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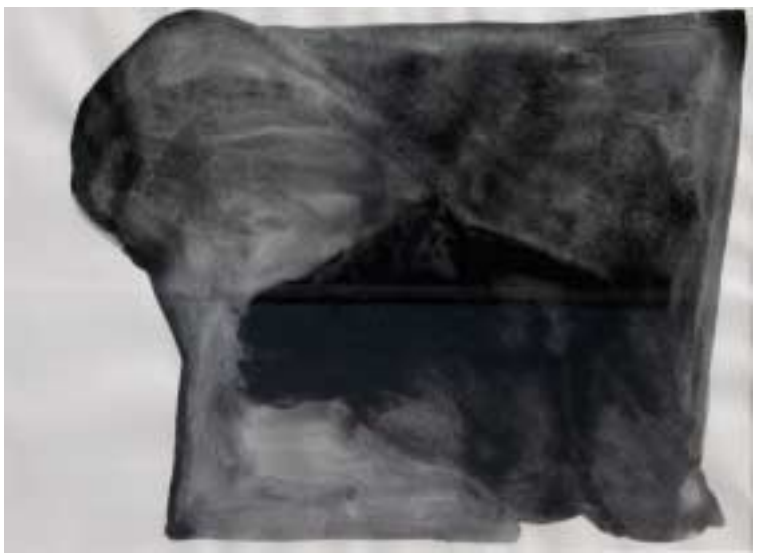

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IN THIS EDITION

Decree Law nr. 34/2005 of February 17th
Interest and Royalty Payments

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The purpose of this Decree-Law is to transform into Portuguese law the Council Directive nr. 2003/49/EC, of June 3rd, which provides for a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. The aim consists of exempting those payments from taxation at the source to assure that said payments are subject to tax once in a Member State.

Portugal was allowed a transitory regime in two phases: as to the date of application of this Directive, Portugal is authorised not to apply the respective benefits *until the date of application of the Council Directive 2004/48/EC, of June 3rd,* on taxation of savings income in the form of interest payments; and another period of eight years, *as from the date of application of the Directive,* during which the rate of withholding tax on interest and royalty payments made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State must not exceed 10% in the first four years and 5% in the final four years.

This Directive aims to assure, within the scope of the beneficiary company of the income, equality in the tax system of interest and royalties generated in internal operations and cross border operations made between associated companies.

Amendments to Articles 80 and 90 of the Company Income Tax Code are made and an Article 89 A introduced in the same Code.

Decree Law nr. 35/2005 of February 17th – Related with the annual and consolidated accounts of certain types of companies

This Decree-Law transfers into the Portuguese legal system the Directive nr. 2003/51/EC of the European Parliament and Council, of June 18th, that amends the Council Directives nr. 78/660/EC, 83/349/EC,

Moust Important Legislation Published :

- Notice nr. 84/2005, of April 4th, 2005 – Public communication that the Government of the Portuguese Republic has deposited, on October 15th, 2001, its instrument of acceptance regarding the Amendments to the International Maritime Organisation Convention, adopted by the Assembly of the Organisation on November 4th, 1993.

- Decree-Law nr. 76/2005, of April 4th – Amends Decree-Law nr. 76/2003, of February 4th, that transfers into the Portuguese legal system Directive nr. 2001/37/CE, of the European Parliament and of the Council, of June 5th, on the approximation of the laws, regulations and administrative provisions of the Member States

86/635/EC and 91/674/EC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

Article 2 of the Decree-Law establishes the provisions regime with particular reference to companies subject to the supervision of the Insurance Institute of Portugal and of the Bank of Portugal.It is established that in Bank of Portugal notices or instructions and by regulatory rules of the Insurance Institute of Portugal, the necessary amendments to the respective prudential and accounting standards shall be made.

Article 3 provides for the prudential principle as to liabilities incurred and as to foreseeable liabilities and potential losses.

Several amendments are introduced to Decree-Law nr. 238/9 of July 2nd, to Decree-Law nr. 147/94, of May 25th, to Decree-Law nr. 410/89, November 21st, which approves the Official Accounting Plan and to Decree -Law nr. 262/86, of September 2nd, among others. ■

concerning the manufacture, presentation and sale of tobacco products.

