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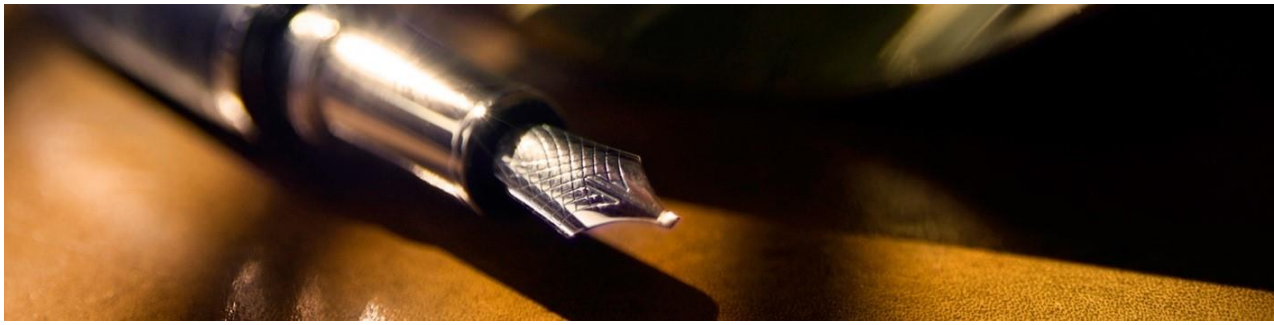

NEWSLETTER I CORPORATE

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CORPORATE LAW NEWSLETTER I 2ND QUARTER 2017

I PROHIBITION OF BEARER SECURITIES

On May 3, 2017, Law no. 15/2017 was published, prohibiting the issue of bearer securities and creating a transitional regime for the conversion of existing bearer securities into nominative securities.

Law no. 15/2017, which entered into force on May 4, comes under measures aimed at preventing tax evasion and the use of the financial system for money laundering and terrorism financing. Although these regimes are not the subject of our analysis, it must be noted that two other significant laws related to the prevention and suppression of money laundering and terrorist financing were published on the same date: Law no. 14/2017, which determines the annual publication of the total value and intended purpose of transfers and remittances of funds to countries, territories and regions with favourable tax regimes, and Law no. 16/2017, which extends the requirement to register bank shareholders to the identification of the beneficial owners of the entities with a shareholding on such banks.

With the approval of Law no. 15/2017, Portugal adopted a position similar to the one found in some Member States, such as the United Kingdom, which eliminated bearer shares by means of the *Small Business, Enterprise and Employment Act* of 2015. Thus, the nominal nature of securities, which was already mandatory in some situations (such as shares represented by temporary certificates, shares which are not fully paid, shares subject to transmission restrictions or whose holder is required to make supplementary capital contributions to the company, or even in the cases of credit institutions, among others), has become the rule. In practice, it is now possible for the issuer of the securities to know the identity of their holders, for there to be transparency and legal certainty, thus complying with the scope of Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

It must be noted that the main characteristic of bearer securities, such as, for example, shares in public limited liability companies, is the fact that they do not allow the issuer entity to identify their holders, neither control any transmissions that are carried out, unlike the case of nominative securities.

To this end, under Law no. 15/2017:

a) Since May 4, 2017, the issuing of bearer securities is prohibited;
b) Existing bearer securities must be converted into nominative securities until November 4, 2017;
c) From November 4, 2017:
   - The transmission of bearer securities is prohibited; and

- The right to take part in profit distribution associated with bearer securities is suspended.

Regarding the conversion procedures, the Government has until September 2, 2017 to regulate Law no. 15/2017 (*i.e.* 120 days after its entry into force), to specify the terms and conditions applicable to the conversion of bearer securities. However, irrespective of the publication of these regulations and their entry into force, the six months term for conversion of securities ends on November 4, 2017. In an extreme situation, if, by chance, the Government makes use of the 120 days granted by Law no. 15/2017 and only publishes those regulations on September 2, 2017, the holders and issuers of securities shall only have a short period of two months to carry out the conversion in question.

Given that the term for conversion of the securities is limited, this may imply that issuers of securities, their holders, as well as other interested parties (such as secured creditors or holders of other rights over the bearer securities) start to draw up their own procedures, such as, for example, the recordal of ownerships in the share registry books when they are nominative, intended for conversion, to avoid the consequences referred to above.

