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EDITORIAL MOMENTUM

In his “Book of Disquiet”, Portuguese poet Fernando Pessoa famously wrote that “I live in the present tense. The past I no longer have it”. This new edition of Momentum seeks precisely to analyse developments that shape today’s legal solutions at a global level.
This newsletter opens with an article by Magda Sousa Gomes, associate and co-head of the Employment department, concerning Law 18/2016, of June 20, which reinstated the 35-hour week in the public sector. Following this, I, in co-authorship with trainee Constança Ferreira Nunes, analyse the new regulation of the European Commission on market soundings and privileged information. Miguel Gorjão-Henriques, partner and head of the European Law and Competition Law department, and Inês Avelar Santos, associate of the same department, scrutinise the considerations of the European Commission on the unjustified restrictions on the export of medication to other EU countries, while Alberto Saavedra, associate of the same department, sets out the guidelines on State aid rules issued by the European Commission in May 2016 with the aim of enhancing public investment. Alexandra Valpaços, associate of the Restructuring and Insolvency department, draws our attention to another measure aimed at incentivising economic growth, with her article on the Capitalise Programme (Programa Capitalizar), a collection of company restructuring measures approved by the Government, through the Resolution of the Council of Ministers No. 42/2016, published on 18 August.
In another article focusing on Employment law, associate Rita Canas da Silva, the department’s other co-head, takes up what she calls “the never ending judicial tale” pertaining to employment contracts vs. service agreements, and when one is one or the other, and what rights employees have to withdraw automatic official proceedings against employers when the latter abuse of service agreements. And, to close this most recent issue of **SÉRVULO**’s English language newsletter, trainee Catarina Saramago writes about the new law on shareholder scrutiny of banks voting caps, approved and ratified in April.
We trust that you find these articles both useful and interesting and remain available in case you need any further information in respect to these issues.

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THE RETURN OF THE 35-HOUR WEEK FOR PUBLIC SECTOR EMPLOYEES

From July 1, 2016, according to Law No. 18/2016, of June 20, the standard working week for employees in the public sector is to consist of 35 hours. This is the second time the General Law of Public Sector Employees is changed. This change was approved on June 20, in connection with Law No. 35/2014.

Considering that several departments of the public sector (i.e. judicial employees and the majority of local administration employees) maintained the 35-hour working week, as a result of interim measures applied, the change in the law only comes to reinstate the previous regime.

The 35-hour weekly limit for public sector employees became valid through the alteration of articles 103, 111 and 112 of the General Law of Public Sector Employees.

The reduction in weekly working hours to 35 means that daily working hours change to 7 (instead of 8). However, it is important to inform that this maximum limit (i.e. 7 hours per day) does not apply to flexible working contracts – nevertheless, the average of the work allocated on a weekly, fortnightly, or monthly basis still equals 7 hours a day –, nor to special fixed-term contracts. Further to this, the amendment in question does not exclude the possibility of the existence of contracts where the weekly hours are fewer than the 35 envisaged in the extraordinary law and in cases of special contracts involving varied lengths of working periods.

Inevitably, the reduction in weekly hours worked by public sector employees means that the availability of departments that provide client-facing services to the general public will also be re-adjusted from 8 to 7 hours.

Furthermore, for services that are open to the public from Monday to Friday, the (fixed) opening hours shall be from 9 am to 12:30 pm and from 2 pm to 5:30pm. On the other hand, for services that are open to the public on Saturday mornings, the opening hours shall be from 9:30 am to 12:30 pm and from 2 pm to 5:30 pm (Mon-Fri) and from 9:30 am to 12 pm (Saturdays).

This law also reiterates that employees’ salaries or remunerations cannot be reduced or working conditions changed (in a way that is unfavorable to the employees) as a result of the reduction in working hours contained within it.

The change in working hours back to 35 (weekly) has generated a fair amount of controversy, with one side believing this regime will increase productivity, considering that the previous change to working hours was negatively received by those employees whom it affected. On the other hand, some state that this new regime highlights the distinction between public and private sector employees. According to people who support this side of the argument, this change represents a backward step with regard to developments being made to equalize the working conditions of the public and private sectors, additionally potentially resulting in increased overtime spending.

(...) “According to people who support this side of the argument, this change represents a backward step with regard to developments being made to equalize the working conditions of the public and private sectors, additionally potentially resulting in increased overtime spending.” (...)

