VIEIRA DE ALMEIDA & Associados Sociedade de Advogados, R.L.

DECEMBER 2015

NEWS

BANKING & FINANCE / CAPITAL MARKETS

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EDITORIAL

Pedro Cassiano Santos

Since our last Newsletter (May 2015) there were several developments in the economic, political and legal contexts – at both European and national level. This is the main reason why we believe it is worthwhile for our reader to invest a few moments on the following articles.

It is certain that, at a domestic level, our jurisdiction has been marked in recent months by the end of a political cycle and the beginning of a new one, while maintaining its attractiveness to investors, along with all its operational and market access conditions. In a new political context, such will be the main challenges to meet, enabling market structures operations and their respective legal frameworks within an environment of certainty and security to remain operational in our jurisdiction. In this respect, it is fair to say that the Portuguese legal framework has risen to the new challenges it has been constantly facing. It is now up to the relevant economic and legal stakeholders to pursue their activities the best they possibly can, taking every opportunity, covering their risks and resisting threats, as indeed has always been the case.

Furthermore, at an international level we are living in a climate of uncertainty and turmoil, especially in the aftermath of widespread violent and aggressive events, at times arising in the most unexpected places. In this context, it is also up to the relevant economic and juridical stakeholders to pursue their activities the best they possibly can, taking every opportunity, covering their risks and resisting threats, as indeed has also always been the case.

At the European level, and on a more legal side, one should highlight the Commission Securitisation Initiative, of 30 September, which encompasses two legislative proposals: a Regulation applicable to all securitisations and including transparency, due diligence and risk retention rules together with the criteria for Simple, Transparent and Standardised ("**STS**") Securitisations; and a proposal to amend the Capital Requirements Regulation to make the capital treatment of securitisations for banks and investment firms more risk-sensitive and able to properly reflect the specific features of STS securitisations.

On the national landscape, attention should be drawn to the legal draft regarding the implementation of the "Transparency Directive", which amends Directive 2004/109/EC, on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, in a gradual bolstering of transparency and legal security.

We should also mention Notice of the Bank of Portugal no. 1/2015, which anticipates the application of a capital conservation buffer requirement, promoting financial stability and resilience to absorb unexpected losses within credit institutions and investment firms.

In this respect, it is noteworthy to refer Order (*Portaria*) no. 362/2015, in respect of the minimum share capital requirements of credit institutions and financial companies, following a set of legislative releases which postulated an update of said requirements.

In the insurance sector, Law no. 147/2015 of 9 September has implemented in Portugal "Solvency II Directive", enacting the new Insurance and Reinsurance Legal Framework. This new legal regime aims to strengthen consumers' protection, while enhancing competitiveness through reinforcing the effectiveness of the regulatory system. Unsurprisingly, law-making process was affected in recent months, by virtue of its inevitable connection with political cycles. However, the dynamics and specific demands of the activity in various economic sectors, together with several developments on regulation and jurisprudence (including some pending decisions that may considerably impact the economic activity, such as public-private partnerships, swaps, anti-competitive practices and litigation relating to bank resolution) will certainly contribute to provide us with a quite interesting semester. And we shall surely report on whatever most draws our attention. Many thanks,

Pedro Cassiano Santos, 30 November 2015.

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THE COMMISSION SECURITISATION INITIATIVE

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Paula Gomes Freire / Mariana Padinha Ribeiro / Sandra Cardoso

The European Commission published on 30 September 2015 (i) a proposal for a securitisation regulation, aimed at establishing a single framework applicable to simple, transparent and standardised securitisation transactions ("**STSS Regulation**"), and (ii) a proposal to amend Regulation (EU) no. 575/2013 of 26 June on prudential requirements for credit institutions and investment firms (known as "**CRR IV**"), in order to adjust it to the proposed STSS Regulation.

These proposals were disclosed further to other initiatives in this context, namely the public consultation of May 2015 on a possible European framework for securitisation, which main goal, following the subprime crisis, was to establish an improved and stricter supervision of securitisation transactions. Worth mentioning also the Frequently Asked Questions on Securitisation disclosed by the European Commission and available here.

The STSS Regulation proposes duties to be applicable to (i) institutional investors (only this type of investor is under the scope of the proposal), such as due diligences requirements or regular monitoring of the profile risk and the relevant underlying pool of assets; (ii) originators and sponsors (*maxime*, retention of at least 5% of net economic interest in the securitisation); (iii) originators, sponsors and securitisation special purpose entities, in respect of the information to be disclosed (regular publishing of information, disclosure of the securitisation documents and agreements) and its contents (for instance, even if a prospectus is not required, a summary of the main features of the securitisation should be drafted).

