

# ABREU & MARQUES

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Should you require any copies of the legislation herein referred or wish us to respond to any questions you may have on any of the matters raised in this newsletter, please contact this law firm or send an email to any of the persons named above.

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## 1 - NEW LEGISLATION

• **Financial Sector** - Decree-law 31-A/2012 - Feb 10 - Reinforces the Bank of Portugal intervention powers in institutions under its supervision, amending, in consequence, the Credit Institutions and Financial Companies Legal Regime, the *Fundo de Garantia do Crédito Agrícola Mútuo*, the Credit Institutions and Financial Companies Liquidation and Restructuring Regime and the Bank of Portugal Organic Law.

• **Treasury Bills** - Decree-law 40/2012 - Feb 20 - Amends the Treasury Bills legal regime, increasing their issuing term.

• **Public Entities** - Law 8/2012 - Feb 21 - Approves the rules applicable to compromises undertaking and to the public entities outstanding payments.

• **State Budget 2012** - Decree-law 32/2012 - Feb 13 - Approves the execution rules of the 2012 State Budget and amends several legislation, including the Tax General Law and the Retirement Statute, among other.

• **State Budget 2012 - Tax Infractions General Regime** - Rectification 11/2012 - Feb 24 - Rectifies the law that approved the 2012 State Budget amending article 22 of the Tax Infractions General Regime.

• **IRS** - Order 2075-A/2012 - Feb 13 - Approves the withholding tax rates to be in force during 2012.

• **Invoicing** - Rule 22-A/2012 - Jan 24 - Amends the Rule that regulated the invoicing computer programmes certification procedures, and that foresees a set of technical rules, that must be followed by the companies producing software, in order to reinforce the fight against fraud and tax evasion.

• **Employees Health and Safety** - Decree-law 24/2012 - Feb 6 - Foresees the minimum prescriptions regarding employees protection against the risks for the safety and health, due to the exposure to chemical agents at work, adopting the Community Directive on this matter.

• **Judicial Courts Costs** - Law 7/2012 - Feb 13 - Amends the Judicial Courts Costs Regulation.

• **Medicines** - Law 11/2012 - Mar 8 - Approves new rules regarding the prescription and supply of medicines, amending several legislation regarding this matter, including the Medicines for Human Use Legal Regime.

- **Surveillance Systems** - Law 9/2012 - Feb 23 - Amends the legislation that regulates the use of video cameras by the security forces and services in public places of common use.

## 2 - REINFORCEMENT OF FINANCIAL STRENGTH OF CREDIT INSTITUTIONS

On January 11, Law 4/2012, that amends Law 63-A/2008 of 24 November, which established measures to reinforce the financial strength of credit institutions, under the initiative to strengthen financial stability and the availability of liquidity in financial markets, was published in the Official Gazette.

Law 4/2012, which came into force on January 12, amended for the third time Law 63-A/2008, change that, due to its extension, led to the republication of the latter.

The reinforcement of the financial strength of credit institutions is carried out through capitalization operations funded with of public investment, aiming to the fulfilment of the *core tier 1* ratio<sup>1</sup>. The use of public investment, which has subsidiary and temporary nature, thus being applicable to capitalization operations of credit institutions to take place up to June 30, 2014, is made in accordance, notably, with the principles of necessity and proportionality, of remuneration and guarantee of the invested capitals and of minimization of the risks of distortion of competition. The State may not exercise, regardless the amount of its participation in the share capital of the credit institution, domain or control over the institution, except in cases of a materially relevant default of the recapitalization plan.

The capitalization operation can be made through:

- a) acquisition of own shares held by the credit institution, or of other securities representative of the share capital when the institution does not assume the form of a limited company by shares (*sociedade anónima*);
- b) increase of the share capital of the credit institution;
- c) other financial instruments eligible for *core tier 1* own funds under the conditions for such eligibility.

When the capitalization operation is carried out through the acquisition of own shares of the credit institution, such shares will be automatically converted into special shares. The capital increase referred to in b) above can only take place through the issue of special shares.

The issuance or conversion into special shares in the terms previously mentioned is not subject to express statutory provision and follows the regime of ordinary shares, except to the extent that they give right to a priority dividend.

