PORTUGUESE CAPITAL MARKETS

MACEDO VITORINO

ABOUT US

MACEDO VITORINO WAS ESTABLISHED IN 1996, FOCUSING ITS ACTIVITY ON ADVISING DOMESTIC AND FOREIGN CLIENTS IN SPECIFIC ACTIVITY SECTORS, INCLUDING BANKING, TELECOMMUNICATIONS, ENERGY AND REAL ESTATE AND INFRASTRUCTURE.

Since the firm's incorporation, we have been involved in several high-profile transactions in all the firm's fields of practice, including banking and finance, capital markets, real estate, M&A, complex disputes, and corporate restructurings.

We have strong relationships with many leading international firms in Europe, the United States and Asia, enabling us to handle any cross-border legal matters effectively.

We are mentioned by The European Legal 500 in most of its practice areas, including Banking and Finance, Capital Markets, Project Finance, Corporate and M&A, Tax, Telecoms and Litigation. Our firm is also mentioned by IFLR 1000 in Project Finance, Corporate Finance and Mergers and Acquisitions and by Chambers and Partners in Banking and Finance, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

The multidisciplinary and integrated character of our corporate and commercial group allows us to efficiently solve the legal issues of our clients, in particular:

- Commercial contracts, distribution agreements and franchising
- Competition and European law
- Copyright, intellectual property, IT, patents and trademarks
- Corporate and acquisition finance
- Dispute resolution, litigation, mediation and arbitration
- Employment
- Foreign investment, mergers & acquisitions and privatisations
- Real estate acquisition and disposal
- Tax

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INTRODUCTION

This paper provides an overview of the current state of the Portuguese Capital Markets and addresses the main capital market rules, dealing specifically with the regime of qualified holdings, admission to trading, public offerings and, finally, the sanctioning regime.

The number of domestic listed companies in Portugal has been decreasing. The number of listed companies in Portugal reached its peak in 1990, with 152 listed companies at the Lisbon and Oporto Stock Exchange. Presently, only 53 companies are listed in Euronext Lisbon.

The main reasons for the decrease in the number of listed companies are the change in the shareholding structure of listed companies through a merger or acquisition, which may be followed by a "squeeze-out" of minority shareholders and consequent withdrawal from the stock exchange (as were the cases of Companhia de Seguros Tranquilidade, S.A. and with Vodafone Telecel – Comunicações Pessoais, S.A.) or by decision of the shareholders.

Since 2000, there were more than 50 IPOs in Portugal. Although the number of IPOs decreased after the financial crisis of 2008. SMEs, unlike state-owned companies, have requested to be listed on either the Portuguese regulated market (Euronext Lisbon) or another platform (in particular, multilateral trading facilities such as Euronext Access and Euronext Growth).

The last IPO in Portugal took place in 2021 with the listing of Greenvolt – Energias Renováveis, which meanwhile has been acquired by KKR.

The prices of the twenty listings with the largest market capitalisation form the Portuguese Stock Index 20 ("PSI-20"). PSI-20 is the main benchmark stock exchange index in Portugal, which includes, among others:

- EDP, a power company, which has the largest market capitalisation in the PSI 20 and its subsidiary EDP Renováveis;
- Galp, an oil and gas company with investments in the electricity market as well;
- Millennium BCP, the largest private bank in Portugal;
- SONAE, a conglomerate of industrial and distribution companies;
- Jerónimo Martins a leading Portuguese distribution group with a presence in Poland and Colombia; and
- NOS, the second largest telecom operator in Portugal.

1. REGULATORY FRAMEWORK

The main instrument of regulation of the Portuguese Capital markets is the Portuguese Securities Code (*Código dos Valores Mobiliários*, "**Securities Code**"), approved by the Portuguese Government in 1999, under the Decree-law 486/99, of 13 November, whose last amendment was made under Decree-law 66/2023, of 8 August.

The Securities Code provides the basic regulation on financial instruments, public offers, securities negotiation, supervision of the markers and crimes against the market. The Securities Code was an important instrument for the development of the Portuguese Capital Markets as it brought more stability and certainty to companies and investors.

The development of the European Common Market also included the issuing of common rules regarding the capital markets. The main instruments issued by the European Union regarding this matter are:

- Directive 2004/25/EC, of the European Parliament and of the Council of 21 April 2004 on takeover bids;
- Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on markets in financial instruments (known as "**MiFID II**"), which replaced Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004;
- Regulation 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("**MiFIR**")
- Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse ("**MAR**"); and
- Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Prospectus Regulation**").