Additionally, the STSS Regulation contains requirements in respect of asset-backed commercial paper programmes, supervision and the provision by the Member States of criminal sanctions (if applicable) and administrative sanctions applicable to breaches of the main provisions of said Regulation.

Securitisation transactions that meet certain requirements relating to their structure may be qualified as "simple, transparent and standardised securitisations" ("**STSS**"). For this to happen, the securitisation transactions must comply with several requirements (although some are already market practice), namely (a) representations and warranties to be provided by the originator, (b) the underlying pool of assets and its debtors meeting specific criteria such as that of being an homogeneous pool of assets, (c) classification of scenarios of early amortisation, and (d) information to be provided in the transaction documentation.

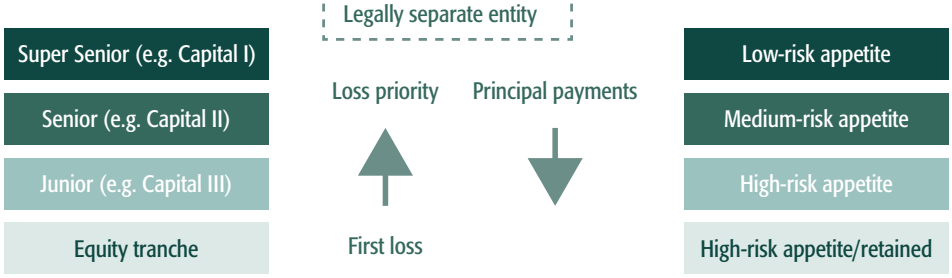
As the STSS "seal" may lead to a different treatment of such securitisation transactions by investors, perhaps the attribution of said "seal" will become a key goal and therefore strengthen, somehow, this market.

HOW DOES SECURITISATION WORK?

1. TAKE A POOL OF MORTGAGES/LOANS

2. CONVERT THEM INTO TRADEABLE SECURITIES

3. TAILOR TO DIFFERENT RISK/REWARD PREFERENCES. THE BANK/ LENDER IS REQUIRED TO RETAIN AT LEAST 5% OF THE TOTAL AMOUNT SECURITISED



(Source: The European Commission)

CAPITAL CONSERVATION BUFFER

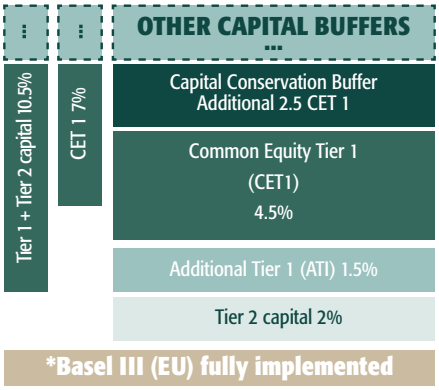
Orlando Vogler Guiné / Soraia Ussene

Part of the new features under the Basel III framework, adopted with adjustments at European Union level through Directive no. 2013/36/EU of 26 June 2013 ("**CRD IV**") and Commission Regulation (EC) no. 575/2013 of 26 June 2013 ("**CRR**"), were the capital buffers provisions.

In Portugal, these provisions were transposed in October 2014 by adding a new title to the Portuguese Banking Law ("**Baking Law**") – Title VII-A. The applicable capital buffers accrue with the other capital requirements, and need to be met with highest quality capital (CET1). The capital buffer foreseen as first in such Title is the capital conservation buffer which serves general preventive purposes. It corresponds to 2.5% of the total risk exposure amount, on an individual and consolidated basis, as applicable.

Although there was legal room for a larger transitional period, the Bank of Portugal decided, under the terms of Notice 1/2015, to anticipate its entry into force, in order to promote the strengthening of solvency levels and a higher resilience of the financial system.

Therefore, as from 1 January 2016 the capital conservation buffer will be applicable to a number of entities, including credit institutions and investment firms with head office in Portugal. The institutions that fail to fulfil this requirement shall submit to the Bank of Portugal a capital conservation plan under the terms of article 138-D of the Banking Law.



TRANSPOSITION OF DIRECTIVE 2013/50/EU

Orlando Vogler Guiné / Francisco Mendonça e Moura

Showing or not your hand? The trend in the capital markets is certainly that of transparency of useful information to the market. In this context, the CMVM has recently released the final version of the draft legislation proposal on the transposition of Directive 2013/50/EU. Further legislative steps are still to come before a final statute can come into effect. We highlight some of the main projected amendments to the Securities Code *(Código dos Valores Mobiliários)*.