When the interest acquired by the State under the terms of subparagraphs a) and b) above does not exceed a certain threshold (which has yet to be defined by Order (*Portaria*)), the same can only exercise its voting rights on resolutions regarding the amendment of the by-laws, mergers, spin-offs,

transformation, dissolution or other matters for which the law or the by-laws require a qualified majority. However, if such participation exceeds the threshold (yet to be defined), the State may exercise in full the voting rights attached to its shareholding.

In case of a materially relevant default of the recapitalization plan:

- a) the State may exercise all voting rights corresponding to the shareholding held in the credit institution;
- b) the State may appoint or increase the number of members who represent it in management body, which may assume executive functions, or in the supervisory body of the credit institution to ensure its representation in corporate bodies in proportion to the percentage voting rights held in the institution;
- c) the State may freely dispose, in whole or part, its shareholding in the institution, regardless of the existence of preemption rights;
- d) the amounts distributable as dividends to shareholders who acquired their participation outside of this regime are necessarily engaged in the public disinvestment, subject to compliance with the minimum levels of own fund, namely of *core tier 1*.

Access to public investment depends on the presentation by the credit institution at the Bank of Portugal, of a recapitalization plan that foresees the necessary and appropriate measures for this purpose, the respective timing, as well as the demonstration that the institution meets the adequate strength conditions for the continuation of its activity.

Bank of Portugal shall examine the recapitalization plan and submit, within 10 business days, its proposed decision, duly substantiated, to the government member responsible for the finance area. The Minister of Finance shall, in turn, decide on realization of the capitalization transaction, based on the above proposal of Bank of Portugal.

When a credit institution presents a level of *core tier 1* own funds, inferior to the minimum established, and does not present at its own initiative, or does not change in accordance with guidelines of the Bank of Portugal, a recapitalization plan with the recourse to private capital or fails to comply the plan submitted, the Bank of Portugal may determine that the institution must submit a recapitalization plan with the use of public funds. In case of default of the foregoing, Bank of Portugal may appoint an interim administration for the institution, revoke their license to operate or implement resolution measures under the Legal Framework of Credit Institutions and Financial Companies.

Credit institutions having its head office in Portugal are the ones eligible for this regime.

<sup>1</sup> According to Bank de Portugal Notice no 3/2011 (as amended), banks should strengthen their *core tier 1* ratios (on a consolidated basis or on an individual basis, if not part of a financial group subject to the supervision on a consolidated basis of Bank of Portugal), for an amount not in-

ferior to 10% until December 31, 2012. Similarly, and taking into account the risk profile and outcome of the exercise of assessing solvency and deleveraging, to be developed under the Financial Assistance Program, the Bank of Portugal may also determine, on a case by case basis, higher levels of the *core tier 1* ratio and/or the anticipation of the expected date of compliance.

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### 3 - PORTUGAL - TAX AMNESTY (RERT III)

The 2012 budget approved by Law nr 64-B/2011, of December 30, approved a new exceptional regime of regularization of undisclosed funds (abbreviated as RERT III), held outside Portugal up to 31 December 2010, by means of a payment of a 7,5% tax upon the undeclared funds.

The regime of exceptional regularization is applicable to undisclosed funds placed outside Portugal up to 31 December 2010, consisting of:

- a) deposits;
- b) certificates of deposits;
- c) securities;
- d) other financial instruments including life insurance policies connected with investment funds units and operations of capitalization related with life investment instruments.

RERT III is applicable both to private individuals as well as to corporate entities and covers patrimonial elements directly or indirectly held by the taxpayers.

One major difference of RERT III towards RERT II is that all the assets, either placed within the EU, EEA countries or third countries do not have to be repatriated into Portugal to benefit from this exceptional regularization regime.

An official form for tax regularization, approved by the Ministerial Decree nr 7-A/2012 of 19 January, has to be completed and filed by the taxpayer or by its legal representative before 30 June 2012.

Along with the completed form, the following original or authenticated documents should be filed before the intermediary bank, or the Central Bank:

- a) documents proving the ownership at 31 December 2010 of the assets disclosed;
- b) documents evidencing the individualized amounts of the assets disclosed as described in item 3;
- c) identification and head office, effective management or permanent establishment of the relevant institution that issued the titles, or where funds were deposited, or other, depending of the specific situation.

The taxpayers carrying out the disclosure of the assets and payment of 7,5% will be shielded against:

a) all tax liabilities in relation to the disclosed patrimonial assets and income up to 31 December 2010;

b) liability for tax infringements arising from illegal actions related with change of facts or figures reported to the tax authorities in respect of the declared assets and income (e.g. this covers the crimes of tax fraud or misappropriation of funds).