The capital markets regulatory framework is completed considering the multiple regulations of the Securities Market Authority (*Comissão do Mercado de Valores Mobiliários*, "**CMVM**").

2. LISTING AND TRADING OF SECURITIES

2.1. ADMISSION TO TRADING

In order to be admitted to trading, a financial instrument shall be issued in accordance with the personal law of the issuer.

The issuer must comply with the following requirements:

- It must be duly incorporated and carry out business according to the applicable law;
- It must prove that it has a financial and economic situation compatible with the nature of the securities to be listed.

If the financial instruments are to be listed in the Euronext Lisbon, the issuer must comply with the following additional requirements:

- It must have carried out a business for at least three years; and
- It must have published managing reports and annual financial statements in respect of at least three years before the application for listing is presented.

Besides, for shares to be listed in Euronext Lisbon, the issuer must:

- Ensure that the shares are sufficiently dispersed among the public; and
- Provide evidence that their market capitalisation (or, if this cannot be determined, the company's equity) is at least of €1,000,000.

Sufficient dispersion is deemed to occur if at least 25% of the share capital represented by such class of shares is held by the public.

Shares of foreign companies can be listed if they fulfil all requirements applicable to the listing of Portuguese shares, through the presentation of a legal opinion that states that the general requirements established in the Securities Code are being met. The Securities Commission may not accept to list shares of non-EU companies if they are not listed in their national stock exchange.

Shares may be listed after registration of the company's incorporation or if share capital increases before the commercial registry office, even if its publication has not yet been carried out.

2.2. LISTING PROCEDURE

The listing procedure is initiated with the filing of an application to Euronext Lisbon by (i) the issuing company or (ii) holders of at least 10% of the shares, if the issuer has shares admitted to trading in a regulated market.

Euronext Lisbon then provides the CMVM with a copy of the listing application and the documents necessary for the approval of the prospectus or to assess where a prospectus is not required.

The listing application must be presented with the documents necessary to prove compliance with the listing requirements, such as:

- Copy of the issuer's articles of association;
- Certificate of the Commercial Registration Office;
- Copy of the resolution on the listing;
- Audited financial statements for the last three years; and
- Draft of the listing particulars.

Euronext Lisbon will resolve the listing application within 90 days following the filing.

Prior to the listing application, the issuer must submit to the approval of the CMVM a prospectus containing complete, truthful, updated, clear, objective, and lawful information, allowing the offerees to make an informed assessment of the offering. The liability of the issuer over the information of the prospectus has been reinforced in the last years.

The issuer, the members of the offeror's and the issuer's management body, the members of the auditing body of the offeror and the issuer, the certified accountant of the offeror, the accounting firms and any other individuals that have certified or, in any other way, verified the accounting documents on which the prospectus is based and the financial intermediaries may be liable for damages caused by the non-compliance of the prospectus with the provisions of the Securities Code.

The listing may be rejected if:

- the requirements above mentioned are not met by the issuer or the security;
- the issuer fails to comply with the obligations resulting from admission in another Member State, where the security is already listed; and
- the issuer's situation is such that admission would be detrimental to investors' interests.

2.3. DISCLOSURE OBLIGATIONS

All relevant information on issuers, such as annual reports, amendments to the articles of association, rights attached to the shares and publicity of their financial situation must be notified to the CMVM and Euronext Lisbon.

Issuers of shares listed in Portugal and in other EU Member States are obliged to provide the CMVM and Euronext Lisbon with the same information that they are required to provide to the markets and to the authorities of other EU Member States where such shares are listed.

Issuers of shares listed in a stock exchange located or operating in Portugal and a stock exchange located or operating in a non-EU country must provide the CMVM and Euronext Lisbon with any additional information that, being relevant for the valuation of the shares, they are bound to provide to the markets and to the authorities of that country.

Issuers must also publish their annual reports and information in respect of their activities and financial results in each semester or quarter, depending on the assets, the net sales, and the average employees.

The companies that issue shares admitted to listing must immediately inform the public of any events occurring within their field of activity that are not public knowledge and that, due to their impact over the net asset or financial situation or in the normal course of their business, are likely to influence, in a relevant way, the price of the shares.

3. QUALIFYING HOLDINGS

3.1. REPORTING DUTIES

Any entity reaching or exceeding a holding of 5%, 10%, 15%, 20%, 25%, a third, a half, two-thirds and 90% of the voting rights in the capital of an issuer of shares admitted to trading on a regulated market or reducing its holding to a value lower than any of the above thresholds, must, as soon as possible, and within four trading days of the occurrence of the fact or knowledge thereof, communicate that event to the CMVM and the company wherein the participating interest is held.

