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

APRIL 2013

NEWS

BANKING & FINANCE / CAPITAL MARKETS

Index

EDITORIAL

Pedro Cassiano Santos

Since our last Newsletter (October 2012) many advances and setbacks occurred in the economic and political context both in Europe and in Portugal.

During these six months we have been assisting to the worsening of the economic situation in countries like Greece or Cyprus, allowing us to predict what may occur in our country and in other countries, particularly in the so-called peripheral zone of the European Union.

In Portugal, in November, the sixth evaluation of the Troika has been concluded, highlighting the results obtained in respect of the three pillars of the rescue program: (i) fiscal consolidation, (ii) public debt, and (iii) structural changes.

According to the Troika, the growth and the inflation were in line with the values set in the program but these are rather penalizing results. Although less than expected (1 per cent.), the Real GDP contracted 0.8 per cent. in the third quarter of 2012. During this period the State Budget for 2013 has been approved, but several doubts have been raise regarding the compatibility of some of its provisions with the Portuguese Constitution. On 5 April 2013, the Constitutional Court considered unconstitutional four of the provisions analysed: (i) the suspension of the annual vacation allowance for public employees, (ii) the withdrawal of the annual vacation allowance of retired persons (iii) the suspension of the payment of the annual vacation allowance regarding teaching and research contracts, and (iv) the implementation of a special contribution over sickness and unemployment allowances.

The Portuguese Government will need to find a way to offset the impact of this constitutional rejection, always bearing in mind the respective implications in 2013 deficit.

The seventh Troika evaluation took place last February and the respective results are now depending on the procedures that the Portuguese Government will take to guarantee the control of the deficit. These will not be easy times but the strength and resilience the people have shown so far shall certainly be maintained. Let's see until when and where this situation may be kept.

At the market level, the scenario has been brightened by some relevant developments and the completion of major transactions which demonstrate precisely levels of strength and resilience that many would not expect.

As regards the bank's recapitalization, Banif has also been recapitalized by the Portuguese State, a process that shall be followed by a recapitalization by private shareholders, a process in which, even when the respective outcome is still uncertain, all energies shall be needed.

In the capital markets, a special reference to the last day during which Brisa had its shares traded on the stock exchange, as a result of the successful completion of the take-over bid launched by Tagus.

In the last months we have assisted to the continuing success of bond issues targeted to the retail market, such as the public offerings of fixed rate bonds by Mota-Engil and Benfica SAD.

We also highlight the implementation of the Resolution Fund establishing a new approach to the intervention of the Bank of Portugal in financial companies and credit institutions.

The European Central Bank implemented new rules for the usage of bonds guaranteed by the State and non-collateralised bonds by banking institutions as collateral in monetary policy operations.

The Portuguese Government in the meantime submitted a law proposal which establishes a mandatory recapitalization scheme that creates measures in order to promote the better financial liquidity of the credit institutions under the initiative of the financial stability and liquidity availability in the financial markets.

In the next short articles we try to summarize these legislative changes and we hope you may find them interesting.

We thank you for your interest, and in case you have any comments or suggestions regarding these or other topics, please let us know through amn@vda.pt.

Pedro Cassiano Santos
Pedro Simões Coelho
Paula Gomes Freire
José Pedro Fazenda Martins
Ana Rita Almeida Campos
Hugo Moredo Santos
Benedita Aires
Tiago Correia Moreira
Orlando Vogler Guiné
Benedita Magalhães da Cunha
Rita Rendeiro
Pedro Bizarro
João Bento
Francisco Eiró
Maria Corrêa Nunes
Diogo Belard Correia
Ana Moniz Macedo
Álvaro Duarte
Carlos Couto
Rita Chambel
Miguel Cancela de Abreu
Maria Carrilho
João von Funcke

Resolution of Credit Institutions and Investment Companies

Index

Orlando Vogler Guiné

"**Resolution**, f. n. (From the latin *resolutio*). Total termination of consistency, reduction of a body to its principles (…)" - *Grande Diccionario Portuguez*, Dr. Fr. Domingos Vieira, Oporto, vol. 5, 1874

