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NEWS

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EDITORIAL

Pedro Cassiano Santos

Since our last newsletter (October 2014), many advances took place in the economic, political and legal contexts, both in Europe and in Portugal, and that is the main reason why we believe it will be worth it to give a few minutes of your attention to the upcoming articles.

At the European level, relevance must be given to the implementation of a Quantitative Easing plan by the European Central Bank ("**ECB**"), which was justified by the need to tackle the very weak levels of inflation across the Eurozone. With this program intended to be carried out until September 2016 the ECB expands its purchases in order to include bonds issued by euro area central governments, agencies and European institutions in a combined monthly amount of up to €60 billion. As a result, the ECB expects to improve the balance sheets of banks, generating greater liquidity in the economy and allowing for more investment and lending.

Similar to what we had noted in our previous edition the Portuguese market remains particularly active despite the harsh conditions.

In this context we highlight the Portuguese banking sector for two distinct reasons. On the one hand, the 2015 first quarter results of some of the largest private national banks which have now returned to profits. On the other, we highlight the takeover bid on BPI by the Spanish group La Caixa, and the subsequent merger proposal between BCP and BPI presented by one of the reference shareholders of BPI, which have brought further agitation to the market. Also in the banking sector, a final reference to the ongoing sale process of Novo Banco.

We also draw your attention to the sale process of PT Portugal to the French group Altice and the privatisation of TAP reflecting, together with the latest developments on the banking sector, the interest of investors of various origins in Portuguese companies.

On the debt level, issuance of bonds continues quite successfully, with particular emphasis to the public offering of bonds issued by Futebol Clube do Porto – Futebol, SAD and to the placement with private investors of bonds issued by both EDP and Brisa.

Also, we note the issuance of securitised bonds by the two securitisation vehicles Tagus – STC, S.A. and Sagres – STC, S.A., in the amount of approximately € 500M and € 710,2M, respectively, the first pertaining to energy market assets and the other to bank receivables originated with SMEs.

In the legal context we highlight the enactment of Decree-Law no. 26/2015, of 6 February ("**DL 26/2015**"), amending the Portuguese Companies Code as to the rules on preference shares and bond issuance, generally. We stress the amendments regarding (i) the limits applicable to the issue of bonds, now deleted for issuances of bonds with a minimum nominal amount equal to or higher than € 100,000 and placed with qualified investors; and (ii) to rules applicable to the common representative, as the issuer may now appoint a common representative directly in the terms and conditions governing the bonds. With this respect, we invite you to read the Flash News on DL 26/2015, available at http://www.vda.pt/xms/files/Newsletters/2015/VdA_Flash_-_Amendments_to_SIREVE_and_PER_and_to_the_regime_and_preferences_shares_and_bonds_-09.02.2015-.pdf.

Also, a reference is deserved by: (i) Law no. 23-A/2015, of 26 March, implementing Directive 2014/49/UE, of 16 April, of the European Parliament and the Council, regarding deposit guaranteed scheme and Directive 2014/59/UE, of 15 May, of the European Parliament and the Council, establishing an operating framework for the recovery and resolution of credit institutions and investment companies; (ii) Law no. 16/2015, of 24 February, partially implementing Directive 2011/61/EU, of 8 June 2011, on Alternative Investment Fund Managers; and (iii) also other topics that we try to briefly describe in the upcoming articles.

We thank you in advance for your attention and please let us know if any comments or suggestions on these and other topics should arise through fapc@vda.pt.

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IMPLEMENTING BRRD

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Benedita Aires / Inês Perez Sanchez

Law no. 23-A/2015 of 26 March (hereinafter, "**Law 23-A/2015**") enabled the so-awaited transposition of Directive 2014/49/UE of 16 April of the European Parliament and the Council regarding the Deposit Guaranteed Scheme, and Directive 2014/59/UE of 15 May of the European Parliament and the Council which establishes a operating framework for the recovery and resolution of credit institutions and investment companies ("**BRRD**").
On the lookout for one step further towards a Banking Union and the completion of the internal market, these Directives aim to eliminate certain distinctions encountered amongst Member-States' legislations concerning the Deposit Guaranteed Schemes ("**DGS**") rules applicable to credit institutions ("**CIs**"), by harmonizing the methods of financing of DGSs, as well as awarding national authorities with powers and tools enabling the intervention of such entities, at the earliest time possible, in a crisis scenario of a given CI, minimising costs for taxpayers'. Some of these powers include preventive measures, corrective intervention measures and temporary administration, along with resolution tools intended to ensure the continuity of the essential financial services to the economy and to prevent the occurrence of severe consequences for financial stability.

