE_Portugal%20Report.pdf) provide declarations from an employers' confederation that reflect this tendency.

75. See CENTRO DE RELAÇÕES LABORAIS (CRL), *Relatório Anual sobre Negociação Coletiva – 2015*, 31, available at: <https://www.crlaborais.pt/negociacao-coletiva-relatorios>; CENTRO DE RELAÇÕES LABORAIS (CRL), *A Negociação coletiva em números – 2005-2016*, 10-11, available at: <https://www.crlaborais.pt/inf-estatistica>; *Livro Verde sobre as Relações Laborais* 2016, 395 ff. (available at: <http://cite.gov.pt/pt/destaques/noticia613.html>); MINISTÉRIO DO

After the end of the adjustment programme, the Resolution of the Council of Ministers no. 43/2014 of 27 June introduced greater flexibility in this process, determining that the employers' associations would only need to comply with one of the following criteria: i) the employers represented by the signatory employers' association employed at least 50% of the employees of that sector of activity, within the envisaged geographic, personal, and professional scope; or ii) at least 30% of the affiliates of the employers' association signing the agreement were micro, small, and medium companies.⁷⁶ This measure was criticised by the European Commission, for constituting 'a major setback in the reform of collective bargaining in Portugal' However, its effects were limited since micro, small, and medium companies (which constitute the dominant typology in the Portuguese business fabric) display lower rates of affiliation to employers' organisations.⁷⁷

The reduction of administrative extensions of collective agreements might have been more effective than the decentralisation-aimed measures at fostering wage adjustments at company level. In fact, aside from the aforementioned fall in the number of new agreements concluded, there was a noticeable delay in the updating of the pay scales enshrined in collective agreements,⁷⁸ and between 2012 and 2015 the salary increases were insufficient to prevent a reduction in the workers' purchasing power.⁷⁹

In 2017, the current government revoked the aforementioned diplomas through the Resolution of the Council of Ministers no. 82/2017 in order to promote the administrative extension of collective agreements, and defined new elements that the Minister of Labour should consider when deciding whether to grant an extension, including: i) the impact on employees' wages, so as to benchmark the possible economic impacts of extension; ii) the salary increase; iii) the impact on salary range and the reduction of inequalities within the scope of the collective agreement to be extended; iv) the percentage of employees to be covered (in total and by gender); and v) the proportion of women covered.⁸⁰

TRABALHO, SOLIDARIEDADE E SEGURANÇA SOCIAL, *Atualização do Livro Verde sobre as Relações Laborais*, cit., 11.

76. This measure led to the increase in administrative extensions, which went from merely 12 and nine, respectively, in 2012 and 2013, to 13, 36, and 35, respectively, in 2014, 2015, and 2016 – see MINISTÉRIO DO TRABALHO, SOLIDARIEDADE E SEGURANÇA SOCIAL, *Atualização do Livro Verde sobre as Relações Laborais*, cit., 12.

77. Numbers available at MINISTÉRIO DO TRABALHO, SOLIDARIEDADE E SEGURANÇA SOCIAL, *Atualização do Livro Verde sobre as Relações Laborais*, cit., 15.

78. See DGERT, *Relatório sobre regulamentação coletiva publicada no ano de 2013*, 7 (available at: https://www.dgert.gov.pt/wp-content/uploads/2016/02/2013_vmpi_anual.pdf); DGERT, *Relatório sobre regulamentação coletiva publicada no ano de 2014*, 5 (available at: https://www.dgert.gov.pt/wp-content/uploads/2015/12/2014_vmpi_anual.pdf); DGERT, *Relatório sobre regulamentação coletiva publicada no ano de 2015*, 5 (available at: https://www.dgert.gov.pt/wp-content/uploads/2016/02/2015_vmpi_anual.pdf). As shown in these reports, the delay was particularly lengthy between 2013 and 2016.

79. See DGERT, *Regulamentação coletiva de trabalho publicada em 2016 em números*, 13 (available at: <https://www.dgert.gov.pt/wp-content/uploads/2018/02/Rel.-RCT-2016.-DGERT.pdf>).

80. The recovering trajectory that both collective agreements and administrative extensions had been experiencing since 2017 was interrupted with the COVID-19 pandemic. In fact, in 2020, there were merely 169 new collective agreements concluded, which meant a return to the 2011 numbers (although there were 49 administrative extensions, contrasting with the 17 that had been granted in 2011) – see CENTRO DE RELAÇÕES LABORAIS (CRL), *Relatório Anual sobre Negociação Coletiva em 2020*, 52 (available at <https://www.crlaborais.pt/documents/10182/13326/Relat%C3%B3rio+Anual+Negocia%C3%A7%C3%A3o+Coletiva+em+2020/28ecbe79-0b9d-4910-bb16-1a45a5ba8e98>).

