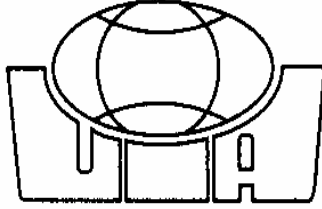


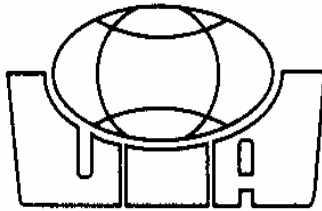
Congrès de l'UIA 2005 - Fez, 31 août - 4 septembre 2005
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MERGERS & ACQUISITIONS COMMISSION

**Takeover Rules Revisited:
The Impact of the EU Directive and its Effect on other Countries**

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Country Report for Portugal

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1. CURRENT TAKEOVER LAW

1.1. CONTROL OF TAKEOVERS

Does your jurisdiction control the conduct of company takeovers? ¹

Yes, the Portuguese legal framework incorporates provisions aimed at regulating takeovers. In fact, Portugal has innovative provisions on takeover bids, incorporating most of the solutions proposed by the 13th Directive on Company Law. The legal breakthrough that culminated in these provisions envisaged the liberalisation of the market for corporate control, thus developing the financial sector.

Takeover bids are regulated by the provisions of both the Securities Code² and the Companies Code. Moreover, the role of the stock market supervisory authority (*Comissão do Mercado de Valores Mobiliários*, CMVM) encompasses the supervision and regulation of public offers of securities. Thus, CMVM Regulations on takeover bids and other related issues are also relevant.

In addition, the general rules and principles of Civil Law and Commercial Law applicable to public offers and to standard form contracts are also applicable³.

The aim of the provisions is two fold, the control and protection of shareholders and the sound functioning of the financial markets.

1.2. APPLICABILITY OF TAKEOVER RULES IN YOUR JURISDICTION

What companies are affected by the takeover rules?

E.g.

- **Only corporations that are officially listed on a stock exchange or exchanges situated within the Member State?**
- **Limited liability companies?**
- **Closed corporations?**
 - **Corporations that are not listed but with many shareholders (are the Takeover provisions applicable *per analogiam*)?**

Only publicly held corporations with shares listed in the Euronext Lisbon stock exchange are subject to takeover rules. Takeover rules of the Portuguese Securities Code only apply to public offers of acquisition addressed to all the shareholders of a public company. Exception is made for bids for the acquisition of shares of closed corporations addressed to more than 200 shareholders.

¹ ***This does not address anti-trust or similar rules but rules designed to regulate the conduct of a takeover and, particularly, the protection of the shareholders***

² Approved by Decree-Law 486/99 of 13 November 1999. Amended by Decree-Laws 61/2002 of 20 March 2002; 38/2003 of 8 March 2003; 107/2003 of 4 June 2003; 183/2003 of 19 August 2003; and 66/2004 of 24 March 2004.

³ Pereira, José Nunes - “*O Regime Jurídico das Ofertas Públicas de Aquisição no Recente Código do Mercado de Valores Mobiliários: Principais Desenvolvimentos e Inovações*”, ed. *Revista da Banca*, No. 18, 29, 1991, p.32.

1.3. WHAT FORM DOES REGULATION TAKE?

e.g. voluntary rules, statutory provisions, a statutory framework with rules?

Following the trend within continental Europe, the Portuguese provisions on takeovers encompass statutory provisions, as well as CMVM Regulations.

1.4. WHAT ARE THE REQUIREMENTS FOR AN OFFER-MEMORANDUM?

The launch of a takeover bid over the securities representing the share capital of a publicly held company or giving right to its subscription or acquisition must be preceded by the publication of a prospectus (offer memorandum), which must contain complete, true, updated, clear and lawful information and be published with the offer announcement.

The main objective of the provisions is to allow the addressees to make an informed assessment of the offer. Prior to the publication and advertising of the prospectus (offer memorandum), the offeror must send to the target, to the managing entities of the regulated market in which the securities that are object of the offer or comprise the consideration for the offer are listed, and to the CMVM a preliminary announcement of the bid and publish it. This preliminary announcement must also be registered with the CMVM.

➤ **Minimum requirements⁴**

In accordance with Article 136 of the Securities Code and Article 7 of the CMVM Regulation 10/2000, which provide that following information must be disclosed:

- Offeror's corporate name and activity;
- Purpose of the offer;
- Undertaking that the offeror is legally bound by the information and conditions of the offer it publishes;
- Type of prospectus;
- Quantity, type and par value of the securities being acquired;
- Date when the prospectus was prepared; and
- Information about how the prospectus is being distributed and places where it can be consulted.

In addition, Article 138 of the Securities Code and Appendix III to CMVM Regulation N. 10/2000 set out specific complementary information that must be included in the prospectus, as follows:

- Brief description of the operation, specifically a summary description of the conditions of the offer;
- Description and information on the type of operation, particularly the total or partial nature of the offer;
- Minimum and maximum number, type and class of shares that the offeror proposes to acquire;

⁴ This analysis takes into account the rules currently in force alone. Nevertheless, a piece of legislation that incorporates Directive 2003/71/EC of the European Parliament and of the Council on prospectuses of public offers, once approved by the Portuguese Parliament, will introduce rules aiming at, *inter alia*, harmonizing the prospectus' requirements and creating a "European Passport", whereby a prospectus approved in a Member country would be accepted in any other EU country.

