The International Capital Markets Review

Fourth Edition

Editor
Jeffrey Golden

Law Business Research

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This article was first published in The International Capital Markets Review - Edition 4
(published in November 2014 – editor Jeffrey Golden).

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THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-30-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET GRETTE DA

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY LLP

ATTORNEYS AT LAW BORENIUS LTD

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SOCIEDADE DE ADVOGADOS RL

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EDITOR'S PREFACE TO THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor's Preface to each of the previous editions of *The International Capital Markets Review*. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the 'resilience' of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a 'big freeze' on capital market transactional work was 'thawing' were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or 'confirmation' that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor's Preface to the fourth edition of the work, we have just witnessed the successful launch of the world's largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US$25 billion. Meanwhile, *The Times* reports a buoyant London braced for a 'listing stampede'. Hong Kong is rivalling New York for the greatest number of cross-border deals. The *Financial Times* also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting 'fatter'. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of *The International Capital Markets Review*!

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2014

EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding US$700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than US$180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 24

PORTUGAL

Orlando Vogler Guiné, Ana Moniz Macedo and Sandra Cardoso[1]

I INTRODUCTION

As a result of the deteriorating economic conditions since the financial crisis that began in mid-2007 and of the financial and strategic difficulties Portugal has faced in recent years, the Portuguese government requested external assistance from the IMF, the European Commission and the ECB in April 2011.

The Economic Adjustment Programme has led to an environment of uncertainty and strong initial contraction in the Portuguese economy, but recent times have been strong in terms of capital markets – high-yield transactions, exchangeable bonds transactions, IPOs, takeover bids and public offerings of shares and bonds – and they remain wide open to new transactions.

The Portuguese framework on capital markets is substantially in line with the European legislation. The Securities Code, enacted by Decree-Law 486/99, as amended, establishes the framework in relation to financial instrument, offers, financial markets and financial intermediation. Specific laws may apply to specific instruments and transactions (commercial paper, covered bonds, recapitalisation, etc.) and regulations issued by the Portuguese Securities Market Commission (CMVM), the Portuguese central securities depository Interbolsa and by Euronex Lisbon should also be considered.

On the banking side, the main framework is the Credit Institutions and Financial Companies Framework, enacted by Decree-Law 298/92, as amended. Also, the notices and instructions issued by the Bank of Portugal may be relevant. Bearing in mind the banking union that is being prepared and the EU harmonisation developments, national banking laws are much in line with EU rules.

1 Orlando Vogler Guiné is a senior associate, and Ana Moniz Macedo and Sandra Cardoso are associates at Vieira de Almeida & Associados, Sociedade de Advogados RL.

The Portuguese financial regulation system is composed of three pillars (following the same structure as the European supervisory system, and being divided in accordance with the activities and matters at stake) supervised by three different authorities: (1) the Bank of Portugal, which is the central bank and which has prudential and market conduct powers to supervise matters related to credit institutions and financial companies acting in Portugal; (2) the CMVM, which is empowered to supervise the market conduct of financial markets, issuers of securities and financial instruments and financial intermediaries, and (3) the Portuguese Insurance and Pension Funds Authority (ISP), which supervises the insurance system.

Portuguese authorities may also apply sanctions to those entities that do not comply with the applicable laws. In general, the fines depend on the type of entity and activities carried on and the seriousness of the breach. A supervisory authority's decision may be contested and submitted to the decision of a special court that exclusively decides on competition, regulation and supervisory matters.

Supervisory authorities are now much more active in sanctioning market players and the special court on regulatory matters has been set up to enhance the capacity to respond to the current demands on regulatory matters. In recent years, authorities have imposed fines on several entities, including banking board members who have been accused of hiding relevant accounting information. Reference should be made to the procedures that the supervisory authorities have recently lost due to prescription, but the law will be amended in order to mitigate this.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Market trends and legal remarks

The past 12 to 18 months have presented an interesting but challenging environment in the Portuguese capital markets. In May 2013 the first Portuguese high-yield bond[2] was launched by Portucel, and was well received by the market. It was a noteworthy transaction for a number of reasons, including the use of Portuguese-law global notes (but closely following English-law global note structures) to allow the application of the favourable tax regime (withholding tax exemption for non-residents) foreseen in Decree-Law 193/2005 (described below, and amended in December 2013). This was a covenanted transaction and there was an expectation in the market that this could trigger other high-yield bond transactions, including with 'covenant-lite' or 'covenant-loose' features (as seen in other jurisdictions over the past year), but so far the market has not moved in that direction.

