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EMPLOYMENT AND SOCIAL SECURITY BULLETIN

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Social Dialogue Agreement and the State Budget for 2023

Last October 10, the Government and Social Partners (except for CGTP) reached a social dialogue agreement, the so-called “Medium Term Agreement for the Improvement of Income, Wages and Competitiveness (the “Agreement”). This Agreement will have a significant impact on employment relations in the foreseeable future, which we should look at right now.

The Agreement is outlined in 5 main areas:

1. Salaries improvement;
2. Young people: Attraction and retaining of talent;
3. Employees: non-wage income;
4. Companies: Taxation and Financing;
5. Administrative Simplification and Context Costs.

1. SALARIES IMPROVEMENT

The announced objective is to increase by + 3 percentage points salaries relative weight on the GDP in relation to the pre-crisis figure (2019: 45,3%), converging towards the EU average, in order to reach a relative weighting for wages in GDP of, at least, 48,3% in 2026.

In order to reach this objective, it is estimated that a Salaries Increase of 1,3 percentage points is necessary – which will translate into a nominal appreciation of the salaries per employee of 4,8% in average over the course of the years 2023 to 2026.

There is an aim of reaching a Minimum Monthly Guaranteed Salary (“MMGS”) of, at least, € 900.00 in 2026, being the increase of the MMGS as follows:

| Year | 2023 | 2024 | 2025 | 2026 |
|--------|-------|-------|-------|-------|
| Amount | € 760 | € 810 | € 855 | € 900 |

2. YOUNG PEOPLE: ATTRACTION AND RETAINING OF TALENT

- Increase on the annual personal income tax (“IRS”) Benefit for Young People to 50% in the first year, 40% in the second year, 30% in the third and fourth years and 20% in the fifth year, as well as an increase on the benefit caps for each year.

The 2023 State Budget Law (“LOE 2023”) which has already been approved in general terms, amends the wording of article 12th - B of the CIRS, foreseeing that the exemption is of 50% in the first year, 40% in the second year, 30% in the third and fourth years and of 20% on the last year, with the following caps: 12.5 times the amount of the Social Supports Index (“IAS”), 10 times the amount of the IAS, 7.5 the amount of the IAS and 5 times the amount of the IAS, respectively.

- Setting up of an annual program aimed at supporting the execution of open-ended employment contracts with qualified young persons with monthly salaries of at least € 1,320.00.
- Extraordinary extension of the “Programa Regressar” (Return to Portugal Program) while the Agreement is in force and adapting the respective application rules.

3. EMPLOYEES: NON-WAGE INCOME

- Updating in 2023 the IRS bands, considering the nominal appreciation of the salaries per employee of 5,1%, and ensuring the principle of fiscal neutrality on the salaries increases, with the annual updating of the IRS rates so that it does not lead to tax increases.

| Taxable Income(€) | Rates | |
|--------------------------|--------|--------|
| | Normal | Medium |
| Up to 7479 | 14,50 | 14,500 |
| More than 7479 to 11284 | 21,00 | 16,992 |
| More than 11284 to 15992 | 26,50 | 19,579 |
| More than 15992 to 20700 | 28,50 | 21,608 |
| More than 20700 to 26355 | 35,00 | 24,482 |
| More than 26355 to 38632 | 37,00 | 28,460 |
| More than 38632 to 50483 | 43,50 | 31,991 |
| More than 50483 to 78834 | 45,00 | 36,669 |
| Higher than 78834 | 48,00 | |

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- Narrowing and, whenever possible, elimination, of the gap between the amount of the IRS withheld and the tax due, evolving to a tax withholding system that ensures that the salary increases amount to actual monthly net earnings increases for employees.
- Change the “minimum subsistence level” rules so that it may lead to a higher level of IRS progressivity.
- Setting up of a Return to the Labour Market Incentive aimed at long term unemployed persons, which allows the partial cumulation of unemployment benefits with the salary paid by the employer.
- Increase on the overtime payment once 100 hours of overtime are reached (50% for the first hour or fraction, 75% per hour or fraction thereof in business day, 100% per hour or fraction on weekly rest day or public holiday) - **(it requires an amendment to the Labour Code)**.
- Reduction in half on the IRS withholding rate for these overtime payments.

The LOE 2023 foresees an amendment to article 99th - C of the CIRS under which the autonomous withholding rate applicable to overtime payment is reduced by 50% as from the 101st hour of performed overtime work.

- Updating of the amount of the tax exemption over meal allowances to a daily amount of € 5.20.
- Evaluation and implementation of a new tax framework in order to benefit the employee in case of attendance of certified professional training.
- Implementation of measures that minimize the impact of the increase of housing costs on household budgets.

