CRISIS AND LABOUR LAW

RECENT DEVELOPMENTS IN PORTUGUESE LABOUR LAW*

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Abstract

The present study exposes the main features of the recent changes introduced in Portuguese labour law, following the severe crisis the country went through and the external financial aid it required. It addresses separately the alterations implemented in individual labour law and collective labour law, pinpointing the main developments verified in these areas and the driving forces behind them.

Aside from an explanatory perspective (that covers the previous and the currents traits of the labour regime), this article also provides a critical point of view, regarding the consequences of these changes and the reactions they provoked amongst Portuguese society and its social partners.

Keywords: crisis; Memorandum of Understanding; Portuguese labour law; Recent developments

1. INTRODUCTION

This study offers a succinct overview of the main (and recent) developments introduced both in individual and collective labour relations under the Portuguese regime.

These changes go back to 2011 and the driving forces behind them were the Memoranda[1] agreed between the Portuguese State and the so-called *Troika*, the latter composed by the European Commission, the European Central Bank and the International Monetary Fund.

In fact, as it is widely known, Portugal was particularly affected by the financial and economic crisis. And in order to ensure the country's commitments, the State

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** All the rules, mentioned in this article, lacking reference to any legal instrument, belong to the Portuguese Labour Code.

1 Romano Martinez, 'O código do trabalho e a reforma de 2012. Apreciação geral', *Revista de direito e estudos sociais*, 53, no. 1–2, 2012, p. 12.

was forced to request external financial aid. This assistance was granted under the condition that Portugal would implement a series of structural reforms, regarding fiscal policy, the financial sector regulation and supervision; the budgetary framework; the health care system; public-private partnerships; state-owned enterprises; the public administration; education; the goods and service markets; housing markets; the judicial system, and so on.

Naturally, labour law was not exempt from these demands (quite the contrary) and the *Memorandum of Understanding on Specific Economic Policy Conditionality* of 17th May 2011[2] contained a significant number of impositions and recommendations concerning this domain. The key purpose of these measures was to diminish the risk of long-term unemployment, to reduce the labour market segmentation, to foster job creation and to ease the transition of workers from jobs, firms and sectors.[3] They were implemented progressively, with the introduction of the necessary amendments to statute.

Aside from the general picture of the reforms, this article also provides for a discussion of their impact and of how they relate to the principles of the Portuguese Labour Law. And as it is further demonstrated, it is clear that the measures imposed by the Memorandum caused tensions in the labour law system in Portugal, in light of guarantees offered by the Portuguese Constitutional Court and fundamental rights protection.

Due to lack of opportunity, we do not address the actions that aimed at the labour relations of civil servants. Indeed, they are also quite numerous and would require a whole article devoted merely to this subject. However, and in order to provide an overall picture, the main innovations on this chapter were: the promotion of civil servants' mobility (within local, regional and central administration); the revision of the salary policy; the limitation of promotions and the freezing of wages and hiring; the cutting-back of costs related with health systems; and the reduction of pensions above a certain amount.

2. DEVELOPMENTS IN INDIVIDUAL LABOUR LAW

2.1. UNEMPLOYMENT BENEFITS AND SEVERANCE PAYMENTS

Having the abovementioned intentions in mind, the Memorandum stated, among other things, that the maximum duration of unemployment benefits should be reduced to no more than 18 months.[4] And it asked, as well, for the diminishing of the amount paid to employees under these circumstances.[5]

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2 This Memorandum, as well as the *Memorandum of Economic and Financial Policies* and the *Technical Memorandum of Understanding*, can all be found, both English and Portuguese versions, at www.portugal.gov.pt/pt/os-temas/memorandos/memorandos.aspx.

3 Paragraph 4 of the Memorandum.

4 Whereas previously its maximum duration was of three years.

5 Paragraphs 4. 1. i), and ii), of the Memorandum.

This demand was materialised in *Decree-law no. 64/2012*,[6] 15th March. Additionally, *Decree-law no. 65/2012*, 15th March, extended the unemployment benefits to some categories of self-employed workers that provide their services to a single firm on regular basis, in accordance with paragraph 4. 1. iv), of the Memorandum.

Severance payments were also targeted, since the Memorandum required their decrease and alignment with the prevailing average in the EU. However, Bernardo Lobo Xavier[7] stresses that, although severance parameters were, indeed, lower in other European countries, their wages are higher and collective bargaining, as well as social plans, substantially raise legal compensations. Therefore, this alignment was more illusory than real.

Still, this led to the downgrading of severance payments due to employees in case of extinction of the work post, employee's unsuitability and collective terminations – which was put into practice in a phased manner.

In its original wording, Article 366 of the Labour Code provided for a compensation of one month for each complete year of service.[8] There was no maximum limit and collective agreements could elevate this amount. Additionally, the Code established a three-month payment amount as a minimum compensation.

The one-month payment (per complete year of seniority) was reduced to 20 days with *Act no. 53/2011*, 14th October. Furthermore, this legal instrument determined that the final amount cannot be higher than 12 months of salary (and the monthly salary used for these sums cannot be higher than 20 minimum wages). However, this new calculation method was merely applicable to employees whose contracts were signed after the new rules entered into force.

Later on, *Act no. 23/2012*, 25th June, extended this rule to all contracts. Yet, this legal instrument predicated an intricate set of transitional rules applicable to employees admitted to service before this Act entered into force. This technique was afterwards replicated by *Act no. 69/2013*, 30th August, which reduced the 20 days' payment to 12 days[9] per complete year of tenure.

The current transitional regime differentiates labour contracts according to the moment they were signed.

In relation to open-term contracts entered into before 1st November 2011 (Article 5, no. 1, *Act no. 69/2013*):

i) Regarding the execution period until 31st October 2012, the compensation will correspond to one-month pay for each complete year of seniority.

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6 All the legal instruments mentioned in this study can be found at the national online database: www.dre.pt.

7 Bernardo Lobo Xavier, 'Compensação por despedimento', *Revista de direito e estudos sociais*, 53, no. 1–2, p. 76.

8 The year fractions are calculated in a proportionate manner – Article 366, no. 2.

9 The Memorandum demanded a reduction to 10 days, but this intent, as of now, has not yet been fulfilled.

ii) Concerning the execution period comprehended between 1st November 2012 and 30th September 2013, the compensation amount corresponds to 20 days of pay;
iii) Finally, the rest of the execution period, verified after 1st October 2013, grants a compensation that corresponds to the following:
   - 18 days of pay for the first three years of contract, as long as its duration was not reached until 1st October 2013;
   - and 12 days of salary for the subsequent years (which is now the rule).

