Legal insight

Amendment to the Securities Code and related legislation

info@abreuadvogados.com
abreuadvogados.com

INTRODUCTION

Last 31 December, it was published the Law 99-A/2021, which, among others, made substantial amendments to the Securities Code ("Código dos Valores Mobiliários" - "CVM"), to the General Regime of Collective Investment Undertakings, to the Statute of the Association of Statutory Auditors, to the Legal Regime of Audit Supervision, to the Statute of the Securities Market Commission, to the Insolvency and Corporate Restructuring Code, among others.

The aim of this reform was to promote the protection of investors and promote the development, competitiveness and efficiency of the markets through the implementation of simpler, objective, clear and proportional regulation.

Given the extent and depth of the changes under analysis, we highlight in this Newsletter the main new features.

The amendments introduced by Law 99-A/2021 will come into force 30 days after its publication, with the exception of the new wording of article 3 of the Legal Framework for Audit Supervision, which came into force on 1 January 2022.

MAIN CHANGES

Amendments to the Securities Code

1. Elimination of the figure of the public company
The figure of the public company is eliminated, since it has no parallel in other legal systems.

Public companies which have this status on the date of publication of this law will continue to be governed by the legal and regulatory rules in force until 31 December 2022.

2. Attribution of voting rights and qualifying holding
In this regard, note should be taken of the clarification of the Securities Code as to the attribution of voting rights held by or imputable to a certain company, providing that they are also imputable to the company that controls it, but not the opposite.
Furthermore, taking into consideration shares pledged as guarantee or managed, registered or deposited with a third party, it is clarified that there is only an imputation of votes to this third party in the cases where this latter can exercise the voting rights at its discretion in the absence of specific instructions from the holder of the shares.
The articles concerning the obligation to communicate to the regulator the acquisition of a qualifying holding in regulated entities have been amended, namely by eliminating the duty to communicate qualifying holdings in relation to the 2% threshold.

3. Plural Voting
Provision is made for the issue of shares with plural voting rights, as a competitive measure to disperse capital on the market.

4. Participation and Voting in Shareholders General Meetings
The regime for attending and voting at the General Meeting has been simplified. In this sense, a single declaration of participation to be sent to the financial intermediary is now foreseen.
On the other hand, the amendments also provide that the disposal of shares between the relevant record date and the date of the General Meeting does not affect the exercise of the right to participate and vote in the respective meeting. However, the chairman of the board of the general meeting must be informed of the duty of disposal.

5. Public Offerings Regime
Major changes have been made to the regime of public offers of securities, in order to make it simpler and more up-to-date.

Among several changes, we highlight the adaptation of the Securities Code to Regulation (EU) 2017/1129 of the Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.
Simultaneously, and given that European legislation does not refer to it as a mandatory service, the voluntary nature of assistance and placement services in public offerings is now provided for.
Returning to the regime of offers *proprio sensu*, and together with the regime of the offer by change of circumstances, a model for the revision of public offers is consecrated, which allows the revision of its terms and conditions, provided that it does not become unfavorable to the respective addressees.
As for the regime of responsibility for the prospectus, an attempt has been made to align the national regime with the European one. The members of the management and supervisory boards and the statutory auditor of the offeror and issuer, in functions at that date, may be held liable for its contents.

Still regarding prospectuses, it is clarified that these may be presented in English even if they refer to offers in Portugal. However, the CMVM may require that at least the summary is translated into Portuguese.

6. Amendments to the Takeover Bids Regime
The legal regime of takeover bids underwent its last major revision in 2006. At that time, it was necessary to adapt the national regime to the Directive on Takeover Bids.
The present revision is based on principles of simplification, alignment with the European legislation and fundamental principles of market promotion.
The first and perhaps most important reform is to restrict the scope of application of the

takeover bids regime to offers for the acquisition of shares and securities which grant the right to subscribe or acquire shares issued by companies whose shares are admitted to trading on a regulated market in Portugal.
The reform also brings in a new set of rules on the pendency of conditions and prejudicial issues of registration of takeover bids. Thus, the aim is to clarify the regime applicable to "launching conditions" as circumstances of the takeover bid as defined by the offeror, as well as preliminary questions related, among others, to encumbrances or administrative authorizations.
By mere lapse of time, the takeover bid will now extinguish in six months (if administrative authorizations are required) or three months (if such authorizations are not required). In this way, an excessive extension of the situation of uncertainty generated by the bid after its preliminary announcement is prevented.
Pending the takeover bid, it is also foreseen that the trading of securities of the type that are the object of the bid or that comprise the consideration outside a regulated market will be subject to CMVM's prior authorization, releasing the offeree company from the obligation to issue a prior opinion to each application and allowing a greater celerity in the authorization process.
As for the offeree company's report on the opportunity and conditions of the takeover bid, included in the current Article 181 of the CVM, it is provided that the offeree company shall again issue a statement on the bid, by determination of the CMVM, when the contents of the draft prospectus that was considered by the management board for the issuance of its statement has undergone substantial changes.

