



Brazil – The other side of the dream

Sam is grey, average, normalized and mechanical. Sam lives in a police State and does not pursue freedom. Sam solely dreams with a woman. Due to a print error, a bureaucratic task, ultimately due to a fly, Sam Lowry becomes a terrorist, is captured, hides in his dream and merely hums: "Brazil".

We remember the symbology (and the protest) of the 1985 science fiction dystopic movie of Terry Gilliam "Brazil" (in Portugal "Brasil – the other side of the dream") in this quarter in which Brazil celebrated, on 7 September, its cry "Independence or Death".

Courtesy to our Brazilian friends and reminding our presence in S. Paulo when Portugal and Brazil look at each other in search of the "dream", we dedicate our main theme to the changes of control on listed companies pursuant to Portuguese and Brazilian laws.

I. Mandatory takeover of shares by transfer of control – Portuguese and Brazilian perspectives

A. Mandatory takeovers

Portuguese law, and Brazilian law as well, has rules pursuant to which someone may be under the obligation to launch a take over to buy securities issued by a listed company.

Pursuant to article 187/1 of the Portuguese Securities Code ("PSC") a person that, directly or through related entities, exceeds one third or a half of the voting rights on a listed company is under the duty of launching a takeover to buy all the shares and other securities which give right to acquire or subscribe the shares of the target company.

As regards the limit of one third, article 187/2 of the PSC allows the shareholder to produce evidence, before the Portuguese Securities Commission ("CMVM"), that he neither controls nor it is in a group relationship with the target company and therefore waive the duty to launch the mandatory takeover. Furthermore, other rules of the PSC exempt the shareholder from the duty to launch a takeover (article 187 of the PSC which applies, for example to certain cases of execution of a financial recovery plan and merger of companies) or suspend such duty if the

shareholder *undertakes the obligation to terminate the event that originated the duty to launch the takeover*, within the next 120 days (article 190 of the PSC).

On its turn, the Brazilian system foresees, on article 254-A of the Brazilian Share Companies Law ("**BSCL**"), the obligation to launch a takeover in case of *direct or indirect transfer of the control of the listed company* and that such transfer may only be executed *under the precedent or resolutive condition that the buyer undertakes the obligation to launch a takeover to buy the voting shares of the remainder shareholders of the company*. This provision is complemented by the Instruction no. 361/2002, of the Brazilian Securities Commission ("**CVM**") which § 5 gives to the CVM the power to impose the launching of a takeover if it *verifies that an onerous transfer of control of a listed company has occurred*.

On the Portuguese law, more precisely on the referred article 187/1 of the PSC, the rules establish simultaneously (i) a rebuttable presumption that the exceed of one third of the voting rights is a control shareholding, having CMVM the power to assess the evidence of *no-control* submitted by the shareholder and (ii) a *non-rebuttable* presumption of control whenever the shareholder exceeds one half of the voting rights of the target company. Legal rules of the Brazilian system are more flexible. The CVM has the power to impose the launching of the takeover regardless of the concrete threshold of the shareholding. For that the *verification of an onerous transfer of control* will be sufficient.

Both the Portuguese and the Brazilian systems give relevance to the concepts of control. The concepts of *group relationship* in the Portuguese system, and *controlling shareholder* in the Brazilian system are of relevance as well.

B. Control, group and controlling shareholder

In the PSC, the control relationship is defined as *the relationship between a natural or a legal person and a company whenever, regardless of the domicile or the head office being located in Portugal or abroad, the former may exercise on the later, directly or indirectly, a dominant influence* (article 21/1). This article also states that *in any case a control relationship will exist whenever a natural or a legal person: i) has the majority of the voting rights, ii) may exercise the majority of the voting rights pursuant to a shareholders' agreement or iii) may appoint or exonerate the majority of the board or supervisory members* (article 21/2 of the PSC).

In short, the concept of control on the PSC has its origin in the corresponding concept of *dominant influence* foreseen in the article 486 of the Portuguese Companies Code ("**PCC**"), however with sensitive differences such as the existence of control relationship between a natural person and a company or the express possibility of existence of a control relationship between companies whose head offices are located in countries other than Portugal.