- Ministerial Order nr. 363/2005, of April 4th – Updates the remunerations for the calculation of invalidity and old age pensions under the general regime of social security.

- Ministerial Order nr. 380/2005, of April 5th – Approves the regulations on the extension of the alterations of the collective labour contract (CTT) entered into between APECA – Associação Portuguesa das Empresas de Contabilidade, Auditoria e Administração (APECA – Portuguese Association of Accountancy, Auditing and Administration Companies) and the Union of the Workers of Offices, Services and Commerce and others.

- Ministerial Order nr. 381/2005, of April 5th – Amends the Regulations of Enforcement of the Measure of Support "Modernization and Development of Energy Infrastructures", approved by Ministerial Order nr. 400/2004, of April 22nd.

- Ministerial Order nr. 383/2005, of April 5th – Determines the rates to be charged by the National Institute of the Railroad Transport (INFT).

- Decree-Law nr. 77/2005, of April 13th – Provides for the legal regime of social protection in maternity, paternity and adoption under the scope of the social security welfare sub-system in light of the regime approved in labour legislation in force.

- Ministerial Order nr. 418/2005, of April 14th – Approves the internal regulations that define the organisation and operation of the Health Regulatory Authority.

- Ruling Decision nr. 24-A/2005, of

Implementation of Software and Outsourcing Better contract than sorry!

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Do you need new software? What are you thinking of doing? Buy software (SW) off-the-shelf? Buy SW and make an add-on? Or buy new bespoke SW made to measure your needs?

Independently of the best technical solution for your case, what you should know is that each one of the referred decisions correspond to different contractual concerns, with different rights, duties and responsibilities for both parties.

In the first case - **SW *off-the-shelf*** – we are faced with a "purchase and sale", more specifically, a licensing contract for use of the SW with one sole payment as compensation for the right to use the SW. That is to say, the product is paid for, installed and used.

The contract underlying this relation is a standard contract of the supplier, that is to say, a Contract of Adhesion that operates on the basis "either accept these conditions or do not buy the product".

In the second case - **SW with *add-on*** – we have a mixed contract. On one side, we have the base SW already "pre-made", which is licensed. However, this SW cannot be installed and immediately start to operate because it needs to be adapted to the Client. A specialized company is then contracted which analyses the operating methods of the Client-User – the workflow – and makes an add-on to the SW system. In other words, it adapts the SW system to the specific procedures of your company, "adjusts the suit", creates the charts deemed necessary, gives form to the approval procedures and customizes the information and renders it accessible depending on the user.

The elaboration of this add-on is a contracting agreement, this is, "*a contract whereby one of the parties undertakes in relation to the other to perform a certain task for a price*" (art. 1207 of the Civil Code). Yes, it is the same type as a contract to build houses and bridges. And if you think of the importance that SW, for example, an ERP, would have in your company. you would quickly consider it with the same level of concern and rigour as you would in the awarding of the construction of your company's building.

That is, it should have detailed plans, time-limits and well defined stages, penalties for delays, criterions and forms of supervision of the work(s), provisional and final acceptance of the work(s), ownership of the work(s), tests, guarantees of fulfilment / of operation and others. Considering that the work necessarily implies the collaboration of the client-user (in the definition of the workflow, in the tests, etc.), the contract must contain a clear division of responsibilities. The implementer will "enter into your house" and will come to deeply know your methods; therefore you need confidentiality, confidentiality and more confidentiality. There must be a balance in the penalties between a certain flexibility that may be given to the implementer and an effective penalty – for example, increasing penalties or a grace period. The acquisition of Hardware (central and per user) for the new system may also be related with this contract. This is indispensable to have an idea of the TCO (*Total Cost of Ownership*).

As concerns the third type of contract, **new bespoke SW** – allow me to ask a question: Do you really need this? Could you not adopt the second type of contract? OK, you were not impressed or you really need bespoke SW from scratch. Then

we are faced with a contracting agreement that is frankly more complex and detailed in all of the aspects referred above. Besides that, clauses regarding intellectual property will have to be incorporated, particularly the use of the "source-code" – the heart of any system – as well as foresee the situation of total non-fulfilment by the implementer (it may happen!). In any case, you should be prepared for a long, complex and irregular relation with your implementer and therefore should have clauses adequate for this scenario.

