IBERIA

Francisco de Sousa da Camara and Antonio Pinto Leite examine the Portuguese Government's attempts at boosting the country's competitiveness with a wholesale review of tax and employment legislation

Lisbon Tourist Board

Getting the Portuguese economy into competitive shape is a key point on the new Government's agenda. Recent tax and labour law reforms have already indicated the intentions, in broad outline, of the Government that came to power last year. In tandem with an austere approach to public finance, which has already brought the public deficit down from 4.1% to less than 3%, it is to be expected that further reforms and incentives will be introduced to consolidate and boost the economy.

Tax incentives

Firstly, companies entering into reorganisations (mergers, merger/division, transfer of assets) may continue to obtain exemptions from transfer tax on property (SISA) legal fees connected with notary and registration services and stamp duties relating to such legal fees. These exemptions are especially attractive where they can be combined with tax neutral operations or others where tax losses may offset profits of other companies.

Secondly, the Government received an express authorisation to enact a special tax regime for investments abroad by resident companies (exports of goods or services). A tax credit of an amount up to 20% of the corporate income tax can be granted where the company agrees to make a specific investment in tangible assets (excluding urban property or other assets on which VAT is non-deductible) and R&D in the two years following the date on which the deduction occurs.

> The Portuguese Government has proposed an overall reform of employment law to improve the competitiveness of enterprises by creating a more flexible employment environment

Reduction of capital gains taxes

The need to revitalise the Lisbon Stock Exchange was one of the key factors behind the reinstatement of capital gains tax exemptions or reductions. The current regime can be summarised as follows:

- Capital gains obtained on the sale of securities by non-resident individuals and companies without a permanent establishment in Portugal to whom those could be attributed are tax exempt, provided the seller is not a resident of a tax haven, the seller is not owned, directly or indirectly, by a resident and at least 50% of the Portuguese company's assets do not consist of Portuguese real estate.
- Regardless of their place of residence, individuals realising gains with the transfer of shares held for more than 12 months are tax-exempt on their disposal from 1 January, 2003. If shares are held for less than 12 months the net gains are subject to a

Continued on page 36

IBERIA

Continued from page 34

10% tax rate. Capital gains obtained by individuals with the sale of bonds and other debt securities are also tax exempt.

- Capital gains realised by resident corporate entities are generally fully taxable, although 50% of the gain may be exempted provided the total consideration received is reinvested within a four-year period beginning in the year preceding the disposal. A specific exemption may also apply, as is the case for the gains obtained by holding companies.
- Portuguese holding companies (SGPSs) have become more attractive. Basically, they can benefit from a total (100%) dividend participation exemption and from a total capital gains exemption on the gains obtained with the sale of shares or quotas of other companies. This applies provided that the shares were not acquired from a related company or from a company subject to a special tax regime (domestic or international). These exemptions are not subject to a minimum holding in votes or in capital. The minimum holding period is one year.

Employment law reform

The Portuguese Government has proposed an overall reform of employment law by way of the creation of an employment code. The fundamental objective is to improve the competitiveness of enterprises by creating a more flexible employment environment. A major change heralded by the code relates to the regulation of work for a number of employers (groups of companies), by providing for the joint and several liability of group members.

Regarding the increased flexibility of the employment relationship, it is proposed that the number of working hours may be adapted to production fluctuations, without the need for recourse to overtime. Until now the state has had to authorise exemptions from fixed working hours. The new code would dispense with this authorisation. The parties involved would be able to agree on specific solutions involving a change of workplace. It is proposed that fixed-term contracts of employment should become more widely available and that the maximum term of such contracts be six years (the current maximum term is three years).

In connection with the transfer of establishments, the new code would create liability on the part of the transferee for all debts, provided that the employees demand payment thereof during the 15 days preceding the transfer. The alteration of the provisions governing holidays would limit the accumulation of holidays and increase the number of days' holiday as a reward for punctuality.

In relation to the termination of contracts of employment, existing legislation provides that where a court considers the dismissal of an employee to have been unfair, the employee is entitled to reinstatement. Under the new law, the court cannot order the reinstatement of the employee in cases of enterprises with up to 10 employees, nor in the case of management and administrative staff, if this involves major inconvenience.

So far as relations between employers and trade unions are concerned, collective bargaining agreements will no longer give rise to acquired rights on the part of the employees, which cannot be diminished, as has been the case until now. Such agreements will expire at the end of a specified term and the conditions will have to be renegotiated.

The proposed reform provides that directors and shareholders of companies can be held personally liable for employment credits, in the event that non-payment to the employees is the consequence of an intentional act. The Government's proposal has met with widespread acceptance from both employers and trade unions and currently is being considered in Parliament, which has already passed the proposal on the floor of the house. The code should come into force at the end of 2003 or at the beginning of 2004, following a six-month *vacatio legis* period.

Francisco de Sousa da Camara and Antonio Pinto Leite are partners at Morais Leitao J Galvao Teles & Associados.

COMPETITION LAW

During the course of the past year we have seen growing recognition from European institutions of the need to adapt to new economic and politic realities, both at the European and global level. The legislative changes to Portuguese competition policy proposed during the past few months follow the pattern of this evolving European reality and are of the utmost importance for the economy.

The amendments to be introduced concern, on the one hand, the organisational structure of the enforcement agencies, and on the other, substantial rules contained in the Portuguese Competition Act. The amendments aim to:

- Move towards more efficient application of competition rules;
- Strengthen enforcement mechanisms; and
- Implement a true 'competition culture' in Portugal.

The creation of the new Competition Authority (*Autoridade de Concorrencia*) by Decree-Law on 18 January, has altered the structure of the enforcement agencies. The new authority will be responsible not only for the enforcement of competition law, but also for the legal statute prohibiting individual restrictive practices. It is expected to start functioning at the end of March 2003.

This new authority will have increased competencies in the application of Community competition law, resulting from Council Regulation (EC) 1/2003 on the implementation of Articles 81 and 82 of the EC Treaty, and will benefit from the proposed enhanced co-operation between the European Commission and other national competition authorities.

The Portuguese Competition Act is still undergoing amendments. Parliament will vote on it in the very near future. One of the major features of the proposed Act is the widening of its scope of application, to cover all sectors of the economy and all types of undertakings (*inter alia*, public undertakings and undertakings enjoying special or exclusive rights).

Another important feature is the maintenance of the preliminary assessment of restrictive practices (*Pedido de Apreciacao Previa*) by the enforcement agencies on request of the participating undertakings, contained in Decree 1097/93, of 29 October. This differs from the new approach at European level, according to which the system of 'legal exception' has been introduced.

Lastly, another major change concerns the maximum amounts of fines to be imposed on undertakings that are found to have participated in anti-competitive practices. Here the Portuguese Competition Act follows Council Regulation 1/2003 more closely, by establishing a ceiling of 10% of the annual turnover of the undertakings concerned as the maximum amount of a fine that may be imposed.

Carlos Botelho Moniz is a partner and Margarida Rosado Fonseca is an associate at Morais Leitao J Galvao Teles & Associados.

Lisbon Tourist Board