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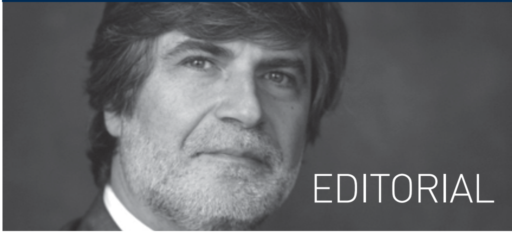

EDITORIAL

This edition of *Momentum* has a special significance, as the first to be produced from the new offices of Sérvulo & Associados, in Lisbon's Chiado district. Two of the articles in this issue deal with questions arising from the State Budget Law for 2009. One of these looks at the changes to the Corporation Tax (IRC) Code caused by the adoption of the International Accounting Standards (IAS/IFRS), whilst the other assesses the new rules for real estate funds investing in residential property for let.
Also of interest are the comments on the changes to investigatory procedures governed by the Code of Criminal Procedure, and those on the European Commission's communication on its position on the abuse of dominant positions. This issue also highlights the delay in transposing into Portuguese law the community directive on cross-border mergers, with a look at the main implications of the incorporation of these rules into the domestic legal system.
Finally, this issue documents the involvement of lawyers at Sérvulo & Associados in two projects for new legislation. The head of our Employment Law Department, who sat on the Commission in charge of the review of the Employment Code, takes a critical look at the new rules on temporary employment contracts. And we publish another article on the draft law on property in the public domain, examined here by one of the members of the Ministerial Commission set up to draft it.
In an environment of continuing legislative change, where the new legal rules may result in fresh requirements, challenges or opportunities, this edition of *Momentum* is an opportunity for us to share our experience and reflections.

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STATE BUDGET LAW FOR 2009 – TRANSPOSITION OF INTERNATIONAL ACCOUNTING STANDARDS FOR THE ASSESSMENT OF IRC (CORPORATION TAX)

Although Law 64-A/2008, of 31 December (approving the State Budget Law for 2009), made no far-reaching changes to the Corporation Tax (IRC) Code, article 74 of the law did grant authorization to legislate on various aspects of corporation tax. In this article we shall focus on just one of these, set out in paragraph 1, which determines that "the Government is hereby authorized to amend the Corporation Tax (IRC) Code and complementary legislation in order to adapt the respective rules to international accounting standards and national accounting rules which set out to adopt these standards".
The importance of this authorization to legislate derives from the context in which it was adopted, specifically the fact that, previously, in relation to corporation tax, the *reception* of changes to accounting standards, when fiscally relevant (i.e. those capable to influencing the assessment of the taxable income of tax payers subject to corporation tax), has always taken place *automatically,* by operation of the reference contained in Article 17 of the Corporation Tax (IRC) Code. This article lays down that *"the taxable income of corporations (...) comprises the algebraic sum of the net profit of the period and positive and negative variations in assets over the same period, not reflected in such profit, determined on the basis of the accounts"*, which, under the terms of paragraph 3 a) of the same article, must be *"organized in accordance with the accounting standards and other legal provisions in force for the respective economic sector"*. In the light of this provision, when a change is made to accounting standards, it has previously been understood that this change will be capable, *ope legis* (i.e. without requiring adaptation of the respective fiscal rules and by operation of the legislative *reference* referred to above), of affecting the assessment of the taxable income of tax payers subject to IRC.

> "(...) the writer of the legislation has again pointed out the questionable constitutionality of the reference mechanism contained in Article 17 of the State Budget Law"

