

PUBLIC
LAW

THE IMPACT OF THE 2012 STATE BUDGET LAW IN THE RENDERING OF SERVICES' AGREEMENTS

Regarding the signature of the rendering of services' agreements with public entities and its renewal, the **2012 State Budget Law**¹ ("2012 SBL") **follows the same line drawn by the 2011 State Budget Law**² ("2011 SBL"), imposing, once again, reductions in the remunerations concerning those agreements and the need to obtain a previous binding opinion issued by the member of the Government responsible for the financial area.

Still, 2012 SBL introduces some innovations when compared to 2011 SBL, raising new doubts and reflections, that we will now discuss in this briefing.

I. The extension of the application of the salary cuts to the values to be paid under rendering of services' agreements³

2011 SBL's article 19 contains the regime of the salary cuts applicable to the public sector employees, determining that the non liquid total monthly remunerations that surpass € 1.500 are reduced in the following terms:

- i) 3,5 % over the total value of remunerations superior to € 1.500 and inferior to € 2.000;
- ii) 3.5% over the amount of €2,000, accrued with 16% above the total value of the amount that exceeds €2,000, totaling a global percentage that may vary between 3.5% and 10%, in what concerns amounts equal or over €2,000 up to €4,165;
- iii) 10% of the total value of remunerations superior to € 4.165.

2012 SBL's article 26, no. 1, determines that the salary cuts established by article 19.º of 2011 SBL are applicable to the "*paid values for the rendering of services' agreements that, in 2012, are renewed or signed with identical object and, or, identical counterpart of the 2011's agreement*", in which the following entities are parties:

¹ Law no. 64-B/2011, 30 December.

² Law no. 55-A/2010, 31 December, altered by Law no. 48/2011, 26 August and Law no. 60-A/2011, 30 November.

³ We underline that the salary cuts determined by article 26.º of 2012 SBL (referring to 19.º of 2011 SBL) is only applicable to the amounts paid under rendering of services' agreements, and not by any other type of agreements, such as public work or public service's concessions, agreements for the supplying of goods, leasing agreements or works agreements.

2012 SBL determines a widening of the application scope of the remuneration reduction established in article 19 of 2011 SBL, compared to the previous regime of 2011 SBL

- a. Bodies, services and entities listed in numbers 1 to 4 of article 3 of Law no. 12-A/2008, 27 February, in its current wording [that is, services of the direct and indirect administration of the State, services of the regional and municipal administration, President of the Republic and Parliament's support bodies and services, services of courts and State Prosecutor and respective management bodies and of other independent bodies], including institutes with a special regime and public law entities, even if autonomous or independent due to their integration in the regulation, supervision or control areas,
- b. corporate public entities, public companies with total or majority of public share capital and entities of the municipal or regional company sector⁴,
- c. Public foundations and other public establishments uncovered by the previous paragraphs,
- d. Cabinets according to paragraph n) of no. 9 of article 19 of 2011 SBL.

The first number of article 26 of 2012 SBL determines a widening of the application scope of the remuneration reduction established in article 19 of 2011 SBL, compared to the previous regime of 2011 SBL.

Actually, the remuneration reduction is applicable to the following situations, already established in the 2011 SBL:

- Renewal of an agreement that was in execution in 2011 (in this situation the object and party remain the same);
- Signing of a new agreement with the same party and an identical object to the agreement that was in execution in 2011 (materially it is a renovation).
But the new SBL also applies the salary cuts to the following situations, that were not in the 2011's regime:
- Signing of a new agreement with an identical object of the agreement that was in execution in 2011 but with a different party.
- Signing of a new agreement with the same party of an agreement that was in execution in 2011 but with a distinct object.

The first of these novelties means that **all agreements with the same object must have an inferior value in comparison to 2011, regardless of the other party.** Hence, when the contracting authority starts a public procurement procedure towards the signing of a rendering of service's agreement with an identical object to one that was executed in 2011, it is now obliged to comply with a maximum price ("*base*" price) that corresponds to the amount paid in the previous agreement deduced of the reduction percentage established in article 19 of 2011 SBL⁵.

