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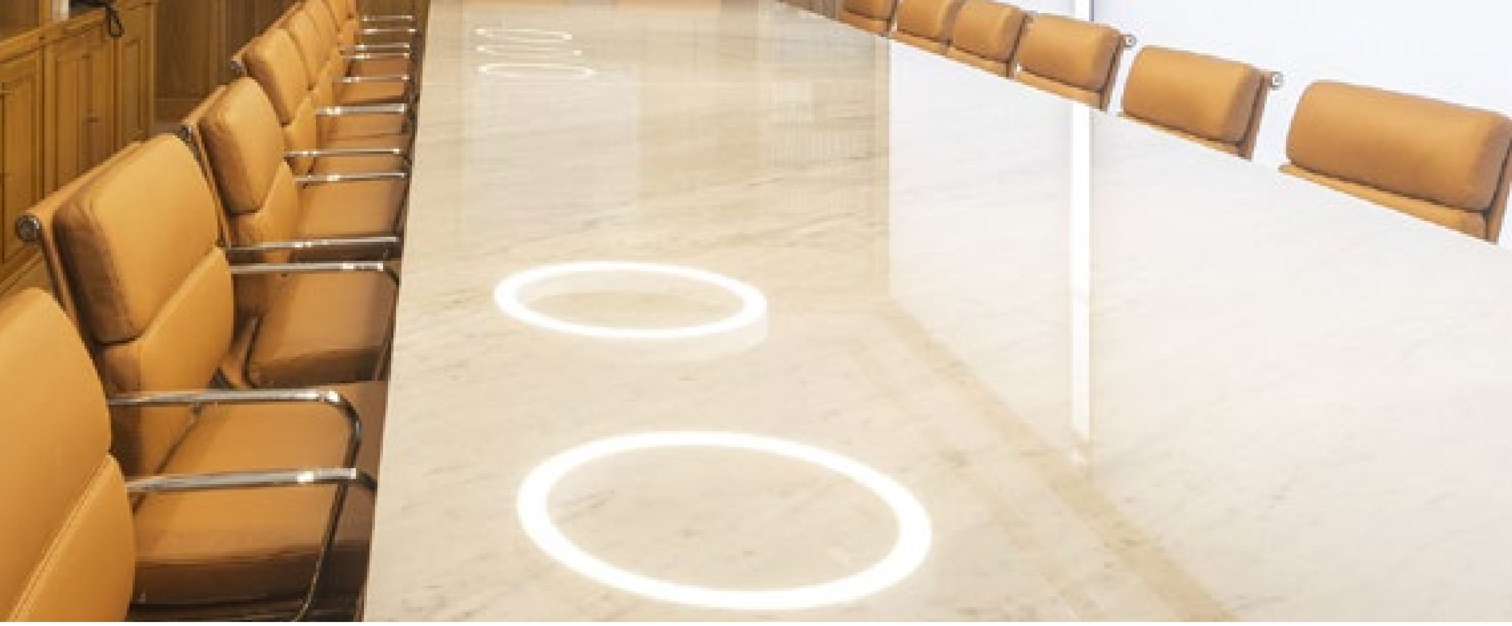
Revised Portuguese Securities Code

Road map



Revised Portuguese Securities Code

Road map

A careful cross-cutting revision of the Portuguese Securities Code (PSC) was long overdue – different from those occurring in a fragmented way when transposing European directives.

It is in this context that Law no. 99-A/2021, of December 31 (Law no. 99-A/2021) was enacted, introducing several changes not only to the PSC, but also to other laws, such as the General Regime of Collective Investment Undertakings (*Regime Geral dos Organismos de Investimento Coletivo*) and the Legal Regime of Audit Supervision (*Regime Jurídico da Supervisão de Auditoria*).

At a first glance, given the extent of the amendments, one might think that Law no. 99A/2021 has revolutionized the PSC. Once the lens is sharpened, however, one concludes that that is not the case – nor did it have to be – although there are, of course, changes worth mentioning that the set of texts we present herein aim to broadly address.

If we were to attempt systematizing the changes that Law no. 99-A/2021 introduced in the PSC, we would suggest grouping them into the following four major groups:

1. Some amendments aim to **simplify the construction of the law in several areas**, such as:

    a. The fine-tuning of the transposition of European directives that experience has shown to be relevant for the purposes of greater legal certainty, where, for example, the so-called **Shareholder rights and Transparency Directives** stand out;

    b. The changes introduced to **eliminate references to specific European Union**

acts, promoting clarity and stability in the PSC.

2. Several amendments with the purpose of **eliminating concepts or requirements that are specific to the Portuguese regime or that are misaligned with concepts of European legislation or gold plating**, as occurs with:

    a. The **concept of the publicly traded company**, which, because it has no parallel in other legal systems, was pointed out as a "factor that generates uncertainty for economic agents" at various levels and is now replaced, in most cases, by the concept of issuer of shares admitted to trading on a regulated market;

    b. The **concept of public offer**, which is now fully aligned with the prospectus requirement regime under Regulation (EU) 2017/1129 of the European Parliament and of the Council, of 14 June 2017;

    c. The requirement for **mandatory financial intermediation in public offers**, which has now been eliminated; and

    d. The withdrawn of the **2% of voting rights** threshold for the reporting of qualifying holdings.

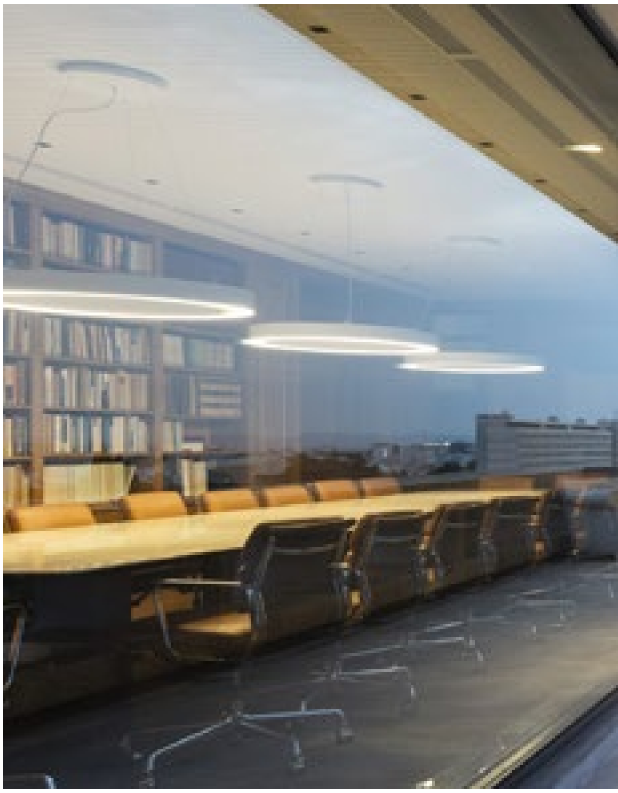
3. Changes with the purpose of making **other areas of the regime with impact on the attractiveness of the capital market more flexible**, of which we would highlight:

    a. The regime of **exclusion from admission to trading**, in which it is worth noting, for example, that the entity acquiring the minority shareholders' shares may now be a shareholder of the company, a third party, or the company itself;

    b. The **squeeze-out** regime, in which it is now only necessary for the bidder to reach 90% of the voting rights (and not also 90% of the voting rights covered by the bid);

    c. The amendment of the regime for **the revision of offers**, which, for example, now allows the offeror to broadly revise the terms and conditions of its offer (provided that the overall conditions are not less favorable than the original conditions for the respective addressees), thus allowing changes in market conditions to be taken into account while an offer is pending;

    d. The **takeover bid** regime, which is now only applicable to companies with shares admitted to trading on a regulated market and suffers several other changes, such as the fact that it is now possible to prove lack of control when more than half



of the voting rights of the target company are held and, also, with regard to the rules for determining the consideration or competing bids.

4. The adoption of **innovative regimes** in light of our corporate legal framework, as is the case:

    a. Of the new **legitimacy certificates** for the purposes of voting at the general meeting, which facilitate the participation of beneficial owners of the shares in the life of the company; and

    b. Of the introduction of **multiple voting**, derogating principles rooted in our legal system with the objective of promoting financing through the public issuance of capital by issuers, where it is intended to maintain an unchanged control structure.

Finally, three closing remarks:

1. Without prejudice to the intentions behind this change to the PSC, **only its construction and practical application** – not only by economic agents, but also by the supervisor – will **allow us to assess whether the objectives have been achieved** and whether the national capital market will become more dynamic and attractive;

2. A **thoughtful assessment of the effects of this revision** will still have to be made in **the medium term in light of**: *(i)* the effects of reducing regulatory barriers directly that is intended with this revision; *(ii)* the effects of the suppression of reporting duties which the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM) announces that may result from this revision (and which are not yet fully known); and *(iii)* some strengthening of the CMVM powers resulting from this revision in certain areas (for example, the power to require the convening of general meetings or to limit the distribution of dividends); and

3. Despite the apparent simplicity as to the entry into force of the law, *i.e.*, as to the PSC, on the thirtieth day following its publication (January 30, 2022), the **transitory provisions** are not entirely free of doubt, notably in what concerns the regime applicable to public companies on the date of publication of Law no. 99-A/2021.

The analysis of this revision deserves our more immediate attention, reflected in this road map, but it will also justify a **more in-depth debate that, at ML, we propose to develop throughout 2022 with the various market agents**, in initiatives directed at **issuers**, **investors** and **newcomers** that aim to enter the national capital market.

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Portuguese Securities Market Commission

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General Meeting

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PCC

Portuguese Companies Code

PIE

Public interest entities

PSC

Portuguese Securities Code

Revised PSC

Portuguese Securities Code revised by Law no. 99-A/2021

ROC (*Revisor Oficial de Contas*)

Statutory Auditor

SROC (*Sociedades de Revisores Oficias de Contas*)

Statutory Audit Firms

UBO

Ultimate Beneficial Owners

Suppression of the concept of "public company" ("*sociedade aberta*") – main impacts from the issuers, investors, and newcomers' perspective

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Intending to bring the Portuguese framework in line with the European Union framework and thus enhancing the equal treatment of issuers and investors and facilitating their access to the markets, the Revised PSC suppressed the concept of "public company" ("*sociedade aberta*") and revoked and amended the provisions of the PSC applicable to such type of companies.

From the perspective of issuers, investors and newcomers, the suppression of this concept does not bring great novelties to the legal regime applicable to the issuers of shares, already largely inspired by the European Union framework. However, the suppression of this concept will definitely contribute, on one hand, to a simplification of regimes and a greater alignment with European practices and, on the other hand, to access the market through the mere issuance of equity instruments and/or admission to non-regulated markets.

In this chapter we will briefly place in context the suppression of the concept of "public company" ("*sociedade aberta*") and summarily list the impacts of such suppression on the regulation of Portuguese capital markets, in particular in matters regarding: *(i)* the right of securities' holders to an equal treatment; *(ii)* the transparency regime; *(iii)* the resolutions adopted by shareholders' general meetings; *(iv)* public offerings; *(v)* the loss of the status of "public company" ("*sociedade aberta*"); and *(vi)* the applicable sanctionatory regime, referring, in some cases, to other chapters of this road map for a more detailed information.

