



February 27, 2012

RULES FOR IMPLEMENTING THE 2012 STATE BUDGET

Introduction

Law-Decree 32/2012, of February 13, which regulates the execution of the Portuguese State Budget for 2012, approved by Law 64-B/2011, of December 30, established a particularly strict regime regarding the management of public spending, which in itself is not surprising, given the need for compliance with the fiscal targets set out in the Economic and Financial Assistance Program, the Memorandum of Understanding (MOU) signed between Portugal and the Troika (EC, IMF, ECB).

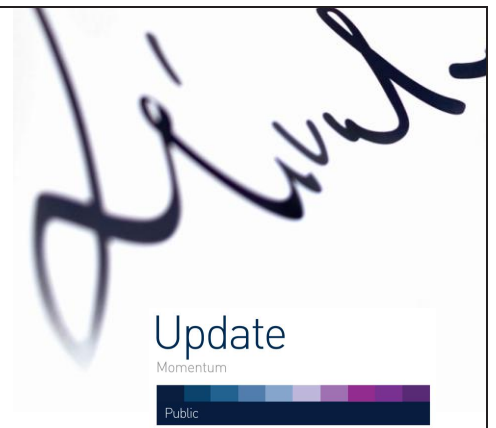
However, the terms of this Law-Decree at various points cast doubts as to the exact meaning of the latter's provisions and may even, in some respects, raise questions about its compatibility with the Portuguese Constitution.

It is impossible to offer here a complete or fully formed view of said statute, but we would like to address two aspects that deserve special attention, for their practical importance or for the questions they may raise. They are (i) the unified treasury management regime and (ii) the undertaking of contractual commitments regime.

The unified treasury management regime

The unified treasury management regime pursuant to article 89 of Law 64-B/2011, of December 30, in essence sets forth that any movement of funds must be performed using the banking services provided by the Institute of Treasury Management and Public Credit (IGCP - Instituto de Gestão da Tesouraria e do Crédito Público, I.P.).

Public entities must demonstrate the required implementation of this regime by declaring monthly and online with the Treasury Directorate-General (DGO - Direção-Geral do Tesouro) the



balance at the end of each month of deposits and applications with the IGCP on the one hand and with banking institutions on the other (article 16, paragraph 1, of Law-Decree 32/2012, of February 13).

It should be noted that (i) failure to comply with the treasury regime constitutes grounds for withholding budgetary transfers and (ii) revenues of all investments made in breach of the regime revert to the State (article 89, paragraphs 5 and 8, of Law 64-B/2011, of December 30). Moreover, placing legal entities under the treasury regime also seems to imply the mandatory use of the Portuguese Treasury Card to make payments electronically and via credit card, with a corresponding prohibition on the use of credit cards issued by commercial banks.

However, the constitutionality of the application of this system to some legal entities of a private nature which have been reclassified for the purposes of public accounting is doubtful since it may be disproportionately restrictive of the principle of private autonomy or a breach of the constitutional property right, understanding this right in broad terms. A situation of lesion to private property may arise, particularly when placing private entities under the regime results in an increase in expenditure or in the frustration of benefits or income that could otherwise be obtained.

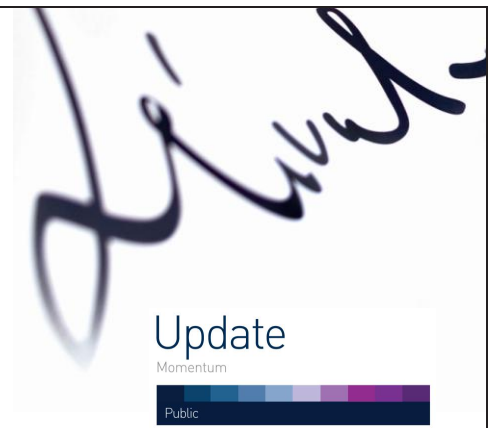
Moreover, even when not relating to private entities but to public entities not included in the indirect administration of the State - namely, institutions of higher education -, the compatibility of the application of this regime with their constitutional autonomy is also doubtful.

