

PORTUGAL'S NEW LEGISLATION ON DEFENDING TAKEOVER BIDS - SÉRVULO

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Measures against takeover bids revamped: Portuguese draft legislation under public consultation for the adoption of breakthrough rule

I. Object

1. A Portuguese draft legislation aiming to review the rules concerning the restrictions on the transfer of securities and on voting rights in public companies is under public consultation (up to September 8) launched by the Securities Market Commission (CMVM).

II. Background and purposes

2. Whilst introducing a breakthrough rule, the European Directive on takeover bids (Directive 2004/25/EC) left Member States the possibility to reserve the right not to require companies to apply such rule, provided that companies were granted the option to include breakthrough provisions in their by-laws. Hence, and up until now, the national regime set forth in article 182º-A of the Securities Code left the decision of whether or not to adopt the breakthrough rule primarily to the companies, trusting that the marketplace itself would prevent the maintenance of restrictive statutory and contractual provisions on the transfer of securities and on voting rights, traditionally used as defensive measures against takeover bids.

3. However, the practice has shown that free competition does not necessarily lead to a voluntary suspension or elimination by public companies of their statutory and contractual defensive measures. Hence, the draft legislation currently under public consultation aims to clearly and unequivocally adopt a breakthrough rule in the context of takeover bids.

4. The purposes of the now proposed amendment are (i) to increase the efficiency of the market for the control of public companies, (ii) favour the investment, (iii) enhance the liquidity of the securities, (iv) improve corporate governance, and mostly, (v) ensure a balance between investment and stockholder power and so affirming the principle of proportionality between control and stock.

III. Proposed regime

5. The draft breakthrough rule operates in two essential moments: (i) while the offer bid is still pending, by determining that any statutory and/or contractual restrictions on voting rights shall be ineffective at the general meeting of shareholders which decides on any defensive measures; (ii) to establish the outcome of the bid, by determining that any restrictions on the transfer of securities provided for in the articles of association of the offeree or in contractual agreements between the holders of its securities shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid.

6. Furthermore, and without prejudice to statutory provisions that provide for a lesser threshold, where, following a bid, the offeror holds 2/3 or more of the capital carrying voting rights, no restrictions on the transfer of securities apply to it, nor any restrictions on voting rights apply at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members, nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply. Such general meeting must take place within at least two weeks of notification.

7. The offeror that successfully acquires less than 2/3 of the capital carrying voting rights is also worthy of protection against defensive measures within the draft legislation under public consultation. In order to prevent that the offeror is in such cases left indefinitely submitted to the inconveniencies caused by the limitations on voting rights, it is proposed that where the articles of association of public companies governed by the Portuguese law provide for any restrictions on the number of votes that may be held or exercised by the shareholders, they should also provide for the periodical (at least every five years) submission of those restrictions to resolution by the general meeting of shareholders, without aggravated quorum demands and at which such restrictions will not apply.

8. A reciprocity safeguard in case of counter-bid is also proposed, to ensure equality between the two companies that are both offeror and offeree, as to the chances of success of the bids. Hence, the breakthrough rule will not apply within the context of a takeover bid launched by a company that is not subject to the same rule or that is controlled by a company not subject to the same rule, provided that the target company has previously equally announced a takeover bid over any of such companies based on authorisation granted by its shareholders in the general meeting.

9. Finally, the draft legislation also provides for equitable compensation for any loss caused by the suspension of the effects of contractual agreements between the holders of securities that are fully disclosed, as well as the suspension of special rights set forth in the articles of association, up to the date when the bid has been made public, except in case of suspension of any restriction on the exercise of the voting right.

10. These proposed rules increase the potential for future takeover bids and therefore will have a major impact in the context of the forthcoming privatizations – that will namely include listed companies EDP, Galp and REN.