I. The concept of "public company" ("*sociedade aberta*") as we know it was introduced in the Portuguese legal system in 1999, with the approval of the PSC.

The preamble of Decree-Law no. 486/99, of 13 November, stated that the concept of "public company" ("*sociedade aberta*") intended to "deepen the autonomy of the public companies' legal regime, strengthening the transparency of their management and control (...) and broadening the corporate resolutions' legal framework, in line with the modern trends regarding the governance of public companies" (our translation).

However, the concept of "public company" ("*sociedade aberta*") never found parallel in other legal systems (which do not acknowledge the concept of "public company" ("*sociedade aberta*"), but only the concept of listed company ("*sociedade cotada*") and its application became a "factor generating uncertainty among economic agents", notably as to the qualification criteria, the applicable legal regime, and the requirements for delisting.[1]

In fact, the parallel coexistence of these two concepts in the Portuguese legal system – "public company" ("*sociedade aberta")* and listed company ("*sociedade cotada*") – created countless difficulties in the transposition of directives and in the enforcement of European regulations, as well as in their practical application, imposing additional requirements of a merely national nature to those arising from the European legislation.

The concept of "public" company ("*sociedade aberta*") became increasingly inadequate to the reality, characteristics, and competitiveness of the Portuguese market and, recognizing such inadequacy – 22 years after being introduced –, the Revised PSC suppressed the concept, in order to create conditions for "market participants, at national level, to act in a regulatory environment under equal conditions to their competitors".[2]

II. Until now, the classification of a company as a "public company" ("*sociedade aberta*") applied to: *(i)* issuers of shares subject to any public offer for subscription or public offer for sale or exchange of more than 10% of the respective share capital; *(ii)* companies resulting from a demerger or incorporating part of the assets of a "public company" ("*sociedade aberta*"); and *(iii)* companies whose shares or other securities granted a right to their subscription or acquisition, which were admitted to, or which had been admitted to, trading on a regulated market.

This classification had as an immediate effect the application of (on top of the ordinary corporate framework foreseen in the PCC) the specific legal regime foreseen in the PSC for "public companies" ("*sociedades abertas*"), which was successively "undermined" by the listed companies' regime. Such specific legal regime covered, among others, matters related to the right to equal treatment, information duties, corporate resolutions, public offers, and delisting.

With the suppression of this concept, the regulatory framework set out in the Revised PSC is now centered solely around the concept of issuers of securities and, with a more demanding regime, of issuers of shares.

Therefore, with this suppression, the legal regime applicable to companies qualified as "public" ("*sociedades abertas*"), for reasons other than the admission of shares to trading on a regulated market, becomes more flexible and market access is boosted by the mere issuance of equity instruments and/or admission to non-regulated markets.

[1] See the explanatory statement to the Proposal of Law no. 94/XIV/2.ª.

[2] See the explanatory statement to the Proposal of Law no. 94/XIV/2.ª.

However, the suppression of the concept of a "public company" ("*sociedade aberta*") does not bring great novelties to the current issuers of shares or to their shareholders, not even to any newcomer to those markets, as most of the legal regime keeps applying to those entities since it was already largely inspired by the European Union framework. This is particularly evident, for instance, in matters related to market abuse, information duties regarding financial information, qualifying shareholdings and corporate governance, and shareholders' rights and public offers, as detailed in other chapters of this road map.

III. The moment from which the legal regime applicable until now to "public companies" ("*sociedade aberta*") will cease to apply to them does not seem entirely clear considering the relevant transitional provision, as it suggests a case-by-case analysis.[3]

In view of this provision and following the Circular – Revisão do Código dos Valores Mobiliários da CMVM de 31 de dezembro de 2021 issued by the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM) the following seems to result:

(i) "Public companies" ("*sociedades abertas*") with no shares admitted to trading on a regulated market on 31 December 2021 shall continue to be governed by the relevant legal regime foreseen in the PSC and in the CMVM's regulations in force up until now, and, as from 1 January 2023, shall automatically lose their "public company" status, thus ceasing to be subject, from that point onwards, to that legal regime and to CMVM's supervision as a "public company" ("*sociedade aberta*");

(ii) In any case, and cumulatively, if such companies, on 31 December 2021, are issuers of other securities (other than shares) or come to have shares or other securities admitted to trading after that date, they shall be subject to the new regulatory legal framework of the Revised PSC, effective as of 30 January 2022;

(iii) On the other hand, "public companies" ("*sociedades abertas*") with shares admitted to trading on a regulated market on 31 December 2021 shall be subject to the new regulatory framework of the Revised PSC, effective as of 30 January 2022.

IV. We list below the main changes applicable to issuers of shares or other securities as a consequence of the suppression of the concept of "public company" ("*sociedade aberta*").

Equal treatment

The issuers of securities admitted to trading on a regulated market or multilateral trading facility – instead of "public companies" ("*sociedades abertas*") – shall ensure the equal treatment of the holders of securities issued by them belonging to the same class.

Information duties

For a more detailed analysis regarding the transparency regime of qualifying shareholdings applicable to the issuers of shares, we refer to the chapter of this road map entitled "Qualifying holdings – from the issuer and investors' perspective", which details, *inter alia*, the suppression, in the Revised PSC, of the 2% threshold applicable to "public companies" ("*sociedades abertas") issuers of shares or other securities granting the right to subscribe or acquire them, admitted to trading on a regulated market located or operating within a MemberState of the European Union.

[3] "Public companies considered as such on the date of publication of the present law shall continue to be governed by the legal and regulatory rules in force up to 31 December 2022" (our translation).

The duty to communicate to CMVM the existence of shareholders agreements aimed at acquiring, maintaining, or reinforcing a qualifying shareholding in relation to the issuer of shares, or ensuring or frustrating the success of a takeover bid has remained unchanged in the Revised PSC.

Corporate resolutions

For a more detailed analysis in this regard, we refer to the chapter of this road map entitled "[*Participation and voting in a share issuer's shareholders general meeting*]", which describes the main changes to the previously applicable legal regime, aimed at simplifying the exercise of voting rights in the shareholders' general meetings of issuers of shares.

The framework applicable to the suspension of corporate resolutions (Article 24), share capital increases (Article 25) and annulment of resolutions regarding share capital increases (Article 26) has remained unchanged in what concerns the issuers of shares.

Public offers

For a more detailed analysis in this regard, we refer to the chapters of this road map entitled "The new regime for public offers in the Portuguese Securities Code – the expected harmonization with the European legislation and other innovations" and "Revision and simplification of the takeover bids' regime", in which the following concepts are presented: *(i)* "offer of securities to the public" and duty to publish a prospectus or a document replacing it adopted in line with the European rules;[4] and *(ii)* "takeover bid" focused on issuers of shares regarding their duty to launch a mandatory bid.

We note that the process for admission to trading on a regulated market (Article 233) has remained unchanged. Nevertheless, the legitimacy to request such admission is now granted to the holders of, at least, 10% of the securities issued belonging to the same class, if the respective issuer already has securities admitted to trading on a regulated market.

Delisting

For a more detailed analysis in this regard, we refer to the chapter of this road map entitled "Voluntary delisting (voluntary exclusion from trading)".

Also aiming to ease market exit, we refer to the chapter of this road map entitled "Revision and simplification of the takeover bids' regime", in which it is detailed the amendments introduced to the squeeze out requirements.

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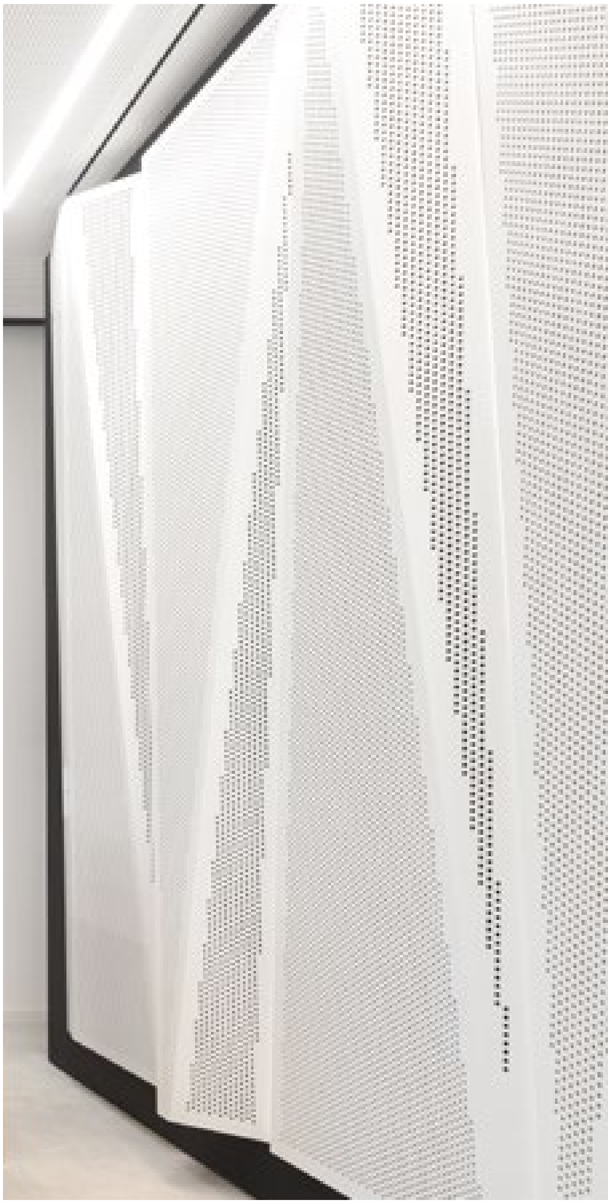
4 No longer distinguishing between a public and a private offer, *inter alia*, depending on whether the offer was addressed to the general shareholders of a "public company" ("*sociedade aberta*") or of a "company whose capital was closed to investment by the public".

Sanctioning regime

With the disappearance of the concept of "public company" ("*sociedade aberta*"), the specific sanctionatory regime foreseen for this type of companies (Articles 390 and 393 (2), paragraph *i*), of the PSC) was revoked.

V. In conclusion, one welcomes that the Portuguese legislator has recognised that the concept of "public company" ("*sociedade aberta*") has little practical relevance, only creating disproportionate obstacles and limiting the access of national issuers and investors to the market on equal terms with their international competitors. We even admit that there were conditions to cease the application of the "public company" ("*sociedade aberta*") specific regime in relation to companies without shares admitted to trading on a regulated market with a shorter adaptation period.

Although, as mentioned before, from the perspective of issuers, investors and newcomers, the suppression of the concept of "public company" ("*sociedade aberta*") does not bring great novelties to the legal regime currently applicable to the issuers of shares (which was already largely inspired by the European Union legal system), the suppression of this concept will definitely contribute, on one hand, to a simplification of regimes and a greater alignment with European practices and, on the other hand, to access the market through the mere issuance of equity instruments and/or the admission to non-regulated markets.