Indeed, even in the light of the *irregularity* (which we believe is evident) of this reference mechanism, due to breach of the principle of fiscal legality in its two normative dimensions (that of the formal reservation of the law and that of the material reservation or of fiscal specificity – we should recall, by way of example, the case of Accounting Guideline no. 25, which *broadened* the fiscally relevant classification of finance lease operations), it is clear that both the writers and the appliers of fiscal legislation have always reiterated the understanding – which came to represent a consensus – that changes to accounting rules of relevance to the assessment of taxable income could be validly absorbed into fiscal rules through this referential mechanism.
In effect, until the 2009 State Budget Law took effect, the writers of fiscal legislation had never felt any need to formalise, by expressly granting authorization to legislate, the reception of changes in the financial reporting of certain acts of legal transactions. This means, therefore, that in the light of this shift in understanding (clearly revealed in the authorization to legislate contained in Article 74.1 of the State Budget Law for 2009), the writer of the legislation has again pointed out the questionable constitutionality of the reference mechanism contained in Article 17 of the Corporation Tax (IRC) Code. In our view, the authorization to legislate contained in Article 74.1 of the 2009 State Budget Law will be sufficient (insofar as it manifestly contradicts the understanding previously held) to legitimate the reaction by tax payers against the levying of tax on grounds which may have drawn on accounting rules which are not set down in law, but which have been directly evoked by operation of the said Article 17 of the Corporation Tax (IRC) Code.

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AT LAST, THE NEW RULES ON CROSS-BORDER MERGERS

Attentive observers of company law will undoubtedly be aware of the delay in transposing into Portuguese law Directive 2005/56/EC, of the European Parliament and the Council, of 26 October 2005, on the cross-border merger of limited liability companies. Even after the much discussed reform of 2006, the Companies Code failed to provide rules on mergers where one or more of the companies have their registered office, central administration or principal place of business in a member State of the European Union other than Portugal.
Well past the deadline for transposition of the directive in question (December 15th, 2007), and after the European Commission had notified the offending States, requesting them to comply with their obligation, a draft law finally saw the light of day in October last year, designed to translated into Portuguese domestic law the provisions of this and other directives (Draft Law no. 236/X, of 30 October 2008). In the meantime, in December 2008, the European Commission brought proceedings in the Court of Justice requesting a declaration that the Portuguese State, by not approving the legislative, regulatory and administrative measures needed to comply with the directive in question, is failing to comply with its duties under the same directive.
In the particular case of Portugal, the delay is utterly incomprehensible. Indeed, the Companies Code, which underwent reform in 2006, already establishes, for internal mergers, a good part of the solutions which are now to be adopted for cross-border mergers. The draft law in question lays down that, in addition to the information required for internal mergers (Article 98 of the Companies Code), the draft terms of cross-border mergers should contain the rules for the transfer of shares or other securities representing the capital of the company resulting from the international merger; the date of the merging companies' accounts used to establish the conditions of the cross-border merger; information on the arrangements for involving employees in defining their respective participation rights in the company resulting from merger (if applicable) and the likely repercussions of the merger on employment. The first of these requirements are not exactly new. There is similarly nothing significantly innovative in the rules on scrutiny of mergers, or in the

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rules for approval or other procedural aspects. As a result, in terms of the arrangements for publicising mergers, the protection of creditors and other third parties and formal requirements, the rules to apply to participation in cross-border mergers by companies with registered offices in Portugal are precisely the same as those for internal mergers, except (and this is in fact new) for the requirement that companies with registered offices in Portugal must obtain a pre-merger certificate (as provided for in the directive), attesting to proper completion of the pre-merger acts and formalities, which certificate may be requested from any Companies Registry, after registration of the terms of the merger. Although this is not clearly stated in the draft law, it should also be understood that a similar certificate (to be issued by the relevant authority of the country or countries in which the merging companies have their registered offices) should be presented on applying for registration of the terms of merger in Portugal, when the company resulting from the merger has its registered offices in Portugal.
The real innovations in the proposed rules on cross-border mergers relate to employment issues: the terms of the merger must set out the resulting employment measures and the arrangements for employee involvement in defining participation rights in the company resulting from the merger. This last aspect, which is also contemplated in the draft law, will involve adoption of relatively complex rules for cross-border mergers, especially when they involve companies subject to employee participation rules which set a higher level of requirements than those applicable under Portuguese law.