As to the concept of *group relationship*, the PSC refers the matter to the PCC (article 21/3) and clarifies that the group relationship may as well exist between

companies whose head offices are located in Portugal or abroad. Therefore, there will be *group relationship* between two companies, pursuant to the PSC, whenever a company is the only shareholder of another, buys all the shares of another company or when both execute a *parity group agreement* (“contrato de grupo paritário”) ou a *subordination agreement* (“contrato de subordinação”), regardless of the country where their head offices are located.

Pursuant to the Brazilian law, a transfer of control is defined as a direct or indirect *transfer or shares of a control stake, of shares attached to shareholders agreements or of securities convertible into voting shares, the transfer of warrants and other securities or rights over convertible securities that will result in a transfer of share control on the company* (§ 1 of article 254-A of the BSCL).

Similarly, the Instruction CVM no. 361/2002 foresees in article 29 § 4 that it is a transfer of control the *operation or set of operations of transfer of securities with voting rights, or convertible into securities with voting rights, or of onerous transfer of subscription rights of those securities, executed by the controlling shareholder or by persons of the controlling group, through which a third party, or group of third parties representing the same interest, acquires the control of the company*, has established on article 116 of the BSCL which defines the concept of controlling shareholder.

Pursuant to this last article (116 of the BSCL) and to article 3 IV of the Instruction CVM no. 361/2002, the *controlling shareholder* is the *natural or legal person, fund or universality of rights* (“universalidade de direitos”) or *group of persons obliged by a voting agreement, or under common control, direct or indirect, which holds shareholders rights allowing him or them, permanently, the majority of the voting rights on a shareholders meeting and the power to appoint the majority of the directors of the company, and effectively uses those powers to direct the activities and the functioning of the company*.

C. Related entities and persons representing the same interest

To understand the Portuguese rules on mandatory takeovers it is fundamental to know the rules on aggregation of voting rights pursuant to which the votes of related entities are counted as belonging to the shareholder, as foreseen in the several hypotheses described on article 20 of the PSC.

Pursuant to this article, in addition to the voting rights of the shares a person (the “participant”) holds, it will be counted as being held by him the voting rights of shares: (i) held in usufruct, (ii) held by third parties in their own name, but on behalf of the participant, (iii) held by a company with which the participant is in a control or group relationship, (iv) held by holders of voting rights with whom the participant has entered into a voting agreement, except if, by virtue of this same agreement, the participant is bound to follow a third

party's instructions, (v) held, if the participant is a company, by members of its administration and supervisory committees, (vi) that the participant may acquire pursuant to an agreement executed with the respective holders, (vii) held by way of security or managed by or deposited with the participant if the voting rights have been attributed to the participant, (viii) held by holders of voting rights which have granted discretionary powers to the participant to exercise them, (ix) held by persons that have entered into any agreement with the participant aimed at either acquiring control of the company or frustrating any changes to its control or otherwise constituting an instrument of concerted exercise of influence over the company in which they own shares and (x) attributable to any individual or entity described in one of the previous cases by application, with due adaptations, of the criteria described in any of the other cases.

Therefore, in the Portuguese system, the fact that the participant does not hold himself any share on a listed company does not prevent him from being under the obligation to launch a takeover. For that it will suffice that he has undertaken the obligation to buy shares (more than one third or one half) or has executed a shareholders' agreement pursuant to which he may influence the voting rights of other parties.

The aggregation of voting rights of related entities is known to the Brazilian law as well, which for that purpose defines *people representing the same interests*.

To this respect, the above mentioned Instruction of CVM no. 361/2002, on article 3 § 2, foresees the assumption that *people who represent the same interests* are those who (i) *directly or indirectly control the shareholder, are in any way controlled by him or are with him under common control of another person or (ii) has acquired, even if under condition precedent, his control or the control of the target company or has undertaken the obligation to buy or has an option to buy the share control of the target company or is intermediary in agreement destined to transfer such control.*

D. Some comparative conclusions

From this brief and general view over the legal framework of mandatory takeovers in case of transfer of control in Portugal and in Brazil we may conclude that in both legal systems the purpose is to protect the minorities with the attribution of a *disinvestment right*, which is implemented through the imposition of the corresponding obligation to buy on the new controlling person.

Nevertheless there are sensitive differences of legal methodology that we shall stress by their relevant practical impact.

