# INTERNATIONAL SECURITIES LAW AND REGULATION

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# Portugal

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## Introduction

### Regulatory System

The first Securities Market Code[1] established the Markets and Securities Commission (CMVM), a public agency, independent at both administrative and financial levels, granting it regulatory and supervisory powers previously held by the government. A second major reform was carried out in 1999 with the enactment of the Securities Code,[2] which has been in force since 1 March 2000.

In 2004, the Securities Code was revised to promote the competitiveness of the Portuguese securities markets at an international level. The Securities Code has been subject to major reorganisations as a consequence of the Portuguese implementation of European Union (EU) legislation.

### Legal Sources

The Securities Code embodies the main rules of securities regulation and provides legal support for the enactment of other regulatory instruments. This set of rules is complemented by the enactment of the CMVM Regulations (*Regulamentos*), Instructions (*Instruções*), and Ministerial Decrees (*Portarias*). The CMVM also issues general 'soft law' instruments, such as recommendations and assessments. Other relevant legal instruments regulating the Portuguese securities markets include:

- The particular legal instrument regulating each type of securities;
- The Companies Code (*Código das Sociedades Comerciais*, CSC), approved by Decree-Law Number 262/86, of 2 September, as amended;
- The General Framework on Credit Institutions and Financial Companies (*Regime Geral das Instituições de Crédito e das Sociedades Financeiras*), approved by Decree-Law Number 298/92, of 31 December, as amended; and

1 Decree-Law Number 142-A/91, of 10 April.
2 Decree-Law Number 486/99, of 13 November, as last amended by Decree-Law Number 40/2014, of 18 March.

- The access to insurance activity, approved by Decree-Law Number 94-B/98, of 17 April, as amended.[3]

**Authorities**

The Ministry of Finance (*Ministério das Finanças*) defines the policies relating to the securities markets, exercises administrative supervision over the CMVM, and coordinates securities supervision and regulation between public authorities.

The CMVM is responsible for regulating and exercising supervision of the securities markets, public offerings of securities, settlement systems, and central securities systems.

Without prejudice to the competence granted to other authorities, the following entities are supervised by the CMVM in relation to activities involving securities:

- Management entities of regulated markets, MTFs, settlement systems, clearing houses, central securities depositories, and central counterparties;
- Financial intermediaries and investment advisers;
- Issuers of securities;
- Qualified investors and holders of qualifying holdings;
- Guarantee funds and investor compensation schemes and their respective managing entities;
- Auditors and rating agencies, registered with the CMVM;
- Securitisation firms;
- Venture capital firms;
- Entities proposing to enter into or mediate insurance agreements linked to investment funds or to market individual agreements to open-ended pension funds, under such activities;
- Holders of short positions on relevant shares and sovereign debt and acquirers of protection in sovereign credit default using swaps;
- Other persons whose main or secondary activity relates to the issue, distribution, trading, registration, or deposit of financial instruments or, generally, with the organisation and functioning of the markets in financial instruments.

The CMVM has jurisdiction to supervise foreign entities exercising cross-border activities to the extent that such activities have some relevant connection to markets, operations, or securities subject to Portuguese law.

3 The Securities Code, as well as some complementary legislation, is available in English on the CMVM's website (http://www.cmvm.pt). It is stressed that this translation is for information purposes only and bears no legal value, and therefore it should not be the basis for any legal assessment or deemed as replacing proper legal advice.

The CMVM's supervisory duties also include prudential supervision over operators of markets, settlement systems, central securities systems, central counterparties, collective investment funds, and the operators of guarantee funds and investor compensation schemes. This prudential supervision seeks the preservation of the solvency and liquidity of the institutions, prevention of systemic risk, and control of ethical standards of members of management bodies and holders of qualifying participations.

The Bank of Portugal (*Banco de Portugal*) oversees the banking sector, regulating and supervising all credit institutions and investment companies (ie, most of the financial intermediaries operating in the securities markets), officially acknowledges monetary securities (ie, short-term debt securities), regulates and manages the settlement systems, and acts as lender of last resort. The Portuguese Insurance Institute (*Instituto de Seguros de Portugal*) regulates and supervises insurance, reinsurance, pension funds activities, and insurance intermediation.

## Portuguese Markets

### In General

Since 1 November 2007, investment orders can be executed not only in regulated markets (formerly designated as exchanges) but also within multilateral negotiation systems and systematic internalisation schemes. Financial intermediaries can promote the matching of their own financial instrument portfolio with orders submitted by their clients within a systematic, organised, and frequent framework but out of any regulated market or multilateral negotiation systems. This procedure is designated by the Securities Code as a systemic internalisation and is regulated by EC Commission Regulation 1287/2006, which is directly applicable in Portugal.

Multilateral negotiation systems are subject to the rules applicable to regulated markets on registration, securities admission, membership, operation, and supervision powers but, unlike such markets, they do not necessarily operate on a regular basis and can either be managed by regulated market operators or by financial intermediaries which are registered with the CMVM.

The opening of a regulated market is subject to government authorisation, at the operator's request and following consultation with the CMVM. The list of regulated markets operating in Portugal is conveyed to the European Securities and Markets Authority and to all EU Member States and available at the regulator's website. The regulated markets operating in Portugal are:

- Eurolist by Euronext Lisbon (*Mercado de Cotações Oficiais*), the official quotations market managed by Euronext Lisbon — *Sociedade Gestora de Mercados Regulamentados*, S.A.;
- Futures and options market (*Mercado de Futuros e Opções*), managed by Euronext Lisbon — *Sociedade Gestora de Mercados Regulamentados*, S.A.;

- Special Public Debt Market (*Mercado Especial de Dívida Pública*, MEDIP), managed by MTS Portugal — *Sociedade Gestora do Mercado Especial de Dívida Pública, SGMR*, S.A.; and
- Energy Commodities Market (*Mercado Ibérico de Electricidade*, MIBEL), managed by OMIP — Pólo Português, *Sociedade Gestora de Mercados Regulamentados*, S.A.

**Operational Rules and Membership**

The operating rules of regulated markets are set out by each operating entity and are subject to prior registration with the CMVM. Operators of regulated markets located or operating in Portugal should agree among themselves as to any informative or operative connections necessary for the proper functioning of the markets they manage and for the protection of the interests of investors. Operators of regulated markets located or operating in Portugal may enter into agreements with similar entities in other states, which ensure that securities listed on any of the relevant markets are also admitted to trading on the other markets or that members of one regulated market are permitted to participate in another market. Such agreements are no longer subject to registration, although the CMVM may oppose its execution if the regulated market located or functioning in a foreign state does not impose requirements similar to those of the regulated market located or operating in Portugal.

Regulated markets function by means of public sessions, which may be ordinary or extraordinary. Ordinary regulated market sessions are held at the time and on the days defined by the regulated market operator, for regular trading. Extraordinary sessions take place as a result of a judicial decision or a decision made by the regulated market operator, at the request of specific interested parties.

Following the implementation of the MiFID Directive, membership in a regulated market is not limited to financial intermediaries. Any entities that evidence to be professionally apt and have adequate negotiation capacity, organisation method, and financial resources can be admitted as members of a regulated market. The operator of the market will have responsibility for the admission of market members, in accordance with the principles of equality and respect for the rules of healthy and fair competition. Regulated market members who merely exercise trading functions may only be admitted after having entered into an agreement with one or more of the members which guarantee settlement of transactions carried out by them.

**Admission Requirements and Procedures**

The admission of securities to a specified regulated market is determined by each operator. However, the Securities Code imposes minimum requirements with regard to admission to trading on the official quotations market regarding both the issuer and the securities issued.

As a general rule, the issuer must show conformity with the law to which it is subject, with regards to both its incorporation and operation, and demonstrate

that its financial and economic situation is compatible with the nature of the securities to be admitted and with the market on which listing is being requested.

Nevertheless, only issuers that, in addition to these requirements, have been conducting their business for at least three years and have published their annual financial statements in accordance with the applicable law for the three preceding financial years can apply for official listing of securities.

Any fungible, assignable, unencumbered securities or other financial instruments enabling an orderly price formation are eligible to be admitted to trading on a regulated market to the extent that they have been issued in conformity with the issuer's statutory law and the respective content and form of representation complies with the applicable law.

