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Index

EDITORIAL

Pedro Cassiano Santos

Portugal has been struggling against the effects of an international crisis much focused on the lack of liquidity experienced by sovereigns in a large scale but especially in the Euro-zone and, mostly, in peripheral States such as Portugal. This environment has a very profound impact on access to liquidity by the banking sector with the consequent reduction of credit made available to market players in general. The last months were characterized by a continuous increase of the reference interest rates, namely interest rate risk premia comprised in the applicable spreads, with significant rises marked by the rating downgrade of the Portuguese Republic and, hence, of Portuguese issuers in general. In this scenario, the calling for the intervention of international bodies– the so-called troika (comprising the European Commission, the European Central Bank and the International Monetary Fund) - was inevitable, and their financial support was only available after a plan for economic and financial restructuring was put in motion, the main objective of which was to remedy or narrow greatly the existing deficit. This was the context in which a political crisis took place, resulting in a new government founded on a stable parliamentary majority, the performance of which is heavily marked by the pressure imposed by liquidity scarcity, high volatility, risk aversion and the need for rebalancing public finances.

Albeit the above harsh environment, this new political and economic environment has given rise to some opportunities, namely due to the privatization plan, to be implemented and completed before the end of 2013, and covering several relevant sectors, bringing forward a noteworthy contribution to encourage the equity sector of the Portuguese market. Asset backed securities continue to be a recurring instrument in the constant search for liquidity and financial stability on the banking sector. Moreover, it is worth mentioning the return of the non performing loans segment, with several transactions already being completed or currently being prepared to be accomplished before year end 2011. On the other hand, the trend to seek equity capital is now more pronounced, exchange offers having been launched for securities issued in different market contexts (mostly subordinated and preferred capital exchange offers) to capture the discount at which they are trading and exchanging them for new bond issuances already in a value up to approximately € 3 billion. Furthermore, and especially regarding those entities that are also present in other non-Portuguese geographies (minimizing therefore the country risk Portugal), Portuguese corporate issuers have acceded in this last quarter to international debt markets, proving the effectiveness of the effort made in the exploring new sources of financing and liquidity. The price and the conditions applicable to these issuances are major challenges faced by these transactions, but a market for them has proven to exist. The last semester of 2011 also witnessed the approval or the placement for public consultation new legislation seeking to provide tools foster market robustness, by strengthening the supervisory authorities' powers and the effectiveness of their activity. This is the context in which we provide you with this edition of our Banking & Finance / Capital Markets Newsletter, where we further highlight the process of cross-border mergers between companies from different European jurisdictions, a new useful possibility for companies with pan-European activity now admitted in UE legislation.

Many thanks for your time and we thank you in advance for any comments and suggestions on this edition which you may wish to convey to amn@vda.pt.

Pedro Cassiano Santos; Pedro Simões Coelho; José Pedro Fazenda Martins; Paula Gomes Freire; Ana Rita Almeida Campos; Hugo Moredo Santos; Benedita Magalhães da Cunha; Benedita Aires; Tiago Correia Moreira; Orlando Vogler Guiné; Rita Rendeiro; Pedro Bizarro; João Ulrich; Domingos Salvação Barreto; Ana Moniz Macedo; João Bento; Maria Corrêa Nunes; António Antunes Gomes; Álvaro Duarte; Mariana Padinha Ribeiro; Tomás Van Zeller

Cross-border merger of credit institutions with head office in the European Union

Index

Tiago Correia Moreira, Orlando Vogler Guiné and Dominik Costa

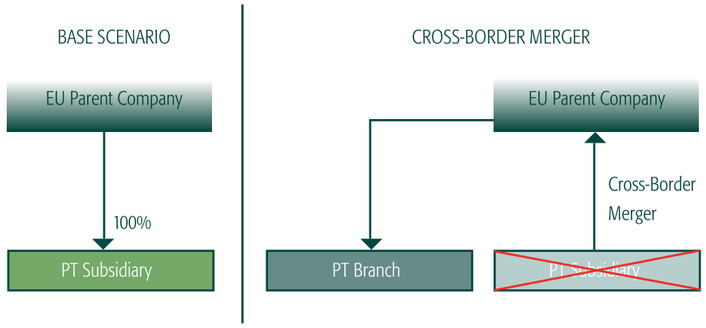
Purposes. In a context where credit institutions with head-office in the European Union are increasingly searching for means to optimize their shareholding structures and the management of their own funds, the conversion of the subsidiaries of such institutions into branches, through a cross-border merger, may be an efficient method to achieve such goal. The conversion shall allow branches to directly benefit from the technical and organizational means of the parent company and, accordingly, create conditions to offer better products and services to their clients, while simultaneously reducing legal and operational costs related with the subsidiary/branch.