Qualifying holdings – from the issuer and investors' perspective

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The Revised PSC, pursuing the overall goals of updating, simplifying and clarifying the applicable regimes and harmonising the internal regulatory framework with the existing European framework, simplifies the regime applicable to the communication of qualifying holdings through the establishment of a single rule applicable to holdings in all relevant issuers and through the elimination of the communication duty in relation to the 2% threshold, seeking to increase the attractiveness of the regime to investors who wish to take up positions greater than 2% but lower than 5%.

Regarding the regime applicable to the imputation of voting rights, the Revised PSC introduces changes aimed at clarifying the imputation of voting rights: *(i)* in the context of control or group relationships; and *(ii)* in situations of shares pledged or administered, registered or deposited with a third party.

Finally, in relation to qualifying holdings, the Revised PSC now expressly provides in Article 363 (5), paragraph *f)*, for the possibility of the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM), in the exercise of its powers of prudential supervision, in relation to the entities subject to it, to inhibit the exercise of voting rights by shareholders or holders of qualifying holdings.

Amendments to the qualifying holdings regime

The changes introduced by the Revised PSC regarding qualifying holdings are focused on Articles 16, 16-B, 20 and 20-A of the PSC regarding the duties of communication and imputation of voting rights. As we shall see, these amendments seem to follow the purpose of simplification, standardization of procedures at a European level and progressive elimination of gold plating rules.

First of all, the duties of communication of qualifying holdings under Article 16 of the PSC were structured in the respective numbers 1 and 2, by reference to different types of companies, providing for the application of different thresholds of relevance of such qualifying holding to each of those types of companies. In general, there were communication duties regarding shareholdings from 5% and also regarding public companies ("*sociedades abertas*") subject to Portuguese personal law that are issuers of securities admitted to trading in a Member-State of the European Union, from 2%.

Considering this framework, the Revised PSC introduces two main changes. On the one hand, it eliminates the two sections classifying types of companies and the respective thresholds for relevant shareholdings, unifying them into a single one, and now provides that the duty to communicate a qualifying holding applies to whoever reaches or exceeds a holding of 5%, 10%, 15%, 20%, 25%, one third, half, two thirds and 90% of the voting rights corresponding to the share capital of: *(i)* any issuer for which Portugal is the competent Member State; and *(ii)* any issuer with securities exclusively admitted to trading on a regulated market in Portugal, but for which Portugal is not the competent Member-State.

On the other hand, the Revised PSC eliminates the 2% threshold, putting an end to this gold plating rule for the communication of qualifying holdings (see Article 9 of Directive 2004/109/EC of the European Parliament and of the Council, of 15 December 2004). This 2% threshold, when introduced in the PSC, may have taken into consideration the specific characteristics of the Portuguese capital market at the time of its approval, but nowadays, and considering its dimension and the global reality in which it is inserted, it does not seem to have a plausible motivation that justifies its permanence. Therefore, we highlight that the obligation to communicate to the market a qualifying holding shall only exist as from 5% of the voting rights corresponding to the share capital of a issuer of shares.

Secondly, the Revised PSC adds two new paragraphs to number 4 of Article 16, thus requiring the following information to be provided in the context of communications of qualifying holdings: *(i)* the identification of the holder, as well as the natural or legal person empowered to exercise voting rights on behalf of the holder; and *(ii)* the indication of the situations that determine the imputation to the holder of voting rights inherent to securities belonging to third parties, pursuant to Article 20 (1) of the Revised PSC.

Thirdly, and already within the scope of Article 16 (6) regarding the duty to renew the communication of qualifying holdings, the Revised PSC no longer requires the participant to renew the communication to the market whenever there is any change in the title of attribution of voting rights, requiring only that it does so when it acquires shares underlying financial instruments already held, and only if such shares represent a percentage of voting rights indispensable for the maintenance of the relevant threshold of the qualifying holding initially communicated. It is also clarified that this renewal of communication must be made within the general deadline applicable to the communication of a qualifying holding.

In fourth place, and reflecting the conformity of the Revised PSC with the rules of a global capital market, there is also the new number 11 of the same Article 16, which makes the communications of qualifying holdings to the participated companies more flexible, now allowing them to be written in any language commonly used in international financial markets.

Fifthly, in relation to Article 16-B, regarding non-transparent qualifying holdings, the Revised PSC proceeds with the repeal of its number 2, eliminating the period of 30 days after notification of the Portuguese Securities Market Commission for interested parties to submit evidence to clarify the aspects raised in the notification of the Portuguese Securities Market Commission, or to take measures to ensure the transparency of the ownership of qualifying holdings, maintaining. However, the possibility for interested parties to adduce elements and/or take measures in that sense to avoid the declaration of lack of transparency and the respective information to the market is maintained.

Sixthly, the Revised PSC introduces two important changes to the rules governing imputation of voting rights. As it is known, the PSC also attributes relevance to the indirect holding of voting rights, by equating the voting rights which are held directly by the holder or entity participating in the voting rights, to those which are held in the circumstances described in the various sub-paragraphs of Article 20 (1) of the PSC. These situations in which the voting rights are indirectly held under the terms of Article 20, are relevant not only for the purpose of determining the existence and the amount of qualifying holdings, but also to the extent that they embody an additional duty of communication under the terms of paragraph *b)* of Article 16 (1) of the PSC.

Within this scope, we highlight that the Revised PSC amends, essentially:

(i) Paragraph *b)* of Article 20 (1), now establishing that, in the context of a control or group relationship, only the voting rights held by a company controlled by the participant or subordinated to it are considered in the calculation of the qualifying holdings, as opposed to the PSC that considered for this purpose all the voting rights held by a company that was in a control or group relationship with the participant (the purpose is to clarify that the voting rights held by or attributable to the controlling company are not, by effect of the control relationship, attributable to the controlled company); and

(ii) Paragraph *f)* of number 1 of the same article, providing that, in the calculation of the qualifying holdings, the shares held as collateral by the participant or administered, registered or deposited with it are considered, but only in cases where the voting rights may be exercised by the participant at its discretion in the absence of specific instructions from the respective holder, as opposed to the PSC, according to which such shares held as collateral by the participant or administered or deposited with it (not including, the shares registered with the participant), only qualified for the calculation of qualifying holdings if the voting rights had been attributed to them.

Finally, still on the subject of qualifying holdings, the Revised PSC now expressly provides in Article 363 (5), paragraph *f),* for the possibility of the Portuguese Securities Market Commission, in the exercise of its powers of prudential supervision, in relation to the entities subject to it, to inhibit the exercise of voting rights by shareholders or holders of qualifying holdings.

With regard to the applicable sanctions' framework, the Revised PSC revokes Article 390, which established that the omission of communication or disclosure of a qualifying holding in a public company ("s*ociedade aberta*") – a concept eliminated by the Revised PSC – constituted a very serious administrative offence. Following that revocation, it seems that only the provisions of Article 400 remain, under the terms of which the breach of duties provided for in the Revised PSC but not specifically referred to in the rules regulating sanctioning will constitute, in most cases, a less serious administrative offence.

It should be noted, however, that in relation to public companies ("*sociedades abertas*") that were in that capacity on 31 December 2021 (and which shares or other securities are not, in the meantime, admitted to trading) the legal and regulatory rules currently in force shall continue to apply until 31 December 2022 (that is, in relation to those companies, the amendments introduced by the Revised PSC mentioned above are not applicable during that period).

In a circular issued on 31 December 2021, the CMVM clarified that several regulations and instructions impacted by the Revised PSC are currently being revised, with Regulation no. 5/2008 and Instruction no. 1/2010 being particularly relevant for the present topic.

In conclusion, the Revised PSC has, on the one hand, eliminated additional requirements of an exclusively national scope for disclosure of qualifying holdings and, on the other hand, made the Portuguese capital market rules on qualifying holdings simpler and easier for investors to understand, thus contributing to making the national market increasingly attractive and competitive.

Participation and voting in general meetings of issuers of shares

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The Revised PSC amends a number of provisions regulating the participation and voting in the general meetings of issuers of shares. In light of the changes introduced, new questions arise, such as: What are the main amendments to the regime of participation and voting in the general meetings of issuers of shares? Will it be easier to participate? Who can participate? What are legitimacy certificates?

Answering these questions, the Revised Portuguese Securities Code: *(i)* focuses on simplifying procedures and communications in relation to the participation and voting in the general meetings of issuers of shares; *(ii)* introduces clarifications in the wording/construction of the current regime; and *(iii)* creates the legitimacy certificates to facilitate and promote the exercise of shareholders, in particular, the exercise of voting rights by UBOs.

Some of the watchwords in this revision of the PSC are simplification, clarification, and agility. The regime of participation and voting in general meetings of issuers of shares was amended in conformity to these objectives.

This text examines, briefly and through exemplification, how this is reflected in the Revised PSC.

Confirmation of votes cast electronically (Article 22-A of the Revised PSC)

Article 22-A (1) of the Revised PSC is one of the examples of clarification of wording introduced by this legislative revision. In fact, the content of the provision is maintained, but with a wording that clarifies any previous doubts that the electronic confirmation of receipt of votes is made only to those who expressed their vote electronically.

In turn, Article 22-A (2) of the Revised PSC brings two novelties concerning the issuer of shares' duty to inform about whether the votes cast by electronic means were validly recorded and counted: *(i)* the subject of the information is now the "investor on behalf of whom the shareholder holds the respective shares" instead of the shareholder, that is, if there is no coincidence between the shareholder and the investor (*i.e.*, generally, the custodian bank and the UBO, respectively), the information must reach the latter (it is possible, of course, for the shareholder and investor to coincide, notably when the shareholder is not the custodian bank, holder of a "jumbo account" where the shares are held on behalf of the UBO); and *(ii)* it is no longer necessary for the issuer of shares to inform the investor, if this information is already available to him/her (we would add, other than through a direct response to the request received). It should be noted that, pursuant to Article 393 (2), paragraph *j*), of the Revised PSC, the breach of the duty to confirm receipt of votes cast electronically to the person who cast them constitutes a serious administrative offence (we would add "by this means" to avoid doubts, in line with the clarification introduced in Article 22-A (1) of the Revised PSC).

In line with the amendments to the PSC that allow the identification of the shareholder up to the UBO and that aim to facilitate the communication between them and the issuers of shares, using the intermediation chain, Article 22-A (3) of the Revised PSC establishes that the Financial Intermediary that receives a confirmation of the receipt or registration and accounting of votes by electronic means, transmits it directly to the investor or, if this is not possible, through the intermediation chain.

Power of attorney (Article 23 of the Revised PSC)

The changes introduced to this provision result from: *(i)* the revocation of Article 109 (2) of the PSC, where the means of communication with investors were set out; and *(ii)* a general amendment in the wording of this legislative diploma, which aims to give the norms a more direct and injunctive nature (in this case, replacing, in Paragraph 5 of the precept "shall provide" by "provides").

