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## Insolvency & Restructuring - Portugal

### Court Strikes Down Ban for Managers of Insolvent Companies

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#### Facts

##### Constitutional Court Decision

On January 14 2009 the Constitutional Court ruled on the constitutionality of two provisions of the Insolvency and Corporate Rescue Code.<sup>(1)</sup> The court held that Article 186(2)(a) of the code<sup>(2)</sup> is constitutional, but that Article 189(2)(b) is not.

#### Facts

The first instance decision prohibited the managers of a bankrupt company from carrying out actions in relation to the company's assets (or assets managed by it) for a period of three years without the approval of an administrator; the managers' authority was restricted to purely administrative actions. Moreover, the court imposed a five-year ban on the managers engaging in business or holding office in the governing body of a commercial or civil law company, association, private economic foundation, public company or cooperative.

The managers appealed, claiming that Article 186(2) was unconstitutional. They argued that the government had exceeded its powers by introducing the presumption of guilt provided for in the article.

#### Constitutional Court Decision

The Constitutional Court held that the rule in Article 186(2) is not unconstitutional. It found that the government had not exceeded its authority, as not all measures in relation to the rule need to derive from the legislature's authority. In introducing the presumption of guilt into the code, the government had merely added a procedural provision and had not amended or exceeded the substantial terms of its mandate from the legislature.

The court then analyzed the constitutionality of Article 189(2)(b), which allows the courts to prohibit parties from performing certain acts or holding certain positions in commercial entities where the preconditions for a presumption of guilt are met. In line with its previous practice,<sup>(3)</sup> the court held that the article is unconstitutional.

In deciding both questions, the court emphasized that an individual's ability to act in his or her civil capacity may be restricted only in exceptional circumstances and solely in order to protect a person from the consequences of his or her legal incapacity. Therefore, it concluded that a restriction of civil capacity cannot be applied as a penalty or with penal consequences. Moreover, it clarified that a person may be declared incapable only on the basis of a deficiency inherent in his or her personal characteristics (ie, in cases in which such persons are unable to exercise responsibility for their own actions and interests).

The court considered that the case in question concerned a failure to comply with obligations as a result of the managers' culpable behaviour; this could not be interpreted as an innate incapacity on the part of the managers to manage assets.

In the context of insolvency, the provisions governing 'inability' within the relevant meaning of the term are not intended to apply to persons who are found to lack legal capacity in respect of their own interests. Rather, they are punitive in nature and result in the imposition of a penalty for an individual's unlawful and culpable behaviour. This position is supported by the fact that a minimum and a maximum term applies to such a declaration of ineligibility, as in the case of a criminal penalty.

The court held that the application of this regime on such terms in an insolvency context is inappropriate and excessive. Therefore, it ruled that Article 189(2)(b) is unconstitutional.

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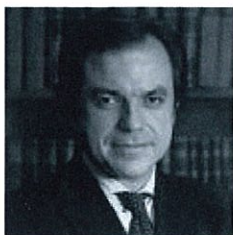
### Endnotes

- (1) Decision 570/2008.
- (2) Implemented by Legislative Decree 53/2004,
- (3) See Decision 564/2007.

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