- The consideration offered, including its specific calculation methods, the factors and data on the basis of which it was determined;
- The payment method of the consideration, especially when the securities that are the object of the offer are also listed in a regulated market that is located or operates abroad;
- In cases of cash compensation, information on the depository of the cash consideration, or on the entity that provided a bank guarantee for its payment;
- Indication that the securities being offered as consideration have been blocked, if they have already been issued;
- If the consideration contains an option for cash or securities how this option may be exercised;
- Whether there are any pro rata allotments and how they will be implemented, as well as any criteria for rounding off;
- Whether there are any expenses, fees or taxes, which the recipient of the offer is responsible for;
- List of the financial intermediaries responsible for the offering, with a description of the responsibilities of each intermediary;
- Identification of the persons responsible for the prospectus and the scope of their responsibility;
- The underwriting syndicate members that have provided advisory services;
- The purposes of the acquisition, especially as regards the maintenance of listing in a regulated market of the securities which are the object of the offer, the maintenance of the status of public company, the continuity or change in the activity carried out by the target company and by companies that are in a control or a group relationship with it, its human resources policy and financial strategy;
- The impact of the takeover on the offeror's financial situation;
- Dates and times of the beginning and end of the offering, including the latest date and time at which acceptances can be received;
- How the recipients of the offer can proceed to accept it;
- Stock exchange(s) where the transaction will be executed and where offer acceptances should be sent;
- Reference to the right of the recipients of the offer to revoke their acceptance prior to the closing of the operation, if a competing bid is launched in the meantime, as well as details of other cases, including those foreseen by law, in which the recipients will also have this right;
- The period of time during which offer acceptances may be revoked;
- The entity responsible for calculating and disclosing the results of the offering, with specific reference to the locations where the results will be made available;
- The quantity of securities issued by the target company that are owned by the offeror, [or

related parties, directly or indirectly, especially the percentage of voting rights that each of them can exercise in the target company⁵;

- List of the quantities, dates and consideration offered for securities acquired by the offeror or related parties within the past six months that are of the same class as the securities that are the object of this takeover bid;
- The percentage of voting rights that may be exercised by the target company in the offeror company;
- Any shareholder's agreements entered into by the offeror, or related parties,, with material influence in the target company;
- Any agreements or understandings with other individuals or legal entities to whom the offeror must transfer any quantities of the stocks acquired in the takeover bid, after the transaction closure. In addition to the respective terms of these agreements, the identity of the interested parties must be disclosed, as well as the information that would have been required had they acted as offerors;
- Any agreements entered into between the offeror, or related parties, the offeror and board members of the target company, including any special advantages gained upon the launch of the bid, whether to be executed on an immediate or deferred basis; and
- The name, functions, address, telephone numbers, fax number and e-mail address of the person designated as the offeror's market relations representative.

➤ **Is expert evaluation required to determine the accuracy/fairness of consideration?**

Portuguese provisions on takeovers do not require expert evaluation of the accuracy or fairness of the consideration, but only certification or verification of the accounting documents on which the prospectus is based.

Effectively, financial information should be subject to a report or written opinion prepared by an auditor registered with the CMVM.

Notwithstanding the above, in mandatory takeover bids, if the CMVM regards the cash or securities consideration proposed by the offeror, as not duly justified or equitable, or insufficient or excessive, the minimum consideration will be calculated by an independent auditor appointed by the CMVM, at the offeror's expense.

➤ **Is there mandatory equal treatment of all shareholders?**

There is mandatory equal treatment for all shareholders.

Hence, a takeover bid should be addressed to all holders of securities that are the object of a given offer.

⁵ The calculation of qualifying holdings should take into account, *inter alia*, the voting rights of the following: third parties in their own name, but on behalf of the offeror; a company with which the offeror has a control or group relationship; shareholders with whom the offeror has entered into a voting agreement; and members of its management and supervisory boards.

If the takeover does not entail the acquisition of the totality of the shares and securities of the target company, which confer subscription or acquisition rights, neither the offeror nor any related party, directly or indirectly, may accept the offer.

Except in relation to different classes of securities or addressees, there must be a single price for the offer which should be fixed in objective terms and in the legitimate interests of the offeror.

The offeror shall neither offer better nor different conditions to some shareholders in a pending public offer.

This prohibition is reflected in Article 180 (1) of the Securities Code and prevents the offeror, or any related party, from negotiating the acquisition of securities of the same class to those subject of the offer, outside the stock exchange, after the date of the publication of the preliminary announcement until the assessment of the offer's results, unless authorised by the CMVM following a previous opinion from the target company⁶.

Furthermore, in the context of compulsory acquisitions, the Securities Code specifically requires the equal treatment of holders of shares of the same class, in particular with regard to the calculation of the consideration.

This special emphasis on the consideration is understandable. Otherwise, the rationale behind mandatory takeovers could be undermined. Indeed, the concept of compulsory acquisitions aims to give minority shareholders opportunity to selling their shares under conditions identical to those prevailing prior to the acquisition of a control position, pursuant to a takeover bid.

➤ **Is different treatment allowed for different classes of shareholders? If so, are there requirements for equivalent or other fair treatment of the different classes?**

Yes, different treatment for different classes of shareholders is allowed, but only with regard to the consideration.

Article 124 (2) of the Securities Code specifically provides that different classes of securities or addressees may have different prices.

The determination of the consideration must reflect a legitimate interest of the offeror. There are no other equivalent requirements for fair treatment.

In addition to the bona fide principle, the principle of the protection of the fair expectations of the holder of certain rights will apply.

➤ **May the consideration be in shares alone (share exchange deal) or is a cash alternative required?**

In the context of a regular takeover bid, the consideration maybe solely in shares, issued or to be issued, and a cash alternative is not compulsory. The consideration may also contain an option. In these cases, the offeror should provide information on the exercise terms of this option.