The LOE 2023 foresees that in 2023 the tax withholding rate over category A income is lowered to the immediately previous one on the scale taking into consideration the monthly salary and household situation, provided that the taxpayer has a home loan over its personal and permanent residence and receives a monthly salary of up to € 2700.

- Increase on the amount of the severance payment to 14 days per year of employment in case of termination within a collective dismissal or extinction of labour position procedure **(it requires an amendment to the Labour Code)**.

4. COMPANIES: TAXATION AND FINANCING

- 50% increase on the weighting of the costs with salaries increases (salaries and Social Security costs) on the Corporate Income Tax (IRC) for all companies that:
 - Have a dynamic bargaining agreement (being considered as such the execution or renewal of a collective bargaining agreement (CBA) in the last 3 years);
 - Annually update the salaries in line with the figures foreseen in the Agreement or foreseen in the applicable CBA;
 - Reduce the salaries range, being taken into consideration the ratio between the parcel of the base salary of the 10% employees with higher wages in relation to the total and the parcel of base salary of the 10% of employees with lower wages in relation to total.

LOE 2023 adds a new article (19th – B) to the Tax Benefits Statute that rules this matter. Under the mentioned article, in order to assess the net taxable profit of IRC and IRS with organized accountancy taxable entities, the costs linked to salary increases arising from “Dynamic CBAs” and in relation to employees with open-ended contracts are considered in 150% of the respective amounts, and are deemed as costs of the financial year. Taxpayers that increase the salaries range (gap between the higher and lower fixed salary of employees, established on the last day of the tax year) are excluded.

They are only considered the costs in relation to employees whose salaries have increased by at least 5,1% from the previous tax year and whose salary is higher than the MMGS.

The maximum amount of the costs that may be considered for this effect per employee corresponds to 4 times the amount of the MMGS.

- Creation of a Tax Incentive to Corporate Capitalization (ICE), by combining the Retained and Reinvested Profits Deduction (DLRR) with the Conventional Remuneration of the Equity Capital (DLRR), simplifying the tax incentives to capitalization and investment, by eliminating redundancies and limitations the current system has revealed and furthermore improving the Investment Support Tax Regime (RFAI), by increasing the regional increase. With the ICE the deadline for deduction of the eligible costs is extended from 6 to 10 years, being considered both non-monetary and cash contributions as well as shares issuance premiums and corporate reserves.

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The LOE 2023 includes a new article (43rd – D) to the Tax Benefits Statute that regulates this matter. It flows from the new article that, when determining the taxable profit of both corporations, civil societies, co-operatives, State-owned companies and other collective entities of both public and private, headquartered or with effective center of management in Portuguese territory, it may be deducted an amount corresponding to the application of a 4,5% rate to the amount of the net electable equity capital. The rate is increased by 0,5 percentage points in case the taxpayer is qualified as a Small Mid Cap.

The deduction is made when assessing the taxable profit for the tax year when the increase on the net electable equity capital occurs and to the nine following tax years, being excluded the tax years in which the taxpayer reduces its share capital with refunds to the shareholders.

The deduction may not exceed, in each tax year, the greater of the following caps:

- € 2,000,000.00; or
- 30% of the results before depreciations, amortizations, net financing costs and taxes, being the part of the deduction that exceeds this limit deductible on the determination of the taxable income of one or more of the five following tax years, after the deduction for that same period.
- Revision of the system for reporting and deduction of tax losses arising from previous financial exercises, in order to streamline it. The time limit for reporting tax losses is eliminated the deductibility is limited to 65% of the taxable revenue. Furthermore, the procedure to transfer tax losses will also be streamlined within the scope of corporate restructurings.

The LOE 2023 amends the CIRC in order to reflect the terms of the Agreement.

- Selective reduction of the IRC for companies that invest in Research and Development, reinforcing the Sistema de Incentivos Fiscais à Investigação e Desenvolvimento Empresarial (SIFIDE II – Tax Incentives to Corporate Research and Development System) in the area of direct investment.
- Increase, for 2023, to the taxable profit limit to which the special IRC rates are applicable as far as SMEs are concerned, as well to companies that run activities in interior territory, from € 25,000.00 € 50,000.00, broadening of the scope of application to Small Mid Caps and, while the Agreement is in fore, extension of the reduced rete for two years to companies that result from SME's mergers.

LOE 2023 foresees that in cases of taxpayers that qualify as SME or Small Mid Cap, the IRC rate applicable to the first € 50,000.00 of taxable profits is of 17%.

