



LITIGATION

DECLARATION OF UNCONSTITUTIONALITY

A CHALLENGE AGAINST THE NOTE ITEMISING AND JUSTIFYING PARTY COSTS WILL NO LONGER BE SUBJECT TO THE DEPOSIT OF 50% OF ITS VALUE

The Constitutional Court has held that the rule is unconstitutional because it violates the reservation of legislative power of the Portuguese Parliament and the fundamental right of access to the law and to judicial protection.

Judgment no. 73/2019 of the Constitutional Court in case no. 727/2018 was handed down on 29 January 2019¹ and published on 21 February 2019. The judgment declared unconstitutional, with general mandatory force, the rule appearing in article 33(2) of Ministerial Order 419-A/2009 of 17 April. Under this rule, a challenge against the note itemising and justifying party costs is subject to a deposit of 50% of its value.

The Constitutional Court held that the above rule was unconstitutional because it violates the reservation of legislative power of the Portuguese Parliament (Assembleia da República) and the fundamental right of access to the law and to effective judicial protection, enshrined respectively in articles 165(1)(b) and 20(1) of the Constitution of the Portuguese Republic.

As a rule, all judicial proceedings are subject to procedural costs, which cover the court fee, the charges and the parties' costs (see article 529(1) of the Code of Civil Procedure). The party costs include the expenses borne by each party in relation to the proceedings. At the end of the case, the winning party has the right to receive compensation for these costs, as a general rule, from the losing party or the party responsible for payment. For this purpose, the winning party must file a note itemising and justifying the party costs.

Until this judgment was handed down by the Constitutional Court, any party that wanted to challenge the note itemising and justifying party costs was «obliged» to deposit 50% of the value of that note, failing which the court would reject the challenge.

This condition - like its predecessor which required a deposit of the total value of the note - represented a serious restriction on a fundamental right enshrined in the constitution: the right of access to justice and to effective judicial protection. This right is analogous to other rights, freedoms and guarantees, whose regulation and legislation are exclusively within the power of the Portuguese Parliament (see article 165(1)(b) of the Constitution).

It is this restrictive effect, governed solely by Ministerial Order - when legislation on the matter in question is exclusively within the power of the Portuguese Parliament - that is, again, at the origin of the declaration of unconstitutionality of the original wording of article 33(2) of Ministerial Order 419-A/2009 of 17 April. This wording was changed following the declaration of unconstitutionality of the wording introduced by Ministerial Order 82/2012 of 29 March, which required the deposit of the total value of the note.

¹ Available [here](#).

The reasons underlying the declaration of unconstitutionality relate mainly to defects of an organic-formal nature. However, regardless of those reasons, the elimination of this rule from our legal system was long overdue. It is clearly unjust to have a rule which, in its current terms, places a very heavy economic-financial burden on the party bringing the challenge and creates a real barrier to defending their legitimate rights and interests.

There are, however, numerous rumours about the legislature's intention to intervene in the future, by means of legislation issued by the body with power to do so - the Portuguese parliament. This legislation is expected to expressly require the deposit of all or part of the value of the note itemising and justifying party costs upon bringing a challenge, as happened when the Code of Judicial Costs was in force.

However, it is certain that the deposit obligation ceases to exist in the meantime.

There are numerous rumours about the legislature's intention to intervene in the future through legislation issued by the body with power to do so - the Portuguese parliament - expressly requiring the deposit of all or part of the note itemising and justifying party costs.

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