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## Editorial



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The Securities Law has experienced an important and troubled reform in the last years both in Portugal and in other jurisdictions.

In Portugal, the reform process commenced in 2000, with the entry into force of the new Securities Code (“Código dos Valores Mobiliários” – hereinafter the “CVM”). Approved by Decree-Law nr. 486/99, of November 13<sup>th</sup>, its entry into force implied the revocation of most of the legislation governing the Securities field and, in particular, the so-called Securities Market Code. Following the approval of the new Code, the whole legal framework was renewed, with emphasis on the detailed amendment occurred in respect to the Regulations approved by the Securities Market Commission (“Comissão do Mercado de Valores Mobiliários” – hereinafter the “CMVM”).

Further to the approval of the CVM, together with the regulations issued by the CMVM, it was expected a reasonable stabilisation of this area of law could be foreseen, which, at the end of the 90’s, had already been subject to multiple legislative interventions. However, such stabilization did not happen, since what was foreseen as the normal evolution of the Portuguese legislative process for the subsequent years was disrupted by multiple external factors which have caused a strong ebullition in this area of Law. We would like to point out two of those factors.

First of all, the Portuguese Securities Law has been amended by significant changes at the European Community level. Following the approval of the Financial Services Action Plan of 1999, which defined the objectives, priorities and intervention / harmonisation areas in order to create a single market for financial services and to erase the barriers to the integration of the market at an European level, as well as of the Lamfalussy Report of 2001, which main purpose was to ensure a speedy, efficient and transparent decision making process with respect to financial services’ regulation. In this context, we have witnessed the continuous approval of European

Directives with a direct impact upon Portuguese law, such as, for example, Directive 2003/6/CE on Market Abuse, Directive 2003/71/CE on Prospectuses, Directive 2004/25/CE on Take-over bids, Directive 2004/109/CE on the harmonisation of transparency requirements and Directive 2004/39/CE on Markets in Financial Instruments. This important European movement that created the “second generation” of European Securities Law will probably continue with the same intensity, as may be perceived from the recent White Paper - Financial Services Policy 2005 – 2010, which defines the main objectives for the next five year period.

Secondly, the Securities Law has been exposed to the influences, in a first stage, from the United States and, further, from other different jurisdictions, motivated by several financial scandals, such as the ENRON, WORLDCOM, TYCO, PEREGRINE SYSTEMS and ADELPHIA’s cases. Said scandals lead to a significant reform, the most remarkable moment being the approval of the Sarbanes-Oxley Act. The effects of the approval of the new North American legislative framework were immediately felt in Europe and, particularly, in Portugal – first of all, considering the requirements imposed to European issuers with securities admitted to trading in the North American markets in order to comply with the new rules; in second place, considering the national and European Community legislative movements motivated by the same or similar problems or even by the direct influence of the North American markets. Clearly, Portuguese law accompanied this movement focused on, but not limited to, the reforms on Corporate Governance, where CMVM took a pivotal role.

The purpose of this newsletter is to illustrate, as accurately as possible, this troubled legislative scenario, in particular the underlying factors that have contributed for the successive renewal of this legal system in the last five years. ■

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## The Prospectus Directive: Directive nr. 2003/71/EC of the European Parliament and of the Council, of November 4th, 2003



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The national Securities Market is being the target of a legal reformatting destined to contemplate rules arising from several Community directives, among which is Directive 2003/71/EC of the European Parliament and of the Council, of November 4th, 2003, published in the Official Journal of the European Union of December 31st of the same year, on the prospectus to be published when securities are offered to the public or admitted to trading (“listing”), hereinafter referred to as “Prospectus Directive”.

The Prospectus Directive, which maximum deadline for transposition of was expired last July 1st, was complemented by (EC) Regulation 809/2004 of the Commission, of April 29th, 2004, in force since July 1st, 2005, on the information contained in the prospectus, the respective format, the incorporation by reference, the publication of such prospectus and the disclosure of announcements.

As the Portuguese Government did not proceed with the timely transposition of the Prospectus Directive, the Executive Board of the Securities Market Commission (“CMVM”) issued a general report on its application in the national legal system as from July 1st, 2005, alleging the existence of certain rules with aptitude to produce a direct effect in the Portuguese jurisdiction, which are:

- i. sub-paragraphs m) and n) of the first paragraph of Article 2 referent to the definition of “home Member State” and of “host Member State”;
- ii. the second paragraph of Article 3 on the non-implementation of the obligation to publish a prospectus;
- iii. Article 4 on the exemptions from the obligation to publish a prospectus;
- iv. the third and fourth paragraphs of Article 5 and Article 12 on the possibilities of drawing up the base prospectus in separate documents and the drawing up of a base prospectus;
- v. Article 9 on the validity of the prospectus;
- vi. Article 11 on the incorporation of information in the prospectus by reference;
- vii. the second and fourth paragraphs of Article 13 on the time limits for approval of the prospectus by the competent authority; and
- viii. Articles 17 and 18 on the EU scope of approval of the prospectus.

Therefore, since July 1st, 2005, the CMVM has been evaluating the granting of a prior registration to offers of securities and its listing to trade based on those rules.

