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INFORMATIVE NOTE

TAX

Share option plans in start-ups and changes to SIFIDE II

On 23 December 2022, the Government's presented Draft Law 56/XV/1 to the Portuguese Parliament. This law is intended to create a regulatory framework that fosters the development of companies with a business model equipped with a strong innovation component and potential for future growth.

In this context, a definition of the legal concepts of start-up and scale-up is proposed, as is the simultaneous creation of a set of specific investment and tax policies aimed at capitalising and attracting talent to these companies.

Furthermore, a set of significant amendments are proposed to the Tax Incentive System for Business Research and Development (*Sistema de Incentivos Fiscais à Investigação e Desenvolvimento Empresarial*, or '**SIFIDE II**') and these amendments are intended to make research and development ('**R&D**') more attractive.

It was presented a Draft Law to the Portuguese Parliament intended to create a regulatory framework that fosters the development of companies with a business model that has a strong innovation component and potential for future growth.

These are the most important measures:

- Change to the taxation rules for share options and subscription and/or plans to grant shares involving securities in companies classed as start-ups, SMEs (including small-mid caps) and companies operating in the innovation sector. The change provides for the deferral of taxation until the date of disposal of the securities and for reduced rates of taxation.

- Changes to the SIFIDE II scheme, with the following highlights:

  i) Making the scheme more competitive by increasing the deduction for expenses incurred in R&D activities and extending the reporting deadline in the context of SIFIDE II.

  ii) New rules on access to tax benefits.

  iii) Imposition of reporting duties on participating companies.

Tax team

Tax rules on share options / share subscription

Under these new arrangements, gains realised by employees will now only be taxed at 50% of their value and will be subject to the special rate of 28% for Personal Income Tax purposes.

Draft Law 56/XV/1 provides for the creation of special arrangements for the taxation of gains arising from share options, share subscription and/or share allocation plans or equivalent rights attributed by SMEs (including small-mid caps), by entities operating in the field of innovation or by companies recognised as start-ups.

Under these new arrangements, gains realised by employees will now only be taxed at 50% of their value and will be subject to the special rate of 28% for Personal Income Tax purposes (i.e., an effective rate of 14% will apply). This is subject to the condition that the rights underlying the securities generating the gains or equivalent rights are held for a minimum period of 1 year.

Moreover, the taxation of gains made by employees upon exercising the option, subscription or allocation is deferred to the first of the following dates:

- Disposal of the securities, where the gain is calculated based on the positive difference between the realisation value and the strike price of the option or right, plus whatever was paid to acquire that option or right.
- Loss of the status of resident in Portugal, where the gain is calculated based on the difference between the market value and the strike price of the option or right, plus whatever was paid to acquire the option or right.

For the purposes of the application of these new arrangements, a start-up is considered to be a legal entity that meets all of the following requirements:

i) Having been operating for less than 10 years

ii) Employing fewer than 250 people

iii) Having a turnover not exceeding €50,000,000

iv) Not being the result of the demerger of a large company and not having capital formed by any direct or indirect majority holding of a large company

v) Having its registered office and at least 25 employees in Portugal.

Besides these requirements, start-ups must meet one of these conditions:

- Be companies meeting the criteria set out by Ministerial Order 195/2018 of 5 July.
- Have their ability to engage in research and development activities recognised by the National Innovation Agency (ANI).

The tax allowance for the expenses of R&D activities associated with projects to create projects ecologically goes up from 110% to 120%.

- Have certification of the process of recognition of companies in the technology sector.
- Have concluded at least one round of venture capital financing through an entity qualified to provide venture capital financing and subject to supervision by the CMVM (Portuguese Securities Market Commission), or similar international authority, or by means of the entry of equity or quasi-equity instruments by investors that are not founding shareholders of the company, namely, business angels.
- Have received investment from Banco Português de Fomento, S.A., or from funds managed by it, or from one of its equity or quasi-equity instruments.

