

# CUATRECASAS, GONÇALVES PEREIRA



## NEWSLETTER | CORPORATE

NEWSLETTER CORPORATE | October, 2013

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## NEWSLETTER CORPORATE

### I THE NEW LEGAL FRAMEWORK OF SPORTS COMPANIES

Decree-Law No. 10/2013 of 25 January 2013<sup>1</sup>, which redrafts the legal framework of sports companies by introducing significant changes to the same, came into effect on May 1<sup>st</sup> 2013.

This legislation shifted the legal paradigm of professional sport in Portugal, by establishing the adoption of the corporate legal form by sports companies that intend to take part in professional sports competitions.<sup>2</sup>

The so called “special management scheme”, set out in Decree-Law No. 67/97 of April 3<sup>rd</sup> has been extinguished, giving rise to a system that provides for the obligation of sport organisations participators in professional sports competitions to establish sports companies.

Therefore, at present, all sports companies that wish to participate in professional sports competitions, must do so under the form of public limited sports company (*sociedade anónima desportiva (SAD)*) or of single member private limited sports company (*sociedade desportiva unipessoal por quotas (SDUQ, Lda)*).

The following are the most relevant changes introduced by the new legal framework of sports companies:

#### ***Sui generis* companies**

Sports companies are a *sui generis* type of companies: they continue to be governed in a subsidiary fashion by the general rules applicable to commercial companies, public limited liability companies and also private limited liability companies (“quota” companies), and retain the specificities that result from the specific needs of their object - sports activity.

In this way, the new legal framework has deleted all references that were a mere transcription of the provisions of the *Código das Sociedades Comerciais* (Portuguese Companies Code), maintaining only one subsidiary generic reference.

#### **Method of incorporation of sports companies**

The method of incorporation of sports companies has remained unchanged in relation to the old framework and it can be the result of: (i) the transformation of a sports club<sup>3</sup>, (ii) the legal personalization of a team that participates or wishes to participate in sports competitions, or (iii) its incorporation as such, from the beginning.

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<sup>1</sup> The amendment made by Decree-Law 49/2013 of 11 April, brought the effective date forward from 1 July 2013 to 1 May 2013.

<sup>2</sup> The professional nature of sports competitions is defined in *Portaria* No. 50/2013 of 5 February, which also sets out the preconditions to participate in those competitions, imposing on sports companies a relevant set of obligations relating to their budget, financial balance and presentation of accounts.

<sup>3</sup> The legislator makes an exception in light of article 130 of *Código das Sociedades Comerciais* (Companies Code), which sets out the participants in a transformation of a company.

### **SAD or SDUQ**

The previous form exclusivity of the past legal framework, which imposed that sports companies could only adopt the form of public limited liability company (*SAD*), has been abandoned. A new option has been introduced, which is the single member private limited sports company form (*sociedade desportiva unipessoal por quotas (SDUQ, Lda)*), wholly held by the founding sports club.

Moreover, sports companies have been given the possibility to transform into different corporate types, that is, a company that was initially incorporated under the form of public limited liability company may now be transformed into a single member private limited company and *vice versa*.

On the other hand, organisations that participate in non professional competitions may also voluntarily be incorporated under the form of sports companies.

### **Minimum share capital and payment**

With regard, specifically, to professional sport competitions, the amounts of capital required for participating companies have been adjusted.

Accordingly, the capital of companies that participate in the 1<sup>st</sup> League cannot be less than €1.000.000,00 or €250.000,00, depending on their adopting the public limited liability or the single member private limited company form, respectively.

On the other hand, the capital of companies that participate in the 2<sup>nd</sup> League cannot be less than €200.000,00 or €50.000,00, depending on their adopting the public limited liability or the single member private limited company form, respectively.

As for the minimum capital of companies that participate in other professional competitions, the same cannot be less than € 250.000,00 or € 50.000,00, depending on their adopting the public limited liability or the single member private limited company form, respectively.