Furthermore, it foresees that the same IRC rate is applicable in the two tax years following the merger of SMEs carried out between January 1, 2023 and December 31, 2026, provided that all intervening taxpayers are qualified as Small Mid Cap.

- Immediate reduction of 2,5 percentage points on the autonomous rates applicable to the acquisition of plug-in hybrid vehicles and reduction of the autonomous rates applicable to the acquisition of vehicles powered by natural gas.

LOE 2023 foresees that in the case of plug-in hybrid vehicles whose battery may be recharged by connection to the power grid and that have a minimum autonomy range in electrical mode of at least 50 km and emissions lower than 50 gCO₂/Km, as well as vehicles powered by natural gas, the autonomous tax rates are of, respectively, 2,5% for vehicles with na acquisition cost lower than € 27,500.00, 7,5% for vehicles with an acquisition cost of € 27,500.00 or higher and of 15% in case of vehicles with a cost of € 35,000.00 or higher.

- Creation of a financial incentive to tailored training programs.
- Implementation of measures aimed at supporting companies within the scope of certified in job professional training.

5. ADMINISTRATIVE SIMPLIFICATION AND CONTEXT COSTS

Set of measures to be implemented from which we highlight:

- Conversion of the Fundo de Compensação do Trabalho ("FCT" – Employment Compensation Fund) in order to allow companies to finance the qualification and certified training of employees and help young employees, by providing assistance in part of the housing costs.
- Eliminate FCT contributions and, while the Agreement is in force, to suspend the monthly payments for the Employment Compensation Warranty Fund.

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EXTENSION ORDERS

The following Extension Orders (“EO”) were published:

- EO of the collective bargaining agreement (“CBA”) between Associação Nacional de Comerciantes e Industriais de Produtos Alimentares (ANCIPA) and the Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins (SETAAB) – Fruits and Vegetable Industry. The scope of application of the OE does not include employees who are unionized at unions represented by FESAHT. The new salary scale and monetary clauses are applicable as from August 1, 2022;
- EO of the CBA between the Associação Empresarial de Viana do Castelo and others and CESP – Sindicato dos Trabalhadores do Comércio, Escritórios e Serviços de Portugal. The scope of application of the extension includes employers that, in the Viana do Castelo District, develop a business of retail trading, undertakers and fitness centers, hairdressers and beauty centers. It does not include retail of cars or motorbikes or fuel for vehicles in specialized undertakings. They also fall outside the scope of application of the extension employers whose activity, (i) being of retail or mixed trading, have a continuous food sales area equal or larger than 2000 m2, (ii) being the activity of nonfood retail trading have a continuous sale area of 4000 m2 or longer, (iii) being the activity of food retail or mixed, belonging to a company or group of companies that has, nationwide, a sales area equal or larger than 25.000 m2. The new salary scale and monetary clauses are applicable as from August 1, 2022;
- EO of the changes to the CBA between the Associação dos Armadores de Tráfego Fluvial e Local and the Sindicato da Marinha Mercante, Indústrias e Energia – SITEMAQ and others. The extension is applicable to employers who own motorized or non motorized vessels who run activities of freight transport, delivery and loading, towing services, passengers transport and tourism, sand and aggregates extraction, dredging and public works, coastal shipping and other qualified services and employees unionized at the unions that executed the CBA. The new salary scale and monetary clauses are applicable as from August 1, 2022;
- EO of the changes to the CBA between the Confederação Nacional das Instituições de Solidariedade (CNIS) and the Federação Portuguesa dos Sindicatos do Comércio, Escritórios e Serviços (FEPCEs) and others. The extension is not applicable to employment relations which, in the same field of economic activity, fall under the application of a negotiated CBA nor to employees unionized at unions represented by the Federação Nacional dos Sindicatos dos Trabalhadores em Funções Públicas e Sociais – FNSTFPS. The new salary scale and monetary clauses are applicable as from December 1, 2021;
- EO of the changes to the CBA between the Confederação Nacional das Instituições de Solidariedade (CNIS) and the Federação Nacional dos Sindicatos dos Trabalhadores em Funções Públicas e Sociais (FNSTFPS). The extension is not applicable to employment relations which, in the same field of economic activity, fall under the application of a negotiated CBA. The new salary scale and monetary clauses are applicable as from January 1, 2022;
- EO of the changes to the CBA between the Associação Nacional de Lacticínios (ANIL) and others and the Sindicato dos Profissionais dos Lacticínios, Alimentação, Agricultura, Escritórios, Comércio, Serviços, Transportes Rodoviários, Metalomecânica, Metalurgia, Construção Civil e Madeiras. The extension encompasses employers that carry out activities of milk, butter, cheese production, fresh or preserved milk products as well as to the production milk based beverages. The new salary scale and monetary clauses are applicable as from June 1, 2022;
- EO of the changes to the CBA between the Associação dos Comerciantes de Carnes do Concelho de Lisboa and others and the Sindicato dos Trabalhadores da Indústria e Comércio de Carnes do Sul. The extension is applicable in the Lisbon and Setúbal Districts, as well as in the municipalities of Belmonte, Covilhã and Penamacor. The extension is not applicable to employers whose activity, (i) being of retail or mixed trading, have a continuous food sales area equal or larger than 2000 m2, (ii) being the activity of food retail or mixed, belonging to a company or group of companies that has, nationwide, a sales area equal or larger than 15.000 m2. The new salary scale and monetary clauses are applicable as from June 1, 2022;
- EO of the changes to the CBA between the Associação Nacional dos Centros de Abate e Indústrias Transformadoras de Carnes de Aves (ANCAVE) and the Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins (SETAAB). The extension is applicable to companies that carry out the activity of abattoirs, butchering, processing, slicing and packaging of birds, as well as to its commerce (CAE 10120). The extension is not applicable to employees unionized at the Sindicato dos Trabalhadores da Indústria e Comércio de Carnes do Sul or at unions represented by FESAHT. The new salary scale and monetary clauses are applicable as from June 1, 2022;