It is also to be noted that, in addition to the amendments made to the Securities Code ("**CVM**") (Articles 52 and 97) and the Commercial Companies Code ("**CCC**") (Articles 272, 299 and 301), to adapt these statutes to the new legal framework, Law no. 15/2017 repealed Article 52(2) (nominative and bearer securities), Articles 53 (convertibility) and 54 (conversion methods), Article 63(1)(a) (registration with a single financial intermediary), Article 101 (transmission of certificated bearer securities) and Article 104(1) (exercise of rights), all of the Portuguese Securities Code, and Article 299(2) (nominative and bearer shares) and Article 448 (disclosure of shareholdings) of the Commercial Companies Code.

As Law no. 15/2017 entered into force on May 4, the aforementioned rules have been repealed since that date, which raises a number of questions of practical nature. These include the question of how can holders of bearer securities transfer or exercise their underlying rights (such as voting right) until November 4, 2017 or what will happen to the distribution of profits associated with bearer securities that take place after that date.

The question referring to the transmission of securities between the date of entry into force of Law no. 15/2017 and November 4, 2017 is problematic, since Article 101 of the Portuguese Securities Code on the transmission of bearer securities has been repealed, causing a gap in the law. Considering the intention of the legislator, and, although this is not expressly stated in Law no. 15/2017, it is legitimate to ask whether the transmission of securities, in addition to their issue, is also prohibited since May 4. Without a better understanding, we believe that the transmission is not prohibited (only the issuing is prohibited) and it is only necessary to define which procedures must be followed, since Article 101 no longer exists and the Government' regulation has not yet been published.

We recall that the rule, regarding shares, is the free transferability, being the only limitation the terms and conditions provided by law (Article 328(1) of CCC), for which reason in the absence of an express rule (as is the case with Law no. 15/2017) no other interpretation can be made. Quite to the contrary: using the interpretation *a contrario* of Law no. 15/2017, which mentions that the prohibition on transmission of securities only takes effect *after the six-month period from the date of entry into force of the law*, it can be concluded that *before the end of that period* there is no limitation.

The following must also be noted: as determined by the Supreme Court of Justice, in its Judgment of May 15, 2008, "the purchase and sale of shares is not a *quod effectum* contract – it is a contract with merely obligational immediate effects, like contracts of the same type regarding credit instruments on paper, which transmission requires delivery, endorsement or equivalent action" and, for this reason, the transmission of certificated bearer shares is only completed with their handover. All this leads us to the conclusion that, for the transmission of bearer securities, we must continue to apply the rule contained in the repealed Article 101(1) of the Securities Code, under the terms of which "certificated bearer securities are transmitted by delivery of the certificate to the acquirer or to the custodian indicated by the acquirer".

In this respect, and as we have said, we believe that the solution presented as the most compliant with the legal system is to apply the procedures provided for in the repealed Article 101 of the Securities Code to transmissions occurring until the entry into force of the regulations. Among other arguments, we believe that nothing prevents the repealed rules from still being applied, since there is a gap in the law to be filled; moreover, this gap has to be filled, since transmission is not prohibited (as mentioned above), for which reason rules have to be found that allow this to occur.

On the other hand, after November 4, 2017, the failure to convert bearer securities to nominative securities implies the impossibility of exercising the right to their free transmission, as well as the suspension of the right to take part in profit distribution. This means that any transfer that has taken place after that date and concerns bearer securities is null and void. Also the holders' right to receive dividends or interest, depending on whether they are shares or bonds (but not just that), respectively, is restricted.

The second question – the suspension of the right to take part in profit distribution – raises questions about the consequences of non-conversion of securities after November 4, in other words, whether the right to take part in the distribution is suspended until the corresponding conversion or, on the contrary, this right is extinguished. On our part, although the wording of the Law no. 15/2017 may raise some doubts on this matter, we believe the right is merely suspended until the effective conversion of the securities into nominative securities.

