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# NEWS

## BANKING & FINANCE / CAPITAL MARKETS

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# EDITORIAL

*Pedro Cassiano Santos*

We write this year's second Newsletter in a market context, such as the Portuguese, which has not yet returned to the level prior to the international financial crisis, that lasts for over two years. We have witnessed, however, some signs of activity and namely note Portuguese issuers returning to the debt markets, notably through commercial paper and even through their Eurobonds programmes, usually named EMTN. We are also seeing an increased interest of both equity and debt issuers for hybrid securities transactions and other structured trades, and thereby these new market segments are being developed, attending the capitalisation needs of issuers and the investor's appetite for higher risk and remuneration.

Concerning financial institutions in particular, some covered bonds issues have been undertaken this year and securitisation transactions continue to be closed – now through an increased use of securitisation companies to the detriment of securitisation funds. So far, the main objective of these securitisation trades has been the obtaining of asset-backed securities, with a high rating and, thus, eligible collateral for short-term financing transactions executed with the Central European Bank, through the entering into of repurchase agreements (repos).

On the stock market side, and after the attempted takeover of Cimpor which inevitably marked the first quarter, some privatisation transactions have been put forward, namely of 100% of the capital of BPN and tranches of capital of EDP and GALP, although the market conditions are not very favorable for this sort of transactions.

The domestic front is naturally also marked by the discussion over the 2011 State Budget and by the need to balance public finances.

In any event, the exercise of balancing public finances, reducing the deficit and fostering the Portuguese position in the international capital markets, of which public and private issuers will benefit, is still to be accomplished. This is a broader challenge, for which we certainly require sound laws and solutions compatible with international investors' demands for the acquisition of Portuguese debt. Taking into consideration the exemptions to the withholding tax regime on payments made to non-resident investors, which have been enlarged in the 2011 State Budget proposal, such a trend already seems to have been accepted in the context of public debt. But the private sector also requires this type of measures to access international financing in conditions as attractive as possible.

In this context, we address a number of subjects in this Newsletter. We provide a more detailed analysis on the new regulatory model (twin peaks) which is under discussion, the foreseen changes to the Prospectus Directive, securities investment companies and real estate investment companies and aviation finance transactions.

We refer briefly to a set of other items, including CMVM Regulation no. 5/2010, regarding the disclosure of economic long positions in listed shares issued by Portuguese companies.

We trust that the matters addressed herein are of the interest of the addressees of this Newsletter.

In the event that you have any comments or suggestions to these or other subjects, for which we thank you in advance, we kindly invite you to send them to: amn@vda.pt.


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# AIRCRAFT FINANCING DO YOUR HOMEWORK!*

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*Hugo Moredo Santos and Tiago Correia Moreira*

The structuring of an aircraft financing deal requires an understanding of the underlying specifics to this kind of transaction, especially those circumstances which justify its autonomy vis-à-vis other deals such as railway or ship financing. Therefore it is critical to get acquainted with the specifics of this kind of transactions. Only in such a context one can realize why it is almost impossible to speak about aircraft financing without introducing more or less sophisticated leasing structures (operational and financing).

The asset. The most immediate and obvious question is the asset, i.e. the aircraft which renders aircraft financing such a distinct discipline. The aircraft, as the financed asset, has a specific value on the delivery by the manufacturer to the operator. The fact that it is possible to foresee, to a certain extent, its depreciation value, allows the structuring of the financing at stake taking into account the future value of such asset and its potential as collateral. It is also worth to keep in mind that the concept of "aircraft" gathers within itself other realities which shall further have to be considered, among others, the engines and remainder equipment of the aircraft.

The risk. An aircraft is supposed to move from one place to the other. But the moveable nature of an aircraft leads, in the large majority of the cases, to the owner of the aircraft loosing the de *facto* control over the aircraft from the date on which it is delivered to the operator. Due to the tasks it is aimed at performing, the aircraft may potentially be found in any jurisdiction worldwide when the owner is intending to repossess the aircraft (eventually to re-sell or refinance it). Such jurisdiction may have rules different from those of the jurisdiction where the aircraft is registered or fail to recognise certain legal concepts (e.g. there are jurisdictions where the concept of mortgage does not exist). For such reason, the aircraft gathers within itself another distinct element which must at all times be considered - the risk.

In fact, the structuring of a aircraft financing deal must at all times pay close attention to the risks involving the asset being financed, namely by providing for mechanisms which ensure repayment of the capital and interests in cases of total or partial loss of the aircraft.

The parties. But besides the financed asset, there's another distinctive feature. This time around it is worth attaining on the parties of an aircraft financing deal.

In this area, the entity which immediately takes the leading role on this type of deals is the aircraft operator, i.e., the airlines which lack the financing to create, expand or renew their aircraft fleet.

