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NEWS

BANKING & FINANCE / CAPITAL MARKETS

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EDITORIAL

Pedro Cassiano Santos

Since our last Newsletter (October 2015) many advances and setbacks have taken place in the economic, political and legal contexts, both in Europe and in Portugal, which is why we believe it is worth giving a few minutes of your attention to the articles here included.

At the European level, the Brexit is certainly a major recent event corresponding to the unprecedented exit of a Member State from the European Union, particularly considering the United Kingdom's "heavyweight" status in the financial (and legal) markets.

The Brexit may impact on the provision of legal and financial services in Europe, and even more so globally, and it certainly impacts on the financial sector across the European Union ("**EU**") considering that the existing legal regimes for so many important matters, such as the rules relating to Undertakings for Collective Investment in Transferable Securities ("**UCITS**"), the Markets and Financial Instruments Directive II ("**MiFID II**") and the Prospectus Directive, may no longer apply globally to the entire continent. Much uncertainty still exists and Europeans (including Britons!!) witness with dismay the positions taken by politicians from both sides of the Channel, hoping that ways may be found for cooperation to prevail, to save what needs to be preserved and to award far greater value to that which unites the continent than that which divides us. This is a must!!!

In Portugal, the European Commission ("**EC**") presented its findings of the post-programme surveillance mission to Portugal, having identified many remaining challenges for Portugal and the Portuguese economy, now under a new political leadership and certainly struggling with a very timid economic performance burdened by a seemingly never-ending shake-up of the banking system.

The spectrum is still marked by the resolution measure implemented on top of yet another, far larger resolution implemented back in 2014, but which is still giving rise to relevant effects across the market, to Banco Internacional do Funchal, S.A. ("**Banif**") pursuant to the decision of the Portuguese Government and the Bank of Portugal ("**BoP**") on 20 December 2015, which resulted in the sale of Banif and of most of its assets and liabilities to Banco Santander Totta, S.A. ("**Santander**") for € 150 000 000.00. The BoP deemed this a solution capable of maintaining the integrity of the domestic financial system, safeguarding families' savings and those of businesses by transferring them to Santander, as well as providing for the financing of the economy. Additionally, Bankinter acquired the retail, private and corporate banking and life insurance segments of Barclays and opened its first branch in Portugal in April 2016.

At the level of the Portuguese banking sector, we further highlight the takeover bid of Banco Português de Investimento ("**BPI**") by the Spanish group CaixaBank, a major shareholder of BPI, which was announced to the market at € 1.13 per share. It is contingent on the elimination of voting rights, reaching above 50% of the bank's share capital, and on the obtaining of the applicable regulatory authorisations. The takeover bid pertains to the full amount not held by CaixaBank, which corresponds to 55.9% or 814.9 million shares. Last year, a similar bid was unsuccessful despite best efforts, but this time CaixaBank informed the European Central Bank ("**ECB**") and asked for the suspension of any administrative proceedings against BPI, therefore allowing it more time to retain the excessive risk it currently holds. In the event that CaixaBank acquires control of BPI it will have to come up with a solution to the aforementioned challenge.

Finally, a quick reference to some relevant events, which are highlighted in this Newsletter: (i) restructuring of failing or likely to fail companies; (ii) analysis of the amended bonds regime under the Portuguese Companies Act ("**CSC**") a year after its publication and what could have been done differently; (iii) analysis of the current case law on swaps; (iv) new rules for the approval and publication of prospectuses and public announcements pursuant to Commission Delegated Regulation (EU) no. 2016/301, of 30 November 2015, which complements Directive no. 2003/71/CE, of 4 November 2003; (v) entry into force of the Single Resolution Mechanism ("**SRM**") on 1 January 2016 and what it entails; (vi) Portugal's entry into the Target2-Securities ("**T2S**") project on 29 March 2016 and its regulatory consequences; (vii) unification of the Code of Corporate Governance and a brief explanation of the regulatory consequences; (viii) summary of the European Securities and Markets European Securities and Markets Authority's ("**ESMA**") opinion on loan origination by funds; and (ix) newly elected President of the Portuguese Republic Marcelo Rebelo de Sousa's passing of an amendment to the Legal Framework of Credit Institutions and Financial Companies ("**RGICSF**") opinion that entered into force on 1 July, which envisions to provide shareholders of credit institutions the possibility of periodically re-evaluating the justification for the statutory limitations in regards to holding and exercising their voting rights. We try to give a brief account of these events in the upcoming articles.

