

**BANKING AND FINANCE | CAPITAL MARKETS**

# Information duties of issuers and rules applicable to takeover bids

## CMVM regulation 1/2023

CMVM (the Portuguese Securities Market Commission) Regulation 1/2023 on the information obligations of issuers and rules applicable to takeover bids (“**Regulation 1/2023**” or the “**Regulation**”) was published on 26 April. The Regulation repeals CMVM Regulations 7/2018 (amendment of CMVM Regulation 5/2008), 5/2008 (disclosure requirements), 3/2006 (bids and issuers), 11/2005 (scope of International Accounting Standards) and 6/2002 (presentation of financial information by segment). The Regulation also provides for the possibility of reviewing and consolidating all these matters not subject to repeal into a single, autonomous and simplified regulation.

### 1. What is at stake?

In general terms, the objectives of this revision are (i) to adapt the content of the above-mentioned regulations to the changes made to the Portuguese Securities Code (Código dos Valores Mobiliários - “**Securities Code**”) at the end of 2021, and (ii) to continue the process of simplifying the obligations incumbent on issuers, eliminating those that are redundant or additional to the European legislation, unless there are specific national circumstances that justify their maintenance.

The rationale behind this revision is therefore to simplify the legislation and to increase the transparency and comprehensibility of the current rules for issuers in order to promote investor confidence and market competitiveness. The main changes introduced by this new Regulation are detailed below.

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### 1.1. Information duties - regulation of the matters provided for in CMVM Regulations 5/2008 and 11/2005 and repeal of Regulation 6/2002

- **End of public companies:** Regulation 1/2023 excludes from its subjective scope, by virtue of the abolition of the public company in the new Securities Code, those entities that have made public offers without the subsequent admission of the securities to the market. Instead, it focuses on companies with securities admitted to trading on a regulated market.
- **Elimination of duties that already result from the Securities Code or the MAR:** With regard to the disclosure of facts concerning companies issuing securities, it appears that Regulation 1/2023 eliminates from its objective scope a number of information duties that also result from the Securities Code and Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (“**Market Abuse Regulation**” or “**MAR**”). In particular, we note the duties to disclose (i) assignments or changes of credit ratings, which is information falling under the concept of privileged information, (ii) lists of holders of qualifying holdings in the annual report and accounts, already included in the corporate governance reports and notices of qualifying holdings, (iii) the duty of confidentiality with respect to privileged information resulting from the MAR, and (iv) certain rules on the means of disclosure.
- **Own shares:** In order to improve alignment with the European rules contained in Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 (the “**Transparency Directive**”), the reporting obligation will no longer apply to all transactions in own shares, but only when the percentage of voting rights attached to the own shares in question exceeds or falls below the thresholds of 5% or 10% of the total voting rights. This obligation also applies to other securities giving the right to subscribe, acquire or sell shares issued or to be issued by the issuer.
- **Managers’ transactions:** the notification and disclosure of transactions by managers and closely related persons upon their appointment or after the admission of the securities to trading is no longer regulated by this Regulation. This is because it is understood that this obligation to disclose the initial position does not result from the European regulation applicable to managers’ transactions (the MAR) and that this information is already disclosed by issuing companies in other ways. The Portuguese Companies Code and the Securities Code require the disclosure of this information in the proposals for general meetings, whenever the election of members is an item on the agenda. It should be noted that this aspect in no way conflicts with the obligations to report transactions following the appointment of managers or the admission of securities to trading, which remain in place.
- **Criteria for the notification of changes in securities with voting rights attached:** This Regulation limits the previous rule on changes in securities with voting rights attached (Article 2(3) of CMVM Regulation 5/2008) to the rules on mandatory takeover bids (“**Takeover Bids**”), in the sense that the market must be informed of changes which, while leaving the size of the holding with voting rights unchanged, may give the participant an ability to exercise influence that it did not have previously. The proposed solution is limited to cases where the relevant thresholds for takeover bids are exceeded. It is designed to ensure the protection of minority shareholders which is the basis of the takeover bids rules. It also aims to ensure transparency in the event of an effective change of control. This can be monitored through compliance with the rules on the acquisition, modification and elimination of qualifying shareholdings and the corresponding sources of attribution or securities.

- **Financial information:** In line with the amendments to the Securities Code, Regulation 1/2023 repeals the rules on quarterly financial statements and stipulates that issuers that are not required to publish consolidated financial statements must now present their financial statements in accordance with international accounting standards. In this respect, Regulation 1/2023 has removed the obligation to present financial information by segment for individual financial statements in accordance with the Accounting Standards System.

## 1.2. Public offers - updating and revision of matters contained in CMVM Regulation 3/2006

- **Repeal of the rules on public offers:** Regulation 1/2023 repeals several rules relating to offers and issues. These include the rules on (i) the communication of private offers and the collection of investment intentions, whose corresponding rules were removed from the Securities Code, (ii) the development of acceptances and the calculation of results, also considered unnecessary in view of the new Securities Code, and (iii) the telephone assistance manual. The latter has been withdrawn because the information obligations imposed on financial intermediaries concerning financial instruments, as well as the rules on the conservation of client orders, are already covered by European and national regulations.
- **Amendments to the rules on takeover bids in the light of the amendments to the Securities Code:** the rules on takeover bids are maintained in the Regulation, with some adjustments resulting from the amendments made to the new Securities Code, in particular with regard to:
  - i) The exemptions from the obligation to make an offer, taking into account (a) the addition of a new reason for exemption provided for in Article 189(1) (d) of the Securities Code (acquisitions mortis causa), and (b) the alignment of the communication period with the times of compliance with the obligation, in order to avoid the existence of a time lag of uncertainty regarding the launch of an offer.
  - ii) Disclosure of the prospectus. These rules have been simplified and aligned with the rules on distribution offers in Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 (“**Prospectus Regulation**”).
  - iii) The rules on supplements, which have been updated in line with the current rules under Article 176(b) of the Securities Code.
  - iv) The rules on exchange offers (only applicable to offers of shares), which are now governed by the Regulation, with amendments to clarify the application of the Annex to the takeover bid prospectus and, where applicable (e.g. where the offer exceeds €8 million), the provisions of the Prospectus Regulation (e.g., the information requirements of the exemption document).