The entry into force of Law 23-A/2015 introduced several changes in the existing legal framework, namely on: (i) the General Framework for Credit Institutions and Financial Companies ("**RGICSF**"), (ii) the Portuguese Securities Code ("**CVM**") and (iii) Decree-Law no. 199/2006 applicable to the liquidation process of ICs with headquarters in Portugal with branches in another Member-State.
Despite the fact that Portugal had previously adopted a resolution mechanism in force since February 2012 (last amended in August 2014), which enshrined resolution tools in line with the ones now being transposed, Law 23-A/2015 operates a complete transposition of the BRRD putting in place the extension of powers granted to BdP, strengthened namely by the ability to have at its disposal enhanced means and evaluation criteria, both in what concerns recovery plans as well as in what concerns the resolution of credit institutions.
Reflection of this is the case of non-compliance with the minimum requirements for the maintenance of the banking license necessary to carry out the activity by a CI, in which circumstances BdP is allowed to determine the application of bail-in measures to strengthen CI's own funds. This is achieved through the reduction of the principal amount of the credits representing liabilities of the failing institution (and which are not own funds' instruments nor excluded by Law 23-A/2015 – eligible liabilities) or by way of a capital increase by conversion of eligible liabilities into ordinary shares or other instruments of the intervened entity.
Also new is the asset segregation tool which enables BdP to transfer the assets, rights or liabilities of a CI or a bridge institution to a separate vehicle created for such purpose to manage those assets, with a view to maximising the value of a further disposal or liquidation.
The universe of recipients subject to these measures has also been widened, not only and solely CIs continue to be subject to those measures but also the groups within which such CIs are integrated are now subject to this exercise. Hence, financial institutions that are subsidiaries of CIs, financial companies, mixed financial companies, financial holding companies and mixed financial holding companies can now be subject to the application of those measures (if covered by the supervision of the parent undertaking on a consolidated basis by BdP).

JUDICIAL DEVELOPMENTS ON DERIVATIVES

Orlando Vogler Guiné / Sandra Cardoso

"Derivation" (From the Latin derivatione). Action or effect of one thing derivating from another" (Grande Dicionário de Português or Portuguese Language Treasure, by Dr. Fr. Domingos Vieira, 2nd volume, Oporto, 1873)
The Supreme Court of Justice ("**STJ**") Decision of 10 October 2013 acknowledging the validity of a derivative contract highlights the applicability to derivative contracts governed by Portuguese law, namely between banks and SMEs, of the *rebus sic standibus* rule and the importance of a balanced contract. Nevertheless, there has been an intense legal discussion, in courts and among scholars, regarding derivatives: whether they are not rather instruments of gaming and betting or of a merely speculative nature, with consequences upon its validity. It was also discussed the validity of an English jurisdiction clause.
On 11 February 2015, the STJ clarified in two Decisions a number of these issues. The STJ affirmed derivatives as legally valid financial instruments, recognised as such in EU and national law, as well as the validity of English jurisdiction clauses. This was an important step for the financial system stability.

VARIABLE INTEREST RATES IN LOAN AGREEMENTS WITH CONSUMERS AND COMPANIES

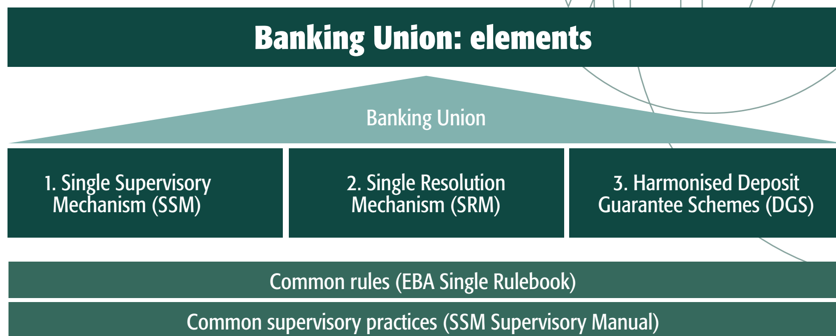
Orlando Vogler Guiné / Sandra Cardoso

The Bank of Portugal ("**BoP**") affirmed that interest rates in loan agreements, having as underlying a reference index, should follow the respective evolution even if it becomes negative. The sources for this position are Decree-Law no. 240/2006, of 22 December, and Decree-Law no. 171/2007, of 8 May. BoP admits that legal solutions may be implemented to overcome this effect, including through derivatives.
This issue will continue to be on the spotlight. In our view, the onerous nature of bank loans should be considered together with other legal principles. The law expressly admits the possibility to modify the interest rate in the regime of general contractual conditions. The Civil Code foresees the so-called rebus sic standibus rule. It does not appear to us as a legitimate end result for lenders generally to be forced to accept a negative interest rate or even zero interest scenario, irrespectively of the negative evolution of the index and the relevant agreement being silent on this.

