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WILL THE CONSTITUTIONAL COURT PUT AT RISK THE MOU IMPLEMENTATION?

In the final phase of the Assistance Programme, the Portuguese Government is putting all its efforts in complying with the MoU. However, following the presentation of the 2014 budget, a negative ruling of the Constitutional Court (CC) could put at risk the MoU implementation.

The CC successive rejections of fiscal adjustment measures agreed with the Troika are being object of lively debates in Portugal and worrying international creditors. Doubts about the CCs' political impartiality were raised since its creation but, in the current political and financial situation, any political activism of this jurisdiction could have very heavy consequences for the country. The budget laws' constitutionality control will influence the outcome of the Assistance Programme: in case of rejection of measures that contribute to achieve the targets laid down in the MoU, a second rescue programme could be necessary, with serious economic and social costs for the country.

In July 2013, the Portuguese Government just avoided collapse. The deep crisis was caused by the resignation of the Minister of Finance, Vitor Gaspar, number 2 of the Government, followed by the Minister for Foreign Affairs, Paulo Portas, leader of the minor coalition party and number 3 of the executive. One of the main reasons for Minister Gaspar's resignation, as highlighted in a letter he addressed to the Prime Minister Passos Coelho, was the successive rejections of the Constitutional Court (CC) of some fiscal adjustment measures undermining the fulfilment of obligations signed with the Troika. According to several opinion makers, the reaction of the CC concerning some fiscal adjustment measures proposed by the Government can be determinant for the success of the adjustment programme implementation.

In Portugal, there is a lively debate on CCs' role in the definition of the current major policy options. Opinion makers diverge between those who think that the CC is defending the interest of the nation and citizens' rights foreseen in the Constitution, and those who consider that the CC exercises more than a judicial power accusing it of being "activist" and politically engaged. On the other hand, some opinion makers note that the CC rulings are always negative in cases where the CC judges have their own interests at stake, e.g. in case of public servants pension or salary reductions. The discussions about the nature of the CC as a non-traditional judicial power exist since its creation, but as it currently influences deeply the implementation of the Assistance Programme, this debate became even more important. The possibility of a second rescue is seen in Portugal as a threat, as it can bring additional financial constraints and new, even harder, fiscal adjustment measures.

The Government is committed to comply with the conditions agreed with the Troika. However its' room for manoeuvre becomes more limited after each CC rejection and the decreasing public opinion support.

Are there any alternative measures that the Government could implement without touching the measures that risk to be declared unconstitutional? Is the CC undermining the Assistance

Programme's successful implementation because of intrusion of political considerations in its rulings? Is the supremacy of the Fiscal Pact respected by the CC rulings? These are the main elements that cause division and strong debates among politicians, constitutional lawyers, opinion makers and that recently even involved international entities.

Do not touch these rights, find another way to fill the gap!

In the framework of the implementation of structural reforms to comply with the Assistance Programme, several proposals to reduce State expenditure were presented by the Government. These measures were severely criticised by the opposition and some of them were rejected by the Constitutional Court.

Already in July, Vitor Gaspar mentioned in his resignation letter that the successive rejections of the CC and the erosion in public opinion support to the measures undertaken in the framework of the fiscal adjustment policy were the main elements that lead to his resignation.

The analysis of the initial proposals made by the Government that were rejected by the CC and of alternative solutions found afterwards demonstrate that the new measures were less effective from the MoU implementation point of view. This trend is likely to worsen as throughout the screening of the legislation, the room for manoeuvre for new fiscal consolidation measures after each rejection become reduced. With another setback from the Constitutional Court, the Portuguese government has narrower choices every time.

A second rescue at stake - an "ordeal" for the Portuguese?

After a rejection by the CC of a law introducing a state officials' requalification scheme, PM Passos Coelho left clear that, without complying with the MoU, Portugal risks to be obliged to ask a second rescue with very painful financial consequences for the population.

Portugal's international credibility and attractiveness for investors are closely linked to the predictability of its policy implementation. Each time the CC took a decision declaring unconstitutional a fiscal consolidation measure agreed with the Troika, the financial markets reacted immediately.

It is clear that a consensus among political and institutional actors is crucial for the implementation of the Programme and for political stability, which is necessary for Portugal to regain the investors and the international creditors' confidence.

Are the criticisms on the CC well founded?

The CC is composed by 13 constitutional judges (10 elected by the Parliament, 3 chosen by the elected judges) appointed for 9 years. At least the 10 elected judges are easily identified with a political party for each term in office. An agreement between the main parties establishes six judges for each block that tends to reflect the political composition of the Parliament at the time of the election.

Is the Portuguese CC a "negative legislator"^[1] - _ _ ?:

A study published in the Illinois Law and Economics Research Paper concluded that the CC judges in Portugal nominated by right-wing parties are much more likely to vote in favour of constitutionality of norms adopted by a left-wing Government than judges from left-wing parties to do the inverse. They are much more sensitive to the party in power. The researchers' interpretation is also that not only party affiliation matter in terms of preferences, but political opportunism can also play its role, especially when stakes are higher.

