



# CVM

*Comissão de Valores Mobiliários*

*Protegendo quem investe no futuro do Brasil*

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## ***Enforcement Actions as a Result of Launching a Bid***

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## *Legal Framework*

1. Law 6.404/76 – The Corporation Law;
2. CVM Instruction 361/2002.

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## *Mandatory Acquisition Public Offers (OPA's)*

### Types of Mandatory Offers

For the purposes of this presentation, Law 6.404/76 and CVM Instruction 361/02 provide for three types of mandatory public offer for the acquisition of shares issued by a registered (listed) corporation:

#### 1. OPA for the cancellation of registration with the CVM:

The registration of a publicly-held corporation for its shares to be traded in the market can only be cancelled if the corporation itself, the majority shareholder or the controlling corporation, directly or indirectly, carries out a public offer to acquire the entirety of outstanding shares for a fair price, at least equal to the appraised worth of the corporation. It is a self determined decision of the bidder.

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## Mandatory Acquisition Public Offers (OPA's)

### 2. OPA due to an increase in stockholdings:

Whenever the controlling shareholder, the person entailed to him, or other people acting with the controlling shareholder or a person entailed to him, acquires, by other means different from an OPA, shares representing **more than a 1/3 (one third) of the total shares of each type or class**, an OPA shall be performed. It is a self determined decision of the bidder.

### 3. OPA due to a control alienation:

The direct or indirect transfer of control of a publicly-held corporation can only be effected under the condition that the acquirer agrees to conduct a public offer to acquire the voting shares owned by the remaining shareholders. The OPA shall have by object all shares issued by the company to which is granted full and permanent right to vote, by legal or statutory provision. It is a legal obligation of the bidder.

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## Acquisition Public Offers (OPA's) – Other types

### 1. Voluntary OPA :

According to sole paragraph of article 31 of CVM Instruction 361/02, to any voluntary OPA formulated by a controlling shareholder or by a person entailed to him, having as object the total of the outstanding shares issued by the object company, or the total of a specific class or type of outstanding shares, the same rules for an OPA due to increase in stockholdings shall be applied.

### 2. OPA for control acquisition:

The OPA for control acquisition shall only depend on registration with the CVM if it involves the exchange of securities. The general and special procedures applicable to any voluntary OPA apply to an OPA for control acquisition.

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## OPA – General Procedures

### Registration with the CVM (CVM Instruction 361, article 2)

According to paragraph 1 of of article 2, the following OPA modalities shall be subject to previous registration with the CVM:

- OPA for the cancellation of registration with the CVM;
- OPA due to an increase in stockholdings;
- OPA due to a control alienation;

Voluntary OPA and OPA for control acquisition shall only depend on previous registration with the CVM if **they involve the exchange of securities**.

### General Principles (CVM Instruction 361, article 4)

- I – indistinctly addressed to the holders of shares of the same type and class of those that are object of the OPA;
- II – equitable treatment to receivers, adequate disclosure of information on the object company and the bidder;
- III – previous registration with the CVM (article 2, paragraph 1);

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## OPA – General Procedures

### General Principles ( CVM Instruction 361, article 4)

- IV - the OPA shall be intermediated by a broker or securities dealer, or a financial institution with investment portfolio;
- V – the OPA shall be launched through uniform price, except for the possibility of fixing different prices (due to different classes of shares);
- VI – whenever an OPA is formulated by the company itself, by the controlling shareholder, or by a person entailed to him/her, it shall be instructed with an appraisal report on the object company;
- VII – the OPA shall be effected in auction, in stock exchange or organized over-the-counter market entity, except if, in case of a voluntary OPA or an OPA for acquisition of control, which are not subject to registration, the CVM expressly authorizes the adoption of a different procedure;
- VIII – the OPA shall be immutable and irrevocable after the OPA instrument (call) is published, except for the hypothesis provided for in article 5.

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## OPA – General Procedures

### Modification and Revocation (CVM Instruction 361/2002, Article 5)

The modification or revocation of an OPA, after the announcement is published, shall depend on previous and express authorization of the CVM, by observing, in the first case, the requirements for registration previewed in article 9 of CVM Instruction 361/02.

- The modification or revocation of an OPA, whenever deferred, shall require the immediate disclosure of a material fact, with emphasis in the modifications deferred by the CVM, and if it is the case, indicating the remaining term for the offer announcement and the date of auction.
- Without harming the restrictions established in civil and commercial laws, and the administrative punishments on the CVM jurisdiction, if it is the case, the modification or revocation of an OPA not subject to registration with the CVM shall be disclosed as material fact, including the information mentioned above;

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## OPA – General Procedures

### Financial Intermediation (CVM Instruction 361/2002, Article 7)

The bidder shall hire a broker, a securities dealer or a financial institution with investment portfolio to intermediate the OPA.

#### The intermediary institution shall:

- help the bidder during all phases of the OPA, and requesting him/her to practice the acts necessary for the correct development of the offer, as well as the ceasing of activities that harm such development, being subject to interrupt its services in case there is a refusal by the bidder, under the penalty of not being exempt from the responsibilities imposed by this Instruction;
- guarantee the financial settlement of the OPA, and the payment of the purchase price.

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## OPA – General Procedures

### Appraisal Report (CVM Instruction 361/2002, Article 8)

Whenever an Acquisition Public Offer (OPA) is formulated by the company itself, by the controlling shareholder, or by a person entailed to him/her, an **appraisal report** on the object company shall be elaborated.

#### The appraisal report:

- may be elaborated by the intermediary institution, broker, or securities dealer, or financial institution with investment portfolio that have specialized and duly equipped area, having proven experience, or even by specialized company with proven experience;
- shall contain the company worth determined/calculated according to evaluation criteria adopted by the bidder for the definition of fair price.