To the contracts made between 1st November 2011 and 30th September 2013, only rules ii) and iii) are applicable (according to Article 5, no. 3, of the same diploma). And, finally, the contracts made after 1st October 2013 are subject to the general rule of Article 366 of the Labour Code.

Another set of transitional rules was also provided for fixed-term contracts and temporary employment contracts, also distinguishing the solution according to the moment said contracts were concluded and whether they were subject to extraordinary extensions.[10]

The aim of these special regimes was to safeguard the expectations of older employees, taking into account the period of contractual execution previous to the new rule.[11] Still, even these transitional calculation methods are subject to several limitations (enshrined in Article 5, nos. 4, 5 and 6; and Article 6, nos. 4 and 5), which introduce a ceiling to the compensations paid in these cases.

The result of these continuous amendments was the creation of a very complex system[12] that hardened the task of employers in calculating the compensations their employees were due.[13] Regardless, it is considered a balanced solution, since it protects employees' expectations.[14]

2.2. GROUNDS FOR INDIVIDUAL DISMISSALS

In a related matter, and in order to try and promote the end of market segmentation, the Memorandum asked for a number of changes regarding the grounds for individual dismissals.

In fact, according to the Memorandum, if it were easier to terminate open-ended contracts, employers would more frequently resort to this form of hiring.[15] Júlio Gomes[16]

10 *Vide* Article 6 of *Act no. 63/2011*.

11 Maria Rosário Ramalho, *Tratado de direito do trabalho. Parte II – Situações laborais individuais*, 5th edition, Coimbra, Almedina, 2014, p. 1038.

12 Monteiro Fernandes, *Direito do trabalho*, 17th edition, Coimbra, Almedina, 2014, p. 569.

13 See www.publico.pt/economia/memorando-da-troika-anotado (7/08/2015).

14 Maria Rosário Ramalho, *op. cit.*, p. 1038.

15 Paragraph 4. 5., of the Memorandum.

16 Júlio Gomes, 'Algumas reflexões sobre as alterações introduzidas no código do trabalho pela lei n.º 23/2012, de 25 de junho', *Revista da ordem dos advogados*, 72, p. 578.

challenges this outlook, since everything indicates that employers hire because they have a need for manpower, and not because it is easier to dismiss.

Despite this view, the Memorandum, bearing that other idea in mind, determined that individual dismissals due to unsuitability of the employee should be possible even without the introduction of new technologies or other changes to the workplace. Furthermore, a new ground should be added targeting situations where the employee has agreed with the employer to meet specific delivery objectives and does not fulfil them, for reasons deriving exclusively from his responsibility.[17] This last imposition was dropped, during the negotiations between the government and its social partners. Still, the first one was implemented by *Act no. 23/2012* and, nowadays, Article 375, no. 2, of the Labour Code gives ground to dismissal for unsuitability without any changes to the workplace, as long as some conditions are met. Which are: the productivity or quality of the work rendered has decreased; the employer has informed the worker and offered him an opportunity to give his views on the situation and also to try and correct the issue.

The constitutionality of this provision was challenged before the Constitutional Court, on the grounds that it violated the prohibition of dismissals without a fair cause (Article 53 of the Portuguese Constitution). In fact, it was feared that this rule would lead to unjustified and arbitrary dismissals.

The Court, however, concluded that it was not the case and that the provision was valid, since there are enough guarantees to ensure a fair evaluation of the employers' performance. Plus, it would not be reasonable to force the employer to keep this worker when the decrease in quality or quantity is definitive (see *Judgment of the Constitutional Court no. 602/2013*).[18]

Act no. 23/2012 also targeted individual dismissals linked to the extinction of work positions. Indeed, the Memorandum stated that these dismissals should not have to necessarily follow a pre-defined seniority order, when more than one employee is assigned to those functions. It should only be demanded that the employer established 'a relevant and non-discriminatory alternative criterion'[19] to this effect.

Following this indication, that legal instrument modified Article 368, no. 2, of the Labour Code, determining that employers should choose these relevant and non-discriminatory criteria, in order to pick the employee whose post was to be extinguished.

The validity of this change was also questioned before the Constitutional Court, since it was believed that the new rule would allow the employer to choose the most convenient criteria in order to dismiss specific employees. It could, therefore, enable therefore 'custom-made' dismissals.

17 Paragraph 4. 5. i), of the Memorandum.

18 Available at www.tribunalconstitucional.pt/tc/acordaos/20130602.html (7/08/2015).

19 Paragraph 4. 5. ii), of the Memorandum.

The Court decided that the new provision was, indeed, incompatible with the Portuguese Constitution. Indeed, statute must determine the criteria for the selection of the affected employees, in order to prevent the employer from targeting workers he wishes to dismiss (but against whom he has got no fair cause). And allowing the employer to determine the grounds, merely stating that they should be relevant and non-discriminatory, is clearly insufficient to avoid such a danger.

Faced with this decision, the legislator chose to modify the Labour Code once again. Through *Act no. 27/2014*, the employer has to follow these hierarchised criteria: worst performance review; lower academic and professional qualifications; heavier burden in maintaining the contractual bond; less experience at the work post and less seniority.

Monteiro Fernandes[20] disagrees with the current path. In fact, the Author claims that the reason why the legislator had previously chosen to state the criteria for this sort of dismissal was another. Rather than ensuring the objectivity behind the choice of employee, it aimed at preventing discretion and discrimination and protecting workers in a more vulnerable position. However, the new requisites do not share the same goal. They were construed to try and implement objectivity. But the social idea, that was the true justification for the legislator's interference, was set aside.

Additionally, the Memorandum also stated[21] that these dismissals should not be subject to the obligation of previously attempting to transfer the employee to an available compatible position.

This rule meant that if there was any post available and compatible with the professional qualifications and the aptitude of the employee, then, the employer should offer it to him, before dismissing him.[22] Only if the employee declined this way out, would then the employer be able to proceed with the dismissal. Indeed, only then could the employer claim that it was impossible to maintain the labour relation (which is a condition for the usage of this mechanism).

This duty was present in the Portuguese regime,[23] both for dismissals due to the extinction of the work position and unsuitability of the employee. However, *Act no. 23/2012* eliminated this step and determined that, as long as the employer resorted to non-discriminatory and relevant criteria, the maintenance of the labour relation would be considered unfeasible.

Some Portuguese authors labelled the new rule as bizarre[24] and the Constitutional Court declared that this alteration was unconstitutional. It argued that the elimination of this rule made it possible to dismiss an employee when, in fact, it is feasible to

20 Monteiro Fernandes, *Direito do trabalho…*, *cit.*, pp. 397–398.

21 Paragraph 4. 5. iii), of the Memorandum.

22 See Monteiro Fernandes, *Direito do trabalho…*, *cit.*, p. 547.

23 It was the '*dever de reclassificação*', or '*repêchage*' as it is called in the French regime – *vide* Monteiro Fernandes, '*A reforma laboral continua*', *Revista da ordem dos advogados*, 74, 2014, 394.