THE NEW BANKING SUPERVISORY SYSTEM

Ana Moniz Macedo / Francisco Mendonça e Moura

The recent financial crisis has shown how problems in the financial sector of any Member State can have significant impacts on the economy of the euro-zone as well as repercussions as to the Euro's appreciation/depreciation. As such, based on main objectives to ensure the safety and soundness of the European banking stability, to increase financial integration and stability and to ensure a consistent supervision, the European Union has adopted a legislative package consisting on the creation of a banking union based on three structural pillars: (i) the Single Supervisory Mechanism ("**SSM**"); (ii) the Single Resolution Mechanism; and (iii) the Harmonised Deposit Guarantee Schemes.



The first steps have already been taken and the SSM officially entered into force last November. It consists of, amongst other, the implementation of a shared supervision model, under which the prudential supervision is shared between the European Central Bank ("**ECB**") and the National Competent Authorities ("**NCA**") acting under strict cooperation, and the market conduct supervision of credit institutions ("**CIs**") remains with the NCAs.

In this regulatory context, responsibilities such as the registrations of CIs (authorizations and revocations), the analysis of the acquisition of qualified shareholdings in CIs, the assessment of the fitness and property of members of governing bodies and the application of supervisory measures (directions, instructions, inspections and sanction application) have been transferred to the ECB. As to prudential supervision, the allocation of tasks and responsibilities between the ECB and the NCAs is now done on the basis of the qualification of CIs as significant or less significant, being significant those CIs under direct supervision of ECB whereas less significant CIs shall continue to be supervised by the relevant NCAs. Qualification of CIs as significant or less significant shall be based on the following criteria: (i) the total value of its assets exceeding € 30 billion or exceeding 20% of national GDP of the relevant Member State; (ii) the CI being one of the three most significant credit institutions established in the relevant Member State; (iii) the CI being a recipient of direct assistance from the European Stability Mechanism; or (iv) the total value of its assets exceeding € 5 billion and the ratio of its cross-border assets/liabilities in more than one other participant Member State to its total assets/liabilities being above 20%.

ECB shall directly supervise 1200 entities using the Joint Supervisory Teams ("**JST**") constituted by representatives of ECB and the relevant NCAs. NCAs directly supervise around 3500 less significant institutions, subject to the ECB's general supervision, which may participate in some activities with the NCAs or take over direct supervision of any such CIs if necessary to ensure consistency on the implementation of high supervisory standards.

In this context, the ECB has now an integrated vision of the European banking system and is responsible for the direct supervision of around 120 financial groups representing around 85% of total banking assets in the euro-zone. In Portugal, significant CIs under direct prudential supervision of ECB are Banco BPI, S.A., Banco Comercial Português, S.A., Caixa Geral de Depósitos, S.A. and Novo Banco, S.A.. Other less significant CIs will remain under the supervision of the Bank of Portugal.

Notwithstanding the merits of this new model, many uncertainties still remain, in particular on its effectiveness, agility and coordination of ECB with all the NCAs and the ECB's capacity to act on a so large scale, within different legal systems. The differences on the supervision are already being experienced by the CIs but the merits of the new model shall be assessed in the future.

UNDERTAKINGS FOR COLLECTIVE INVESTMENT LEGAL FRAMEWORK

Pedro Simões Coelho / Carlos Couto

On 26 March 2015 Law no. 16/2015 of 24 February ("**RGOIC**") has been enacted, which partially implemented Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers (AIFMD). RGOIC had a material impact on the undertakings for collective investment ("**UCI**") legal framework, by merging into one single law both Decree-Law no. 60/2002 of 20 March (on mutual funds) and Decree-Law no. 63-A/2013 of 10 May (on real estate investment funds).

Therefore, RGOIC has implemented a new approach on several matters notably the introduction of a thorough control on remuneration policies and accomplishing specific changes to the rules applicable to depositories, namely in respect of liability, independency and delegation and sub-delegation requirements.