On one side, the Portuguese system is formally complex and organized. The rules on mandatory takeovers are almost all within the PSC and stand on a developed set of presumptions that are relevant for information to market as well. This overlapping may be the source of difficulties when interpreting the law.

On the contrary, the Brazilian system rules the mandatory takeovers independently, which allows a better understanding of the matter, yet with recourse to a large number of rules within infra legal sources.

The Brazilian system, when compared to the Portuguese, has a large number of *open ended rules* in which the teleology appears in the legal hypothesis (e.g the *transfer of control*). The higher flexibility of the Brazilian system has the downsides of unpredictability and uncertainty risks in the interpretation and application of the law, which requires the interpreter to characterize (or not) each transaction as a *transfer of control* with the inevitable consequences, and face the risk of the CVM imposing the launching of a takeover if it understands that a *transfer of control* has occurred¹.

From the stand point of the legal solutions, we note that the Portuguese system anticipates more clearly than the Brazilian one its harms on the mere possibility of *control*. Several rules follow this path such as the mandatory takeover resulting from exceeding one third of the voting rights and the rules on aggregation of votes. The Brazilian rules are far more centered in the effective transfer of control.

In both systems, Portuguese and Brazilian, the regulatory authorities (CMVM and CVM) are main characters at the interpretation, construction and application of the laws and regulations on mandatory takeovers. One must not find strange therefore that in both jurisdictions, in face of the increasing globalization of the capital markets, the solutions tend to converge on its essential aspects.

II. News on legislation and case law

A. Banking Law: institutional and material

1. Banking minimum services

Bank of Portugal approved notice no. 4/2011, published in 2.nd Series of the Portuguese Official Gazette no. 154, dated 11 August, established the duties of the credit institutions in respect of the disclosure of their adherence to the banking minimum services regime and to the advertising of contractual and maintenance conditions of the deposit account created under such regime and the possibility to convert the existent deposit account into a banking minimum services account and the assumptions of such conversion.

¹ Portuguese law reduces these risks with the use of *hard and fast rules*. However, the PSC still grants to the CMVM significant powers to interpret and ultimately to impose the launching of a mandatory takeover.

The referred notice considered the content of the Commission Recommendation 2011/442/EU dated 18 July 2011 on access to a basic payment account. This recommendation aims to guarantee that consumers resident in the European Union have the right to open and operate a basic payment account with a payment services provider in their respective territory.

2. Restrictions to the granting of credit established by articles 85 and 109 of the Banking Law (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*)

Instruction no. 17/2011, published in the Official Bulletin of the Bank of Portugal no. 8, dated 16 August 2011, and which entered into force on 21 August 2011 approved a number of measures aiming to simplify the regime presently in place in respect of the compliance, by the credit institutions, of their obligations foreseen in articles 85 (Credit to corporate bodies' members) and 109 (Credit to qualified participations' holders) of the Banking Law, without prejudice to the maintenance of the existence of mechanisms which allow monitoring the compliance with the obligations established in such legal provisions.

This instruction also revokes Instruction no. 13/2008, published in the Official Bulletin of the Bank of Portugal no.10/2008, dated 15 October 2008.

3. Management of the operational risk in market related activities

Instruction no. 18/2011 published in the Official Bulletin of the Bank of Portugal no. 8, dated 16 August 2011, which entered into force on the same date, determines that all credit institutions and investment companies shall consider, in regard to the valuation and management of the operational risk exposure, the guidelines published by the Committee of European Banking Supervisors, presently European Banking Authority, on 12 October 2010 under the name "Guidelines on operational risk management in market related activities".

4. Report to the Mutual Agriculture Guarantee Fund

Instruction no. 19/2011, which entered into force on 20 September 2011, determines that financial institutions participating in the Mutual Agriculture Guarantee Fund, shall dispose of an information system which allows to transfer to such Fund, in electronic format and within 2 business days from request of the Fund, a complete register, by depositor, of the existent credits on such date.

5. Interbank Netting System

Instruction no. 20/2011, which entered into force on 15 September 2011, changes Instruction no 3/2009 which regulates the Interbank Netting System (*Sistema de*

Compensação Interbancária (SICOI)), namely in respect to the participation conditions and penalties for the breach of the SICOI Regulation.