Once they have been admitted to a regulated market, securities may be subsequently traded on other regulated markets without the need of the relevant issuer's consent or further information provision (although notice will be provided to the relevant issuer). The listing of each type of securities entails additional requirements, such as:

- Shares must evidence an adequate level of public dispersal ascertainable at admission and forecasted market capitalisation of at least €1 million or (alternatively, if the capitalisation criteria cannot be ascertained) own capital, including the results of the previous financial year, amounting to at least €1 million;
- The amount of the loan represented by a bond financing cannot fall below €200,000; and
- The admission of convertible securities entitling the holder to subscribe for shares is conditional on the previous or simultaneous admission to trading of the underlying securities (this requirement may be waived by the CMVM if so permitted by the personal law governing the issuer, should the issuer demonstrate that the holders of the relevant securities possess the necessary information to make a reasonable assessment of the value of the shares into which the bonds are convertible).[4]

When the securities are subject to a foreign law (with the obvious exception of all EU Member States), the CMVM may require a legal opinion confirming compliance with the aforementioned requirements.

The admission of securities subject to the governing law of any EU member state may not be conditioned on previous admission to a regulated market operating in such state. The application for admission to trading on a regulated market must be filed with the respective operator by:

- The issuer;

4 If the underlying securities are already admitted to trading on a regulated market located or operating in an EU Member State where the issuer has its head office, admission to listing will involve prior consultation of the authorities of the relevant member state.

- The holders of at least 10 per cent of issued securities belonging to the same category; or
- The Agency for Exchequer and Public Debt Management (*Agência de Gestão da Tesouraria e da Dívida Pública* — IGCP, E. P. E.) if the securities in question are bonds issued by the Portuguese State, together with the necessary information and documentation required to prove that all the above referred requirements have been met.

Applications can be submitted before such requirements are met, provided that the issuer indicates how and when these will be met. The operator must provide the CMVM with a copy of the admission application, as well as with any documents necessary for the approval of the admission prospectus. The application for listing must include reference to the means by which the issuer is to disclose information to the public, the identification of the member of the settlement system approved by the market operator through which the payment of the rights (conferred by the securities to be admitted) is guaranteed, and the designation of an attorney to represent the issuer before the market and the CMVM.

Notice of approval or denial of the application must be served by the operator to the applicant within 90 days and subsequently to the CMVM, identifying the securities admitted, describing their characteristics and the means of accessing the prospectus. Admission to trading on a regulated market can only be denied where there is a confirmed:

- Non-fulfilment of the requisites set by law, regulations, or rules of the respective market;
- Non-fulfilment by the issuer of duties to which it is subject in other markets, located or operating in Portugal or abroad, where the securities in question are listed; or
- Admission to trading not being advisable in the investors' interest, based on the issuer's situation.

**Admission Prospectus**

Prior to the admission of securities to trading, the issuer must publish (either (i) in a major newspaper or (ii) by means of providing copies at the registered office or website of the issuer, the branches or websites of the relevant financial intermediaries, and the registered office or website of the operator of the market where the securities are to be listed or, finally, (iii) in the CMVM website) a prospectus approved by the CMVM or by the competent authority of another member state, in line with the criteria described below applicable to the offer prospectus.

The Securities Code foresees some admission prospectus exemptions in relation to certain types of securities, which include, among others, non-equity securities issued or unconditionally guaranteed by a member state (including regional or local authorities), member state Central Banks, public international entities, associations with legal status or non-profit-making bodies recognised by a

member state; securities where the total consideration of the offer is less than €5 million (limit calculated over a 12-month period) and provided certain conditions are met; shares securities offered, allotted, or to be allotted free of charge to existing shareholders or to former directors or employees by their employer, by a company in a control or group relation, or by a company subject to joint control; and securities already admitted to trading on another regulated market.

The admission prospectus may, in whole or in part, be written in a language (other than Portuguese) currently used in the international financial markets if:

- The securities to be listed have a nominal value equal to or over €100,000 or, in cases where the securities do not have a nominal value, where the unitary subscription or sale price is equal to or over such value;
- The listing was directed to markets in several different states;
- The issuer is not domiciled in Portugal; or
- It is destined for a market or market segment which, due to its characteristics, is only accessible to institutional investors.[5]

The form and contents of the prospectus, as well as the responsibility for its contents, are very similar to those outlined below in relation to the public offers prospectus.

**Information Disclosure Duties**

The information to be compulsorily disclosed under the rules described below must be disclosed at least through a specific broad access communication channel, ie, the CMVM Information Disclosure System (*Sistema de Difusão de Informação*).[6]

Additionally, issuers of securities admitted to a regulated market must release such data on their corporate website for at least one year counted as from such mandatory disclosure. The CMVM may require defaulting entities to provide the missing or incomplete information and publish it at their expense.

In some cases, it also may waive the disclosure of information whenever the relevant release is contrary to public interest and likely to cause damages to the issuer, provided that the non-disclosure does not lead to a deficient evaluation of the relevant securities by the investor.

Compliance with these requirements must be made in Portuguese, or certified Portuguese translations of the relevant documents must be submitted, unless otherwise waived by the CMVM.

5 The CMVM may, however, require a summary in Portuguese that describes the offering and the risk factors.

6 See http://www.cmvm.pt.

**Periodic Disclosure Requirements**

The following issuers of securities must submit to the CMVM an extensive list of periodic information relating mainly to economic and financial data:

- Issuers of securities with a nominal value of less than €1,000 if such securities are admitted to trading on a regulated market operating in Portugal or other EU member state, when such issuers are subject to Portuguese *lex personalis*[7] or are exclusively admitted to trading on a regulated market operating in Portugal, when such issuers are subject to an EU member state *lex personalis*; and
- Issuers subject to a *lex personalis* other than that of an EU member state of securities with a nominal value of less than €1,000 if such securities are admitted to trading on a regulated market operating in Portugal or other EU member state and the CMVM is designated as the competent authority to supervise the relevant disclosure.

The issuers identified above must publish and make available to the public for a five-year period the following documentation:

- Within four months as of the end of the financial year, the management report, annual accounts, the legal certificate of accounts, and other accounting documents required by law or regulation even if such documents have not yet been approved by the issuer's general shareholders' meeting, the list of qualified holdings, and the entire text of a report of an auditor registered with the CMVM (which should include an opinion relating to growth forecasts for the business and the financial and economic situation of the issuer and elements corresponding to the legal certification of accounts, if not required by another legal rule or if not drawn up by an auditor registered with the CMVM); and
- Within two months as of the end of the first semester of the financial year, half-year information relating to the activity and results of such semester, including the list of qualified holdings, the condensed financial demonstrations, a half-year management report, a list of securities issued by the company or the issuer group, and a description of material-related parties' transactions if share issuers are concerned.

In each case, the documentation set must include an officers' certificate (identifying the name and status of each officer) confirming that, to the best of the officers' knowledge, the disclosed information was prepared in accordance with the applicable accounting principles, providing a truthful and appropriate description of the issuers' financial condition and that the management report adequately describes such issuer's business evolution and forecasts and includes a risk factor identification. The documentation in such cases must also include:

- Quarterly information relating to operations, profit/loss situation, and economic and financial situation where the issuers subject to Portuguese *lex*

7 In practice, the issuers which are subject to Portuguese *lex personalis* are companies with registered head office in Portugal.

*personalis* exceed, for two consecutive years, two of the following three limits: (a) a €100 million balance sheet, (b) €150 million profits, and (c) 150 workers;[8] and

- An annual statement summarising the information made available to the public in the preceding year under the mandatory disclosure provisions, including detailed information on the source of such requirements.

Issuers that are Member States (or regional or municipal authorities) or Central Banks, as well as issuers of debt securities with a nominal value exceeding € 100,000, are exempt from the above-mentioned disclosure duties. Other data which triggers disclosure obligations includes:

- Amendments to the company's by-laws (which must be notified to the CMVM and the relevant regulated market operator(s) before their approval);
- Issue of securities;
- Amendments to any right inherent to the respective issued securities;
- Acquisition or disposal of own shares, whenever as a result thereof the proportion of same exceeds or falls below the thresholds of 5% and 10%;
- Approval of annual accounts by the general shareholders' meetings;
- Calling of general meetings;
- Attribution and payment or exercise of any rights conferred by listed securities or by the shares to which these give the right to;
- Modification of the rights of bondholders which result, specifically, from changes to the conditions of the loan or to the interest rate; and
- Issue of other shares and of other bonds, with an indication of the beneficial privileges and guarantees associated with them.

There is a duty of managers of issuing companies admitted to trading on a regulated market (and on any persons closely related to such managers, as defined under the Securities Code) to disclose to the CMVM acquisitions of a company's shareholding exceeding €5,000, or of any securities related to such company entered into on their behalf, on behalf of third parties or of third parties on the former's behalf within five business days after reaching the €5,000 threshold.

