16 NEWSLETTER MOMENTUM

SEPTEMBER 2015 | ENGLISH EDITION

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EDITORIAL MOMENTUM

Shakespeare once famously wrote that "Brevity is the soul of wit". Inspired by this motto, this new edition of Momentum is dedicated to short comments related to legal developments that are relevant at a global level.

The first article in this newsletter is by Diogo Feio and Ana Moutinho Nascimento and it focuses on the tax benefits that the Portuguese legal regime offers non-habitual residents in the country. Marta Salgado Areias has authored an article on the e-Privacy Directive, or Cookie Law, and how it affects the owners of websites in Europe and beyond. Magda Sousa Gomes, of the Employment department, analyses the new regime of the Wage Guarantee Fund which aims to protect employees in the event of the insolvency of their employing entity. Luís Bordalo e Sá and Inês Avelar Santos, of the European and Competition department, look at two recent ECJ decisions, in the case *Groupement des Cartes Bancaires*, and its rejection of the EU's accession to the ECHR, respectively. Joana Pinto Monteiro shines a light on the amendments that have been made to the legal regime governing the exploitation of local lodging. And, finally, Patrícia Akester focuses on Portuguese copyright law and how it relates to the private copying scheme, especially considering recent amendments to the law.

We trust that you find these articles both useful and interesting and remain available in case you need any further information in respect to these issues.

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THE PORTUGUESE NON-HABITUAL RESIDENT TAX REGIME

In Portugal there is a very competitive personal income tax regime for non-habitual residents, making it more appealing to high value-added professionals and pensioners.

This regime provides that, for non-habitual residents, the income of employees and independent professionals obtained in Portuguese territory from high value-added activities is subject to withholding tax at a rate of 20%, if the taxpayer does not opt for aggregation.

With regard to foreign income, an exemption regime applies. In the case of income from dependent employment, the applicable exemption applies if the foreign income is taxed in the other country, under the convention to eliminate double taxation. In cases where this convention does not exist, the exemption applies if the income is taxed in the other country and should not be considered as obtained in Portuguese territory. In the case of pension income, the exemption also applies provided that the income is taxed in the other country, under the convention to eliminate double taxation, or it should not be considered as obtained in Portuguese territory. If the income is obtained through high value-added independent work, through intellectual or industrial property, through information obtained in the industrial, commercial or scientific sector, from capital income, real estate income or increases in wealth (such as capital gains), then the exemption applies when this income can be taxed in the other country, in light of the convention to eliminate double taxation. In cases where this convention does not exist, the exemption applies when the income can be taxed in the other country, in accordance with the OECD Model Tax Convention on Income and on Capital, if said country is not included in the list of countries with privileged taxation, provided that the income is not considered obtained in Portugal.

It should be noted that, in this context, aggregation applies only for the purpose of determining the rates that can be applied to other income. On the other hand, non-habitual residents can opt for the tax credit method, which, in this case, means that there is a mandatory aggregation for tax purposes, according to law.

The taxpayer is entitled to the application of the regime for a period of 10 years from his/her registration as a resident in Portuguese territory, having also registered as a non-habitual resident at the same time or by March 31 of the following year. In conclusion, it should be noted that:

a) This regime is very competitive compared to regimes in other European countries with similar characteristics;

b) It applies to individuals who come to reside permanently in Portugal, but also to those who only reside temporarily in the country;

c) It can be a decisive factor in attracting highly qualified taxpayers, with the consequent relocation of decision-making centres to Portugal;

d) This scheme can be combined with the Residence Permit Allocation Scheme for Investment Activities (i.e. Golden Visa);

"(...) In Portugal there is a very competitive personal income tax regime for non-habitual residents, making it more appealing to high value-added professionals and pensioners.(....)"

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IS YOUR WEBSITE (STILL) NOT COMPLIANT WITH THE COOKIE LAW?

Although strongly contested, the amendments to the e-Privacy Directive[1] came into effect in 2009, and Member-States were given until 25 May 2011 to transpose them to their legal systems. However, there are still a large number of websites that serve EU users and which do not comply in full with the provisions requiring that websites ask users if they agree with the storage of cookies and equivalent technologies on their devices, providing them with all relevant information (about how many, why and for what purposes they are used, whether they are essential or not and how consent can be revoked) in simple language, in order to obtain their prior, specific and informed consent.

Cookies are small pieces of data stored by a website on a device to collect data about its visitors, such as their login, searches on the web and preferences, helping them, for example, to repeat tasks. Furthermore, the information collected can be used for online behavioural target advertising (that is, online advertising will be displayed in accordance with each user's interests). So, although cookies are very important to improve websites, they also have a restrictive impact on individuals' privacy and the EU Directive's main goal is precisely to allow users to make an informed decision about how they want to use the web.

