

RECENT CHANGES TO THE PUBLIC INSTITUTES' FRAMEWORK LAW AND THE PUBLIC MANAGER'S STATUTE

PUBLIC LAW

During January 2012, two important acts were approved which are oriented for budget consolidation and public expenditure reduction:

- **Decree-Law no. 5/2012, 17 January**, which **amends and republishes the Public Institutes' Framework Law¹**, and
- **Decree-Law no. 8/2012, 18 January**, rectified by the *Corrigendum* no. 2/2012, 25 January, which **amends and republishes the Public Manager's Statute²**.

Both acts introduce changes regarding recruitment and selection of officials and public managers, as well as in the matter of salaries, benefits and privileges.

Main changes to the Public Institutes' Framework Law

(introduced by Decree-Law no. 5/2012, 17 January)

First of all, this act introduces changes in the public institutes' governance models.

On one hand, public institutes **are now obliged to have a governing council as a management body** (article 17.º, no. 1). As such, there is no longer the alternative of having institutes ruled by a president assisted by one or more vice presidents.

On the other hand, the composition of the governing council is limited so that, as expressed above, it is now the sole model of public institutes' governance.

Besides **a president**, public institutes may now have **up to two board members and a vice-president** (article 19.º, no. 1). Previously, besides the president, the governing council could have from two to four board members, one of which could be replaced by a vice-president.

Secondly, regarding nominations and mandates of the governing council members, some novelties are worth mentioning.

The **nomination of members of the governing council is now made through a tender procedure**, conducted by the Recruitment and Selection to the Public

¹ Approved by Law no. 3/2004, 15 de January, and altered by Law no. 51/2005, 30 August, by Decree-Law no. 200/2006, 25 October, and no. 105/2007, 3 April, by Law no. 64-A/2008, 31 December, by Decree-Law no. 40/2011, 22 March, and by the Resolution of the Parliament no. 86/2011, 11 April.

² Approved by Decree-Law no. 71/2007, 27 March, and altered by Law no. 64-A/2008, 31 December.

Changes regarding recruitment and selection of officials and public managers, as well as in the matter of salaries, benefits and privileges

Administration Commission³, in which case the rules of the Public Administration Staff Statute for the senior governing positions (article 19.º, no. 4) are applicable.

Furthermore, the **rule that prevented nominations of governing board members after the resignation of the Government or the calling of elections to the Parliament was eliminated.**

Regarding the duration of the mandate, it is increased from 3 years to 5 years, renewable once for an equal period of time (article 20.º, n.º 1). The cessation of the mandate is allowed by identical groundings as those ruled in the Public Administration Staff Statute, namely by incapacity to ensure the compliance of the determined orientations and goals (article 20.º, no. 4).

Thirdly, we must also underline the new rules regarding the payment of the members of the governing council of public institutes.

The payment of the members of the governing councils is now aligned with the ones of the senior governing offices of the direct administration of the State (article 25.º, nos. 2 and 3). This way, the earnings of the presidents are indexed to the ones of the first rate senior governing offices (this being € 3.734/month) and the vice-presidents and board members to the ones of the second rate senior governing offices (that is, € 3.173, 95/month).

Benefits and privileges are now eliminated by the reorientation to the Public Administration Staff Statute⁴, that is now subsidiarily applicable (article 25.º, n.º 1), instead of Public Manager's Statute.

Two other notes are also important regarding this new regime.

On one hand, it is important to note that the introduced changes are applicable to the designated or to be designated governing members (article 7.º of Decree Law n.º 5/2012, 17 January).

On the other hand, besides **universities and higher education schools, private institutions of social solidarity, the National Health Services' establishments and the independent administrative entities, seven public institutes have a special regime.** Which means that the referred rules may not be applicable to them. They are:

- "Instituto Nacional de Estatística";
- "Instituto de Gestão da Tesouraria e do Crédito Público";
- "Instituto Nacional de Medicina Legal";
- "Instituto Nacional de Aviação Civil";
- "Instituto Financeiro para o Desenvolvimento Regional, a Administração Central do Sistema de Saúde"; and
- "INFARMED".