Besides the above mentioned rules already being applied in the national legal system, there are other rules contemplated in the Prospectus Directive that are already reflected in the Securities Code, approved by Decree-Law nr. 486/99, of November 13th, of which we point out the following:

- i. the need to publish the prospectus whenever securities are offered to the public or admitted to trading (Articles 134 and 236);
- ii. the need for approval of the prospectus by a competent authority prior to disclosure (Articles 140 and 236); and,
- iii. the possibility of the prospectus being drafted in the current language of use in the international financial markets.

Only recently did the Portuguese Parliament grant to the Government, through Law 56/2005, of November 25th, the necessary legislative authorisation for the amendment of the penalty rules presently provided for in the Securities Code, already modified several times, in the sense to adapt those rules to the transposition of the Prospectus Directive in the Portuguese legal system.

Therefore, the approval by the Government of the law that will implement the transposition of the Prospectus Directive to the national legal system is expected at any moment, the contents of which, pursuant to the draft Decree-Law of transposition placed by the CMVM for public consultation on October 15th, 2004 and news recently broadcasted by the media, will namely fall over the following matters:

- choice of approval of the prospectus as the sole reference for purposes of administrative control of offers, the obligation of prior registration at the CMVM;
- creation of the so-called “European passport for issuers” (which will permit the validity of a prospectus in all countries of the European Union, provided it has been approved by the competent authorities and such approval is notified to the competent authority where the issuer intends to issue new securities or apply for its admission to trading) in replacement of the figure of “mutual acknowledgement of a prospectus” which has revealed to be a particularly slow process, besides implying significant costs for the issuers;
- possibility of the prospectus consisting of three separate documents (registration document, note of the securities and summary), a new technique of introduction of information by reference and contemplation of the base prospectus for programmes of issues;
- alteration of the terminology of “institutional investors” to “qualified investors” and extension of its subjective scope of application with a view to include other entities that were previously not covered by such qualification; and
- qualification as public of all offers that are aimed for, at least, 100 people (200 people in the present legal regime) provided non-qualified investors with residence or establishment in Portugal are concerned. ■



## Corporate Governance



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Along with the recent discussions on the legislative reform of the Portuguese capital markets pursuant to the new financial services EU directives, by the end of 2005, we faced a new intervention of CMVM on listed companies corporate governance which resulted in the **amendment of Regulation 7/2001** and of the **Recommendations for Corporate Governance**. As timely announced to the market, CMVM, in close cooperation with the Government, recently submitted for public consultation a package of amendment proposals to the Companies Code bringing corporate governance discussion into the agenda.

This article aims to point out the main “novelties” brought by the amended Regulation and Recommendations considering its immediate impact upon listed companies and its relevance on the preparation of the next *annual corporate governance reports*.

Despite of not being the scope neither the intention of this article to assess in detail the solutions foreseen in the **amendment proposals to the Companies Code**, some general considerations of this matter must be brought up.

In fact, it is interesting to verify the acknowledgement by CMVM that the sustainability of a greater intervention in this area implies an update of our Corporate law in light of the developments that have been verified in the various international *fora*.

This is the only path one can envisage to achieve the main goals of the legislative reform, as announced in the introductory wording to the proposals: (i) promoting the *competitiveness of the Portuguese companies, allowing for their alignment with advanced corporate governance models*, (ii) *enhancing the companies’ autonomy, namely by providing alternative governing solutions*; and (iii) *eliminating unjustified distortions among different corporate governance models*.

Notwithstanding, a responsible discussion on the modernisation of our Corporate law shall avoid the temptation to focus only on the transposition or accommodation of the “advanced” corporate governance solutions adopted by foreign legal systems or under several EU initiatives. In fact, we shall bear in mind that, by contrast to CMVM Regulation and Recommendations to companies listed in the Portuguese securities market, the Companies Code’ revision impacts upon all the Portuguese business landscape, which, as known, has particular features related to our (traditional) shareholding concentration and the (small or average) size of many of our companies.

It seems advisable that the ultimate result of the Companies Code decision reform reflects the “generalized disapproval of corporate governance solutions disregarding the companies’ size (one size fits all)” giving each company the freedom to assess which alternative is more adequate to its characteristics and size. As we know, that on the other side of the advantages there is a consideration of costs, which is not always consistent with the interests underlying the best international standards.

Also considering the Portuguese business landscape, we emphasise that, in contrast with the envisaged “conciliation of models nowadays recommended by the international discussion on corporate governance”, it is given a curious relevance to the rehabilitation of the two-tier model (Germanic), which never encountered a huge success in the Portuguese market not only, as suggested, because this model “suffers from distortions affecting its adoption by the Portuguese companies ” but certainly because it does not fit with our corporate culture.

Finally, although we agree with the need of a greater flexibility of the Companies Code as to the management and supervision models (i.e., a flexibility constrained by a prohibition of cherry picking with regard to the features of the three proposed models), it is also expected that the ultimate result of the Companies Code’s revision is confined to inherent core principles and main aspects .

Following these considerations, we will now briefly approach the major “**novelties**” arising from the last review of the **CMVM Regulations and Recommendations** with the aim to strengthen the supervision system (check and balance) within the listed companies, in particular, adopting a more demanding concept of independence of directors and to promote more transparency, specifically in the areas of remuneration of directors and policy for the communication of irregularities.