Furthermore, if the consideration consists of cash, the offeror should deposit the total amount with a financial institution, or provide an appropriate bank guarantee before registration of the offer.

⁶ See Pereira, José Nunes , op. cit. p.81

If the consideration consists of securities, these should have appropriate liquidity and be easy to evaluate.

However, in the event of a mandatory takeover, if the consideration consists of shares, the offeror should indicate a cash alternative of an equivalent value. The aim of such a rule is to allow the consideration to be easily quantifiable.

- **Are there mandatory time periods for shareholders to consider the bid? Is the timetable for the takeover controlled by the rules? If so, in broad terms, what are the key time periods?**

Yes, there are mandatory time periods for shareholders to consider the bid. Article 183 of the Securities Code regulates the key time period of the offer, which may vary between two to ten weeks and starts on the day after the publication of the public offer's announcement and prospectus. The CMVM, on its own initiative or at the request of the offeror, may extend the offer period in case of revision, the launching of a competing offer, or when the protection of the interests of the addressees so demands.

Table 1 - Key time periods:

Stage	Period
Application for registration of the offer with the CMVM	20 days from the publication of the preliminary announcement
Offer period	2 – 10 weeks
Revision of the offer	10 days before the end of the offer period
Report regarding the opportunity and conditions of the offer by the target company	8 days from receipt of the draft public offer's announcement
Publication of the preliminary announcement of a compulsory takeover	30 days of the fact that gives rise to the duty of launching the offer
Launching of total mandatory takeover bid	6 months following the assessment of the offer's result that gave rise to the duty of launching the takeover bid

- **Disclosure requirements**

- When do they apply?

Disclosure requirements apply to the prospectus, in order to allow the addressees of the offer to become aware of its terms and conditions and to make an informed decision.

The Securities Code stipulates that the prospectus must be published in one or more newspapers of mass circulation in the country or in the form of a brochure to be made available to the public, free of charge.

In particular, the prospectus should be made available for public consultation at the offeror's and issuer's headquarters, at the headquarters and branches of the financial intermediaries responsible for collecting the addressee's declarations, and at the headquarters of the regulated markets in

which the securities are or will be listed. The prospectus may also be publicised by any other means.

The prospectus may only be published after approval by the CMVM.

- Is disclosure of shareholdings at bidder level required?

The bidder should disclose, in the prospectus, any qualifying holdings, either owned by them, or any related parties, in the target company.

1.5. REQUIREMENTS FOR THE OFFEREE

Articles 181 and 182 of the Portuguese Securities Code encompass specific obligations and restrictions on the offeree company during the standstill period (i.e. from the publication of the preliminary announcement of the takeover or from the moment when the target has knowledge of an impending takeover).

➤ **Disclosure requirements**

The board of the target company must, from the publication of the preliminary announcement up to the assessment of the result of the offer, report to the CMVM on a daily basis on the transactions carried out by its members, or those who have qualifying shareholdings.

In addition, the target board must provide the CMVM, as the competent supervisory authority, with all the information required.

It must also inform the employees, directly or through their representatives, of the contents of the offer's documentation.

During the standstill period, the target board must act *bona fide* at all times, particularly, concerning the accuracy of information provided.

➤ **Information/opinion of the board supplied to shareholders and stakeholders?**

The Portuguese provisions on takeovers require the target board to circulate a detailed assessment report on the offer, to shareholders and stakeholders.

The target board must prepare the report within eight days of receipt of the draft announcement of the public offer and is bound to provide complete, accurate, updated, objective and legal information.

The report must be published in the official bulletin of the regulated market where the shares of the offeree are admitted to trading.

In addition, the report must be sent to both the CMVM and the offeror and contain detailed financial information and a feasibility study by an auditor registered with the CMVM.

➤ **Expert evaluation?**

Yes, there will be expert evaluation in the feasibility study undertaken by an external auditor registered with CMVM.

➤ **Neutrality vs. active role?**

Article 182 promotes the neutrality of the board during the stand still period. The applicable provisions expressly prohibit the target board⁷, from pursuing any act that may significantly affect the target's net assets, thus frustrating the objectives announced by the offeror, as soon as it becomes aware of the decision to launch a takeover bid⁸ for more than a third of securities of the same class, before the assessment of the offer's results or before completion of the process, if at a prior date.

Furthermore, during the standstill period, the board may only perform acts of day-to-day management of the company⁹.

An exception is made for acts resulting from the fulfilment of obligations assumed before the board becomes aware of the offer launch¹⁰ and acts authorised by resolution passed by a special three-quarter majority of the voting rights, at a general meeting specifically called for that purpose during the offer period

The issuing of shares and other securities conferring subscription or acquisition rights and the entering into contracts representing the sale of important company assets, are deemed to be relevant changes to the net assets of the company, for the effects of the provisions of Article 182.

1.6. MANDATORY BID FOR ALL SHARES VS. PARTIAL BID

➤ **When is it required?**

The holding of voting rights exceeding certain thresholds triggers a duty to launch a takeover bid for the totality of the shares and other securities granting subscription or acquisition rights.

➤ **Does it depend on acquiring a controlling interest in target? If so, what is regarded as a controlling interest?**

The holding, directly or indirectly, in excess of one third or half of the voting rights in a publicly held company triggers a duty to launch a takeover bid for the totality of shares and other securities granting subscription or acquisition rights.

Effectively, a mandatory takeover bid for the totality of shares depends on anyone holding, directly or indirectly, through qualifying shareholdings,¹¹ in excess of one third or half the voting rights.

⁷ The interests of the board do not necessarily coincide with those of the shareholders.