On the other hand, also in what concerns real estate investment funds, some changes have been made on the rules regarding asset allocation, real estate appraisal and valuation as well as in connection with alternation requirements for individuals that carry on appraisal and auditing activities.

It is also worth stressing the establishment of a European passport for alternative investment fund managers and alternative investment funds distribution ("AIF"), exclusively with professional investors. Nonetheless, until the enactment of the European Commission delegated act, foreseen to occur until October 2015, a national AIF private placement regime (not foreseeing a passport mechanism for third countries) is in effect.

The aforementioned changes have been followed by the enactment of a specific administrative offense procedure, segregated from the one set out in the Portuguese Securities Code.

Consequently and as a result of the amendments introduced by RGOIC, a new regulation from the Portuguese Securities Commission ("**CMVM**") will be enacted in the short-term replacing the CMVM Regulation no. 5/2013 and CMVM Regulation no. 8/2002.

Portuguese Insurance and Pension Funds Supervisory Authority

Further to the entry into force of Law no. 67/2013, of 28 August (the Regulatory Entities Framework Law), Decree-Law no 1/2015, of 6 January, has been enacted, changing the name of the Portuguese Insurance Institute, now denominated *Autoridade de Supervisão de Seguros e Fundos de Pensões* ("**ASF**") and approving ASF's by-laws. ASF by-laws provide for relevant changes, namely: (i) consolidation of organic, operational and financial independence principles, (ii) strengthening operational autonomy, (iii) attribution of new competences within the Financial Supervision European System and (iv) establishment of the principle of specialty as to ASF's legal capacity.

Bank of Portugal Notice no. 10/2014 (the "Notice")

The Notice strengthens the information requirements applicable to credit institutions and financial companies on consumer credit agreements, thereby allowing customers to overview any development of the credit agreements, as already happens with mortgage loan agreements and deposit accounts. The Notice regulates the duties of periodic information applicable to credit institutions towards clients within the relevant consumer agreements. Furthermore, the Notice sets forth further information duties regarding some additional events, namely contractual breaches, settlement of arrears and corrective payments and early redemption of the corresponding credit agreement.

Circular Letter no. 2/2015/DSP

The Circular Letter no. 2/2015/DSP of the Bank of Portugal ("**Circular Letter**") on the selection and evaluation policy of members of corporate bodies and members of key functions in credit institutions ("**Internal Policy**") has been published on 2 March 2015. Further to the disclosure in 2013 of the European Banking Authority Guidelines and the recent amendments to the General Regime for Credit Institutions and Financial Companies ("**RGICSF**"), the Circular Letter determines that institutions having not yet approved an Internal Policy according to the RGICSF and the Circular Letter guidelines (such as the diversity of skills and competences) shall undertake to do so in the next General Meeting of Shareholders, usually taking place in May each year.

New Legal Framework on Venture Capital, Entrepreneurship and Specialised Alternative Investment

Law no. 18/2015 of 4 March partially implements Directives no. 2011/61/UE and no. 2013/14/UE by establishing a new legal framework applicable to venture capital investment, social entrepreneurship investment and specialised alternative investment and repeals Decree-Law no. 375/2007, of 8 November. Among others, the main changes introduced were: (i) the regulation of social entrepreneurship investment and of specialised alternative investment activities and (ii) the establishment of a simplified procedure for venture capital companies managing a portfolio of assets not exceeding € 100 million (when the assets under management were acquired using leverage) or € 500 million.

Regulation (EU) ECB/2015/534 of the European Central Bank (the "Regulation")

The Regulation establishes the financial information required to be provided for the purposes of supervision by supervised entities to National Competent Authorities ("**NCAs**"), by specifying the form, frequency, reference dates, remittance periods and timeframe as to submission of such financial information. This aims to ensure that supervised entities report (in a quarter-, semi-annual- and annually basis) a common minimum set of information to the NCAs, and to establish uniform methodologies to its effectiveness. The Regulation also includes maps on the applicable reporting obligations and the methodologies on information format.

Regulation on Central Counterparties

The CMVM has approved Regulation no. 1/2015 amending the CMVM regulations currently applicable to central counterparties. This Regulation provides for further rules applicable to central counterparties under CMVM Regulation no. 4/2007 and regulates specific features of the Central Counterparties Regime ("**RJCC**"), according to the EMIR Regulation on OTC derivatives, central counterparties and trade repositories, the RJCC and related European legislation. This Regulation further amends CMVM Regulation no. 4/2007 by eliminating references to central counterparties and CMVM Regulation no. 5/2007, and also revokes rules applicable to matters now being regulated by European regulatory instruments.

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