- *The “independent non-executive director”* - CMVM recommends that the administration body “must include a sufficient number of non-executive directors, the role of whom is to continuously accompany and assess the management of the company by the executive members”. Therefore, the most important basis of this Recommendation is to withdraw benefits from the “separation of the non-executive directors in view of the current management”, conferring to them duties to effectively oversee the management.

Additionally, it is recommended that “a sufficient number of independent members must be included among the non-executive members (...)” and in those cases whereby only one non-executive director exists, he must be independent.

In this case, the pivotal reason is based on the role of independent directors “to follow and supervise in informed terms the management of the company, assuring that the company activity considers the interests of all parties involved and that conflicts of interest in this area be adequately prevented”.

Therefore the Board of Directors must meet and determine which is the “sufficient” number of “non-executive directors” and then which is the “sufficient” number of “independent directors” and furthermore submit the non-executive directors to the “famous” test of “independence” to ultimately justify in its Annual Corporate Governance Report that the structure of this body complies with the CMVM Recommendations.

Not less demanding is the task of realisation of the test of independence, which the Recommendations of 2003 provide would suffice by the relational element (“the non-executive directors who are associated with any group of specific interests in the company”), now strengthened by a so-called “functional element” (that is, who are in any circumstance that

may affect his exemption of analysis and decision). Besides these elements, the situations foreseen in Article 1 of Regulation 7/2001, which, in accordance with a “negative test”, disqualifies the independence of directors in the line of the English Combined Code. The obligation of the issuer to assess the independence with reference to other specific circumstances concerning each director is still maintained.

- *Disclosure of the Remunerations Policy* - The obligations of disclosure in the Corporate Governance Report regarding the description of the remunerations policy have been strengthened in benefit of transparency, now requiring a summary and explanation of the company policy as to contractually negotiated compensations or compensations through settlement in the case of discharge and other payments linked with the anticipated termination of functions, besides the indication of the individual or collective remuneration of the directors.

In favour of legitimating the determination of remunerations, CMVM recommends that “a statement on the remunerations policy of the company boards be submitted for the consideration of the Annual General Meeting of shareholders”.

The proposal on the approval of plans for attribution of shares and or options to purchase shares or based on share price variations to members of the management body and/or employees should also be submitted to the General Meeting, containing all elements necessary for its correct assessment.

- *Policy on the Communication of Irregularities* - The Corporate Governance Report must now also include a description of the

general lines of the policy on communication of irregularities allegedly verified within the company, that is, the famous “whistleblowing”.

CMVM invites listed companies to adopt a policy of communication of irregularities, indicating the means through which the communication of irregular practices may be made internally and the treatment to be given to the communications, including confidential treatment.

The addressees of the recommendations are advised that the internal communication of irregularities cannot imply any harmful treatment by the employer and recommends that the supervision of this practice should be entrusted to a person or body different to the one with authority to receive and treat the communications in order to create an incentive to internal communications.

**In conclusion**, the new CMVM Regulation and Recommendations and the amendment proposals to the Companies Code evidence that a true culture of good corporate governance shall depart from a coherent legal, regulatory and recommendatory “environment”.

It is expected, however, that the ultimate solution found to give effect to the amendment proposals does not affect the Companies Code aim neither crystallises any solution in relation to an absolutely dynamic reality which should be dealt with at the regulatory and best practices level, subject to the ongoing assessment “by the market” - and “for the market”-, where the supervisory entities undertake a motivating, conciliating and guiding role. Thus being, the alternative paths for the listed companies’ compliance must be found at such level of approach and less *via* a legislative intervention. ■

## The Main Challenges placed by the Directive on Markets in Financial Instruments (“DMFI”) to Investment Companies



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A lot has already been written about the Directive 2004/39/EC, of April 21<sup>st</sup>, on markets in financial instruments (“MIFID”), which repealed the Directive 93/22/EEC on investment services (“ISD”). However, there still seems to be space for **discussion on MIFID’s impact upon the activity of investment firms operating in Portugal as well as in other EC Member States** (“Investment Firms”).

### 1. The Main Innovations

In fact, if the ISD had a significant impact upon Investment Firms’ activity through the extension of the Community passport, MIFID will most certainly have an additional relevance on the financial services market landscape in Europe, in particular taking into account the following innovations:

- The extension of the investment services’ list to “investment advice” and to the “operation of Multilateral Trading Facilities” (“MTFs”);
- The expansion of the derivative products included in the concept of “financial instruments”;
- A clear distinction is drawn between professional and non-professional clients;

- The harmonisation of conduct of business rules, including the best and timely execution rule, the suitability rule and duties of information based on the Know your customer principle;
- The recognition of MTFs and Systematic Internalisers as trading structures; and
- Systematic Internalisers in shares are subject, in respect to shares admitted to trading on a regulated market, to pre-trade disclosure obligations and to a duty to trade under the conditions disclosed (Article 27), as well as to post-trade disclosure obligations on the execution of orders (Article 28).