As such, with the reference to the means of communication provided for in Article 109 (2) of the PSC, now revoked, having been excluded, the aforementioned request for a proxy document for a general meeting of an issuer of shares made to more than five shareholders, regardless of the means of communication, must contain, in addition to the elements provided for in

Article 381 (1), paragraph *c)* of the Portuguese Companies Code (*i.e.*, the specification of the meeting, indicating place, day, time of the meeting and agenda; indications regarding document consultation by shareholders; precise indication of the person or persons who will serve as representatives; the direction in which the representative will exercise the vote in the absence of instructions from the represented party; the mention that, should unforeseen circumstances arise, the representative will vote in the direction he/she believes best satisfies the interests of the represented party), as well as an indication of the voting rights which are attributable to the applicant under the terms of Article 20 (1), and the basis of the voting direction to be exercised by the applicant.

This is a simplification of the current regime, since relevance is now given only to the number of shareholders and not also to the means of communication (which could lead to the application of the provisions of Article 23 (3) of the PSC if up to five shareholders were involved, but standardized communications were used, for example).

Inclusion of matters in the agenda and presentation of proposals for resolutions

The wording used in Article 23-B (2) of the Revised PSC now expressly states that the request for the inclusion of proposals for resolutions on matters referred to in the convening notice or added to the convening notice, is submitted within five days of the convening notice or the respective addition to the convening notice. This was what seemed to result from the correct construction of the rule, but the clarification introduced in what concerns the reference to the amendment of the notice is a positive aspect, as it provides security both for the issuer of shares and for shareholders/investors.

Participation and voting in the general meeting

Under Article 23-C (3) of the Revised PSC, the current duplicate declaration of intent to participate in the general meeting is no longer required: it must now be sent only to the Financial Intermediary and not also to the Chairman of the Board of the General Meeting, addressing a long-standing criticism by the market, of an unnecessary bureaucratic burden.

The number 7 of the aforementioned provision, in turn, has put an end to substantial discussion, by making clear that by adhering to the record date regime, and moving away from the blocking regime, the national legislator allows those who have transferred ownership of the shares between the record date and the date of the general meeting to participate and vote in the general meeting.

Legitimacy certificates

Article 78 (5) of the Revised PSC has brought a novelty to the national legal system. This provision aims to materialize one of the flagships of this revision: the intention to foster the exercise of shareholders' rights by creating a regime that allows the participation of UBOs instead of the custodian bank.

In fact, this new rule allows (but does not impose) that legitimacy certificates for the exercise of rights be issued by a person other than the holder, as long as the following requirements are cumulatively met: a) it is requested by the person with legitimacy to request the registration (*i.e.*, the account holder); b) the certificate states its issue date, the category of securities, the identification of the account holder and the legitimized person, the rights that the latter is legitimized to exercise and, if applicable, the period in which he/she may do so; and c) the securities in relation to which the certificate is issued are blocked.

Naturally, the success of this regime will depend on a dialogue between the custodian bank and the UBO and on the intention of the latter to participate directly in the general meeting. The truth is that, until this amendment, this was not a possibility set forth in our law, so now the regulatory framework has been established to overcome the criticism of investors who demanded the possibility of directly exercising the right to vote at general meetings of issuers of shares.

Supervision by Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM) and Administrative Offenses

Regarding the holding of general meetings, other than by initiative of the issuers of shares or their shareholders, it should be noted that the new Article 363 (5) ("Prudential Supervision") of the Revised PSC gives the CMVM powers to require the convening of extraordinary general meetings of issuers of shares with a specific agenda or resolution proposals when, in the exercise of its prudential supervision powers, it determines that these should adopt measures necessary to safeguard their financial soundness, the interests of the investors, the stability of the financial system and the regular functioning of the market.

In turn, there are new serious administrative offenses to take into account, notably:

a) The failure to provide information to the shareholder regarding the registration and counting of his/her votes (Article 389 (3), paragraph *g)*, of the Revised PSC);

b) the breach of the following duties (Article 394 (2), paragraphs *j)* to *l)*, of the Revised PSC):

    i. The duty of verifying the authenticity of the postal vote, guaranteeing its confidentiality and, as mentioned above, sending confirmation of receipt of the votes cast electronically to the person(s) who cast them;

    ii. The submission of the remuneration policy proposal to a vote at the general meeting of shareholders of a company that issues securities admitted to trading on a regulated market;

    iii. The duty to submit the remuneration report for consideration by the general meeting of shareholders of a company that issues securities admitted to trading on a regulated market.

In short:

The most significant novelty regarding participation and voting in the general meeting of issuers of shares is the new legitimacy certificate intended to allow UBOs to participate. Some changes were introduced to make the regime clearer or simpler, such as, for example: *(i)* expressly stating that the transfer of shares between the record date and the date of the general meeting does not preclude the transferor's right to participate and vote in the meeting in question; or *(ii)* eliminating the duty of the shareholder to send the declaration of intention to participate in the general meeting to both the Financial Intermediary and the Chairman of the Board of the General Meeting, with sending it to the Financial Intermediary now being sufficient. One should bear in mind the prudential supervision powers of the CMVM and the administrative offenses that the Revised PSC has added.

Multiple voting shares

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One of the most significant amendments of the Revised PSC consists in the enshrinement in Article 21-D of the possibility of issuing shares with multiple voting rights. In addition to corresponding to an obvious exception to the general prohibition set forth in Article 384 (5) of the Portuguese Companies Code of establishing multiple voting in public limited liability companies, said amendment opens (yet another) breach in the "one share, one vote" principle. This text briefly reviews the legislative developments which have taken place in this field, further addressing the rational of the aforementioned new legal provision and also the legal framework regarding the issuing (including by means of conversion) of shares with multiple voting rights, with some doubts remaining unaddressed by the lawmaker.

Aiming to "improve the attractiveness and competitiveness of our [capital] market", the Revised PSC enshrined in Article 21-D the possibility of issuing shares with multiple, or plural, voting special rights, as "an additional instrument to promote the dispersion of capital in the market, available to companies already in the market, but also to those wishing to be admitted for the first time"[1] (our translations).

The legal framework under analysis is one of the most significant substantive amendments brought about by the Revised PSC. In fact, in derogation – as concerns companies to which Article 21-D is applicable – to the general prohibition set forth in Article 384 (5) of the PCC of establishing multiple voting in public limited liability companies, the issuing of shares with privileged voting rights is now allowed, up to a limit of five votes per share (Article 21-D (1)). Simultaneously, a breach is opened in the "one share, one vote" principle set forth in Article 384 (1) of the PCC, a principle that, however, has never been absolute, as results from Article 384 (6), *a*) and *b*) (the latter paragraph allowing a statutory cap to the exercise of voting rights) and 341 *et seqq.* (which allow the issuing of non-voting preferential shares) of the PCC.

The amendment now implemented, which allows the granting to certain shareholders of voting rights which are not proportional to the fraction of capital held by said shareholders, thus reducing the risks of loss of shareholder control, does not constitute a (total, at least) innovation, since, prior to the entry into force, in 1986, of the PCC, the setting forth of voting privileges in public limited liability companies was relatively common in Portugal, as shown by Article 531 (1) of the PCC, which allowed the plural voting rights existing on such date to be kept in force. In fact, it is still permitted to establish plural voting (limited to double voting) in private limited liability companies, provided that the shareholdings (*quotas*) granting such plural voting do not correspond to more than 20% of the share capital (see Article 250 (2) of the Portuguese Companies Code). However, the damaging effects resulting from the unrestricted admissibility of multiple voting led several legal systems to abandon the liberalism in this matter which characterized the beginning of the 20th century, establishing a clear prohibition (*e.g.*, Germany, with the *Aktiengesetz of* 1937, Italy, with the *Codice Civile of* 1942, or Spain, in 1951).[2]

The 21st century has poured "new wine into old wineskins": over the past few years, a relevant part of Portuguese and foreign scholars has questioned – in connection with the intense debate on the related, although distinct, topic of "loyalty shares" – the aforementioned prohibition,[3] invoking certain benefits that would result from allowing multiple voting, such as promoting the entry of newcomers, specially fast-growing tech companies, into the capital markets, allowing the original control structure to be safeguarded for a longer period of time.

It is therefore not surprising that, currently, there is a legislative trend somewhat contrary to the one which characterized the 20th century;

1 See the fourth paragraph of the explanatory memorandum included in the Law Proposal no. 94/XIV/2.ª, which is aligned with the recommendation contained in the OECD report of October 2020 and the "diagnosis" therein made regarding this matter (pp. 15, 16 and 108, respectively).

2 About this matter, see Pedro Maia, *Função e Funcionamento do Conselho de Administração da Sociedade Anónima*, Coimbra, Coimbra Editora, 2002, pp. 122-124 (footnote).

3 Both as regards law to be established or "*de iure condendo*" (see A. Menezes Cordeiro, D. de Oliveira Festas, "Article 384", *in* A. Menezes Cordeiro (coord.), *Código das Sociedades Comerciais Anotado*, 4th ed, Coimbra, Almedina, 2021, p. 1281) as well as regards law presently in force ("*de iure condito*"), even if, in the latter hypothesis, only in so far as listed companies as concerned (Madalena Perestrelo de Oliveira, "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de ações com direito de voto plural às L-shares", *RDS*, year VII, 2015, 2, p. 452). The Revised PSC is silent on these "loyalty shares", doubts subsisting in legal literature as to their admissibility in light of the legal framework currently in force.

see, for example, what happened in Italy, where the 2014 reform amended the *Codice Civile* in order to reinstate multiple voting.[4]

The legal framework now established is available for companies issuing shares listed on a regulated market or multilateral trading facility (or, under the terms of Article 21-D (2), which listing is intended). As already noted, the voting privileges now allowed are capped at five votes per share, which goes beyond the double voting that may be foreseen in the by-laws of private limited liability company and also exceeds the upper limit of three votes per share proposed by the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM) in its written remarks in respect of the Revised PSC,[5] such limit curiously coinciding with the one foreseen in Italian law. In addition, no limit was expressly set forth as to the number of shares to which voting privileges may be granted, which seems to indicate that, not taking into account the existence of other special categories of shares, this limit, at least in those cases in which shares with multiple voting rights result from the conversion of ordinary shares, should be the one provided for non-voting preferential shares (see Article 341 (1) of the PCC and the remission made to Article 344 of said code in Article 21-D (4)).

