



Corporate and Commercial Law

## CORPORATE, MERGERS AND ACQUISITIONS GROUP


- Anticipated distribution of dividends in the context of the approval of the state budget for 2011. | 2/3
- Elimination of minimum share capital requirement on private limited companies. | 4/5
- Can a shareholder become a District Attorney's Assistant in a lawsuit where the crime of disloyalty has been committed against the Company by its director? | 6/7

## EDITORIAL

Welcome to the first 2011 Aware from the Corporate and Mergers & Acquisitions Group (CMAG) of Abreu Advogados.

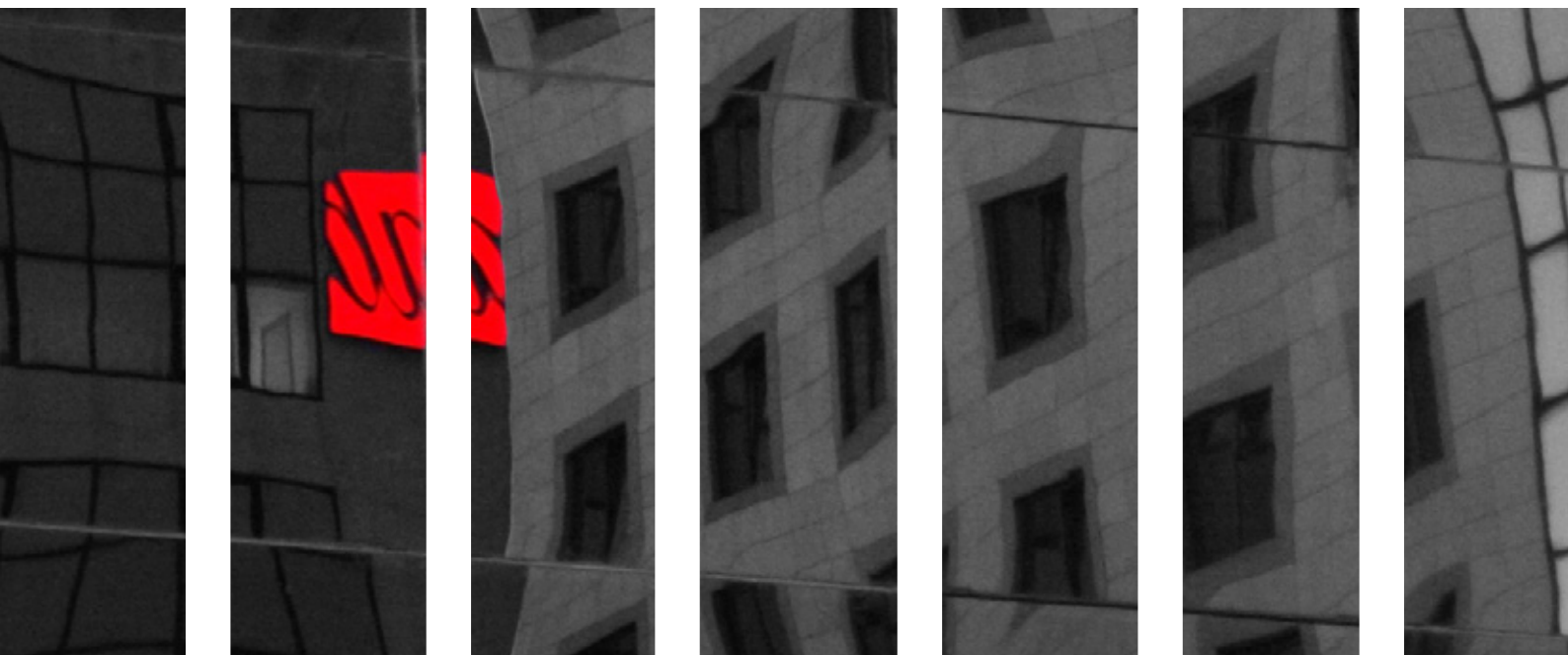
In the first article, following to the recent controversy on the early distribution of dividends in several economic groups, we cover this issue from the perspective of the Portuguese Companies' Code.

