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## Takeovers: New Rules

**Decree Law no. 219/2006**, dated of November 2<sup>nd</sup> (“DL no. 219/2006” or “Decree-Law”), implementing the Takeovers Directive<sup>1</sup> and some aspects of the Transparency Directive<sup>2</sup>, enters into force as of today. The aim of this Newsflash is to highlight the main amendments to the Portuguese Securities Code (“Código dos Valores Mobiliários” or “Cód.VM”) and to the Portuguese Competition Act.

### 1. Aggregation of Voting Rights

DL no. 219/2006 changes **art. 20 Cód.VM** and adds a new **art. 20-A**, which are relevant provisions in the field of mandatory bids and qualifying holdings.

a) The new **paragraph h) to art. 20/1** establishes an “**acting in concert**” definition imposing the aggregation of voting rights “held by anyone who has entered into an agreement with a holder aiming to acquire control or frustrating a change in control of the relevant company or which, in any other way, consists of an instrument of concerted exercise of influence” upon the relevant company”.

In this context, it is foreseen a presumption that “transferability agreements in respect to shares representing the company’s share capital” are deemed as an “instrument of concerted exercise of influence” (art. 20/4). This presumption may be refuted with the Portuguese Securities Exchange Commission (“Comissão do Mercado de Valores Mobiliários” or “CMVM”) under the terms provided for in art. 20/5.

As far as art. 20/1 is concerned and by comparison with its previous wording, paragraph f) gave rise to the new **paragraphs f) e g) with some adjustments**, under which there is an aggregation of:

“f) Voting rights attached to shares given as security to, or managed by or deposited with, the holder, if the voting rights have been attributed to the holder”;

g) Voting rights in regard to which were granted discretionary powers for their exercise to the holder”.

b) Significant changes were also set forth regarding the aggregation of voting rights (i) by **controlling companies of managing companies of investment funds, pension funds or venture capital funds or of financial intermediaries authorised to carry out individual portfolio management on behalf of third parties** as well as (ii) by **companies associated to pension funds**. **Art. 20/3** clarifies that it shall not be attributed to those entities “voting rights attached to shares included in funds or managed portfolios”, provided that the relevant managing company or the financial intermediary

<sup>1</sup>Directive 2004/25/EC, of the European Parliament and of the Council, dated of April 21<sup>st</sup>, on takeover bids.

<sup>2</sup>Directive 2004/109/EC, of the European Parliament and of the Council, dated of December 15<sup>th</sup>, on the harmonization of the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

exercises such voting rights in an independent manner *vis a vis* the controlling company or the associated company.

Pursuant to the new **art. 20-A** the controlling companies of managing entities or financial intermediaries and the companies associated to pension funds shall (only) benefit from an exemption to the aggregation of voting rights if, on one hand, they do not interfere in the exercise of voting rights and, on the other hand, the relevant managing company or the financial intermediary are able to evidence an autonomous decision process.

As a final remark, we emphasize that the rules enacted override a “mere” implementation of the EU rules governing takeovers. In fact, not only some aspects of the Transparency Directive are already anticipated in *DL no. 219/2006*, but also the list of relevant situations for the purpose of aggregation of voting rights under **art. 20** was expanded by the new acting in concert definition.

## 2. Major changes to the Takeovers Environment

a) The main features of legal duty to launch a mandatory bid remain unchanged whenever anyone exceeds the one-third or half of voting rights thresholds in a public company. Although, the offeror is now obliged to immediately make public a preliminary announcement when the mandatory bid thresholds are triggered.

The provisions governing the **minimum price** in a mandatory bid were partially reviewed, in particular, with the view to: (i) allow, under certain conditions, Exchange Bids without a mandatory cash alternative; and (ii) expand the scenarios where the price is deemed not equitable due to the influence of extraordinary events or reduced liquidity of the relevant securities or when it results from an agreement between the purchaser and the seller.

b) The new rules regarding **competing bids** are intended to contribute to a more competitive market for corporate control. Therefore, the provisions previously foreseen in Regulation 10/2000 of CMVM were included in the *Cód.VM* with some material changes, from which we emphasize: (i) the auction regime now accepted in our regime; and (ii) the reduction to 2% of the minimum amount for the purpose of revision of the initial or competing price offered.