6. Consumer Credit Market

Circular Letter of the Bank of Portugal no. 45/2011/DSC, dated 28 July 2011, published in the Official Bulletin of the Bank of Portugal no. 8, dated 16 August 2011, defines a set of good practices to be followed by the credit institutions in the consumer credit activity, namely in respect to: the time of the delivery of the standard information (*Ficha de Informação Normalizada*), the legibility of the information, the valuation of the consumer's solvency, the financing of charges, the information to be specified in the overdraft credit agreements to be repaid in one month, the rendering of information on the nominal interest rate and on the amendment of the financial conditions of the loan due to default by the consumer in respect of the subscription of financial products and services, the introduction of amendments to the agreements and the availability of out-of-court settlements.

The rectification of the Directive 2008/48/EC from the European Parliament and the Council, dated 23 April 2008, in respect of credit consumer agreements which revoked Directive 87/102/EEC of the Council, was published in European Official Journal L234/46, dated 10 September 2011, and amends paragraph 3 (credit costs) of Annex II (Standard European Consumer Credit Information) of the Directive 2008/48/EC, by replacing "missing payments" by "late payments" in the late payments costs item.

7. Own Funds

Circular Letter of the Bank of Portugal no. 10/2011/DSP, dated 23 August 2011, sets forth the understanding of the Bank of Portugal in relation to the clearance of the amount to be deducted to the own funds in respect of the difference between expected losses and the sum of value and provisions, related with tax effects. In fact, such difference shall be deducted 50% to the basic own funds, and 50% to the complementary own funds, further to the application of the limits for the eligibility of complementary own funds, being the remaining amount, in case that these reveal insufficient to absorb the deduction, deducted to the basic own funds.

8. Decree-law no. 88/2011, dated 20 July

Decree-Law no. 88/2011, dated 20 July, which entered into force on 21 July 2011, operated the transposition of Directive no. 2010/76/EU, of the European Parliament and of the Council, dated 24 November 2011, which amend the Directives nos. 2006/48/EC and 2006/49/EC, both of the European Parliament and of the Council dated 14 of June, as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies by the supervisory authorities, proceeding with the amendment of the relevant provisions

of the Banking Law, of Decree-Law no. 104/2007, dated 3 April, on the access to the activity of credit institutions and respective exercise and of Decree-Law no. 103/2007, 3 April, on the adequacy of the own funds of credit institutions and investment companies.

This Decree-Law aims to impose on the credit institutions and investment companies the obligation (i) to adopt remuneration policies and practices which promote a solid and effective risk management and to disclose detailed information over the same, as well as to submit such policies and practices to the analysis of the Bank of Portugal, and (ii) in respect to the collaborators which activity has a significant impact on the risk profile of the institution, to provide that the variable component of the remuneration constitutes a balanced proportion of the remuneration as a whole, and assure that the global amount of the variable remunerations does not limit its capacity to reinforce its own funds basis.

This decree-law also provides a set of own funds requirements more demanding than the ones applicable to the traditional securitization positions holding the same rating, establishing a reinforced supervising process applicable to particularly complex resecuritization.

9. Balance sheet of the monetary financial institutions

The Governing Council of the European Central Bank adopted Regulation (EU) no. 883/2011 of the European Central Bank dated 25 August 2011 which amended Council Regulation (EC) no.25/2009 concerning the consolidated balance sheet of the monetary financial institutions (BCE/2008/32) in order to adjust the definition of "monetary financial institutions" along with the update of the definition of "electronic money institution" and "electronic money" and to introduce new criteria for the identification of European Money Market Funds (MMFs) for European System of Central Banks statistical purposes so that the population of MMFs is aligned with the identification criteria expected to apply for supervisory purposes aiming to increase market transparency and facilitate management reporting on funds by their agents.

10. Case law

Decision of the Supreme Court of Justice dated 12 July 2011 available at www.dgsi.pt

The lender, as a banking institution, could not fail to know the borrower's and its affiliates' commercial status and financial situation. Therefore, having the termination of the pledge occurred in June 2008 - two months before the declaration of insolvency - the lender could not prevent itself from knowing the situation which the borrower was facing, due to the special relationship it had with the insolvent. The assumption of bad faith, in this case, cannot be

rebuttable, therefore the appellant should demonstrate having acted in good faith.