In the second article, we analyse the elimination of minimum share capital requirement on private limited companies in the context of the Council of Ministers Resolution dated 30<sup>th</sup> December 2010, which establishes a number of measures aimed to simplify the process of incorporation of private limited companies by quotas and single member private limited companies.

Finally, in the third article, we give notice of an inversion from the Portuguese jurisprudence on the matter of the legitimacy of a partner of a company, who is not a director, to constitute himself as an assistant in a criminal procedure against a director for the crime of disloyalty against such company. 

Enjoy your reading,

*The CMAG Team*



## ANTICIPATED DISTRIBUTION OF DIVIDENDS IN THE CONTEXT OF THE APPROVAL OF THE STATE BUDGET FOR 2011

*Isabel Pinheiro Torres (Trainee Lawyer)*  
*Manuel Sá Martins (Trainee Lawyer)*

The controversy caused by the announcement that several economic groups would carry out an early distribution of their dividends released the debate on the legality and taxation of an early distribution of profits. In this article, we plan to address this issue from the standpoint of Corporate Law rules, not intending to discuss it in the Taxation field.

In a Corporate context, such an operation is perfectly legitimate, provided it complies with all legal requirements. The Companies Code (CSC), in Article 297, provides that the articles association may authorize the distribution of profits during the same fiscal year to which they relate to and not only (at the date on which the companies usually do it) upon approval of the accounts and balance sheet relating to the financial results.

Thus, from the wording of said Article, in its latest version, resulting from changes introduced by Law-Decree 76-A/2006 of 29-3, we find that:

**"1 - The articles association may authorize that, in the course of a year, advances on profits are made to shareholders, provided they comply with the following rules:**

**a)** *The board of directors or the executive board of directors, with the consent of the supervisory board, audit committee or general and supervisory board, decides to proceed with the advance;*

**b)** *The board of directors' or the executive board of directors' resolution is preceded by an interim balance sheet prepared up to 30 days in advance and certified by the auditor, showing the existence of sums available to the alluded advances, which must comply, to the extent applicable, with the rules of Articles 32 and 33, taking into account the results obtained during the part of the year in which the advance is made that has already elapsed;*

**c)** *A single advance payment is made during each year and always in the second half of it;*

**d)** *The amounts to be allocated as an advance do not exceed half of those which would be distributable under point b).*

**2 - If the articles association are changed in order to include the authorization mentioned in the preceding paragraph, the first advance can only be made in the year following that in which the contract change occurs".**

As such, it appears that the first requirement for the admissibility of this legal concept is the existence in the company's contract of a clause that expressly authorizes it. Then, the requirements stated above must simultaneously be fulfilled. Their absence would make the advances illegal, with consequences for the shareholders as stated in Article 34 ("restitution of property wrongfully received") and responsibilities for directors and managers, as listed in Articles 72 ff. and 514, all from the CSC.



The biggest risk here is, of course, the possibility that the determined annual distributable profit will be of less value than the advances that were previously made, with no free reserves to fill the gap. One may read, in this sense, the opinion of Abilio Neto in *Código das Sociedades Comerciais. Jurisprudência e Doutrina*, Ediforum, in which the author comments Article 297, underlining the gravity of this particular case, as fictitious dividends can only be recovered in case of irregular distribution and if partners know or should have known of the irregularity (see Article 34 of the CSC).

*(continuation on page 3)*

## ANTICIPATED DISTRIBUTION OF DIVIDENDS IN THE CONTEXT OF THE APPROVAL OF THE STATE BUDGET FOR 2011 (CONTINUATION)

It is indeed, in view of this risk, that one justifies the existence of the above mentioned point d) (as it prohibits the execution of more than one advance per year or during the first half of it), and also of point c).

Taking this rule into consideration (Article 297), let us now consider three issues of great practical relevance.


The first relates to the clarification of which profits may be distributed in advance, according to the Article, given that its wording raises some questions: can profits accumulated in previous years be distributed, or only the profits obtained in the year in question? According to Paulo de Tarso Domingues, in *Variações sobre o Capital Social*, Almedina, "what is at stake is the anticipation of an year's profit, so only the wealth generated in this period may be covered by the board of directors' decision".