The regime of undertaking of contractual commitments by public entities

In several instances Law-Decree 32/2012, of February 13 shows a particular concern with the undertaking of contractual commitments, being completed in this respect by Law 8/2012, of February 21.

In fact, Articles 4 ff., of Law-Decree 32/2012, of February 13 establish a set of provisions to cover commitments undertaken by the public administrative sector and by entities integrating the public national health service (Article 3).

Therefore, pursuant to Article 4, paragraph 1, all these entities should determine the funds available until the 5th working day of each month and the law defines what is meant by “available funds” - Article 82, paragraph 6, and Article 3, point f), of Law 8/2012, of February 21.



This is relevant because, pursuant to paragraph 2 of the same legal provision, the contractual commitments may not exceed the available funds, and the compliance with this limit will be subject to scrutiny by the relevant public authorities.

The undertaking of contractual commitments depends also on various conditions, notably: (i) the assessment of the legality of the relevant expenses, (ii) recording the information in the system that supports the budget execution and (iii) the issuance of a valid and sequential commitment number that shall be reflected in the purchase order or equivalent document - Article 4, paragraph 3.

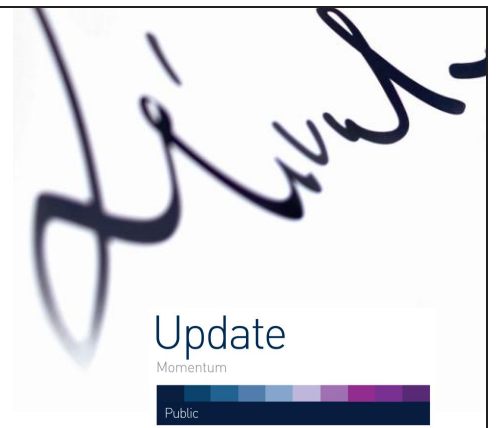
The failure to comply with this legal regime and, in general, the budget implementation legislation generates financial responsibility and might be the cause of retention of an amount equal to the infringement up to 1/12 of the budget allocation, or the transfer of the state budget, allowance or advance to the entity in breach (Article 6, paragraph 1).

This scheme is then supplemented by Articles 82 ff of Law-Decree 32/2012, of February 13, and Law 8/2012 of February 21.

With regards to this last Law, amongst several aspects we here draw attention to the following:

- a) Pursuant to paragraph 2 of Article 2 thereof, the regional and local entities are also subject to the principles contained therein;
- b) Pursuant to paragraph 3 of Article 5 thereof, contracts or obligations underpinning documents with no mention of a valid commitment number generated by the accounting systems supporting budgetary execution shall be deemed void and null;
- c) In the event referred to in the preceding paragraph, the economic agents that carry out the provision of goods or services may not claim payment from the State or from the public entities involved nor do they hold any right to compensation - Article 9, paragraph 2;
- d) However, holders of political office, directors or accounting managers who take on commitments in violation of this Act are liable for civil, criminal, disciplinary and financial purposes - Articles 9, paragraph 4, and 11, paragraph 1.

Besides difficulties of practical application, the aspects identified above raise many questions as to the exact scope of this law and about the constitutionality of some of the solutions adopted, which may call into question (i) the constitutional autonomy of certain public entities, (ii) the constitutional principle of civil liability of public authorities, (iii) the right of ownership or, more



broadly, the protection of economic assets and (iv) the protection of their legitimate expectations in the context of the activities of the State and of administrative entities.

Conclusion

As is apparent from this brief foray into Law-Decree 32/2012, of February 13, and into Law 8/2012, of February 21, it is to be expected that some legal uncertainty will be an additional problem to the already very demanding and difficult task of strict compliance with the State Budget for 2012.

Far from being considered unambiguous and straightforward to apply, these statutes will require the attention and care not only of senior officers, but also of lawyers and jurists in order to properly determine their terms and even, in some respects, their compliance with the relevant constitutional parameters.

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