Thank you for your attention. Should you have any comments or suggestions on these or other topics, please do not hesitate to let us know through the email: fapc@vda.pt.

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DEBT RESTRUCTURING

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Tiago Correia Moreira / Sebastião Nogueira

Rationale: A company's debt restructuring process is usually driven by the need to resolve treasury needs. This goal may be achieved through renegotiation of the terms and conditions of existing debt and through the contracting of new financing, allocated to the reimbursement of the existing debt while simultaneously providing liquidity to fund its business.

Starting point: Once the purposes of the restructuring process are well established, the company in question should begin by outlining its debt profile in order to identify possible approaches to the financiers. The replacement of "old debt" with "new debt" requires prior and in-depth knowledge of the reality underlying the restructuring process.

Types of debt: It is also important to identify the types of debt held by the company, including, as applicable, loan agreements (bilateral and/or syndicated, governed by local law or foreign law), bonds issuances (on the market or privately placed), commercial paper issuances, lease agreements, etc. Additionally, the company's debt profile should clearly distinguish between secured and non-secured debt, while also identifying the types of securities at stake (privileged credit entitlements, retention rights, pledges, mortgages, etc.), as well as the maximum amount secured by this collateral. A comprehensive and detailed overview of the debt profile should allow the company to define a coherent and well-ordered restructuring plan.

Restructuring plan: The restructuring plan should, based on the company's debt profile, define the strategy and course of action to be pursued, including the conditions to be renegotiated with creditors and the final configuration of the debt profile at the end of the restructuring process. The more detailed the restructuring plan, the more likely it will be a success. Such details may include the extension of the reimbursement plan deadline (by possibly applying grace periods for capital reimbursements), the renegotiation of the applicable interest rate and the amendment or temporary waiver of certain covenants so that specific business matters may be dealt with during a transitional period (notably, negative pledge or additional indebtedness covenants).

Total or partial restructuring: When debt restructuring is carried out in a (pre-) insolvency scenario, it is not required that all the company's creditors be engaged in this process, particularly if the restructuring plan only involves debt with specific features. Nevertheless, due to the type of obligations usually undertaken in debt agreements, maintaining a comprehensive view of this debt is of outmost importance in order to avoid bringing into question so that the commitments undertaken on non-restructured debt.

Debt Restructuring: 4 questions a Company should ask itself:

What do I need?	How much do I owe?	Who are my creditors?	What do I have to give back?

THE AMENDED BONDS REGIME – A YEAR AFTER

Catarina Pinho / Soraia Ussene

Decree-Law no. 26/2015, of 6 February, amended the bonds regime in the CSC. We comment below the most relevant changes.

In article 348 the exceptions to the general rule of more than one year commercial registration for a company to issue bonds were extended, by including the possibility of an auditor report, issued under certain terms, as an exception. The audit report must not be dated more than three months prior to the issue of the bonds, and the auditor needs to be registered with the Portuguese Securities Market Commission ("**CMVM**"). This new venue has already been successfully tested, including with registration of the relevant bonds with the local CSD (Interbolsa), and it is a very interesting tool that can be used for, inter alia, newly incorporated SPVs to issue bonds.

A number of changes were made to article 349, including by adjusting the way to assess the general limitation for issuing bonds *vis-à-vis* the company's financial situation autonomy. In our view, the most relevant change was the inclusion of a wholesale exemption, clearly inspired in the Prospectus Directive. Thereunder, bond issuances with a denomination per bond or a subscription price per investor of at least € 100 000.00 are not subject to the above limitation. This corresponds to the market practice anyway in the institutional segment and has now been contributing to open the bond market to a wider range of issuers.