24 See Monteiro Fernandes, *Direito do trabalho…*, *cit.*, p. 547; and Rosário Ramalho, *op. cit.*, p. 1057.

keep him in another position, which, in turn, violates the prohibition of dismissals without a fair cause, enshrined in Article 53 of the Constitution (see *Judgment of the Constitutional Court no. 602/2013*). According to this principle, these dismissals must be an *ultima ratio* measure, considering the lack of subjective ground related to the employee. This means that the employer should implement an alternative solution, when possible.

The declarations of unconstitutionality have an *erga omnes* effect and determine the reinstatement of the previous regime (Article 282, no. 1, of the Portuguese Constitution). Therefore, the obligation of attempting to transfer the worker to a suitable position was reinforced once again without further ado.

Still, and although unnecessary,[25] the legislator chose to expressly recognise this obligation and, currently, it can be found in Articles 368, no. 4, (dismissal due to the extinction of work post) and 375, no. 1, d), (dismissal due to unsuitability of the employee) of the Labour Code.

It must be stressed, however, that this obligation does not seem to cover the dismissal due to the employee's unsuitability based on the new ground (based on the change of the worker's performance, without changes to the work post).[26] In fact, this new instrument is provided by Article 375, no. 2, a), which is not targeted by the no. 1, d), of the same Article.

2.3. WORKING TIME SCHEMES

The legal intervention regarding working time arrangements is not a recent plight. It has been happening since the first Labour Code (of 2003) and its permanent aim has been to bestow greater malleability towards the employers' interests.[27]

On this chapter, the Memorandum advocated for the easier introduction and renewal of working time arrangements and short-time working schemes in case of industrial crisis.[28] Once again, this was addressed by the legislative reform of 2012, embodied in *Act no. 23/2012*.

Specifically, the Memorandum wished for the possibility of implementing a 'bank of hours' by direct agreement between employees and employer. This was accomplished with the introduction of the 'individual bank of hours' and 'group bank of hours', adding to the pre-existent 'bank of hours' – which was renamed as 'collective bank of hours'.

The collective bank of hours is instituted by a collective agreement and it allows for the normal period of a day's work to be increased up to four hours; and also the extension of the normal week's working period up to 60 hours (with the maximum

25 Monteiro Fernandes, *Direito do trabalho…*, *cit.*, p. 548.

26 Monteiro Fernandes, "A reforma…", *cit.*, p. 395.

27 Nunes de Carvalho, 'Tempo de trabalho', *Revista de direito e estudos sociais*, 53, no. 1–2, 2012, p. 22.

28 See paragraph 4. 6. i), and ii), of the Memorandum.

limit of 200 hours).[29] The collective agreement must provide for a compensation, which may correspond to extra salary, to the equivalent reduction of working time or, since 2012, to the extension of holidays.[30] However, Nunes de Carvalho[31] argues that these are not truly vacation days, since the employer will not have to pay holiday allowance.[32] These are merely extra days that can be enjoyed along with vacation days.[33]

In turn, the individual bank of hours, provided by the added Article 208-A of the Labour Code, allows the access to this expedient through an *ad hoc* agreement signed directly between employer and employee or through a general proposal from the employer, to which the workers may oppose in writing, within 14 days.[34] It enables the normal period of a day's work to be increased by up to two hours; and the extension of the normal week's working period up to 50 hours (with the maximum limit of 150 hours). Either the *ad hoc* agreement, or the general proposal shall state the compensation method for the extra work provided by the employee.[35]

Finally, the group bank of hours (see Article 208-B of the Labour Code) allows the extension of the other banks of hours (collective and individual) to employees initially unaffected by these mechanisms. This lack of initial coverage may happen because these workers are not affiliated to the trade union that entered into the agreement that provides for the collective bank of hours.[36] Or, in case of the individual bank of hours, it may occur because the employee has not signed the *ad hoc* agreement or has opposed the general proposal presented by the employer.

There are two possible scenarios for the extension:

– the agreement that provides the collective bank of hours may enable the employer to extend this regime to a group of workers, as long as it is originally applicable to 60% of the employees of that team, section, or economic entity;[37]

29 *Vide* Article 208, no. 2. These limits may be surpassed in case of business crisis (Article 208, no. 3).

30 See Article 208, no. 4.

31 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 27.

32 Similarly, Monteiro Fernandes, 'As primeiras estações da reforma laboral: tempo de trabalho, tempo de não trabalho, compensação de despedimento', *Revista de direito e estudos sociais*, 53, no. 1–2, p. 104.

33 This new regime has given rise to other practical doubts. How are these days to be scheduled? The same way other vacation days are? Is the employee entitled to any meal allowance? See Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 27–28; and Monteiro Fernandes, 'As primeiras estações…', *cit*., p. 104.

34 *Vide* Article 205, no. 5, *ex vi* Article 208-A, no. 2.

35 The compensation possibilities are the same as in the collective bank of hours.

36 As this study explains ahead, due to the principle of affiliation (see Article 496), collective agreements only apply to employees affiliated to the trade unions that entered into these instruments.

37 See Articles 206, no. 1, *ex vi* 208-B, no. 1.

– if the general proposal, aimed at the individual bank of hours, is accepted by, at least, 75% of a team, section, or economic entity, the employer may apply the same scheme to the remaining workers of that structure.[38]

There is a safety valve that exempts employees covered by a collective agreement that provides for an opposing regime or, regarding the first scenario, an employee affiliated to a trade union that opposed the extension of the collective agreement in question.[39]

The bank of hours, in all of its forms, carries dubious aspects. For instance, the notions of team, section, and economic entity, as well as the measurement of the threshold percentages are imprecise.[40] And this uncertainty enables the employer with a higher degree of discretion.

It is also peculiar that the law omitted any reference to a possible opposition on the part of the employees, since they may be seriously harmed by the enforcement of this regime, particularly when this option is available among other mechanisms, such as overtime work, *ius variandi*, or individual transfer. Additionally, the Constitution (see Article 59, no. 1, b)) encompasses the protection of the employee's personal and family life. Evoking these elements, Nunes de Carvalho[41] concludes with the existence of a legal gap, which must be filled resorting to the principles of labour law and also parallel dispositions of the Labour Code, and upholds the employee's right to oppose to the application of the group bank of hours.