The regime of competing offers is another point to be highlighted. As from the publication of the preliminary announcement of a public offer for the acquisition of securities admitted to trading on a regulated market, any other public offer for the acquisition of securities of the same category may only be made through a competing offer.
With this reform, the present regime of the qualification of a bid as competing is replaced by the imposition of specific duties according to the moment in which each of the bids is announced or according to the moment in which each of them obtains the registration. In this sense, it is left to the addressees to assess the merit of each bid, which, involving judgements of a subjective nature, may lead to different evaluations by each addressee.

We would also like to point out that the reform also clarified the procedure to be observed in the case of negative proof of dominium, with the purpose of bringing greater transparency to the market and preventing situations where investors are positioned in the expectation of a takeover bid which, in the end, may not materialize.
New rules are also provided for exemptions to the duty to launch a takeover bid. It is clarified that a voluntary derogatory takeover bid is one in which the consideration is, at the date of the respective registration, in line with the requirements of article 188 of the CVM (ruling out the possibility of interpreting that this price must be recalculated at the date on which, at the end of the voluntary takeover bid, the duty to launch a takeover bid would arise).
Article 189 of the Securities Code also provides amendments to the exemption regime due to financial reorganization arising from the need to adapt to the regime of the Insolvency and Business Restructuring Code, also clarifying the criteria of the exemption arising from mergers, given the doubts that arose with the previous wording
Finally, it was established that the takeover bid price prevails, except if, between the end of the bid and the registration of the squeeze-out, the offeror or persons who are with the offeror in any of the situations provided for in article 20 of the CVM have acquired securities of the category of those that are the object of the bid for a higher amount.

Changes to supervision costs (CMVM by-laws)

7. Imputation of supervision costs
With the most recent revision of its By-Laws, the CMVM may now directly request from the supervised entities the amounts relating to the increase of supervision costs arising from exceptional situations, which require specific or specially increased resources, namely considering the significant complexity, slowness or unpredictable and urgent nature of the supervision in question. This mechanism will depend on the regulation to be prepared by the CMVM itself, which will establish criteria for the determination of the amounts, as well as the methods and deadlines for settlement and collection of the contributions as reimbursement of costs and expenses legally provided for.

Legal Framework for Audit Supervision
The objective of this revision was to simplify the regime previously in force, making it more efficient and focused, as acknowledged by the Securities Market Commission (CMVM) in a press release.

The revision of the Legal Framework for Audit Supervision will come into force on 30 January 2022, with the exception of Article 3, which came into force on 1 January 2022.

8. Entities of Public Interest
The new version of the Legal Framework for Audit Supervision considerably reduces the list of entities of public interest, a concept that is relevant for being subject to supervision by the CMVM. According to the CMVM, this change allows supervision to be "more focused on the more complex entities and those with greater systemic risk, with gains in efficiency and the reduction of unnecessary costs to the market while safeguarding the quality of overall supervision and the protection of investors".
Credit institutions, investment firms, collective investment undertakings in contractual and corporate form, venture capital companies, venture capital investment companies and venture capital funds, credit securitization companies and credit securitization funds, as well as public companies with a large turnover or total net assets, will disappear from the list of public interest entities.

On the other hand, the Law now refers to issuers of securities admitted to trading on a regulated market located or operating in Portugal, entities whose main activity is to acquire shareholdings with a majority of voting rights in credit institutions, insurance holding companies and mixed insurance holding companies and pension funds financing a special social security regime.

9. Competences of the CMVM
In what regards Audit Firms, the CMVM will have the power to supervise the suitability, qualification and professional experience of the members of their corporate boards and the suitability of partners who are not Statutory Auditors, under the terms of regulations to be prepared in the future by the CMVM itself.
Generally, the CMVM is responsible for the quality control of auditors who carry out the statutory audit of public interest entities.

10. Registration of auditors and sanctioning framework
The revision of the Legal Framework for Audit Supervision also brings some new features to the procedure of registration of auditors, including auditors and auditing entities from third countries. The intention in relation to the latter group is to adapt the demands and requirements of the register, although some room for discretion remains, based on the principle of reciprocity and equivalence of rules, to change or waive them. The legislative reform sought to integrate the OECD recommendations regarding the elimination of barriers to accessing the auditing career, simplifying the cross-border auditing activity.
With regard to the sanctions framework, it was decided to review and reorganize the list of administrative offences, maintaining, however, the division between very serious, serious and light administrative offences and the respective frameworks for applicable fines.

Insolvency
This Law amends the Insolvency and Corporate Recovery Code, approved by Decree-Law 53/2004, of March 18, namely Article 55, which establishes the functions of the Insolvency Administrator and Article 203, which refers to the conversion and extinction of common or subordinated credits regardless of consent.

Article 204 of the Insolvency and Corporate Recovery Code, approved by Decree-Law no. 53/2004, of 18 March, is also revoked.
In addition, this Law adds article 64-A to the Securities Code, approved by Decree-Law no. 486/99, of 13 November, on the registration of book-entry securities of issuers in liquidation or insolvency.

