

# CUATRECASAS, GONÇALVES PEREIRA



## NEWSLETTER | CORPORATE LAW

CORPORATE LAW NEWSLETTER | September, 2015

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## CORPORATE NEWSLETTER

### I NEW LEGAL REGIME ON STATUTORY AUDITS SUPERVISION

On 9 September 2015, Law No. 148/2015, approving the Legal Regime on Statutory Audits Supervision was published. The new regime, which will only come into force on 1 January 2016, applies to statutory auditors (ROCs), statutory audit firms (SROCs), auditors and audit entities of Member States of the European Union and of third countries registered in Portugal.

This law partially complies with Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014, on statutory audits of annual accounts and consolidated accounts, simultaneously enabling the enforcement, in the domestic legal order, of Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014, on specific requirements regarding statutory audit of public-interest entities.

By reviewing the European legal framework for the statutory audit of the annual and consolidated accounts, the aforementioned Directive aimed to generally reinforce and apply stricter requirements to the public supervision system. The Regulation developed and implemented various aspects related to the statutory audits of accounts of entities classified as of public interest, by recognising the importance, complexity and scope that they represent, namely for the purposes of stability and confidence in the financial system.

Besides the compliance with the directive and the creation of rules for the application of the abovementioned regulation, Law no. 148/2015, of 9 September, amends the statute of the Portuguese Securities Commission (CMVM), the Portuguese Securities Code and the Commercial Companies Code (only Article 413), to ensure the conformity of the content of certain provisions of that statute and those codes with the rules that will be set out in the new Regime on Statutory Audits Supervision. It also revokes Decree-Law no. 225/2008, of 20 November (which created the National Auditing Oversight Council and contained, in its Article 2, the internal list of entities classified as of public interest). The processes and procedures started and pending under that body pass on to CMVM, together with the staff assigned to the body (only for some time). Nevertheless, there will still be a renamed General Auditing Oversight Council which will be regulated by Article 35 and the public-interest entities will be those listed in Article 3, both of the new Regime on Statutory Audits Supervision.

With the new Regime on Statutory Audits Supervision, CMVM will thus be responsible for public oversight of ROCs and SROCs, along with auditors and the audit entities of Member states and of third countries registered in Portugal, as well as all the auditing activities they carry out. It is to be noted that the responsibilities of CMVM on this matter may overlap with those of Statutory Auditors Bar Association (OROC), including the oversight of procedures and acts of registration carried out by OROC and the quality control systems it has implemented pursuant to its by-laws. In connection with

Supervision, Article 25.2(b) states that CMVM may even give *orders and issue specific recommendations to the OROC*.

Pursuant to Article 4.4 of the new Regime, the following shall be the exclusive responsibility of CMVM: (a) ensure quality control and the systems of inspection of ROCs and SROCs of auditors conducting the statutory audits of public-interest entities, as well as inspections of other auditors arising from a complaint by another national or foreign authority, (b) assess the performance of the supervisory body of public-interest entities, pursuant to Article 27 of Regulation (EU) no. 537/2014, of the European Parliament and of the Council of 16 April 2014, (c) issue regulations on matters falling within the scope of its responsibilities, consulting OROC for this purpose and (d) investigate and decide on administrative offence proceedings, including the application of penalties.

As already provided for in the Portuguese Securities Code, the preliminary registration of ROCs and SROCs with the CMVM is maintained, as well as registration with the OROC. The registration is a mandatory requirement for the performance of public interest activities by ROCs, SROCs and other auditors (duties defined in Article 41 of the new statute of OROC, approved by Law no. 140/2015, of 7 September, which will also enter into force in January 2016: auditing of accounts or other acts in which the intervention of ROCs in that capacity is required). Registration with CMVM is developed in Articles 6 to 22 of the new Regime on Statutory Audits Supervision, including rules on refusal, cancellation, suspension and amendments. CMVM also guarantees the public and centralised disclosure of the registration system. Subject to registration as well are auditors and the audit entities of Member States and of third countries that intend to carry out statutory audits in Portugal.

Information requirements include the following: (i) ROCs and SROCs that audit the accounts of public-interest entities shall prepare and disclose an annual transparency report, as well as an additional report on the supervisory board in the case of a statutory audit; and (ii) ROCs or SROCs that audit the accounts of public-interest entities shall confirm in writing to the supervisory body of the audited entity that its partners, as well as the top management and directors who perform the statutory audit, are independent from the entity, as well as inform the supervisory body of the entity, each year, of all the services, other than auditing, provided to the entity and to examine, with the supervisory body of the audited entity, any threats to their independence and the safeguards applied to reduce these threats.