Without any pretension to stress a detailed approach to the changes brought by MIFID, we will focus herein on what we consider one of the touchstones of this Directive with major implications in our legal system (under which the conduct of business rules are already highly regulated), which is: **the answer given by MIFID to the structural changes in the financial markets and to the multiplication of trading venues** in light of the tension between the objectives of competition and competitiveness between trading platforms, increasing liquidity, efficiency and transparency of the price formation process, as well as protection of the investors.



Thus, we hereby intend to assess as far as the Systematic Internalisers' regime briefly described in (f) above is concerned, whether the compromise solution foreseen in MIFID gives an adequate response to the Investment Firms' concerns without disregarding the objectives above pointed out.

## 2. The challenges between Investor's Protection, Markets' Efficiency and Investment Firms' Competitiveness

In first place, the challenges posed by the internalisation of orders may be summarised through an ultimate purpose of ensuring that this activity operates as a structure for the execution of orders without hindering the efficiency of the price formation process and the investors' interests (in particular, assuring the best execution of their orders, investment decisions taken on a informed basis and the prevention of conflicts of interests).

Within this context, the impact of Articles 27 and 28 may be analysed in three phases. Firstly, the Systematic Internalisers shall define, under the scope of their commercial policy, the circle of investors to whom they will give access to their quotes considering the prior classification of their clients between professional and non-professional clients. Secondly, a distinction is made between quotes which entail an obligation to trade under the terms disclosed at the time of receipt of the orders and, exceptionally, quotes that may subject to a price improvement since those are received from professional clients. Finally, the Systematic Internaliser may invoke an exit clause linked to commercial considerations such as the credit status of the client, the counterparty risk and the final settlement of the transactions.

**Therefore, the internalisation regime is intended to be a further catalyser for the integration of the trading platforms and the increase of competitiveness and liquidity together with Disclosure Controls essentially aiming to protect the investor. However, said objectives are subject to three relevant tests, which we will now consider.**

Firstly, the **questions left open by MIFID** have been raising, and will certainly continue to raise, ample controversy, for instance, with respect to (i) the definition of Systematic Internaliser, which depends on three imprecise concepts (organised, frequent and systematic activity) or to (ii) the outlines of the disclosure framework applicable to Systematic Internalisers, which vary in light of the existence of a liquid market and the size of the Systematic Internaliser's dealings vis-a-vis the standard market size.

In fact, in order to avoid the total inadequacy or excess of regulation, it is crucial that the Community and national authorities continue to listen to the industry with respect to the rules that will detail this Directive at a Community level and its implementation at a national level.

Secondly, questions will be raised as to the **level of adequacy of the provisions set forth under the MIFID to the different markets of the 25 Member-States, taking into consideration**

**the diverse features and dimensions of each market.**

In this respect, one shall emphasise that the concept of Systematic Internaliser depends on quantitative criteria to be harmonized among the Member-States, raising, for example, a doubtful issue as to whether, in our market, it makes sense, following the proposals of the CESR (the "Committee of European Securities Regulators"), to establish that the Systematic Internaliser's regime is triggered when (i) the internalisation represents more than 20% of the total trading volumes by the Internaliser or when (ii) the market quota of the Internaliser in the share transactions concerned is superior to 0.5% of the total market of the relevant share.

In the same manner, as concerns the definition of liquidity, it is argued whether this concept shall be assessed by reference to free float, number of transactions and/or turnover, taking into account that, according to data published by the CMVM, under the turnover criteria, there are, for the purposes of Article 27 of the MIFID, 7 or 8 liquid shares in our market, whilst in accordance with the criteria of the number of transactions, we would only have 3 liquid shares.

The third test to MIFID, in this context, concerns to the **transparency requirements imposed on Systematic Internalisers** based upon an assumption that the investor will benefit from an integrated information structure at the Community level, which raises two additional problems. In first place, at this integration stage, infrastructures for the consolidation of information do not exist. Additionally, such option implies costs to Investment Firms which will have consequences on the competitiveness between trading facilities, thus limiting the manner how they will compete among themselves and the benefits for the investor.

## 3. A challenge won?

In conclusion, we must underline that MIFID is a clear example of the robustness of the harmonization process leveraged by the FSAP ("Financial Services Action Plan") that is changing the course set forth under the ISD towards a clear interventional tendency based on the so-called **Disclosure Controls** and a shift of the underlying rationale of EC regulation from the creation of the internal market of investment services to an **imperative purpose of investor protection**.

Notwithstanding, there are inevitable **doubts on whether the successor of the ISD will be a won challenge, that is to say, will it balance investor protection and creation of a level playing field among trading structures** (i.e., an integrated and competing trading platform at a European scale), despite of the financial and organisational costs imposed on Investment Firms in relation to their technical, human and compliance structures and their commercial strategy. Therefore, we question on whether the new regime will significantly increase the burdens that Investment Firms will be subject to, without being able to reach the convergence objectives as well as creating transparency rules that may reveal unfavourable, not only for Investment Firms but for the efficiency of the market and for the investor, to the extent that those may negatively affect the liquidity levels of the European market.