To calculate the voting rights held by a person or entity, in addition to the voting rights inherent to any shares owned by them, one must consider, among others, the voting rights:

- Held by third parties on their behalf;
- Held by a company controlled by them;
- Held by third parties with whom a shareholders agreement has been entered into regulating the exercise of voting rights;
- Held by the directors or members of a supervisory body (in case of a legal entity);
- That may be acquired by virtue of a call option or other agreement entered into with the respective holders;
- Inherent to shares held as collateral under certain circumstances;
- Held by third parties who have granted discretionary powers to them to exercise such voting rights;
- Held by persons who have entered into an agreement aimed at acquiring control of the company or avoiding a change of control or otherwise constitutes a concerted exercise of influence over the company;
- Inherent to the shares underlying financial instruments held under certain conditions.

The communications must specify, in particular:

- The circumstances which determine the attribution of voting rights inherent to shares belonging to third parties; and
- The identification of the entire chain of entities to which the qualifying holding is attributed and the percentage of voting rights assigned to the holder of the qualifying holding.

The communication duties are not applicable in certain cases, such as:

- Shares held by custodian entities provided they only exercise the voting rights of those shares or instruments as per the holder's written instructions;
- Shares held by a financial intermediary that result from its activity as a market-maker, acting as such, and whose inherent voting rights reach, exceed or fall below the 5% share capital voting right threshold, provided that it does not intervene in the management of the issuer concerned or influence the issuer either to purchase shares or to support its price and that informs CMVM within the four trading days that it acts or aims to act as market-maker regarding the issuer concerned;
- Shares held by a financial intermediary in its trading portfolio, provided that the voting rights held by the trading portfolio do not exceed 5% of the share capital voting rights and the share voting rights held by the trading portfolio are neither exercised nor applied to intervene in the management of the issuer;
- The shares purchased for the purposes of stabilisation regarding exemptions for buy-back programs and financial instrument stabilisation transactions, provided that the share voting rights are neither exercised nor applied to intervene in the management of the issuer.

3.2. MANDATORY TAKEOVER

Whenever a qualified shareholding exceeds, directly or indirectly, one-third or half of the voting rights, the holder of such qualified shareholding must immediately launch a public takeover bid for all shares and other securities issued by that company conferring rights to subscribe or acquire them.

The Securities Code regulates the conditions of such public takeover, such as the consideration. Under the mandatory takeover rules, the consideration in a mandatory public tender offer cannot be lower than the higher of the following amounts:

- The highest price paid by the offeror or by any related persons for the acquisition of securities of the same category, or that the offeror or any of those persons has committed to pay, in the six months immediately preceding the date of publication of the preliminary announcement of the offer;
- The weighted average price of those securities in a regulated market during the same period.

The Securities Code includes some exceptions to this duty. Among other situations, the launch of the offer will not be required when the person who would be obliged to do so demonstrates to the CMVM that they cannot exercise a dominant influence over the target company.

We will review in more detail the mandatory takeover offer rules below.

4. PUBLIC OFFERS

4.1. GENERAL RULES

The following are deemed public offers:

- Offers of securities to the public that require the prior disclosure of a prospectus or document required in accordance with European Union law;
- Takeover offers;

Public offers relating to securities that require prospectuses may take place through the intervention of a financial intermediary, which can provide the following services:

- Assistance and placement of public offers for the distribution of securities;
- Assistance, as from the preliminary announcement and receipt of the statements of acceptance, in takeover bids.

Since December 2021, the intermediation of a financial intermediary is not mandatory in Portugal.

When the public offer is intended to sell securities, it is normally called a public offer for distribution (*oferta pública de distribuição*). When the securities that are an object of the offer are issued at the moment of the offer it will be called an initial public offer (*oferta pública de subscrição*) and when the securities object of the offer were pre-existent a secondary public offer (*oferta pública de venda*).

On the other hand, a takeover (*oferta pública de aquisição*) is an offer addressed to unidentified recipients to acquire shares or securities conferring the right to subscribe to or acquire them issued by a company whose shares are admitted to trading on a regulated market in Portugal.

Public offers shall take place under conditions that ensure equal treatment to addressees. When the total amount of securities subject to statements of acceptance by addressees exceeds the total of securities on offer, the securities are allocated in proportion to the requested amounts, unless other criteria are determined by law and mentioned in the prospectus.