Later, there was a successful placement of an exchangeable bond into GALP shares, but again, no further relevant convertible or exchangeable issuances then took place. Some listed issuers have, however, been preparing for such issuances, including through shareholders' meetings resolutions or changes to their by-laws, to allow them to move swiftly in the event that there is a mutual appetite for these instruments.

2 Reg S/144A.

Since the last quarter of 2013, some relevant equity capital markets transactions have taken place. The state-owned universal postal services operator (CTT) was initially 70 per cent privatised in December 2013 in the context of the Portuguese Economic Adjustment Programme, and the remaining 31.5 per cent shares were offered at the beginning of September 2014, through an accelerated book building. This was the first IPO in many years, and was followed by the IPO of ES Saúde (a health-care operator) at the beginning of 2014. This issuer was recently subject to a tender offer, shortly after followed by a competing offer that was preliminary announced and thereafter another competing offer was launched. During this process, an additional bidder tried to acquire the major shareholding directly, via an over-the-counter (OTC) transaction. In the end, the relevant shares were acquired by the third offeror (Fidelidade, the largest Portuguese insurance company, purchased earlier by the Chinese conglomerate Fosun).

These were the first competing offers announced in Portugal since the turn of the century and under the current Securities Code and several regimes, such as securities law, competition law and health law had to be considered. In this context, the CMVM considered that, *inter alia*, (1) a competing offer may not be subject to the approval of the Competition Authority if the (first) tender offer is not subject to the same approval, and (2) a bidder may not propose to acquire OTC a major shareholding that will result in a mandatory takeover if is not able to comply with the competing offers regime. Grounds for these decisions were essentially the applicable deadline to launch competing offers in the Securities Code. The CMVM also published a set of frequently asked questions regarding these offers.[3]

On the telecommunications front, ZON and Sonaecom merged, benefiting from a waiver to launch a mandatory takeover by the controlling shareholders, as foreseen in the Portuguese Securities Code. On the other hand, Portugal Telecom and Oi launched a cross-border business combination, entailing merger approvals by shareholders, liability managements and consent solicitation process (where a record-date regime, similar to record-dates applying to listed shares, applied in respect of Portuguese-listed bonds), and a very substantial international (US and other) share capital increase of Oi. This process is still ongoing, and was also affected by the crisis in Grupo Espírito Santo in 2014. A number of share capital increases, particularly of banks, have been successfully placed since June 2013, totalling €3.7 billion, among Banif, BCP (the highest-ever share capital increase of a Portuguese-listed company) and BES. Montepio also issued fully subscribed and listed equity.

Another Portuguese-listed company (FCP) approved the issuance of preference shares by a shareholders' resolution. On the same day, a mandatory tender offer over FCP was announced. Preference shares issued under Portuguese law are not common among Portuguese-listed companies, since the Portuguese regime contains some relevant differences concerning the rules applicable to the interest to be paid to the holders of preference shares. The legal regime may well be amended to allow more flexibility,

3 Available in Portuguese version at www.cmvm.pt/CMVM/Apoio%20ao%20Investidor/Faq/Pages/20141013j.aspx.

as these instruments are generally undercompetitive compared with 'international' preference shares.

The end of 2013 and beginning of 2014 saw a move towards normality in terms of debt for a number of banks and also corporates issuing debt in the international markets. Also, the state increasingly gained access to the market, and the exit from the Portuguese Economic Adjustment Programme in May and June 2014 was shortly followed by the successful placement of US$4.5 billion of notes issued by the Republic of Portugal, under its €15 billion EMTN Programme in July 2014 (referenced in more detail in Section II.iv, *infra*). Green bonds and project bonds, or cat bonds (i.e., bonds linked to catastrophes, instruments of interest for insurance companies) have not yet been launched by Portuguese issuers.

In addition, some securitisations, of bank assets and also of electricity deficit, were made. To meet rating agencies' demands, securitisation structures grew more complex, to some extent, but allowed successful placements with international investors.