II NATIONAL AND EU LEGISLATION

Directive (EU) 2017/828 of the European Parliament and of the Council of May 17, 2017

This Directive amends Directive 2007/36/EC regarding the inducement of long-term shareholder engagement. This latter legislation establishes requirements in relation to the exercise of certain shareholder rights attached to voting shares regarding general meetings of companies which have their registered office in a Member State and their shares are admitted to trading on a regulated market situated or operating within a Member State. Member States must transpose this Directive into national law by June 10, 2019.

Commission Implementing Regulation (EU) 2017/815 of May 12, 2017

Amending Implementing Regulation (EU) 2015/1998 referring clarification, harmonisation and simplification of certain specific aviation security measures.

Commission Implementing Regulation (EU) 2017/830 of May 15, 2017

Amending Regulation (EC) No 474/2006 referring the list of air carriers banned from operating or subject to operational restrictions within the Union.

European Commission Notice 2017/C 191/01

Interpretative guidelines on Regulation (EC) no. 1008/2008 of the European Parliament and of the Council — Rules on Ownership and Control of EU air carriers.

Decree-Law no. 75/2017 – Official Gazette no. 121/2017, Series I of June 26, 2017

Approves the rules governing the possession of pledged property in a commercial pledge (*penhor mercantil*). According to this statute, which enters into force on July 1, 2017, to guarantee a commercial obligation in which the guarantor is a trader, the parties to a pledge agreement may now agree that, in the event of default, the secured creditor may appropriate the object or the right pledged, provided the conditions in question are met. This new mechanism means that the asset or right pledged is transferred to the creditor, avoiding the need to resort to its judicial or extrajudicial foreclosure sale. Thus, the validity of the so-called *pacto marciano* is now recognised.

Decree-Law no. 79/2017 – Official Gazette no. 125/2017, Series I of June 30, 2017

Amending the Commercial Companies Code and the Insolvency and Corporate Recovery Code, introducing a simplified mechanism for the increase of the share capital by conversion of shareholders loans at private limited liability companies.

Ordinance no. 136/2017 – Official Gazette no. 73/2017, Series I of April 12, 2017

Establishes the requirements and conditions necessary for the installation, operation and supervision of electronic bingo, in its various forms, and approves the rules concerning the award of national bingo prizes.

III RELEVANT COURT DECISIONS

Supreme Court of Justice, Judgement of May 11, 2017, Procedure no. 3508/13.4

The Supreme Court was called upon to decide on a case where a public limited liability company (controlling company), whose share capital is owned by five shareholders, all being individuals. The controlling company is the sole shareholder of two other public limited liability companies (controlled companies). The board of directors of the controlling company determined the dismissal of the Plaintiff (one of the five shareholders who are individual) from his position as a director of the controlled companies. In this regard, the Plaintiff requested that the resolutions of the board of directors of the controlling company, Defendant in the court proceedings, be declared null and void, as this is, under Article 403(1) of the Commercial Companies Code ("**CCC**"), an exclusive responsibility of the controlling company's general meeting.

Defending his position, the Plaintiff understood that the board of directors of the Defendant, as sole shareholder of the controlled companies, may not exercise the powers granted by law to the general meeting regarding matters of its exclusive responsibility (such as the dismissal of the Plaintiff from his position as director), since, despite the relationship of corporate dependence and its integration into the scope of a corporate-economic unit, admiting this possibility would disregard the individual legal personality of each controlled company, destroying their legal, administrative and patrimonial autonomy.

The Defendant, the controlling company, challenged this opinion, claiming that the dismissal of the Director, a matter that, under Article 403(1) of the CCC, is the sole responsibility of the general meeting in companies with more than one shareholder, is transferred to the sole shareholder, which replaces that body, in single-member companies. This interpretation is based on the application of Article 270-E(1) of the CCC, in conjunction with Directives 2009/102/EC, of 16 September and 89/667/EC, of 21 December, which grants the board of directors of a single-member company all the responsibilities that the law grants to general meetings (such as the dismissal of directors). The Supreme Court dissented from this biased interpretation of national and community law, noting that, although the Defendant is the sole shareholder of the controlled companies, it cannot be considered a sole shareholder under the terms of that legislation, since the situation regulated therein does not correspond to the situation dealt with in the case. Under these terms, the Defendant company is not a single-member public limited liability company (as it claims to be), but instead a multi-member company, as is clear from the composition of its share capital.