It should be highlighted that the capital increase mechanism provided for in the previous legal framework, which required sports companies participating in professional football competitions to successively increase their capital, has been eliminated.

### **Participation of Public Entities**

The participation of Autonomous Regions, Municipalities or Associations of Municipalities in public limited liability sports companies is limited to public limited liability sports companies within the area of jurisdiction of those public entities and to the maximum amount of 50% of the capital of the public limited liability sports company, however, this holding cannot exceed 50% of the equity capital of any such public limited liability sports company.

Notwithstanding the above, the existing holdings of Autonomous Regions, Municipalities or Associations of Municipalities in public limited liability sports companies incorporated under the previous legal framework, are governed by a transitory legal framework, during which the holding may be maintained up to a maximum of 50% of the company's

capital during the two seasons following the effective date of the new legal framework, *i.e.*, until the end of the 2014-2015 season.

### **Shares and Ownership of the Capital**

The capital of the single member private limited sports company is represented by a single indivisible and non-transferable share, wholly held by the founding club<sup>4</sup>.

Conversely, the shares of public limited liability sports companies are typically nominative shares, which cannot be subject to limitations as to their transferability and may be of two categories:

- (i) Category A: may only be subscribed by the founding club, where the company has arisen from the legal personalization of a team;
- (ii) Category B: all other shares.

### **Companies arising from the legal personalization of teams**

Where the sports company arises from the legal personalization of a team, the founding club cannot directly hold less than 10% of the capital of the corresponding public limited liability sports company – which, in practice, translates into the impossibility to transfer the same percentage of the capital, which must continue to be directly held by the founding club. No maximum limit is now established to the percentage of the founding club's holding.

This is also one of the significant changes made to this legal framework, since in cases such as these, the founding club was required to hold at least 15% of the capital of the public limited liability sports company and could not hold more than 40% of that same capital.

The founding club is also granted special corporate rights and sports rights, such as the right to veto resolutions of the general meeting concerning the merger, demerger or dissolution of the public limited liability sports company, which right is intended, among other things, to safeguard the historical and symbolic heritage of the club.

### **Sporting disciplines**

Another innovative aspect relates to the fact that the object of sports companies may now be the participation in more than one sporting discipline, possibility which was denied in the previous legal setting.

Unlike the previous legal framework, according to which the object of the sports company was the participation in just one discipline, in accordance with the new legal framework it is now possible to establish a sports company pursuing several disciplines, with all inherent advantages in terms of costs and the centralisation of professional management.

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<sup>4</sup> Without prejudice to the company being transformed into a public limited liability sports company.

However, the following limitations have been set out: (i) a sports club that establishes a sports company engaged in more than one discipline can only have one sports company, and (ii) each sports club can only originate two or more sports companies if the object of each such company is just one sporting discipline.

It should be added that, the capital of sports companies that pursue several disciplines must correspond at least to the higher minimum capital required for each discipline the company is to pursue.

### **Management of sports companies**

The management body of sports companies must consist of the number of members set out in the by-laws, with at least one or two executive managers, depending on their being single member private limited sports companies or public limited liability sports companies.

The managers are required to be engaged full time in the management of the corresponding companies, and sports companies are required to inform the organisers of the sports competitions in which they take part, each year, of the identity of their executive managers. These measures imposed by the new legal framework seek to promote the professionalization of sports companies' management.

With regard to incompatibilities, and without prejudice to the provisions of the general law and special rules applicable to sports directors, the directors or managers of sports companies cannot be: (i) member of the bodies of sports federations or club sports associations of the same discipline; and (ii) professional sports people, coaches and referees in office, of the same discipline.

### **Limitations to the exercise of corporate rights**

The new law also provides for limitations to the ownership of holdings and the exercise of corporate rights, thereby seeking to prevent potential situations of conflict of interests.