Furthermore, the Author criticises the legal option of facilitating the access to such an vague mechanism. Rather than enabling it and creating further doubts, the legislator should have clarified the previous issues.[42]

On the other hand, Nunes de Carvalho[43] claims that the collective bank of hours should have been given a prominent role, only allowing the usage of the other options when, following a serious negotiation, an agreement is unattainable. In fact, the individual agreements may frequently hide a unilateral imposition.[44] Plus, the Memorandum merely required the possibility of implementing a bank of hours through an agreement signed by employer and employees at company level. This means that other solutions were also open, such as the negotiation between employer and the employees' representative structures.[45]

38 *Vide* Articles 206, no. 3, *ex vi* 208-B, no. 2.

39 See Article 208-B, no. 3.

40 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 32–33.

41 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 33–35. See also Monteiro Fernandes, 'As primeiras estações…', *cit*., p. 103.

42 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 36.

43 *Idem*, *ibidem*.

44 See also Monteiro Fernandes, 'As primeiras estações…', *cit*., p. 103.

45 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 30.

In turn, Júlio Gomes[46] maintains that the creation of the new types of bank of hours translates the legislator's reaction to the lack of success this mechanism had in some sectors merely through collective bargaining. For the Author, this denotes that the legislator's respect regarding the right to collective bargaining only exists if and as long as it is able to produce the intended results. More than promoting collective bargaining, the goal is to create a 'remote-controlled' collective bargaining system.

The Constitutional Court was also called to evaluate the compatibility of these mechanisms with the Constitution (see *Judgment of the Constitutional Court no. 602/2013*). Indeed, the petitioners stated that the employees were put in a vulnerable position with an individual bank of hours, since it is very difficult for them to refuse such a deal. In turn, the group bank of hours enforces a work time regime without the workers' consent. Additionally, it violates freedom of association, for it applies the conditions of a collective agreement to a worker that lacks affiliation to the signing trade union. Besides, either of them aggravates the conciliation between professional activity and personal and family life (which is safeguarded by the Constitution – see Article 59, no. 1, b)).

The Constitutional Court, however, decided that both individual and group banks of hours were in line with the Constitution. Regarding the first, it stated that the opposition of the employers, as long as given in writing, is perfectly suitable to shun this regime. Concerning the second one, it argued that the affected employees would not be excessively burdened. In fact, the regime must be applicable to either 60% or 75% of the remaining workers of that group, which means that the majority of the employees have deemed this regime acceptable. Additionally, it considered that there was no violation of freedom of association because the root of the employers' power lies not with the collective agreement, but it rather derives comes from statute. And even if it came from collective agreements, the Constitution enables their extension to employees lacking affiliation with the signing trade union, anyway.

We do not share the Court's point of view. Particularly, regarding the group bank of hours, although the Constitution allows for the extension of collective agreements, as we will see ahead, this possibility must be carefully weighed. Notably, the representativeness of trade unions should be ensured (which does not happen under Portuguese law). Besides, this is a peculiar kind of extension, since it merely applies part of the agreement. Collective agreements are the product of negotiation. This means that, while it supplies the bank of hours, the agreement, most likely, offers some kind of benefit towards the employees (aside from the methods of compensation provided by statute). However, the workers affected by the group bank of hours will only have access to its legal regime, without those other benefits. It is an extension merely *in pejus*. Therefore, in our opinion, the group bank of hours violates the freedom of association and is, at least, partially unconstitutional.

46 Júlio Gomes, 'Algumas reflexões…', *cit*., p. 607.

Moving to another subject, and as we mentioned in the beginning of this subsection, the Memorandum also advocated an easier introduction and renewal of short-time working schemes in case of industrial crisis. To comply with this demand, *Act no. 23/2012* produced several modifications in the regime of *lay-off*. In fact, this measure allows for the suspension of labour contracts (or the reduction of working time) when the business has been affected (due to market, structural, or technological reasons; or to the occurrence of catastrophes). However, the suspension or reduction must be deemed necessary to ensure the company's viability and the labour posts.[47]

Act no. 23/2012 added that, in order to access this regime, the enterprise must have its tax and social security obligations fulfilled.[48] This demand has a moralising intention, since the enforcement of this mechanism implies economic support from the State (during this time, the greater part of the employees' salaries will be paid with public funds).[49] However, it may be an excessive demand for enterprises dealing with a crisis scenario. In fact, in these situations, these obligations are frequently the first to be set aside.[50]

That legal instrument also inserted a new Article into the Labour Code (298-A) according to which the employer may only resort again to lay-off after the fulfilment of a moratorium (merely after the passing of half the time for which the measure was applied). This period of time may be reduced by an agreement between the employer and the employees' representative structures (or in their absence, with the affected employees directly). The intent was to avoid continuous usage of this measure, ensuring the rationalisation of public funds.

However, the rule presents some shortcomings. In fact, there is no limit for the reduction operated by agreement, which means that, although the moratorium cannot be suppressed, it may be substantially reduced.[51] On the other hand, since the rule mentions the entering into agreement with the employees previously affected, it seems that there will be no moratorium if the new lay-off applies to workers who were not included before.[52] And, finally, since considering that public funds are at stake, it is peculiar that the moratorium may be set aside by a simple agreement between employer and employees.[53]

Still on this chapter, and in order to expedite this measure, *Act no. 23/2012* shortened the deadlines for the communications and negotiations necessary to its implementation (see Articles 299 to 301).

47 *Vide* Article 298, no. 1.

48 See Article 298, no. 4.

49 *Vide* Article 305, no. 4.

50 Also questioning whether this requisite is narrowing disproportionately the lay-off's scope of application, see Nunes de Carvalho, 'Suspensão ou redução de laboração em situação de crise empresarial', *Revista de direito e estudos sociais*, 53, no. 1–2, 2012, p. 136.

51 Nunes de Carvalho, *ibidem*, p. 136.

52 Nunes de Carvalho, *ibidem*, p. 136–137.

53 *Idem*, *ibidem*, p. 137.

2.4. OVERTIME WORK AND PUBLIC HOLIDAYS

Another set of requests from the Memorandum aimed at the regulation of overtime work. In fact, this document asked for the reduction of the minimum additional pay to a maximum 50%.

Previously, according to the Labour Code, employees were granted an extra 50% pay for the first hour of overtime work, 75% for the additional hours and 100% for overtime during holidays.

The Memorandum also demanded the elimination of the compensatory time off, equal to 25% of hours of overtime work.[54]

These recommendations were implemented in the 2012 labour reform, embodied in *Act no. 23/2012*, which revoked Article 229, nos. 1, 2, and 6, (compensatory time off) and changed Articles 268 and 269 (payment of overtime work) of the Labour Code.

The Constitutional Court was asked to analyse the constitutional conformity of these changes and decided that they were valid (see *Judgment of the Constitutional Court no. 602/2013*). The petitioners claimed that the new regulation of overtime reduced salaries and the value of work, and violated the right to rest and leisure. However, the Court argued that since the payment of overtime work and salaries are different realities, the employees' salaries were not affected. Additionally, it is possible to provide for a more favourable regime through collective bargaining.