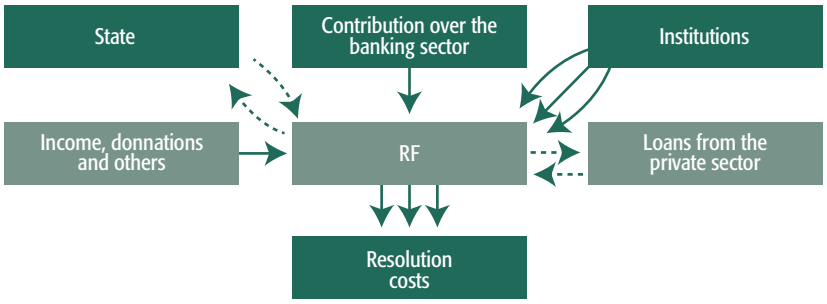
The resolution of credit institutions and investment companies ("**Institutions**") has been recently subject to a number of statutes, starting with Decree-Law no. 31-A/2012, of 10 February 2012, which replaced Title VIII of the General Regime of Credit Institutions and Financial Companies ("**RGICSF**"), now entitled "*Corrective intervention, provisory administration and resolution*".

By the end of the year, Law no. 64/2012, of 20 December 2012, was published, extending the resolution regime to parent companies of Institutions subject to consolidated supervision, without prejudice to the application of resolution measures directly to the subsidiaries. On the following day, Ministerial Order no. 420/2012 ("**Ministerial Order**") was published, which approved the regulation of the Resolution Fund ("**RF**"), the purpose of which is to provide financial support to the application of resolution measures and fulfill its remainder legal functions in connection with the execution of such measures. A few days later, on 26 December, the Bank of Portugal published its Notice no. 18/2012, regarding the contents of resolution plans which the Institutions must periodically approve and submit to the regulator, and some ancillary rules.

As it is possible that, in the context of a resolution, the RF has insufficient funds, the RGICSF and the Ministerial Order foresee that, besides the resources from the financial system and other resources, the State may make contributions to the RF, notably in the form of loans or guarantees, and as such recoverable in time by the State. The determination of the initial, periodic and special (the latter, in case of insufficiency of funds by the RF) contributions owed by the Institutions has been recently regulated by Decree-Law no. 24/2013, of 19 February 2013.

In summary, the RF costs structure is the following:

The Bank of Portugal has in the meantime published two instructions on this matter: Instruction no. 6/2013, on the reporting of data for calculating the initial and periodic contributions, and Instruction no. 7/2013, which sets a base rate of 0.015% for the purposes of determining the periodic contributions to the RF for the year 2013.



Proposal for a Mandatory Recapitalisation Framework

Benedita Aires

Since February 2013, Law Proposal no. 127/XII, which introduces a sixth amendment to Law no. 63-A/2008 of 24 November and which establishes measures to strengthen the financial soundness of credit institutions, is being discussed in Parliament.

Following precedents from other European jurisdictions, such as the German and the Spanish, the mentioned Law Proposal intends to introduce, *inter alia*, a mandatory capitalisation mechanism with resort to public funds. It foresees that, in extreme situations which may pose a threat to the national financial system stability, the Bank of Portugal ("**BoP**") may propose, with due justification, to the member of the Government responsible for finance affairs, to carry out a capitalisation transaction, as a temporary measure, without the beneficiary credit institution submitting a recapitalisation plan and without obtaining its respective approval by the general meeting of shareholders.

In fact, in the mentioned exceptional situation, the BoP, after appointing an interim board of directors which submits a recapitalisation plan with resort to public funds which is not approved in general meeting, may propose the mandatory capitalisation, without obtaining the respective approval by the general meeting, or any other procedure required by law or by the articles of association of the bank. On the other hand, the banking regulator, in case of an urgent situation which cannot be postponed, may propose a mandatory capitalisation without the prior appointment of an interim management, also grounded on the objective inadequacy of other measures and intervention procedures foreseen in the law.

The fact that the Law Proposal frames such measures in strict compliance with principles of adequacy, necessity and proportionality and insufficiency of other measures foreseen in the law, does not prevent cautious reactions from the entities involved. While, on the one hand, the European Central Bank and the Portuguese Securities Market Commission understand that any limitation


The Rescue Plan

of shareholders rights will demand careful consideration in light of European directives on shareholders rights, in any event being designed as a last resort solution to prevent systemic risk, on the other hand, the Portuguese Banking Association is concerned with the articulation with intervention and resolution frameworks foreseen in the law and considers that mandatory capitalisations constitute a seriously restrictive intervention in the property rights of shareholders of the bank at stake.