⁸ This may be prior to the preliminary announcement. Jorge Brito Pereira goes a step further and argues that the beginning of the "stand still" period may be regarded as the time when the target company becomes aware, through reasonably complete and reliable information, of an imminent takeover bid, even if the final decision of launching a takeover bid still depends on the fulfilment of certain conditions. See Pereira, Brito Jorge, "A Limitação dos Poderes da Sociedade Visada Durante o Processo de OPA", 175 in *Direito dos Valores Mobiliários* (Volume II). Coimbra: Coimbra Editora 2000, p.187.

⁹ Arguably, these inhibitions are only applicable to the target company not including companies controlled by it. Jorge Brito Pereira is of the opinion that although desirable that companies controlled by the target company should be subject to such limitations this would however require amendment in that sense of the actual provisions on takeovers. *Ibid.* p.189.

¹⁰ This refers to obligations due in the standstill period. Otherwise, the target company could frustrate the objectives announced by the offeror by complying in advance with the obligations assumed before the board becomes aware of the offer launch. *Ibid.*, p.197.

¹¹ See *supra* footnote no. 7.

When the holding exceeds one third of the voting rights, but the legal entity is able to prove to the supervisory authority that it has neither the control of the target, nor involvement in a group relationship, the duty to launch a takeover bid may be waived.

In addition, this one third limit may be eliminated by the by-laws of publicly held companies that do not have shares or securities that grant subscription or acquisition rights listed in a regulated market.

➤ **May it contain conditions?**

A takeover may be subject to conditions, insofar as they correspond to a legitimate interest of the offeror, do not affect the normal functioning of the market, and their compliance does not depend on the offeror (see Articles 123 (1) (h) and 124 (3) and (4) of the Securities Code).

In the case of a mandatory bid, nothing is specifically said with regard to the imposition of conditions.

Nevertheless, the intention behind a mandatory bid would only be fulfilled if any conditions imposed by the offeror not only corresponded to a legitimate interest of the offeror, but also complied with the general civil law principle of bona fide.

It is paramount that the obligation of launching a takeover bid is not frustrated by the conditions imposed on the offer.

➤ **What is the equitable price/other method of determining the price to apply?**

The consideration for a mandatory takeover bid should be the highest in the following:

- The average price of the securities object of the compulsory takeover bid in a regulated market during the last six months immediately prior to the publication date of the preliminary announcement of the offer; or
- the highest price paid by the offeror or by any individual or entity with a qualifying shareholding, for securities of the same class, within six months immediately prior to the publication date of the preliminary announcement of the mandatory takeover.

If the consideration cannot be calculated by using the above criteria, or if the CMVM deems the consideration proposed by the offeror unjustified or inequitable, insufficient or excessive, a minimum consideration will be calculated by an independent auditor appointed by the CMVM.

1.7. SQUEEZE-OUT OF REMAINING MINORITY SHAREHOLDERS AFTER TAKEOVER OFFER

- **What threshold applies – e.g. 90%, 95%?**
- **What price applies?**
- **What are the rights of minority shareholders (e.g. to have the price scrutinized by court or to require that their shares be purchased if the bidder does not operate the minority squeeze out).**

Minority shareholders' rights are also protected by the relevant corporate governance provisions of the Securities Code. Thus, after the launch of a takeover bid, shareholders with less than 10% of the voting rights in the target company have the right to have their stake acquired within six months of the closing date of the offer (sell-out mechanism).

Shareholders, who, after the launch of a takeover bid, hold directly or indirectly, more than 90% of the voting rights in the target company, can acquire the remaining shares within six months of the closing date of the offer (squeeze-out mechanism).

Should they fail to put forward a proposal to buy out the minority shareholders, each one of them can invite the controlling shareholder in writing to make an offer for their shares within thirty days.

In the absence of such an offer, the minority shareholder may trigger a compulsory purchase of their stake, addressing their request to the CMVM. This one becomes effective from the date of notification by the CMVM to the controlling shareholder.

Moreover, as mentioned above, in compulsory acquisition proceedings, equal treatment to holders of shares of the same class must be ensured, in particular regarding the calculation of the consideration.

The Portuguese Companies Code contains similar mechanisms in the case of private equity transactions.

1.8. COMPETENT AUTHORITY

➤ Which authority is competent?

Article 353 and following of the Securities Code and the CMVM legal framework provide that the entity responsible for the supervision, registration and regulation of public offers of securities is the Portuguese stock market supervisory authority, the CMVM.

➤ Are its decisions legally binding?

The CMVM is indeed vested with all necessary powers for the purposes of carrying out its role of supervision and regulation of securities markets and, in particular, of public offers. The CMVM must also ensure that the parties to a takeover bid comply with the rules governing takeovers and its decisions within the scope of its duties are judicially enforceable.

The CMVM's Executive Board (*Conselho Directivo*) has jurisdiction over administrative offences proceedings imposing sanctions and additional sanctions, as well as precautionary measures.

The CMVM's decisions may be judicially appealed against. The competent court to judge the appeals is the Lower Criminal Court of Lisbon. This court also has jurisdiction over the review and execution of CMVM's decisions in the administrative offence proceedings, as well as over any other measures imposed by the CMVM within the scope of such proceedings, which may also be appealed against.

1.9. SANCTIONS

➤ What sanctions can be imposed on the bidder for non-compliance?

E.g.

➤ Civil sanctions such as when voting rights in target are paralysed

➤ Administrative sanctions – fine

Several sanctions may be imposed on the bidder for non-compliance with takeover rules.

Liability for the accuracy of the contents of the information divulged for advertising purposes and for the contents of the prospectus

First and foremost, the offeror is civilly liable for the accuracy of the information advertised and for the contents of the prospectus.

Who is liable?

