



NEWSLETTER | CORPORATE

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CORPORATE LAW NEWSLETTER | DECEMBER, 2016

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NEWSLETTER CORPORATE LAW

I JUDGMENT OF THE CONSTITUTIONAL COURT NO. 591/2016: ON THE RIGHT TO LEGAL AID OF FOR-PROFIT LEGAL PERSONS

The Constitutional Court deemed unconstitutional the provision of Article 7.3, of Law no. 34/2004, of 29 July, as amended by Law no. 47/2007, of 28 August (hereinafter “Law on Access to Law and the Courts”), in the part in which it denies legal protection to profit-making legal persons, without consideration of their specific financial situation.

Introduction

The public limited company appellant in the judgment in question presented a request for legal aid in the forms of exemption from court fees and other charges related to the proceedings and appointment and payment of the legal representative’s fees, in order to challenge an order for payment brought against it through the National Payment Orders Office [*Balcão Nacional de Injunções*].

The provision whose constitutionality is questioned would have been the grounds for rejection of the request for legal aid, by summarily and absolutely stating that *profit-making legal persons and individual establishments with limited liability are not entitled to legal protection*.

Claiming the unconstitutionality of this provision and that it is contrary to the Law of the European Union (in particular Article 47 of the Charter of Fundamental Rights of the European Union), the Appellant brought proceedings to challenge the rejection by the District Court of Braga, which had, in turn, rejected the challenge.

In that decision, the Tribunal argued that i) Article 20 of the Constitution of the Portuguese Republic, which simply recognises a general right to legal protection, is a programmatic provision, backed up by the Law on Access to Law and the Courts, which undoubtedly denies it to profit-making legal persons; ii) in any case, if it found itself in a difficult financial situation or current or imminent insolvency, the claimant would always have the possibility of proposing itself for recovery and of, consequently, benefiting from the exemption provided for in Article 4.1(u) of the Regulations for Procedural Costs; iii) the aforementioned exemption would therefore avoid the unconstitutionality claimed.

Disagreeing with this decision, the Company lodged an appeal to the Constitutional Court, in the judgment now being analysed, for assessment of the provision in Article 7.3, of the Law on Access to Law and the Courts, *in the part that denies legal protection, in particular legal aid, to profit-making legal persons, without consideration for their specific financial situation and/or in the part that denies legal protection, in particular the award of legal aid, to legal persons that, in the abovementioned absolutely exceptional financial and social*



circumstances, providing evidence of their insufficient means, demonstrate that the dispute for which the aid is requested goes beyond its normal economic activity, causing costs considerably higher than its financial capacity.

Explanatory Statement of the Constitutional Court

The Constitutional Court then explains the reasoning behind the precept whose constitutionality is being questioned: the provision is based on the idea that profit-making legal persons are not able to enter into a situation of insufficient means that might justify the need for legal aid, since, by their very legal form, they must have an organisational and financial structure capable of tackling the foreseeable costs of their activities, *including those resulting from litigation*. Nevertheless, this interpretation is promptly contested, the Constitutional Court noting that *besides not being founded on any constitutional precept, it infringes the extent and scope of the essential content of the segment of Article 20.1, of the Constitution, according to which "justice shall not be denied to a person for lack of financial resources"*.

As a consequence, the Constitutional Court presents a number of grounds for the declaration of unconstitutionality of the provision. It states, in particular, that:

- i) The access to courts established in Article 20 of the Constitution is not limited to a mere programmatic precept, but is instead an *indispensable guarantee of the protection of fundamental rights*. Thus, no person – whether natural or legal – can be deprived of access to justice.
- ii) The right to access to courts established in article 20 of the Constitution is compatible with the nature of legal persons.
- iii) Legal aid granted to a profit-making legal person does not necessarily represent a factor distorting competition, liable to cause disequilibrium and litigation and, for this reason, is not necessarily contrary to Article 81(f), of the Constitution of the Republic, which aims to ensure the functioning of markets. This idea was already put forward by the Court of Justice of the European Union, in its judgment of 22 December 2010.
- iv) In order to safeguard the functioning of markets and competition, on the one hand, and access to justice as a fundamental right, on the other hand, various criteria can be considered, in particular: i) the legal form of the company; ii) the financial capacity of its shareholders; iii) the company's corporate purpose; iv) how the company is set up; v) the relationship between the resources it is granted and the activity it intends to pursue; vi) the circumstances of the dispute.