Multiple voting rights may be granted to shares: *(i) ab initio*, *i.e.*, upon incorporation of the company (see Article 24 (1) of the PCC); or *(ii)* subsequently, either in the context of a share capital increase, in which case the then current shareholders will be entitled to a pre-emption right on the subscription of the new shares (Article 458 of the PCC) or through a conversion of ordinary shares into privileged shares. In either case the resolution must abide by general rules for statutory amendments of public limited liability companies (Article 21-D (3)), thus a two-thirds majority being required for its approval (see Article 386 (3) as well as (4) and further Article 383 (2) and (3), all of the PCC).[6]

If other special classes of shares already exist, and since the creation of new classes of shares with equivalent or superior special rights will indirectly affect shareholders holding special shares, the latter shareholders' consent is required in order for multiple voting shares to be created, such consent to be given by means of a resolution to be adopted by a two-thirds majority in a shareholders' meeting to which only shareholders holding special shares may be admitted (see Article 24 (5) and (6) of the PCC).[7]

Other matters concerning the legal framework applying to multiple voting shares have been discussed extensively in foreign jurisdictions, in particular whether multiple voting shares should be perpetual or terminate/elapse at a given moment of time, as well as whether the free transferability rule (see Article 328 of the PCC) should apply to them.[8]

Article 21-D provides no clear answer to these doubts; perhaps the lawmaker's silence is based on the understanding the general legal regime is applicable, meaning, as to the two questions raised, that voting privileges may be kept indefinitely and that the free transferability rule is entirely applicable.

4 See the current wording of Article 2351, 4th paragraph, of the *Codice Civile*.

5 See the written remarks of CMVM dated of 07.10.2021, in which mention is made to the "existence of risks in the proposal presented" (p. 19). Notwithstanding this warning, as regards multiple voting the final wording of the Revised PSC is the same as the one contained in Law Proposal no. 94/XIV/2.ª.

6 In its aforementioned written remarks, the Portuguese Securities Market Commission proposed a majority corresponding to three quarters of the votes cast.

7 Madalena Perestrelo de Oliveira, "Direito de voto…", cit. p. 454.

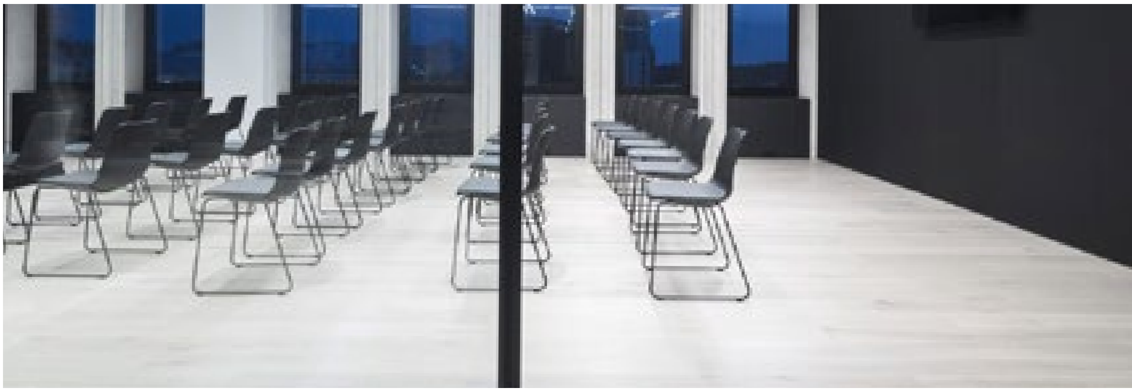
8 See, among others, Clara Hochleitner, "Dual-class Technology Firms", *Drexel Law Review*, vol. 11 (2018-19), pp. 101 to 147, *passim*.

It will, as such, be up to the courts and the legal doctrine to find answers to the doubts raised and to all others that will inevitably arise.

It is possible that, in terms of the attractiveness of capital markets for newcomers – and, above all, for the shareholders that control them –, the new (old) multiple voting may prove to be advantageous, although, from the investors' point of view, some risks are not to be excluded, which should be dealt with primarily within the context of the requirement to provide quality information; as an Italian scholar states, "in some specific situations, depending on the industry, business model, and personal characteristics of shareholders, MVS [multiple voting shares] can benefit investors, but overall they are more often a disadvantage than an advantage for minority shareholders, and institutional investors generally oppose their use. MVS can however contribute to pursue other goals, such as attracting more corporations to stock exchanges"(our translation).[9]

It will be up to the market to clarify whether this new regime is a mere (albeit interesting) academic exercise or not; the real acid test of the now implemented legal solution will result from the adoption, or not, of multiple voting shares by existing issuers of listed shares and newcomers.

9 Marco Ventoruzzo, "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", *SSRN*, 2015, p. 9.



The new regime for public offers in the Portuguese Securities Code – the expected harmonization with the European legislation and other innovations

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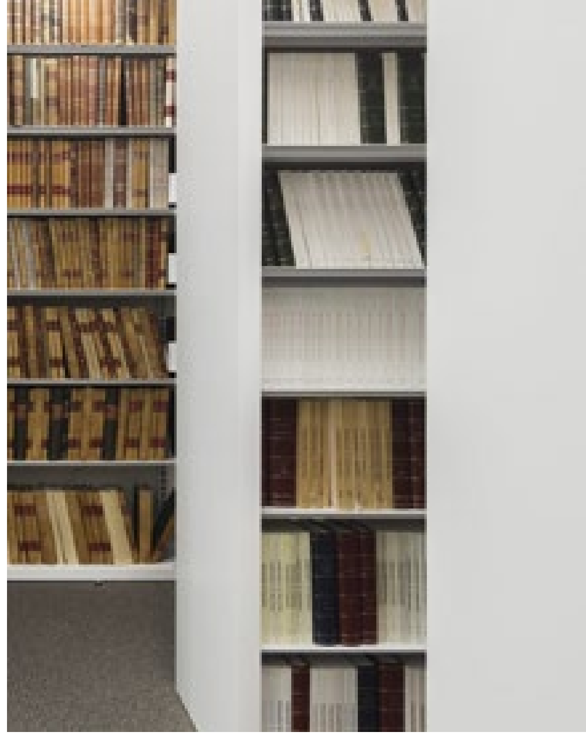
The Revised PSC has suffered important changes in what concerns the public offers regime: *(i)* firstly, the trigger for the qualification of an offer as public is now, similarly to the European regime, the obligation to publish a prospectus, setting aside the previous qualification criteria and the duality of the qualification as "private offer" and as "offer exempt from publishing a prospectus"; *(ii)* secondly, the highly discussed regime of responsibility for the prospectus was modified, in particular regarding its subjective scope; *(iii)* thirdly, the requirement for mandatory financial intermediation, which was previously provided for in Article 113 of the PSC (according to which public offers of securities for which a prospectus was required had to be carried out with the intervention of a financial intermediary), has been deleted; and, finally, *(iv)* the current Article 124 (1) of the PSC has been repealed and replaced by the new Article 128-A, according to which the offeror may now generally revise the terms and conditions of the offer, while respecting the principle that the offer's overall conditions shall not be less favorable to the respective addressees. The new changes primarily reflect an alignment with European legislation and a more flexible regime, with the promise to promote the interest of issuers of securities in the Portuguese capital market and which regime may generate the interest of more European players.



One of the most awaited modifications to the PSC was the greater harmonization of the general regime for public offers applicable in the Portuguese legal system with that provided for in the respective European legislation.

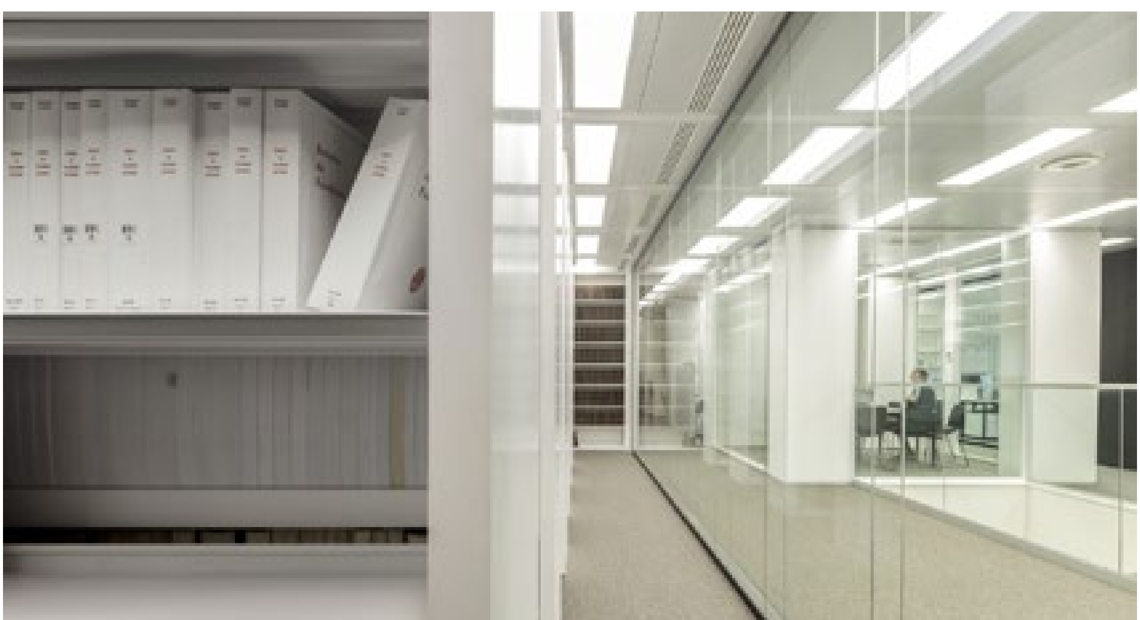
In fact, the entry into force of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 (the Regulation), which repealed Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 and aimed to be an essential step towards the completion of the Capital Markets Union, has created some uncertainty in the Portuguese capital markets regarding the qualification as public of certain offers of securities. In fact, the wording of the Regulation establishes that securities shall only be offered to the public in the Union after prior publication of a prospectus, drafted in accordance with the applicable law, unless the exceptions expressly provided therein are met, thus reinforcing the intrinsic link between the obligation to draw up a prospectus and the very concept of public offer. However, the PSC has so far maintained the distinction between the qualification of an offer as public and the obligation to publish a prospectus. During the last few years there have been several doubts of interpretation and application in specific cases, taking into account the lack of total coincidence of the concepts and exceptions and the fact that the Regulation, by its nature, is directly applicable in the Portuguese legal system.

In the new wording of the Revised PSC, the trigger for qualifying an offer as public is now also the obligation to publish a prospectus, a concept now fully aligned with the European legislation. The legislator thus chose to fully amend the content of the former Article 109 of the PSC, which now states that "the following are public offers: *a*) offers of securities to the public that require the prior publication of a prospectus or document required in accordance with European Union law; *b*) takeover offers referred to in Article 173 [*i.e.*, takeover bids]" (our translation), setting aside the previous criteria. Article 109 of the Revised PSC also determines that, in addition to the other exemptions foreseen in European legislation, the chapter corresponding to public offers does not apply "to offers of securities to the public which total value in the European Union is less than 8,000,000 €, calculated by reference to the offers carried out over a period of 12 months" (our translation), thus opting to adopt the possibility expressly foreseen in Article 3 (2), paragraph *b*), of the Regulation.