From these seven public institutes only "Instituto de Gestão da Tesouraria e do Crédito Público" previously benefited from a special regime. On the opposite,

The nomination of members of the governing council of Public Institutes is now made through a tender procedure

³ Independent entity, not yet working, that will function next to the member of Government responsible by the area of public Administration.

⁴ Approved by Law no. 2/2004, 15 January, altered by Law no. 51/2005, 30 August, no. 64-A/2008, 31 December (LOE/2009), no. 3-B/2010, 28 April (LOE/2010) and no. 64/2011, 22 December, that republished it.

The payment of the members of the governing councils is now aligned with the ones of the senior governing offices of the direct administration of the State

Instituto do Turismo de Portugal used to benefit from a special regime and is now under the common regime.

There is no longer any reference to “Banco de Portugal” as a public institute, because that type of qualification would not be satisfactory regarding its functions as a central bank, member of the Eurosystem, and therefore a higher degree of independency should be attributed to it.

Main changes to the Public Manager’s Statute

(introduced by Decree-Law no. 8/2012, 18 January)

The main changes to the rules disciplining the exercise of the Public Manager’s office occur in two main domains: i) nomination and resignation regime and ii) payments. Concerning nomination and resignation of personalities to the exercise of the Public Manager’s office, we underline the following novelties:

First of all, the designation of public managers occurs by election or nomination (article 13.º, no. 1). The **nomination** is made by Council of Ministers’ Resolution, reasoned and **published in *Diário da República*** along with a note regarding the academic and professional résumé of the designated, under proposal of the member of the Government in charge of the financial area (article 13.º, no. 2).

Secondly, the nomination proposals to the exercise of public managers office now include a **non binding evaluation of the résumé and of the adequacy of the personality’s profile**, by the Commission of Recruitment and Selection for Public Administration (article 13.º, no. 3).

Thirdly, the entering of management contracts in all public companies is now obligatory, and not just those that provide general interest services (article 18.º, no. 1). These contracts cannot predict specific compensation regimes or any other type of compensation for the cessation of functions and now mandate resignation when the performance evaluation is negative (article 18.º, nos. 4 and 5).

Finally, the public managers’ **right to compensation**, in the resignation by mere convenience situations, now **depends on the effective exercise of office for 12 months in a row**, by opposition to the previous inexistence of a minimum period of the exercise of functions (article 26.º, n.º 3)

Regarding the payment of Public Managers, the following aspects must be underlined: Firstly, it is determined that the payment of public managers shall include:

- A **monthly payment**, that **cannot surpass the monthly payment made to the Prime Minister** (article 28.º, nos. 1 and 8). This payment is now determined regarding the complexity, difficulty and responsibility inherent to the respective functions criteria and the normal practice of the market in the respective sector (article 28.º, no. 3)

The nomination proposals to the exercise of public managers office now include a non binding evaluation of the résumé and of the adequacy of the personality’s profile, by the Commission of Recruitment and Selection for Public Administration

The criteria and the payment of the public managers to use in each of the categories are defined by Resolutions of the Council of Ministers (article 28.º, no. 4), monitored by the Recruitment and Selection for Public Administration Commission (article 28.º, no. 5), except for the anonymous societies, in which the definition of the payment is competence of the respective general assembly or a commission of payment (article 28.º, no. 6).

- A **monthly bonus**, paid 12 times a year, for representation expenses, **in the value of 40% of the respective payment** (article 28.º, no. 2). However, it is no longer allowed the use of credit cards and other payment instruments by public managers concerning the expenses in service of the company. It is equally forbidden the reimbursement of any expenses that fall into the scope of personal representation expenses (article 32.º, nos. 1 and 2).