The rights of shareholders holding shares in more than one public limited liability sports company having the same discipline as object, can only be exercised in one company, with the exception of the right to profit and to the transfer of corporate interests. It must also be mentioned, that the organisation having a control position<sup>5</sup> in a sports company, cannot have a holding in a competing sports company of more than 10% of the corresponding capital.

### **New tax scheme**

Following the enactment of the new legal framework of sports companies, Law No. 56/2013 of 14 August amended for the first time the specific tax scheme applicable to sports companies, with a view to adapting the tax scheme to the new legal setting.

In line with the goal of professionalization of professional sport in Portugal, underlying the legal framework analysed above, it is noteworthy to observe in the tax reform the

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<sup>5</sup> Where there is control within the meaning of article 21 of *Código dos Valores Mobiliários* (Securities Code).

measures aimed to promote the reorganisation sought through the establishment of sports companies, through the grant of tax benefits.

## II NATIONAL LEGISLATION

### **Decree-Law No. 133/2013. D.R. (Portuguese official gazette) No. 191, Series I of 2013-10-03**

Adopts the new legal framework of the business public sector, making use of the legislative authorisation granted under Law No. 18/2013, of 18 February.

### **Regulation No. 380/2013. D.R. (Portuguese official gazette) No. 192, Series II of 2013-10-04**

Lays down the regulation on the duties of prevention and combat against the laundering of gains from unlawful sources and the financing of terrorism in the business sector.

### **Resolution of the Council of Ministers No. 62-A/2013. D.R. (Portuguese official gazette) No. 197, Supplement, Series I of 2013-10-11**

Approves the conditions for the public offering and the schedule of conditions for the direct institutional sale, as well as the special acquisition conditions benefiting the employees of CTT, S.A. and of companies either controlled thereby or belonging to the same group, in particular, price conditions.

### **Resolution of the Council of Ministers No. 62-B/2013. D.R. (Portuguese official gazette) No. 197, Supplement, Series I of 2013-10-11**

Sets up the special monitoring committee for the privatisation process of CTT - Correios de Portugal, S.A., approved by Decree-Law No. 129/2013, of 6 September.

### **Resolution of the Council of Ministers No. 63/2013. D.R. (Portuguese official gazette) No. 199, Series I of 2013-10-15**

Sets out the composition of the mixed committees set up or to be set up under bilateral agreements entered into with third countries in the economic area.

**Resolution of the Council of Ministers No. 64/2013. D.R. (Portuguese official gazette) No. 199, Series I of 2013-10-15**

Amends for the second time Resolution of the Council of Ministers No. 44/2011, of 25 October, which provides for strategic coordination for economic diplomacy and the internationalisation of economy.

**Portaria (Ordinance) No. 302/2013. D.R. (Portuguese official gazette) No. 200, Series I of 2013-10-16**

Identifies the formal requirements of the form and the investigative elements that should accompany the procedures of prior authorisation, prior notification subject to deadline and the simple communication relating to the setting up, operation and modification of industrial establishments.

**Portaria (Ordinance) No. 303/2013. D.R. (Portuguese official gazette) No. 200, Series I of 2013-10-16**

Lays down the requirements for the incorporation of the management entity of a Business Park, identifying the obligations and competences, defining the rules for the drafting of the internal regulation, the investigative elements that should accompany the applications for setting up and for the operation certificate as well as the applications for the transformation into a Business Park.

**Decree-Law No. 141/2013. D.R. (Portuguese official gazette) No. 202, Series I of 2013-10-18**

Ensures the implementation in the national legal system of the obligations arising from Regulation (EU) No. 260/2012 of the European Parliament and of the Council of 14 March 2012, establishing technical and business requirements for credit transfer and direct debits in euro.

**Decree-Law No. 142/2013. D.R. (Portuguese official gazette) No. 202, Series I of 2013-10-18**

Amends for the fifth time the *Lei Orgânica* of the Bank of Portugal, enacted by Lei No. 5/98 of 31 January.