Also concerning prospectuses, the muchdiscussed Article 149 on responsibility for the contents of the prospectus has been amended and clarified. In fact, the wording now states that the members of the offeror's and issuer's management and supervisory bodies, as well as the offeror's statutory auditor, are responsible for the contents of the prospectus, but only, in all cases, those who are in office on the date of approval of the prospectus. It is also relevant to note that, in relation to the chartered accountant, the connection between the responsibility for the contents of the prospectus and the certification or assessment of the accounting documents on which the prospectus is based was removed. The responsibility of the guarantor is now also foreseen, where applicable, in harmony with the Regulation, and the reference to the responsibility of financial intermediaries was removed (considering the deletion of the mandatory financial intermediation requirement in the context of public offers).

One other innovation in the Revised PSC that should be mentioned in the context of public offers is the elimination of the mandatory financial intermediation requirement (in relation to assistance and placement), previously provided for in Article 113 of the PSC, according to which public offers of securities for which a prospectus was required would have to be carried out with the intervention of a financial intermediary. This important innovation may have the systemic effect of rendering public offers of securities more attractive to issuers, considering the high costs normally incurred by issuers during their capital markets operations involving public offers which have been, until now, forcing the intervention of a financial intermediary. On the other hand, the possible trend to disconnect public offers from financial intermediary services will necessarily deprive the issuer of securities of the personalized advice and know-how of these market players, particularly with regard to price calculation and determination, as well as to the gathering of market feedback on potential investment slots, which is why it is expected that the most relevant issuers in the market will continue, regardless of the elimination of this obligation, to hire financial intermediaries for the provision of assistance and placement services in their capital market operations.

Attention should also be drawn to the no less important amendment pertaining to the legal regime of the revision of the offer, which, without ignoring the turbulence in the markets over the last few years and some less successful experiences of players in the Portuguese market, has made more flexible the terms under which issuers may resort to this institute, rendering, similarly to the other amendments, the launching of public offers more attractive. In fact, Article 124 (1) of the PSC ("the contents of the offer may only be modified in the cases foreseen in Articles 128, 172 and 184" – our translation) was revoked, and the new Article 128-A determines that "until two days before the end of the offer's period, the offeror may, subject to CMVM's authorization, revise its terms and conditions, provided it does not make it globally less favorable to the respective addressees" (our translation). Therefore, the revision of the offer ceases to be exclusively applicable to the revision of the consideration in terms of its nature and amount, and the offeror may now



generally revise the terms and conditions of its offer, while respecting the principle that the overall offer conditions shall not be less favorable than the initial conditions for the respective addressees. The obligation that any revision of the consideration must always be upwards, by at least *2%* of its respective value, was also deleted. The modification of the offer remains, of course, a reason for the extension of the respective offer period, which continues to be the prerogative of the CMVM, on its own initiative or at the request of the offeror.

As for other innovations on the subject of offers, it should also be noted that the new wording of Article 163-A now specifically states that the prospectus may be prepared in English, unless the CMVM opposes this on the grounds that it would be contrary to the regular functioning of the market or the interests of investors. Although this possibility had already been proven possible in practice, it had not yet been expressly authorized in the relevant legislation.

Finally, the list of conducts that constitute a very serious, serious, and less serious administrative offence with regard to public offers (Article 393 of the PSC) has also been revised to reflect the remaining changes to the PSC, to eliminate duplications and to simplify the wording of the article. Two paragraphs were added to no. 1 of such article, thus constituting very serious administrative offences: "omission of due information or omission to provide such information under the due terms, accessibility and models" (our translation) – paragraph *g)*, and the "carrying out of operations not allowed or under conditions not allowed" (our translation) – paragraph *h)*.

Following this analysis of the main changes to the public offers regime in the Revised PSC, it should be noted that the changes it suffered are to be praised, in particular with respect to the alignment of the trigger for qualifying an offer as public with the one foreseen in the European legislation and the increased flexibility of the offer revision regime, two innovations carried out with the promise to promote the interest of issuers of securities in the Portuguese capital market and which regime may certainly generate the interest of more European players. In particular, the approximation to the European legislation makes the Portuguese regime more understandable to foreign investors, while the various simplification and flexibility mechanisms remove some rigidity from the terms under which public offers may take place in our legal system.

Revision and simplification of the takeover bids' regime

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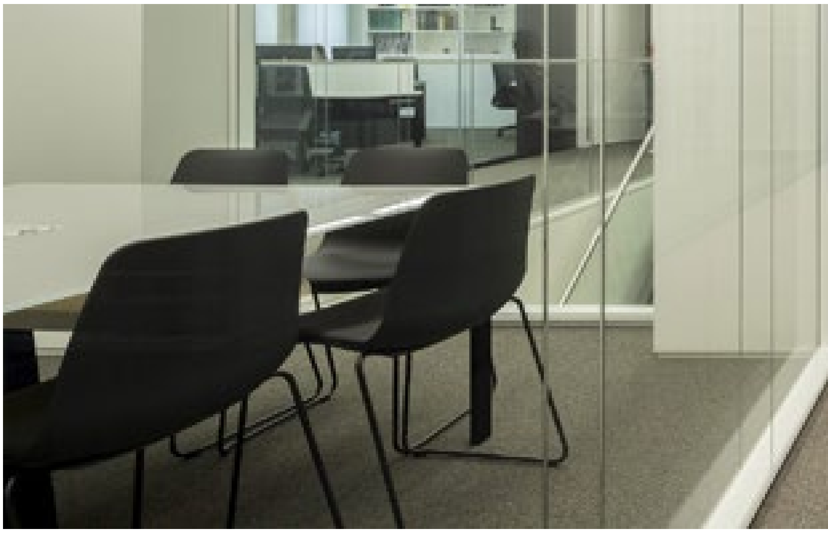
The revision of the PSC resulting from Law no. 99-A/2021, of 31 December, has promoted more harmonization with European law, a legislative simplification and a greater concretization of legal requirements and criteria that may contribute positively to a more dynamic national capital market.

In the area of market for control, the legislative revision precisely reflects this ambition, having introduced seven adjustments that should be highlighted as to the regime related to takeover bids.



Application of the takeover bids' regime only to equity instruments

In line with the regime of the Takeover Bids Directive (Directive 2004/25/EC of the European Parliament and of the Council, of 21 April 2004), the institute of takeover bids is now applicable only to public offers for the acquisition of shares and other securities that confer the right to the respective subscription or acquisition issued by companies whose shares are admitted to trading on a regulated market located in Portugal.

Thus, financial instruments not representing capital, even if issued by companies whose shares admitted to trading on a regulated market, may now be acquired without being subject to the takeover bids' regime, profoundly simplifying the possibility of acquiring debt securities.

Possibility of derogating the mandatory takeover bid

Regarding the functioning of the market of control of listed companies, the most relevant change for investors relates to manner of application of the materiality *thresholds* for the mandatory launch of a takeover bid. With the thresholds of 1/3 and 50% of voting rights for the launching of a mandatory takeover bid remaining unchanged, it is now possible to demonstrate the lack of control even if the investor holds more than 50% of the voting rights of the offeree company.

For this purpose, it is necessary to submit evidence of the absence of dominant influence over the offeree company before the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários* – CMVM), in order to demonstrate that the mere holding or attribution of voting rights does not allow to effective control over the issuing company, particularly in light of concrete case situations that lead to this circumstance, such as those related to the attribution of competing voting rights, the precarious and non-operational nature of the attribution of voting rights or the incapacity to exercise control over the board of directors.

As before, the possibility of negative proof of dominance allows the derogation of the duty to launch a takeover bid only on a temporary basis, ceasing as soon as the investor becomes dominant. During this period, any increase in the attribution of voting rights above 1% imposes on the investor the duty to communicate such change to the CMVM.

Consideration for the mandatory takeover bid

Another revision of the takeover bid regime with special practical relevance concerns to the determination of the minimum consideration applicable in case of a mandatory takeover bid. The law now recognizes not only the highest price paid by the offeror in the six months prior to the preliminary announcement of the takeover bid, as well as the highest price that the offeror has committed to pay, thus emphasizing the agreements made before the launch of the takeover bid, even if not fully implemented.

Competing takeover bids

Other amendment particularly relevant for the operability of a takeover bid corresponds to the revision of the regime of competing takeover bids, granting more latitude for the definition of the conditions of a competing bid.

Thus, the offer that occurs after the preliminary announcement of a takeover bid and which has as purpose the acquisition of securities of the same category, only has the following requirements to comply with:

(i) To raise the consideration in a minimum of 2%;

(ii) To comprise an equal or greater amount of securities;

(iii) To have an equal or lower success condition.

The deadline to launch a competing takeover bid was also adjusted and clarified and is now the end of the 5th business day prior to the deadline for a takeover bid registered with the CMVM.

Transactions during the takeover bid

The regime for the transaction of securities that are the object of a takeover bid, as from the respective preliminary announcement, has also been simplified. The CMVM's prior authorisation is now sufficient for the transaction to take place and the payment of a higher price for acquisitions carried out within this scope requires an increase in the takeover bid consideration, both in voluntary and mandatory takeover bids.

Issuer report

It should also be highlighted a legislative amendment that is important both from the perspective of investors and issuers and which consists in the express disclosure of the following:

(i) The voting behaviour from the members of the board of directors of the offeree company regarding the report on the convenience and conditions of the takeover bid; and

(ii) The declaration regarding the existence or inexistence of situations of conflict of interest between the directors and the addressees of the takeover bid.

Since the behaviour assumed by the issuer's board of directors during a takeover bid is relevant, this amendment introduces more transparency in governance matters. At the same time, it reinforces the scrutiny on how the special fiduciary duties arising for the directors of an issuer subject to a takeover bid are fulfilled.

Compulsory takeover bid

Lastly, the regime of the takeover bid for the squeeze out has been simplified, as it is now sufficient for the offeror to have reached 90% of the voting rights corresponding to the share capital in order to be able to exercise this prerogative, eliminating additional requirements that are not envisaged in the Takeover Bids Directive.

The determination of the consideration applicable to the compulsory takeover bid is now based on a simpler and clearer criterion, corresponding to the highest price paid or agreed to be paid between the settlement of the takeover bid and the registration of the compulsory takeover bid.

Concluding remarks

The legislative amendments succinctly pointed out constitute a step that may contribute towards greater dynamism in the corporate consolidation of listed companies, creating more equality of treatment and reinforcing the level playing field to attract investors interested in acquiring corporate control over companies in the national capital market.

In view of this new regulatory environment, it seems prudent both for listed companies to have (or review) internal rules applicable to the performance of their corporate bodies and employees during a takeover bid, and for current shareholders with relevant positions to assess the appropriate measures to take if they face a takeover bid.

Voluntary delisting (voluntary exclusion from trading)

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The voluntary delisting (voluntary exclusion from trading on a regulated securities market) corresponds to a new autonomous regime derived, in part, from the legal framework previously established in the PSC.