The competing offer may (only) be launched until the fifth day prior to the term of the initial bid period. Notwithstanding, CMVM keeps its prerogatives to refuse the takeover’s registry on the grounds of lack of time to reach an decision, thus remaining some level of uncertainty in the course of this process.

- c) In case of **offer revision**, it becomes lawful a price revision of 2%, being such revision acceptable until the fifth day prior to the term of the offer period.
- d) Insofar as the **limitations to the management of the target company during the takeover period** are concerned, the acts related to previous decisions not yet executed fall within the scope of such limitations. There are more favorable rules applicable to the management in two aspects: (i) targets may convene general meetings within a 15 days term; (ii) the *Cód.VM* expressly allows the management to “search” for competing offerors.
- e) **Innovative disclosure obligations** are imposed not only with respect to the Preliminary Announcement and Prospectus but also to the Report of the Target’ Management. The content of the annual corporate governance report to be made public by issuers of shares admitted to trading in a regulated market is also subject to relevant alterations.
- f) The requirements for the purpose of the **squeeze out and sell out mechanisms** were changed in what concerns its relevant thresholds (reaching or exceeding 90% of voting rights representing the company’s share capital and 90% of voting rights included in the offer), the relevant term to exercise this rights (3 months) and the new concept of “fair price”.
- g) Finally, companies governed by the Portuguese laws have an option to voluntarily suspend **restrictions to the transferability of shares or exercise of voting rights**. When public companies do not fully exercise this option, the change or suppression of these restrictions shall not be subject to a decision taking quorum of more than 75% of the issued votes.

## 3. New Competition Rules

This Decree-Law also introduces a number of important amendments to the Competition Act, although with imperfect legislative technique.

Regarding time-limits for submission of notifications, the notification of takeover bids or of exchange bids cannot anymore be filed until the date of publication of the launching announcement. It must now be served within **7 working days after the date of publication of the Preliminary Announcement**. In the case of acquisition of a controlling stake in an issuer of shares admitted to trading on a regulated market, the notification shall be filed within **7 working days after the publication of the announcement of such acquisition**.

The Decree-Law also amends the deadlines which the Portuguese Competition Authority ("PCA") is bound to respect in the assessment of concentrations. In proceedings which undergo an in-depth investigation, the PCA shall from now on only enjoy a total of **90 working days** to make its assessment (as opposed to the 120 working days, which it enjoyed under the previous legislative framework). Furthermore, the PCA's discretion to suspend proceedings pending information requests addressed to the Parties or to third parties is now significantly reduced. The PCA shall, from now on, enjoy only a total of **10 working days** during which it may keep proceedings suspended as a result of requests for information.

Finally, the Decree-Law establishes the possibility for the PCA to undertake a **prior assessment** of concentrations. Such possibility is, nevertheless, dependent on the future establishment, by the PCA, of administrative proceedings to that effect. ■

## HOW WILL THESE NEW RULES APPLY?

### Acting in concert

*If, upon the entering into force of paragraph h) to art. 20/1 Cód.VM, the mandatory bid thresholds are exceeded, the holder shall: (i) comply with its qualifying holdings' disclosure obligations within 10 days and (ii) launch a mandatory bid, within 180 days, unless it terminates the triggering event upon which the mandatory bid thresholds were superseded, namely by selling the exceeding securities.*

### Restrictions to the transferability and exercise of voting rights

*Public companies which by the entering into force of this regime have not made an option for the suspension of any restrictions to the transferability and exercise of voting rights may change or erase such restrictions, provided that it is not required a decision taking quorum of more than 75% of the issued votes.*

### Changes to the Takeover rules and new competition rules

*The provisions of **DL no. 219/2006** shall not apply to takeovers which preliminary announcement was made public prior to the entering into force of this new framework, neither to the respective competing offers, unless as far as the exceptional rules above stressed related to the acting in concert scenario and to restrictions to the transferability and exercise of voting rights.*

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