For such reason it is always relevant for the financiers to know the airline company which is to operate the aircraft and its essential features since, as a rule, being such entity that which is to bear the transaction costs (mostly through the rents to be paid for the use of the aircraft), their business plan, their market performance and compliance with legal and regulatory rules is what needs to be kept in mind.

A financing entity concern should not be exactly the same if it is dealing with a low cost airline or with a charter airline as for example, in the latter case, its seasonal activity is not irrelevant for the terms and condition of their financing.

But there are other players which play an important role in aircraft financing, notably, the financing banks. Taking into account the amount used in these transactions it is common for these transactions to involve the participation of a bank syndicate or the intervention of the export credit agencies.

Moreover, there are also other entities which, though not being the leaders of these deals, play a fundamental role at a certain stage of the deal for the importance they represent, such as the aircraft, engines and equipment manufacturers, the insurance and re-insurance companies and the regulators.

*This article is part of a series of articles from the authors about aircraft financing

# NEW POSSIBILITIES WITH REGARD TO COLLECTIVE INVESTMENT UNDERTAKINGS CORPORATE STRUCTURES

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*Pedro Simões Coelho and Pedro Bizarro*

In spite of having been referred to in Portuguese law for some time, the creation of collective investment undertakings under a corporate structure lacked an actual legal framework. This void was recently filled by the Portuguese legislator, in a way which brought the Portuguese legal system in line with those of several other countries.

Decree-Law no. 71/2010, of 18 June, enacted the legal framework of securities investment companies ("**SIC**") and real estate investment companies ("**REIC**"). These structures are meant to invest in securities and other financial instruments and in real estate and each of them may be incorporated as variable capital or fixed capital companies, as is the case, respectively, with open-ended and closed-ended investment funds.

There are plenty of similarities between the new investment companies and the existing contractual structures, the legal framework applicable to the later also governing (as applicable) most of the issues regarding the former. However, we understand that the differences between both are what makes the new corporate structure appealing.

Among others, the possibility of self management (through corporate bodies appointed by the shareholders) constitutes an interesting alternative to the existing model, eliminating the fund/management company relationship and thus the need to pay management fees, albeit the need for a custodian remains. Additionally, at least in the case of fixed capital companies, shareholders may participate in the management to an extent unreachable by unitholders in contractual funds.

Indeed, the legal framework governing the powers of the general meeting of shareholders of limited liability companies foreseen in the Portuguese Companies Code is to be subsidiarily applied to the new structures. This legal framework grants shareholders the general capacity to rule on matters outside the capacity of the other corporate bodies. Although the law determines that this will not be applicable to situations where it would be contrary to the nature of fixed capital SICs or REICs (without expressly stating the cases in which it is so), it looks conceivable that this feature alone is enough to attract investors with a desire for active intervention in the management of their investment.

More could be said about this new structure. For now, we shall be observing how the market reacts to it.

# ARE WE EVOLVING TO THE ESTABLISHMENT OF A SOLE EUROPEAN SUPERVISOR?

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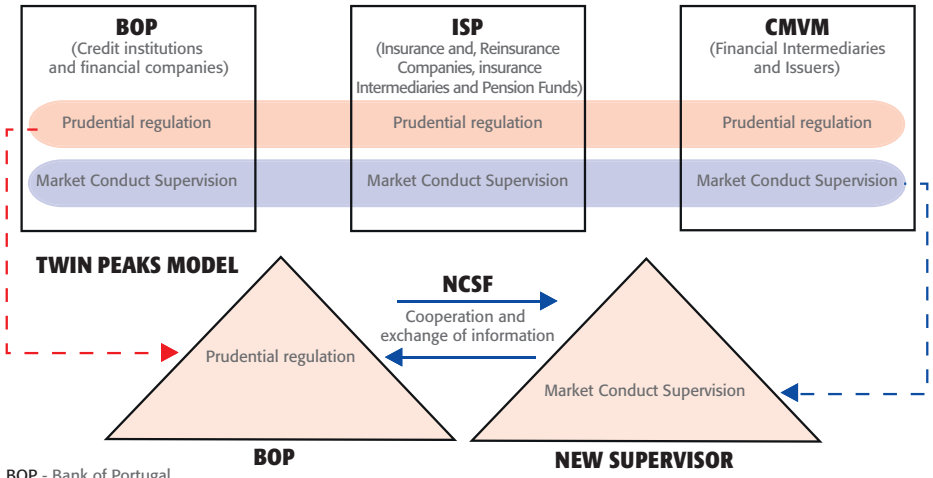
*Rodrigo Formigal*