However, the legislative measures implemented by *Act no. 23/2012* went beyond what had been asked by the Memorandum. Indeed, the Labour Code provided extra holidays, as a prize for attendance,[55] which could go, by law, to as many as three days. This measure was implemented in 2003, as an incentive for employees' attendance. It granted up to three extra days of holidays, adding to the 22 week days (see Article 238, no. 1), in case of perfect attendance or a reduced number of absences. And, by collective agreement, this increase could be even more generous. This notion was eliminated in 2012, although the Memorandum made no reference to it.

Furthermore, despite being absent from the conditions stated in the Memorandum, four holidays were eliminated by this reform: 5th October and 1st December (public holidays) and 1st November and Corpus Christi day (religious holidays).[56]

It was also determined that when an employee is absent from work in the previous or subsequent day to a public holiday or the day of rest, the salary loss will be doubled (see Article 256, no. 3).

These changes represent a shift of paradigm. In fact, we went from a model of incentives to attendance to an alternative of prevention and greater penalty for

54 The Memorandum stated, however, the possibility of such norms being revised, upwards and downwards, by collective bargaining – according to paragraph 4. 6. ii), of the Memorandum.

55 Previous wording of Article 238, no. 3.

56 See Article 234, no. 1.

absenteeism.[57] Monteiro Fernandes[58] criticises the aggressive nature of the new rules, since the penalty for unjustified absences was already severe (loss of payment, disciplinary relevance and ground for dismissal). In addition, Portuguese absenteeism (one of the highest in Europe) is almost entirely composed of justified absences, related to illness and other causes.

Called in to evaluate the new rules, the Constitutional Court stated that they were in accordance with the Portuguese Constitution. The petitioners held that this modification violated the right to rest, leisure, paid holidays and the conciliation of professional and personal life. However, and regarding public holidays, the Court argued that they do not represent a worker's right, but rather an employers' duty towards the State. So the elimination of some of these days did not offend the workers' rights. On the other hand, the aim of the holidays' increase was not to increment the employees' vacation period. Indeed, its purpose was to fight absenteeism. It was a political choice and the Legislator was entitled to withdraw it (as he did).

2.5. EXTRA MEASURES

Aside from the changes to the legal regime, the legislator tried to ensure that the reform would also include the pre-existing collective agreements that covered these subjects. The idea was to create a protective barrier against the 'past'.[59]

Aiming at this intention, Article 7, of *Act no. 23/2012*, determined that the clauses of such agreements were to be:

- null and void (when disposing over severance payments, in case of extinction of the work post, unsuitability of the employee or collective termination; and when providing for a compensatory time off regarding overtime work);[60]
- reduced (when granting extra holidays – as a prize for attendance – beyond three days. The increment was reduced to three days);[61]
- and suspended (when conceding an additional payment for overtime work, higher than the one provided by statute).[62]

Several Authors characterised this rule as bizarre. Particularly where it determined the clauses to be null and void, since they lacked any internal or formative vice.

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57 Teresa Teixeira Motta, 'Férias, feriados e faltas', *Revista de direito e estudos sociais*, 53, no. 1–2, 2012, p. 60.

58 Monteiro Fernandes, 'As primeiras estações…', *cit.*, p. 106.

59 Monteiro Fernandes, 'A "reforma laboral" de 2012. Observações em torno da Lei 23/2012', *Revista da ordem dos advogados*, 72, 2012, p. 558.

60 See Article 7, nos. 1 and 2, of *Act no. 23/2012*.

61 *Vide* Article 7, nos. 3, of *Act no. 23/2012*.

62 See Article 7, nos. 4, of *Act no. 23/2012*. It was also determined that if, within two years, the suspended clauses were not altered, the sums they provided should be reduced to half (with the limit of the amount enshrined in statute) – according to Article 7, no. 5.

The legislator should, therefore, have chosen a different path, such as loss of efficacy through legal revocation.[63]

Once again, the Constitutional Court was called in to pronounce itself regarding the validity of these norms. The petition claimed that they were all invalid, since they violated the right to collective bargaining. In fact, the subjects addressed by these clauses (now at stake) are part of the 'reserve' of collective bargaining (a fundamental right, enshrined in Article 56 of the Constitution), which prevents any legislative intervention. In addition, the nullity and reduction of these clauses clashed with the principle of legitimate expectations (provided by Article 2 of the Constitution, as a consequence of the Democratic State).

The Court argued that, in relation to the severance payments, there was no interference with the 'reserve' of collective bargaining. In fact, this regime is highly imperative, which means that collective agreements are merely able to determine some of its aspects.

However, it recognised that matters were different regarding the compensatory time off in case of overtime work and the increase of holidays. In fact, the regulation of these matters is negotiable by collective agreements and it is a field particularly devoted to collective bargaining. In this case, these legal rules were interfering with the reserve of collective bargaining. And the Court considered that this meddling was not proportionate to its intentions.

As the Court stressed, it is possible for the legislator to restrict fundamental rights. However, this intervention must be necessary, adequate, and proportionate to its purpose (besides respecting the essential core of the rights in question).[64]

Considering that new agreements could provide the same set of clauses on these subjects, the intervention in the previous agreements was unnecessary and inadequate to its finality (which was the standardisation of labour conditions). And, for this reason, it was also unconstitutional.

In turn, the suspension of clauses that provided additional pay for overtime work higher than the legal regime was considered valid. The Court argued that this suspension affected not only the previous but also the new agreements celebrated for a period of two years. Therefore, although interfering with the reserve of collective bargaining, this measure was adequate to fulfil its purpose.[65]

This last rule, as well as the other relating to severance payments, was also subjected to a reading in light of the principle of legitimate expectations. And the Court stated

63 Nunes de Carvalho, 'Tempo de trabalho', *cit*., p. 37–38; Monteiro Fernandes, 'A "reforma laboral" de…', *cit*., p. 558.

64 See Article 18, nos. 2 and 3, of the Portuguese Constitution.

65 However, the reduction to half of these amounts, mentioned in fn. 63, was deemed unconstitutional. The Court stated that this measure meddled with the reserve of collective bargaining and it was not adequate to reach its purpose. In fact, after these two years, new agreements would be able to provide for more favourable regimes. So it was unnecessary to reduce previous agreements. Therefore, this rule failed to fulfil the conditions mentioned in Article 18 of the Constitution.

that since they both lacked retroactive effects (they merely had retrospective efficacy), those expectations were safeguarded. On the other hand, collective agreements are not supposed to last indefinitely, so their effects naturally have a temporally limited efficacy. And, finally, these actions are necessary and legitimate in a context of financial and economic crisis that justifies the superimposition of the public interest in relation to individual needs. In conclusion, the principle of legitimate expectations was not deemed violated and these rules were considered valid.