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THE NEW REGIME ON MARKET SOUNDINGS AND INSIDER INFORMATION

1. General Framework

Envisaging to complement Regulation n. 596/2014, of the EU Parliament and the Council of 16th April 2015 (“Market Abuse Regulation”) with regard to market soundings, the Commission approved Delegated Regulation (EU) 2016/960 and Implementing Regulation (EU) 2016/959, both of 17 May 2016. All these regulation enter into force on the 3rd July 2016.

2. The concept of market soundings; soundings and transactional road-shows

Market sounding is defined as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. It may amount to a road-show performed in the context of an issuance of securities (issuance of shares or debt - simple or securitized), Public Tender Offers, mergers (transactional road-shows) or road-shows – even if not deliberately transactional – which take place alongside one of these operations.

3. Market soundings and insider information

The legal regime for market soundings entails an exception to the prohibition of disclosure of insider information, eg. Information of precise nature concerning one or more issuers or financial instruments, not made publicly available, but which, if it were, would likely have a significant effect on the prices of those financial instruments (notably, issuance licenses) or related financial derivatives. On that regard, so long as the legal requirements set out on the aforementioned regulations are met, communication of insider information may be lawful. Nonetheless, it should be noted that duties imposed under to the market soundings regime are also applicable to market soundings where there be no communication of insider information.

4. Duties market participant who conduct market soundings are bound to comply with

Market participants conducting market soundings ought to adopt the procedures accounting for and describing how to perform said soundings. The procedures are directed at whoever works on the market soundings, regardless of whether they are [direct] employees or third parties. This aims at ensuring equal treatment of people subject to the soundings and to guarantee an adequate safety level to the information disclosed during the soundings employees and these third parties have performed.

As such, Market participants conducting market soundings ought to define for each and every single sounding a standardized set of information to be provided and to asked to people subject to the sounding, notably, *(i)* to inform the person subject to the sounding that said contact is done in the context of a market sounding, which is being recorded; *(ii)* that he/she will receive information which the market participant, who sends it, considers to be or not to be insider information, and, if applicable, an estimate of the moment in time when said information will no longer be considered insider information, as well as the criteria capable of influencing that estimate; *(iii)* the duties he/she will be bound to where she receives insider information and acquiesces to that extent; *(iv)* identification of the disclosed information which the market participants deems to be insider information.

Whenever the market participant who disclosed insider information consider that said information is no longer as such, they ought to inform those subject to the sounding of that change in nature. And they ought to do so in respect of the minimum content for said communication as provided by law.

Additionally, market participants conducting market soundings should keep record of those subject to the sounding, regardless of the nature of the information disclosed. Hence, they ought to make a separate listing for each sounding containing data regarding those people and an additional one accounting for the potential investors who had informed them that they wished not to be included in market soundings on all potential transactions or only certain types of transactions.

5. Duty to register market soundings

Market participants disclosing information should keep record of communications performed in the context of market soundings away from third parties, other than those subject to the market sounding. That ought to happen regardless of whether or not they consider the sounding not to involve disclosure of insider information. Record of communications should be kept in an electronic device, for at least 5 years.

The framework for market soundings mandates the registration of the information communications between market participants disclosing information and those subject to market soundings (notably, recordings of phone calls, copy of exchanged emails, recordings of conference calls and meetings and conferences’ minutes and written notes not recorded], thus adding that, in given cases, it should follow a standardized registration model.

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EUROPEAN COMMISSION: PORTUGAL SHALL REMOVE THE RESTRICTIONS ON EXPORT OF MEDICINAL PRODUCTS

Recently, the European Commission rendered a reasoned opinion in an infringement procedure nr. 20144166 against Portugal, urging Portugal to amend the Medicines Act (Decreto-Lei nr. 176/2006, of August 30th) based on the argument that it created obstacles to the free movement of goods within the Union's single market (articles 34 to 36 of the TFEU). Failure to comply with a European Commission's reasoned opinion in such a procedure may lead the European Commission to refer Portugal to the EU Court of Justice (ECJ).