Then, still according to the same author, "because Article 15, paragraph b) of the EU Capital Requirements Directive is unequivocal in this regard, in stipulating that "the amount to be distributed can not exceed the total profits made since the end of last year."<sup>1</sup>

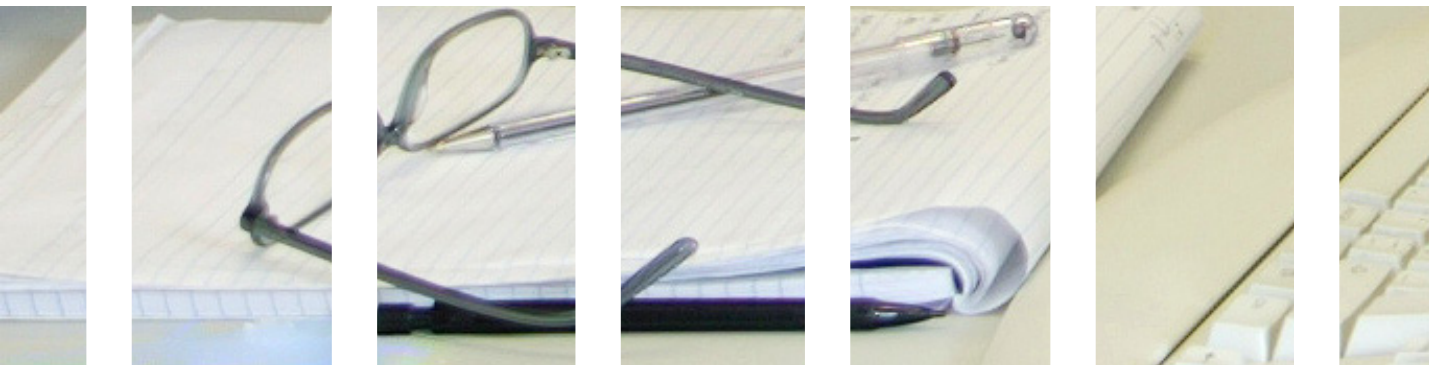
The second issue concerns the possible application of these rules to private limited liability companies. Although this issue is still debated among the doctrine, most authors tend to defend the analogical application of this system to private limited companies.

In this sense, see Paulo de Tarso Domingues, in his book cited above, indicating that even for such companies, where they might not have an auditor, as indeed is usual, the mid-term balance sheet required by law must be certified by an independent auditor, appointed to that effect.

The third and final particularity lies in the fact that the public corporations that were established before the entry into force of the Companies Code (October 31<sup>st</sup>, 1986), are not subject to any statutory authorization to conduct distribution of dividends operations, provided they comply with the requirements stated in the paragraphs of Article 297 (see Article 537 of the CSC).

For all that was mentioned, it seems that this operation is properly regulated in Portuguese Corporate Law and could be carried out without any legal impediment, provided the criteria outlined above are fulfilled. 

<sup>1</sup>. And therefore, the reference in point d) of paragraph 1 of Article 297, restricting the advance to half of the sums that would be distributable, "refers to half of annual profits revealed by the mid-term balance sheet".



## ELIMINATION OF MINIMUM SHARE CAPITAL REQUIREMENT ON PRIVATE LIMITED COMPANIES

*Leonor Monteiro (Lawyer)*

On December, 30, 2010, the Council of Ministers approved a Decree-Law that establishes a number of measures aimed to simplify the process of private limited companies by quotas and single member private limited companies' incorporation, among which we highlight the following:

- a)** Elimination of minimum share capital requirement, being possible to the shareholders or to the single shareholder to freely set it; and
- b)** Possibility of the shareholders or of the single shareholder to make their capital contributions' deposit until the end of the first financial year of the company.

These measures aim to reduce the administrative costs and expenses due with the company's incorporation, stimulating and promoting the competitiveness and the employment, under the Government's commitment assumed on the XVIII Government's Program and, most recently, on the Council of Ministers' Resolution which has approved the Competitiveness and Employment's Initiative ("*Iniciativa para a Competitividade e para o Emprego*").