**Corporate Governance Disclosure Requirements**

The corporate governance disclosure requirements reflect European and Organisation for Economic Cooperation and Development (OECD)

8 Issuers that do not meet these requirements have nonetheless to release each semester management board declarations, including a description of material transactions affecting such issuer's financial condition as well as of the company's half-year business performance.

recommendations, particularly in the context of the Takeover Directive implementation.

The CMVM has regulated on these specific disclosure duties[9] and published a Corporate Governance Code. Issuers of shares admitted to trading on a regulated market must include in their annual management report the following detailed information:

- Share capital structure (including the identification of shares which are not admitted to trading, with an indication of the different classes of shares and, in relation to each share class, identification of the rights and obligations attaching to it, and the percentage of share capital represented by each class);
- Share transfer restrictions, such as disposal consents clauses or restrictions on the ownership of shares;
- Qualified holdings in the issuer's share capital;
- Identification of any shareholders that hold special rights and description of such rights;
- Control mechanisms of eventual employee share schemes when the voting rights are not directly exercised by the employees;
- Voting rights restrictions, such as limitations on the voting rights of the holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby the financial rights incorporated in the securities are detached from such securities;
- Shareholders' agreements acknowledged by the company and which may result in restrictions on the transfer of securities or voting rights;
- Rules governing the appointment and replacement of board members and amendment of the articles of association;
- Powers of the board, notably in respect of resolutions to increase equity;
- Significant agreements to which the company is a party and which take effect, are modified, or terminate on a change of control of the company following a takeover bid, as well as the effects thereof, except where their nature is such that this disclosure would be seriously harmful to the issuer (this exception not applying where the company is specifically obliged to disclose such information on the basis of other legal requirements);
- Agreements between the company and its board members or employees providing for compensation on resignation, dismissal without valid reason, or redundancy of such entities following a takeover bid;
- Implemented internal control and risk-management systems with regard to financial information disclosure;
- Declaration detailing the aspects of the Corporate Governance Code which are and which are not being complied with and grounds for any non-compliance, to the extent applicable;

9 Originally through CMVM Regulation Number 1/2007, which has since been repealed by CMVM Regulation Number 1/2010.

- Identification of the location where applicable corporate governance reports are made available to the public;
- Description of the composition and operation of the company's corporate bodies, as well as of any commissions created within such corporate bodies; and
- Remuneration policy of the management corporate body, including the individual and aggregate annual wage amount perceived by its members.

Issuers of securities other than shares admitted to trading on a regulated market operating in Portugal also are subject to some of the corporate governance requirements listed above, but the list of data to be disclosed can be less stringent.

The issuers of shares admitted to trading on a regulated market which are companies subject to Portuguese *lex personalis* are further required to publish a detailed report on their corporate governance structure and practices, in accordance with a specified standard model approved by the CMVM. The report must specifically identify the CMVM's recommendations on corporate governance that are complied with and those that are not. All recommendations that are not fully adopted are understood not to be complied with.

Additional stringent information obligations are imposed on these particular issuers, with a view to ensure a permanent contact with the market with respect to the shareholders' equality and to avoid investor information asymmetries. These include the obligations to:

- Create an investor assistance service;
- Submit to the CMVM information relating to plans for the allotment of shares and/or stock options to employees and/or members of the board of directors during the seven days following the respective approval; and
- Make available an easily accessible website in clearly identified terms, and updated with information including the corporate statutory data, the identity of the office-holders of corporate bodies and the market liaison representative, financial reports (accessible for at least five years), a semester calendar of company events (including general meetings, disclosure of annual, half-yearly and, if applicable, quarterly financial reports), calls and proposals presented for discussion, and voting in the general shareholders' meeting.

**Privileged (Qualified) Information**

Issuers of shares admitted to trading on a regulated market must immediately disclose any privileged information (as well as any changes to information disclosed as such), which is defined as any information that:

- Directly concerns the issuing company or the securities issued by such company;
- Has a precise nature (including past and present data as well as future facts to the extent that such facts are predictable);

- Is not public; and
- Would affect the price of the same if it were made public (ie, price sensitive in light of the judgment of a reasonable investor).

Issuers must keep (for a five-year period) an updated list with all persons that have access to privileged information. Issuers may elect to postpone the disclosure of such privileged information to the extent that such disclosure would prejudice their legitimate interests (as in the case of a material negotiation procedure requiring a certain degree of secrecy) provided that the disclosure postponement does not have a misleading effect on the public and the issuer ensures the confidentiality of the information until its disclosure. For this purpose, the Securities Code sets out the minimum procedures which must be adopted to guarantee that the confidentiality is preserved and that the information is immediately disclosed following confidentiality breach.

**Disclosure of Qualified Holdings Acquisition in Public Companies**

Each time a shareholder reaches or exceeds a holding of 10 per cent, 20 per cent, one-third, 50 per cent, two-thirds, and 90 per cent of the voting rights in the share capital of a public company[10] subject to Portuguese *lex personalis* (or decreases such holding to any of those limits), it must, within four trading days (days on which the relevant regulated market is open for trading) after the occurrence of such fact, inform:

- The CMVM and the company to which such voting rights pertain; and
- The entities referred to above of those situations that determine the attribution to the shareholder of voting rights inherent to securities belonging to third parties.

A public company must immediately publish any disclosure communication received in this context by making it available at the CMVM Information

10 The Securities Code sets up a specific public company concept (*Sociedade Aberta*), defined as a company whose share capital is dispersed among the general public and that has been incorporated through an initial public subscription offering specifically addressed at individuals or entities resident or established in Portugal, which issues shares or other securities that grant the right to subscribe or to acquire shares that have been the object of a public subscription offer specifically addressed at individuals or entities resident or established in Portugal; issues shares (or other securities that grant the right to their subscription or acquisition) that are or have been listed on a regulated market situated or operating in Portugal; issues shares that have been sold by public offer of sale or exchange in a quantity greater than 10 per cent of the company's share capital directed specifically to individuals or entities resident or established in Portugal; or has been incorporated as the result of the de-merger of a public company or a company that incorporates, through merger, all or part of its assets. The status of a public company must be mentioned in all its external acts. The most significant implication of such status (other than the duty to disclose qualified shareholdings) is the possibility of being subject to mandatory takeovers (which are only applicable to public companies).

Disclosure System. Together with the shares or voting rights held, the Securities Code also deems attributed to the relevant holder those rights:

- Held by third parties in their own name, but on behalf of the relevant holder, a company with which the relevant holder is in a control position, holders of voting rights with whom the relevant holder has entered into a voting agreement except if, by virtue of this same agreement, the relevant holder is bound to follow a third party's instructions and, if the relevant holder is a company, by members of its management and statutory audit boards;
- That the relevant holder can acquire pursuant to an agreement executed with the respective shareholders;
- Held by persons that have entered into any agreement with a shareholder aimed at either acquiring control of the company or frustrating any changes to its control or otherwise constituting an instrument of concerted exercise of influence over the company in which they own shares;
- Attached to shares granted and held as security in favour of the relevant holder or administered by or deposited with the relevant holder, if the voting rights have been attributed to the relevant holder or if discretionary powers for their exercise have been granted to the relevant holder; and
- Attributable to any person or entity referred to in one of the previous paragraphs by application, with due adaptations, of the criteria referred to in any of the foregoing bullets.

Accordingly, shareholder agreements that aim at acquiring, maintaining, or reinforcing a qualified holding in a public company or to secure or frustrate the success of a takeover must be disclosed to the CMVM by any of the contracting parties within three days of their execution. The CMVM will determine the full or partial publication of the agreement, according to its relevance to the control over the company.

Company resolutions based on express votes exercised pursuant to agreements that have not been disclosed or published are voidable, except where one is capable of proving that the resolution would have passed without said votes. The duty to disclose qualified holdings also applies to the following categories of companies:

- Portuguese public companies which issue shares or other securities granting the right to their subscription or acquisition, admitted to trading on a regulated market situated or operating in Portugal when each of the following thresholds is attained: 2 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 50 per cent, two-thirds, and 90 per cent;
- Companies incorporated in other EU Member States that issue shares or other securities granting the right to their subscription or acquisition, exclusively admitted to trading on a regulated market situated or operating in Portugal, whenever each of the following thresholds is attained: 5 per cent, 15 per cent, and 25 per cent; and

- Companies incorporated in non-EU countries that issue shares or other securities granting the right to their subscription or acquisition, exclusively admitted to trading on a regulated market situated or operating in Portugal, and in relation to which the CMVM has been chosen by the issuer as the competent authority at the time of its admission to trading, whenever each of the following thresholds is attained: 5 per cent, 15 per cent, and 25 per cent.