It should be recalled that the Medicines Act imposes public service obligations on wholesale distributers regarding the marketing supply, namely having a minimum amount in stock. It also imposes obligations on marketing authorization holders. However, that is not the issue. Recently, the Medicines Act was amended by *Decreto-Lei* nr. 128/2013, which henceforth stipulates that *«INFARMED, I.P., may establish, by means of a Regulation: «(...) a list of medicinal products the export or distribution of which to other Member States of the European Union, and the respective quantities depend on prior notice by the wholesale distributor to INFARMED, I.P.»* (article 100, nr. 2, subparagraph *b)*) (free translation). As a result, INFARMED, I.P. approved the *Regulation on prior notice of medicinal products transactions for outside the country* (Resolution nr. 022/CD/2014 of INFARMED, I.P. Governing Board, subsequently amended and republished by Resolution nr. 1157/2015, of June 22nd), containing a list of those medicinal products, which has been successively updated (last amended by Resolution nr. 661/2016, of March 26th, published in the Official Gazette, 2nd Series, on April 13th 2016).

According to article 100(3) of the Medicines Act that notice shall occur within a period of **5 to 20 days in advance**, allowing INFARMED, I.P. to decide within a period of three working days, on the prohibition of the export or distribution notified or on part of it, based on public health protection or on the right of patients to have access to such medicinal products, in light of the principles of necessity, adequacy and proportionality.

For the European Commission, this obligation of prior notice of exports of medicinal products to other Member States of the European Union constitutes an obstacle to the free movement of goods and, in particular, a measure of equivalent effect to a quantitative restriction on exports of medicinal products. In order to actuate the procedure and its development, the Commission further considered it as disproportionate and not justified in light of both imperative reasons of general interest recognized in the jurisprudence of the European Court of Justice and article 36 of the Treaty.

In the European Commission's opinion, Portugal shall consider the application of restrictive measures concerning intra-EU trade. In the words of the Commission, *«Parallel imports and exports of a medicinal product is a lawful form of trade within the single market»*; however, *«these notification procedures do not set out clear and transparent criteria for determining the medicinal products that may be at risk of a potential shortage due to parallel trade. Furthermore, the procedures impose disproportionate reporting obligations on wholesalers»*.

Even thought Member States have some range to determine which public health reasons justify restriction measures on the movement of goods, it does not follow that they have the right to establish any such measures that do not comply with the principle of proportionality, and that are not absolutely necessary to achieve the legitimate goals pursued, even though they are presented as (legal or *de facto*) non discriminatory. All provisions contrary to European Union law must remain unapplied by the Administration and national courts and their inapplicability does not depend on any condemnation of the State in an infringement procedure. The Medicines Act has not been altered yet to accommodate the Commission's reasoned opinion. However, there is also no news of an infringement procedure against Portugal having been initiated.

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EU STATE AID RULES CLARIFIED TO ENHANCE PUBLIC INVESTMENT

On May 19, 2016, the European Commission published a new guidance on EU State aid rules in its *Notice on the notion of State aid as referred to in Article 107(1) TFEU* ("**Notice**"). This is a "must read" for public authorities and companies receiving or granting public funds. It clarifies those cases in which public support measures can be granted without needing approval under EU State aid rules and explains the notion of State aid based on updated decisional/judicial practice.

What is State Aid?

In accordance with the TFEU, State aid is prohibited unless there is a formal authorisation either by EU legislation or by the European Commission itself on grounds of meeting the EU general interest aims, such as protecting the environment or benefiting regional development, or correcting market failures such as the access of SMEs to financing.

Public intervention may be qualified as State aid when it meets all of the following four conditions, which are clarified in the Notice:

- The intervention entails an economic advantage in favour of a company exercising an economic activity;
- It has been decided by a public entity and is funded by public resources;
- It favours certain companies or activities to the detriment of others; and
- It distorts or threatens to distort competition and affects trade between Member States.

What are the Notice's key clarifications?

Firstly, the Notice assists Member States and companies to recognise public investments that fall under the criteria of State aid by elucidating on the different requirements of the notion of State aid referred above.