The offeror will be liable for damages caused by non-compliance with takeover rules, jointly with members of the offeror's management body, the intermediaries in charge of assisting with the offer, the members of the auditing body, accounting firms, chartered accountants and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based; and any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same. The extent of the liability is judged in accordance with the highest standards of professional diligence.

Exclusion of liability

Liability is excluded if any of the individuals mentioned above prove that the addressee of the prospectus knew or should have known about the insufficiency in the contents of the prospectus on the date of issue of the contractual declaration, or within the period when such a declaration was still revocable.

Liability independently of guilt

Notwithstanding, the offeror is jointly liable, independently of guilt, with any member of the offeror's management body, any financial intermediary or any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the prospectus, if any of them is held responsible.

Award of compensation: measure

The award of compensation should be such to place the claimant in the exact position it would have been in if, at the time of the acquisition of securities, the contents of the prospectus had been in accordance with the legal requirements set out in the Securities Code^{12 13}.

The right to compensation should be claimed within six months from the knowledge of the discovery of the insufficiency in the contents of the prospectus and ceases within two years of the date of disclosure of the result of the takeover.

Restrictions on voting rights

In the event of failure to fulfil the obligation of launching a mandatory takeover bid for the totality of the shares, the Securities Code imposes immediate restrictions on the voting rights and dividends relating to shares that exceed the limit above which a takeover bid would be mandatory.

¹² Regarding these requirements, see question number 1.4 above.

¹³ The obligation to place the claimant in the exact situation it would have been in, should the situation that gives rise to the right to compensation did not occur, follows the general tort rules set out in the Portuguese Civil Code (Articles 562 and following), in particular, Article 485, which sets out the right to compensation resulting from the breach of the obligation to provide information. The same damage cannot be awarded compensation more than once (see Pereira, José Nunes, Op. cit. 1991, p.75), in accordance with Article 485.

These restrictions are also imposed on shares that have been acquired by the exercise of rights inherent to shares exceeding the aforesaid limit, or to other securities granting the right to their subscription or acquisition.

The restriction firstly covers shares directly held by individuals or legal entities obliged to launch the offer and, successively, to the extent necessary, those held by any related party, in proportion to the shares held by each one of them.

The restriction is in force for five years, ceasing totally with the publication of a preliminary announcement of a takeover for a consideration not less than the one that would have been demanded if the duty had been complied with in due time. It may also cease if the shares or other securities subject to the restraint are sold to individual or entities not considered as related parties to the owner of the shares or deemed to hold qualifying shareholdings.

The transgressor is liable for damages resulting to holders of securities for which a takeover should have been launched.

Administrative fines

Pursuant to Article 388 and following of the Securities Code the non-compliance with takeover rules may also constitute special administrative offences subject to fines.

In particular, failure to register the bid with CMVM or to publish the prospectus or preliminary announcement; acts that violate equal treatment of shareholders; disclosure duties; acts that violate mandatory takeover bid duties or communication duties in relation to the increase of voting rights during the bid period; the launching of a bid, without the intervention of a financial intermediary and in violation of rules referring to its amendment, revision, suspension, withdrawal or revocation will result in fines between 25,000 and 2,500,000 Euros.

1.10. WHAT SANCTIONS CAN BE IMPOSED ON THE TARGET FOR NON-COMPLIANCE?

E.g.

➤ **Are corporate actions valid that might be in violation of the takeover rules (e.g. a capital increase is considered a takeover defence but if it had been approved before a bid was launched and no further shareholder approval had been received, is the capital increase valid?)**

Portuguese provisions on takeovers do not cover actions of the target company carried out before the beginning of the standstill period that would otherwise be unlawful if taken during this period. Indeed, a share capital increase approved by the general meeting before a bid was launched and carried out during the offer period does not require a second ratification of the general meeting during this period.

In fact, the Portuguese Securities Code does not impose restrictions on pre-bid or post-bid defences against takeover bids.

In this sense, the validity of corporate decisions of the target taken before the launching of the bid must be seen in the light of the general provisions of the Companies Code and possibly the Securities Code, but not in the light of takeover regulations.

If the measures were proposed by the board with the intention of avoiding replacement stemming from a successful takeover, the board may be held to account for their action, i.e. whether they acted in defence of their own interests rather than those of shareholders' or stakeholders'.

Notably, although there are no specific takeover provisions covering defensive measures taken during the pre and post-bid period, the general principle of *bona fide* may impose on the target board a special obligation of not intentionally frustrating the future success of a takeover bid.

➤ **Any other sanctions such as fines?**

The target company may also be subject to administrative fines. Thus, it is considered a very serious offence, subject to fines between 25,000 and 2,500,000 Euros, to apply for admission to trading of securities that are the object of an offer; to violate the duty to publish a report on the offer and submit it to both the CMVM and the offeror; to violate the duty to inform the CMVM of the transactions in securities which are the object of the offer; and to fail to inform employees about the contents of the offer documents.

Whenever an administrative offence results from the omission of a duty, the payment of a fine or fulfilment of an accessory sanction, does not release the infringer from fulfilling the obligation, if this is still at all possible.

The CMVM may subject the infringer to an injunction to comply with the duty that has not been complied with.

1.11. DEROGATIONS

➤ **In what circumstances (if any) are derogations allowed from the takeover rules?**

There may be derogation of the requirement of launching a takeover bid in the following circumstances:

- When the one third or half of the share capital or the voting rights are exceeded due to the acquisition of securities by a takeover launched for the totality of securities issued by the target company, without any restriction relating to the quantity or maximum percentage of securities to be acquired;
- Due to the execution of a financial recovery plan within the scope of one of the types of recovery prescribed by law; or
- Due to the merger of companies, if the resolution of the general meeting of the company in relation to which the offer would be launched, expressly specifies that the operation would result in the duty to launch a takeover.