Concerning the application of the salary cuts to situations where there is only a party identity (and not an object identity), we believe that the rule of salary cut is

⁴ We underline that, in the terms of no. 3 of article 7 of the Decree-Law no. 558/99, 17 December, in its current wording (State Business Sector regime), exceptional temporary rules may be set by law regarding the agreements entered into by these entities.

⁵ One may argue that the legislator only intended to address the situations in which, due to (artificial) assignment of the contractual position, an undertaking was trying to escape the application of the salary cuts. However, we do not find the needed backup in the law to support such restrict interpretation nor is it imposed by nature of things, as it happens in some of the cases that we talk about *infra*. This way, and unless the legislator clarifies the sense of this rule (which has not happened so far, namely in the context of the approval of the diploma of budget execution for 2012 – Decree-Law no. 32/2012, 13 February), we will have to sustain that such rule has the widened application that we have referred, being applicable to all the agreements with identical object.

New situations of remuneration reduction: i) signing of a new agreement with an identical object of the agreement that was in execution in 2011 but with a different party and ii) signing of a new agreement with the same party of an agreement that was in execution in 2011 but with a distinct object

not applicable by practical impossibility, as when considering a distinct agreement's object, there is no reference towards which it could be possible to reduce the price of the upcoming agreement ⁶⁻⁷. This is so unless the new agreement's object is partially coincident with the previous one, in which case the reduction may be applied, but only in the part where the objects are the same.

To avoid a second salary cut, in agreements already subject to it, the legislator established that cases of **renovation, in 2012, of agreements of rendering of services whose celebration or previous renovation were already subject to the reduction established in the same rule and obtained favorable opinion or communication registry are not subject to these cuts**, according to no. 7 of article 26 of 2012 SBL.

Several doubts arise from this provision. One of them concerns the use of the expression "renovation", which, in our opinion, must be construed as including the situations of *stricto sensu* contractual renewal and those of the celebration of a new agreement with an identical object and the same party. A second doubt arises from the use of the conjunction "and" between the two requirements that the exception depends upon (subject of previous reduction and that has obtained a favorable opinion or communication registry), because, in the case of entities that are not subject to **previous opinion**, the agreements executed by them cannot, by nature, have had a previous favorable opinion. It is our belief that, **in this last case, the existence of a previous opinion does not constitute a necessary requirement for the exception to be considered as verified**.

Equally, **there is no submission of the following situations to the remuneration reductions:**

- 1) The celebration or renewal of rendering of essential services agreements, established in no. 2 of article 1 of Law no. 23/96, of 26 July, in its current version; or mixed agreements whose predominant contractual type is not rendering of services or in which the service is accessory towards a supply of goods (paragraph a) of no. 6 of article 26);
- 2) The celebration or renewal of rendering of services agreements by the contracting authority or services under the cover of a framework agreement (paragraph b) of no. 6 of article 26.º);
- 3) The celebration or renewal of rendering of services agreements by bodies or services under the scope of Law no. 12-A/2008, of 27 February, in its current version, amongst themselves or with corporate public entities (paragraph c) of no. 6 of article 26.º);

⁶ Let us consider the following example: in 2011, someone agreed, with a certain renderer of services, the provision of daily cleaning of a building, and intends to hire in 2012, with the same renderer, the disinfection of a building. The value of both services is not the same nor comparable, which makes impossible to reduce, in 2012, the value of the disinfection services by reference to the value of the cleaning services paid in 2011.

⁷ We admit that the legislator intended to cover the situations in which an undertaking tried to escape the salary cuts by altering, even if marginally, the object of the agreement to be entered into, in comparison with the previous agreement. However, if that was the legislator's intent, it miswrote it and said more than that.