In the meanwhile, you have also heard so much about **outsourcing contracts** that you are probably considering to enter into such a contract. Outsourcing is the rendering of services related with the HW, SW, peripherals and/or telecommunications (voice and/or data) of the company.

These contracts normally have two separate levels: the contractual level that contains the main aspects of the relations between the parties, such as the stages of the process and the considerations; and the technical level that defines, for example, the scope and form for the rendering of services, additional services, error band and penalties. Each one of these levels normally corresponds to different documents - the Contract at a contractual level and the SLA (Service Level Agreement) at a technical level. It is also advisable that there are different interveners at each level with the adequate technical preparation (management people vs. tech people). However, in any case, the contractual level prevailing. If the Contract and the SLA are adequately drawn up, the parties will use only the SLA in +90% of the time of their relation, releasing the manager for other duties.

It should be added that an outsourcing has 3 main phases – Set-up, On-going and Transfer, each one with its specific concerns and rules.

One final remark: TOTAL outsourcing does NOT exist. Certain more sensitive or structural decisions and the supervision of the rendering of services will always have to be entrusted to a person of the Client.

The main advice I would like to give: it is better to invest in a good contract that adequately disciplines the relation between the licensor and the implementer. Or you will probably end up being very sorry (and I am not only referring to money only…). ■

Expiry of Bank Guarantees

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Tax litigation has become an almost exclusive prerogative of medium and large-sized companies in view of the heavy charges involved, not only due to high court costs but also due to the application of the although mitigated principle *solve et repete.*

This tendency, which is contrary to the constitutional right of access to justice, naturally tends to increase if fundamental alterations are not made both under the point of view of the legality of the actuation of the Tax Administration and of the celerity of its decisions, as well as of the Courts.

Thus, as is known, the argument as to the legality of a settlement of a tax, either under an administrative or judicial process, does not exonerate the tax-payer from proceeding with respective payment who, upon payment, has two alternatives: i) to submit a claim of equitable relief or submit a judicial opposition against the act of settlement, by not paying – situation whereby the payment of the debt should be guaranteed under the forms foreseen by law to avoid the process of coercive collection of the debt, commonly known as tax enforcement proceedings.

Until recently, the problem resided on the fact of knowing for how long, if a time-limit exists, should the tax-payer maintain that guarantee. As this represented a financial cost and a limit to the amount in debt, the survival of many companies was questioned.

With the entry into force of Article 183-A, introduced by Law nr. 15/2001, the problem appeared to be, at least, on the road to being resolved.

A time-limit was established for the maintenance of the referred guarantees, which is of 1 year if the tax-payer submitted a claim of equitable relief or of 3 years if the tax-payer preferred to resort to the courts.

Nowadays the problem is another and is based on the lack of coordination between the Tax Administration and the Administrative and Tax Courts, as well as in the wording of the referred legal diploma, whereby it may be stated that the problem is only settled in theory.

In practice the tax-payer, although the law is

April 14th – Determines the maximum percentage of the average increase for urban transports in Lisbon and Oporto, for collective interurban passenger road transports and for train and fluvial transports.

- Parliament Resolution nr. 15/2005 – Assumption of powers of the extraordinary constitutional review.

- Decree-Law nr. 79/2005, of April 15th – Approves the Organic Law of the XVII Constitutional Government.

- Amendment Notice nr. 29/2005, of April 15th, 2005 – Due to amendment of Decree-Law nr. 33-A/2005, of the Ministry of Economic Activities and of Labour, which amends Decree-Law nr. 189/88, of May 27th, reviews the factors for calculation of the value of the remuneration for the supply of energy produced in renewable power stations delivered to the network of the Portuguese electric system (SEP) and defines the procedures for attribution of available power in the same network and period for obtaining an establishment license for renewable power stations, published in the Official Gazette, 1st Series, nr. 33 (supplement), of February 16th, 2005.

- Resolution of the Council of Ministers nr. 82/2005, of April 15th – Approves the Rules of Procedure of the Council of Ministers of the XVII Constitutional Government.

