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Objectives

The Electronic Papers published by the Portuguese Observatory for Good Labour Practices (OPBPL) main goals are to confer the accessibility and high-speed readability of essential information and good practices in regards to work organisation, collective bargaining, human resources management, labour relations, inclusion and sustainability, corporate social responsibility, and labour market statistics.

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Revising to promote flexibility, promote flexibility to compete: considerations regarding ongoing labour changes

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Abstract

The subordinated workforce has seen its legal regulation subjected to some modifications, under the banner of necessity to increase the flexibility in order to make the organizations more competitive and to create jobs.

A new amendment to the Labour Code is on the verge of being published, it is the intent of this e-paper to address the issues regarding the main flexibility measures, internal and external, introduced by the diploma and to reflect upon its consequences.

1 | Changing the Labour Legislation: Why and for what reason?

The explanatory statement contained in the draft bill n.º 46/XII, adopted in May 9th and promulgated by the President of the Republic on the 18th of June 2012, states that in order for the Portuguese Economy to improve its competitiveness "it is essential to have a flexible Labour Legislation, centered around the workers protection rather than the work post itself, suited to a "flexisecurity" framework, that fosters economic growth and job creation aimed at fighting the growing labour market segmentation".

The Amendment to the labour code that recently came to light is now the third one to be manifested since the diploma was published, in February 12th, 2009, fits the economic crisis context that led the country to assume its commitments with the European Union (EU), the European Central Bank (ECB) and the International Monetary Fund (IMF) in which it is foreseeable that, amongst other things, It will implement reforms in legislation concerning job protection in order to fight against the labour market segmentation, promote job creating and facilitate the workers transition between various activities, companies and sectors; facilitate the working hours regimes for them to contain work fluctuations throughout the cycle, better accommodate the differences amongst labour standards in the different sectors and companies and also to increase the companies competitiveness.

If we make an retrospective analysis of the 21st Century alone, we find that the flexibilizing objective of the labour standards is not exclusive to a particular political party nor is it imposed by the economic crisis in which both the world`s and Portuguese economy find themselves in, since it was present in various legislative reforms. It is then fair to claim that eventual necessities of making the labour laws more flexible do not exactly result of the country's current situation; it is however enhanced by it.

A study published in September, 2003 by the McKinsey Global Institute (Portugal 2010: To accelerate Portugal`s productivity growth[1]), revealed that the labour laws in force at the time were a barrier to the national productivity, at the time it concerned about half

[1]Available at http://www.mckinsey.com/locations/Lisbon/Know_how_e_publicacoes/Publicacoes_da_McKinsey/Relatorios%20e%20artigos/Portugal_2010.aspx, consultado pela última vez em 06.06.2012.

the average of the Europe`s most productive countries (Belgium, The Netherlands, Italy, France, Germany and Spain, listed in descending order). The labour legislation`s contribute (prior to the 2003 reform) to a non-structural productivity gap (which is what can be changed by public policies) was “only” 13%. The same study highlighted that the 2003 legislative changes had already allowed for advances in some of the major comparison elements at an international scale. We think that it would be interesting for the same entity, following the same criteria, to verify the country`s current situation, nearly a decade and countless legislative reforms after.

Prior to the new labour laws, some with previously outlined contours – deriving from Law n.º23/2012, July the 25th – others not so much – the announced new amendment to the compensation amounts for cessation of the employment contract initiated by the employer -, we intend to outline the framework of the main flexibility related measures included and question to what extent can that contribute to increase the Portuguese companies competitiveness.

2| Internal and external Flexibility Measures

The main change focuses as much on the internal flexibility (namely the work time organization) as it does on the external flexibility (with changes regarding dismissals for objective reasons). There are also introduced some measures with the intent of reducing the bureaucracy amongst labour relations (rendering unnecessary the forwarding of the work schedule and the timetable exemption agreement to the Portuguese Authority for Working Conditions of the organization`s internal rules of procedure, implicit approval of the reduction and exclusion of the rest period and lightening the communications content previous to the beginning of the companies activity or in case of amendments), much like the applicable regime to the collective work regulations tools. We will focus our attention to the internal and external flexibility measures, starting with the former.