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REAL ESTATE (RESIDENTIAL LET) INVESTMENT FUNDS

With the publication of the State Budget Law for 2009 and specifically Ministerial order no. 1553-A/2008, of 31 December, the legislative framework is now in place for real-estate funds which invest in housing for let (*Fundos de Investimento Imobiliário para Arrendamento Habitacional,* or FIIAH)FIAAHs are subject to the general rules on property funds, except for a number of special features which are worth noting. The regulations on real estate (residential let) investment companies (SIIAH) have yet to be defined, pending the general rules on real estate investment companies to be issued as part of the legislative initiative launched with the public consultation process conducted by the Securities Market Commission in March/April 2008.
The new rules establish that FIIAHs and SIIAHs constituted between 1 January 2009 and 31 December 2013, together with property which they acquire during this period, will enjoy special taxation rules.
In order to qualify for these benefits, FIIAHs are considered to be funds with the following characteristics:
(i) Closed-end funds, privately or publicly subscribed, with total assets, after the first year of operation, of no less than ten million euros, on pain of the Securities Market Commission having powers to cancel the respective FIIAH permit;
(ii) In the case of publicly subscribed funds, there must be no less than one hundred unit holders, and no individual holding shall exceed 20% of the fund's total assets. If this limit is exceeded, the fund's permit may be revoked and the right to distribute the fund's income is immediately and automatically suspended in respect of the portion of the holding in excess of the individual limit;
(iii) No less than 75% of the total assets of the FIIAH must consist of residential property for permanent let, located in Portugal. It should be noted that this percentage limit is measured by the average figure at the end of each of the last six months, and must be met within two years of the incorporation of the FIAAH and within one year of a capital increase, in respect of the value of the increase.
One of the leading new features of these rules is the possibility of a lease being concluded between mortgage borrowers who sell their property to a FIIAH. In these cases, the tenant acquires the right to buy the property back from the fund, to be exercised by 31 December 2020.

The right to buy can be exercised at any time, subject to prior notice of no less than 90 days.
However, the right to buy lapses if the tenant fails to pay the agreed rent for a period of more than three months.
As an incentive for the incorporation of FIIAH's, more favourable fiscal rules have been provided, based on the following tax benefits:
(i) Exemption from corporation tax (IRC) on income obtained by FIIAH duly incorporated between 1 January 2009 and 31 December 2013 and operating under Portuguese law;
(ii) Exemption from corporation tax (IRC) and personal income tax (IRS) for income from FIIAH units, excluding, however, any positive balance between gains and losses on the disposal of these units;
(iii) Exemption from municipal property tax (IMI) for the urban property for permanent residential let, whilst owned by the FIIAH, together with exemption from municipal transaction tax (IMT) with regard to acquisitions by the fund or by tenants;
(iv) Rentals paid are deductible from income tax (IRS) and gains resulting from transfer, in cases where ownership rights are converted into tenancy, are income tax exempt;
(v) Exemption from stamp duty on formalities relating to the conveyance of urban property for permanent residence, both on constitution of tenancy, and on exercise of the right to buy;
(vi) Exemption from the supervision charges payable by FIIAH management companies in respect of the management of these funds.
These fiscal rules will remain in force until 31 December 2020, as from when the general rules for property funds will apply.
In addition, management companies may effect transactions between property funds under their management with the sole purpose of adding permanent housing property to the portfolios of FIIAHs, provided they do so correctly during the six months subsequent to the authorization of the fund and by 31 December 2009 at the latest.
We should stress that provision is made for a supervisory board to oversee the legal and regulatory rules applicable to the operations of FIIAHs and to check compliance with the principles of good governance.
The critical element in this scheme is the balance between the interests of tenants, on the one hand, and those of the fund's investors, on the other.

"As it stands, the scheme may prove of little interest to fund investors"

The price for the right-to-buy option is calculated on the basis of the price paid by the FIIAH for the property, escalated in line with the retail price index. In addition, a tenant not wishing the exercise the right to buy has the right to receive the amount corresponding to the difference between the future value for which the property is sold to third parties and the net present value for which the property was acquired by the FIIAH, less the costs of placing the property, under normal conditions of use, and any outstanding rentals. Rentals for the period between the moment of early termination of contract and disposal of the property to a third party are also deducted, up to the limit of the rentals due through to the end of the lease agreed between the parties.
This may create a permanent expense for the fund, which in the last analysis is subject at any time to a call option enjoyed by the tenant.
As it stands, the scheme may prove of little interest to fund investors. In effect, in both scenarios, and leaving aside the receipt of rentals, the fund may stand to lose: if the property gains in value, the purchase has incentives to buy the property on good terms and, even if he decides not to exercise his option, he benefits from the subsequent increase in the property's value – less the placement costs and rentals due for the period up to sake of the property to a third party. If, instead, the property declines in value, the tenant will see no advantage in exercising his call option and will naturally waive his right to buy.
In mitigation of these drawbacks, we should point out that the tax exemption of capital gains ceases on termination of the lease or when the right to buy is not exercised.