- Amendment Notice nr. 31/2005, of April 20th – Due to amendment of Notice nr. 51/2005, of the Ministry of Foreign Affairs, which made public that the Government of the Portuguese Republic has deposited, on June 25th, 2004, its instrument of acceptance regarding the amendments to

apparently on his side, is compelled to maintain a guarantee until a decision has been declared by the Administration or by the Courts on the claim or opposition submitted, which may take several years. The situation of deadlock is due to the following:

At the term of the period provided for by law (1 or 3 year) the tax-payer must apply for the declaration of expiry of the guarantee from the entity where the process questioning the legality of the settlement of tax is in course, which is the Tax Administration or the Administrative and Tax Courts, depending on whether we are dealing with a claim of equitable relief or a judicial opposition.

Assuming that the tax-payer resorted to the judicial means, it is here that major difficulties arise. In this case, the application must be submitted to the Court where the judicial opposition was lodged.

The rule under analysis provides that, if there is no reply to the application of the interested party within 30 days "*the request is considered tacitly approved*".

Notwithstanding the apparent clarity of the rule, which would lead any interpreter of the law to presume that the tax-payer would have his right guaranteed, even in the absence of an express decision, certain Tax Services – to which the referred guarantees are delivered – refuse to apply the law, on the grounds that they have not received from the Court any express instructions to return the guarantee.

Therefore, the *tacit approval is* not compatible with the referred prerogatives of the Tax Services, which obviously creates entropies that it aims to avoid.

One of the possible solutions for this deadlock depends on a legislative amendment, establishing that the Head of the Tax Service will be competent for the verification of the expiry of a guarantee, that is to say, of the entity competent for the institution and analysis of the tax enforcement proceedings.

Therefore, the same entity would have the burden to declare the expiry of the guarantee and to proceed with its cancellation, without "*intermediaries*". In the absence of a reply, within 30 days, the tax-payer would have the right to collect the guarantee based on the tacit approval of the application for verification of the expiry. Obviously with the right to always resort to the Courts. ■

Directive 2005/29/CE Related With Unfair Commercial Practices

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The final wording of Directive 2005/29/EC concerning unfair business to consumer commercial practices was adopted on May 11th, 2005. Since the Commission Proposal of June, 2003 to-date, the consumer rights before traders was intensely discussed among the different bodies of the European Union, whether dealing with clients of traditional trade or e-commerce consumers, whether referring to publicity, marketing or after-sale service.

The adopted perspective is based on the consideration that "*unfair commercial practices determine the existence of important barriers to the internal market and of appreciable distortions of competition and furthermore that the fragmentation of regulations in this respect is responsible for the creation of other obstacles of a political nature".* Notwithstanding, this Directive, contrary to what was initially thought, became a directive "B2C" ("*business to consumer"), that is to say, a directive* that rules the relations between businesses and consumers, not being applicable to the relations between businesses ("B2B" – "*business to business").*

Certain aspects that were considered useful were merely dealt with in an indirect form, as is the case of the concept of "average consumer"; in fact, although it is stated in the Introduction that "*this directive uses as the benchmark the criterion of the average consumer who is reasonably well informed and reasonably observant and circumspect", as* defined by the Court of Justice of the European Communities, it is certain that further on reference is made to the need of judgement of the Courts and national authorities to determine the atypical reaction of the average consumer in a determined situation. On the other hand, the clear reference to vulnerable groups of consumers, such as children, and the possibility of interpretation that a similar category permits in each Member State, increases the concern of economic agents.

the International Maritime Organisation Convention, adopted by the Assembly of the Organisation on November 7th, 1991, published in the Official Gazette, 1st Series, nr. 39, of February 24th, 2005.

- Ministerial Order nr. 444/2005, of April 29th – Approves the regulations of the extension of the alterations of the collective labour contract (CTT) between the Portuguese Association of Cinematographic Companies and SINTTAV – Sindicato Nacional dos Trabalhadores das Telecomunicações e Audiovisual (SINTTAV - National Union of the Workers in Telecommunications and Audiovisual).