Key exemptions are provided for parent undertakings of management/ investment companies where voting rights are exercised independently (subject to CMVM notification), for usual short settlement cycle and for market makers. However, the Securities Code no longer foresees the possibility of applying for specific exemptions (the CMVM could previously waive disclosure obligations in relation to holdings of 2 per cent and 5 per cent of the voting rights).

If the duty of disclosing qualified holdings is not complied with in accordance with the terms foreseen under the Securities Code, or should there be doubts as to the identity of shareholders of qualified holdings, the CMVM may notify the relevant issuer of such fact and request additional clarifications to be provided within 30 days, after which the CMVM may publish an announcement through its official Disclosure System stating that a specified shareholding is lacking transparency.

As a consequence of such declaration, the voting rights inherent to such shareholdings become automatically suspended. The following information regarding public companies must be disclosed:

- Exercise of subscription rights;
- Exercise of rights of conversion of securities into shares;
- Modification of the imputation title of voting rights in qualified holdings;
- Insolvency declaration application, judicial declaration of insolvency, or judicial refusal of such declaration and approval of the insolvency plan;
- Share capital increase and reduction;
- Applications to admissions to a regulated market and decisions thereunder; and
- General shareholders' meeting to consider the loss of public company status.

## Market Participants

### In General

The implementation of the MiDIF Directive has streamlined the Portuguese legislative approach to the protection of market participants both from the consumer and service provider perspective.

### Qualified and Retail Investors

The most significant conduct of business rules imposed on the financial intermediaries by the MiFID requires that they categorise all clients (by

assessing their previous experience in dealing with financial instruments, as well as their financial condition and investment objectives) and adjust the level of client protection according to each client's expertise level when providing advice and services and choosing the complexity of the investment instruments that can be offered to such entities.

Accordingly, each financial intermediary must come to a decision on whether its client is a qualified or retail customer and let him be aware of such classification ahead of rendering any services. Retail clients are granted further information, assistance, and advice on the available financial instruments and agreements with such clients must be formalised in writing.

Qualified investors include credit institutions, investment firms, collective investment funds and their respective managing companies, insurance companies, pension funds and their respective managing companies, and other authorised or regulated financial institutions (including securitisation funds and their managing entities, and other financial companies) of non-EU Member States, traders in commodities derivatives, state entities, central banks, public entities that administer state debt and supra-national institutions (such as the World Bank, International Monetary Fund, European Investment Bank, and European Central Bank), and companies with a significant dimension for this purpose (ie, which meets two requirements out of €40 million net turnover, €20 million assets, and €2 million net assets).

The CMVM also may, by Regulation, tag as qualified investors other entities (including issuers) with particular experience and competence in relation to securities, by setting out economical-financial indicators to define when such is the case.

Retail customers can request to be re-characterised as qualified investors if they comply with two of the following requirements: have carried out at least 10 transactions of a significant amount per trimester in the last four trimesters, hold a portfolio exceeding €500,000, including deposits in cash, and have one year of professional financial experience.

**Financial Intermediaries**

The revised regulation on financial intermediation evidences a substantial effort in harmonising the organisation and conduct of business by investment firms, which was one of the main achievements intended by the MiFID implementation. The scope of the definition of 'financial intermediation' has been widened to include:

- Services and investment activities in financial instruments (such as order reception and execution, portfolio management, underwriting, book building, negotiation, multilateral negotiation systems management, and investment advice);
- Ancillary services to investment services and activities such as orders registration, custody, investment studies, or advice in the context of a public offer; and

- Management of collective investment schemes and custody of such entities' securities portfolio.

Credit institutions and investment firms, collective investment schemes managers, companies carrying out similar activities authorised to operate in Portugal, securities investment companies, and real estate investment companies are characterised as 'financial intermediaries', while brokers, dealers, asset management companies, foreign exchange agents, investment advisors, and multilateral negotiation systems operators are regarded as 'investment companies'. The Securities Code also holds consultants providing personalised investment advice services (either acting individually or as consultancy companies) as financial intermediaries.

In any of the cases described above, the performance of financial intermediation activities must be authorised by the competent authority and preceded by registration with the CMVM. An official list of authorised financial intermediaries and activities subject to CMVM supervision is permanently available on the regulator's official website.[11] The CMVM informs the European Securities and Markets Authority on the registration of investment companies and credit institutions that provide services or carry out investment activities and management companies of securities investment funds and of securities investment companies that manage collective investment in transferable securities.

Any financial intermediary based in a member state and authorised to carry out activities by one of the EU member state regulators can now freely provide intermediation services in Portugal under the European passport. A list of such authorised intermediaries also is available at the Committee of European Securities Regulators website.[12] The following information must be provided in writing by the financial intermediaries to enable the formation of a conscientious client investment decision:

- The financial intermediary's identification and the services provided;
- The nature of the retail or professional investor or eligible counterparty, for the possible right of requesting a different treatment and any restriction on the level of protection that such implies;
- The source and the nature of any interest that the financial intermediary or persons who act on behalf of same have in the services to be provided, whenever the organisational measures introduced by the intermediary are not sufficient to ensure with reasonable confidence that the risk of the clients' interests being prejudiced shall be avoided;
- The financial instruments and the proposed investment strategies;
- The specific risks involved in the transactions to be carried out;
- The order execution policy and, if applicable, provision for the possibility that clients' orders may be executed outside a regulated market or MTF;

11 See http://www.cmvm.pt.
12 See http://www.cesr-eu.org.

- The existence or non-existence of any guarantee scheme or similar protection that covers the provision of services; and
- The costs of the provision of services.

The information provided to clients must be sufficient to enable a non-qualified investor to assess the risks involved in a specified investment and must include at least a description of concepts such as volatility, 'leverage effect' of some financial instruments (ie, the risk of the exposure being higher than the amounts invested), or other risks associated with specific financial instruments (market, liquidity, credit or foreign exchange risks, and mandatory collateral provision) or markets.

The Securities Code also prescribes specific information check lists for each type of activity. Before receiving and executing any client order, the financial intermediary must request its client to expressly approve a document describing the financial intermediary's 'orders execution policy' (including to any amendments thereto), which must be adapted to the client's level of sophistication. Finally, financial intermediaries must forward their clients, up to the following business day after its execution, a detailed 'order completion report' and provide at any time information on the status of executed orders if so requested by their clients.

The provision of portfolio management services also must be preceded by specific support information, such as the identification of the relevant reference benchmarks enabling the investor to evaluate the performance of its portfolio, the provision of periodic reports on such performance (at least bi-annually), and alert notices each time pre-defined loss thresholds are achieved.

Good practice rules also require that financial intermediaries set up segregated client securities accounts so that these can be ring-fenced on insolvency of the former. Trading in client securities on the financial intermediary's or third parties' behalf is prohibited unless such client otherwise expressly consents to such utilisation, in which case he will have to be provided with details on the transactions involving his securities (responsibilities, risks involved, and restoring conditions).

**Central Counterparties, Clearing, and Settlement**

The trading on regulated markets or multilateral negotiation systems of options, futures, swaps, future contracts, and other derivatives over underlying securities, currencies, interest rates, indexes commodities, climatic variables, licenses, or other derivatives requires the mandatory intervention of a central counterparty.[13] Authorised credit institutions, settlement system operators, and clearing and central counterparties' operators can act as central counterparties.

13 The rules over the settlement of transactions in securities have been altered (ie, upgraded) in order to encompass the new reality of settlement systems now being intertwined, and a number of related issues have since been regulated (for instance, regulating where the liability ultimately lies in such intricate scenarios).

Securities settlement systems of capital markets operating in Portugal are created by written agreement under which common rules and standard procedures are adopted for the execution of transfer orders for securities between participants (which may include credit institutions, authorised investment companies, public entities, clearance agents, central counterparties, and settlement agents). With the exception of those managed by the Bank of Portugal, settlement systems must be recognised by way of registration with the CMVM. Only authorised credit institutions with activity in Portugal and centralized securities systems can act as settlement agents.

The settlement system that operates in the Portuguese regulated markets is managed by Interbolsa — *Sociedade Gestora de Sistemas de Liquidação e de Sistemas Centralizados de Valores Mobiliários*, S.A. Interbolsa settles market operations involving stocks, bonds, and notes and Eurosystem credit operations collateralised by Treasury bonds and private paper. In addition to its tasks as central securities depositary (registration, deposit, and safekeeping of securities) and settlement system, Interbolsa acts as the national securities numbering agency.