Important amendments were also made to the rules applicable to the common representative of the bondholders. In article 357, and similarly as in covered bonds and securitisation bonds, such role may, for ordinary bonds, now also be undertaken by a financial intermediary or an entity authorised to provide investor representation services in an EU Member State (i.e. professional trustees). Additionally, the independence criteria applicable to the common representative were further developed, including a prohibition of appointing an entity that holds, directly or indirectly, 2% or more of the share capital of the issuer or that is in a group or control relationship with the issuer or that provided legal or financial services to the company or the financial intermediaries or promoters involved in the transaction. These changes were also welcomed in the market and trust & agency teams from market professionals have already been engaged for some ordinary bond transactions, giving the investors the benefit of professional assistance in their representation *vis-à-vis* the issuer.

The change in article 358, also following the path of covered bonds and securitisation bonds, allows overcoming in ordinary bonds the previous very difficult challenge to have a common representative in place at the time of issue. The law now permits for it to be appointed in the issuance documents, subject to the bondholders' right to remove it and appoint a new representative. Again, this has already been successfully tested in the market, with a positive outcome for investors, avoiding not having an appointed representative at all or having to apply alternative and more complicated procedures to have one in place from the outset.

In summary, we see these legal changes as highly beneficial for the bond market and would expect that in a subsequent reform (perhaps in 5 to 10 years from now) the limitations under articles 348 and 349 can fully fall away. Such limitations do not apply in the context of other financing arrangements and we believe the market to be now sufficiently mature (if compared to 1986, when the current CSC was published) for such statutory limitations to be dropped.

NEW RULES FOR APPROVING AND PUBLISHING PROSPECTUSES AND FOR DISSEMINATING ADVERTISEMENTS

José Pedro Fazenda Martins / Sandra Cardoso

4 March 2016 saw the publication of the Commission Delegated Regulation (EU) no. 2016/301, of 30 November 2015, supplementing Directive no. 2003/71/EC of the European Parliament and of the Council, of 4 November 2003, with regard to regulatory technical standards for the approval and publication of the prospectus and the dissemination of advertisements ("**Delegated Regulation**").

This Delegated Regulation foresees several technical standards to be taken into account at different stages of the process – as from the moment the request for prospectus approval is first presented, through to its publication or amendment, as is succinctly described below:

I. Elements in the submission of an application for prospectus approval

- Draft prospectus in searchable electronic format;
- Identification of a contact point to which the competent authority can submit all notifications in writing, via electronic means;
- Cross reference list, or draft prospectus with annotated margins accompanied by a document identifying any items not included because they were not applicable;
- Reasoned requests for the omission of information from the prospectus or for the notification of the competent authority of another Member State.

II. Receipt of application for approval by the competent authority

- Acknowledgement of receipt of the application in writing, via electronic means, no later than by close of business on the second working day following the receipt and clearly indicating the reference number of the request and respective contact point.

III. Review of and changes to the draft prospectus

- Notice in writing if the documents are found to be incomplete or if any supplementary information is deemed necessary, or orally if only minor omissions are identified or when extremely important deadlines must be met;
- Submission of subsequent drafts, including both unmarked and marked versions to highlight all changes made to the prospectus, until its final submission.

IV. Decision of the competent authority

- Final decision is notified in writing on the day of the decision and, in the event of refusal, the notification must include reasons for this denial.

V. Publication of the prospectus

- Prospectus must be easily accessible, in searchable electronic format, and be downloadable and printable.
- If published on any website other than that of the competent authority, a disclaimer clarifying who the offer is addressed to must be included.

Some of the standards here discussed translate the practice already established in this domain, such as the sending of documents in electronic format and of subsequent marked draft versions. Others, such as the acknowledgement of receipt by the competent authority of the application for prospectus approval or the general rule of notification in writing in requests for supplementary information, are new to some legal systems and, in our opinion, represent a positive development towards the good functioning of the European capital markets.