- Judgement nr. 4/2005, of May 2nd – I – To determine if an annual life pension resulting from a work accident occurred before January 1st, 2000 is of a reduced amount for the purposes of redemption, considering the criterion resulting from article 56, nr. 1, sub-paragraph a) of Decree-law nr. 143/99, of April 30th, that the two elements – amount of the pension and highest minimum monthly guaranteed remuneration – refer to the date of determination of the pension. II – For the purposes of gradual completion of the redemption of these pensions, the time schedule and amounts provided for in article 74 of the same law shall be taken into consideration, with the wording introduced by Decree-Law nr. 382/1/99, of September 22nd, remitting, under this scope, the updated value of the pension.

- Ministerial Order nr. 455/2005, of May 2nd – Amends the Regulations of Enforcement of the Measure of Support to the Exploitation of the Energy Potential and Rationalization of Consumptions (MAPE), approved by Ministerial Order nr. 394/2004, of April 19th.

The circumstance that reference to the principle of the country of origin was eliminated is also important. In fact, according to the approved version, businesses will not only have to comply with the obligations of its country of origin when selling to consumers in the whole European Union but are held liable in the event their practices are in breach of the rules of the country of the consumer, notwithstanding being in compliance with the rules of its country of origin. With respect to this amendment, the World Federation of Advertisers has already stated that it is a barrier to the functioning of the single European market.

A general prohibition is introduced with this Directive, defining two conditions to classify a commercial practice as unfair. Therefore a Plaintiff will have to demonstrate that (i) the practice is contrary to the requirements of professional diligence, concept defined in the Directive, but is understood by the majority of national legal systems and resorts to the concept of market customs and usages; (ii) the practice distorts or is likely to materially distort the average consumers' economic behaviour. If these conditions are met, we are faced with a prohibited unfair practice, even if the circumstances of the specific case are not covered by the specific categories of unfair practices referred to in the Directive.

Effectively, two categories of unfair practices are listed: misleading commercial practices and aggressive commercial practices.

Misleading commercial practices may consist of actions – when false or causes a consumer to take a transactional decision that he would not have taken otherwise – or omissions – when material information is omitted that the consumer needs to take a transaction decision (as, for example, the existence of dispatch charges or a "right of withdrawal").

Aggressive commercial practices are defined as those that, through harassment, coercion or undue influence, impairs or are likely to impair the consumer's freedom of choice or conduct, indicating the elements that must be taken into consideration to conclude that such concepts exist.

The circumstance of foreseeing an Annex with a "Black List" of commercial practices which are in all circumstances considered unfair is of major importance, some of which are hereby highlighted:

1) Misleading commercial practices:

- Claiming to be a signatory to a code of conduct when the trader is not;
- Making an invitation to purchase products at a specified price that the trade knows he will not be able to maintain during a period of time or in reasonable quantities – the so-called *bait advertising;*
- Making an invitation to purchase a product at a specified price and then subsequently refusing to show the product or deliver it with the intention of promoting a different product (publicity through a disguised product - *bait and switch);*
- Declarations on the reduced availability of a product in order to elicit the consumer to take a decision in a short period of time;
- Use of the so-called editorial content in the media without making that clear in the content;
- Declaration that the personal security of the consumer or his family is at risk if the consumer does not purchase the product;
- Use of the expression "liquidation sale" or equivalent when the trader is not about to cease trading.

2) Aggressive commercial practices:

- Conducting repeated personal visits to the consumer's home, ignoring the consumer's request to leave or making unwanted solicitations by telephone, fax or e-mail;
- Advertising to children in a way which implies that their acceptance is dependent on their parents buying them a particular product;
- Demanding payment for products supplied by the trader but which were not solicited by the consumer.

Also interesting is the absence of the incentive to auto-regulation. Although codes of conduct are mentioned, there is no true incentive for businesses to adopt the auto-regulation as an alternative means for the settlement of consumer disputes.