Furthermore, the derogation of the duty to launch a takeover bid must be expressly acknowledged by the CMVM, at the request of the interested party, which is bound to immediately publish it.

2. DEFENSIVE MEASURES FOR THE TARGET

2.1. WHAT DEFENSIVE MEASURES ARE POSSIBLE DEVICES IN YOUR JURISDICTION?

➤ Board action?

Defensive devices prevent the proper functioning of the stock market. Some of the most important consequences of these defensive devices are that shareholders who have neither management control nor are able to exercise the voting rights corresponding to their shareholdings, see their stakes highly depreciated.

The CMVM Corporate Governance recommendations differentiate between “benign” defensive devices and those incompatible with the shareholders’ interests.

Defensive devices against takeover bids are incompatible with the shareholders’ interests wherever they seek to frustrate hostile takeover bids at all costs, thereby protecting the interests of the incumbent managers rather than the interests of the shareholders, as hostile takeover bids are often considered the most effective tools shareholders have to replace badly performing managers.

Thus, board action from the moment the target company has knowledge of the takeover bid to the final assessment of the result, exclusively aiming at frustrating a hostile takeover bid is not allowed.

As mentioned in question number 1.5, the Securities Code, specifically addresses this issue by preventing the board of the target company from practicing any act that may materially affect the net asset situation of the company; thus, frustrating the objectives announced by the offeror.

As aforementioned, during the standstill period, the board may only practice acts of day-to-day management of the company, and is bound by the *bona fide* principle.

➤ Capital increase?

Article 182 (2) (b) of the Securities Code provides examples of what may constitute a relevant or material change in the net assets of the target. One of them is precisely the issuance of shares or other securities conferring the right to their subscription or acquisition.

Moreover, the issuance of any other securities during the standstill period, such as bonds, is also considered a material change in the net situation of the target.

Thus, the use of a defensive strategy such as Macaroni defence, where the target company issues a large number of bonds that come with the guarantee that they will be redeemed at a high price if the company is taken over, is prohibited during the standstill period.

➤ White knight?

The target company is allowed to seek alternative bids, the so-called White Knight (“The Knight in shining armour gallops to the rescue”), which, pursuant to Article 185 of the Securities Code shall be formalised through a competing offer. Competing offers may be launched for the same quantity of securities as that of the initial offer and the consideration should be at least 5% higher than the one of the initial offer.

However, the white-knight may only acquire securities issued prior the standstill period. As mentioned above, the issuance of a block of new shares and other securities during this period is a material change in the net assets of the target company and, thus, it is not allowed.

➤ **Crown jewels?**

According to Article 182 (2) (b) the target company is deterred from entering into contracts representing the sale of important parts of the company's assets (or *crown jewels*) or of all the company's assets (*corporate suicide*) during the standstill period.

➤ **Golden shares?**

Golden shares held by the Portuguese State in companies operating in areas considered of strategic interest to the Portuguese economy¹⁴ such as Cimpor, Electricidade de Portugal (EDP) and Portugal Telecom (PT), companies operating, respectively, in the cement, electricity and telecommunications sectors allow for the right of veto on strategic M&A decisions or the right to intervene in dealings affecting important company assets.

The compatibility of the golden shares held by the Portuguese State with the EU Treaty was already addressed by the European Court of Justice (ECJ) in the context of the Law regarding privatisations (Case C-367/98 Commission of the European Communities v. Portuguese Republic).

Specifically on golden shares, the ECJ held that depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within companies that were initially public and subsequently privatized, where those companies are in the public interest or provide strategic services.

Accordingly, golden shares are not in themselves contrary to the EU Treaty. However, the specific manner in which the rights they present are exercised by the State should not restrict the exercise of the freedoms provided for by the EU Treaty, including the free movement of capital. This means that the rights they provide for must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures should not be discriminatory on the grounds of nationality, and their exercise should follow precise criteria rather than a discretionary power.

Ultimately, with regard to takeovers, golden shares should not allow the State to veto acquisitions in Portuguese companies above a certain threshold.

In conclusion, the compliance of golden shares with the fundamental principles of EC Law must be assessed on a case-by-case basis.

➤ **Multiple voting rights?**

Multiple voting rights (Article 384 (5)) are forbidden by the Portuguese Companies Code. Exception is made, however, for companies that had this provision enshrined in their Articles of Association prior to the enactment of the new Companies Code (1986).

These companies can lawfully continue to use such a device.

➤ **Maximum voting right (cap)?**

Voting caps, known in Portuguese as "*blindagem de estatutos*" (literally, "armouring the company's articles of association) is a quite common device among Portuguese listed companies,

¹⁴ Or national champions.

examples are: EDP and Multimédia with a 5% voting cap; Cimpor, Banco Comercial Português (BCP) and PT with a 10% voting cap; Banco Português de Investimento (BPI) with a 12.5% voting cap; and Portucel with a 25% voting cap¹⁵.

BCP and BPI take this protection even further by owning directly, or through their pension funds, the percentage of shares or voting rights necessary to guarantee the control of the company. Among listed banks, only Banco Espírito Santo (BES) does not use this device.

Voting caps leave Portuguese listed companies with reduced trading volume the stock exchange and therefore with low market capitalisation.

In fact, the majority of the first twenty listed companies can hardly be, in practice, the object of a takeover bid.

The levels of free-float in most of the companies listed in the Portuguese Stock Index (“PSI”) 20 are below 50% and the four listed companies that have more than half of their capital in free-float are only theoretically open to takeover bids.

Voting caps are also a guarantee that the control of the company remains in the hands of the so-called blockholders or national champions.