Additionally, the Notice provides a thorough guidance on the following topics:

- Public investment for the building or improvement of infrastructure;
- State investment in the construction of infrastructure does not qualify as State aid and hence no scrutiny from the European Commission is needed, if it does not directly compete with other infrastructure of the same kind (for example, railway infrastructure, roads, inland waterways and water supply and wastewater networks). In contrast, infrastructure in areas such as energy, broadband, airports or ports is frequently in competition with analogous infrastructure and such financing may be subject to the European Commission's authorisation if it fulfils the State aid concept.
- The construction of infrastructure involving State funding may not amount to "State aid" if the operators and clients pay a market price, for instance as a result of a competitive, transparent, non-discriminatory and unconditional tender.
- The European Commission's control is critical in cases where EU State aid has cross-border effects, but it is less intense in relation to public investment in local infrastructure or services.
- In principle, there is no State aid if the public entities sell or purchase assets, goods or services in the context of tenders which are in line with the rules of the EU on public procurement.
- Certain cultural activities that are not commercial (e.g. free or against payment of a minimal fee) do not fall under State aid rules.

Why it matters?

The Notice is not binding but is of high relevance for both public entities (e.g. Government, municipalities, direct and indirect administration) and companies (public and private) that are recipients of State aid. It is important to ascertain whether public investments *(i)* do not involve State aid, or *(ii)* require prior authorisation from the European Commission or *(iii)* need to be revised in order to avoid distortions of the level playing field in the single market.

The notice is a practical instrument to ensure the proper application of the rules. However, due to the innumerous forms of State aid which are constantly subject to change, the qualification as State aid is not always clear-cut and a thorough examination of the specific circumstances of the case is needed.

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CAPITALIZE PROGRAM: CORPORATE RESTRUCTURING MEASURES

With the objective of relaunching the Portuguese economy, through the reduction of the high level of debt and the improvement of investment conditions for companies, the Portuguese Government created at the end of last year the Task Force for the Capitalization of Companies (Task Force). The Task Force is now responsible for formulating measures intended to support the capitalization of Portuguese companies.

After developing an analysis on the current situation of national companies, the Task Force presented a set of measures structured in five strategic axes: *Administrative Simplification and Systemic Framework, Taxation, Corporate Restructuring, Increasing Funding and Investment and Capital Markets Development.*

Based on these strategic axes, the Portuguese Government approved, by the resolution of the Council of Ministers No. 42/2016, published on 18th August, the ***Capitalize Program***, which includes a list of measures to be implemented until the end of 2016 and during 2017. Other measures to be proposed by the Task Force may be added, after an assessment of their opportunity and budgetary impact.

We will focus on the *Corporate Restructuring* axis, by pointing out, first of all, the measures that shall have greater impact on the access to the Special Recovery Procedure (SRP); the deadline for the implementation of these measures is the 1st quarter of 2017:

- Increase the criteria for the agreement that initiates the SRP, by requiring it to be signed by creditors representing at least 10% of non-lower-ranking claims;
- Require that the application for SRP is accompanied by *(i)* a proposal of a recovery plan and *(ii)* a declaration either by a Certified Public Accountant or a Chartered Accountant certifying that the debtor is not insolvent;
- Limit the use of the SRP for only legal persons;
- Clarify the consequences arising from the effect of a SRP, especially by clearing any doubts that may result from the interpretation of the applicable law.

Secondly, it is important to focus on a measure that will be, in many cases, crucial to the success of a SRP. Its implementation is scheduled for the 3rd quarter of 2017 and it is meant to provide flexibility in terms of available alternatives for the restructuring of the Tax Authority's and Social Security's claims. Particularly, it aims to allow the acceptance of more favorable payment plans for recovering companies, with longer payment terms, grace periods, interest forgiveness and guarantee waivers, by considering the debtor's concrete situation, financial viability and overall position of all creditors.

Finally, we emphasize two measures with potential to capitalize the companies that may prevent the use of a SRP or help those who already have used the SRP. The implementation of these measures is scheduled for the beginning of 2017:

- Evaluate the possibility of creating investment funds with public resources to invest in companies with financial difficulties. It may involve the participation of private companies and layered capital structures to attract different classes of investors, who can promote the companies' consolidation and strengthen management capacity;
- Evaluate the creation of a public funding line for companies that have undergone a restructuring process, to allow access to the necessary liquidity required for their activities.

We shall be watching to developments of the *Capitalize Program*, particularly the legislative initiatives that implement these (and other) capitalization measures.

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EMPLOYMENT CONTRACTS VS. SERVICE AGREEMENTS: A NEVER ENDING (JUDICIAL) TALE?