A further important element that perhaps remains unaddressed is the principle whereby the competent authority makes no additional comments on previously commented sections of the prospectus where those comments were accepted. Exceptions will, of course, still be applicable due to the material nature of issues or the emergence of new circumstances, for instance. Regardless, there is nothing to prevent the competent authorities from following this principle, as already happens in certain cases.

SWAPS – STANDING POINT

Orlando Vogler Guiné / Carlos Couto

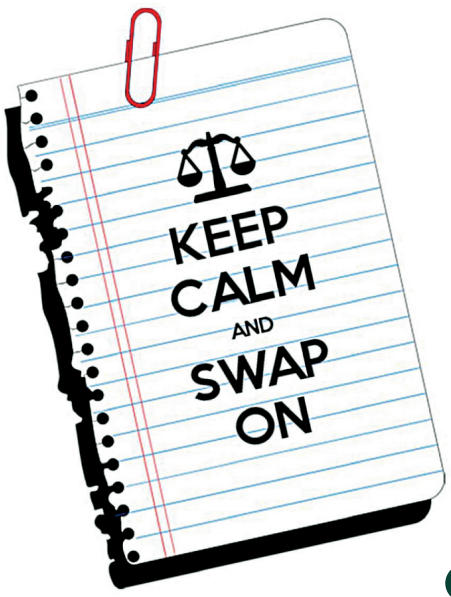
The Portuguese case law on interest rate swap agreements ("**Swaps**"), which began to be developed in 2012, focuses particularly on: (i) the legal value of the merely speculative Swap, (ii) the standard of care falling upon the financial intermediaries, (iii) the applicability of a swap termination due to an abnormal change in circumstances, and (iv) the validity of choice of forum clauses.

The Portuguese Supreme Court of Justice ("**STJ**") decided in 2013, and later reaffirmed its understanding in 2015 that the effects of the 2008 sub-prime crisis constituted a supervening and abnormal change in circumstances, to an extent that justified the termination of Swaps. The STJ also stressed the importance of ensuring a certain degree of contractual balance between the parties entering an agreement. Furthermore, the STJ ruled that non-hedging a Swap would be equated to a gambling or betting contract, producing no legal effects.

Conversely, the STJ's more recent majority position, enshrined in the rulings dated 11 February 2015, 16 June 2015 and 26 January 2016, altered such trend, to now defend a more flexible approach. In fact, the new trend no longer qualifies Swaps in the same way as gambling or betting contracts Swaps and has given greater consideration to the *rebus sic stantibus* clause, taking into account the specific nature of the Swap agreement. The STJ now upholds a more balanced division between the obligations falling upon the financial intermediaries and the client's duty to seek proper information on the terms of the swap agreement to be entered into.

As regards the choice of forum clause, recent case law has come to unanimously resolve this matter by deciding that the choice of jurisdiction under article 25 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council, of 12 December 2012, prevails over Portuguese domestic law. As a result, the possible application of the Portuguese Civil Procedure Code or of the General Contract Terms Act is set aside.

In conclusion, to strengthen the legal validity of Swaps, financial intermediaries should ensure their clients are properly informed on the content and consequences of the Swap in question and that they fully understand the mechanics of the agreement. A minimum balance between the contractual positions of the parties should be ensured. Additionally, the Swap should be sustained by a concrete financing transaction given that the STJ's jurisprudence on the inapplicability of the gambling or betting concept to the matter of Swaps is not yet fully harmonised.



IN BRIEF

Amendments to the Legal Framework of Credit Institutions and Financial Companies ("RGICSF")

Decree-Law no. 20/2016, of 20 April, was the 41st amendment to the RGICSF. Through this amendment, credit institutions' shareholders may periodically (every five years) re-evaluate the reasons justifying statutory limitations to holding and exercising voting rights. Credit institutions whose statutes establish such limitations should hold, until 31 December, a shareholders' general meeting that includes on the agenda a resolution on maintaining or revoking these limitations. The Decree-law is not applicable to mutual agricultural credit banks (*caixas de crédito agrícola mútuo*) or to savings banks (*caixas económicas*).