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THE DEBATE ON CRIMINAL PROCEDURE: A TEST FOR DEMOCRACY

Not long after the changes to the Code of Criminal Procedure took effect on September 15th, 2007 cries of increasing discontent went up from the Department of Public Prosecutions.

This was because, amongst other changes, some more semantic (designed merely to clarify the intentions of existing legal provisions), and others more structural, Articles 86 and 89 revolutionised the dynamics of criminal investigations. In short, in August 2007, the process was public, at the trial stage and at a pre-trial stage (if this had been requested only by the defendant, and the defendant expressed no objection to its being conducted in public), but not at the investigation stage. At this phase, the secrecy of the investigation was the rule, both externally (outside the proceedings, for those not involved) and internally. In other words, not even the defendant could have access to the files.

There are historical grounds for this: an investigation is needed prior to adversarial proceedings. If we don't know what someone might have done, we have no way of arguing with this person whether they actually did anything wrong – in this case, committing a crime – and why they did it (whether they were acting, for instance, in self defence). This is human nature: not everyone who commits a crime confesses.

Hence the drama that has unfolded since September 15 (2007). Since that date, the proceedings are, as a rule, public, on pain of nullity. All the proceedings, including the investigation. So, while the investigation is going on, the defendant will be present, taking note of the issues raised concerning him, the evidence which exists and the evidence that might be found. This offers the "rogue" the chance to get off, destroying documents, silencing accomplices, holding off from his activities. Some might conclude that the new rules grant a sort of "villain's charter". The fact is that, even in cases of terrorism or violent or highly organised crime, the defendant will always have access to the files after 15 months plus 3 further months (in the view of some of the case law and the authors) or after 15 months plus any other period, provided set in advance by the judge (who, as a precaution, could always set a period of 10 years...). In other words, if the courts and the authors are right, within a year and a half at the most, our clients will be in there consulting the files. This is what certain voices at the Department of Public Prosecution have announced as the end of the road for the investigation of organised crime.

This would indeed be a huge oversight on the part of the writers of the legislation, if we were not to accept that all persons are presumed innocent, and if we failed to acknowledge that criminal proceedings have a stigmatising and discrediting effect (sometimes leading companies to bankruptcy), and invade (often, we concede, necessarily) the defendant's house, office and life, depriving him, often for years, of the essential conditions for privacy, liberty, professional activity, in short, his whole life. This is not admissible without limits or for long periods.

We should always bear in mind that when we discuss criminal procedure, we are discussing democracy, the eternal tension between guarantees – such as the presumption of innocence – and the need to assure the community's security.

The outcry provoked by the Casa Pia case led the writers of the legislation to strengthen the guarantees enjoyed by defendants; at the present time we risk being blown in the opposite direction, as the outcry grows to hurricane pitch, leading us to reduce guarantees and bolster powers of investigation.

However, in the last analysis, the issue here is simple: if there are only the resources to manage proceedings over 4, 5 or more years, a fundamental choice has to be made: (i) either we save on resources, maintain the investigation and ignore the defendant; (ii) or we save on resources, let the investigation atrophy and protect the defendant; (iii) or we invest in resources, reinforce the investigation and protect the defendant.

The first two are easy, because all they need is an amendment published in the *Diário da República (the Official Gazette)*. It's just that the first is the death of democracy and the second leaves it dying.

The third choice is what democracy needs, changing the management model, reorganising the investigation, investing in resources and protecting defendants, victims and the community, leaving the law book in peace, just as it stands after that other September: that of 2007 and the guarantees so hotly contested by some, but wholeheartedly welcomed by us.