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- **Adjustment of the structure of the takeover bid prospectus:** In this context, the Regulation seeks to simplify and improve the structure of the prospectus. This includes the introduction of a summary (not exceeding 5 pages) containing the main information on the bid. A set of principles for the drafting of the prospectus has also been established in order to make it easier for investors to understand. These are in line with the prospectus for distribution offers and include the use of simple language, the grouping of related matters and the limitation of repetition of information.
- **New rules for independent experts:** Regulation 1/2023 includes new rules on independent experts for the determination of the minimum consideration in takeover bids or delistings. These new rules aim to:
  - i) Define the criteria and methodology for the selection of experts who may now perform these functions (in takeover bids or voluntary delistings), taking into account the new wording of Article 188(2) of the Securities Code. Under this article, the minimum consideration in takeover bids is the responsibility of an independent expert and not necessarily an “auditor” as provided for under the previous rules.
  - ii) Make it easier to understand valuation reports and ensure that they contain a minimum amount of information by providing for a basic structure and content of the reports, taking into account the experience of previous bids.
  - iii) Ensure a speedy and transparent process, including maximum time limits for the appointment of the expert and for the preparation of the report.

Taking into account other legislation on access to regulated activities supervised by the CMVM, for example, real estate valuers and auditors, and considering the nature and complexity of the activity, as well as the interests to be protected (protection of shareholders and the proper functioning of the market, without imposing disproportionate costs on the offeror), three requirements are established for the experts who carry out the valuation of the target company:

**The Regulation seeks to simplify and improve the structure of the takeover bid prospectus.**

- i) Professional qualifications which guarantee that they have the necessary knowledge to carry out the work properly - academic training which must demonstrate a sound basis for carrying out the valuation functions in question and relevant professional experience (e.g., 5 years).
- ii) Reputation - based on criteria already tested in the field of property valuation.
- iii) Independence - seeking to adapt criteria already tested in other fields, for example, auditors in supervisory bodies of commercial companies, to the functions in question in order to ensure that there

are no circumstances that may affect the independence of the expert, particularly with regard to the offeror and the target company.

As in other leading European jurisdictions, the offeror must submit a proposal for the appointment of an expert to the CMVM, together with its assessment of whether the requirements have been met and the expert's express confirmation that these requirements have been met. The CMVM may reject the proposal if it disagrees with the assessment of whether the requirements of competence, reputation and independence have been met.

In order to increase the speed and predictability of the process:

- i) The offeror has a maximum period of 10 days to submit the expert proposal and the CMVM has the same period to reply (10 working days in both cases).
  - ii) If the CMVM decides not to appoint the expert indicated by the offeror on the grounds of non-compliance with the applicable requirements, it must, within 10 working days of the decision not to appoint the indicated expert, (a) proceed with the appointment of an expert, or (b) invite the offeror to submit a second proposal for an expert, to be indicated by the offeror within 10 working days. In this context, if the CMVM decides not to appoint the second expert indicated by the offeror on the grounds of non-compliance with the applicable requirements, it must appoint an expert within 10 working days of this decision.
  - iii) The expert has a maximum of 30 working days to issue his or her report. Given the complexity of the analysis and the difficulties that may be encountered in the course of the work, the deadline may be extended in accordance with the criteria laid down. The CMVM may specify a longer period from the outset.
  - iv) The need to ensure ease of understanding and completeness of the valuation reports supports the provision of a standardised structure and content contained in the new Annex II to the Regulation. The details contained in this Annex are inspired by the typical structure of research reports and arrangements in other Member States.
- o **Specification of the requirements to assess the liquidity of the securities:** Also in the field of the minimum consideration in takeover bids and in order to increase the predictability of the CMVM's decision on the lack of liquidity of the securities offered (which determines the need to appoint an expert - see Article 188(3) of the Securities Code), the criteria for assessing liquidity are now public.

In order to measure the liquidity of securities, the CMVM takes into account a set of eight liquidity indicators calculated on the basis of trading information on a regulated market for the six months preceding the date of the announcement of the offer. These indicators aim to capture the different dimensions of the liquidity concept, namely trading activity and participation, transaction costs, price impact, elasticity and depth. Statistical classification methods (cluster analysis) are then used to group the shares admitted to trading on a regulated market into three categories (high liquidity group, medium liquidity group and low liquidity group) on the basis of these indicators.

In order to consolidate and validate the results obtained, supplementary exercises are then carried out, including sensitivity analyses of the stocks included in the cluster analysis and of the liquidity indicators used, in order to assess the degree of influence of each of them on the final classifications. The final conclusion should reflect the clustering generated by the ranking algorithms and be validated by the results of the supplementary exercises. ■