LCHClearnet, S.A. operates as a clearing house and as central counterparty for the operations carried out in the Euronext group markets, including Euronext Lisbon, in the spot market, and in the derivative market. In its capacity as clearing house and central counterparty, LCHClearnet's functions include registration, clearing, settlement, collateral management, and risk management associated with the operations carried out in Euronext Lisbon.

## Public Offerings

### In General

The Portuguese regulation of public offers reflects the conciliation achieved by the EU Member States covered by the Takeover Directive, the Prospectus Directive, and the Transparency Directive. Public offers are offers of securities addressed, in whole or in part, to unidentified addressees. The following offers are always deemed public:

- Offers addressed to all the shareholders of a public company, even if its share capital is represented by nominative shares;
- Offers that, in whole or in part, are preceded or accompanied by promotional material or book-building with unidentified addressees; and
- Offers addressed to at least 150 non-qualified investors who are domiciled in Portugal.

Offers concerning securities only addressed to institutional investors and subscription offers by non-public companies, addressed to their shareholders, and except for those cases described in the preceding paragraph, are considered private. The regulations are applicable to all offers specifically addressed to investors resident or established in Portugal (irrespective of the law regulating the securities object of the offer or the applicable statutory law of the offeror or

issuer). The following types of offers are excluded from the provisions of the Securities Code:

- Public distribution offers of debt securities issued by an EU member state or one of its regional or local authorities and public offers of securities that are unconditionally and irrevocably guaranteed by one of such states or authorities;
- Public distribution offers of securities issued by the European Central Bank or by the central bank of one of the EU Member States;
- Offers on securities issued by an open-ended collective investment fund, made by the issuer or on its behalf;
- Offers on or through a market registered with the CMVM that are presented exclusively through the market's own means of communication and that are not preceded or accompanied by promotional material or prospecting or book building from unspecified addressees;
- Public offers of securities with a nominal value of €100,000 or more or with a subscription or purchase price equal or above such amount;
- Public offers of debt securities issued by international public bodies to which one or more Member States belong;
- Public offers issued by associations or non-profit entities, recognised by a member state, with the purpose of obtaining funds for their non-profit activities;
- Public offers of debt securities issued in a sequential or repeated manner by credit institutions, so long as these securities are not subordinated, convertible, or exchangeable; do not grant the right to acquire other securities or are associated with a derivative instrument; certify the receipt of reimbursable funds; and are covered by the Bank of Portugal Deposit Guarantee Fund or a similar deposit guarantee scheme;
- Public offers of debt securities issued in a sequential or repeated manner by credit institutions with a total value (in the previous 12-month period) of below €75 million, so long as these securities are not subordinated, convertible, or exchangeable and do not grant the right to subscribe or acquire other securities or are associated with a derivative instrument;
- Public offers of securities with a total value below €5 million in a 12-month period;
- Public offers of shares issued to replace shares already issued in the same class, if the issue of these new shares does not imply a share capital increase;
- Public offers of securities issued by collective investment undertakings; and
- Public offers of debt securities with a maturity of less than one year.

**Registration, Approval, Documentation, and Publicity**

Without prejudice of the above exclusions, distribution offers prospectuses are subject to prior approval and takeover bids are further subject to prior registration with the CMVM.

The request for approval of the prospectuses or registration must include the following documents (unless updated versions of the same are already in the possession of the CMVM):

- Resolution launching the offer adopted by the offeror's competent statutory body, and of the required management decisions;
- Issuer's and offeror's up-to-date by-laws and commercial registry certificates;
- Management and financial reports of the statutory auditing body as well as the audit reports covering the issuer's accounts for the periods set out in EC Regulation Number 809/2004 (ie, 2004 onwards);
- Report or statement from an independent auditor;
- Identification code (ISIN) of the securities which are the object of the offer;
- Copy of the agreement entered into with the financial intermediary assisting in the operation;
- Copy of the underwriting agreement and the underwriting consortium agreement, if applicable;
- Copy of the market placement agreement, stabilisation agreement, and the 'greenshoe' (over-allotment) agreement, if such agreements exist;
- Draft prospectus;
- *Pro forma* financial information (if applicable);
- Draft public offer announcement; and
- Expert reports (if applicable).

The CMVM also may request from the offeror or the issuer any complementary information that it thinks useful. The offeror must be informed within eight days of the takeover registration or its respective refusal and within 10 days of the public distribution offer prospectus approval or refusal, save in the cases where the issuer has not previously carried out any public distribution offer or admission to a regulated market, in which case the period is extended to 20 working days.

Registration of the takeover and approval of the prospectus may only be refused when (having given the applicant the opportunity to remedy the same) any of the documents used in the preparation of the request is false or does not conform to the legal or regulatory requirements or, in the case of takeover registrations only, registration of the offer is illegal or fraudulent.

All of the publicity materials related to a specified public offer are subject to prior approval by the CMVM, which may authorise advertising in advance of the approval of the prospectus or registration of the offer, as long as it does not cause problems to the addressees or to the market.

**Launch, Execution, and Amendments**

All public offerings of securities in relation to which the drafting of a prospectus is mandatory require the intervention of a financial intermediary, who will

provide at least assistance and placement services, in public offers for distribution and assistance services in the context of takeover bids, following the preliminary announcement as well as receipt of acceptance orders. Compulsory intermediation can nevertheless be provided by the offeror itself if it is duly authorised to act as a financial intermediary.

The price of the offer is a single one, except for the possibility of different prices according to different classes of securities or addressees, fixed in objective terms and in the legitimate interest of the offeror. The offer can only be subject to conditions that correspond to the offeror's legitimate interest and that do not affect the normal functioning of the market — it can never be subject to conditions the verification of which depends on the offeror.

The acceptance of the offer by the addressees is made through an order addressed to a financial intermediary, which can be revoked up to five days before the offer's deadline or within a shorter term if set out in the offer documentation. At the end of the offer period, the offer result is immediately assessed and disclosed by a financial intermediary who gathers all the acceptances received, or in a special regulated market session. In the case of a public distribution offer, the financial intermediary or the operator of the regulated market also must inform if admission to trading on a regulated market has been applied for.

In the case of an increase in the risks of an offer due to an unforeseen and substantial modification of the circumstances on which, as known to the addressees, the decision to launch the offer was based, the offeror may, within a reasonable period and by means of the CMVM's authorisation, modify or revoke the offer. This is the only circumstance under which the offeror may revoke the offer. The offeror may also modify the offer by reducing the price initially announced by at least 2 per cent and by reviewing the consideration as to its nature and amount up to five days before expiry of the bid period (a reviewed bid cannot contain conditions making it less favourable and its consideration must be at least 2 per cent greater than the preceding offer as to its amount.)

**Prospectus Requirements and Liability**

As a general principle, the launch of any public offer of securities must be preceded by the publication of a prospectus approved by the CMVM, but the following types of public offers are exempt from this requirement:

- Offers of securities as a result of a merger or de-merger, to at least 150 shareholders who are not qualified investors (so long as a document is made available to these with information that the CMVM considers equivalent to that of a prospectus);
- Payment of dividends in the form of shares of the same class as those that granted the right to the dividend (so long as an informative document is prepared containing the number and nature of the shares and the reasons and characteristics of the offer); and

- Offers of securities to management or employees by their employer (or a subsidiary of their employer) when the latter has listed securities (so long as an informative document is prepared containing the number and nature of the shares and the reasons and characteristics of the offer).

The issuer also may prepare a basic prospectus (which must be the subject of an addendum whenever updated information is available), for public offers of debt securities, including warrants, issued in the context of a programme (ie, at least two issues during a 12-month period) or debt securities issued continuously or repeatedly by a credit institution (so long as the amounts received are used to invest in assets that secure the liabilities of these securities until their maturity date and, in case of insolvency of the issuer, the amounts are used on a priority basis to pay the principal and interest of the securities). The contents of such base prospectus are defined in EC Regulation Number 809/2004.

A prospectus must include information on the individuals who are responsible for its content, the objectives of the offer, the issuer and its activity, the offeror and its activity, the issuer's corporate governance structure, the name of the members of the issuer's and the offeror's statutory bodies, and the financial intermediaries that are members of the underwriting consortium, when such exists. In addition to these, specific information requirements must be included according to each type of offer as described below.