ESMA's Opinion on Loan Origination by Funds

On 11 April 2016, ESMA issued an opinion on the key principles to be observed in the construction of a European legal framework on loan origination by funds ("**Opinion**").

This Opinion was issued further to the request of the European Commission, in the context of the Comission´s Action Plan on Building a Capital Markets Union, published in 2015, and aims at contributing to its execution, outlining the key elements to be considered in a future consultation on the matter.

Focusing on the frameworks currently in force in the different Member States, the Opinion highlights several key issues, such as authorisation requirements, types of funds and of investors, organisational requirements, eligibility criteria and systemic risk.

T2S (TARGET2-Securities) in Portugal

Since 29 March 2016, the Portuguese securities market is linked to T2S, through Interbolsa and the Bank of Portugal. T2S is a technical platform for the provision of securities settlement services to central securities depositories and, through these, to the final users (CSD participants) in central bank money.

T2S is designed to facilitate settlement and collateral management in Europe and will contribute to greater integration of the European capital markets, making the financial markets more secure and efficient and helping companies that wish to issue shares and bonds in various locations around Europe by providing access to more diversified sources of financing to the real economy.

Entry into Force of the Single Resolution Mechanism

On 1 January 2016, the new SRM came into force within the framework of the European Banking Union. The SRM is aimed at ensuring an efficient resolution for defaulting banks, thus preserving systemic stability and minimising economic costs.

One of the SRM's major implications is the transfer of the powers held by national resolution authorities as regards bank resolution to the Single Resolution Board, a supranational authority responsible for analysing and implementing the resolution measures to the Union's largest banks.

A Single Resolution Fund has also been created, consisting of an estimated 55 billion euros following its full implementation, which is scheduled to occur within eight years. The purpose of this Fund is to bear the costs relating to banking resolution, thus minimising the burden for national taxpayers, seeing as it is funded directly by the financial system.

New Criteria for the Application of EU Bail-in Rules in Case of Resolution

On May 2016, the European Commission took an important step towards ensuring compliance with the "bail-in" rules for banks, having clarified the overall EU resolution framework. The Commission has proposed a Delegated Regulation specifying the criteria the competent authorities will need to consider when setting the minimum requirements for own funds and eligible liabilities ("**MREL**") for the purpose of loss absorption and bank recapitalisation.

Consolidation of the Regulation on Corporate Governance

To fulfil a gap in corporate governance, the CMVM published, in 1999, a Corporate Governance Code. Later, in 2013, the Portuguese Institute of Corporate Governance ("**IPCG**") approved its own Code. As a result of the dialogue between both entities, it was decided that the IPCG would become solely responsible for corporate governance regulations, while the CMVM would remain as the competent regulatory authority. A Corporate Governance Code project, containing the essential principles of corporate governance, has been submitted for public consultation, the deadline of which ends on 25 July 2016.

ESMA's Guidelines on Alternative Performance Measures

Following the publication of Commission Delegated Regulation (EU) no. 2016/301, supplementing the Prospectus Directive and establishing new mechanisms for their approval, we note that ESMA's guidelines, dated 5 October 2015, on Alternative Performance Measures disclosed by issuers or persons responsible for the prospectus, when publishing regulated information or prospectuses, has became mandatory as of 3 July. Examples of regulated information include management reports disclosed to the market in accordance with the Transparency Directive and disclosures issued under the requirements of article 17 of the EU Market Abuse Regulation. These guidelines set out principles that must be applied in full by the issuers or persons responsible for the prospectus.

Crowdfunding Legal Framework's Latest Developments

CMVM's Regulation no. 1/2016, of 5 May, further develops the Crowdfunding Regime ("**RJFC**" – Law no. 102/2015, of 24 August) in what concerns electronic platforms' managing entities registration procedure and the definition of investment limits. It also sets forth several duties on the part of crowdfunding beneficiaries, including information disclosure obligations for the purpose of informing investors, crowdfunding electronic platforms and the CMVM. This regulation applies exclusively to crowdfunding through capital and through loans and shall enter into force only upon approval and publication by the regulator of the legal framework applicable to breaches of the RJFC.