4.2. PROSPECTUS RULES

As a rule, public offers will require the disclosure of a prospectus. However, the Prospectus Regulation includes some exceptions.

As an example, an offer of securities addressed to qualified investors will not require the disclosure of a prospectus. An offer of securities addressed to investors who invest an amount in excess of the threshold set out in the Prospectus Regulation (e.g. €100,000) may also not require the disclosure of a prospectus.

The information in the prospectus must be complete, true, updated, clear, objective, and lawful information, allowing the offerees to make an informed assessment of the offer.

The prospectus must include, amongst other, information on:

- The individuals responsible for the prospectus content;
- The offer's purpose;
- The offeror and its activity;
- The name of the members of the offeror's corporate bodies; and
- The financial intermediaries which compose the consortium for the placement, if any.

The content of the prospectus must be adapted to the nature and characteristics of the securities that are object of the offer.

The prospectus may only be disclosed after receiving the approval of the CMVM. If, from the date of approval of the prospectus and until the offer's deadline, an error is detected in the prospectus or a new fact occurs or a fact not previously considered that is relevant to the decision to be taken by the offerees is revealed, the offeror must file an addendum or rectify the prospectus.

As a rule, the following entities or persons are liable for damages caused by the non-compliance with the prospectus rules:

- The offeror;
- The issuer;
- The guarantor, when applicable;
- The members of the offeror's and of the issuer's management body;
- The members of the auditing body of the offeror and of the issuer;
- Any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included in the same.

4.3. TAKEOVER RULES

The takeover begins with the publication of a preliminary announcement.

The preliminary announcement must contain:

- The name and head-office of the offeror;
- The name and head-office of the target company;
- The securities that are object of the offer;
- The consideration;
- The name of the financial intermediary in charge of assisting the offer;
- The percentage of voting rights in the target company attributable to the offeror;
- A brief reference to the objectives of the offeror, in particular, those regarding the continuity or modification of the businesses of the target company and its affiliates and the offeror, to the extent it may be affected by the offer;
- The information regarding the application (or not) to the offeror of the same limitations on the management and the exercise of voting rights set out in articles 182 and 182-A of the Securities Code;
- The offeror's intention to request the derogation foreseen in paragraph a) of article 189/1 of the Securities Code; and
- The legal conditions that the offer is subject to.

After the preliminary announcement of a takeover bid, the offeror must apply for registration of the takeover bid with the CMVM and file the draft launch announcement and draft prospectus to the target company.

After receiving and reviewing this documentation, the target company must send the offeror, the CMVM and disclose to the public a report on the opportunity and conditions of the bid.

After the offeror has formalised its application for registration of the bid, the CMVM will review the application and decide whether to register the offer or not. The bid will only be launched when the conditions of launch are verified (or waived by the offeror). If the CMVM registers the bid, then the offeror launches the takeover bid with the investors.

After the registration of the offer or the approval, the withdrawal of the offer depends on the increase of the offer risks due to an unforeseen and substantial change in circumstances, which is known by addressees and factored into the decision to launch the offer.

The change of the circumstances may lead to a modification of the offer but my also occur by decision of the CMVM.

5. FINANCIAL INTERMEDIATION ACTIVITIES AND SERVICES

5.1. INTERMEDIATION ACTIVITIES AND SERVICES

Under the Securities Code, financial intermediation activities include, among others, (i) investment services and activities in financial instruments and (ii) ancillary services.

Investment services and activities include:

- Reception, transmission and execution of orders on behalf of third parties;
- Management of portfolios on behalf of third parties;
- Underwriting and placing of a public offer for distribution with or without a firm commitment;
- Dealing on own account;
- Investment advice;
- Management of Multilateral Trading Facilities ("**MTF**"); and
- Management of Organized Trading Facility ("**OTF**").

Ancillary services include:

- Registration and deposit of financial instruments and custodian services, such as cash/collateral management;
- Granting of credits, including security loans, for carrying out transactions on financial instruments on which the entity granting the credit is involved;
- Preparing investment research, financial analysis or other general recommendations relating to transactions in financial instruments;
- Advice on capital structure, industrial strategy and related areas, as well as mergers and acquisitions;
- Assistance relating to public offer of securities;

- Foreign exchange services and rental of safety deposit boxes linked to the rendering of investment services;
- Investment activities and services when related to certain underlying assets (e.g. commodities, climatic variables, freight rates, emission allowances inflation rates or other official economic statistics).

