



BANKING & FINANCE | GENERIC OPINION OF THE PORTUGUESE SECURITIES MARKET COMMISSION ON *SHORT SELLING*

In light of the current situation in the financial markets and further to the recent approval of Instruction n.ºs 1 and 2/2008, the Portuguese Securities Market Commission (“**CMVM**”) has issued, last thursday, a generic opinion (“Opinion”) on *short selling* in order to clarify the circumstances under which *short selling* transactions are admissible.

In accordance with the CMVM’s understanding set forth in the Opinion, the assessment, by the financial intermediary, of the orderor’s entitlement to the instruments is necessary in ensuring a successful settlement of any sale of financial instruments, including *short selling*. If, at the time of reception of the *short selling* order, the orderor fails to provide the financial intermediary with proof, by means of a loan or other effective circumstance, as to its entitlement to the financial instruments necessary for settlement, then the orderor will be considered an illegitimate party to the transaction and the financial intermediary is required to deny the execution of such transaction.

The regulator states in the Opinion that legitimacy to order the transaction is, nonetheless, deemed to exist if the financial intermediary receiving the order guarantees the settlement of the financial instruments at sale thereof on behalf of the orderor, or in case a different financial intermediary specifically provides the same kind of assurance as to the settlement. In these circumstances, up to the closing of the relevant market session where the *short selling* order occurred, the orderor is required to obtain the financial instruments being sold, subject however to the financial intermediaries’ guarantee to, in the same period of time, making the financial instruments available for settlement in case the orderor fails to obtain them. To this end, the CMVM clarifies that, for such purpose, the generic agreement entered into between the financial intermediaries and the settlement system participant to back the formers’ positions, is insufficient.

In the context of the Opinion, it is relevant to note that the CMVM expressly states that legitimacy to operate *short selling* transactions does not by itself eliminate the possibility that a given transaction, under certain circumstances and upon verification of certain legal requirements, may constitute a situation of market manipulation or violation of the obligation to defend the market.

Although not proceeding to a close ended listing, the CMVM does point out certain circumstances which, upon verification of the applicable legal requirements, may lead to the conclusion that market manipulation or violation of the obligation to defend the market has occurred:

- a) Circumstances upon which the execution of selling transactions aggravates or is susceptible of aggravating the volatility or instability of financial markets or of one specific financial instrument;
- b) High volume of short selling, either in absolute terms; in accordance with the liquidity and depth of the market; or by reason of its concentration in a short period of time;
- Foreseeable or effective significant influence in the price of the financial instrument;
- Relevant settlement disruption, upon the verification of the unavailability of the sold securities.