The assumption of prejudicial acts set forth in article 120, no. 3, of the Portuguese Insolvency Code (CIRE) is not unconstitutional. This assumption because it is set forth for the benefit of the insolvency estate, is consistent with the insolvency proceedings and with the interests of all the creditors competing to the payments at the expense of the insolvency estate. It serves as a repair mechanism for certain acts that the law deems harmful and hindering the common interest or the par conditio creditorum.

Decision of the Supreme Court of Justice dated 8 September 2011 available at www.dgsi.pt

The personal guarantee (“fiança”) provided by the managing partner of the company, who was specially entrusted with its respective commercial management, is not null and void based on the indeterminacy of the object of the negotiation, when related to future liabilities, arising from the development of a contractually determined relationship, subject to a fixed term, and resulting from the supply of goods and services directly related with the normal and predictable day-to-day activities of the company, which the managing partner/guarantor could, in fact, conform and significantly influence, through the exercise of its management powers arising from the law and the by-laws.

Decision of the Supreme Court of Justice dated 6 September 2011 available at www.dgsi.pt

The client, who is or should be aware of the existence of counterfeited checks and corresponding abnormal movements from his bank account, violates such duty of information, whenever he does not give prompt knowledge to the bank, thus allowing that identical and more serious anomalies continue to occur.

In this factual context, and given that it is proven that the forged signatures presented enough similarities with the genuine signature included in the subscription form, to be able to pass an examination of recognition of similarity; should the bank - for lack of action with any guilt, even assumed (article 799, no. 1 of the Portuguese Civil Code) - be exempted from any responsibility for the damages suffered by the client as a result of the debit in his account, through the discount of checks, after the failure of compliance with the aforesaid duties.

11. Short news

Stress tests of the European Banking Authority

On 15 July 2011, the European Banking Authority (EBA) published the results of its 2011 EU wide stress testing exercise of 90 financial institutions over 21 European countries. The purpose of these stress tests was to assess the resilience of the banks involved against an adverse although plausible scenario. The stress tests were carried out in cooperation with the European Systemic Risk Board (ESRB) and the supervisory national authorities.

The main goal was to assess banks' capital adequacy against a 5% Core Tier 1 capital benchmark. The adverse stress test scenario covers a two year time horizon (2011-2012), by using a static balance sheet assumption as at December 2010. This exercise did not take into consideration the business strategies envisaged by the banks nor their management actions and does not correspond to their forecast of results.

According to a statement of the Bank of Portugal of that same day, the four major Portuguese banking groups assessed (Banco Comercial Português, Banco BPI, Caixa Geral de Depósitos and Espírito Santo Financial Group – of BES), "(...) and which represent the large majority of the system – are able to withstand a renewed severe materialization of risks at the global and national levels", being that "the results determine that all four Portuguese banks meet the capital benchmark set out for the purpose of the stress test."

Statement of the Bank of Portugal, available at: http://www.bportugal.pt/en-US/OBancoeoEurosistema/ComunicadoseNotasdeInformacao/Lists/LinksLitsItemFolder/Attachments/60/comb20110715_en.pdf.

Opinion of the European Data Protection Supervisor

The European Data Protection Supervisor adopted an Opinion on the proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (2011/C 216/04). The main aim of the Proposal is to establish common rules to increase security and efficiency of the over-the-counter derivatives market.

B. Insurance law: institutional and material

1. Fire Insurance

Regulation no. 6/2011-R, of 18 August (*in* Portuguese Official Gazette, 2nd Series, no. 181, of 20 September 2011) publishes the indexes to be considered, in the insurance agreements beginning or terminating in the 4th quarter of 2011, for the purposes of the automatic update, in the fire insurance regarding risks related with houses, of the value of the house or of the part of it that is insured, in accordance with article 135 of the Portuguese Insurance Contract Law, approved by Decree Law no. 72/2008, of 16 April.

2. Uniformization of the remunerations to be paid to any member of a jury or technical commission

Regulation no. 7/2011-R, of 8 September (*in Portuguese Official Gazette*, 2nd Series, no. 184, of 23 September 2011) proceeds to the uniformization of the remunerations to be paid to any member of a jury or technical commission in the insurance and pension funds sectors, amending therefore Regulations no. 9/1994, of 27 July, no. 17/2006-R, of 29 December and no. 7/2007-R, of 17 May. This Regulation has entered in force in the day immediately succeeding the date of its publication.