The prospectus of a public distribution offer (to which EC Regulation 809/2004 also applies) must include a summary that refers to the essential characteristics of the offer and the risk factors associated with the issuer, the guarantor (if applicable), and the securities object of the offer. If the public distribution offer affects securities already admitted or expected to be admitted to trading on a regulated market situated or functioning in Portugal or in any other EU member state, a single prospectus satisfying the requirements for both effects can be approved and used.

When the definitive price or the number of the securities object of the offer cannot be stated precisely, the prospectus may omit this information so long as the criteria for determining these factors is set out, and the addressees may cancel their orders within at least two working days after the factors are fixed. Takeover prospectuses also must include information on:

- The consideration offered and its justification;
- The minimum and maximum amounts of securities that the offeror intends to acquire;
- The percentage of voting rights that can be exercised by the offeror in the target company and by the target company in the offeror company as well as the identification of the persons that may be related with qualified shareholders of the offeror or the offeree;
- An indication of the securities that have been acquired in the previous six months by the issuer, of the same class as those that are the object of the offer, with acquisition dates, amount, and consideration paid;

- The offeror's intentions with regard to continuity or modification of the business activity developed by the target company and, insofar as it is affected by the bid, the offeror company and, in the same terms, companies that have a control or group relationship with the offeror or offeree, consequences in terms of personnel policy, place of business, and financial strategy, maintenance of the public company status, and admission on a regulated market of the securities which are the object of the offer;
- The possible implications of the success of the offer on the offeror's financial situation as well as in the funding of the bid;
- The shareholders' agreements entered into by the offeror with significant influence over the target company;
- The agreements entered into between the offeror and any persons related with qualified shareholders or members of the corporate bodies of the target company;
- The method of payment of the consideration when the securities that are the object of the offer are also admitted to trading on a regulated market situated or functioning abroad;
- The compensation proposed in the event of removal of rights with the form of payment and method used to calculate its amount;
- The domestic legislation that will apply to agreements entered into by the offeror and holders of securities in the offeree company, following acceptance of a bid, as well as the courts having jurisdiction to resolve any disputes resulting therefrom; and
- Any charges to be borne by the addressees of the bid.

If the consideration consists of securities, issued or to be issued, the prospectus must include all information which would be required if the securities were the object of a public offer for sale or subscription. At the request of the issuer or offeror, the CMVM may authorise the omission from the prospectus of information the disclosure of which would be contrary to the public interest, or seriously detrimental to the issuer, as long as such omission would not be likely to mislead the public with regard to facts or circumstances, the knowledge of which is essential for the assessment of the securities which are the object of the offer or if such information is not material. The prospectus may only be disclosed after approval by the CMVM, and must be made available to the public in reasonable advance of the offer launch by way of:

- Publication in one or more newspapers of mass circulation throughout the country;
- In the form of a brochure available, free of charge, to the public, in particular at the offeror's and issuer's headquarters, at the headquarters and branches of the financial intermediaries in charge of gathering the addressee's orders, and at the headquarters of the operator of the regulated markets in which the securities are or will be admitted to trading; or

- In the website of the issuer, the financial intermediaries responsible for underwriting the offer, the regulated market where listing has been sought, or the CMVM.

If either of the first two methods is used, the prospectus also must be made available in electronic format in one of the sites referred to in the last point. The CMVM is the competent entity to approve a prospectus of public distribution offers where the issuers have their registered offices in Portugal, in the case of shares and other securities that give right to their subscription (and as long as the issuer also is the issuer of the underlying securities), with a par value of below €1,000.

The member states where the issuer has his registered office or in which the securities have been or will be admitted to trading or offered to the public are, at the option of the issuer or the offeror, competent in relation to distribution offers of debt securities and other securities that give right to their subscription or equivalent cash amounts (as long as the issuer of such securities is not simultaneously the issuer of the underlying securities or a group member of such issuer) with a par value of more than €1,000. The CMVM may delegate its approval powers in relation to a prospectus to an authority in another member state, with the latter's agreement and with notice to the European Securities and Markets Agency.

A prospectus approved in another member state for a public distribution offering to be made in Portugal and in another member state is valid in Portugal so long as the CMVM receives an approval certificate from the authority of the other member state and a copy of the approved prospectus (with a translation of the summary).

The prospectus of a takeover bid over securities admitted to trading on a regulated market situated or operating in Portugal and approved by a competent authority of another member state will be recognised by the CMVM, provided that such prospectus is translated into Portuguese and that a certificate, issued by the competent authority responsible for approval of the prospectus, stating that the prospectus meets the relevant Community and national provisions, accompanied by the approved prospectus, is made available to the CMVM. The CMVM may require that any supplementary information resulting from the specificities of the Portuguese regime concerning formalities relating to consideration payment, acceptance of the bid, and tax regime applicable thereto be added to the prospectus.

The offeror, the members of the offeror's management body, the issuer, the members of the issuer's management body, the promoters (in the case of offer for subscription for the incorporation of a company), the members of the auditing body, accounting firms, and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based, the financial intermediaries in charge of assisting with the offer, and any other entities that agree to be named in the prospectus as being responsible for

any information, forecast, or study included in the same are potentially liable for damages caused by errors or inaccuracies in the prospectus, unless they prove they have acted without fault.

Liability can be avoided if any of the individuals concerned prove that the addressee knew or should have known about the deficiency of the prospectus' content on the date of issue of the contractual declaration or when cancellation of the securities transaction was still possible, or if the damages arose from the summary of the prospectus or its translation, unless when read with the rest of the documentation it contained erroneous, misleading, or incompatible information or it doesn't provide fundamental information to allow the investors to determine if and when they should invest in the mentioned securities.

**Distribution, Subscription, and Public Sale Offers**

Following the implementation of the Prospectus Directive, the former principle of prior registration of all offers was revoked, the current approval of public distribution and subscription offers resulting now from the corresponding prospectus approval.

In relation to public distribution offers, the Securities Code set out a specific information disclosure duty: the issuer, the offeror, and financial intermediaries must, until the information relating to the offer is made public, limit the disclosure of information related to the offer to what is necessary to fulfil the objectives of the offer, warning the addressees as to the privileged nature of the information issued, and limit the use of privileged information to such purposes as necessary for the preparation of the offer.

Additional documentation requirements are imposed for the application for approval of a public subscription offer to incorporate a company, which must include the identification of the promoters, evidence of the subscription of the minimum share capital by the promoters, a copy of the draft by-laws, and a provisional commercial registration certificate. The launch by the same entity of a new public subscription offer of securities of the same kind as those which had been the object of a previous offer, or the launch of a new series, is subject to the prior full payment of the subscription price by all addressees (or giving notice to those that have not yet paid up) of the previous series or issue.

The application for approval of the prospectus of a public sale offer is submitted with documents that evidence that the securities offered have been blocked. The issuer of securities distributed in a public sale offer must provide the offeror, at the latter's expense, with the information and documentation necessary to prepare the prospectus. The Securities Code allows a reduction of not more than 2 per cent of the price first announced in the context of a public sale offer.

The Securities Code allows bookbuilding to determine the viability of a proposed public distribution offer but never in cases of takeovers. Bookbuilding may only commence after the disclosure of the preliminary prospectus, and no offers may be or are made through the bookbuilding process, although more

favourable subscription or purchase rights may be offered to those consulted. The preliminary prospectus for bookbuilding purposes is subject to approval by the CMVM.

**Takeover Bids**

The CMVM will have powers to supervise any takeover bids where the target issuers:

- Have their registered offices in Portugal, provided the securities concerned by the bid are admitted to trading on a regulated market situated or operating in Portugal or are not admitted to trading on a regulated market at all; or
- Are subject to a foreign law, provided that the securities concerned by the bid are admitted exclusively to trading on a regulated market located or operating in Portugal; or, if these are not admitted to trading in the member state where the registered office of the issuer is located, have been first admitted to trading on a regulated market situated or operating in Portugal.

If the admission to trading of the securities concerned by the bid is simultaneous in more than one regulated market of several Member States but does not include the member state where the registered office of the issuer is located, the issuer must, on the first day of trading, choose the competent authority to supervise the bid from among the authorities of such Member States and notify such decision to the regulated markets in question and the corresponding supervisory authorities.