In fact, the regime applicable to the voluntary delisting is similar to the previous regime established in Article 27 (1), paragraph *a)*, of the PSC for the loss of the quality of "public company" ("*sociedade aberta*"): the delisting must be resolved and approved by 90% of the voting rights corresponding to the share capital and must be requested to the CMVM, leaving shareholders who have voted unfavorably with an "exoneration" right, the compensation for which must be calculated using the rules applicable in respect of mandatory takeover bids.

In addition to the reorganization of the legal regime within the PSC and the fact that it has been autonomized, the notable novelty is the fact that the entity acquiring the shares of minority shareholders no longer has to be necessarily a shareholder of the company and may now be a third party or the company itself.

Multiple vote (a novelty of the Revised PSC) cannot be exercised in GM resolutions concerning delisting.

Under the PSC (previous regime), the matter of voluntary exclusion from trading on a regulated securities market (delisting) was often associated with the "loss of the quality of 'public company'" ("*sociedade aberta*") regulated by the provisions of Articles 27 *et seq.* of the Code.

However, this association was debatable (and discussed), since, on the one hand, there were public limited companies which, although not "public companies" ("*sociedades abertas*"), had their shares admitted to trading in a regulated market operating in Portugal[1] and, on the other hand, there were "public companies" ("*sociedades abertas*") without their shares admitted to trading in a regulated market.

Therefore, although the "loss of 'public company' ("*sociedade aberta*") status" would necessarily have the effect of "immediately excluding the company's shares from trading on a regulated market" (our translation),[2] a certain company may wish to exclude itself from trading on the market without necessarily wishing to lose its "public company" ("*sociedade aberta*") status as a result.

Within the scope of the new regime established by the Revised PSC, the figure of the "public company" ("*sociedade aberta*") disappears (and, thus, also the regulation on the "loss" of that quality), and the matter of the voluntary exclusion from trading on a regulated securities market will now have autonomous regulation, and has been reorganized within the Code and placed in Articles 251-F *et seq*.

Although in the previous regime it was clear that the loss of the quality of "public company" ("*sociedade aberta*") is one thing and the voluntary exclusion from trading on the market is another thing, it may be helpful to briefly review the regime of the loss of the quality of "public company" ("*sociedade aberta*") established in Articles 27 *et seq.* of the PSC, since the legal solutions adopted in the Revised PSC in respect of the voluntary exclusion from trading (delisting) share several aspects in common with that regime.

Thus, under the previous regime, the loss of "public company" ("*sociedade aberta*") status could occur in the following cases: *(i)* if, following a takeover bid, a shareholder came to hold (directly or by imputation) more than 90% of the voting rights; or *(ii)* a resolution by the GM to that effect (or in a meeting of holders of special shares and other securities conferring the right to subscribe for or acquire shares), approved by a majority of 90% or more of the share capital (or, in respect of a meeting of holders of special shares and other securities conferring the right to subscribe for or acquire shares, a majority corresponding to 90% or more of the securities concerned); or (*iii*) in cases where one year has elapsed since the shares were excluded from trading on a regulated market, based on the lack of public dispersion.[3]

In cases of loss of "public company" ("*sociedade aberta*") status as a result of a decision by the GM, the issuing company had to appoint a shareholder who would be obliged to: *(i)* acquire, within three months of the CMVM's approval decision, the securities belonging, on that date, to shareholders who had not voted in favor of the decision; and, furthermore, to *(ii)* guarantee such obligation of acquisition by means of a bank guarantee or cash deposit.[4] The consideration for the acquisition should be calculated in accordance with the provisions of Article 188 of the PSC, regarding the consideration to be paid

[1] Consider the companies under foreign law admitted to trading on a regulated market operating in Portugal. In fact, only companies governed by Portuguese law may be qualified as a "public company" ("*sociedade aberta*") within the scope of the PSC.

[2] See Article 29 (2) of the PSC.

[3] See Article 27 (1) of the PSC.

[4] See Article 27 (3) of the PSC.

by the offeror for the acquisition of securities made in the context of a mandatory takeover bid.

Finally, under the previous regime, the loss of "public company" ("*sociedade aberta*") status could be requested to the CMVM by the issuing company (and, in cases arising from a takeover bid, also by the offeror),[5] becoming effective as from the publication of CMVM's favorable decision.[6] The CMVM's decision should be published, at the company's initiative, in the bulletin of the regulated market where the securities were admitted to trading, and, in cases of loss of "public company" ("*sociedade aberta*") status due to a decision of the GM, the publication should also refer the terms of acquisition of the securities and be repeated at the end of the first and second months of the three month period for the exercise of the disposal right[7]. The readmission of the securities to trading on a regulated market was prohibited for a period of one year.[8]

Under the new regime established in the Revised PSC, the voluntary delisting of securities from a regulated market in Portugal – "or on a multilateral trading facility" – requires, firstly, that it is decided upon at a GM, with the approval of a majority of 90% or more of "the voting rights corresponding to the share capital" (or, regarding meetings of holders of special shares admitted to trading on a regulated market in Portugal or traded on a multilateral trading facility and other securities conferring the right to subscribe or acquire shares, a majority corresponding to 90% or more of the securities in question).

So, the principle that the approval of a delisting resolution requires a majority of 90% of the "existing" voting rights was maintained, and approval by a majority of 90% of the voting rights that are "present or represented" at the GM is not sufficient.

With regard to the protection of shareholders who do not vote in favor of the resolution to exclude them from trading, the mechanism previously established in Article 27 of the PSC is maintained to a certain extent, in the sense that the company will have to appoint an entity that will assume the obligation to acquire the shares held by such shareholders, maintaining the three month period (counted from the CMVM's approval decision) available to such shareholders to exercise the right of disposal.

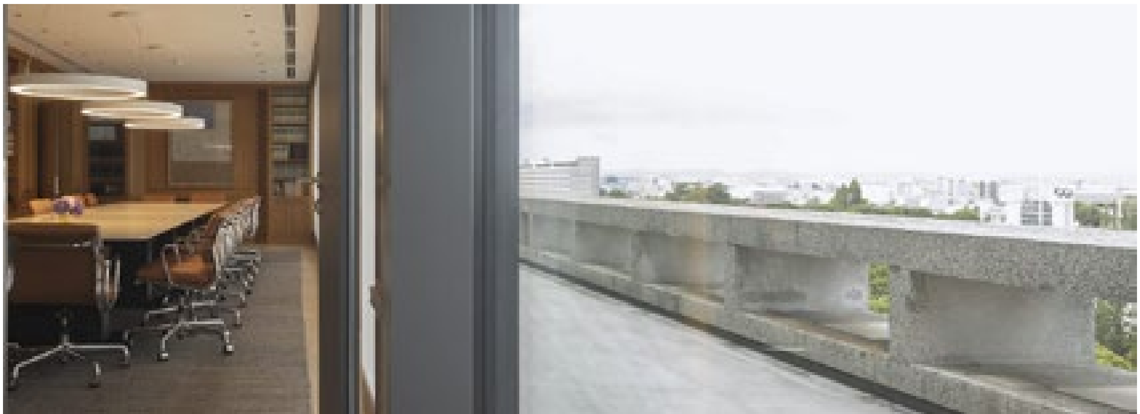
However, within the previous legal regime the entity acquiring the shares of those minority shareholders had to be a shareholder of the company, but in the new regime this is no longer necessarily the case, since the company may instead appoint a third party or declare that it will itself acquire the shares at stake – in the latter case, naturally, only if it is still able to do so, taking into account the treasury shares ("*ações próprias*") regime established in the Portuguese Companies Code.

5 See Article 27 (2) of the PSC.

6 See Article 29 (2) of the PSC.

7 See Article 28 of the PSC.

8 See Article 29 (2), *in fine*, of the PSC.



In this regard, it should also be noted that, where applicable, multiple voting (the new regime established in the Revised PSC) cannot be exercised in the resolutions concerning the voluntary exclusion from trading.[9]

On the other hand, the previous principle of the applicability of the consideration regime in a mandatory takeover bid[10] is maintained.

Once the exclusion has been decided, it must be requested to CMVM within 20 days from the date of the decision.

It should also be noted that the case in which a shareholder holds more than 90% of the voting rights as a result of a takeover bid is no longer a case of automatic delisting.[11] In fact, this circumstance, which is now only dealt with under Articles 194 *et seq.* of the Revised PSC, is now not sufficient to determine exclusion from trading, and it is necessary that the offeror of the takeover bid or the minority shareholder(s) effectively exercise the right, respectively, to acquire or dispose of the voting rights conferred in this context. In this regard, it should also be mentioned that, according to the new version of Article 194 of the Securities Code, for such squeeze-out rights to take place, it is no longer necessary that the offeror of the takeover bid, following the takeover bid, reaches 90% of the voting rights *and* 90% of the voting rights covered by the bid, it now being sufficient that the first requirement[12] is met.

Finally, it should also be noted that the rule previously established in Article 29 (2), *in fine*, of the PSC (re-admission to trading on a regulated market prohibited for a period of one year) has not been carried over to the new regime.

Thus, regarding the voluntary delisting, we essentially understand that the Revised PSC establishes an autonomous, simpler and clearer regime, whose main features correspond, in essence, to the following: *(i)* the delisting must be resolved with the approval of 90% of the voting rights corresponding to the share capital; *(ii)* shareholders who have voted unfavorably benefit from an "exoneration" right; *(iii)* the consideration to be paid to such shareholders in case of exercise of the right must be calculated using rules applicable to mandatory takeover bid; *(iv)* the entity acquiring the minority shareholders' shares may be a shareholder of the company, a third party or the company itself; *(v)* multiple voting cannot be exercised in the resolutions of the GM on delisting.

9 As established in Article 21-D (5) of the Revised PSC.

10 See Article 188 *ex vi* Article 251-F of the Revised PSC.

11 As previously stated in Articles 27 (1), paragraph *a)*, and 29 (2) of the PSC.

12 As to the remaining, the previous regime is maintained, namely the three month deadlines for the exercise of the rights to acquire/dispose of the shares.

Changes to the governance of private equity and other fund management companies

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Law no. 99-A/2021, of 31 December (Law), includes, besides the Revised PSC, a few relevant changes to the Legal Regime of Audit Supervision, approved by Law no. 148/2015, of September 9th (LRAS).

In the new version of Article 3 of LRAS, concerning the qualification of certain entities as being of "public interest" for the purposes of the supervision of financial statement audit accounting, paragraphs *d)* and *e)* (among others) are eliminated; these paragraphs qualify as being public interest entities (PIE) "undertakings for collective investment in contractual and company form, set out in the Legal Regime on Undertakings for Collective Investment, as approved by Law no. 16/2015, of 24 February [*Regime Geral dos Organismos de Investimento Coletivo* – RGOIC]" (our translation), and "private equity companies, private equity investment companies, private equity fund management companies and private equity funds, as established in the Legal Regime for Private Equity, Social Entrepreneurship and Specialized Investment, approved by Law no. 18/2015, of 4 March" (our translation), respectively.