- v) The legal provision whose constitutionality is being ascertained, by simply stating that legal persons are not entitled to legal protection, prevents any case-by-case assessment of their situation. For this reason, the provision in question may even prevent – as it does in this case – access to justice by a legal person, purely due to insufficient means, which necessarily infringes Article 20 of the Constitution. It is therefore essential for the criterion to not render unfeasible a specific assessment of the financial situation claimed by each subject.

The Constitutional Court therefore concluded that Article 7.3, of the Law on Access to Law and the Courts, is unconstitutional, by infringement of Article 20.1 of the Constitution of the Portuguese Republic.

Effect

Since it refers to a specific constitutional review, the declaration of unconstitutionality of the aforementioned provision shall only take effect on the decision appealed against. There is, therefore, no *erga omnes* effectiveness – i.e. general effectiveness – of the decision on the validity of the provision considered unconstitutional, Article 7.3 remaining in effect in Portuguese law. This decision is however not negligible: if the provision is declared unconstitutional or illegal in three specific cases, the Court shall be required to declare the generally binding unconstitutionality of the provision.

II NATIONAL LEGISLATION

Resolution no. 33-A/2016 - Diário da República no. 229/2016, 2nd Supplement, Series II of 2016-11-29

Presidency of the Council of Ministers - Council of Ministers

Appoints the Chairman, Vice-Chairman and one of the members of the board of directors of the Portuguese Securities Market Commission

Ordinance no. 302-B/2016 - Diário da República no. 231/2016, 1st Supplement, Series I of 2016-12-02

Approves the lists of non-reporting financial institutions and excluded financial accounts referred to in Article 4-F of Decree-Law no. 61/2013, of 10 May.

Resolution of the Council of Ministers no. 82/2016 - Diário da República no. 237/2016, Series I of 2016-12-13

Presidency of the Council of Ministers

Authorises the issue of public debt, implementing the 2016 National Budget



Resolution of the Council of Ministers no. 84/2016 - Diário da República no. 243/2016, Series I of 2016-12-21

Presidency of the Council of Ministers

Approves CITec – Programme to Empower Portuguese Industry, as an essential instrument to pass knowledge from higher education institutions on to companies.

Following the approval of the Programme to Empower Portuguese Industry (CITec), the decision was taken to set up the Innovation, Technology and Circular Economy Fund (FITEC), intended to support policies to develop scientific and technological knowledge and its transformation into innovation, to stimulate cooperation between higher education institutions, CIT and the business community.

Law no. 40-A/2016 - Diário da República no. 244/2016, 1st Supplement, Series I of 2016-12-22

First amendment to the Law on the Organisation of the Judiciary, approved by Law no. 62/2013, of 26 August

III EUROPEAN LEGISLATION

Decision of the EEA Joint Committee No 171/2015 of 11 June 2015 amending Annex XXII (Company law) to the EEA Agreement [2016/2206].

Commission Recommendation (EU) 2016/2125 of 30 November 2016 on guidelines for self-regulation measures concluded by industry under Directive 2009/125/EC of the European Parliament and of the Council.

Commission Implementing Regulation (EU) 2016/2227 of 9 December 2016 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in Regulations (EU) No 575/2013 and (EU) No 648/2012 of the European Parliament and of the Council.

IV NATIONAL CASE LAW

Judgment of the Supreme Court of 17-11-2016

Corporate Law – Public Limited Companies – Administration of the Company – Director – Term of Office – Suspension of contracts pertaining to other duties

I. The employment contract entered into by the Plaintiff (employee) and the Defendant (employer) is suspended when the Plaintiff takes office as Chairman of the Board of Directors for a company in the Defendant's group, pursuant to stipulations in



Article 398.2 of the Commercial Companies Code, a suspension that only ends at the end of the term of office of the Director.

II. There is absolute incompatibility between the employment and management relationships, for which reason the terms of office of a company director may not be based on an employment contract.

III. After leaving the office of Director, the Plaintiff reacquires his status as an employee with the rights that he held before the suspension of his employment contract and the start of his term of office as Director, for which reason, once he leaves this office, the Plaintiff can only demand payment of amounts deriving from the employment contract entered into.

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