Although the Commission states that this Directive will only negatively affect "dishonest traders", it is certain that the evaluation of specific situations that fall either within the concept of general prohibition or in the list of prohibitions set forth in the Annex, will be made locally by entities that (still) work not with the concept of "average consumer", as defined by the Court of Justice of the European Communities, but with the concept of vulnerable consumer who may be influenced to all and any commercial practices of businesses. Therefore, not only the publication of the Directive, as well as its transposition into the national legal system – which is foreseen for 2007 – and the practice resulting therefrom are awaited with expectation. ■

- Ministerial Order nr. 456/2005, of May 2nd – Amends the Regulations of Enforcement of the System of Incentives to the Enterprise Modernization (SIME), approved by Ministerial Order nr. 262/2004, of March 11th.
- Ministerial Order nr. 464/2005, of May 5th – Approves Form nr. 11 of the Regulations of Municipal Tax over Vehicles.
- Ministerial Order nr. 473/2005, of May 12th – Determines the list of commercial names authorised in Portugal regarding the commercialisation of fishing and aquaculture products. Revokes Ministerial Order nr. 1428/2004, of November 25th.
- Declaration nr. 8/2005, of May 18th – Publishes charts I to IX, modified in light of the amendments made up to March 31st, regarding the 2005 State Budget.
- Ministerial Order nr. 488/2005 of May 20th – Approves the currency devaluation coefficient for the purposes of monetary correction of the acquisition values of certain goods and rights.
- Resolution of the Council of Ministers nr. 95/2005, of May 24th – Creates the system of Acknowledgement and Monitoring of Projects of Potential National Interest (PIN).
- Resolution of the Council of Ministers nr. 100/2005, of May 30th – Approves the measures that aim to adapt the judicial system to class actions protecting the occasional user and to assure a rational management of the judicial system. ■

Waste Management
Electrical and Electronic Equipment (REEE)

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Decree – Law 230/2004, from December 10, introduces a deep reform in the WEEE management system introduced by Decree – Law 20/2002, 30 January. This reform is motivated both by the need to implement the new Community Directives in the field[1], as by the practical difficulties of the system adopted before.

Based on the principle of the producer individual responsibility for the waste of his products, the new Decree – Law draws a new management system based on the co-responsibility of the other operators involved in the life cycle of WEEE, aiming to prevent their disposal.

1. WEEE included.

The new Decree – Law is applicable to all WEEE (and respective producers), included in the categories of household appliances, IT and telecommunications equipment, consumer equipment, lighting equipment, tools, toys, leisure and sports equipment, medical devices, monitoring and control instruments, and automatic dispensers[2].

2. Management goals.

Until 31 December 2006, at least 4kg/inhabitant/year of WEEE shall be collected by collecting systems, and an average rate of recovery of 75% by an average weight per appliance shall be reached, being approximately 70% of that recovery in the form of reuse and recycling.

3. Co-responsibility and separate collection design.

The State[3] supervises and ensures the WEEE collection systems are set up until 13 August 2005, comply with the legal conditions and reach their goals. Until that date, the producers shall progressively define and structure the coordinated net of WEEE collection systems, financing WEEE separation by categories and its temporary storage at the reception centers, the transportation from those centers until the recovery operators and the WEEE treatment or elimination[4]. On the other hand, the users shall return the WEEE in the collecting centers according to the instructions provided or request its domiciliary collection, baring the costs only when they are not privates. The distributors shall receive from their clients one WEEE per equivalent EEE sell, being possible also to act as WEEE collection centers. The municipalities are responsible for the WEEE collection near private users and distributors, as collection centers, while performing their collection functions of unsorted municipal waste.

4. Collective and individual management system. Producers' register.

The producers referred in the new Decree – Law shall transfer their responsibility to a collective management system, centralised in a management entity, or provide for it individually, ensuring that the same management level of the collective system is reached. Regardless of the system adopted, the producers shall register at the entity set up for that purpose, in order to be possible to control the fulfilment of the obligations and goals established in the new legislation. ■

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(1) Directives 2002/96/EC and 2002/95/EC, 27.01.2003, on WEEE and dangerous substances.

(2) Although EEE with dangerous substances are prohibited to get in the Portuguese market, from 1 July 2006 on, unless aiming certain uses.

(3) Namely the Waste Institute.

(4) Furthermore, the EEE introduced in the Portuguese market after that date shall be marked with the appropriate symbol, in order to be easily identified.