Framework. In this respect, Directive 2005/56/EC of the European Parliament and Council, dated October 26, 2005, on cross-border mergers of limited liability companies sets out, as one of its aims, to lay down Community provisions that facilitate the carrying out of cross-border mergers between various types of limited liability companies governed by the laws of different Member States. This Directive was transposed into the Portuguese jurisdiction by Law no. 19/2009, dated 12 May 2009, which introduced, in Chapter IX of the Portuguese Commercial Companies Code, a new Section II on cross-border mergers.

Effects. Under the cross-border merger legal regime, the conversion of the subsidiaries into branches of credit institutions with head office in other Member-States is achieved through the dissolution, with no liquidation, of the subsidiary incorporated in Portugal and the transfer of all its assets and liabilities to another company, previously existing in another Member-State. Simultaneously, the credit institution shall pass on to act through a branch, to which all such assets and liabilities will be allocated to, thus ensuring a continuing activity of the institution at stake in the Portuguese market, by means of a process which aims at being neutral for both clients and other counterparties.

Corporate matters. From a corporate standpoint, the implementation of the cross-border merger requires both the incorporating company and the incorporated company to be coordinated in the preparation and execution of the documents required for the completion of such process; such documents include, notably, the common draft terms of the cross-border merger, to be drawn by the management or administrative body of each of the merging companies; additionally, there is a double scrutiny on the transaction legality, which is based upon, on the one hand, the issuance of the pre-merger certificate, in relation to each of the companies whose head office is in Portugal and at their request, conclusively attesting the proper completion of the pre-merger acts and formalities; and the scrutiny of the cross-border merger legality within its registration, provided that the incorporating company's head office is located in Portugal (if, on the contrary, the merging company's head office is located in another Member-State, then such control is to be carried by the local entities).

Regulatory matters. Since we are dealing with entities subject to the supervision of different regulatory entities, notably the Bank of Portugal and the Portuguese Securities Market Commission, it must be further ensured that all applicable regulatory procedures are complied with so as to confirm that, on the cross-border merger effective date, the registrations required for the carrying out of the banking and financial intermediation activities, respectively, are updated and there is no interruption in the carrying out of such activities.



New interventional mechanisms in credit institutions

Benedita Magalhães da Cunha and Ana Moniz Macedo

Within the context of the international financial crisis and having in mind the current difficulties of Portuguese banks, a much more interventional regulation aiming at helping to promote the stability of the financial system and avoiding systemic effects in a crisis situation is required.

Accordingly, the Portuguese Council of Ministries has presented a proposal to amend the insolvency laws applicable to credit institutions and financial companies. Main novelties consist on the implementation of a regime composed by three different steps of intervention (corrective, temporary and of termination) and on the constitution of a resolution fund, financed by the intuitions to which the termination measures may be applied.

This new regime grants increased interventional powers to the Bank of Portugal ("BoP"), materialized, inter alia by (i) requirements of recovery and termination plans and the reinforcement of notification duties to BoP (corrective intervention); (ii) the monitoring of the relevant institutions by delegates and temporary members of the social bodies appointed by the BoP and suspension of the members then in functions (temporary intervention); and (iii) adoption of measures which avoid the systemic contagious effect and the global negative effects inherent to the insolvency of a credit institution, such as the sale or transfer of activities to third entities (termination intervention). The resolution fund which is intended to be created aims at ensuring the necessary financial support to the application of such measures.

Although not all of the above referred measures correspond to real novelties in light of the current regime (e.g. the possibility to appoint temporary members of social boards), we have no doubts that these measures enable the construction of a more protective regime. We trust however that the implementation of these mechanisms shall not constitute an obstacle to the establishment (and maintenance) of international financial parties in the Portuguese market.