No extinction of criminal prosecution is foreseen if the source of the undisclosed funds is a crime other than of a fiscal nature.

The above effects mentioned in a) and b) will not be applicable if at the date the undeclared assets and income are disclosed a tax inspection is already pending or any other criminal or infringement procedure of a tax nature was already started.

The non completion of the Form, the filing of the Form with failures or omissions of patrimonial elements will increase the tax liability due (not the 5% tax applicable under the RERT regime but the tax liability due under normal circumstances), on 60%.

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### 4 - RECENT AMENDMENTS IN PORTUGUESE LABOUR LAW

Although widely announced and discussed publicly until the beginning of the first quarter of this year 2012, only two changes to the Law 7/2009 were published - Law 53/2011 and Law 3/2012 -, there is a great expectation towards the announced changes, not yet published.

#### 1 - Law 53/2011, October 14

Law 53/2011, which introduces the second amendment to the Labor Code, approved in annex to Law 7/2009, February 12, establishes a new system of compensation for different types of termination of employment contracts, applicable only to new contracts.

In this framework is added to the Labor Code article 366-A ("*Compensation for new employment contracts*"), which regime has some differences from the previous regime, still applicable to the contracts in force.

The new regime, maintaining salary and seniority bonus as the basis for calculation of compensation, introduces the reduction in the number of days to be taken in consideration and sets a maximum value of the salary to be taken in consideration and a maximum amount of the compensation value.

For new contracts the regime established by article 366-A foresees that:

(i) the amount of compensation is equal to 20 days of basic salary and seniority bonus for each full year of seniority or fraction thereof;

(ii) the amount of monthly basic salary and seniority bonus to be considered for the basis of calculation may not exceed 20 times the minimum guaranteed salary (currently € 485.00);

(iii) the total amount of compensation may not exceed 12 times the monthly basic payment and seniority bonus of the employee or, when the limit specified above is taken in consideration, 240 times the minimum guaranteed salary.

For the new contracts the law does not establish any longer a minimum limit for the compensation value.

The application of this law was adjusted to allow different timings:

a) immediate application, after the entry into force on November 1, of some of the amendments to the existing regulations and of the new regulations to the new contracts, defined as those entered into after the entry into force of this law, i.e. all contracts concluded as from November 1;

b) application of certain amendments to the existing regulations only on the date of enactment of the legislation regulating the compensation fund for the work.

The law has determined further that the employer is obliged to adhere to the labour compensation fund and make contributions according to the regime which will be established, being liable for the full payment of the compensation determined by the application of article 366-A until the compensation fund is set up or until the employer has adhered to the same.

## 2 - Law 3/2012, January 10

The present law sets an extraordinary renewal for the ongoing labour contracts subject to a fixed term, which maximum duration would be until June 30, 2013.

Such contracts can now be subject to two extraordinary renewals, but the total of the renewals must not exceed 18 months.

The extraordinary length of each renewal can not be less than one sixth of the maximum contract term work or its actual length, whichever is inferior.

Out of this exceptional regime are the non fixed term contracts since the maximum six years began in 2009, with the result that it will only be reached in February 2015.

However, a labour contract subject to an extraordinary renewal can not exceed December 31, 2014.

As well as in the previous regime, if the maximum duration periods or the number of renewals is exceeded, the contract is considered a non term contract (i.e. permanent).

Concerning the right to severance payment due to the expiration of a fixed term contract by the employer, two different

regimes are now established, one applicable to the duration of the contract until the first extraordinary renewal, the other from that renewal onwards.

Until the first extraordinary renewal, the amount of compensation is calculated according to the legal regime applicable to a term contract concluded on the date of effectiveness of the relevant contract.

From the first extraordinary renewal, the amount of compensation is calculated according to the legal regime (introduced by Law 53/2011) applicable to a term contract concluded at the time of the extraordinary renewal.

The amount of the compensation to be paid will be the result of the sum of these two components.

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**On March 8, at Lisbon, took place the presentation of the book "Abreu & Marques - 30 anos - Estudos de Direito", within the scope of the law firm anniversary commemoration and that gathers a selection of legal studies, on the legal areas where "Abreu & Marques" provides its main legal advising.**