Transposition of the Prospectus Directive to the Portuguese Legal System

Hugo Moredo Santos / Miguel Cancela de Abreu

Decree-Law no. 18/2013, of 6 February 2013, transposed to the Portuguese legal system Directive 2010/73/EU, of 24 November ("**New Prospectus Directive**"). This Directive amended Directive 2003/71/EC, of 4 November ("**Prospectus Directive**") and Directive 2004/109/EC, of 15 December ("**Transparency Directive**"). Although the transposition deadline had already passed, it ended on the 1 July 2012, individuals could already rely, by means of a generic opinion approved by CMVM on 13 July 2012, on the provisions of the New Prospectus Directive which imposed on Member States "unconditional and clearly expressed duties", together with the rules which resulted from the entry into force of the Delegated Regulation (EU) no. 486/2012 of the Commission, of 30 March, which materialized the New Prospectus Directive and amended Regulation (EC) no. 809/2004, of 29 April, as to the form and content of the prospectus and which rules are directly applicable in the internal legal system.

The framework of the New Prospectus Directive, transposed in the above terms, mainly to the Portuguese Securities Code, having been introduced, among others, the following amendments:

a) Broadening and unification of the concept of qualified investor, both in the public offers regime and in the financial intermediation activities;

b) Increase of the minimum number of non-qualified investors on the receiving end of a securities offer (to 150 people), so it can be considered as a "public offer";

c) Increase of the nominal unit value of an offer of securities (to €100 000), for it to be classified as a "public offer";

d) Imposition for the summary of the prospectuses to be a key source of information on the offer presented in a clear and short way and harmonized within the European Union, as well as a set of specific elements related to the offer;

e) Clarification of the terms and deadlines in which an addendum shall be published;

f) The possibility of using the same prospectus in a set of subsequent public offers by financial intermediaries, as long as certain requirements are verified.

The impacts of the legal framework of independent administrative entities

Pedro Cassiano Santos / Ana Moniz Macedo

Proposal of Law no. 132/XII of 13 March 2013, on the legal framework of independent administrative entities with functions of regulation and competition defense has recently been publicly disclosed.

As foreseen in other European countries and considering the recognition of the primacy of the public interest of the activities undertaken by regulators, this regime aims at granting a higher independence level to such entities, ensuring the application of structural guaranties: good-management models; administrative and financial autonomy and informative transparency.

The present regime will be applicable to the following entities, both the Bank of Portugal and the Media Regulator Entity being exempted once they enjoy of a specific constitutional treatment:

Financial	Non Financial	Former Public Institutes
Securities Market Commission	Competition Authority	Comunications National Authority
Insurance Authority	Energy Services Regulatory Authority	Civil Aviation National Authority
	Water and Waste Services Regulatory Authority	Mobility and Transports Authority
	Health Regulatory Authority	

For its impact over the current regime, we outline the following structural amendments: **(i) financial autonomy**: although many regulatory authorities (in particular the financial ones) had already financial and administrative autonomy, this obligation is now applicable to all the above mentioned authorities, which must develop its activities with the contributions, fees and tariffs charged to the entities subject to its supervision; **(ii) the creation of a supervisory commission**: having in mind the autonomy attributed to the relevant entities, the setting up of a supervisory body responsible for the control of the regulations' compliance and of the good financial and asset management is essential; **(iii) exclusivity, incompatibility and impediments**: the obligation to work on an exclusive basis to the relevant authorities is now mandatory (which ends with the employees' assignment schemes between supervisors and supervised entities) and a cooling off rule has also been implemented. Pursuant to this rule, directors of the relevant authorities and holders of management or similar positions cannot establish any type of contractual link with supervised entities for a period of two years after the termination of their contractual relationship with the relevant authority. As consideration for this, during the cooling off period the relevant directors are entitled to receive half of the monthly wage that they would receive if they were in functions.

This was not yet the time for the expected deeper reform of the legislative framework applying to financial authorities', which was long awaited and has now been refrained and waits for better days. We must accept that a most turbulent period is also a period unsuitable for processing structural changes in the functioning of market regulators and, with the entering into force of the rules outlined in the proposal now published, the ethical rules and independence principles, on which the activities of those authorities are based, become stronger. Many of the rules now implemented were already applicable to the Portuguese Securities Market Commission and to the Portuguese Insurance Institute but this is still a (small!) step in the right direction.

The New Legal Framework for Undertakings for Collective Investment: better late than never

Index

Pedro Simões Coelho / Pedro Bizarro

If during the last three or four years we had been asked to point out the area within the capital markets sector more in need of legislative and regulatory reform, the area of undertakings for collective investment ("**UCI**") would be a strong candidate. Confusing, disorganized and, on some points, inadequate, the Legal Framework of Undertakings for Collective Investment ("**RJOIC**") was long due for profound change.

Making the best of the need to implement the UCITS IV Directive, the Portuguese legislator decided to reform the RJOIC, replacing the old Decree-Law no. 252/2003, of 17 October 2003, with an entirely new one, the Decree-Law no. 63-A/2013, of 10 May 2013.