Qualified shareholdings: Economic long positions become part, under the Securities Code, of qualified shareholdings, following to much extent the regime already provided for under CMVM regulation. However, the "client servicing exemption" will not be applicable.

The general range of exemptions is broadened and adjusted, and will now expressly recognise a custodian exemption and a trading book exemption (5%).

Public offers: The previous reference to 150 residents in Portugal targeted, one of the criteria for public offers, is now replaced by 150 residents per Member State.

Language: Some rules are redefined, giving, in our view, additional margin to accept the English language. We are considering notably transactions with prospectuses for the admission to trading on a regulated market and with no associated public offer, even if the nominal value of the securities is less than €100,000. In practical terms, this means that the information shall be provided both in English and Portuguese, which does already frequently occur.

Disclosure of quarterly information: In practical terms this was already mandatory for many companies with shares admitted to trading on regulated market, but it will now become voluntary, except if it is mandatory for prudential purposes.

Information on bond issues: Amendments are put forward to a rule which had been subject to gold-plating, by removing the obligation for issuers of securities admitted to trading on a regulated market to disclose information on issues of bonds when these have not been subject to public offer nor to admission to trading.

Non-Transposition of Directive 2013/50/EU: Please note additionally that the CMVM has issued an opinion on the enforcement of the Directive, taking into consideration that the deadline for its transposition (26 November 2015) has not been met.

For the CMVM, qualified shareholders may either choose to comply with the existing Portuguese rules or with the rules laid down in the Directive. In any case, such shareholders shall additionally comply with Commission Delegated Regulation (EU) 2015/791 of 17 December 2014, which is directly applicable in Portugal since 26 November 2015 and which includes specific rules relating to disclosure exemptions and to notifications related with qualified shareholdings resulting from holding of financial instruments (including cash-settled financial instruments).

For these purposes, recourse shall be made to the template for the communication of qualified shareholdings made available by ESMA. No details have however been given regarding the necessity and means to disclose that, due to the introduction of the trading book exemption, a position is no longer attributable to a specific shareholder.

INSURANCE AND REINSURANCE LEGAL FRAMEWORK

Pedro Simões Coelho / Carlos Couto

Law no. 147/2015 of 9 September ("**Law 147/2015**") has implemented in Portugal Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009, as amended from time to time, on the taking-up and pursuit of the business of insurance and reinsurance ("**Solvency II**").

Law 147/2015 carried out the reshaping of the fundamentals of the Portuguese legal framework applicable to the insurance sector. In particular:

a) It enacted the new insurance and reinsurance legal framework ("**RJASR**");

b) It enacted the procedural regime applicable to special crimes of the insurance and pensions schemes sector and to the misdemeanour proceedings which are conducted by the Portuguese Insurance and Pension Schemes Supervisory Authority ("**ASF**");

c) It amended Decree-law no. 12/2006 of 20 January, which regulates the activity of pension funds as well as their managing companies;

d) It amended the insurance agreements legal framework, enacted by Decree-law no. 72/2008 of 16 April.

Due to its relevance, we stress the enactment of the RJASR, which is aligned with the regulatory architecture implemented by Solvency II, based on three pillars:

a) Pillar I – defines the quantitative financial requirements, including assessment of assets and liabilities, available capital and capital requirements related matters;

b) Pillar II – addresses the qualitative requirements, notably the supervision process, internal auditing, risk management and corporate governance; and

c) Pillar III – governs the reporting due to supervisory authorities and public disclosure, taking into consideration the information treatment and disclosure by the insurance companies and the necessary connection with accounting standards applicable to the insurance sector.

Besides the focus on the aforementioned pillars, the RJASR is encompassed in a broader regulatory framework, whic turns away from traditional sources – national legislation implementing European Directives – in order to comprise several other legal sources, construed in the broader sense of the term. Actually, the legal sources of the new standard of the insurance sector supervision will also include directives, European Council delegated acts, and technical standards and guidelines of the European Insurance and Occupational Pensions Authority. The new RJASR intends, in short, to (i) increase the insurance consumers' protection, by promoting a deeper integration of the European insurance market, (ii) increase the international competitiveness of the European insurance and reinsurance companies, and (iii) implement an overall better regulation.

However, the key point introduced by the RJASR concerns the new capital requirements system, which is divided in three steps:

a) Own funds assessment;

b) Ranking of the own funds in tiers, depending on their quality; and

c) Determination of the eligible assets.

Besides the capital requirements system, it was also implemented the ORSA (Own Risk and Solvency Assessment), which compels the insurance and reinsurance companies to encompass in their business strategies a periodic assessment of their global capital needs, with reference to their specific risk profile, being the results of each assessment disclosed to ASF.