This means that undertakings for collective investment mentioned in the RGOIC and private equity companies, private equity investment companies and private equity funds are no longer qualified as PIE.[1] Pursuant to Article 2 (13) of Directive 2006/43/CE of the European Parliament and of the Council, of 17 May 2006, PIE are companies with securities admitted to trading, credit institutions and insurance companies; additionally, this directive grants Member-States the prerogative of (rather tautologically) designating as PIE those entities which they consider to be of public interest, which Portuguese lawmakers have done in 2015 for the entities mentioned above (among others).

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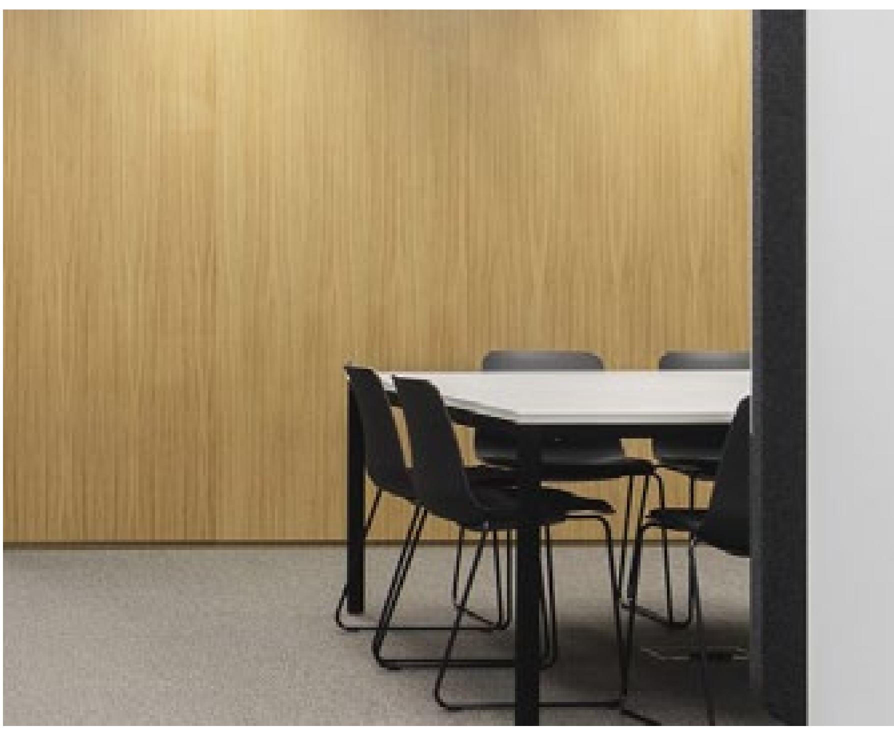
1 Private equity fund management companies (*i.e.*, which manage assets above the thresholds of Directive 2011/61/EU of the European Parliament and of the Concil, of 8 June 2011) are not included in this list, even though the most common understanding of the matter, including that of the regulator, and depending on the system, is that these entities should have been considered PIE as well.

Portuguese Securities Market Commission – (*Comissão do Mercado de Valores Mobiliários* – CMVM) is tasked with the public supervision of statutory auditors (ROC), of statutory audit firms (SROC), of auditors and audit entities of Member-States and third countries, of their partners and members of the corporate bodies, which powers include: *(i)* ensure quality control and inspection systems of ROC and SROC over auditors which perform statutory account audit works for PIE, as well as inspections over other auditors following complaints from other national or foreign authorities; and *(ii)* evaluate the performance of the PIE's supervisory body, pursuant to the provision of Article 27 of Regulation (UE) no. 537/2014 of the European Parliament and of the Council, of 16 April 2014 (Regulation 537/2014).

These changes (as well as the other amendments made to the LRAS) are based on the provision of Article 8 of its precursory statute to LRAS, which contemplated the necessity to revise this legal regime within three years following its entry into force. Pursuant to the provision of Article 22 (2) of the Law, the amendments to the LRAS (including the changes being discussed herein to Article 3) enter into force on 1 January, 2022.



The qualification of an entity as being of public interest for the purposes of the LRAS has the following main repercussions:

a) Forcing audit works to financial statements prepared by PIE (necessarily done by ROC or SROC registered before CMVM) to a more demanding regulatory regime, set out in the provisions of RJSA and Regulation 537/2014;

b) The requirement for PIE, pursuant to Article 3 of the LRAS precursory statute, adopt one of the governance structures which involve both a collegiate supervisory body (audit board, audit committee[2] or general and supervisory board) and a ROC or SROC;[3]

c) As a consequence of being mandatory to adopt a reinforced audit structure, the establishment of additional duties (in relation to those already set forth under general corporate law provisions)[4] of the collegiate audit body in controlling the process for the preparation of financial statements and the audit of the same, as well as the monitoring of the ROC/SROC independency, verification of adequacy requirements for these entities an approval of the rendering of services beyond audit services.

It is clear that this amendment to the LRAS has the consequence of reducing significantly both the complexity of Governance mechanisms as well as operational costs for management companies of undertakings for collective investment (*sociedades gestoras de organismos de investimento coletivo* – SGOIC), private equity companies (*sociedades de capital de risco* – SCR) and (AIFM compliant) private equity fund management companies (*sociedades gestoras de fundos de capital de risco* – SGFCR) which do not intend to adopt a "reinforced" audit structure.

On the one hand, remuneration and Operations costs inherent to the existence of a collegiate supervisory body are eliminated. These typically encompass, in the abovementioned entities, attendance fees (payable for the members of the audit body for each meeting they attend), costs related with organizing meeting of the supervisory board and recording of the same as well as costs (including legal advice, commercial registration fees, etc.) regarding the appointment, replacement, resignation and removal of its members.

On the other hand, the fact that these entities are no longer qualified as PIE means that the complexity of its audit process of its financial statements (and the financial statements of the undertakings for collective investment of the funds they manage will decrease and, therefore, so will the costs associated with the hiring of ROC/SROC.

Perhaps more relevant than the reduction of direct costs, however, will be the streamlining of decision and internal reporting processes for SGOIC, SCR and SGFCR. Among other aspects, with the waiver of the qualification of these entities as PIE, the respective process for

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2 Formally a part of the board of directors in the "Anglo-Saxon" model, pursuant to the provision of Article 278 (1), paragraph *c)*, of the PCC.

3 Pursuant to the provision of Article 3 (4) of the LRAS precursory statute, in PIE with no legal personality, the requirements regarding the composition of the audit bodies are applicable to the respective management entity, which means that fund management entities are also covered by this duty, whether or not they are qualified as PIE (*i.e.*, only the undertakings for collective investment managed by the latter are qualified as such).

4 See Article 420 (3) of the PCC.

the approval of accounts will no longer require the intervention (opinion) of the collegiate supervisory boy and more intense of the latter in relation to the ROC audit works, which represents a significant simplification of such processes.

The collegiate supervisory body will also no longer be required, regarding the approval of accounts of undertakings for collective investments managed by these entities, to control the processes for the preparation of the financial statements and the respective audit works.

Also, it will no longer be necessary for the ROC to prepare a report addressed to the collegiate supervisory body of the entity in question, pursuant to the provision of Article 11 of Regulation 537/2014.

It should be noted, regarding this point, that with this change to the LRAS relevant constraints associated to the engagement of ROC/SROC which perform audit works on PIE. Firstly, the appointment of ROC/SROC will no longer be required to be preceded by an opinion of the supervisory body regarding of specific entity to be procured. Secondly, the maximum periods for ROC/SROC to hold office (as previously defined in the Charter for Statutory Auditors).

Furthermore, it cannot be ignored the regulatory repercussions of this change in the incorporation and activities of SGOIC, SCR e SGFCR.
As a matter of fact, pursuant to the recent "Guidelines regarding the evaluation of the adequacy for the exercise of regulated functions and of holders of qualified participations", published by CMVM, more demanding prerequisites for adequacy, experience and availability of the members of SGOIC, SCR and SGFCR have been implemented. These requirements have added a significant regulatory "burden" in the processes for authorization/registration of the commencement of activities of these entities (which translate, for instance, in the filling-in of the respective questionnaires) and for its functioning (in the need to repeat the process in the case of appointment of new members of the supervisory boy and in the obligations for the communication of facts which may affect the adequacy of the persons being evaluated to CMVM). For the SGOIC, SCR and SGFCR which do not intend to have such collegiate supervisory bodies in its governance structure, the withdrawal of their qualification as PIE shall mean, in practice a simplification of the regulatory prerequisites to commence and perform the respective activities.

The approval of these amendments appears to point towards an easing of the incorporation and organisation requirements of SGOIC, SCR and SGFCR which is positive for these entities and for the asset management sector in general. If, on the one hand, the non-qualification of these entities as PIE may overly alleviate its internal controls and, ultimately, facilitate improper conduct by the management body (with potential negative repercussions for investors in undertakings for collective investment managed), the fact is that experience has shown that the performance of collegiate supervisory bodies in these entities has been of limited efficacy, taking into account its selection process (which has led, for instance, CMVM to demand additional training of many members of audit boards of management companies in order to ensure the effective adequacy in the performance of its functions), pre-existing close relationships between members of supervisory bodies and shareholders and/or members of the management body of management entities[5] and a considerable lack of knowledge of the legal and

[5] Even taking into account the extensive list of incompatibilities which is set forth in the provision of Article 414-A of the PCC.

regulatory environment surrounding the private supervision of PIE.

In this sense, it appears that the regulatory framework triggered by the qualification of SGOIC, SCR and SGFCR as PIE has imposed additional costs for the operation of management entities without having demonstrated, in a relevant manner, palpable results regarding the quality of its governance mechanisms. In this regard it is worth mentioning that CMVM itself, notoriously zealous of its mission to protect investors' interests in capital markets, has agreed with this amendment to the LRAS in its opinion to the respective draft Law no, mainly for reasons of effectiveness in its supervision actions[6] (which demonstrates significant clarity in its cost-benefit analysis of imposing regulatory charges to these entities).

What does this all mean for the asset management sector? In a nutshell, that the amendment of Article 3 of LRAS, which appears unassuming at first sight, should not be disregarded. If, on the one hand, this will be an opportunity to simplify the regulatory web that is hindering the creation and growth of various management companies, on the other hand, it imposes an additional burden on the running of these management companies: while at the same time it allows them to choose not to have collegiate supervisory bodies, they will be required to take on greater responsibility for the establishment and supervision of management control mechanisms in the preparation of the financial statements of the management entities and funds they manage, and in the supervision of the work of the ROC.

6 CMVM has referred, for these purposes, that: "this reduction of [the list of PIE] will allow for a better allocation of supervision resources, to exercise an audit supervision which is closer, timely, and risk focused, and will allow a greater focus in the activities of supervision of audit functions of CMVM in the auditors of entities with greater relevance and systemic risk (notably, credit institutions and listed companies, which have demonstrated greater fragilities in what concerns accounts audit) and bring closer together supervision practices for audit works with those of other Member States which have a ration of number of PIE versus persons dedicated to audit supervisory quite smaller than Portugal" (our translation).