- Notice of the Bank of Portugal nr. 7/2005, of June 6th – Amends the Notice of the Bank of Portugal nr. 11/94, published in the supplement of the Official Gazette, 2nd Series, of December 29th, 1994, determining the maximum limit of the rate of annual contributions for the Deposit Guarantee Fund.

- Notice of the Bank of Portugal nr. 8/2005, of June 6th – Amends the Notice of the Bank of Portugal nr. 7/96, published in the Official Gazette, 2nd Series, of December 24th, 1996, referring to the capital adequacy regime of investments firms and credit institutions.

- Amendment Notice nr. 44/2005, of June 9th – Due to the amendment of Decree-Law nr. 85/2005, which provides for the legal regime of incineration and co-incineration of waste, transferring into the Portuguese legal system Directive nr. 2000/76/EC, of the European Parliament and Council, of December 4th, published in the Official Gazette, 1st Series, nr. 82, of April 28h, 2005.

- Ministerial Order nr. 510/2005, of June 9th – Updates the tax rate over petroleum and energy products (ISP).

The Adaptation of Portuguese Law to the EU Regime for Prospectuses

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Following the Financial Services Action Plan, the **Directive 2003/71/CE** of the European Parliament and of the Council, of November 4th, **on the prospectus to be published when securities are offered to the public or admitted to trading** (the so-called the "**Prospectuses Directive**") was published in the Official Journal of the European Communities and came into force on 31 December 2003. This Directive shall be transposed in all EU Member States by 1 July 2005. In accordance with the new four-level approach for EU legislation (Lamfalussy process), the **Prospectuses Directive** defines framework broad general principles (level 1), being accompanied by **Commission Regulation (EC) No. 809/2004**, of July 19th, level 2, which, based on the technical advice given by the Committee of European Securities Regulators ("**CESR**"), deals with the format and the contents of prospectuses. The **CESR** has also published, on February 2005, a set of recommendations on the implementation of the **Commission Regulation (EC) No. 809/2004**.

The key aims of the Directive are to protect investors and to increase market efficiency in cross-border capital raising, in the scope of the creation of a single European market for financial services. The new **Prospectuses Directive** seeks the harmonisation of the requirements for the drawing-up, approval and distribution of prospectuses, as well as to implement a single authorisation system ("a single passport for issuers"). In fact, once approved by the competent authority in one EU Member State, a prospectus will be accepted in another EU Member State - provided the competent authority of that Member State is notified - without further local examinations of its content. In order to ensure uniform application of the new regime for prospectuses, which replaces the current principle of "mutual recognition of prospectuses between Member States", the European supervision authorities should cooperate and harmonise interpretation. The Directive foresees, under certain circumstances, the choice of the competent authority for the approval of the prospectus.

The **Commission Regulation (EC) No. 809/2004** will come into force of 1 July 2005. This text clearly defines the information to be provided in the prospectus and covers the prospectus format, the information incorporated by reference, the publication of prospectuses and the dissemination of advertisements. It is also established a standard format for all prospectuses, irrespective of their use.

In Portugal, the **Prospectuses Directive** needs to be implemented by means of a Decree-Law, which is expected to be enacted soon. It should be highlighted that a Law authorizing the Government to approve such Decree-Law will be required, as the implementation of the Directive shall introduce some amendments to the system of sanctions for breaches of rules under the Portuguese Securities Code ("Código dos Valores Mobiliários"). Due to the fact that the **Prospectuses Directive** is a maximum harmonisation Directive, it does not leave Member States free to impose more demanding requirements, defining instead common standards to be implemented.

The Portuguese Securities Market Commission ("Comissão do Mercado de Valores Mobiliários", commonly called "**CMVM**") proposed, on the last quarter 2004, a draft Decree-Law to implement the Directive in question, having launched a public consultation process on this matter.

The main amendments introduced by the above mentioned draft Decree-Law are related to the public offering of securities regime and to the rules in force on admission to trading on regulated markets, among which:

(i) The creation of an "European passport of prospectuses";

(ii) The definition of the national competent authority to approve the prospectus;

(iii) The possibility to choose the format of the prospectus: single or tripartite (including the registration document, the securities note and the summary note);

(iv) The new scheme of incorporation of information by reference;

(v) The adoption of a "base prospectus" for offering programmes;

(vi) The obligation to provide annual information;

(vii) The requirement to deliver a summary;

(viii) The possibility of drafting the prospectus in a language customary in the sphere of international finance.