5.2. AUTHORISATION/REGISTRATION REQUIREMENTS

As a rule, only financial intermediaries can perform, on a professional basis, financial intermediation activities in Portugal.

The following entities are deemed "financial intermediaries":

- Credit institutions;
- Investment firms;
- Managing entities of collective investment undertakings;
- Entities with functions correspondent to those described in the previous paragraphs that are authorised to exercise any financial intermediation activities; and
- Self-managed securities investment companies and real estate investment companies.
- The following entities, among others, are deemed "investment firms":
- Broker companies;
- Broker-dealer companies;
- Asset managing companies;
- Intermediary firms of money markets and foreign exchange markets;
- The investment advice firms;
- The management entities of MTFs or OTF;
- Other entities that are defined as such by law or which, not being credit institutions, are persons whose regular and professional business consists of providing investment services to third parties or carrying out investment activities.

The professional performance of any financial intermediation activity is subject to the following conditions:

- Authorization by the competent Portuguese authority; and
- Prior registration with the CMVM.
- Exceptions to the authorisation/registration requirements

The Securities Code sets out a list of exemptions which allow persons or entities to carry out certain investment services or activities even if they do not qualify as financial intermediaries and/or are not duly authorised.

Under certain circumstances, an entity established in a non-EU country may also be entitled to provide an investment service or activity to Portuguese residents provided that such service or activity may fall under the concept of reserve solicitation. However, the provision of an investment service or the pursuit of an investment activity under this exception is subject to limitations.

5.3. ADVERTISING AND TIED AGENTS

The advertising and prospecting activities which are aimed at the execution of financial intermediation contracts or the gathering of information on current or prospective clients may only be carried out in Portugal by:

- A financial intermediary authorised to carry out such activity; and
- A tied agent.

In general, a tied agent is:

- A natural person who is established in Portugal and is not included in the organisational structure of the financial intermediary; or
- A company with a registered office in Portugal which is not in a control or group relationship with the financial intermediary.

A tied agent may represent the financial intermediary in the rendering of the following services:

- Prospecting, without prior solicitation, outside the establishment of the financial intermediary, aimed at finding clients for any financial intermediation activity; and
- Reception and transmission of orders, placement and advice on financial instruments or services provided by the financial intermediary.

Tied agents do not need to be authorised or registered with the CMVM, as they will act on behalf of the financial intermediary, which must be duly authorised to carry out its activity in Portugal. However, the appointment of a tied agent by a financial intermediary is only allowed after communication of his/her identity to the CMVM.

5.4. INVESTMENT ADVISORY

Under the Securities Code, investment advice includes personal recommendations to a client as a current or prospective investor, either upon request of such investor or at the initiative of the investment advisor, in respect of transactions on securities or other financial instruments.

Investment advice may be carried out by:

- Financial intermediary authorised to pursue this activity, in respect of any financial instruments; and
- Autonomous investment advisers, solely in respect of securities.

Autonomous investment advisors may also receive and transmit orders in respect of securities provided that:

- The transmission of orders is addressed to financial intermediaries; and
- The advisor does not hold any funds or securities belonging to the clients.

Autonomous investment advisors do not need authorization from the Bank of Portugal but must be registered with the CMVM.

Financial intermediaries that provide investment advice must notify the identity of their employees to the CMVM.

5.5. RESTRICTIONS ON INDUCEMENTS

Following the implementation of the MiFID II in 2018, Portuguese law enhanced the inducement standards.

Under the Securities Code, financial intermediaries may not, concerning the provision of a financial intermediation activity to the client, offer to, or receive from, third parties any remuneration, fee or non-monetary benefit, except if:

- The existence, nature and amount of the payment or benefit or, where the amount cannot be ascertained, the method of calculating it, is clearly disclosed to the client, in a comprehensive, accurate and understandable manner, prior to the provision of the relevant service; where applicable, the investment firm must also inform the client about the mechanisms for transferring to the client the remuneration, fee, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service;
- The payment of the remuneration, fee or non-monetary benefit enhances the quality of the activity provided to the client and does not prejudice the duty to protect the best interests of the client; and

- The payment or benefit enables or is necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and by its nature will not give rise to conflicts with the investment firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients.

For services of investment advice on an independent basis and the services of portfolio management, the Securities Code prohibits financial intermediaries to accept and retain fees or any monetary and non-monetary benefits from third parties. Only minor non-monetary benefits are allowed under certain circumstances.

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