Evolution in the payment systems market and the project for implementing the new E-Money Directive

Index

Pedro Bizarro

Technological improvements, namely in telecommunications, have generated opportunities for entities wishing to offer to their clients simpler and more comfortable ways to carry out payments for goods or services. Systems enabling payments through cell phone or similar (as developed throughout the world) are a suitable example of this tendency.

In the European Union, the legislator has sought to keep up with these developments. The approval, in 2007, of the Payment Services Directive (2007/64/EC) was a first step in that direction. Later, in 2009, a new E-Money Directive (2009/110/EC) was approved. The draft Decree-Law for implementing this Directive in Portugal is already available ("Draft DL").

As was the case with the previous e-money legal framework (enacted by Decree-Law no. 42/2002, of 2 March 2002), the Draft DL allows banks to issue e-money and foresees rules for creating specific e-money issuers. The new framework also lets other types of credit institutions issue e-money, provided that such activity is not forbidden by the specific legal and regulatory framework applicable to them.

It is important to point out another innovation: unlike the previous framework, the Draft DL allows e-money issuers to lend money to clients, although they may not, for that purpose, use funds received from clients against the issuance of e-money and are in any case subject to own funds requirements.

Notwithstanding these limitations, the chance to grant loans makes e-money issuance a more attractive prospect for non-financial companies, allowing them to explore, even if on a relatively modest scale, the consumer loans market.

Portugal is known to be favourable ground for innovations in payment systems, as shown by the popularity of *"Via Verde"* (a very successful automatic toll payment system) or of payments of goods and services through the *"Multibanco"* ATM network. Whether the changes brought about by the Draft DL will help to maintain this trend is yet to be seen.

Remuneration in the Financial Sector

Ana Rita Almeida Campos and João Bento

On 20 July 2011, in the middle of the summer, the Decree-Law no. 88/2011 ("DL 88/2011") has been enacted, implementing the Directive no. 2010/76/EU, of 24 November and in relation to which we have chosen to point out the matters on remuneration policies applicable to credit institutions ("CIs") and investment companies ("ICs").

With the purpose of promoting financial strength and a bigger resilience among CIs and ICs towards the financial crisis, these institutions are now obliged to establish remuneration policies and practices consistent with a prudent and healthy risk management, such policies to be disclosed to, and subject to the supervision by, the Bank of Portugal ("BoP").

In order to ensure that remuneration policies do not encourage the excessive assumption of risks and are also in line with CIs and ICs' long term objectives, this Decree-Law also establishes a few guidelines to be considered when creating and implementing such policies, notably with regard to the ratio between fixed and variable remuneration of their employees.

In line with what already happens with the majority of listed companies, the DL 88/2011 also establishes the obligation to CIs significant in terms of dimension, internal organisation and nature/scope/complexity of their activities, of appointing a remuneration committee responsible for preparing the remuneration policies. [1]

It also deserves to be mentioned the CIs' new duty to disclose to the "BoP", pursuant to this Decree-Law, the number of employees receiving annual compensations equivalent to €1.000.000, or above, their business departments and all corresponding remuneration components. With this measure, it is extended to the CIs, with more detail, an obligation already existing in respect of public interest entities' (*"entidades de interesse público"*) corporate bodies.

Finally, an aspect that raises some perplexity: the provisions abovementioned apply retroactively, as of 1 January 2011, in relation to all remuneration components, received by directors, employees responsible for taking risks or with controlling functions as well as by employees which total remuneration is not less than the remuneration received by the directors or the employees referred to above.

[1] As defined in Law no. 28/2009, of 19 June 2009.

IN BRIEF

CMVM's Instruction No. 10/2011

This Instruction, which entered into force on 1 April, 2011, revoked CMVM'S Instruction no. 3/2008, and sets forth the information to be submitted to CMVM regarding the activity of credit granting, aiming to make the process faster and to become easier for financial intermediaries to access the extranet provided by CMVM. Financial intermediaries operating in Portugal as credit grantors, except those acting on a free provision of services baisis, shall notify CMVM, until the third day of the month following the transaction, the credit amount in currency and the amount of financial instruments approved, granted and used on a daily and monthly basis. Loans in public offerings, margin accounts, loans of short, medium and long term and the financings with an equivalent scope shall also be reported to the CMVM.