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- EO of the changes to the CBA between APROSE – Associação Nacional de Agentes e Corretores de Seguros and the Sindicato dos Trabalhadores da Actividade Seguradora (STAS). The extension is applicable to employers whose activity is insurance brokerage and of reinsurance, officially registered with the categories of insurance agent, insurance broker, and reinsurance broker. The extension is not applicable to employees unionized at the SINAPSA – Sindicato Nacional dos Profissionais de Seguros e Afins. The new salary scale and monetary clauses are applicable as from June 1, 2022.

Case Law Highlights

Fixed Term Employment Contract – Seasonal Activity

Judgement of the Supreme Court of Justice from 09/07/2022 – Proc. 16670/17.8.T8PRT.P1.S1

In this judgement, issued with one dissenting vote, the Supreme Court of Justice looked at the concept of “seasonal activity” as a justifying reason for executing a fixed term employment contract.

One can read in the judgement’s syllabus that:

«II – A company that runs river cruises in the course of around ten months per year may not claim seasonal activity as the justification for the execution of a fixed term contract for a cabin maid, outside any peak of its activity, being that such hiring corresponds to an enduring company’s need and not to a temporary one.»

In the lawsuit the plaintiff was a company that runs cruises at the Douro River, being that the lower courts considered proved that clients only looked for cruises in the Douro River during a specific period of the year (chiefly between April and October), which is connected to weather conditions as well as to the wine production cycle in that region. Also, the running of such cruises rely on shipping conditions along the river (which usually does not occur during the winter months, namely from November to March of the following year).

In just two paragraphs and leaving aside any reference to the mentioned facts, the Supreme Court of Justice ruled that such activity does not show the seasonal characteristics that would allow the execution of term employment contracts with such justification. In the Judgment it is given an example of a decision in a French case, of a museum that hired security guards and doorman under term employment contracts claiming a temporary need, being that it was shown in court that the museum ran temporary exhibitions year-round. In that case the court decided that there was no temporary need since those exhibitions were, after all, the enduring activity of the museum. We find that the Court erred in this parallel. If one can state that a museum’s activity, although it may vary significantly from season to season, it is in fact carried out throughout the year, in the case under the Supreme Court of Justice’s analysis, the facts state that the plaintiff could only develop its activity in part of the year.

On the other hand, it is our understanding that the Court’s ruling is detached of what is the reality of a company with the characteristics of the plaintiff. In fact, one can raise the following question: what are the company’s alternatives? It hires the employee under an open-ended employment contract and has one employee with “nothing to do” for around 4 months each year? Hires the employee under an intermittent employment contract (an almost non-existing type of employment relation in Portugal) and that would place the employee in a less favorable economic position from the one which would result from a succession of fixed term employment contracts with interim periods of access to unemployment benefits or of execution of another employment contract? It conducts a collective dismissal procedure each year, when it becomes clear that it will have no work for its employees, solution that, apart from being unfeasible would also place the employee in a worse economical situation?

In summary, we strongly disagree with the Court’s ruling, particularly because it leads to a solution that is absolutely detached from the alternatives that a company as the one which was the plaintiff – and as is the case for most hospitality companies – may resource to in order to tackle an economic activity which, although being evermore extended over the year is, undeniably, seasonal.

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