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"(...) when we discuss criminal procedure, we are discussing democracy, the eternal tension between guarantees – such as the presumption of innocence – and the need to assure the community's security"

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FREE COMPETITION AND EXCLUSIONARY CONDUCT: PRONOUNCEMENT BY THE COMMISSION

After half a century during which Article 82 (formerly Article 86) of the EC Treaty has been in force, the Commission has finally published a communication on its priorities in applying the prohibition of abuses of a dominant position with exclusionary effect [COM(2008) 832, of 5.12.2008].

This communication is the end of a public consultation process which started in 2005 with the *Draft discussion paper*, and is of fundamental importance to understand how the Commission intends to pursue, in future and also in the present, abusive conduct by undertakings in a dominant position.

The communication should be read with great care by companies operating in markets subject to the supervision of the Competition Authority or the Commission, such as companies operating in the fuels, telecommunications or pharmaceutical sectors, to mention but a few.

With regard to price-based conduct, the Commission has announced that it will pursue forms of behaviour capable of undermining competition from competitors as efficient as the undertakings in a dominant position. As a benchmark, the Commission will use the criteria of average avoidable costs and long-run average incremental costs in order to determine the degree and time-scale to which the dominant undertaking is covering its costs.

The forms of conduct specifically considered by the Commission also include (1) *exclusive purchasing obligations,* which, although may involve compensation for buyers, may be prejudicial to end consumers, in some cases even when the obligation is imposed for a short period; (3) *conditional rebates,* either retroactive or incremental, i.e. applicable only to purchases above a given volume;

> "For the first time in 50 years, the Commission publishes a communication interpreting the law on abuses of a dominant position"

(3) *tying and bundling,* especially when the tied products are distinct, as regards demand, and the tie, whether forced (in the case of tying) or voluntary (in the case of bundling), has the effect of excluding competitors from the market, "levering" sales in the dominated market and excluding competitors in a non-dominated market (pure bundling was discussed at length in the high-profile *General Electric/Honeywell* case); (4) predatory practices; (5) margin squeeze; and (6) *refusal to supply.*

Regarding this final group, the Commission recognises that, in general, an undertaking, even when dominant, must be free to choose its trading partners. However, as discussed in our previous articles (v. *Momentum* nos. 1 and 2), the Commission recalls that it may be unlawful the refusal to supply existing or new clients, or to license industrial property rights or denying access to an essential infrastructure or network ("essential facility"). We should stress that the refusal does not have to be actual, and that undue postponement of supply or the imposition of unreasonable conditions may be deemed equivalent to refusal.

The non-exhaustive list of abusive practices and the relevance of market dynamics should prompt companies to consider these guidelines, not least because the penalties for breaching the law, be it the EC rule or the equivalent provision in Portugal, can lead to a fine of up to 10% of the global turnover of the undertaking (or corporate group) in the previous year, as well as other consequences, including civil liability before those harmed by the restriction on competition.

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PUBLIC DOMAIN: THE NEW LAW AND ITS PERSPECTIVES

On 27 October 2008, the Portuguese Government, acting through the Ministry of Finance, presented and submitted for public discussion a draft law to provide the Portuguese legal system with a general set of rules on property belonging to the public domain of the State, the autonomous regions and the municipalities. This new framework, which is expected to be approved and come into force during the first half of 2009, will not prejudice the effectiveness of pre-existing rules relating to specific sectors of the public domain, and the new rules will only apply in these sectors to matters not regulated by the specific rules already in force.

The draft law presented for public discussion reflects primarily a search for balance between protection of public domain property, on the one hand, and its perception as a collective economic resource, to be exploited pursuant to the best practices of public management, on the other hand.

In view of such balance, and without omitting to provide appropriate safeguards for the public interest, the draft law at hand seeks to make a number of changes to the Portuguese legal system designed to allow private companies to contribute more effectively and efficiently to the use of public domain property. In this regard, I would like to point out four aspects of the proposed rules.

In the first place, the draft law expresses a clear legislative intention not to extend the public domain status beyond the precise limits of the underlying public interest. This intention is clear in several points of the law, namely: (i) it is made a pre-condition for inclusion in the public domain that the relevant property is indispensable for meeting collective needs and (ii) when the property no longer serves, in accordance with the law, the public function which justified its classification as public domain, the authority holding such property is required to declassify it.