In this context, the draft implementing measures released by the European Commission, on the last February 6, may be a window of opportunity to clarify some of the doubts raised by this Directive, in particular concerning the scope of the pre-trade and post trade-transparency rules. ■



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## The aggregation of voting rights under the Draft Decree Law implementing the Directive on Takeover Bids



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As emphasised by CMVM, under the Public Consultation nr. 11/2005, our legal system already contemplates, on a large extent, the solutions foreseen under Directive 2004/25/EC, of April 21<sup>st</sup>, 2004 (“Directive on Takeover Bids”), thus the draft Decree Law for implementation of the Takeover Bids Directive (“Draft Decree Law”) submitted by said supervisory authority would not determine a deep change to the regime set forth under the Securities Code.

Consequently, the amendments are intended to “align” the provisions set forth in the Securities Code with the “specificities of the regime” provided for in this Directive and CMVM also anticipates the implementation of some of the solutions foreseen in Directive 2004/109/EC, of December 15<sup>th</sup> (“Transparency Directive”), in particular, insofar as the following matters are concerned:

- (i) Aggregation of voting rights under Article 20 of the Securities Code;
- (ii) New requirements for the compulsory acquisition;
- (iii) Revision by CMVM of the consideration in mandatory and voluntary takeover bids;
- (iv) New framework applicable to competing takeover bids;
- (v) Disclosure obligations in respect to workers’ representatives and amendments to the contents of the management’s report of the offeree company;
- (vi) Optional regime of suspension of the effects of transfer and voting restrictions (optional break through rule);
- (vii) New rules for determination of the competent supervisory authority of the offer; and
- (viii) Mutual recognition of the takeover bid prospectus and revision of its contents, including, namely, detailed elements on the Offeror’s plans for the offeree company.

Without prejudice of the relevance to the market of the several amendments proposed, we have opted to approach the news **on the “famous” Article 20 of the Securities Code** for two reasons. First of all, considering its direct impact upon the duty to launch a mandatory bid and the qualifying holdings’ regime applicable to public companies (the so-called “sociedades abertas”). Additionally, the amendments to this rule are a clear example that the Draft Decree Law exceeds, in certain aspects, a mere “alignment” of the Securities Code with the Directive on Takeover Bids.

### 1. The new regime of shareholders acting in concert

CMVM pursues a major goal of conferring “efficiency and consistency to the new regime of shareholder cooperation”, namely, through the aggregation, under the new sub-paragraph h) of nr. 1 of Article 20, of the votes held by “individuals who have entered into any agreement with the holder, with the purpose of acquiring the control of the company or frustrating the change of control or which, in any other way, consists of an instrument of concerted exercise of influence” over the public company. In

this context, there is a refutable presumption that “agreements in respect to the transferability of the shares” are “instruments of concerted exercise of influence”.

Further to a careful analysis of the referred provision we consider that the current wording of the Draft Decree Law will not easily reach such objective. In fact, the implementation task undertaken by CMVM has restrained from making an effort to harmonise the general definition of “person who acts in concert” foreseen under the Directive on Takeover Bids with the list of situations foreseen in the number 1 of Article 20 in force.

In fact, the proposed solution gives rise to a clear overlapping between sub-paragraph h) and the other sub-paragraphs of number 1 of Article 20 since the situations foreseen therein may also be deemed as an “instrument of concerted exercise of influence” over the company, without clarifying which situations are intended to be covered by the broad wording of the new sub-paragraph h).

In addition, since sub-paragraph e) already covers the aggregation of rights “that the participant may acquire through agreement entered into with the respective holders”, this provision seems to include the “agreements in respect to the transferability of the shares”, which, pursuant to the new sub-paragraph h), are presumed to be “instruments of concerted exercise of influence”. In practice, due to such duplication, the holders of an interest in public companies will face two practical problems. Firstly: Will the votes held by a party to said agreements be aggregated in accordance with both sub-paragraphs e) and h) or solely under the later? Secondly: How can it be evidenced before CMVM, for the purpose of said refutable presumption, that the relationship between the parties is “independent of an effective or potential influence over the public company”?

In this respect, we further stress that the proposed amends will apply to existing situations, thus a holder may exceed one of the mandatory bid limits foreseen in Article 187 of the Securities Code due to the mere entry into force of this amendment. In this case, the holder would not only be obliged to, within 10 days, comply with the disclosure obligations applicable to qualifying holdings but also launch a takeover bid, within 30 days, unless the holder transfers the exceeding securities.

### 2. Management companies of collective and individual portfolios

As above referred, the Draft Decree Law anticipates the implementation of the provision corresponding to Article 20 provided for in the Transparency Directive in respect to the aggregation of voting rights to companies that have control over management entities of collective investment schemes (investment funds, venture capital funds and pension funds) and over financial



intermediaries authorised to manage portfolios on third party's behalf.

Pursuant to the Draft Decree Law, voting rights held by management entities of collective investment schemes or financial intermediaries in respect to shares included in managed funds or portfolios shall not be aggregated to the controlling companies' shareholding for the purposes of sub-paragraphs b) and f) of nr. 1 of Article 20 of the Securities Code, provided that the management entity exercises the voting rights in a manner "independent" from the controlling company.