Since the Directive wants to protect EU citizens' privacy, the obligation to obtain users' consent applies not only across the EU, but also to websites hosted and/or owned by a non-EU entity, for example, a US website serving Portuguese visitors.

Taking into consideration that nearly all websites use cookies that require consent (since a few cookies are exempt, notably those that are strictly necessary, in the terms defined in the law), it is strongly advisable that website owners inventory cookies and analyze them in light of the law, consequently taking the necessary measures to be compliant with it.

This assessment is paramount, not only to avoid an enforcement action from the regulators – that in Portugal, can impose a fine of up to EUR 5,000,000, in case the offence is committed by a legal entity –, but also because consumers are becoming more attentive and concerned about privacy and the failure to comply with applicable requirements may be detrimental to the commercial reputation of a website owner.

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[1] DIRECTIVE 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

THE NEW REGIME OF THE WAGE GUARANTEE FUND

On April 21, the new regime of the Wage Guarantee Fund (henceforth referred to as WGF) was approved by Decree-Law No. 59/2015.

In short, the main features of the new regime are the following:

a) Unification of the specific legislation regarding the WGF, which was spread out over several legal diplomas;

b) Transposition of Directive No. 2008/94/EC of the European Parliament and of the European Council, of October 22, 2008, relating to the protection of employees in the event of the insolvency of their employer (also known as 'the Employer Insolvency Directive');

c) Adaptation of the WGF regime to the Program *Revitalizar* in order to ensure that workers belonging to companies that are part of recovery plans have access to the WGF;

d) Insertion of a transitional legal provision which allows access to the WGF by workers who have submitted applications during a Special Recovery Process (PER – Processo Especial de Revitalização) or between September 1, 2012, and the date of entry into force of this new regime, as long as the workers are covered by an insolvency plan approved by a Court decision, in the context of insolvency proceedings, thus extending the scope of the WGF;

e) The WGF still ensures the payment of labour credits due to workers and dating from the previous six months from the start of the insolvency procedure or from the submission of the application to PER or to the System of Recovery of Companies by Extrajudicial Means (SIREVE - Sistema de Recuperação de Empresas por Via Extrajudicial). However, the payment of these labour credits is only guaranteed up to 1 (one) year from the day after the termination of employment;

f) Inclusion of an anti-abuse provision that determines that the WGF may refuse the payment of the guaranteed labour credits in case of abuse, in particular collusion or simulation, allowing the reduction of the amount of the labour credits in case of non-conformity between the requested amounts and the amounts stated in the declarations of remuneration of the 12 months prior to the date of the application submission, when they relate to effectively received remuneration; and

g) Combining the WGF regime and the legal systems of the labour compensation fund (LCF), the equivalent mechanism (EM) and the labour compensation guarantee fund (LCGF), established by Law No. 70/2013, of August 30.

Thus, following the intention of its genesis at the time of Decree-Law No. 50/85, of February 27, which introduced a wage guarantee system in order to ensure to employees the payment of remuneration due and not paid by the employer declared extinct, bankrupt or insolvent, the WGF has the purpose of ensuring that the payment, to the employee, of claims arising from the employment contract or its breach or termination, as long as a declaration of insolvency of the employer is passed in court, a judge's order designating a provisional judicial administrator, in case of PERs, or an order of acceptance is issued for the application made by the Institute for Support to Small and Medium Enterprises and Innovation (IAPMEI - Instituto de Apoio às Pequenas e Médias Empresas e à Inovação) within the context of the recovery of companies by extrajudicial means.

However, the payment of the claims referred to above is subject to a double limitation: one of a temporal nature, as the WGF merely ensures the payment of estimated claims that have matured in the six months prior to starting the insolvency procedure or to the submission of the application in PERs or to the application for use of the recovery of companies by extrajudicial means, and provided that said payment is requested up to 1 (one) year from the day after the date on which the employment contract ceased; and another of a pecuniary nature, as it simply ensures the payment of claims arising from the employment contract up to a maximum amount equivalent to six months' wages, and with the maximum monthly amount corresponding to three times the minimum guaranteed monthly wage.

As for the connection of the WGF regime with LCF, the LCGF or EM regimes upon payment of the compensation due to employees for the termination of the employment contract that is calculated in accordance with article 366 of the Labour Code, directly or by legal reference, the new WGF legal regime establishes that it covers said compensation, except for the part covered by the LCF, the LCGF or by EM, after the WGF has been triggered, except in cases where the latter cannot take place.

Finally, it should be pointed out that the new WGF regime entered into force on May 4 and is applicable to claims submitted after its entry into force and to the requests submitted pending PER or between September 1, 2012 and the date of its entry into force, by employees covered by an insolvency plan, approved by a court decision, in the context of insolvency proceedings.

"(...) The new legislation brings together, in a single text, matters that were dispersed in several pieces of regulation, and it also transposes an EU Directive intended to approximate the laws of the various Member States concerning worker protection in the event of the insolvency of an employer.(....)"

