



OCTOBER 2018

## CONSTITUTIONAL LAW

# PRIVATE SECURITY LAW DECLARED PARTIALLY UNCONSTITUTIONAL

## JUDGMENT OF THE CONSTITUTIONAL COURT NO. 376/2018

*This judgment addresses a recurring question in Portuguese constitutional case law: whether the constitution permits automatic limitations on access to professional activities based on a criminal conviction.*

### 1. SUBJECT MATTER

The Judgment of the Constitutional Court No. 376/2018, delivered on 4 July 2018<sup>1</sup>, was published on 18 September 2018. This judgment declared the unconstitutionality with general mandatory force of the rule in article 22(1)(d) and, with reference to this, the rules appearing in paragraphs 2, 3 and 4 of the same article. These provisions are all from the Legal Framework on Engaging in Private Security Activities<sup>2</sup>, which made the authorisation to engage in private security activities subject to the requirement of “not having been convicted, by a final, unappealable judgment, of the commission of intentional crime provided for in the Criminal Code and other criminal legislation”. The Constitutional Court held that this rule violates article 47(1), together with article 18(2), both of the Constitution of the Portuguese Republic (the “Constitution”).

In this Informative Note, we set out the main implications this decision could have for private security work.

### 2. THE DECISION OF UNCONSTITUTIONALITY

The Constitutional Court has declared the unconstitutionality of the above rule because it breaches the principle of proportionality and the fundamental right to freedom of choice of profession, enshrined respectively in articles 18(2) and 47(2), both of the Constitution.

This judgment addresses a recurring question in Portuguese constitutional case law: whether the constitution permits automatic limitations on access to professional activities based on a criminal conviction, considering that article 30(4) of the Constitution provides that “no penalty involves a necessary effect of loss of any civil, professional or political rights”.

The Constitutional Court concluded (although not unanimously) that article 30(4) of the Constitution does not prohibit a restriction of civil, professional or political rights, as an automatic effect of a conviction. Such a restriction is not prohibited if “objective reasons, which relate to the nature of the activity in which they engage and with other constitutional values capable of being affected by this activity” are at issue. However, in the case of a restriction on the right to freedom of choice of profession provided for in Law no. 34/2013, of 16 May the Constitutional Court ruled that it was disproportionate and, therefore, unconstitutional. The Court reached this conclusion based on the fact that the restriction covers convictions that might not affect the suitability to engage in private security work.

<sup>1</sup> Available [here](#).

<sup>2</sup> Law no. 34/2013 of 16 May.

### 3. CONSEQUENCES FOR PRIVATE SECURITY WORK

This main effect of this decision is to eliminate the rule requiring that certain persons working for or with private security companies must not have been convicted, by a final, unappealable judgment, of the commission of an intentional crime as provided for in the Criminal Code and other criminal legislation. The persons in question are the directors and managers of private security companies, security personnel, security directors, those responsible for self-protection services, private security trainers, training managers and pedagogical coordinators of training bodies. The elimination of this rule has retroactive effect to the date of entry into force of the rule, that is, from the entry into force of Law no. 34/2013 of 16 May. However, there is an exception for convictions with the force of res judicata.

In practical terms, the processes already completed are not affected, but the above rule no longer applies to pending or new applications for authorisation for by directors. Similarly, any cases where an application has been refused for non-compliance with this rule can now be re-submitted, because this rule can no longer be applied.

*This main effect of this decision is to eliminate the rule requiring that the directors and managers of private security companies, security personnel and security directors [...] have not been convicted of an intentional crime by a final, unappealable judgment.*

However, doubts arise as to which rule will apply from now on, in the absence of the rule declared unconstitutional. In principle, as article 22(1)(d) of the current law (Law no. 34/2013 of 16 May) replaced article 8(1)(d) of the old law (Decree-Law no. 35/2004 of 21 February), article 8(1)(d) of the Decree-Law no. 35/2004 of 21 February should apply once again, as if it had never been repealed. Accordingly, directors and managers of private security companies will be required to prove that they have *"not having been convicted by a final, unappealable judgment, of the commission of an intentional crime against life, physical integrity or the protection of private life, or property, the crime of forgery, a crime against the security of telecommunications, against public order and peace, resistance or disobedience to public authority, of illegal possession of weapons or any other intentional crime punishable with a sentence of imprisonment of more than 3 years, without prejudice to judicial rehabilitation"*.

However, there are arguments that the unconstitutionality of article 22(1)(d) the current law (Law no. 34/2013 of 16 May) may not lead to the reinstatement (recovery) of article 8(1)(d) of the old law (Decree-Law no. 35/2004 of 21 February). If that were the case, neither of the rules would apply (one because it has been repealed and the other because it was declared unconstitutional). As a result, no conditions would exist in relation to criminal convictions. It is not the role of the Constitutional Court to establish the revalidating effects of its decisions, so everything will depend on the understanding that the courts and the Public Administration adopt in the future. If it does indeed apply once again, nothing guarantees that article 8(1)(d) of the old law (Decree-Law no. 35/2004 of 21 February) will not also be declared/held unconstitutional, if this question comes to be raised before the courts.

It should be noted that this possibility was not ruled out by the judgment under analysis here. In addition, the judgment does not rule out the possibility of the legislature intervening in the future to list the criminal convictions that would prevent the granting of an authorisation to engage in private security work.



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PEDRO PIRES

Estudo para uma nova pele (soldados de plástico cromados), 2005

Resina, soldados de plástico e gesso  
44 X 23 X 29 cm

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