➤ **Poison pill?**

As a poison pill is designed to automatically decrease the value of the company’s assets in case of a takeover bid and may also imply a capital increase, it is forbidden by provisions of Article 182 (2) (b) of the Securities Code. Such prohibition is only valid during the standstill period, hence, only poison pills of the type flip-in are not allowed.

2.2. HOW MAY DEFENSIVE DEVICES BE DEPLOYED?

e.g. is shareholder approval required?

Defensive devices may only be deployed pursuant to a resolution passed by a three-quarter majority of the voting rights in a general meeting called for this specific purpose during the period of acceptance of the bid¹⁶.

3. EU-DIRECTIVE 2004/25/EC OF 21.4.2004 ON TAKEOVER BIDS (“DIRECTIVE”)

3.1. IF THE DIRECTIVE APPLIES TO YOUR JURISDICTION WHAT ARE THE ESSENTIAL CHANGES THAT WILL BE REQUIRED TO ACCOMMODATE THE DIRECTIVE?

The Portuguese Securities Code, containing mandatory provisions on takeover bids came into force on 13th November 1999. It incorporates the principles of the proposal of the Council for the

¹⁵ In general, the cap is not applicable to holdings of the Portuguese State.

¹⁶ According to Pereira, Jorge Brito (op. cit., p.198), this will always be the case of a general meeting called during the standstill period.

13th Directive on Company Law^{17 18}, so anticipating the changes, which was truly revolutionary for this field in the Portuguese legal framework of public takeovers.

The aim was to prevent further amendments should the proposal for the 13th Directive be approved, just as it happened with Directive 2004/25/EC. Thus, as the Portuguese provisions on takeover bids already include many of the features set out in the new Directive, it is not being envisaged that substantial amendments would be required¹⁹.

E.g.

- **Nature of rules (compulsory vs voluntary)**
- **Nature of information required**
- **Requirements to inform employees**
- **Increasing or reducing the range of companies within the ambit of the rules**
- **Restrictions on frustrating action**
- **Requirements to publish relevant information in the annual report**
- **Strict neutrality rule**
- **Break-through rule**
- **Right to opt out**
- **Squeeze-out right**
- **Sell-out right**

General Comment

Most of the above mentioned examples are already covered by the Portuguese provisions on takeover bids.

Nature of rules (compulsory vs voluntary) and scope of application (increasing or reducing the range of companies within the ambit of the rules)

-The rules are of a compulsory nature apply to companies admitted to trading on a regulated market, and state a strict principle of equal treatment of shareholders.

Nature of information required

The offeror is required to prepare a prospectus or offer document, with the terms and conditions of the offer and any other relevant information necessary to enable the shareholders of the target company to reach a properly informed decision on the bid. Thus, the requirements of the prospectus set out in the Portuguese provisions are identical to the ones referred to in Article 6 (3) of the Directive.

Furthermore, the provisions in force require the board of the offeror and of the offeree to provide timely and detailed information in order to protect investors and stakeholders in general.

Requirements to publish relevant information in the annual report

¹⁷ Name under which Directive 2004/25/EC was known during the discussion of the proposal period.

¹⁸ The Portuguese law maker had access to the third revised version of the proposal for the 13th Directive of 11 November 1997.

¹⁹ António Menezes Cordeiro is of the same opinion. See Cordeiro, António Menezes “A 13.^a Directriz do Direito das Sociedades”, *Revista da Ordem dos Advogados*, V. 64, 2004. Available from: <<http://www.oa.pt/genericos/detalheArtigo.asp?idc=3314&scid=25208&ida=25604>>

Only part of the information referred to in the Directive is required to be made public by means of annual accounts and financial statements in the annual report²⁰. The remaining information may be disclosed through other means of communication, such as CMVM's Information Disclosure System, any other safe electronic means easily accessed by investors and made available by the operator of the market where the securities are traded (Article 1 and following of the CMVM Regulation 4/2004 of 27 May 2004 and Article 249 of the Securities Code).

Requirements to inform employees

Information requirements also include information to be provided to employees of the target company (Article 181 (2) (c) of the Securities Code)²¹.

Strict neutrality rule and restrictions on frustrating the bid

As aforementioned, provisions of the Portuguese Securities Code already provide for the strict neutrality of the target board during the bid period and, therefore, impose firm restrictions on the possibility of frustrating a hostile takeover.

Any restrictions on frustrating the takeover in the pre-bid period are not included in the Portuguese provisions on takeovers and will have to be addressed. The same must be said for the right of companies to opt in the event the Portuguese State opts out.

Break-through rule and right to opt out

Both the breakthrough rule and the right to opt-out from both the breakthrough rule and the rule imposing limitations on the target company during the pre-bid period (Articles 11 and 9 of the Directive, respectively) require amendments to the Portuguese legal framework in force. A public consultation, precisely on these two topics, was held by the CMVM between 21 January 2005 and 22 April 2005.

In order to implement the breakthrough rule, voting caps²² would have to be regarded as having no effect, during the time of acceptance of the bid at the general meeting deciding on any defensive measure against a hostile takeover bid²³.

Restrictions on the transfer of shares or rights to its subscription or acquisition would also have no effect vis-à-vis the offeror during the period of acceptance of the bid.

Furthermore, voting caps or special rights on the appointment or removal of the board would have

²⁰ According to Article 116 (1) of the Securities Code, if at the date of the application for the offer registration more than nine months have elapsed since the end of the last financial year, entities which are not obliged to publish half-yearly accounts, or have not fulfilled such obligation, should provide special reports and accounts, prepared according to the format for reports and annual accounts to be submitted at the end of the first half of the current financial year.