The difficult enforcement of what shall be deemed as acting in an "independent" manner is to some extent clarified in Article 20-A, which provides for a list of situations whereby the entity concerned ceases to benefit from the derogation from an aggregation of voting rights if the exercise of its functions is conditioned by instructions of the controlling company, by the relevant decision-taking, commercial or organisational structure or by any behaviour evidencing that the exercise of voting rights is not conducted in the interest of the holders or of the clients.

Strictly speaking, this concern with the interest of holders or clients is not new as far as it had already been dealt with by the CMVM in Article 81 of Regulation nr. 15/2003 applicable to collective investment schemes. The innovation is that this matter no longer has relevance solely for the purpose of prevention of conflicts of interest and, as provided for in the Transparency Directive, for the purpose of disclosure of qualifying holdings. In fact, now the

management entities' / financial intermediaries' conduct may lead to the duty of launching a mandatory bid by the respective controlling company.

### 3. Final notes

As a general comment, we would like to emphasise the absence under the Draft Decree Law of a proper answer to some of the issues raised by the market in this regard, in particular, the legal prohibition of a consideration in kind in the case of a mandatory bid remains without a solution.

As concerns the impact of the extension of the cases of aggregation of voting rights representing the share capital of public companies, we understand that the interpretative doubts and overlappings briefly described above will certainly create a large grey area, increasing the risk of potential non-compliance with the framework applicable to mandatory bids and/or to the disclosure obligations regarding qualifying holdings.

These final notes have a particular relevance if the following four aspects are examined: (i) the sanctions applicable to the violation of such framework; (ii) the application of this regime will vary upon vague and undetermined concepts, leaving a large margin of discretion to CMVM on a casuistic basis; (iii) the uncertainty to be raised by the new wording of Article 20 will create a need of prior consultation with CMVM, thus, giving rise to clear obstacles to the celerity required by the market in its investment decisions; as well as (iv) the consequences of the new regime will affect the decisions of public companies, bidders and holders of qualifying holdings, including the controlling companies of management entities of collective investment undertakings and of financial intermediaries authorised to manage portfolios on third party's behalf. ■

## Transposition of the New Community Market Abuse Regime



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In spite of the name by which it is known, Directive 2003/EC of the European Parliament and of the Council of January 28th, 2003 "Market Abuse" rules topics that go far beyond the extent of the two criminal types that are historically protected under that expression (market manipulation and insider trading).

The referred Directive provides for a first level regulation and was followed by 4 implementation Directives and a Regulation of the EU:

- European Commission Directive 2003/124/EC of December 22nd, 2003: implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation
- European Commission Directive 2003/125/EC of December 22nd, 2003: implementing Directive 2003/6/EC, of January 28th, as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest;
- European Commission Directive 2004/72/EC of April 29th, 2004: implementing Directive 2003/6/EC, of January 28th, as regards accepted market practices, the definition of inside information in

relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions;

- (EC) Commission Regulation 2273/2003, of December 22nd, 2003: implementing Directive 2003/6/EC, of January 28th as regards exemptions for buy-back programmes and for operations of stabilisation of financial instruments.

Although the deadline for the transposition of the Directive expired on October 12th, 2004, only last December 22nd the Decree-Law that will introduce the necessary adaptations in the Portuguese legal system was approved, and it is still not in force.

The approved Decree-Law is still not of public knowledge. However, the respective draft Decree-Law is known, as well as the Authorisation Law (Law 55/2005 of November 18<sup>th</sup>) which allowed the Government to legislate on an issue reserved to the Parliament by the Constitution.

Therefore, based on the analysis of the above referred draft Decree-Law and the Authorisation Law, it is possible to conclude that, although the Portuguese legal system conforms to the Directive in many relevant aspects, its implementation will determine the

introduction of significant changes, which may be briefly identified as follows:

- Enhancement of the cooperation between securities authorities of Member-States;
- Introduction of new disclosure duties, such as the drawing up of lists of insiders;
- Introduction of rules regarding a matter insufficiently ruled up to now and of a large sensitivity for the integrity of financial markets: the preparation and disclosure of investment recommendations and financial analysis reports concerning issuers of securities or financial instruments. The new rules introduce disclosure duties regarding authorship, information sources, conflicts of interests and an express and the obligation to make a clear distinction between facts and opinions, etc;
- Duties of supervision and collaboration with the CMVM impending on financial intermediaries in respect to suspicious transactions and reduction of the scope its professional secrecy;
- (Re)definition of insider trading: widening of the definition of insider trading to those cases whereby the information originated from criminal actions, specifically aimed at terrorist acts (September 11<sup>th</sup> occurred during the drafting of the directive proposal and had a serious impact thereto);
- Introduction of new administrative offences;
- Reinforcement of the CMVM's power to seize benefits obtained with securities law offences was reinforced; in order to avoid the use of corporations as a formal device to obtain unfair benefits, companies are now liable in criminal proceedings being subject to seizure of advantages obtained;
- The CMVM powers were strengthened: CMVM was granted powers: (i) to request existing telephone and data transmission records from telecommunication services providers; (ii) to evaluate and publicly define the acceptable and unacceptable market practices; (iii) to disclose decisions in respect to: (a) serious or extremely serious administrative offences; and/or (b) criminal court decisions, regardless of its provisory nature. To clarify existing doubts, the CMVM was expressly conferred "freezing" powers over assets or values related to criminal or administrative offences;
- It was furthermore established the non-applicability of the general

principle of «*reformatio in pejus*» in securities law. Thus the courts will now be able to increase the penalties applied by the CMVM under an appeal submitted by the sentenced party itself;

- The confidentiality duties impending over the CMVM were strengthened by aggravating the fines applicable to its breach.