Finally, the RJASR further regulates the supervision of insurance groups, covering matters in connection with the solvency calculation, supervision of groups with centralised risk management, risk concentration and intragroup transactions.

The RJASR will enter into force and effect on 1 January 2016, without prejudice of a phasing-in period up to 2026 applicable to some of its provisions, notably in respect of own funds and financial situation assessment.

Banking Institution as Arranger

The Decision of the Lisbon Court of Appeal, of 3 December 2015, ruled that, in the context of a contract under which a bank is obliged, as arranger, to find investors for a certain construction project and to structure the transaction, such contract has a dual nature of a provision of services contract and, more specifically, mandate without representation.
The court considered that the bank had established conditions that the principal could not meet in due time, which meant that the principal was not able to enter into the financing agreement; therefore, the court found that there had been just cause to revoke the mandate and enter into a financing contract with another party.

Savings Banks New Legal Framework

Decree-law no. 190/2015, approving the new savings banks legal framework and amending the mutual associations' code, has been enacted on the 10th of September. The new legal framework draws a distinction between two types of savings banks based on the value of its assets portfolio: *caixas económicas anexas* and *caixas económicas bancárias*, in which the former have an asset portfolio bellow €50 million, while the latter surpass said threshold. This legal framework aims to clarify the distinction between savings banks which perform limited banking activity and those intended to perform the same services as general banks.

Minimum Share Capital Requirements applicable to Credit Institutions and Financial Companies

Order no. 362/2015 of 15 October ("**Order**") was recently published and has amended for the ninth time Order no. 95/94 of 9 February in respect of the minimum share capital requirements of credit institutions and financial companies. The Order was issued following a set of legislative releases, which required an intervention as to the minimum share capital requirements applicable to investment companies, leasing companies, credit financial companies (*sociedades financeiras de crédito*) and savings banks (*caixas económicas*), having said requirements been revoked in respect of some sorts of companies that no longer exist under Portuguese law.

Banking Secrecy vs. Duty to Cooperate

The Decision of the Lisbon Court of Appeal, of 8 October 2015, confirmed that banking secrecy, as a duty of professional confidentiality, is not an absolute limit neither to the duty to cooperate in legal proceedings nor to the right of a due process of law and can be restricted when a higher interest is at stake. In other words, in case of conflict, the interest which, legally, is deemed higher should prevail.
In this case, the Court decided in favour of the supremacy of the right of defence of the defendants and of the lifting of banking secrecy.

CMVM Regulation no. 2/2015

After entry into force of the new Framework of Collective Investment Undertakings (Law no. 16/2015 of 24 February), securities and real estate collective investment undertakings began to be regulated under the same statute. Similarly, CMVM Regulation no. 2/2015 was approved (revoking Regulations no. 8/2002 and no. 5/2013), in order to likewise regulate both subjects under the same statute, taking the opportunity to extend the requirement of the preparation of the depositary annual report also for real estate collective investment undertakings and to standardise, in particular, the reporting deadlines and minimal disclosures of portfolios and the application of the institutes of transformation and spin-off.

CMVM Regulation no. 3/2015

"Venture-backed companies harness the entrepreneurial spirit, provide tomorrow's technologies and create jobs. Regardless of economic cycles, the impact of venture capital investment on the overall economy is clear." (Jim Martin, Chairman EVCA High-Tech Committee, June 2002)

Despite more than a decade having elapsed, the above statement could not be more accurate these days. Therefore, we would highlight the recent enactment of CMVM Regulation no. 3/2015 ("**Regulation**"). The Regulation develops the regulatory framework applicable to venture capital, as well as relevant aspects in respect of social entrepreneurship and alternative specialised investment, following the enactment of Law no. 18/2015 of 4 March. We would notably stress in this context the amendment of the evaluation rules, which are henceforth aligned with the internationally accepted standards. Considering the fact that the Regulation is directly applicable and that it has entered into force on the day immediately after its enactment, the relevant entities, including venture capital companies, shall commence as soon as feasible analysing their internal policies and the regulations of any funds under their management, in order to assess the need for adaptation of a set of matters and to formalise any amendments thereof.

Council of Ministers Resolution no. 86/2015

The Council of Ministers Resolution no. 86/2015, published on 2 October 2015 and subsequently amended by the Rectification Statement no. 45/2015 ("**Resolution**") established the conditions under which the new floating rate Treasury Bonds, referred to as "Floating Rate Treasury Bonds", may be issued.
The Resolution was published further to the Council of Ministers Resolution no. 3/2015, published on 12 January 2015 and amended on 16 June 2015, which authorises the issuance of public debt in the context of the implementation of the Portuguese State Budget for 2015.