As an exception to the rule referred in the previous paragraph, public managers designated in service commission regime or by occasional assignment agreement, in companies whose main function is the production of assets and market services, including financial services, and under market competition regime, **may choose a remuneration equivalent to the medium updated remuneration from their origin job site of the past three years**. Such option must be expressly authorized by decision of the member of Government responsible for the financial area, to publish in “Diário da República” (article 28.º, no 9). However, in these cases, public managers will not earn the monthly bonus for representation expenses (article 28.º, no. 10).

Second, management prizes may still be attributed at the end of the the exercise of functions or mandate, **but now they cannot surpass half of the monthly payment** (article 30.º, no. 1, b)). **It is established that during the time in which the Economical and Financial Aid Program is in force, no management prizes shall be attributed** (article 4.º of Decree-Law no. 8/2012, 18 January). Nevertheless, this aspect brings no significative news, for the prohibition of performance awards was already in force by the PEC 2010-2013 execution regarding i) state business sector’s companies, ii) public companies, iii) participated companies, iv) companies held by state public companies, including those from the regional sector and municipal, v) public institutes and vi) legal persons of public law with independency for exercising regulation, supervision or control functions (article 29.º of Law no. 55-A/2011, 31 December and article 29.º of Law 64-B/2011, 30 December).

In third place, the exercise of functions by inherence, participation in advisory boards, supervision commissions or other bodies in entities, positions in the mother companies and non executive functions in other companies of the business public sector, in addition to the job as a public manager, **no longer entitles one to any additional benefit or privilege** (article 31.º).

The payment of public managers shall include a monthly payment, that cannot surpass the monthly payment made to the Prime Minister.

*During the time in which
the Economical and Financial
Aid Program is in force,
no management prizes
shall be attributed*

Finally, it is determined that, for those who play a role in companies or other public entities and has previously exercised functions as a public manager (earning, because of that exercise, complementary pension benefits), now has the obligation to choose between the payment in the company or public entity where he/she exercises his/her functions or the referred complementary pension benefits, **putting an end to the previous alternative between “a 1/3 of the current payment + complementary pension benefits” or “1/3 of the complementary pension benefits + current payment”** (article 38.º). Bear in mind that Decree-law no. 137/2010, 28 December, had already eliminated the possibility of the accumulation of public payments with public pension system pensions. The present change widens that prohibition of accumulation to the complementary pension benefits.

The changes introduced are also applicable to the public managers already designated or to be designated (article 7.º, no. 1, of Decree-Law no. 8/2012, 18 January).

Contact

Fernanda Matoso | fmatoso@mlgts.pt



MEMBER OF
MLGTS LEGAL CIRCLE
INTERNATIONALITIES WITH THE PORTUGUESE-SPEAKING WORLD

To address the growing needs of our clients throughout the world, particularly in Portuguese-speaking countries, MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA has established solid associations and alliances with leading law firms in Angola, Brazil, Mozambique and Macau (MLGTS Legal Circle).

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA

ASSOCIADOS
SOCIEDADE DE
ADVOGADOS

LISBON

Rua Castilho, 165
1070-050 Lisbon
Telephone: (+351) 213 817 400
Fax: (+351) 213 817 499
mlgtslisboa@mlgts.pt

OPORTO

Av. da Boavista, 3265 - 5.2
Edifício Oceanvs – 4100-137 Oporto
Telephone: (+351) 226 166 950
Fax: (+351) 226 163 810
mlgtsporto@mlgts.pt

MADEIRA

Avenida Arriaga, Edifício Marina Club, 73, 2º
Sala 212 – 9000-060 Funchal
Telephone: (+351) 291 200 040
Fax: (+351) 291 200 049
mlgtsmadeira@mlgts.pt

São Paulo, Brazil (in association)
Mattos Filho, Veiga Filho, Marrey Jr.
& Quiroga Advogados

Luanda, Angola (in association)
ALC – Angola Legal Circle Advogados

Maputo, Mozambique (in association)
SCAN – Advogados & Consultores

Macau, Macau (in association)
MdME | Lawyers | Private Notary

MEMBER
LEX MUNDI
THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS

www.mlgts.pt