Among the more relevant innovations of the Directive, we must point out — due to its special practical relevance: the complete reformulation of the regime of disclosure of information by issuers (known as the duty to disclose "relevant facts") on which a lot has been written in the past.

Regarding this issue, in general terms, we would point out the following aspects: the new disclosure regime relays on the following basic rule; inside information must be immediately disclosed to the public by issuers.

That is to say, information which abusive misuse constitutes "insider trading" must be immediately disclosed by issuers — save for exceptional cases — as up to now occurred with the so called "relevant facts".

This means that the new disclosure regime has a considerably wider scope. In fact, it includes facts of uncertain outcome, such as pending negotiations, which were not considered as "relevant facts" under the regime still in force. However, the potential damages of the disclosure of such types of facts are corrected by the broadening of situation in which the disclosure may be delayed.

In fact, the disclosure delay ceases to depend on a previous authorisation of the CMVM and is now decided by the issuer itself; the issuer decides if there are grounds to delay the disclosure of certain inside information, without previous consent of the CMVM.

However, this "revolution" is less significant than meets the eye: in fact, whenever an issuer opts to delay the disclosure, the issuer must communicate such fact to the CMVM which, in its term, may decide to order the immediate disclosure or directly proceed with it.

To conclude, it may be stated that the new regime considerably strengthens the powers of the CMVM and introduces more demanding disclosure duties. ■

## The Impact of the Transparency Directive on Issuers: in particular, the "Periodic Information"<sup>1</sup>.



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**Directive 2004/109/EC of the European Parliament and of the Council, approved on December 15th, 2004 (and commonly referred to as the "Transparency Directive")**, was published in the Official Journal of the European Union L 390/38, of 31.12.2004, having entered into force on January 20th, 2005. This Directive, *on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market<sup>2</sup> and*

*amending Directive 2001/34/EC*, is included in the package of EU Directives foreseen in the Financial Services Action Plan ("FSAP"), with particular relevance in the goal for the creation of a European single market in financial services which was intended to be reached last year. Counting on a considerable implementation deadline, the transposition period of the Transparency Directive to the national legal systems shall continue until January 20th, 2007 (Article 31/1).



The Transparency Directive follows the Lamfalussy four-level approach, solely contemplating general principles (at “level 1”) and reverting its implementation to the subsequent adoption of implementation measures<sup>3</sup>, the preparation of which involves the participation of several entities with the strong motivation of the Committee of European Securities Regulators (“CESR”). It should be pointed out that, differently to what occurs with other diplomas issued by the competent EU authorities (such as the “Prospectus Directive”), the Transparency Directive does not correspond to a directive of maximum harmonisation, conferring the possibility for the “home Member States” to impose more stringent requirements (which, immediately and at medium term, allows a level of uncertainty to be managed by issuers, with evident reflexes in the choice of the “home Member State”, when applicable), and simultaneously preventing the “host Members States” from establishing stricter requirements in relation to those defined in such Directive (see Article 3).

As in the “Prospectus Directive”, the purpose of the Transparency Directive is the improvement in the provision of information and the consequent strengthening of the confidence of all investors (and not solely of investors of the European Union) in capital markets.

The wording of the Directive<sup>4</sup> defines the requirements to be observed by issuers of securities admitted to trading in a regulated market, located or operating in a Member-State of the European Union, on information duties. The purpose of this Article is restricted to the identification of the eventual impact of the duties classified by the Directive itself as “periodic” (including the “so-called” financial information, that is, Annual Financial Reports, Half-yearly Financial Reports and Interim Management Statements) to issuers.

Therefore and under the scope of periodic information, the minimum content that information must have, as well as the deadlines to be observed (with a view to an increase in the frequency and celerity that financial information is produced and disclosed), are in general defined. It is possible to verify, from the analysis of the Transparency Directive, the identification of certain aspects that are susceptible of causing an impact on issuers<sup>5</sup>:

**1. The preparation of accounts included in the financial statements that contain the Annual and Half-Yearly Financial Reports, in accordance with international accountancy standards<sup>6</sup>, whenever the issuer is obligated to prepare consolidated accounts<sup>7</sup>, under the terms of Directive 83/349/EEC of the Council, of June 13th (Article 4/3 and Article 5/3).**

**2. Issuers of shares or debt securities<sup>8</sup> will be required, in accordance with Article 5/1, to disclose the Half-Yearly Financial Reports.**

**3. The Directive does not require the preparation of quarterly financial information but foresees the disclosure of two Interim Management Statements (Article 6), one in each six-month period of the financial year. Such statements shall contain, with reference to the respective period, a general description of the financial position**

and performance of the issuer and of the companies under its control, as well as an “explanation of the material events” and “transactions that took place” and have an impact thereto. It should be noted that, in those cases whereby Quarterly Financial Statements are published by the issuers “*under either national legislation or the rules of the regulated market or of their own initiative (...) pursuant to the referred legislation or rules*”, the issuer will be dispensed from presenting the Interim Financial Statements. This regime will be assessed by the European Commission after five years counting from the entry into force of the Transparency Directive.