With the goal of increasing the employer`s capacity in adjusting his employees work hours to the necessities of the organization, avoiding breaks in productivity resulting from the so called “bridges”, it is allowed that the employer, unilaterally, may be able to choose to close the company or the establishment for a vacation day set somewhere between a regular weekly work day and a holiday that happens to coincide with a

Tuesday or Thursday (as long as the workers are duly informed of this occurrence up until December the 15th of the previous year), allocating the closing time to coincide with the workers vacations or making up for it with work on another day of the week (in this case it is not considered as extra workload).
It is a sound measure due to the fact that the employer now has management control over the activity/inactivity periods and can now freely book the workers vacations

While on the work hour's flexibility subject and the need to adjust them to the productive needs, an hour bank system begins to take form. The possibility, established in 2009`s Labour Code, of using it as a collective labour regulation tool, added along with the aforementioned hour bank system, established between each employee and his employer inclusively against the employees will in the case of the hour bank system. This measure, along with a considerable reduction of benefits while having to do additional work (this will henceforth be paid with an extra 25% in the first hour or fraction and 37.5% in the following hours if the additional work is done on a week day, and with an extra 50% if it is done on a rest day or national holiday; these norms are now in place) as well as the available possibilities in terms of setting up systems that deal with the employees work hour adaptability, allows the employer a large flexibility in allocating his employees work hours to the productive needs. By not formally increasing the weekly working period (PNT), what is being done is allowing the employee to work more hours without additional costs for the employer, provided that the benefits attached to working extra time can be an equal amount of rest time, money (in this case, the value does not have to coincide with the figures set for extra work done) or even both. In the following table we can observe the average PNT of the six most competitive countries as well as Portugal according to the*2010: Accelerating Portugal`s productivity growth* study. The statistical data relate to 2010[2], for which they may not take into account recent legislative reforms conducted by the different countries, they are however illustrative of the not always univocal relationship that exists between competitiveness and the highest number of hours worked.~

Competitiveness Ranking	Weekly Average PNT in 2010
1.º Belgium	36,9
2.º The Netherlands	30,6
3.º Italy	37,8

[2] Available at: http://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS.

4.º France	38
5.º Germany	35,7
6.º Spain	38,6
PORTUGAL	39

Source: OECD

In what concerns the external flexibility measures, the changes are centered essentially on the dismissals with an objective reason (just cause) regime, more specifically the dismissal due to the dissolution of the job and dismissal due to adaptability issues. Regardless of the fact that dismissing someone held accountable for a particular negative situation is the main reason that our country has the most restrictive[3] legislation, the legislator chose to increase the flexibility further on the subjects of job dissolution and adaptability issues dismissal. It should be noted that the Law n.º 53/2011 promulgated on the October the 4th, had already reduced the compensations for terminating an employment contract when initiated by the employer, and that such rules also apply to both employment contract termination procedures addressed previously.

In regards to dismissals due to job dissolution the major changes are as follows:

a) the law refrains from setting up a list of preferable employees to be dismissed, the employer can now do it himself;
b) it is no longer the employee`s responsibility to prove that there isn`t another, suitable work post available to be allocated to the employee;
c) the calculation procedure stipulated for the compensations given when dismissing an employee will, as of the contracts signed on November the 1st 2011 now also be applied to the contracts celebrated prior to that date, however only regarding the following period.

The outcome is that the regulations for dismissing someone due to job dissolution are now closer to the regulations concerning collective dismissals.

The deepest changes occur when dismissing someone on the grounds of failure in adapting.