Law no. 19/2011, of 20 May 2011

This Law, which amends the Decree-Law No. 27-C/2000 of 10 March 2000, establishing the so called minimum banking services introduces in such services the access to bank accounts via ATM, home banking and branches of credit institutions, certain transactions such as deposits, withdrawals, goods and services payments, direct debit and national interbank transfers, as well as the availability of quarterly statements, discriminative of account movements or availability of passbooks. To the adherent credit institutions is forbidden the non-conversion of the existing bank accounts into minimum services banking accounts.

Instruction no. 17/2011 of the Bank of Portugal

Instruction no. 17/2011 of the Bank of Portugal ("BoP") clarifies the legal framework related to the restriction on the granting of credit and guarantees by credit institutions to members of its corporate bodies (including any persons and/or related entities), as well as to any person and/or entity with a qualified holding in such institution. Credit institutions are now required to implement internal control procedures to comply with the applicable legal framework, namely, prepare a list identifying all people and/or entities under said restriction and the maintenance of appropriate records with the credit amounts and liabilities of the latter. The abovementioned internal control procedures shall ensure that all relevant information is available in a clear format to the BoP.

Circular Letter of the Bank of Portugal no. 32/2011

Circular Letter of the Bank of Portugal ("BoP") no. 32/2011, of 17 May 2011, sets a number of best practices to be followed by credit institutions in regard to contractual clauses which allow for unilateral modification of interest rates and other charges for borrowers. The clauses should specify the facts which could justify their modification and allow for a reversal if those facts cease to exist. The modifications at stake are to be communicated clearly and transparently to the borrowers, who should be given a reasonable deadline, which the BoP understands should be no less than 40 days, within which they may choose to cancel the contract.

Calculation of Tier 1 Capital

Following the guidelines issued by the European Banking Authority ("EBA") regarding the eligibility of certain elements for the calculation of Tier 1 Capital, under the title "Implementation Guidelines regarding Instruments referred to in article 57(a) of Directive 2006/48/EC recast" and "Implementation Guidelines for Hybrid Capital Instruments", the Bank of Portugal ("BoP") issued Instruction nr. 12/2011, of 15 July 2011, which provides for the integration of such guidelines for the purposes of article 3 of the BoP's Notice nr. 6/2010, of 30 December 2010, which sets out the positive elements that may incorporate the Tier 1 Capital of the institutions subject to its supervision.
This instruction came into force on 15 July 2011.

Decree-Law no. 85/2011

Decree-Law no. 85/2011, of 29 June 2011 ("DL 85/2011"), implemented into the Portuguese legal framework Directive no. 2009/44/EC concerning the mechanisms designed to increase the coordination between payment systems and also regarding the possibility of credit institutions to give their credit claims as financial collateral, i.e., the amounts they stand to receive from loans they have granted. With this decree-law the conditions applicable to the definitive settlement in payment systems as well as to the settlement of securities become simpler and clearer. Upon the entry into force of this diploma and provided that certain conditions are met, the transfer orders may be carried out even in the case of insolvency of one of the parts involved.

Circular Letter of the Bank of Portugal no. 45/2011

Circular Letter of the Bank of Portugal ("BoP") no. 45/2011 aims to direct the behavior of banks in the consumer credit market. The BoP's guidelines include the duty to provide the FIN promptly so that consumers are given enough time to compare offers before deciding and to restrict the charges contained in the loan to those discussed with the client. Also stipulated are best practices regarding the provision of information about nominal interest rates and about the modification of the financial conditions of the loan due to the consumer's breach of obligations relating to the optional acquisition of other financial products.

A (More) Effective Break-Through Rule

On 8 September the public discussion period launched by CMVM on the draft amendments to article 182-A of the Portuguese Securities Code ended. Under the current rule, the suspension of certain defensive measures, such as voting caps or share disposal restrictions foreseen in the by-laws or shareholders' agreement, is dependent on the option made by the shareholders in the company by-laws. It is now proposed that the suspension shall be mandatory – suspending disposal restrictions during a tender offer (OPA), as well as voting caps on the first shareholders' meeting called after the OPA to decide on amending the by-laws or appointment/dismissal of directors, provided that the offeror has acquired at least 2/3 of the voting share capital. The reciprocity principle is generally kept in. Finally, CMVM also proposes to turn its corporate governance recommendation no. 1.6.1§2 into law, and thus at least every 5 years voting caps shall be subject to review in a shareholders' meeting in which the voting caps will not apply.

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