IV. Final remarks

Generally, the reforms we have explored in this article resulted in lower total earnings for a significant proportion of employees, extended working time periods (without additional pay) and more flexible working time schemes, easier and lower-cost dismissals, and a severe erosion of collective bargaining.⁸¹ It should be noted that while these measures were chiefly motivated by the MoU and its demands, some of them had been under consideration for a while and follow the deregulation and flexibilisation trends that had been present in Portuguese legislation since the adoption of the 2003 Labour Code.⁸²

In turn, the unemployment rate only started to decline after the reversal of some austerity measures operated by the left-wing government elected in November 2015. However, it is unclear whether this decline is an outcome of the austerity measures or, on the contrary, a consequence of the reversal of such measures, or even just an effect of other cyclical changes.

To the EU authorities,⁸³ the merit lies with the austerity measures since the labour market reforms ‘improved incentives for job creation’, while the high levels of long-term and youth unemployment may be due to ‘some aspects of the legal framework’, which ‘discourage firms from hiring workers on open-ended contracts’. In particular, employers face high and uncertain firing costs when individual dismissals are deemed unfair. ‘This is due in part to the possibility of a worker being reinstated if the dismissal is deemed unfair, and to inefficiencies in legal proceedings’.⁸⁴ Consequently, there is a belief that the road to reducing unemployment is paved with easier dismissals.

There are three key findings concerning the 3,343,255 employment contracts concluded between November 2013 and May 2017:⁸⁵

81. Act no. 23/2012 and the State Budgets of 2011, 2012, and 2013 (among other measures) were analysed by the Committee on Freedom of Association (of the ILO). This body acknowledged that several of the ‘crisis’ measures had been discussed by social partners, on the Standing Committee on Social Dialogue, and had been approved by a large consensus – see 376th Report, case 3072. However, it should be underlined that, on the one hand, on the employees’ side, only the General Union of Workers (*União Geral dos Trabalhadores*) agreed to it (since the General Confederation of Portuguese Workers refused to do so), and, on the other hand, the Portuguese Standing Committee on Social Dialogue’s composition is not determined by criteria of representativeness (which are lacking in the Portuguese industrial relations system).

82. As acknowledged by both trade unions and employers’ associations – see M. P. CAMPOS LIMA/M. ABRANTES, *op. cit.*, 25–26. For that reason, some authors believe that the crisis rhetoric was used as a tool to encroach on the employees’ rights – see J. J. ABRANTES, ‘A jurisprudência constitucional recente em matéria laboral (algumas notas)’, *Para Jorge Leite. Escritos jurídico-laborais*, vol. I, Coimbra, Coimbra Editora, 2014, 13.

83. See S. CLAUWAERT, *op. cit.*, 60; EUROPEAN COMMISSION, *Recommendation for a Council Recommendation on the 2017 National Reform Programme of Portugal and delivering a Council opinion on the 2017 Stability Programme of Portugal*, Brussels, 22.5.2017, COM(2017) 521 final, 5.

84. EUROPEAN COMMISSION, *Recommendation for a Council Recommendation on the 2017 National Reform Programme of Portugal and delivering a Council opinion on the 2017 Stability Programme of Portugal*, Brussels, 22.5.2017, COM(2017) 521 final, 5–6.

85. J. RAMOS DE ALMEIDA, ‘Novo emprego. Que emprego?’ *Barómetro das Crises* 2017, no. 16, available at: http://www.ces.uc.pt/observatorios/crisalt/documentos/barometro/16BarometroCrises_Novo_emprego.pdf. Since the beginning of the pandemic until the second half of 2021, around 172,600 jobs were lost. Of these, 153,300 were fixed-term contracts and 32,400 were other forms of precarious employment (namely, bogus self-employment). From the second half of 2020 onwards, there was more job creation, but, particularly between the third trimesters of 2020 and 2021, 61% of these new contracts were precarious (fixed-term contracts, bogus self-employment, and so on). This means that precarious workers were most affected by the job losses caused by the pandemic and they are also the basis of job recovery –

- (i) there is a downward trend regarding open-ended contracts;
- (ii) there are 'a myriad of non-permanent contracts of short duration, many of them temporary and/or part-time, in permanent rotation for the same job or even for the same worker';
- (iii) there is a tendency for wages to deteriorate (which was not more pronounced as the proximity of the legislative elections in 2015 and the commitments of the government led to three increases in the national minimum wage).