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THE ECJ JUDGMENT IN *GROUPEMENT DES CARTES BANCAIRES* THE LIMITATION OF THE "SUFFICIENT DEGREE OF HARM" IN RESTRICTIONS OF COMPETITION BY OBJECT

The relevant legal criteria used to ascertain the anti-competitive nature of an agreement has, nowadays, been widely debated and increasingly jeopardized. The case-law of the European Court of Justice (ECJ) shows that certain typical prohibited collusions, such as horizontal price fixing, are objectively predictable to produce negative effects in the market, to the detriment of consumers. In the EU, these behaviours are seen as a restriction by object, thus without the need for the authorities to carry out the analysis of its effects.

In *Groupement des cartes bancaires* (Proc. C-67/13 P), dated 11.9.2014, the ECJ has clarified its position. The dispute arose with a series of measures adopted by a group of the major French banking institutions to achieve interoperability of the systems for payment. According to the Commission, these measures had an anti-competitive purpose which was not justified as a balancing mechanism between the acquisition and issue functions of banking cards. On appeal, the GC considered that the agreements referred to in article 101(1) TFEU "do not form an exhaustive list of prohibited collusions and, for that reason, there is no need to interpret the concept of infringement restrictively". However, the ECJ reversed that decision on the grounds that the GC erred in law when it took the view that the restrictive object of the measures at issue could be inferred from their wording alone. According to the ECJ, "the concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects", otherwise "the Commission would be exempted from the obligation to prove the actual effects on the market".

With this judgment, the ECJ finally takes a step forward in considering that a prior and careful analysis of the effects of agreements is deemed necessary. Indeed, where certain types of coordination which, in theory, may restrict competition by "object" (and, therefore, will be prohibited under 101 (1) TFEU), even in those cases, the authorities will have to justify whether such a restriction reveals a sufficient degree of harm in order to be characterized as a restriction "by object". More importantly, the ECJ set out the relevant legal criteria: "it is necessary (…) to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market". In conclusion, the relevant legal criteria to ascertain the anti-competitive nature of certain collusive behaviours is necessarily based on an actual examination of the effects (and not of their object) of those behaviours on competition.

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"(…)To ascertain the anti-competitive nature of certain collusive behaviours "it is necessary (…) to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market".(….)"

OPINION 2/13: ECJ REJECTS THE EU'S ACCESSION TO THE ECHR

The accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) is seen as the missing piece in the structure of European human rights law: because the EU itself is not a party to the Convention, proceedings for violations of human rights by the EU cannot be brought before the European Court of Human Rights (ECtHR).

In Opinion 2/13 of December 2014, the Court of Justice of the EU (ECJ) rejected – once again – the EU's accession to the Convention, finding it incompatible with EU law, mainly for the following reasons.

1) The specific characteristics and autonomy of EU law
   The Contracting Parties may have higher standards of protection of the rights enshrined in the Convention, yet on harmonized areas of EU law, Member States (MS) may not have higher standards than those established in the Charter. No provision in the agreement seems to ensure the coordination of these two systems.
   The obligation of mutual trust between MS would be hampered, as "the ECHR would require a Member State to check that another Member State has observed fundamental rights".
   Protocol 16 to the ECHR establishes that national courts may address the ECtHR for advisory opinions. Even though the agreement does not contemplate the EU's accession to this protocol, the accession may undermine the preliminary ruling mechanism (article 267 TFEU).

2) Article 344 TFEU
   As the draft agreement does not prevent MS from using the ECtHR to settle disputes concerning the interpretation or application of the Treaties, it opens the door for MS to breach article 344 TFEU, according to which they may not submit those disputes "to any method of settlement other than those provided for [in the Treaties]".

3) The co-respondent mechanism
   A Contracting Party may become co-respondent in proceedings brought by non-MS (by invitation of the ECtHR or by decision of the same court upon the request of that Contracting Party). This mechanism inherently involves the assessment by the ECtHR of EU law.

4) The procedure for the prior involvement of the ECJ
   The draft agreement provides for the prior involvement of the ECJ in cases brought before the ECtHR. However, this procedure leaves out the assessment of secondary law.

5) The specific characteristics of EU law as regards judicial review in CFSP matters
   The accession would empower the ECtHR to rule on the compatibility with the ECHR of acts to which the ECJ does not have jurisdiction to review in light of fundamental rights, in the context of the common foreign and security policy (article 275 TFEU).
   The Court is adamant in affirming its ultimate jurisdiction over the interpretation and application of EU law. Yet, given the special nature/importance of human rights disputes, one would expect a deeper reasoning for the rejection of the accession, beyond the formal obstacles thoroughly identified in the Opinion.

"(...) "The Court is adamant in affirming its ultimate jurisdiction over the interpretation and application of EU law."(....)"