The Decree-Law under analysis arises from a number of initiatives and measures to be adopted under Simplex program, which we second the creation of an online company incorporation system ("*Empresa Online*"), the Simplified Corporate Financial Information ("*Informação Empresarial Simplificada*"), the one-stop shops of "*Empresa na Hora*" and the permanent certificate of the companies registry.

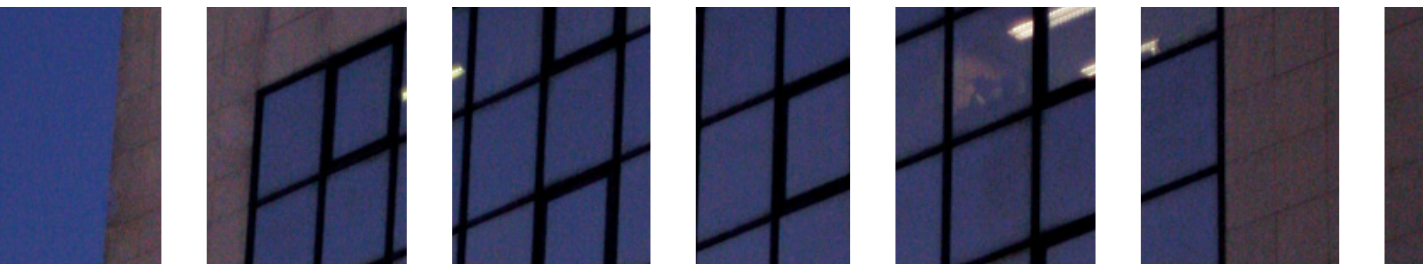
The elimination of minimum share capital requirement on private limited companies is also considered by the World Bank to be one of the good practices around the world in making it easy to start a business.<sup>1</sup>

With the entry in force of the above-referred Decree-Law, share capital of the private limited companies by quotas and single shareholder private limited companies is freely set (in opposition of the minimum presently required of € 5.000,00), corresponding to the sum of the nominal value of the quotas subscribed by the company's members. Once, also under these measures, the minimum nominal value of the quotas will be amended to € 1,00, we may conclude that the minimum share capital of private limited companies by quotas will be € 2,00 and of single shareholder private limited companies € 1,00.

The benefits for competitiveness and for employment of the adoption of these measures are easily recognized.

In fact, many of micro and small companies – in particular the ones that its main activity is to render services – arise from an easy-completion idea, not needing a big initial capital investment. Mandatory provision of initial share capital prevented often entrepreneurs – mostly young people without economic resources – to push forward with its own business plan.

*(continuation on page 5)*



<sup>1</sup>. See "*Doing Business 2011: Making a Difference for Entrepreneurs*".


## ELIMINATION OF MINIMUM SHARE CAPITAL REQUIREMENT ON PRIVATE LIMITED COMPANIES (CONTINUATION)

In addition, in most cases - especially in cases where companies are incorporated with the minimum share capital - the initial capital is allocated to pay the costs of incorporation, registration and early-stage operations' of the company<sup>2</sup>.

More, the definition of share capital as "a figure representing the sum of contributions of shareholders"<sup>4</sup> does not allow the persistent defense that it constitutes a guarantee for the company's creditors as it constitutes a mere accounting member cipher - different from equity or net assets - which amount may, as above mentioned, have been "used" from the beginning.

What truly consists of the guarantee of company's creditors shall be the company's equity capital - the asset/equity ratio, notwithstanding there is often a personal guarantee by the shareholders, in addition to the company's liability.

Notwithstanding the foregoing, it can be defended that the protection of company's creditors is always ensured with the maintenance of the rules established on article 31 *et seq.* of Portuguese Companies Code (related to the capital maintenance) - which did not suffer any changes with the publication of this Decree-Law.

This Decree-Law also provides the possibility for the members to deposit the amount corresponding to the share capital by the end of the first financial year of the company, instead of on a stage prior to the company's incorporation. This commitment shall be declared by shareholders in the act of incorporation, under its responsibility. It is currently expected the enactment of this Decree-Law by the President and its publication. 