2.6. MINIMUM WAGE

Finally, the Memorandum also targeted minimum wage. It stated that 'over the programme period, any increase in the minimum wage will take place only if justified by economic and labour market developments and agreed in the framework of the programme review'.[66]

It happens that minimum wage is the subject of ILO Convention no. 131 and also of Article 59, no. 2, a), of the Portuguese Constitution. And according to this last rule, each year the State must determine this amount. And, to do this, it must take into account the level of economic development and stability, the productivity, but also the needs of the workers and the increase in cost of living (in line with Convention no. 131).

There was, therefore, a clash of views regarding minimum wage. The *Troika* merely saw it as a productive cost. However, the Constitution and ILO see it also as an indispensable condition for a decent existence.[67] This last perspective criticises the usage of low wage policies to promote economic and social development.

However, in the Memorandum, the government pledged not to raise minimum wage for the duration of the programme, unless the *Troika* gave its consent. Evidently, the Constitution does not prohibit the maintenance of the minimum wage's amount in situations of true national disgrace. Yet, it is possible to determine different minimum wages, according to the characteristics of each sector or even enterprise. Although this is not the current option, the legislator has previously implemented that solution. For this reason, some Authors question the constitutionality of this imposition, since it froze the minimum wage not only for debilitated companies, but also for the profitable and stable ones. Furthermore, this policy was insensitive to the existence of primary social needs, precisely when the country was going through a general and extraordinary increase in the cost of life, deepening the inequalities in one of the most unequal countries of the EU.[68] Not to mention that, in case of improvement of Portugal's financial and economic state, it would still be necessary to obtain the *Troika*'s approval to change the amount of minimum wages.

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66 See paragraph 4. 7. i), of the Memorandum.

67 João Reis, 'Troika e alterações no direito laboral coletivo', in *O memorando da "troika" e as empresas*, Coimbra, Almedina, 2012, p. 136.

68 João Reis, *op. cit.*, p. 137–138.

Despite these objections, the minimum wage stayed untouched (at 485 euros) from 2011, until recently *Decree-Law no. 144/2014*, 30th September 2014, raised it to 505 euros.[69]

3. DEVELOPMENTS IN COLLECTIVE LABOUR LAW

Aside from the innovations experienced in the individual relations, collective labour law was also subjected to a significant number of changes.

In fact, one of the main purposes of the Memorandum was to boost the competitiveness of Portuguese undertakings. And since collective agreements play a significant role in the determination of wages, and other labour costs,[70] they were particularly targeted by the labour reform.[71]

3.1. THE EXTENSION OF COLLECTIVE AGREEMENTS BY STATE INTERVENTION

Regarding this matter, the Memorandum stressed the need to define clear criteria for the extension of collective agreements. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms should be among these requisites.[72]

This demand was fulfilled by the *Resolution of the Council of Ministers no. 90/2012*. And so, according to this legal instrument, for now on, an agreement will only be open to extension by State intervention if the following conditions are met:

- the extension of an agreement must be required by its signing parties (one trade union and one employers' association);
- in order for all of the enterprises (and employees) of the sector to be included in the scope of the extension, the employer's side of the convention must employ, at least, 50% of the workforce of that sector.

Recently, in 2014, the *Resolution of the Council of Ministers no. 43/2014* introduced a new alternative criterion. Thereby, an extension will be possible if the employer's side of the convention employs – at least – 50% of the workforce of that sector **or** if the

69 *Vide* Article 2 of this legal instrument.

70 Josefina Menezes Leitão, 'Traços gerais da contratação colectiva em Portugal', *Sociedade e trabalho*, no. 2, 1998, p. 44.

71 Paragraph 4. 7., of the Memorandum.

72 Paragraph 4. 7. ii), of the Memorandum: '(…) the Government will: (…) *define clear criteria to be followed for the extension of collective agreements* and commit to them. *The representativeness of the negotiating organisations* and *the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria*'.

employers' association that signed the agreement is composed – at least – in 30% by SME.

In order to better understand these changes and their impact, it is necessary to first take an overview of the Portuguese collective bargaining system.

According to Portuguese law[73] (a rule also found in the German or Italian regimes), collective agreements only cover employees affiliated to the trade union that signed them with their employer (or with the employer's association the latter belongs to).[74] Consequently, employees lacking trade union membership, or members of a competing union, will not be covered by the agreement.

This regulation differs from the one found in other countries like France, Belgium, Austria, and Finland, where when an employer (or an employers' association) enters into an agreement it binds all the employees of the undertaking. This happens even if they are not members of the signing trade union or if they are affiliated to a competing trade union. Therefore, these agreements carry an *outsider effect*.[75]

On the other hand, the extension of collective agreements by State intervention can be found, among others, in Austria, Belgium, Czech Republic, Estonia, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, and Slovenia.[76] In most cases, there must be a request for the extension, presented by at least one of the parties that signed the convention (*e.g.* Germany, the Netherlands, Belgium, and Austria).[77]

In countries where conventions lack the *outsider effect*, extension mechanisms function as an escape valve, granting access to convention conditions to employees who, otherwise, would not have it. Therefore, extension mechanisms help to expand the advantages associated to collective bargaining.[78]

Particularly in Portugal, and considering the heavy presence of SMEs,[79] the low union density,[80] and the limited effect of collective agreements (principle of

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73 See Article 496, no. 1.

74 Robert Rebhahn, 'Collective labour law in Europe in a comparative perspective (part I). Collective agreements, settlement of disputes and workers' participation', *The international journal of comparative labour law and industrial relations*, 19(3), 2003, p. 283.

75 Robert Rebhahn, *op. cit.*, p. 283, 287; Pélissier, Auzero, and Dockès, *Droit du travail*, 27th edition, Paris, Dalloz, 2013, p. 1341.

76 Eurofound, *Extension of collective bargaining agreements in the EU*, 2011, p. 2–3. These extensions are common in Germany, France, and Belgium, whereas more unusual in Austria and Ireland – *vide* Robert Rebhahn, *op. cit.*, p. 292.

77 Robert Rebhahn, *op. cit.*, p. 292.

78 *Idem*, *ibidem*, p. 290.

79 As of 2008, 99.7% of the non-financial societies were SMEs (*Estudos sobre Estatísticas Estruturais das Empresas*, 2010).