As regards content, the most significant changes have to do with the implementation of the UCITS IV Directive, particularly as regards cross-border mergers of UCI and the specific rules regarding master feeder structures (i.e. UCI investing almost exclusively in another UCI), which existence may determine that the UCI in which they invest is not required to collect investments from the public. At the same time, even a superficial appraisal of the currently available version of the new RJOIC allows us to acknowledge a significant effort to organize themes and concepts. It is difficult to apprehend the fruits of this effort prior to seeing how the new RJOIC will behave in practice, but the creation of an article for defined terms, as well as the changes to the types of existing UCI, may contribute to facilitate the reading and interpretation of the rules.

Almost two years after the original end-date for implementing the UCITS IV Directive, Portugal is about to carry out such implementation, being one of the last Eurozone countries to do so. Timing may be less than flawless, but the fact that the opportunity was used to overhaul a framework which needed reforming is still worth some praise.

IN BRIEF

Bank of Portugal Notice no. 15/2012 - Basic Bank Account Services

Notice no. 15/2012 of the Bank of Portugal ("**BoP**"), which revokes Notice no. 4/11, establishes the information that credit institutions must disclose regarding their adherence to the basic bank account system for opening and operating basic bank accounts. According to BoP's Notice no. 15/2012, the adherent credit institutions shall publicly and permanently disclose information at their branches or websites on such adherence and are required to include in their pricing list information regarding the conditions for opening basic bank accounts an on the provision of basic bank account services. Additionally, the referred credit institutions shall inform all natural persons who are holders of current accounts on the possibility of converting those accounts into basic bank accounts, as well as on the requirements for such conversion.

Draft Law no. 98/XII – Consumer Protection

On 20 September 2012, the Government presented to the Parliament the draft Law no. 98/XII (the "**Draft Law**"). This initiative aims to promote the timely compliance of contracts and avoid an increase in household debt, while contributing to the reduction of civil disputes.

Accordingly, the Draft Law seeks to amend Law no. 23/96 of 26 July (establishing measures to protect essential public services' consumers), Law no. 24/96 of 31 July (concerning consumer protection) and Law no. 5/2004, of 10 February (which regulates electronic communications).

European Regulation on short selling and CDS

Regulation (EU) no. 236/2012, of 14 March 2012 ("**Regulation**"), establishes common European rules in relation to short selling and credit default swaps ("**CDS**"), harmonizing information obligations, as well as public disclosure of short selling positions all across the European Union. The Regulation also imposes restrictions to naked short selling, sets forth new rules for sovereign debt CDS and also grants broader powers to the *European Securities and Market Authority* (ESMA). The Regulation has leaded to the revocation of both Regulation of CMVM no. 4/2010 and Instruction of CMVM no. 2/2008.

CMVM Pubic Consultation on Corporate Governance of Listed Companies

28 March 2013 was the deadline for submission of the feedback to CMVM's public consultation no. 2/2013 concerning the re-exam of the current framework on corporate governance. The consultation focused on two documents: i) a draft regulation of the governance of listed companies (repealing Regulation of CMVM no. 1/2010), which is due to enter into force on January 2014 and ii) an amendment draft to the Corporate Governance Code. Aiming to improve the present recommendations in light of the recent experience, special attention was due to problems related to market transparency, shareholders protection, conflicts of interest and market efficiency.

ECB's Decision and Guideline, 20 March 2013

Aiming to ensure the equal treatment of counterparties in the Eurosystem, the Governing Council of the European Central Bank ("**ECB**") has adopted Decision ECB/2013/6, which establishes that, as of 1 March 2015, uncovered bank bonds issued by the counterparty using them or by entities closely linked to the counterparty and fully guaranteed by one or several European Economic Area (EEA) public sectors entities will not be accepted has collateral in the Eurosystem monetary policy operations.

ECB has simultaneously issued a Guideline on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral, according to which National Central Banks shall not be obliged to accept as collateral uncovered bank bonds that have been issued by the counterparty itself and that do not comply with the Eurosystem's minimum credit rating requirements.

Vieira de Almeida & Associados - Sociedade de Advogados, RL | www.vda.pt
Av. Duarte Pacheco, 26 - 1070-110 Lisboa - Portugal | lisboa@vda.pt
Av. da Boavista, 3433 - 8º - 4100-138 Porto - Portugal | porto@vda.pt
Calçada de S. Lourenço, 3 - 2º C - 9000-061 Funchal - Portugal | madeira@vda.pt