**4. Besides the financial statements and the management report included the Annual and Half-Yearly Financial Reports, these should also contain statements made by the persons responsible within the issuer, in which they declare that the first reflect “a true and fair view” and that the second contains a “fair review” (see Articles 4/2 c) and 5/2 c)). It should be highlighted that this practice is also inserted in the more encompassing theme of “corporate governance”. Article 7 (under the title “Responsibility”) provides that the Member States shall ensure the definition of rules on the responsibility for information disclosed (this is, Annual and Half-Yearly Financial Reports, Interim Management Statements and the provision of Additional Information under Article 16) under the terms set forth in that provision.**

Considering the provisions of Article 8, Articles 4, 5 and 6 (duties of periodic information) are not applicable to certain categories of issuers, which are:

- (i) “States, regional or local authorities of a State, public international bodies of which at least one Member State is a member, the ECB and Member States’ national central banks (...);
- (ii) “Issuers that exclusively issue debt securities denominated in a currency other than the Euro, the value of such denomination per unit being equivalent to at least 50.000 EUR, on the date of issuance”.

The Directive under analysis also covers other relevant rules on subjects excluded in this Article (such as, for example, the provisions of the applicable language regime or the competent supervisory authority). In fact, it additionally includes another purpose: the creation of an information dissemination mechanism. The purpose is to make information available to the public (dissemination *stricto sensu*), also determining its presentation before the competent supervisory authority (“filing”) and, finally, the respective storage/filing. It is consequently intended that information circulates in a swift and efficient form within the European States, without restrictions at the level of addressees, so that access (by investors and of the market in general) may be timely and extended at a pan-European level, without costs of direct access to be borne by investors. It is stated that dissemination represents the “key” to transparency...

In Portugal, the Securities Market Commission (“Comissão do Mercado de Valores Mobiliários - “CMVM”) has revealed to be pledged in providing the European area with (a further) legal instrument that

serve the objectives drawn up at a EU level. Until now and in parallel with the inclusion of experts and members of the Executive Board in working groups constituted for that purpose, about three public consultations have been promoted by the national supervisory authority on the works in course, the latter on May 17th, 2005, accompanied by a public session.

The CESR has recently appointed the Chairman of the Executive Board of the CMVM to coordinate a group of specialists entrusted with the preparation of a technical report on the implementation of the "Transparency Directive", to be delivered to the European Commission until June 30th of this year. As far as the object of the consultation is concerned, the creation of a European system for the compulsory storage of information on companies admitted to trading in a regulated market<sup>9</sup> and the definition of the parameters for the presentation of information to the supervisory authorities should be emphasized. The divulgation of an interim report is expected for April, 2006, on the analysis of costs and of financing arising from the creation and operation of the systems implemented at a national level and the study on the possibility and form of linking the different national systems to a single European system.

As a final note, we would like to underline the fact that the transposition of the Transparency Directive is still significantly within the foreseen period and it seems to be the intention of the Government to speed up the preparation of the transposition law, in the course of the global effort being made in that sense.

All we have to do now is wait and see if the governmental promise of timely transposition of the Transparency Directive is fulfilled and the results for an effective application of the provisions that its wording contemplates. ■

<sup>1</sup>All article provisions mentioned in this Article without indication of the source shall be considered as in reference to the Transparency Directive, save when another source is expressly indicated.

<sup>2</sup>This Directive exclusively lays down obligations to issuers with securities admitted to trading in a regulated market and sets aside the situation of public offer, contrary to that verified with Directive 2003/71/EC of the European Parliament and of the Council, of November 4th, *on the prospectus to be published when securities are offered to the public or admitted to trading* (hereinafter the "Prospectus Directive").

<sup>3</sup>Presently and within the context of the Lamfalussy system, the Transparency Directive is at the phase corresponding to "level 2", still with open options as to its execution.

<sup>4</sup>See note 2 above.

<sup>5</sup>With the exception of "on-going information" that includes information on major holdings and information of the holders of securities admitted to trading in a regulated market. We must emphasize a particularity of the Transparency Directive that consists of the imposition of duties not only to issuers but also to the investors themselves, in the case of "on-going information".

<sup>6</sup>International Financial Reporting Standards ("IFRS").

<sup>7</sup>See Regulation (EC) nr. 1606/2002 of the European Parliament and of the Council of July 19th, 2002, *on the application of international accountancy standards*.

<sup>8</sup>However, with limited exceptions.

<sup>9</sup>As occurs at a national level in Portugal, Spain and France, managed by the respective supervisory authorities, respectively, the CMVM (the "Information Disclosure System"), the CNVM and the AMF.



*Cecilia Costa*

*S/título (from the Series Pli), 2005, Lambda colour print, 60 x 90 cm*

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