80 There is no official data, although its gathering was part the Memorandum of Understanding (on specific economic policy conditionality, May 2011) demands – 'The representativeness of negotiating organisations will be assessed on the basis of both quantitative and qualitative indicators. To that purpose, the *Government will charge the national statistical authority to do a survey to collect data on the representativeness of social partners on both sides of industry*' (cfr. 4.7., ii), of the Memorandum).

'affiliation'), this means that most employers and employees are excluded from the direct scope of negotiation. In fact, SMEs generally stand apart from collective bargaining.[81] The global phenomenon of decrease in union membership is particularly felt by these enterprises.[82] Additionally, smaller undertakings often lack representative institutions for the personnel and employers' affiliation is also reduced.[83] And despite having legitimacy to celebrate agreements by themselves with trade unions, these employers show a tendency to direct negotiation with their employees, due to their (usually) more traditional and paternalistic mentality.[84]

Since this ultimately leads to the removal of these employees from collective bargaining, one could assume that the effectiveness of collective bargaining is very narrow. And yet, around 92% of workers[85] were, until very recently, covered by these agreements. This situation came as a direct consequence of the quite liberal usage of the extension of collective agreements by State intervention, the 'true star in the sky of the Portuguese collective autonomy'[86]

Lately, however, the number of extensions has diminished quite visibly. While in 2009 and 2010, respectively, 103 and 113 took place; in 2012 only 12 materialised, and nine in 2013. Finally, in 2014 only 13 extensions were produced and in 2015, to date, merely 21 have been completed.[87]

The reason behind this inflection was the change of the conditions required for the extensions. Before this alteration, extensions were unchained under the discretionary power of public administration.[88] Indeed, until 2012, the Portuguese

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It is estimated that the Portuguese trade union rates are situated around 18.4% (*Livro Branco das Relações Laborais*, 2007, p. 72).

81 Catarina Carvalho, *Da dimensão da empresa no direito do trabalho. Consequências práticas da dimensão da empresa na configuração das relações laborais individuais e colectivas*, Coimbra, Coimbra Editora, 2011, p. 632–633; Marco Biagi, 'Small and medium-sized businesses, industrial relations and managerial culture: the Italian case and comparative remarks', *Bulletin of comparative labour relations*, no. 26, 1993, p. 26.

82 Bouquin, Leonardi, and Moore, 'Introduction: employee representation and voice in small and medium-sized enterprises – the SMALL project', Transfer, 13(1), 2007, p. 17.

83 Marco Biagi, *op. cit.*, p. 26; 1994, 60; Catarina Carvalho, *op. cit.*, p. 608–609, 633.

84 Marie-France Mialon, 'Labour relations in small and medium enterprises in France', *Bulletin of comparative labour relations*, no. 26, 1993, p. 63.

85 *Estatísticas em síntese – Quadros de pessoal* 2010, p. 6. A similarly high percentage is also present in France (around 90%), also due to the frequent resort to agreement extensions (Eurofound, *op. cit.*, p. 6).

86 Jorge Leite, 'O sistema português de negociação colectiva', in *Temas laborais Luso-Brasileiros*, Coimbra, Coimbra Editora/Jutra, 2007, p. 149.

87 Avaliable data at http://bte.gep.msess.gov.pt (20/07/2015).

88 Gonçalves da Silva, 'Pressupostos, requisitos e eficácia da portaria de extensão', in *Estudos do Instituto de Direito do Trabalho*, vol. I, Coimbra, Almedina, 2000, p. 689; Júlio Gomes, 'O código do trabalho de 2009 e o desincentivo à filiação sindical', *Prontuário de Direito do Trabalho*, no. 83, 2009, p. 95; and Nunes de Carvalho, 'Regulamentação de trabalho por portarias de extensão', *Revista de direito e estudos sociais*, no. 4, 1988, p. 442.

Labour code basically just identified the competent body (the Minister of Labour)[89] and stipulated the need for social and economic circumstances to justify resorting to this instrument.[90] This meant that the government could freely choose when and which agreements to extend. All of this changed when the Resolutions of Council of Ministers changed imposed extra requirements for the extension of collective agreements.

It was, in fact, necessary to make some changes in this chapter, in order to better protect undertakings and their competitive position (ensuring that extensions will not be used as a way to distort competition), and to overcome the inconveniences created by the lack of criteria of trade unions' representativeness (along with the absence of official data regarding this element).

Nonetheless, these alterations have been amidst controversy and provoked several practical problems.

To begin, according to the Portuguese Constitution, labour issues should be regulated by statute,[91] more specifically, statute created by the Parliament, or by the government (with the Parliament's authorisation). However, these Resolutions are merely administrative regulations, which does not comply with the constitutional rule.

On the other hand, the Memorandum also required an evaluation,[92] previous to the extension, to ensure that it would not present a menace to the competitive position of the affected enterprises. However, the preamble of the extensions invariably claims that, due to the lack of elements, such an evaluation is not feasible. Still, and considering that similar extensions have previously taken place, the absence of data is not considered an obstacle. In our opinion, though, taking into account the concern behind these new rules (which was, precisely, to prevent the usage of extensions as a means to distort competition), this way of proceeding is hardly compatible with the *ratio* of the Memorandum.

Furthermore, these measures also had the self-proclaimed intent of helping to cope with the national crisis and to promote collective bargaining in Portugal. This goal was hardly achieved, since these changes redounded not only in a significant decrease of extensions, but also in the reduction of new agreements celebrated between social partners. In fact, it seems that the willingness of social partners to participate in collective bargaining lessens when there are fewer guarantees that the same conditions will be extended to their competitors.

89 Article 516, no. 1. The intervention of the Minister responsible for the aimed sector is also required if there is opposition to the extension (from trade unions or employers' associations) based on economical grounds. This is the sole effect of the opposition, as its applicant cannot prevent the extension.

90 Article 514, no. 2.

91 Article 165, no. 1, b), of the Portuguese Constitution.

92 See footnote no. 81.

Additionally, in 2014, 152 agreements were negotiated and, of these, 80 were company level agreements (whereas, before the new rules, sector agreements used to be dominant).[93] Such a tendency seems to meet the intention of the Memorandum, which was to secure more prominence to plant-level negotiation.

To summarise, aside from the criticism aimed at the new requisites,[94] as well as the lack of transparency in their implementation, the efficiency and legitimacy of these measures is also clearly at stake, due to their key role in the stagnation of the Portuguese collective bargaining system. Which explains the displeasure that social partners displayed regarding this matter. Particularly due to the fact that the number of employees that benefit from these conditions (directly or otherwise) has severely decreased. According to information provided from social partners, in 2008, two million employees were covered by these agreements, whereas in 2013, only 200,000 were benefiting from them.[95]

The most recent requisite (that allows for an extension when the employers' association that signed the agreement is composed, at least, in 30% by SMEs) was introduced precisely to meet the social partners' demands. This criterion has only been applicable since October of 2014, so it is still early to assert whether it will be an effective measure to unblock collective bargaining. However, we cannot ignore the low rates of SMEs' membership in employers' associations, as well as the fact that these undertakings are dominant in the Portuguese scenario. It is, therefore, highly unlikely that the answer to our problem has been found. The European Commission, however, was startled by this change. In a recent evaluation (the first 'post-programme' evaluation), it condemned the introduction of this new criterion, considering it as a 'huge' step back in the reform of the national collective bargaining system. Indeed, the Commission fears this may lead to a lack of correspondence between salaries and companies' productivity.