Relevant community legislation:

- Council Decision of 22 December 2004 on the conclusion of the **Agreement between the European Community and the Principality of Andorra** providing for measures equivalent to those laid down in Council Directive 2003/48/EC on **taxation of savings income in the form of interest payments** – O.J. no. L 114, of 04.05.2005;

- Council Decision of 22 December 2004 on the conclusion of the **Agreement between the European Community and the Republic of San Marino** providing for measures equivalent to those laid down in Council Directive 2003/48/EC on **taxation of savings income in the form of interest payments** – O.J. no. L 114, of. 04.05.2005;

- Commission Decision of 15 October 2003 on **ad hoc measures implemented by Portugal for RTP** – O.J. no. L 142, of 06.06.2005;

- Commission Regulation (EC) No 884/2005 of 10 June 2005 laying down procedures for conducting **Commission inspections in the field of maritime security** – O.J. no. L 148, of 11.06.2005;

- Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a **multiannual Community Programme on promoting safer use of the Internet and new online technologies** – O.J. no. L149, of 11.06.2005;

- Directive 2005/14/EC of the European Parliament and of the

As far as public offerings are concerned and given the differences between the new European regime for prospectuses and the Portuguese Law, the draft Decree-Law clarifies that the registration of a public offer implies the approval of a prospectus. This approval becomes the cornerstone of the public offerings' control. Nonetheless, the existence of an offering registration is maintained in view of lawfulness control. When a prospectus is not required for public offerings (e.g., offerings to employees), the offering is exempted from the assistance of a financial intermediary and it is created a simplified registration procedure.

In order to adapt the **Directive of Prospectuses** and the requirement to launch a public offer announcement (under the Portuguese Securities Code), it is foreseen: (i) the abolition of the public offer announcement in public offers for distribution, except for takeover bids ("OPAs"), as in this case the publication of the prospectus summary is not mandatory; (ii) to maintain the announcement regarding the availability of the prospectus only when the offeror exclusively opts for the disclosure by means of electronic format.

Furthermore, some modifications shall be introduced in the legal regime of cash bonds and mortgage bonds, as well as in the legal regime of collective investment undertakings and real estate funds, since the Directive is also applicable to prospectuses of public offers and admissions to trading of bonds issued by credit institutions and participation units.

As a consequence of the implementation of the **Prospectuses Directive**, two major concepts shall be redrafted: "institutional investors" and "public offers".

Firstly, the concept of "institutional investors" shall be replaced by "qualified investors" and shall be extended as to include:

a) Financial Institutions of States that are not Members States of the European Union;

b) Entities trading in commodities and in derivatives on commodities;

c) National and regional governments, central banks and public entities that manage the public debt;

d) International and supranational institutions, namely, the European Central Bank, the European Investment Bank, the International Monetary Fund and the World Bank;

e) Other legal entities whose corporate purpose is to invest in securities;

f) Companies that according to their last annual or consolidated accounts meet two of the following criteria: (i) an average number of employees of 250; (ii) a total balance sheet of € 43 millions; (iii) an annual net turnover of € 50 millions.

Secondly, offers addressed at, at least, 100 natural or legal persons (in the current regime the reference number is 200) other than qualified investors with residence or establishment in Portugal, are qualified as "public offers".

Without prejudice to the possibility that the Decree-Law, which shall implement the **Prospectuses Directive,** may bring some novelties, the expectations towards that fact are not very high, since this Directive is a maximum harmonization Directive and, simultaneously, the **Commission Regulation (EC) No. 809/2004** will soon enter into force, without the need to be adapted to national laws. It seems, thus, justified the analysis of the (predictable) changes to be brought into the Portuguese regime for prospectuses. ■

Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to **insurance against civil liability in respect of the use of motor vehicles** – O.J. no. L149, of 11.06.2005;

- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning **unfair business-to-consumer commercial practices in the internal market** and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) – O.J. no. L149, of 11.06.2005;

- **Information note on references from national courts for a preliminary ruling** – O.J. no. C 143, of 11.06.2005;

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