Cases of renovation, in 2012, of agreements of rendering of services that were already subject to the reduction established in the same rule and obtained favorable opinion or communication registry are not subject to these cuts

- 4) The renewal of the rendering of services agreements, when possible, where the contracts have been entered into following a public tender in which the awarding criteria is the lowest price (paragraph d) of no. 6 of article 26.º).

For the purpose of applying the remuneration reduction, the total value of the rendering of services agreement is considered, except in the case of standing fees established in no. 7 of article 35 of Law no. 12-A/2008, 27 February, in its current version, in which the reduction is applicable over the monthly remuneration (article 26 no. 2 of 2012 SBL).

II. The need of a previous binding opinion

Article 26, no. 4 of 2012 SBL established the need for a previous binding opinion, issued by the member of the Government responsible by the financial⁸ area, for the signing and renewal of rendering of services agreements by bodies or services within the scope of Law no. 12-A/2008, 27 February, in its current wording, whose terms and process are ruled by Ordinance no. 9/2012, 10 January.⁹

This rule is only applicable to the services of the direct and indirect administration of the State, services of the regional and municipal administration, President of the Republic and Parliament support bodies and services, services of courts and State Prosecutor and respective management bodies and of other independent bodies. **The higher education institutions are an express exception, as well as, for example, the corporate public entities, public companies with total or majority of public share capital and entities of the business and local sector¹⁰.**

We must underline that the previous binding opinion is demanded for **the renewal of rendering of services agreements as well as for the signing of new agreements with or without identical counterparties and object.**

However, the following situations referred to in paragraphs 1 to 4 of section I, hereinabove, **are not subject to prior approval.**

The rendering of services agreement signed or renewed without the above mentioned previous opinion is null and **void** (article 26, no. 10, 2012 SBL).

According to article 4 of Ordinance no. 9/2012, 10 January, a “**generic favorable opinion**” is granted, as long as an annual amount of € 5.000 (without VAT) is not surpassed, in the following cases:

⁸ In municipalities, the competent body to issue the opinion is the executive one and it depends on the fulfillment of the listed requirements in paragraph a) and c) of no. 5 of article 26 of 2012 SBL as well as paragraph b) with the required adaptations, being its terms regulated by the portaria referred in no. 1 of article 6.º of Decree-Law no. 209/2009, 3 September, altered by Law no. 3-/2010, of 28 April (article 26.º, no. 8, of 2012 SBL. The referred portaria is yet to be approved.

⁹ The request for the opinion, as well as the respective communication, is made exclusively by electronic means through the e-mail contratacoservicos@mf.gov.pt. The request must gather all the elements referred in article 3, no. 2, of Portaria no. 9/2012, 10 January.

¹⁰ **Camões – Instituto da Cooperação e da Língua, I.P** is also exempted from the favorable binding opinion, regarding the rendering of services agreement related to learning courses and language and Portuguese culture formation, as long as self financed.

The renewal of the rendering of services agreements where the contracts have been entered into following a public tender in which the awarding criteria is the lowest price is no submitted to the remuneration reduction

2012 SBL maintains the need for a previous binding opinion for the signing and renewal of rendering of services agreements by bodies or services within the scope of Law no. 12-A/2008, 27 February

- (i) Signing of rendering of services agreements with the same party and the work agreed fits in one of the following cases:
 - a. Formation actions that do not surpass 132 hours;
 - b. Acquisition of services whose execution is to be concluded within 20 days counting from the notification of the awarding act.
- (ii) Signing or renewal of rendering of maintenance services of machines, equipment or facilities, for the maximum time of one year, to be entered into with the same party.

The bodies and services contracting under the “generic favorable opinion” regime above referred must communicate, by the e-mail contratacaoservicos@mf.gov.pt to the member of the Government in charge of the financial and public administration area, the contracts that have been entered into, until the end of the following month after the awarding took place, together with the elements set forth in no.2 of article 3 of Ordinance no. 9/2012 10 January.

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