The following rules concerning public offer announcements, duties to report any transactions carried out, issuers' duties, competing offers, and mandatory takeovers are not applicable to takeover bids over securities other than shares or securities incorporating the right to acquire shares. As soon as the decision to launch a takeover is taken, the offeror must address a notice to the CMVM, to the issuer, and to the operators of the markets in which the securities object of the offer or included in the consideration are admitted to trading, and publish a preliminary announcement giving notice as to:

- The identity and head office of the offeror, the target, and the financial intermediary in charge of assisting with the offer;
- The securities object of the offer;
- The consideration offered;
- The percentage of voting rights held in the target company directly by the offeror or by related entities;
- A summary statement of the offeror's intentions, notably with regard to continuity or alteration of the business of the target company and, insofar as it is affected by the bid, the offeror company, and, in the same terms, companies which have group or control relationships with the offeree or offeror companies; and

- The status of the offeror with respect to the management limitations imposed on the target following the offer announcement and on the suspension of statutory limitations to transfer of shares and voting rights.

The determination of a maximum or minimum limit of the quantity of securities to be acquired and the subjection of the offer to any conditions will only be effective to the extent that they are included in the preliminary announcement. The preliminary announcement binds the bidder to launch the offer in terms not less favourable than those disclosed in such document, to apply for the takeover registration within 20 days (this term can be extended up to 60 days by the CMVM), and to inform the workforce representative of the contents of the offer document following its disclosure. Until the publication of such announcement, the offeror, the target, its shareholders, and its service providers are subject to a confidentiality duty.

Consideration for the securities that are the object of the offer can consist of cash, securities (already issued or to be issued), or both. The offeror must deposit the relevant cash amount in a financial institution or present an adequate bank guarantee, before registering the offer. Securities eligible to incorporate the consideration must have adequate liquidity and be easy to value. Should these have already been issued, they must be registered or deposited frozen to the order of the offeror in a centralised securities system or with a financial intermediary.

If these are not issued by the offeror, the preliminary announcement and the public offer announcement of the takeover also must indicate the information relating to the issuer and the securities issued or to be issued by the same, similarly to that contained in the offer announcement. In addition to the above general requirements on prospectuses approval, the application for registration of takeovers submitted to the CMVM should include documents evidencing the following facts:

- Submission of the preliminary announcement, the draft public offer announcement, and the draft prospectus to the target company and to the competent authorities of the regulated markets in which the securities are admitted to trading;
- Deposit of the consideration in money or issue of a bank guarantee which guarantees its payment; and
- Freezing of issued securities comprised in the offer consideration.

As from the publication of the preliminary announcement and until the assessment of the offer's result, the offeror and its entities related to such offerors for the purposes of qualified shareholdings attribution become subject to certain limitations. They cannot trade, outside the regulated market, securities of the class of those which are the object of the offer or of those which comprise the consideration except if authorised by the CMVM with a previous report from the target company, and must inform the CMVM daily of

the transactions carried out by each of them relating to the securities issued by the target company or of the class of those which make up the consideration offered.

The securities of the class of those which are the object of the offer, acquired after the publication of the preliminary announcement, will be included in the calculation of the minimum amount which the offeror proposes to acquire. In the context of voluntary takeovers, the CMVM may determine the review of the consideration (if, due to such offeror acquisitions the initial consideration does not appear reasonable) while, in mandatory takeovers, the offeror must raise the consideration up to an amount equal to the highest price paid for the securities acquired. During this same offer period, the target management members must inform the CMVM of any dealings by such entities (or related entities thereto) in securities issued by the target.

The publication of the takeover preliminary announcement also triggers limitations and obligations from the target's perspective. The management body of the target company cannot carry out any acts that materially affect the net asset situation of the target company and which can significantly affect the objectives announced by the offeror (excluding the normal day-to-day management of the company) from the moment it has knowledge of the bid launch decision for a takeover for more than one-third of the securities of the respective class, and until the assessment of the result or until the termination of the respective process.

The scope of this restriction includes execution acts of decisions approved before the above-referred acknowledgment which have not yet been partially or totally implemented (excluding, nevertheless, obligations assumed by the target before such period, acts authorised by a general shareholders' meeting convened for this purpose, and acts intended to seek competing bids).

In addition, within eight days of receipt of the draft prospectuses and announcement of the bid and within five days of disclosure of any addenda to the offer documents, the board of directors of the target company must send to the offeror and the CMVM and disclose to the public a report on the opportunity and terms of the offer, which must include an opinion on the following aspects: type and amount of the consideration offered, offeror's strategic plans for the target company, consequences of the bid on the interests of the target company in general and, in particular, on the interests of its employees and their terms of employment as well in the company's places of business, and the intentions of members of the boards who are simultaneously shareholders in the target company in respect of acceptance of the bid. Should the board receive from the target's employees an opinion on the repercussions of the bid on employment, it must enclose such opinion as an appendix to the board report.

The Takeover Directive also contemplates the abolition of a series of defensive barriers in the context of takeover bids, including non-application of restrictions to the transfer of voting rights or restrictions concerning voting rights or multiple votes. These were implemented by the Securities Code, which now

foresees the possibility of public companies introducing statutory suspensions of the effectiveness of restrictions on transfers and voting rights (which will therefore not apply to transfers resulting from acceptance of a bid) if following the launch of a takeover bid the offeror holds at least 75 per cent of the target's voting rights.

This 'breakthrough rule' is nevertheless not mandatory (it can be adopted at the public companies' shareholders' criteria) and subject to the principle of reciprocity (ie, the by-laws can state that the suspension regime does not apply to takeover bids conducted by offerors which are not subject to the same rules). Amendments to public companies' by-laws for the purposes described above must be disclosed to the CMVM and the public when such companies are subject to Portuguese law.

Following approval of the takeover prospectus and registration of the takeover bid by the CMVM, the offeror of a takeover bid must publish a public offer announcement containing the essential elements of the offer, including:

- The identification of offeror, issuer, and financial intermediaries;
- Capacity in which the financial intermediaries act in the offer;
- The type and number of securities object of the offer;
- The type of offer;
- The price and terms of payment;
- The duration of offer period;
- The criteria for over-subscription;
- The conditions precedent for the validity of the offer;
- The percentage of voting rights held by the offeror and related parties in the target company;
- The locations where the prospectus is available; and
- The identification of the entity responsible for the calculation and disclosure of the results of the offer.

The public offer announcement must be published, at the same time the prospectus is disclosed, in a communications media with wide circulation in the country and in a communications media indicated by the operator of the regulated market where the securities are listed.

The offer period for the takeover can vary between two and 10 weeks, counting from the disclosure of the offer announcement. The CMVM, at its discretion or at the request of the offeror, can extend the offer period in case of modifications, launches of competing offers, or when the protection of the interests of the addressees so justifies. Until five days before the end of the term of the offer, the offeror may revise the consideration, in relation to its type or amount. The revised consideration must be at least 2 per cent greater in value than the previous one. The declarations of acceptance of the offer prior to the revision are considered effective for the revised offer.

As from the publication of the preliminary announcement of the takeover for securities admitted to trading on a regulated market, any other takeover of the same class of securities may only be carried out through a competing offer, which will also be subject to the rules applicable to takeover bids. The competing offer must be launched up to five days before the end of the offering period of the initial offer, for a scope at least equivalent to that of the initial offer and for a consideration amount 2 per cent higher than such offer. Entities holding voting rights which can be deemed attributed to the initial offeror are not allowed to launch any competing offer.

**Mandatory Takeover Bids and Squeeze-Out Provisions**

In accordance with the reasoning that the benefits resulting from the control over public companies should be shared with minority shareholders, the Securities Code sets out a duty to launch a mandatory takeover bid (over the remaining shares and other securities conferring the right to subscribe shares issued by the target) each time a shareholder exceeds, directly or indirectly, one-third and 50 per cent of effective voting rights attributable to the existing share capital of a public company.

However, an effective dominium criteria is adopted, which means that the launch of an offer is not required when the shareholder exceeding the limit of one-third proves that it has neither control of target nor is in a group relationship with such target (but will be under the obligation to notify the CMVM of any increase in aggregate of more than 1 per cent in its voting rights). The one-third trigger can be overruled by the company's by-laws.

The consideration offered in a mandatory takeover context is subject to rigid determination criteria. The amount offered must be the higher of the highest price paid by the offeror (or by any person holding rights which are deemed attributable to the offeror) for acquisition of shares in the six months preceding the publication of the offer announcement or the average price of those securities on the regulated market during the same period.

Furthermore, if the bidder chooses to offer securities as consideration, it must designate a cash alternative of equivalent value. If the consideration cannot be calculated by reference to the criteria referred to above or if the CMVM decides that the consideration, in cash or securities, proposed by the offeror is not justified or equitable, or is insufficient or excessive, the minimum consideration will be calculated, at the offeror's expense, by an independent auditor designated by the CMVM.