The Supreme Court reinforced its position based on the following: the national and community law referred to does not include the autonomous and indefinite creation of the concept of single-member public limited liability company, for which reason, by establishing the amendment to Articles 270-A to 270-G of the CCC, these refer solely and exclusively to single-quotaholder private limited liability companies, which results in the board of directors of the Defendant, as sole shareholder of the controlled companies, cannot exercise the powers granted by law to the general meeting on matters of its exclusive responsibility, as was the case of the dismissal of the Plaintiff as Director.

The Court concluded by saying that although its status as sole shareholder of a company enables the controlling company to give binding instructions to the controlled company, these instructions must be understood as restricted to the matters that are responsibility of the board of directors and none of the general meetings of shareholders. Thus, in this case, it is the exclusive responsibility of the general meeting of multi-member companies, such as the Defendant, to dismiss the Director, as provided for in Article 403(1) of the CCC, subject to being deemed null and void under the terms of Article 411(1)(b).

Oporto Court of Appeal, Judgement of May 16, 2017, Procedure no. 1919/15.0

In the context of a general meeting of a public limited liability company, in which two of the items on the agenda concerned the election of members of the corporate bodies and their remuneration, the majority shareholders voted in favour of a list which did not include the Plaintiff (minority shareholder) or any other member of his family, from which it could be concluded that the majority shareholders intended to exclude that shareholder from the board of directors composition.

Regarding this point, the court of first instance notes that the company's articles of association do not envisage any special right regarding the election to the board of directors, for which reason the shareholders have to appoint to the board those who, at any particular time, they believe have the greatest capacity to conduct the company's business. This interpretation was accepted by the Oporto Court of Appeal, which, based on the normal operation of the majority rule provided for in Article 386(2) of the Commercial Companies Code ("**CCC**"), understood that the resolution that elected the corporate bodies was not wrongful, even with the aim of excluding the Plaintiff and any member of his family from the board of directors.

However, the Oporto Court of Appeal had a different understanding reffering the resolution which approved the increase in the remuneration of shareholders who are simultaneously members of the board of directors from €18.000,00 per month for €22.000,00 per month. Regarding the action for annulment of the corporate resolution proposed by the Plaintiff, a minority shareholder, against the company, the Appeal Court considered that this is an instrument of protection of the shareholding and the interests of its holder, as well as a mean to guarantee protection of the situation of minorities, of the legal position and of the interests of the members of the company, against the majority and its instruments of power.

As such, the Oporto Court Appeal declared wrongful and consequently voidable, under Article 58(1)(b) of the CCC, the resolution that approved for the shareholders, members of the board of directors, a remuneration that represents an increase of more than twice of the previous increase, without any justification. Therefore, considered that the resolution could be harmful to the Plaintiff, a minority shareholder, since, having led to a reduction in the value of each share, reduced the profits to be distributed, hindering any possible sale of his shareholding.

Lisbon Court of Appeal, Judgement of May 11, 2017, Procedure no. 254/09.7

In the case in question, a company with registered office in Spain and holding shares representing 90% or more of the share capital of a company with registered office in Portugal, made an offer to purchase shares to acquire the total control of the Portuguese company, under Article 490 of the Commercial Companies Code ("**CCC**"). This acquisition implied the loss of the Plaintiff's shareholding.

In view of this operation, the Plaintiff requested that the Court declared invalid the purchase offer and that Article 490 of the CCC in conjunction with Article 481(2) of the same code is unconstitutional, as is represents a violation of Articles 13 and 62 of the Constitution of the Portuguese Republic. The Plaintiff is of the opinion that, based on these provisions, the Spanish company could not have made the offer to purchase shares with a view to total control based on Article 490 since the prerogative granted by this rule is merely applicable, under Article 481(2), to companies with registered office in Portugal.

However, the Lisbon Court of Appeal did not have the same opinion as the Plaintiff. To this effect, it is of the opinion that, for the application of Article 390 of the CCC, a corrective interpretation must be made of Article 481(2) of the same code, to conclude that it is not necessary for the company seeking a controlling position to have its registered office in Portugal, in other words, it is sufficient for one of the companies in question to have a territorial connection with the country.

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