However, members of the corporate bodies and taxpayers who directly or indirectly hold at least 10% of the share capital or voting rights of the entity granting the plan are excluded from access to this tax scheme (unless, in the year prior to the granting of the plan, the company was classed as an SME).

Changes to SIFIDE II

Measures to make SIFIDE II more competitive

Draft Law 56/XV/1 provides for a set of measures aimed at strengthening the competitiveness of the scheme:

- The tax allowance for the expenses of R&D activities associated with projects to create projects ecologically goes up from 110% to 120%.
- The deadline for carrying forward expenses that have not been deducted due to insufficient tax being assessed is increased from 8 to 12 years.
- The period of validity of the recognition of the suitability of the entity in terms of research and development is increased from 8 to 12 years.

New rules for access to tax benefits through indirect investment

Following the changes introduced by the State Budget Law for 2021, there is a proposal to introduce a set of additional requirements for access to tax benefits. These include (i) rules intended to prevent situations of double tax benefits in the sphere of the entity that engages in the R&D activity and in the sphere of the investing entity (in R&D institutions or SIFIDE investment funds), and (ii) rules intended to ensure the maintenance of the investment made.

Draft Law 56/XV/1 thus provides for the following changes to the rules on access to tax benefits:

- The value of expenses relating to shareholdings in the capital of R&D institutions and contributions to investment funds that make investments in companies dedicated to R&D will no longer be deductible for Corporate Income Tax (CIT) purposes whenever operations carried out between entities with special relationships are involved.

- Expenses incurred by R&D companies in research and development activities, when the applications in question are directly or indirectly financed by SIFIDE investment funds, will no longer be deductible for CIT purposes.

- Expenses incurred in taking a stake in the capital of R&D institutions and contributions to SIFIDE investment funds no longer benefit from the incremental rate of 50% for the purposes of an CIT deduction (i.e., the deduction from the taxable amount is limited to the base rate of 32.5%).

- The period for holding the investment fund units is increased from 5 to 10 years. If this period is not respected, the amount deducted from the taxable amount will be added to the CIT for the period in which the disposal took place, in the proportion corresponding to the missing period, plus the corresponding compensatory interest.

- SIFIDE investment funds will now have to make at least 90% of the investment (instead of the current 80%) in R&D companies within 3 years of the date of acquisition of the investment units (as opposed to the current 5 years). If this percentage is not respected, the amount proportional to the unrealised part of the investment which has been deducted from the taxable amount will be added to the CIT for the period in which the deadline is missed.

- Reduction of the period within which R&D companies must invest in R&D activities from 5 to 3 years. If they fail to respect this time limit, the amount proportional to the non-implemented part of the investment deducted from taxable income will be added to the CIT for the period in which the deadline is missed.

SIFIDE investment funds will now have to make at least 90% of the investment (instead of the current 80%) in R&D companies within 3 years of the date of acquisition of the investment units (as opposed to the current 5 years).

Reporting obligations

Participating entities must inform the institutions dedicated to R&D and SIFIDE investment funds in which they participate that they benefit from SIFIDE II and the amount in question that is applied. This obligation must be fulfilled by the end of the month following the filing of the *Modelo 22* tax return. If this obligation is not met, the participating entities will be unable to deduct the amounts applied and they will be subject to a fine.

Investments in institutions dedicated to R&D and SIFIDE investment funds made before the date of entry into force of the amendments to the SIFIDE rules are still subject to the application of the new rules.

Temporal application of the law

Draft Law 56/XV/1 provides for the entry into force of the legislative amendments on the day following its publication in the official gazette, Diário da República, even though it will actually take effect on 1 January 2023. Therefore, the approval and publication of the law at a later date should not prevent the rules from being applicable on 1 January 2023.

Draft Law 56/XV/1 also provides that investments in institutions dedicated to R&D and SIFIDE investment funds made before the date of entry into force of the amendments to the SIFIDE rules (i.e., in the period between 1 January 2023 and the entry into force of the Draft Law) are still subject to the application of the new rules. Therefore, any deadlines should be measured from the date they take effect (1 January 2023). ■

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