Exemptions to the mandatory bid rule are foreseen when the thresholds are exceeded as a result of the acquisition of securities in the course of a takeover launched without any restriction relative to the quantity or maximum percentage of securities to be acquired, the execution of a financial redress plan, or the merger of companies, as long as the resolution of the general meeting of the potential target expressly specifies that the merger would result in the duty to launch a mandatory takeover. The exemption must be recognised by way of a

declaration issued by the CMVM at the request of the interested party and published immediately. The duty to launch a takeover can otherwise be suspended if the entity bound by it undertakes to terminate the situation triggering the duty to launch the takeover in the following 120 days, by way of written notice addressed to the CMVM.

Squeeze-out procedures apply to bidders that, following a takeover offer, acquire (directly or indirectly) 90 per cent of the voting rights (up to the determination of the outcome of the bid) corresponding to the share capital of a public company subject to Portuguese statutory law and 90 per cent of the voting rights covered by the bid, and who may compulsorily acquire the remaining shares of the company for a fair consideration in cash, within three months after the assessment of the offer's result.

The squeeze-out procedure entails the publication of a preliminary announcement which must be sent to the CMVM for registration and deposit of the consideration on behalf of the holders of the remaining shares with a credit institution. The compulsory acquisition becomes effective on publication of the offer registration with the CMVM and implies the immediate loss of public company status, as well as the exclusion of the securities from the relevant regulated market.

If the squeeze-out procedure is not timely initiated by the offeror, the holders of the remaining shares can, within three months after the assessment of the offer's result, exercise their rights to sell out, addressing the controlling shareholder an invitation to make a proposal to acquire their shares within eight days.

If no offer or a non-satisfactory offer is received, the remaining shareholders can decide to compulsory sell out by providing the CMVM with a notice to this end with evidence enclosed of the deposit or freezing of the shares and account of the consideration calculated according to criteria set in the Securities Code. In such cases, the sale becomes effective from the date of CMVM notification to the controlling shareholder.

## Criminal Offences

### Insider Dealing and Market Manipulation

Any one who holds privileged information due to their capacity as member of a managing or supervisory body of an issuer or as shareholder, or due to their profession or public function or having otherwise obtained the information illicitly, and who passes on this information to someone outside the regular scope of its functions or, based on this information, trades or advises someone to trade in securities or in other financial instruments, or orders their subscription, acquisition, sale, or exchange, directly or indirectly, on their own account or for third parties, is punishable with imprisonment for a maximum of five years or with a fine up to a maximum of 360 days.

For the purposes of insider-dealing provisions, privileged information is understood to be all non-public information that, being accurate and with

respect to any issuer or securities or other financial instruments, would be capable, if it were given publicity, of influencing in a sensitive manner its price in the market.

Entities which are not listed above but who have access and pass on such information or trade or advise someone to trade in similar conditions (tippers) are also subject to imprisonment for a maximum of four years and fines of a maximum of 240 days.

Market manipulation practices include disclosure of false, incomplete, exaggerated, or biased information and effecting fictitious operations or fraudulent practices capable of artificially varying the regular functioning of the securities or other financial instruments market so as to change the conditions of price development, the regular conditions of offer or demand, or the normal conditions of issue and acceptance of a public offering. Such actions are punishable with imprisonment for a maximum of five years or a fine up to a maximum of 360 days.

The members of the managing entity and those responsible for the direction or inspection of areas of activity of a financial intermediary who, being aware of the facts above described, performed by persons directly subject to their direction or inspection and in the performance of their functions, do not stop them immediately, will be co-liable and subject to imprisonment for a maximum of four years or a fine payable up to a maximum of 240 days, if a more serious punishment is not applicable under any other legal provision.

**Proceedings**

The attempt of any of the two above crimes also will be punished, even if the criminal act does not reach its execution. Once the facts that may be qualified as crimes against the securities or other financial instruments have been established, the executive board of the CMVM may determine the commencement of preliminary investigation proceedings. The process of investigation is initiated and directed by the executive board of the CMVM, which can require the defendant to present all necessary explanations, information, documents, objects, and elements required to confirm or deny the suspicion of crime against the securities or other financial instruments market.

For this purpose, the CMVM may proceed with the seizure and inspection of any documents, independently of their media, assets, or objects associated with the possible practice of crimes against the securities or other financial instruments market, or proceed with the sealing of objects not seized in the premises of the persons and entities subject to their supervision, to the extent necessary for the investigation of the possible existence of crimes against the securities or other financial instruments market.

The CMVM also may apply the following accessory penalties to any insider dealer or market manipulator disqualification, for a period not exceeding five

years, of the practice by the agent of the profession or activity associated with the crime, including prohibition of the practice of management, direction, command, or inspection and, in general, representation of any financial intermediary, in the scope of some or all intermediary activities in securities or in other financial instruments, and publication of the condemnation sentence, at the expense of the defendant, in locations adequate to satisfy the objectives of general prevention of the legal system and the protection of the securities or other financial instruments market. The perpetrator of the crime will also be obliged to deliver any benefits received from the committed crimes.

### Misdemeanors

The Securities Code also contains a long list of actions qualified as misdemeanors which may incur fines, quantified depending on the seriousness of the action:

- Between €25,000 and €5 million when very serious;
- Between €12,500 and €2.5 million when serious; and
- Between €2,500 and €500,000 when qualified as less serious.[14]

Very serious misdemeanors include the following actions: disclosure of information that is not complete, true, updated, clear, objective, and licit; the failure to submit documents to the Information Disclosure System of the CMVM; and failure to communicate or publish qualified holdings, transfer of frozen securities, execution of a public offering without approval of the prospectus or prior registration with the CMVM, and non-launching of a mandatory takeover.[15]

## Jurisdictional Conflicts

### In General

The revised Securities Code recognised the inadequacy of the existing general rules adopted by law or international conventions such as the Rome or Hague Convention to determine the law which should govern multinational situations arising from the internationalisation of the securities markets.

Accordingly, the Securities Code has adopted specific rules on jurisdiction conflicts, setting out both multilateral and unilateral techniques to settle potential jurisdiction conflicts.

14 Misdemeanors are punishable whether intentional or solely negligent, and attempt also is punishable.

15 On 24 May 2011, Law Number 46/2011 was enacted and, as from its entry into force, a new court (specialised in competition, financial regulation, and supervision) has been set up in order to, notably, rule on appeals of decisions or any other legally challengeable measures taken by the CMVM, under misdemeanor procedures.

**Multilateral Approaches — Procedural Solutions**

The Securities Code provides bilateral conflict of laws rules which do not provide material solution to the relevant situation but, instead, determine the law which should govern such situation (which in actual fact can either be Portuguese or foreign law) according to a specified connection factor.

As a general principle, the conflict of law rules in the Securities Code also allocate directly the material law rules applicable by the foreign system, therefore excluding the possibility that the resolution of the conflict be forwarded to another system of law by the foreign conflict of law rules. Among the unilateral solutions adopted are:

- The capacity to issue securities where the form of its representation will be ruled by the *lex personalis* of the issuer, which is primarily determined by the company's head office;
- As a general rule, the contents of the securities will also be ruled by the *lex personalis*, but the Securities Code grants the issuer of bonds or debt security the possibility to elect another jurisdiction, as long as the choice of law is mentioned in the offering registration; and
- The assignment and granting of security over specified securities will be governed, as to securities integrated in a centralised system, by the law of the state in which the entity managing such system is located; as to registered or deposited securities not integrated in a centralised system, by the law of the state in which the entity where such securities are registered or deposited is located; and, as to securities which are neither integrated in a centralised system nor registered or deposited, by the *lex personalis* of the issuer.

**Unilateral Approaches**

In most cases, the private international law solutions adopted in the Securities Code represent unilateral approaches, where substantive material law solutions (which directly regulate international situations, instead of designating the applicable law) are provided.

**Rules of Mandatory Application**

The Securities Code also provides rules which demand mandatory application, even in the context of international situations that would otherwise be subject to foreign law in accordance with the general Portuguese conflict of law rules, provided that a material connection can be established between such situations and the Portuguese jurisdiction.

Such material connection to the Portuguese territory will be likely to exist when orders are addressed to regulated markets members or multilateral negotiation systems (multilateral negotiation systems) members registered with the CMVM, and operations are carried out therein, activities are carried out, and acts are performed in Portugal, or diffusion of information is made accessible in Portugal making reference to situations, activities, or acts regulated by Portuguese law.