According to the OECD statistics available in: http://www.oecd.org/document/11/0,3746,en_2649_33927_42695243_1_1_1_1,00.html

On this matter there are now two types of failures to adapt: *i)* the stage that follows the introduction of modifications within the work place which conduce to changes to the manufacturing processes or commercialization of new technologies or equipment based on different or more complex technology that take place six months prior to the beginning of the procedure; *ii)* the one that translates a substantial modification on what the employee provides, without having been made any change to the job or workstation.

Only the second type of failure to adapt is new. Through it the lack of expertise and zeal (without the need of submitting the employee to any disciplinary procedure) as well as the own productivity or quality drop (these parameters will be set by the employer) makes an employee liable to be dismissed. For this to happen all that it takes is for the employer to inform the employee of how displeased he is with his work; the employer will also need to grant him an opportunity to defend himself in a period superior to five working days, after the time elapses the employer should be notified by writing the appropriate orders and adequate set of instructions concerning his job description and how he should properly execute them, afterword, said employee will be submitted to suitable training and wait for a period not inferior to thirty days. In regards to a worker that holds a position of considerable technical complexity or even a position of management, a formal and written notice of dismissal can occur when the previously agreed targets are not met right after the new amendments to the Labour Code go into effect, as long as the employer informs the employee of his work related dissatisfaction, and provides him with a deadline not inferior to five working days.

The changes in terms of dismissal on the grounds of failure to adapt will, in a way, aid in making even more flexible what was not made flexible initially: employee dismissal for reasons attributed to the former. In fact, the substantial modification of the worker`s contribute, independently of any change introduced to the workplace, when not objectively justified, that is, for reasons unbeknownst to the worker himself, would always be submitted to a disciplinary sanction, this would translate into a dismissal or other adequate penalty. By transforming the lack of diligence, work pride or the accomplishment of targets as objective reasons to dismiss an employee, what is being done is considerably facilitating the employer's task. Dismissing someone for failure to adapt does not have to be a last resort, in the sense that it is also proposed for the paragraph that compels the employer to prove the existence of another work task that could be compatible with the employees training and experience, to be revoked. In the

events that pertain to employers that hold positions of considerable technical complexity or even of management, it is allowed to dismiss anyone for a totally arbitrary reason; the previously set goals will then operate as true resolutive conditions, which in our opinion will raise questions concerning the violation of the constitution.

The recent changes to the labour legislation aim to, professedly, increase the flexibility of Portugal`s current work conditions.

In this field of Law, the legislative changes may not immediately result in the desired effects, by virtue of the collective work regulation tools' coverage rates. The vast majority of the labour standards allow that by a collective labour convention different types of conditions other than the existing ones can establish themselves, and accordingly to what is commonly agreed upon, they are favorable to the workers. Although the union membership fee has decreased[4] considerably, the extension of the collective convention's application defined in ordinance and the possibility of individual adherence to the company`s existing collective convention result that, in actually, the work conditions of the overwhelming majority will be regulated through a collective work regulation tool. For this reason, Law nº23/2012 includes a standard that either nullifies or suspends the applications of some of the collective work regulation tools and employment contract provisions that have at their disposal the contrary (and more favorably) idea of what is written in the proposal. It is however an effective way of generally imposing the wanted modifications, that may jeopardize the constitutional right to collective hiring and the principal of contractual freedom.

Concluding, one would say without a doubt that the introduced measures increase the work conditions flexibility, to note is that flexibility is not necessarily bad, what begs to be demonstrated in some cases is the link between those measures and improving competitiveness. Not to mention that we are still expectant about the Constitutional Court eventual pronunciation in regards to some measures.

[4] In this sense *vide*, for instance, MARIA DA CONCEIÇÃO CERDEIRA, «The Portuguese unionization`s from 1974 to 1995», *Work and Society Magazine*, n.º 1, 1997, and OECD`s statistical data.

3 | Further reading

SITE: http://opbpl.cies.iscte-iul.pt/

Draft bill n.º 46/XI, published in Diário da Assembleia da República, II série-A, n.º 119.

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