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## OPA – General Procedures

### OPA Instrument (CVM Instruction 361/2002, Article 10)

The instrument of OPA shall be signed both by the offerer and the intermediary institution, and shall contain all relevant information on the OPA, besides the requirements set forth in the **Annex II of CVM Instruction 361/02**.

#### Annex II – Requirements of an OPA Instrument:

1. Identification of the object company, the intermediary institution, and the bidder, including, in relation to the later, when it is the case, the identification of his/her controller, with the description of its business purpose, sectors where it acts, and activities developed by it;
2. Express mention of the fact that it is a Tender Offer, detailing its object, in accordance with the modality of OPA.

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## OPA – General Procedures

### Annex II – Requirements of an OPA Instrument – cont.

3. Information on the object company, including;
  - a) chart with its share breakdown, with nominal discrimination and percentage of circulating shares, and also those held by the controlling shareholder, people entailed to him/her, administrators, and those in treasury;
  - b) demonstrative frame of economic-financial indexes relative to the last two fiscal years and to the previous quarter made available to the CVM; and
  - c) indication of the average weighted price quotation of the company shares, discriminated by type and class, the value of net equity per share, and the economic value per share, in accordance with the appraisal report.
4. The quantity of shares object of the OPA, the price under which the OPA shall be formulated, and the conditions of payment;
5. Information on the appraisal report, and where it is available;
6. Information on the auction;

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## OPA – General Procedures

### OPA Instrument – Publication (CVM Instruction 361/2002, Article 11)

The OPA instrument shall be published, under the form of announcement, at least once in the newspapers of huge circulation habitually used by the object company, observing the maximum term of 10 (ten) days, after the obtainment of the registration with the CVM.

The publication of the OPA instrument it shall also , if the case may be, consist of the date when the OPA registration with the CVM has been deferred.

In the maximum term of 24 (twenty four) hours, counted from the publication of the announcement, a copy of the publication shall be sent to the CVM, and also to its electronic address. Additionally, it shall also be made available to people eventually interested.

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## OPA – CVM Enforcement Powers

### Enforcement Powers (CVM Instruction 361, article 4, paragraph 2)

The CVM can determine, at any time:

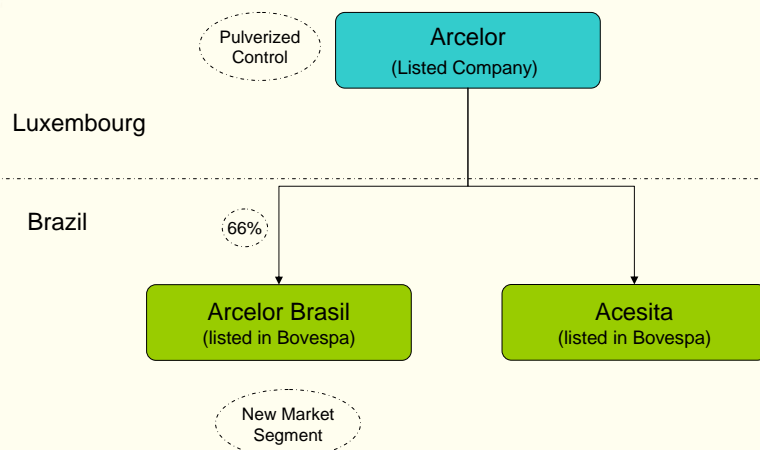
- I - the suspension of an ongoing OPA, or the respective auction, if verifying that the OPA or the auction show healable irregularity or illegality, being the suspension maintained until they are corrected;
- II – the cancellation of OPA, when verifying that it shows unhealable irregularity or illegality;

***Additionally, the Law grants the CVM the power to force a tender offer to occur, whenever the CVM concludes it is necessary.***

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## CVM Enforcement Powers – Arcelor Mittal



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## ***CVM Enforcement Powers – Arcelor Mittal***

### **ARCELOR – MITTAL:**

- Arcelor Brasil by-laws provided for the obligation of carrying out an OPA in accordance with article 254-A of Law 6.404/76 in the case of a control acquisition (and not only in the case of a control alienation).
- Because this provision on Arcelor Brasil by-laws, regulating specifically the hypothesis in which the final controller (Arcelor) has its control originally acquired (i.e., in the market), the OPA due to a control alienation addressed to the shareholders of Arcelor Brasil was carried out.
- The CVM acted in order to grant the observance of that statutory provision by Mittal, which had acquired Arcelor control, and indirectly, Arcelor Brazil control.

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## ***CVM Enforcement Powers – Arcelor Mittal***

### **MITTAL APPEAL:**

- Mittal filed a recourse against the understanding of the CVM Technical Body, questioning the CVM competence to force the compliance of by-laws provisions, stating:
  - No control acquisition occurred, only the merger of two similar companies;
  - The indirect control, hold by Mittal shareholder families, did not change; only the direct stockholdings changed, as a consequence of the integration with Mittal;
  - Article 10 of Arcelor Brasil By-laws did not create a new hypothesis in which the OPA provided for in article 254-A of Law 6.404/76 should be carried out, but a hypothesis of control alienation (and not control acquisition), provided for in that article.

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## ***CVM Enforcement Powers – Arcelor Mittal***

### **CVM Board of Commissioners:**

- After analysing the whole process of transferring the control, the Board of Commissioners concluded that a tender offer should be carried out, since:
  1. This operation was an indirect transfer of control. The control acquisition of Arcelor caused, according to Brazilian Law, the indirect control acquisition of Arcelor Brasil.
  2. Arcelor Brasil By-laws set forth this provision on article 10.
- ***The CVM ordered Mittal to carry out a tender offer, which was addressed to Arcelor minority shareholders;***
- ***Amount of the offer: US\$ 5.6 billion***

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***Thank You!***

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