The banking and financial sector has seen changes in the few years like never before. Credit, savings, insurance and investment products were all subject to new regulation and the words spreads, commissions, guarantee of capital and credit default swaps have entered the vocabulary of pretty much everybody. The global crisis highlighted the need for better control and coordination of the financial system. Although the many changes in the sector, they proved to be insufficient to prevent abusive conducts and to reestablish confidence in a supervision system debilitated by the insolvency of the BPP bank and the nationalization of the BPN bank. The financial crisis demonstrated that the protection of the clients' interests in financial products and services not only depends on the surveillance of the solvability and liquidity of the institutions (**prudencial supervision**), but also relies on the control of the conduct of the institutions and the information that they pass through to its clients (**conduct supervision**). The Government placed under public discussion the reform of the financial supervision in Portugal (http://www.gpeari.min-financas.pt/consulta-publica/) which implies a change in the paradigm followed so far - the specialized supervision giving place to the functional supervision. This means that the tripartite model composed by the BoP, ISP and CMVM, which operates on a supervision by product, entity and subsector of activity basis, will give place to a dualist/twin peaks model composed by two supervisors, the BoP, prudential supervisor of all institutions and financial markets, and a new conduct supervisor created out of the merger of the ISP and CMVM. Changes not only relate to the national boundary and are also felt in the European territory, once reality has shown that the financial crisis of one Member-State will inevitably be reflected and felt on the other Member-States. In September 2010, the European Parliament decided to confer more power to European authorities to watch over banks and other financial institutions in the Member-States and approved the establishment of a European Systemic Risk Board and three European Supervisory Authorities responsible for monitoring banks, markets and insurance with powers to intervene directly on the market players and even, in some situations, overrule national supervisors. These new European authorities will for now work in coordination with the national supervisors but does this mean that we are evolving to the establishment of a sole European supervisor?

The following scheme exemplifies the changes to be implemented:

Tripartite Model




BOP - Bank of Portugal
CMVM - Portuguese Securities Market Comission
ISP - Portuguese Insurance Institute
NCSF - Forum Created by the Portuguese Govermment in 2000 to Facilitate the Exchange of Information and co-ordinate the Activites between the Regulators

In: Proposal of reform of the institutional model of financial supervision

# AMENDMENTS TO THE PROSPECTUS DIRECTIVE

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*Rita Rendeiro*

After the public consultation carried out by the European Commission in early 2009 on an envisaged amendment to the Prospectus Directive (Directive 2003/71/EC, hereinafter, "**PD**"), and further to the publication, in September 2009 of an amendment proposal, on June 17 the European Parliament has adopted a resolution approving the referred PD amendment proposal, although with some changes.

The general feeling that many aspects of the PD had somehow become outdated, together with the need for improvement revealed by the practical application of the PD, led to the approval of measures intended to simplify the application of the PD, simultaneously eliminating or amending provisions which had proven to be ineffective.

As a result, a number of information disclosure obligations impending on issuers were softened and, simultaneously, the exemptions awarded by the PD and the extent of the requirements established therein were increasingly adjusted to the true nature of target investors. Among the new measures adopted, of particular importance in this context are the increase from €50,000 to €100,000 of the minimum threshold in terms of total consideration amount per investor or nominal amount relevant to exempt an entity from the obligation to publish a prospectus and also the increase from 100 to 150 of the maximum number of non-qualified investors targeted in order to obtain the referred exemption. The increase of these limits is considered to be more in line with the actual characteristics of retail investors in the current market environment.

In addition, securities included in an offer the global amount of which is below €5,000,000, calculated over a period of 12 months (while the previous relevant amount was €2,500,000), will also fall outside of the scope of the PD.

A final reference is made to the inclusion in the PD definition of "qualified investor" of a reference to the list of professional clients included in annex II of the Markets in Financial Instruments Directive, thus allowing a higher degree of harmonization between both directives in the context of private placements.

# ALREADY PUBLISHED

## Bank Secrecy

On 2 September 2010, Laws 36/2010 and 37/2010 have been published in the Portuguese Official Journey with the purpose of amending Portuguese Banking Law and Tax Law.

Law 36/2010 foresees the set-up, by the Bank of Portugal ("**BoP**"), of a database of all Portuguese bank accounts, in relation to which BoP will be able to identify the relevant owners, signatories and opening/closing dates.

These data shall be provided by all entities authorised to open bank accounts until the end of May 2011 and, afterwards, every month (up to the 15th day of each month in relation to previous one) and only judiciary authorities in the context of criminal investigations shall have access to it.

Law 37/2010 establishes the requirements to be followed by tax authorities when notifying banks and similar entities for providing information subject to bank secrecy and also establishes the period of 10 business days for such entities to disclose said information.