Labour market segmentation has been a long-standing feature of the Portuguese labour market, and, according to the ILO,⁸⁶ Portugal has one of the highest rates of temporary employment in Europe. This segmentation is predominantly contractual and is linked to a co-existence of several types of contracts,⁸⁷ notably, standard employment contracts (open-ended), temporary contracts (fixed-term, task- or project-based, and casual)⁸⁸ and temporary agency work, but also 'independent contractors', including an elevated rate of bogus self-employment, outsourcing of services, and informal work in general.

Despite the considerable reduction in the level of employment protection, this scenario has not changed. In fact, the relative level of temporary employment has not been affected and the level of involuntary temporary employment has remained stable.⁸⁹ Even during the crisis, temporary employment remained virtually unchanged, with only a two-percentage point dip between 2008 and 2012, which means that the adjustment happened primarily at the expense of permanent employment.⁹⁰ By 2012, the share of fixed-term contracts among new hires reached over 75%. Thus, the reforms seem not only to have failed to improve the existing segmentation problem, but also to have helped maintain the level of temporary employment in a situation where it could have decreased naturally.⁹¹ At the same time, undeclared work, including bogus self-employment, escalated to avoid labour market exclusion.⁹²

In sum, the measures adopted following the financial crisis were not only unable to fix standing problems of the Portuguese labour market, but also had crippling effects on social rights in general and, most particularly, on workers' rights.

As we previously underlined, following the 2015 elections, the new left-wing government started to reverse some of the measures previously adopted, following the MoU impositions.

see J. RAMOS DE ALMEIDA, 'À saída da pandemia: precariedade, baixos salários e estagnação', *Barómetro das Crises* 2021, no. 24, 4-5.

86. ILO, *Non-standard employment around the world: understanding challenges, shaping prospects*, Geneva, 2016, 53; ILO, *Decent work in Portugal 2008–18. From crisis to recovery*, Geneva, 2018, 51.

87. ILO, *Decent work in Portugal 2008–18. From crisis to recovery*, Geneva, 2018, 51.

88. *Idem*, *ibidem*.

89. ILO, *Decent work in Portugal 2008–18*, *cit.*, 62.

90. ILO, *Decent work in Portugal 2008–18*, *cit.*, 58.

91. ILO, *Decent work in Portugal 2008–18*, *cit.*, 58.

92. According to MINISTÉRIO DO TRABALHO, SOLIDARIEDADE E SEGURANÇA SOCIAL, *Livro Verde sobre as Relações Laborais* (December 2016, 179-180, available at http://cite.gov.pt/pt/destaques/complementosDestqs2/LIVRO_VERDE_2016.pdf), the volume of self-employed workers increased especially in the worst-performing labour market years. This shows that this type of work assumes greater visibility in periods of high unemployment, as a form of response to unemployment. Between 2011 and 2014, Portugal had a much higher self-employment rate than the European average, a situation that only started to change in 2015. Another important manifestation of contractual segmentation is that transitions between contractual statuses are low. This means that not only is the share of temporary contracts high, but workers are 'locked' in the temporary status – see ILO, *Decent work in Portugal 2008–18*, *cit.*, 51. It is estimated that the yearly probability of transiting from a temporary to a permanent job was only 12% in Portugal (2004 data).

The minimum wage was increased; public employees' pay cuts were progressively lifted; the four public holidays that had been removed were restored; the maximum working time limits for public employees were reduced to the previous 35 hours per week; and the conditions regarding the administrative extension of collective agreements were alleviated. However, some of the most significant measures regarding the labour regulation were maintained, such as the reduction of severance payments in cases of dismissal or other forms of contract termination, the reduction of additional pay for overtime work, the new rules for the temporal efficacy and suspension of collective agreements, and the reduction of annual leave, among others.⁹³

This shows that even though bailout reforms may not be very resilient,⁹⁴ they do leave their mark, particularly when they correspond to measures that had already been previously under discussion and whose implementation can be supported by an external imposition such as the MoU.

93. As stressed by C. MOURY/D. CARDOSO/A. GAGO, 'When the lenders leave town: Veto players, electoral calculations and vested interests as determinants of policy reversals in Spain and Portugal', *South European Society and Politics* 2019, vol. 24, no. 2, 13.

94. *Id.*, *ibidem*, 23.