3.2. TEMPORAL EFFICACY OF COLLECTIVE AGREEMENTS

The Memorandum also deemed desirable to shorten the survival ('*sobrevigência*') of expired, but not renewed, agreements. In fact, the termination of an agreement does not produce immediate effects. There is a period of time in which it will still be fully applicable (and during which its signing parties are supposed to try and negotiate its substitution). This period, known as '*sobrevigência*' had, previously, a minimum duration of 18 months. *Act no 55/2014*, 25th August, however, reduced it to 12 months.[96]

93 Http://economico.sapo.pt/noticias/contratacao-colectiva-animou-um-pouco-em-2014_209818.html (31/01/15).

94 Namely, the fact that trade unions' representativeness was not included.

95 Www.jornaldenegocios.pt/economia/emprego/lei_laboral/detalhe/ugt_alteracoes_ao_codigo_do_trabalho_vao_ajudar_a_dinamizar_contratacao_colectiva.html (30/12/2014).

96 See Article 501, no. 3. The 12 months countdown will suspend if the negotiations are interrupted for more than 30 days, due to conciliation, mediation or mandatory arbitration between the parties

Furthermore, Article 3, no. 1, of *Act no. 55/2014* prescribes that these deadlines are to be further shortened. The term of 'perpetuity clauses' shall be of 2 years and the '*sobrevigência*' period will be merely 6 months. However, this change must be preceded by a negotiation between the social partners.

Currently, at the end of the provided timeframe, either party is free to inform the Ministry of Labour that the negotiating process was unsuccessful, and, at this point, the convention will only be applicable for an extra 45 days (which, before *Act no. 55/2014*, was 60 days).

Additionally, the legislator decreased the term of 'perpetuity clauses' from 5 to 3 years. When inserted in a collective agreement, these clauses determine that it will be applicable until it is replaced by another agreement entered by the same parties. Until 2003, they truly were perpetual conditions, since, in the absence of an agreement, the instrument would remain in force indefinitely. However, the Labour Code of 2003 set an expiration date to these agreements, determining they would expire after a certain amount, if they were not replaced.

In the current Labour Code (Code of 2009), these 'perpetuity clauses' had a term of five years,[97] which was reduced to three, with the *Act no. 55/2014*.

Clearly, there has been an effort to allow social partners to free themselves more easily from unwanted conventions.

3.3. OTHER CHANGES

To conclude, we only wish to mention two other developments regarding the collective relations.

According to the majority of Portuguese Authors,[98] the right to collective bargaining, as enshrined in the Portuguese Constitution, is only assigned to trade unions.

Júlio Gomes, however, claims that it was the Memorandum's intention to grant the same possibility to work councils.[99] However, the labour reforms did not follow this path. The legislator decided to only widen a possibility that was already provided by statute. In fact, the Labour Code permitted trade unions to delegate the power to collective bargaining onto work councils. Yet, this was only possible in undertakings

(Article 501, no. 4). But even with this suspension, the minimum duration of '*sobrevigência*' will never exceed 18 months (Article 501, no. 5).

97 This timeframe is calculated from one of three possible events: a) the last (integral) publication of the convention; b) the termination of the convention by one of its parties (since it does not produce immediate effects); c) the presentation of a proposal for the revision of the convention, that includes the revision of the perpetuity clause (see Article 501, no. 1).

98 See, among other, João Reis, *op. cit.*, p. 153 and Jorge Jeite, *op. cit.*, p. 141.

99 Júlio Gomes, 'Algumas reflexões…', *cit.*, p. 608. Opposing this view, see João Reis, *op. cit.*, p. 149.

with, at least, 500 employees.[100] *Act no. 23/2012* lowered this threshold to 150 employees, granting this possibility for a larger number of situations.

Finally, *Act no. 55/2014* introduced the possibility of suspending collective agreements.[101] The suspension is temporary, may be total or partial, and must be due to a business crisis. Furthermore, this action has to be indispensable to ensure the company's viability and the safeguard of work posts. The suspension may only be activated with the accord of the agreements' parties.

The legal rule, however, presents some interpretative doubts. In fact, it asks for an agreement between 'employers' associations and trade unions'. Considering that collective agreements can directly signed by employers, without the intervention of their associations, this raises the question of whether company level agreements may suspended. Either the legislator was imprecise, or it meant to circumscribe this possibility only to sector level agreements.

4. CONCLUSIONS

The intervention of the *Troika* in Portugal was a turning point in our labour regime. Like in other European countries, several significant changes had already been implemented (*e.g.* the modification of sources' relations, dated 2003). However, the reforms of 2012 and subsequent years accelerated this process twofold. Particularly, *Act no. 23/2012* implemented measures that led to the decrease in labour costs (at the expense of workers' rights); to the increment of the employers' power of decision; and the neutralisation of previous collective agreements.

These recent developments display an inversion of policy. The idea behind them is that economic development is achieved through low salaries and longer working hours.[102] In an unimaginative manner, the legislator seems to believe that labour law's sole purpose is to increase competition and the only way to achieve it to reduce the cost of labour.[103] Labour law is becoming less and less oriented towards the protection of employees. Nowadays, weighed down by crisis, globalisation and a dominant neo-liberal ideology, it is growing more focused on the needs of companies and their competitive potential.

And even the Portuguese Constitutional Court, rather than assuming an obstructive rule (as it has been accused), has evoked the conjuncture of financial emergency and the commitments assumed by the country to accepted most of these changes.[104]

100 Former wording of Article 491, no. 3.

101 See Article 502, no. 2.

102 Monteiro Fernandes, 'A "reforma laboral" de…', *cit.*, p. 552.

103 Júlio Gomes, 'Algumas reflexões…', *cit.*, p. 576.

104 *Ibid.*, p. 392.

We need to rethink the path we have taken. Labour law cannot, indeed, ignore the challenges posed by the modern and globalised economy. However, it must try and preserve its genetic code, ensuring the protection of employees' rights and interests. Especially since several fundamental rights are clearly at stake (rights recognised not only by the Portuguese Constitution, but also by international instruments). A balance must be found and we still have a long way to go.