Being the share capital a creditors' guarantee, it would be defensible that the elimination of the requirement of a minimum share capital in limited liability companies would weaken the protection afforded. However, this guarantee function has some limitations and weaknesses; therefore it can not be invoked to justify the non-approval and adoption of these measures. In fact:

Firstly, it is worth to recall that, in case of limited liability companies, only the company's assets are liable for company's debts - contrary to general partnerships, in which company's debts can be satisfied at the expense of personal wealth of its members.

Secondly, the company's creditors are not all alike: they are not paid equally if the debtor company fails to, voluntarily, comply with its obligations. The rule of equality of company's creditors does not prevail over the fact that some of them may require the repayment of certain company's goods or to be paid before other creditors<sup>3</sup>.

<sup>2</sup> Take, for example, the provision contained in many limited companies incorporation private documents or public deeds in which management is authorized, even before the incorporation is registered, to withdraw the deposit made with the entries corresponding to the share capital for payment of the installation expenses, including the purchase of goods, equipment and services.

<sup>3</sup> See the provisions set out on the Portuguese Civil Code related to rights of lien and on the Code of Insolvency and Corporate Recoverys.

<sup>4</sup> See A. Ferrer Correia, "Sociedades Comerciais", page 218.

## CAN A SHAREHOLDER BECOME A DISTRICT ATTORNEY'S ASSISTANT<sup>1</sup> IN A LAWSUIT WHERE THE CRIME OF DISLOYALTY HAS BEEN COMMITTED AGAINST THE COMPANY BY ITS DIRECTOR?

*Carlos de Almeida Lemos (Lawyer)*

Article 224º of the Criminal Code (CP) states, in its number 1, that *"Those who have been entrusted, by law or legal act, with the responsibility of having at their disposal pecuniary interests of a third person or administrating or supervise them, and cause to those interests, intentionally and with a severe violation of their duties, relevant pecuniary damage, is punished by imprisonment for up to three years or by a fine"*.

The director who under the scope of his functions, purposefully damages the company's interests, violating the duties that his office imposes onto him, namely the duty of loyalty, falls under this provision. As an example of this kind of situation, one can state the undue use of Company credit cards, transfers to personal accounts of amounts that have not been invoiced by the Company or charging personal expenses as Company costs.



The application of this article has given rise to some issues, in practice, particularly regarding the power of other shareholders of the Company to intervene in such criminal lawsuits. In fact, it happens frequently that, by having a majority position in the share capital, it is easier for the director to perform acts on its behalf and contrary to the company's interests.

In this case, it is of common understanding that a shareholder, director or not, has the power to press charges in order to initiate the lawsuit.

However, it is not that common that the shareholder can become an assistant in it.

This impediment was, and still is, highly relevant, since, under the terms of article 287º, number 1, (b) of the Criminal Procedure Code (C.P.C), only the assistant, and not the offended, is allowed to question the refusal to prosecute by the District Attorney's Office.

The majority of case law in Portuguese courts has been defending that the article 68, number 1, (a) of the Criminal Procedure Code (C.P.C.) establishes a narrow concept of the offended: one who is entitled to a "direct", "immediate" interest or the interest "predominantly" protected by the incrimination. Such understanding has lead to the interpretation under which, if it possible that a crime of disloyalty has been committed, only the Company, collective person, especially whom legally represents it – its Directors – is entitled to the mentioned interest, being impossible, however, for shareholders to become assistants, unless they are also Directors.

As we referred, this impediment is highly relevant as, under the terms of the article 287º, number 1, (b) of the Criminal Procedure Code (C.P.C), only the assistant, and not the offended, is allowed to question the refusal to prosecute by the District Attorney's Office. In other words, if the District Attorney has refused to file a complaint based on the facts given by the Plaintiff, only the assistant may intervene to reverse that decision, by presenting a request to open the Instruction Phase, before the Court.

By following the understanding of the majority of the Portuguese case law, one would not be doing anything but opening the door to the impunity of those who, having the decision-making power in the Company, would prevent the shareholders whom are not directors to control the acts that may involve criminal conducts.