²¹ Cordeiro, António Menezes (op. cit.) says that the requirement to inform employees of the offeror has to be included in the Portuguese rules in order to comply with the Directive. However, the Securities Code and CMVM Regulation 4/2004 of 27 May 2004 provide general duties of information which are also applicable. Therefore, it can be argued that employees of the offeror or their representatives may always become aware of the decision of launching a takeover bid by means of the information published.

²² See *supra* question no. 2.1.

²³ Golden shares, also very common in Portuguese companies are exempt from the breakthrough rule insofar as they are compatible with the EU Treaty (Article 11 (7) of the Directive).

to be regarded with no effect at a general meeting held immediately after the bid, in order to amend the offeree's Articles of Association or to appoint new board members, when the offeror becomes a majority shareholder with 75% or more of the shares or voting rights, following the bid.

Squeeze-out right and sell-out right

Squeeze-out and sell-out rights are already included in the Portuguese provisions.

The differences are the current 90% threshold, which must be increased to 95%; the squeeze-out and sell-out deadlines, which differ from the Portuguese provisions²⁴, and the possibility set out in the Directive of the exercise of the squeeze-out rights by class of securities in which the threshold has been reached.

Table 2 - Summary comparative table:

	Portuguese Provisions on Takeovers Currently in Force	The Directive	Amendments Required to Comply with the Directive?
Nature of rules	Compulsory	Compulsory	No
Increasing or reducing the range of companies within the ambit of the rules	Public companies	Companies with securities admitted to trading on a regulated market	Not necessary. The Portuguese provisions on takeovers also include listed companies within its scope
Equality principle	Yes	Yes	No
Protection of minority shareholders	Yes	Yes	No
Nature of information required	Timely and sufficient to reach a properly informed decision	Timely and sufficient to reach a properly informed decision	No
Offeror required to draw up an offer document	Yes	Yes	No
Requirements to inform employees	Yes	Yes	No
Requirements to publish relevant information in the annual report	Yes	Yes	No
Time allowed for acceptance	2-10 weeks	2-10 weeks	No
Strict neutrality rule	Yes, but not including decisions taken before the standstill period	Yes	Yes, for the pre-bid period.
Breakthrough rule	No	Yes	Yes
Right to opt out	No	Yes	Yes
Squeeze-out right	Yes	Yes	No

²⁴ 6 months and 30 days respectively.

Sell-out right	Yes	Yes	No
Supervisory authority	Yes (CMVM)	Yes	No

Is your jurisdiction likely to opt to include or exclude break-through rights for companies with their registered offices in your jurisdiction?

As mentioned above, the CMVM undertook a public consultation as regards Article 11 of the Directive on the breakthrough rule, as the provisions currently in force do not include such a rule.

This public consultation has sent a clear signal to the market of a wish to open it to corporate control, to liberalise the economy and displayed a firm belief that market forces are well suited to imposing discipline on the markets themselves.

Ultimately, the biggest challenge facing Portugal now is finding a sound balance in protecting the market, investors and stakeholders. Otherwise, companies may seek to avoid an “over regulated market” by choosing to trade in non-regulated markets such as the Portuguese OPEX.

Is your jurisdiction likely to opt to include or exclude the requirements to get shareholder approval for frustrating action for companies with their registered offices in your jurisdiction?

Such a requirement already exists in the Portuguese provisions on takeover bids. As aforementioned, Article 182 (3) (b) of the Securities Code provides that defensive devices may only be deployed following a resolution passed by a three-quarter majority of the voting rights at a general meeting called for this specific purpose.

IF YOUR JURISDICTION IS NOT AFFECTED BY THE DIRECTIVE, COULD CONFLICTS OF JURISDICTION ARISE WHERE EU MEMBER STATES ARE REQUIRED TO TAKE JURISDICTION. ²⁵ THIS COULD ARISE E.G. IF A COMPANY HAS ITS REGISTERED OFFICE IN AN EU MEMBER STATE AND A DUAL LISTING IN AN EU MEMBER STATE AND YOUR JURISDICTION. HOW WOULD SUCH CONFLICTS BE RESOLVED IN YOUR JURISDICTION E.G. WOULD THE PARTIES BE OBLIGED TO COMPLY WITH THE RULES IN YOUR JURISDICTION AND THE RELEVANT EU MEMBER STATE(S)?

N/A

3.2. WHAT IS THE CURRENT STATUS OF THE TRANSPOSITION OF THE DIRECTIVE IN YOUR JURISDICTION?

➤ **When is the transposition expected?**

The public consultation undertaken by the CMVM that ended last April, regarding Articles 9 “obligations of the board of the offeree company” and “breakthrough rule” concerns the preliminary works in the incorporation of the Directive into the Portuguese legal framework. However, up until this moment, when this questionnaire is being answered, no other deadline to incorporate the Directive other than the 20th May 2006 general deadline imposed by its Article 21 has been set.

The debate stirred by the CMVM’s consultation has brought about eminent governance issues,

²⁵

EU Member States will be required to take jurisdiction where the target’s registered office is in a Member State and its shares are admitted to trading on a registered market in that Member State or another Member State.

brain storming over the matters of management entrenchment versus shareholder sovereignty and the ideal governance models evolving into a level playing field for international investment in the Portuguese corporate landscape. The outcome of such debate is widespread and firm conviction that the dismantlement of corporate barriers, such as protective devices that arm Portuguese companies against takeovers will entice investors' confidence and promote the ability of the market forces to function.

In this sense, the implementation of the breakthrough rule as well as of the provisions imposing a certain neutrality behaviour on the target board during the pre-bid period, by nurturing better governance models and practices, fosters confidence at national and international level in the capital market and promote the much wanted openness, leading to a sound and prosperous economic environment.

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