3. Special condition to apply to the insurance agreements regarding the plantation of tomatoes for industrial purposes

Regulation no. 8/2011-R, of 8 September (*in Portuguese Official Gazette*, 2nd Series, no. 184, of 23 September 2011) approves a special condition to apply to the insurance agreements regarding the plantation of tomatoes for industrial purposes, pursuant to the Ministerial Decision no. 261/2011, of 18 August 2011. This Regulation, which shall only be effective for 2011, has entered into force in the day immediately succeeding the date of its publication.

4. Central registration of life insurance agreements, personal accidents and capitalization transactions with beneficiaries appointed in case of decease of the insured person or of the underwriter

Regulation no. 9/2011, of 15 September (*in Portuguese Official Gazette*, 2nd Series, no. 185, of 26 September 2011) postpones to 31 March 2012 the due date set forth by Regulation no. 14/2010-R, of 14 October 2010 (which regulates Decree Law no. 384/2007, of 19 November 2007, regarding the central registration of life insurance agreements, personal accidents and capitalization transactions with beneficiaries appointed in case of decease of the insured person or of the underwriter) initially set forth on 30 May 2011. Therefore, the access to the information contained in the central registration will only become available from 31 March 2012 onwards, and until that date the insurance companies shall fully comply with the duties imposed by Decree Law no. 384/2007, of 19 de November 2007 and by Regulation no. 14/2010-R, of 14 October 2010. This Regulation has entered into force in the day immediately succeeding the date of its publication.

5. Short news

ISP publishes intermediate summary

On 19 September 2011, the Portuguese Insurance Institute has published an intermediate summary regarding the exercise of its supervisory and regulatory attributions over the insurance market, since the beginning of the year until the 30 June 2011. This document is available at www.isp.pt.

Questionnaire on the legal regime applicable to the mandatory motor vehicles civil liability insurance

Between 18 August and 23 September 2011, the Portuguese Insurance Institute has promoted, pursuant to Decision no. 5/2011, of 18 August 2011, a questionnaire on the applicability of Decree Law no. 291/2007, of 21 August, which has approved the legal regime applicable to the mandatory motor vehicles civil liability insurance, enacting in Portugal Directive no. 2005/14/EC, of the European Parliament and of the Council of 11 May, which has amended Directives no. 72/166/EEC, no. 84/5/EEC, no. 88/357/EEC and no. 90/232/EEC of the Council and Directive no. 2000/26/CE, regarding the motor vehicles civil liability insurances. The complete answer to the questionnaire was mandatory for the insurance companies incorporated in Portugal as well as to the subsidiaries of insurance companies incorporated outside the European Union exploring the motor vehicle and/or the motor vehicles civil liability insurance businesses.

The answers to the questionnaire shall be used by ISP in order to prepare an evaluation report on the impact of the applicability of the referred Decree Law, which will in turn be used to justify a proposal regarding the revision of the legal regime applicable to the mandatory motor vehicles civil liability insurance.

C. Securities and capital markets

1. Alternative Investment Fund Managers

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 (published in Official Journal of the European Union in 1 July 2011) on Alternative Investment Fund Managers aims at establishing common requirements governing the authorization and supervision of alternative investment fund managers in order to provide a coherent approach to the related risks and their impact on investors and markets in the European Union.

The alternative investment funds include, for these purposes, all types of funds that are not covered by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 (UCITS IV), irrespective of their legal or contractual manner.

Therefore, the directive establishes harmonized rules to alternative investment fund managers domiciled in the European Union in several matters, notably the authorization request and conditions to obtain such authorization from the respective supervisory authority, minimum amount of share capital and own funds, organization and operating conditions, transparency duties towards the supervisory authority and investors.

On the other hand, the alternative investment fund managers may start to manage and commercialize units or shares of alternative investment funds in another

Member State than the home Member State of the alternative investment fund manager.

The deadline for the implementation of the Directive is 22 July 2013.