Secondly, the draft law provides for exceptional situations, if certain preconditions are met, where inclusion within the military public domain is not based on public ownership, but on a set of authority powers which ensure the Portuguese State the sole right to use the property. This set of authority powers and the right of sole use, however, will not be incompatible with formal private ownership of the property thereby included in the military public domain.

In the third place, with regard to private use permits for public domain property, the draft law maintains the traditional distinction between licenses and concessions, and concessions themselves are divided into private use concessions and operating concessions. All these forms of private use, as well as common use itself, are now provided with general regulations for the first time in Portuguese legal history, which will improve the legal clarity and security in this field and may therefore lead to more efficient economic use of public domain property.

The draft law presented for public discussion reflects primarily a search for balance between protection of public domain property (...) and its perception as a collective economic resource, to be exploited pursuant to the best practices of public management (...)

Fourthly, regulations are also established on the actual granting of these private use permits. In the case of licenses, which are granted for short or medium term use, granting by direct negotiation is understandably allowed, as a general rule. But in the case of private use concessions or operating concessions, the draft law provides for a competitive procedure subject to the Public Contracts Code ("Código dos Contratos Públicos"), with, however, some significant amendments.

These amendments are: (i) a tendering procedure may be opened on the request of a private interested party; (ii) direct negotiation may be adopted whenever the concession is based on an original business model or technology, development of which is relevant to the public interest; (iii) as a rule, procedures include a negotiation phase; and (iv) when certain preconditions are met, a private party who has requested the opening of a tendering procedure may be entitled to a pre-emption right.

In conclusion, we can only express our hope that this proposed legislation which, twenty years on, responds to the demand of Article 84.2 of the Constitution, will effectively see the light of day within the present legislature.

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FIXED-TERM EMPLOYMENT CONTRACTS UNDER THE REVISED EMPLOYMENT CODE

Everyone knows that the legislation on fixed-term contracts is systematically ignored: in law, fixed-term employment contracts exist as an exception, which can only legitimately be used to meet temporary labour needs, whilst in practice these are the standard form of contract – figures from 2007 show that 80% of employees with less than one month's length of service were on fixed-term contracts. Since 1989 the law has sought to combat this situation by imposing new, stricter limitations on fixed-term contracts, with the results we see around us: *the exception in law is the rule in practice*. This is one of the aspects that best illustrates one of the criticisms made of employment legislation (not just in Portugal): the law is losing ground as a regulatory force in the labour markets, which have found ways to circumvent it, resulting in growing segmentation, with protection afforded to those who have managed to find stable employment at the cost of people arriving on the employment market at a later date.

The review of the Employment Code adopts further measures to this end, as it inevitably must as long as the idea persists that this is a constitutional requirement. So in addition to reasserting the requirement that due grounds be stated for having recourse to fixed-term contracts and reaffirming the restrictions on the duration of these contracts, new rules have now been added to combat the use of alternative forms of hiring works designed to circumvent certain restrictions:

- The law prohibits the use of fixed-term contracts to fill a position formerly occupied by a worker on a fixed-term contract, if the latter contract was terminated on the employer's initiative. The prohibition of serial fixed-term contracts remains in effect for a period equivalent to one third of the duration of the last contract;
- There has long been a rule limiting the duration of most fixed-term contracts and respective renewal periods to a maximum of three years. These limitations have now been tightened as follows:
- The prohibition of successive contracts now encompasses: the use of casual labour and service agreements for the performance of tasks corresponding to the same position, including hiring by the same entity or by any other related company or company in the same group as the previous employer;
- These alternative forms of hiring, by the employer or related entities as referred to above, are now considered when counting the maximum duration of fixed-term contracts.

The new limitations are comprehensible from the perspective which the law has repeatedly adopted of combating temporary employment contracts. But they still represent cause for concern, for two reasons: firstly, because the broad and none too careful terms in which they are drafted raise serious doubts as to what situations are in fact covered, and secondly because they cling to a model (with the benefit of constitutional authority) which takes as its paradigm the permanent employment contract, endowed with special guarantees of stability, when this paradigm is increasingly removed from reality.

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"The new limitations to fixed-term contracts are comprehensible but still represent cause for concern"

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