Furthermore, the access by tax authorities to secret information has been extended, being possible now for said authorities to access information subject to bank secrecy in cases of evidenced debts to Social Security.

## CMVM 's Regulation no. 5/2010

It has entered into force, on 12 October 2010, the CMVM's Regulation no. 5/2010 ("**Regulation**"), which amends CMVM's Regulation no. 5/2008 with the purpose of establishing a mandatory disclosure duty to the market of long economic positions in shares of listed companies.

The Regulation states that those who reach, exceed or reduce a certain threshold (2%, 5%, 10%, 15%, 20%, 25%, a third, 40%, 45%, half, 55%, 60%, two thirds, 70%, 75%, 80%, 85% and 90%) of the share capital of a company, subject to Portuguese law, that issued shares admitted to trading on the regulated market, located or in function in Portugal, must inform both the CMVM and the company itself of such fact, within a deadline of four trading days after the occurrence of such event.

The main goals of the Regulation are to prevent potential market failures in respect of (i) pricing mechanisms for quote, (ii) detection of conflicts of interest, (iii) calculation of free-float and (iv) the regime of mandatory takeover bids.

## BPN's privatisation

According to the initially foreseen calendar, the deadline for the presentation of the offers under the public tender regarding the privatisation of BPN was 30 September. However an extension of the period for the presentation of the offers has been granted by the Government until 30 November.

The extension of the time period for the presentation of the offers may attract new offers from potential investors.

It will be difficult for the Government to comply with its goal of announcing the winning proposal by year end, considering that the public tender is still subject to a negotiation phase, prior to submission of final proposals.

## "Country risk"

The "country risk" is the new concept to be considered in the calculation of the coefficient of the credit institutions' own funds.

This is yet another effect of the financial crisis. The purpose of this measure is to grant the credit institutions with additional sturdiness so as to allow the implementation of transactions involving countries that are vulnerable to politic, economic and social changes capable of impacting the value of the investments therein.

It is now up to the Bank of Portugal to establish the own funds requirements for "country risk" that the credit institutions and financial companies must consider from now on.

## The Increase of the Transparency in the Financial Sectors

The harmonization of the prudential assessment of acquisitions and increase of holdings in the financial sector, including the bank and insurance sectors, was finally introduced in the Portuguese jurisdiction with the entering into force of Decree-Law no. 52/2010, of 26 May 2010.

Although this regime foresees many relevant changes, we outline the impact that the changes to the qualified holding regime and to the regime which establishes the attribution of voting rights to the holders of investment companies, credit institutions and insurance companies, may have on the financial world.

In what particularly concerns the companies under the supervision of the Bank of Portugal, we highlight the increase of transparency requirements as the relevant definition of qualified holding comprises, jointly, the holding of capital and the voting rights attribution, on the same terms applicable to listed companies, although this requirement seems to be mitigated by the own concept of qualified holding, which minimum threshold was increased to 10%.

## Communication of Credit Transfer Operations to Offshore Jurisdictions

The communication of credit transfer operations to offshore jurisdictions is now regulated by the Bank of Portugal ("**BoP**") Instruction no. 17/2010, which states that institutions subject to BoP supervision, as well as any entities authorized to perform credit transfer operations, must provide BoP with the registry of credit transfer operations which beneficiary corresponds to an entity located in an offshore jurisdiction.

This information, to be provided until the end of the following month of each trimester, must be remitted to BoP through the electronic communication system denominated BPnet.

The first remittance of information should have been made until 31 October 2010 and should include all credit transfer operations made between 22 June 2009 and 30 September 2010.

## Financial Report of Pension Funds

The Portuguese Insurance Institute ("**ISP**") established, through Regulation no. 7/2010-R, dated 4 June 2010, a new global regime applicable to the financial report of pension funds. This new regime eliminates the listing of accounts and subaccounts that was being used until now and substitutes it for the adoption of the general principles established in the International Accounting Standard (IAS) 1. The normalization in respect of the contents of the different financial statements' was also increased and the conditions for an effective public disclosure of relevant information were ensured.

This new regime also allows managing entities to adapt their financial reports to the different types of pension funds and to the specific characteristics of the plans financed by them.

# SOON...

## Bank of Portugal information dated 10 September 2010

The Bank of Portugal ("**BoP**") issued a statement informing that it is preparing a set of guidelines regarding adequate practices that the financial institutions should follow when inserting clauses allowing the unilateral amendment of interest rates and other fees of mortgage loans.

BoP referred in the abovementioned information that it was not aware, up until that date, of any claims made by clients in respect of the insertion of such clauses in mortgage loans.

Nonetheless, BoP's position is that this type of general contractual clauses should abide principles of transparency, objectivity, and proportionality.

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