If we analyse the current CC decisions, we can conclude that the judges nominated by the right-wing party also voted against the most polemic fiscal adjustment measures (that were, consequently declared unconstitutional). This, almost unanimous rejection, of those measures can have two readings: we can consider that the CC made a pure and strictly legalistic interpretation of the Constitution or the CC through this rejection can be seen as interfering in the Governments fiscal policy by acting as a "negative legislator".

Criticisms about the Constitutional Court

Stone Sweet, an eminent international law specialist raises a possibility of the CC in some circumstances being used as a political weapon. He considers that the preventive or successive control of constitutionality is a non-risky way for a politician to reach a solution that is, perhaps, against its political engagements. Prof. Eduardo Vera-Cruz, Director of the Faculty of Law of Lisbon (FLL), considers that the CC is a politically influenced and not a merely judicial body. According to Prof. Vera-Cruz, if in the current situation the decisions of the CC don't reflect clearly the political engagement of the judges, is because the polemic measures collide with social values that are at the core of the left-wing parties and are also defended by the socially-minded judges nominated by the center-right. The "only way to have politically neutral constitutional jurisdiction would be to place this area under the Supreme Court of Justice" said the Director of the FLL.

Re-enacting an old power game: a similar challenge in the past

In 1983, the government was obliged to adopt a package of strong fiscal consolidation measures required by the IMF to fill in a budgetary gap. The President of the Republic, Eanes, according to suggestions of political and economic commentators also very active nowadays (Jorge Miranda, Medina Carreira, António Vitorino), sent the law package for preventive constitutionality control to the CC, arguing that the tax would breach the principle of non-retroactivity of taxation. The CC decided that, taking into account the economic and financial crisis and the temporary nature of the measure to be implemented, the retroactivity was not arbitrary or oppressive. Averting any doubts on the constitutionality of the law, the CC concluded that the implementation of the new tax doesn't breach neither the principle of the budgetary unity nor the fiscal systems' constitutional objectives.

During the implementation of the current assistance programme, the CC in some cases, concerning the same package of measures, decided in favour, in other cases, rejected the measures proposed by the Government. Therefore, several Constitution specialists (e.g. Prof. Jorge Miranda-one of the redactors of the PT Constitution) consider that the CCs' jurisprudence cannot be seen as being against the Governments' austerity policy.

The CC seen in Portugal as a risk to the MoU implementation

Following the 8th and 9th Troika review, Minister of Finance, Maria Luis de Albuquerque, in a joint communication with the Troika institutions, left a word of warning. The message was clear: if any of the proposed measures will be considered unconstitutional, alternative solutions will have to be found with increased risks concerning employment, and jeopardising the sustainable return to the financial markets.

At the time of the coalition crisis, Europe as a whole was concerned with the lack of political consensus inside the Government and now the Constitutional Court's decisions are also perceived as a potential problem, with international implications.

The CC seen outside Portugal as a risk to the MoU implementation

The tension caused by the conflict between the Government and the CC is having echo among the international partners and rating agencies as well. Statements from high representatives of

all institutions involved in the Assistance Programme are being commented in the media. Some Portuguese political commentators and lawyers consider the international body's messages to the CC like a pressure and as intrusion in national competences.

The non-respect of the fiscal treaty wouldn't be unconstitutional?

Some days before the presentation of the budget (containing some key measures for the MoU implementation), the Government used the last argument in order to convince the CC to pass the measures in question. The argument based on European Law and its transposal in national law is that the Fiscal Treaty that foresees the implementation of measures contained in the budget law was signed by the Government, transposed into national law and consequently the CC should take into account as element of the national legislation.

Presentation of the 2014 Budget by the Government

Today (15/10/2013) the 2014 years' Budget is being presented by the Government and will likely be sent by the President of the Republic for successive control of constitutionality to the CC in November, after the final approval by the National Parliament (scheduled for 26th of November). Opposition party's members expressed already their negative opinion on some of the announces measures that they consider unconstitutional. A report on the 2014 budget will be drafted.

Conclusion

The last two years were a difficult period for the Government and for the Country's citizens. The sacrifices made by the population throughout the implementation of the strong fiscal adjustment procedure start now to show encouraging economic results. The positive outcome of the Assistance Programme is important for Portugal and for Europe. A second rescue would have serious consequences for the economy and could lead to weaken, and in the last result, to the collapse of the Government.

[1] In Kelsen's view, the constitutional court is supposed to function as a "negative legislator" charged with setting aside enacted laws that are inconsistent with the constitution. So long as the constitution is exclusively structural, constitutional review seems amply compatible with the function of the court as a negative legislator.

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