*(continuation on page 7)*

<sup>1</sup>. "Assistant" is a Portuguese entity, meaning the civil party joining the criminal procedure, collaborating with the District Attorney's office, being able to intervene in the investigation procedures (e.g. presenting proof) and appealing of the decisions that involve him

## CAN A SHAREHOLDER BECOME A DISTRICT ATTORNEY'S ASSISTANT IN A LAWSUIT WHERE THE CRIME OF DISLOYALTY HAS BEEN COMMITTED AGAINST THE COMPANY BY ITS DIRECTOR? (CONTINUATION)

Otherwise, we cannot see the applicability of a crime of disloyalty of a member of a company body, especially when it is a major shareholder of that company.

As it is easy to see, the defendant will never allow the report of its own crimes. therefore, the majority of case law was causing an impasse and an easy way of stopping the prosecution for severe crimes performed by the responsible person for the companies' bodies.

As stated in the majority of case law, the constitution as assistant of this shareholder who is not a member of the board of directors would not be accepted. Civil Law rules are his only chance, more precisely, those of Company Law, so that he can remove the defendant/offender, accused by the offended, from the Company's body, and subsequently getting a company deliberation to pursue the criminal, meanwhile removed!

But, before a decision of refusal to prosecute and the deadline of **20 days** to respond – term conceded by article 287º, number 1, of the C.P.C. to require the Opening of the Instruction phase – **it is clearly impossible to do it**, contributing, once again, to a situation of denial of justice, violating the article 20º of the Constitution of the Portuguese Republic.

***If the thesis of majority was to be adopted, the accusation of the heads of the Company bodies for crimes of disloyalty would be, in many cases, inapplicable, when is to them that this incrimination is directed to, which results from the origin of this provision and the legal crime's type itself.***

However, despite being in a lesser proportion, new orientations are arising on the development of the concepts, with clear intentions on the performance of material justice that the legal system must always pursue; orientation towards which we have contributed.

As a result of an appeal lodged against a decision that refused the intervention of a minor shareholder of a public company as an assistant, the Court of Appeal of Coimbra on November 23<sup>rd</sup>, 2010, rejected the narrow concept of offended, widening it to the idea that this concept only makes sense if its scope is interpreted as being the person entitled to the complaining right, embracing a more liberal and modern interpretation of the concept, saying:

*"Thus, despite the majority interest protected by the rule being that of the company, the shareholders' interests are also protected. The company only exists because it has shareholders that are part of it. The shareholder has rights in the company, may want to protect them and, in casu, the only way is by becoming an assistant. Some individual interests of the shareholders are protected".*

This perspective<sup>2</sup> reveals a new tendency in Court decisions, more concerned with an effective application of Justice, which we entirely support.

<sup>2</sup>. The decision of 25th January 2006, of the same Court, appeal number 4100/05 ends in a similar conclusion.

This *Aware* is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects that are referred. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. Articles published in this *Aware* reflect the personal opinion of the respective author and not of Abreu Advogados. For more information please contact us at [apdc.gsf@abreuadvogados.com](mailto:apdc.gsf@abreuadvogados.com) | Visit our website [www.abreuadvogados.com](http://www.abreuadvogados.com)

© ABREU ADVOGADOS 2011

### LISBON \* | HEAD OFFICE

Av. das Forças Armadas, 125 - 12º  
1600-079 Lisboa, Portugal  
Tel.: (+351) 21 723 1800  
Fax.: (+351) 21 7231899  
E-mail: lisboa@abreuadvogados.com

### OPORTO \*

Rua S. João de Brito, 605 E - 4º  
4100-455 Porto  
Tel.: (+351) 22 605 64 00  
Fax.: (+351) 22 600 18 16  
E-mail: porto@abreuadvogados.com

### MADEIRA \*

Rua Dr. Brito da Câmara, 20  
9000-039 Funchal  
Tel.: (+351) 291 209 900  
Fax.: (+351) 291 209 920  
E-mail: madeira@abreuadvogados.com

LISBON  
OPORTO  
MADEIRA  
ANGOLA (IN ASSOCIATION)  
MOZAMBIQUE (IN ASSOCIATION)