Article 11 of the Portuguese Labour Code (hereinafter 'PLC')[1] defines an employment contract as an agreement *'in which a natural person undertakes, upon remuneration, to provide its activity to another or others, within an organisation and under the latter's authority'*[2]. The PLC and all forms of employment regulated therein require the work to be performed with **legal subordination**: work performed independently – i.e. service providers/ self-employed workers – is excluded. Nevertheless, given the complexity of the facts, it is often difficult to assess whether or not this element can be verified.

Similarly to other countries, bogus self-employment requires close monitoring, since it is a form of fraud: the relevance of the problem is reflected in the high number of legal disputes on the qualification of contracts (as civil law or employment contracts)[3].

Article 12, No. 2 of the PLC already qualified as *'a very serious misdemeanour to perform an activity with the formal appearance of a service agreement but according to the typical conditions of an employment contract, in a way that might cause damages to the employee or to the State'*. More recently, Law No. 63/2013, of August 27[4] introduced a special judicial procedure – thus amending the Labour Procedure Code – to assess the qualification of contracts (as service agreements or employment contracts). It also reinforced the competences of the Authority for Labour Conditions *(ACT – Autoridade para as Condições para o Trabalho)* in monitoring fraud and expediting such cases to court, when a suspicion of bogus self-employment is verified and not corrected within the deadline set forth by law.

Since this judicial procedure is carried out officially, regardless of a complaint by the employee, it has been **questionable whether the new regime introduced a system pursuing a mandatory public interest (against fraud and bogus self-employment) or if the free will of the parties shall prevail and the employee be empowered to withdraw the proceedings** – e.g., by entering into an agreement with the employer or by legitimately arguing no interest in (re)qualifying the contract as an employment contract.

In this regard, Courts have not been following a common and straightforward response: under the decision of September 24, 2014, the Lisbon Court of Appeal ruled that this Act had the goal of protecting the employee and **not any public interest** related to the general requalification of contracts[5]; a different understanding was, nevertheless, followed by the Lisbon Court of Appeal decision of October 8, 2014[6], where the Court ruled that the employee was not entitled to withdraw the judicial procedure, since the Public Prosecutor is empowered to proceed with the action even against the employee's will, **given the public interest** inherent to this procedure.

[1] Approved by Law No. 7/2009 of February 12 (hereinafter 'PLC') and amended by Laws No. 105/2009, of September 14, 53/2011, of October 14, 23/2012, of June 25, 47/2012, of August 29, 69/2013, of August 30, 27/2014, of May 8, 55/2014 of August 25, 28/2015, of April 14, 120/2015 of September 1 and 8/2016, of April 1. See also Amendment No. 38/2012, of July 10.

[2] Emphasis added.

[3] E.g. Supreme Court decisions of January, 31, 2012, ruling No. 121/04.0TTSNT.L1.S1, available at http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/ccbf2ac7a9202b5a8025799900386737?OpenDocument (Portuguese version) and of May, 21, 2014, ruling No. 517/10.9TTLSB.L1.S1, available at http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/fff20b913171b0b680257ce50037ad80?OpenDocument (Portuguese version).

[4] Available at https://dre.pt/application/dir/pdf1sdip/2013/08/16400/0516805169.pdf (Portuguese version).

[5] Ruling No. 4628/13.0TTLSB.L1-4, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ae64f6d87fa1dc4e80257d66004d6808?OpenDocument (Portuguese version).

[6] Ruling No. 1330/14.0TTLSB.L1-4, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ab51b7bd12deab0380257d70004bff04?OpenDocument (Portuguese version).

In December 2014, the Lisbon Court of Appeal underlined these different understandings: in its ruling of December 17[7], the Court decided that even if employee and employer agreed on the termination of the employment contract (after the judicial procedure had been initiated), the Public Prosecutor was empowered to proceed with the judicial action, given the public interest inherent to this special procedure and the duty to comply with past obligations (namely, Social Security and Tax duties). A different construction of the law had, however, been disclosed by the Lisbon Court of Appeal in its ruling of December 3 , 2014, where it stated that the Public Prosecutor was not empowered – by lack of interest – to proceed with the judicial action in a similar case.

More recently (on April 20, 2016), the Lisbon Court of Appeal ruled that employee and employer are free to negotiate the end of the judicial procedure - hence the legal claim entailed disposable rights . However, on May 4, 2016, the Constitutional Court ruled (on nine different cases) that the judicial decisions that decided that the Public Prosecutor is empowered to proceed with legal action even against the employee's will were not unconstitutional by infringement of the freedom of choice of the way of working, of the right to legal action and to fair hearing and of the equality principle. Given the different rulings, close attention should be paid to upcoming developments on the topic.