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AMENDMENTS TO THE LEGAL FRAMEWORK GOVERNING THE EXPLOITATION OF LOCAL LODGING

Decree-Law No. 128/2014, of August 29, has established the legal regime of operation of local lodging, by empowering this type of establishment.
The existing legal framework has recently been amended by Decree-Law No. 63/2015, of April 23, although its entry into force only occurs 60 days after its publication.
Of the amendments introduced it is worth highlighting the amendment regarding the exploitation of local lodging establishments.

Pursuant to Decree-Law No. 128/2014, of August 29, a limit was established that forbids a property owner or holder exploiting more than 9 lodging establishments classified as apartments. With the amendment introduced by Decree-Law No. 63/2015, of April 23, this limitation shall only be applied if the number of establishments exceeds 75% of the number of existing fractions in a building, i.e. the owner or holder of local lodging can exploit more than 9 apartments as long as these 9 apartments do not represent more than 75% of the same building. For example, in a building composed of 15 apartments, 11 of these can be local lodging apartments exploited by the same owner or holder.

However, this limitation cannot be considered without reference to the method of calculation of operation provided by the legislator. What are considered to be local lodging establishments classified as apartments are the ones that are registered in the name of the spouse, ascendant or descendant of the owner or holder of the property, as well as those registered in the name of different legal entities in which there are common partners.

Therefore, it is our understanding that under the new regulatory framework there may be two distinct situations where, in one building, more than 9 establishments classified as apartments can be exploited, namely:

a) The building includes over 13 apartments, in which case there may be more than 9 apartments operated by the same owner or holder.
b) In the same building different owners or holders are exploiting apartments as local lodging.

It is important to note that the possibility of having more than one operating holder in a building is already permitted in the current legal framework, i.e. without the amendment now introduced by Decree-Law No. 63/2015, of April 23. However, it is our understanding that the latter will lose part of its usefulness with the entry into force of the new diploma, becoming an alternative in cases where a building does not have more than 13 apartments, in which case it may have an operating holder for 6 apartments and another for 7 apartments.

"(...)"The owner or holder of local lodging can exploit more than 9 apartments as long as these 9 apartments do not represent more than 75% of the same building."(....)"

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PORTUGUESE COPYRIGHT LAW: AMENDMENTS TO THE PRIVATE COPYING SCHEME

As permitted by the Information Society Directive (Directive 2001/29), the Portuguese Copyright Law enables private copying, that is, acts of digital or analogue reproduction carried out by an individual for private, non-commercial purposes.

Crucially, though, the Portuguese Copyright Law does not require private copying to be made from lawful sources, that is, it does no distinguish between private copies made from lawful sources and those made from illicit sources – unlike the Italian Copyright Code, for example, which makes that distinction. This legitimizes, for example, downloads from P2P platforms.

This feature of the Portuguese Law cannot be tolerated, according to a recent judgement of the Court of Justice of the European Union (Case C-435/12 ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding).

National legislations which do not distinguish between lawful and unlawful private reproductions, said the court, are not capable of ensuring a proper application of the private copying exception. And that, the court pointed out, encourages the circulation of illicit copies of works, inevitably reducing the volume of sales or of lawful transactions relating to protected works and having an adverse effect on the normal exploitation of those works.

In light of this judgement, it became obvious that the Portuguese Copyright Law had to ensure the proper application of the private copying exception and thus restrict illegal acts.

Instead, though, a great deal of political energy went into reforming the private copying compensation scheme. The compensation scheme is fundamental – something the British Government seems to have forgotten in its attempt to modernise copyright laws and make them fit for the digital age, following the Hargreaves Review - but other policy concerns need addressing.

The Portuguese Compensation Scheme did require amendment. Bizarrely, it only covered analogue media therefore not reflecting the new digital reality. The goal was to get up to speed with technological evolution without which the private copying scheme was effectively left devoid of practical meaning and impact. And this was done to an extent. The amended levy scheme does not apply to computer programs but was extended to digital media, with compensation amounts depending on storage capacity and typical uses and being paid in the first instance by manufacturers and importers.

However, the amendment may have emerged too late in view of recent technological changes, which entail not local storage but cloud-based storage and not downloading but streaming, or, paradoxically, too early as other changes may soon be required to comply with EU copyright reform.

In any case, the levy system must ensure that a fair balance is maintained between the rights and interests of authors (as the recipients of the fair compensation) and those of users of protected subject matter, and a private copying system which does not consider the lawful or unlawful nature of the source from which a private reproduction has been made may not respect that fair balance. So, much remains to be done.

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“(...)“The amendment may have emerged too late in view of recent technological changes, which entail not local storage but cloud-based storage and not downloading but streaming, or, paradoxically, too early as other changes may soon be required to comply with EU copyright reform”(....)”

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