**Notice of the Bank of Portugal No. 4/2013. D.R. (Portuguese official gazette) No. 203, Series II of 2013-10-21**

Notice of the Bank of Portugal amending the 2<sup>nd</sup> part of Annex III of Notice No. 5/2007, of 18 April, with regard to the calculation of capital requirements relating to irrevocable payment commitments arising from compulsory contributions to the Deposit Guarantee Fund.

**Resolution of the Council of Ministers No. 66-A/2013. D.R. (Portuguese official gazette) No. 202, Supplement, Series I of 2013-10-18**

Approves the terms of the agreement to revoke the telecommunications service concession agreement, to be entered into between the Portuguese State and PT Comunicações, S.A., determining the termination of the fixed telex service, of the data transmission fixed switched service and of telegraph service, and designating the providers of the universal service of connection to a public communications network of publicly available telephone services and of provision of public pay telephones.

**Rectification Statement No. 42/2013. D.R. (Portuguese official gazette) No. 206, Series I of 2013-10-24**

Correction Statement relating to Law No. 62/2013 of 26 August, concerning the «Lei da Organização do Sistema Judiciário» (Law of Organisation of the Judiciary), published in *Diário da República*, 1<sup>st</sup> series, No. 163, of 26 August 2013.

**Decree-Law No. 148/2013. D.R. (Portuguese official gazette) No. 206, Series I of 2013-10-24**

Partially transposing Council Directive [2013/15/EU](#) of 13 May 2013, adapts certain directives in the field of free movement of goods, by reason of the accession of the Republic of Croatia.

**Rectification Statement No. 43/2013. D.R. (Portuguese official gazette) No. 207, Series I of 2013-10-25**

Rectifies [Portaria No. 284/2013](#), of 30 August of the Ministry of Justice, amending for the fifth time [Portaria No. 419-A/2009](#), of 17 April, which regulates the preparation, calculation, settlement, payment, processing and allocation of judicial fees, fines and other penalties, published in *Diário da República*, 1<sup>st</sup> series No. 167, of 30 August 2013.

**Rectification Statement No. 44/2013. D.R. (Portuguese official gazette) No. 207, Series I of 2013-10-25**



Rectifies Portaria No. 280/2013, of 26 August, of the Ministry of Justice, which regulates a number of aspects of the electronic processing of judicial proceedings, published in *Diário da República*, 1<sup>st</sup> series, No. 163, of 26 August 2013.

**Rectification Statement No. 45/2013. D.R. (Portuguese official gazette) No. 208, Series I of 2013-10-28**

Rectifies Portaria No. 282/2013, of 29 August, of the Ministry of Justice, which regulates a number of aspects of civil enforcement proceedings, published in *Diário da República*, 1<sup>st</sup> series, No. 166, of 29 August 2013.

III NATIONAL CASE LAW

**Judgment of the Supreme Court of Justice of 03-10-2013  
Purchase and sale agreement – Ineffective transaction**

In this case, the Supreme Court of Justice was requested to rule on the legal framework applicable to the sale of third party's goods, more precisely, on the sale of a property completed by a third party in the name of the legitimate owner, under a false power of attorney.

In the case under consideration, a third party by means of a forged power of attorney and authentication certificate, subrogated the powers to represent the owner of the property to other person, who, in turn, sold the property on behalf of the owner to the third person, who registered the purchase on his name.

The annulment of the sale and purchase was invoked grounded on the legal framework of the sale of alien property and consequently the purchase price should be returned to the buyer. However, the Supreme Court of Justice considered that, based on the evidence that the seller had concluded a sale in the name of another person rather than in his own name, even if the sale was concluded without representation powers, as the power of attorney was forged, the legal framework of the sale of alien property did not apply. It was observed that, according to the law, the same "*only applies to the sale of alien property as one's own*", that is, to cases where the seller sells in his own name a right held by another. Accordingly, the Supreme Court of Justice confirmed that the transaction could not take effect and excluded the possibility of, in the terms of the legal framework of alien property, the transaction under consideration being declared null and void and the purchase price returned to the buyer.

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