"(...) the relevance of the problem is reflected in the high number of legal disputes on the qualification of contracts (as civil law or employment contracts)".

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[7] Ruling No. 1332/14.6TTLSB.L1-4, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/cfdb333be58db5e780257db700313f42?OpenDocumentt (Portuguese version).

[8] Ruling No 233/14.2TTCSC.L1-4, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2618781679a74f3280257dab002e017c?OpenDocument (Portuguese version)

[9] Ruling No. 2203/14.1TTLSB.L1-4, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2230e8719859374480257fb5004ca548?OpenDocument (Portuguese version).

NEW LAW INTRODUCING VOTING CAPS IN BANKS' BYLAWS

1. General Framework

Decree-Law n. 20/2016, approved on 20th April 2016, introduced alterations to shareholders' voting rights in the context of credit institutions. It added a new article 13º-C to the "Regime Geral das Instituições de Crédito e Sociedades Financeiras" as General Regime of Credit Institutions and Finance Companies/ Corporations (RGICSF). It amounts to a voting cap mechanism to the bylaws of said institutions ("desblindagem")..

2. Decree-Law n. 20/2016 – description and goals

Pursuant to article 384(2) (b) and (3) of The Code of Commercial Companies (CSC), the bylaws of commercial companies may account for voting caps. A voting cap is a constraint regarding a parcel or the totality of votes of a given category of shares, under which votes surpassing a certain amount are not to be taken into account. The scheme operates regardless of the corresponding percentage of share capital.

As a result of article 13-C in RGICSF, credit institutions whose bylaws establish the aforementioned constraint are bound to review said clause at least every 5 years. Hence, in order to maintain or eliminate those constraints, the decision to do so must stem from a shareholders 'deliberation/resolution. Where a deliberation is not undertaken within those 5 years, said constraints are to be considered as having expired.

With regard to the formalities concerning deliberation, it may be express or implied. Moreover, where it be proposed by the Board of Directors, deliberation is not subject to any voting caps nor aggravated requirements as to the quorum [vis a vis those set by law].

The preamble of the Decree-Law clarifies that said solution envisages improving companies' financing ability, namely, by attracting foreign investment. The new regime regarding the voting caps sought to prevent situations where companies are precluded from taking strategic decisions, capable of fostering growth. And it did so by allowing them to periodically reassess the need for said constraints.

3. Background

Decree-Law n. 20/2016 of 20th April stemmed from intense debate on behalf of the EU institutions and CMVM regarding restrictions on voting rights and concerning misuse of said restrictions.

Directive 2004/25/CE of the Parliament and the Council, of 21st April, transposed to Portugal by means of article 182(A) of the Securities Code (CVM), sought to provide guidance in solving the issues concerning voting caps in public takeover bids. It established that Member States could adopt the breakthrough rule, pursuant to which the aforementioned bylaws 'constraints were to be disregarded in the case of a public tender offer where shares amounted to 75% of a listed company.

Article 182(A)(1)(c) establishes that listed companies may provide in their bylaws that said voting caps may be suspended [and stop producing effects] in the case of public tender offers of shares corresponding to at least 75% of the share capital with voting rights.

Nonetheless, owing to the non-mandatory rationale of the Directive, the abovementioned rule does not bind companies to adopt the breakthrough rule. In fact, including the rule in the bylaws is left to shareholders' discretion.

Moreover, pursuant to article 182(A)(2), if companies choose not to include voting caps in the bylaws, further alterations to the bylaws establishing constraints to voting rights may not be subject to a qualified quorum of more than 75% of votes cast.

As a result, article 182 of CVM and article 13 of RGIVSF seek a compromise by favouring private autonomy/self-governance and not imposing overly intrusive solutions concerning the "openness" of each and every company to the company's control market.

Similar considerations were account for by CMVM (Securities and Exchange Commission) in The Corporate Governance Code (2013). Under point I.4 of said code, a parallel recommendation can be found [vis a vis article 13(C) of RGICSF].

Nonetheless, in this latter case, the recommendation entails discrepancies vis a vis article 13(C). It determines that, regardless of having been was proposed by the Board of Directors, the deliberation ought to be adopted without constraints to voting rights or a more qualified quorum than that prescribed by law.

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