11. Duties of the Insolvency Administrator
This Decree-Law revises Articles 55 and 203 of the Insolvency and Corporate Recovery Code, regarding the duties of the insolvency administrator.
In this regard, and as a result of the addition of number 9 to Article 55 of the Insolvency and Corporate Recovery Code, the insolvency administrator is now exclusively competent to decide on the amendment of the form of representation of the securities issued by the debtor or, in the case of book-entry securities, the form of registration thereof.

The cases in which the administration of the insolvent estate is ensured by the debtor during the insolvency proceedings are excluded from the scope of application of this article.

12. Elimination of References to Public Companies
Articles 203 and 204 of the Insolvency and Corporate Recovery Code have been amended in order to delete the reference to the public company concept, since one of the most significant changes introduced to the Securities Code as a consequence of the publication of Law 99-A/2021, of 31 December, is related to the deletion of the referred exclusive concept in the Portuguese legislation, and its replacement by the concept of "listed" company.

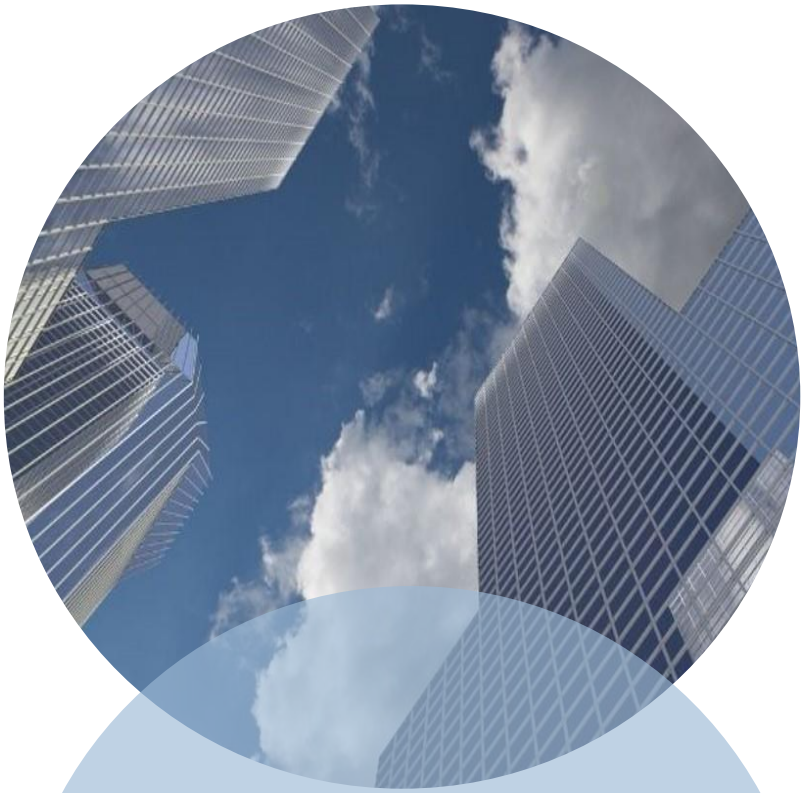
13. Registration of book-entry securities
The present diploma proceeds, complementarily, with the addition of article 64-A to the Securities Code regarding the registration of book-entry securities of issuers in liquidation or insolvency. In this sense, it will become mandatory to register with the issuer or with a financial intermediary representing the issuer, the securities of issuers of listed securities which are under liquidation or insolvency.

The declaration of insolvency will thus trigger the change of the individualized registration form, in which case the issuer will be responsible for changing the individualized registration form within six months from the aforementioned declaration of insolvency.

Statute of the Association of Statutory Auditors
14. Amendments to the functioning of the Portuguese Association of Statutory Auditors
This amendment to the Portuguese Association of Statutory Auditors foresees several changes to the internal functioning of the Association, including its duties, the competences of its bodies, electoral rules and procedures, the duration of the respective mandates and access to the profession, including the registration of auditors from third countries.

15. Functions carried out in the public interest
Within the scope of the exercise of functions of public interest, the role of statutory auditors in their guidance and direct execution, the need to produce additional information and the obligation to communicate various elements associated with the exercise of the profession to the Securities Market Commission are reinforced. The gradual rotation system is densified and now includes persons who perform functions of coordination of the work plan, of review of the work carried out and of management of the relationship with the client, as well as the auditor for quality control of the work.

Conclusions
In view of the above, it is important to emphasize the importance of the present reform, which aligns the national legal framework of securities with that of the European Union, and is expected to be a catalyst for the development and growth of the Portuguese capital market.



Thinking about tomorrow? Let's talk today.

Rodrigo Formigal - Partner
rodrigo.formigal@abreuadvogados.com

Diogo Pereira Duarte – Professional Partner
diogo.p.duarte@abreuadvogados.com

Isabel Pinheiro Torres - Senior Associate Lawyer
isabel.p.torres@abreuadvogados.com

José Carlos de Gusmão – Trainee Lawyer
joao.c.gusmao@abreuadvogados.com

Benedita Marques Pombo - Trainee Lawyer
benedita.m.pombo@abreuadvogados.com

João Diogo Barbosa – Trainee Lawyer
joao.d.barbosa@abreuadvogados.com