With regard to supervision, the prerogatives already attributed to CMVM by the Portuguese Securities Code (namely the exchange of information with other entities, the supervision of compliance with the law and the power to give orders, demand details and information, examine documents, conduct inspections, monitor advertising, etc.) are now extended to the new audit oversight duties regarding the auditing activity, with the power to request information from the Statutory Auditors Bar Association and, as mentioned above, give orders and issue recommendations to the OROC. CMVM may also, whenever necessary, commence and conduct quality control operations with any ROCs

and SROCs, and take the measures that it considers appropriate as a result of such quality control operations. However, CMVM may not interfere in the contents of the legal certification of the accounts or the audit report.

Breach of the duty to make reservations or request to be excused of duty in the legal certification of accounts, as well as breach of the duties of independence and of confidentiality by auditors are qualified as very serious administrative offences and therefore punished with a fine ranging from €25,000.00 to €5,000,000.00.

## II INTERNAL LEGISLATION

### **Law no. 140/2015 – Official Gazzete no. 174/2015, Series I of 07-09-2015**

Approves the new Statute of the Association of Statutory Auditors, pursuant to Law no. 2/2013, of 10 January, which lays down the legal regime for the creation, organisation and operation of public professional associations.

### **Rectification no. 41-B/2015 – Official Gazzete no. 184/2015, 1st Supplement, Series I of 21.09.2015**

Rectifies Ordinance no. 220/2015, of 24 July, of the Ministry of Finance, which approves the financial statement model for the different entities that apply the Accounting Standards System (SNC), published in Official Gazzete no. 143, Series I, of 24 July 2015.

## III EU LEGISLATION

### **Commission Delegated Regulation (EU) 2015/1555, of 28 May 2015, published on the Official Journal of the European Union of 19-09-2015**

Complements Regulation (EU) No. 575/2013 of the European Parliament and the Council with regard to regulatory technical standards for the disclosure of information in relation to the compliance of institutions with the requirement for a countercyclical capital buffer in accordance with Article 440.

## III CASE LAW

### **Judgment of the Court of Appeal of Évora of 10.09.2015 Judicial Exclusion of Partner – Active Legal Capacity**

As regards private limited companies (quota companies), the law provides the possibility of judicial exclusion of a partner who, through a conduct that is disloyal or seriously disturbs the operation of the company, has caused or may cause significant losses. As a requirement for exercising the judicial exclusion of a partner, the law requires a resolution by the partners, on bringing an action against the offending partner.

In this case, the company only had two partners. The exclusion action was brought by one partner against the other, on the grounds that his conduct was disloyal and

detrimental to the interests of company. The partner initiated procedures in his own name and not in the name of the company, as provided in the law. The partner claimed that the existence of a decision by the company would make no sense in this specific case, since it would entail calling a general meeting, which would only be attended by the two partners – plaintiff and defendant. In his opinion, in such a situation, calling a general meeting would have the perverse effect of the offending partner being informed (and possibly voting) about the intention of the other partner to bring an action against him, with a view to his exclusion from the company.

In his defence, the other partner raised the lack of legal capacity of the (plaintiff) partner to bring the action, claiming that proceedings should always have been brought by the company itself, based on the existence of a company decision that validated its intents.

The court of first instance accepted the interpretation of the defendant, having deemed that the partner was not a lawful plaintiff in the action. An appeal was submitted to the Court of Appeal of Évora, which supported the same interpretation: the legal capacity to exercise the right to exclude a partner of a private limited company belongs to the company and the exercise of this right must always be preceded by a decision of the competent internal body (The General Meeting), regardless of the number of partners.

To support its theory, the Court of Appeal of Évora presented the following arguments: (i) legal capacity is analysed by reference to the direct interest in bringing the action, this interest expressed by the usefulness that can result from a favourable decision. It is indeed the company (and not the partner) that is the legal entity whose rights and interests have been harmed by the attitude of the defendant partner and therefore has an interest in suing that person; (ii) the company “speaks” through resolutions of its partners, for which reason this instrument (a resolution of the general meeting) can never be considered unnecessary or superfluous; (iii) the formality associated with need for a resolution is not excessive, since the partner to be excluded, although prevented from voting, would not be prevented from taking his place at the general meeting intended to decide upon the exercise (or not) of the right to exclusion. This is a core right of the partner, as stated in the law.

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