2. Proposed amendment to the Breakthrough Rule

On 26 August 2011, CMVM submitted to public consultation (Public Consultation no. 3/2011) an amendment proposal of article 182-A of the Securities Code which establishes rules on the suspension of the application of transfer of shares and voting rights restrictions regarding public companies in the context of a takeover bid and which are commonly known as "breakthrough rule".

The current wording of the breakthrough rule does not have any practical application, as, on the one hand, no Portuguese listed company has included in its by-laws the suspension of the application of transfer of shares and voting rights restrictions in the context of a takeover bid, frustrating the non-mandatory nature of the rule that had been assumed by the legislator, and, on the other hand, no Portuguese listed company has established in its by-laws a majority of more than 75% of the casted votes for the amendment or elimination of the referred restrictions, being thus useless the only mandatory rule of the breakthrough rule.

The wording of the amendment proposal submitted to public consultation represents a "revolution" of the breakthrough rule by:

- (i) Establishing its mandatory nature;
- (ii) Extending its application to the acceptance of the takeover bid;
- (iii) Reducing the percentage of voting share capital which the offeror must acquire in order to benefit from the application of the rule in the shareholders' general meetings of the target company following the end of the takeover bid;
- (iv) Requiring a "re-approval", at least every 5 years, of the statutory voting caps, being such caps not applicable, as well as any aggravated quorum, to the respective re-approval.

These amendments will allow for the application of the breakthrough rule to the restrictions foreseen in the by-laws of the major Portuguese listed companies (e.g. EDP; PT; BCP) or in the shareholders' agreements (e.g. Galp; Cimpor), which will facilitate the elimination of voting caps and similar rules. After the close of the consultation and considering the criticisms presented to the amendment proposal by different entities, such as the *Instituto Português de Corporate Governance* (the Portuguese Institute of Corporate Governance) or *AEM – Associação de Empresas Emitentes de Valores Cotados em Mercado* (the Association of the Issuers of Listed Securities), we will need to wait for the final amendment act to understand the effective magnitude of the "revolution" proposed for the breakthrough rule.

3. Short News

Annotated presentation published in Official Journal of the European Union in 15 July 2011 of regulated markets and national provisions implementing relevant requirements of MiFID

Taking into consideration that Article 47 of Directive 2004/39/EC requires that each Member State shall maintain an updated list of regulated markets authorized by it, please find below the regulated markets authorized in Portugal and the entities responsible for managing those markets:

- (i) Eurolist by Euronext Lisbon (Mercado de cotação oficial): Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados, SA;
- (ii) Mercado de Futuros e Opções: Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados, SA;
- (iii) MEDIP – Mercado Especial de Dívida Pública: MTS Portugal – Sociedade Gestora do Mercado Especial de Dívida Pública, SGMR, SA;
- (iv) MIBEL – Mercado Regulamentado de Derivados do MIBEL (mercado de produtos energéticos): OMIP – Operador do Mercado Ibérico de Energia (Pólo Português), Sociedade Gestora de Mercado Regulamentado, SA (OMIP).

Empty Voting

On 14 September 2011, the European Securities Markets Authority (ESMA) has submitted to public consultation a call for evidence on empty voting. This can be the beginning of a process of European regulation on a matter where there no uniform rules in the different Member-States. The consultation ends on 25 November 2011.

Action Plan of CMVM for 2011-2012

The Board of Directors of CMVM has decided to define some actions of short term – for the period 2011/2012 – that allow a better market regulation and more efficient supervision, even before the implementation of the expected regulatory reforms. The main objectives of these actions are essentially the reinforcement of the protection of the investors, but also the reduction of the compliance costs of the entities subject to supervision through the improvement of the CMVM practices and simplification of the administrative proceedings.

Please find below the most relevant proposals:

- (i) Improvement of the supervision of the distribution channels of the entities that commercialize complex financial products (including the “mystery client” investigation means), in order to verify the adjustment of the selling team to such products and assure the inexistence of conflicts of interests;

- (ii) Reinforcement of the supervision of the policies on “best execution” of orders, in order to verify if the investment companies comply with the duty to take all the reasonable measures to obtain the best result possible for their clients within the defined execution rules;
- (iii) Implementation of a system that allows the complete filing of the authorization or registration legal requests through the internet site, as well as the permanent follow-up of the respective regulatory procedure.

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