Changes in debt securities legislation

A new regime for the issuance of commercial paper was approved on February 2014.[4] The most relevant change concerns the requirements applicable to the issuers, since they are no longer obliged to comply with a minimum equity amount. Instead, issuers are obliged to comply with at least one of the alternative legal requirements (for instance, being an issuer of securities admitted to trading on a regulated market), but only if the commercial papers are not acquired by institutional investors or if it is not wholesale (amount per unit equal to or above €50,000). This is a strong improvement, since previously there was a strict general limitation (three times their equity amount) on corporate issuers of commercial paper.

It is possible that the general regime of corporate bonds will also be amended in the next year to allow, *inter alia*, for more flexibility in the issuance of bonds (avoiding the general requirement of issuing only up to twice the equity amount, unless the issuer is listed, the bonds are rated or secured or guaranteed).

Bank resolution

The landmark event of 2014 has been the crisis in Grupo Espírito Santo and Grupo BES, which had been effectively controlled so far by the latter. A succession of events led to the first ever resolution of a Portuguese bank under national law, but following closely the principles laid down in the Bank Recovery and Resolution Directive (BRRD).[5]

The Banking Law had already included a resolution regime since 2012, partially amended since then, anticipating many of the solutions that were then under discussion and came to light recently at an EU level, but no bank had thus far been resolved.

Notwithstanding that the BRRD is not yet fully implemented in Portugal, the most important aspects thereof are already recognised in Portuguese law with the view of avoiding systemic risk and cross-contamination to the real economy, allocating losses

4 Decree-Law 29/2014, amending Decree-Law 69/2004.

5 2014/59/EU.

and costs to the banks' shareholders and creditors, and minimising the burden on the taxpayer.

In the event of financial distress of a Portuguese credit institution[6] the Bank of Portugal may determine the application of corrective measures, or provisional administration or resolution, depending on the seriousness of the situation. The application of such measures is subject to the principles of adequacy and proportionality. Under the Portuguese legal framework, although the previous application of less severe measures is not required, note that the banking resolution measure is reserved to extreme situations when corrective intervention and provisional administration are no longer viable, and when:

a the credit institution does not meet or is in serious risk of not meeting the requirements to maintain its authorisation to carry on business;

b it is not foreseeable that such credit institution can, within a reasonable time frame, perform the necessary measures to return to financial soundness and comply with prudential ratios; or

c such measures are necessary to: (1) avoid systemic risks in the banking sector; (2) avoid potential negative impacts in the financial stability plan; (3) minimise the costs in the public purse; or (4) safeguard the confidence of depositors.

A banking resolution measure may be (1) a total or partial alienation of the relevant credit institution's business to another institution or other institutions operating in the market; or (2) a transfer of assets, liabilities, off-balance sheet items or assets under management to a bridge bank created for this purpose.

On 3 August 2014, the Bank of Portugal applied a resolution measure to BES in the form of the transfer to a bridge bank created for such purpose (Novo Banco), after the very high and unexpected losses in its results for the first half of 2014 and, *inter alia*, the decision of the ECB to suspend its counterparty status. Besides this being the first time the resolution was tested in practice, it should be noted that BES was a major Portuguese bank and part of one of the biggest economic groups in Portugal, holding interest across several sectors. Novo Banco has as its sole shareholder the Resolution Fund, which depends upon contributions by the Portuguese banking system, and which will need to ultimately reimburse the state of the loan it advanced to the Resolution Fund and was used to pay most of the share capital of Novo Banco. The bridge bank has been created for two years (which may be extended for up to five years), but the intention shared between regulators, officials and the banking community points to a swift sale of Novo Banco.

Substantially most of the estate of BES was transferred to Novo Banco. In the 3 August deliberation, all assets, liabilities off-balance sheet items and assets under management were transferred, unless expressly excepted in the deliberated perimeter,

6 Whenever it becomes incapable of meeting its obligations or in the event of reduction of its own funds to below the minimum required by law or of failure to comply with applicable solvency ratios.

which was adjusted on 11 August 2014.[7] The Bank of Portugal is entitled to further adjust the perimeter, which was set up following the burden-sharing and bail-in guiding principles enshrined in the law under which it must be ensured that a credit institution's losses are primarily assumed by its shareholders and creditors, according to their hierarchy (particularly subordinated creditors), and on equal terms within each class of creditor. Note that beside their investment in the shares of BES, qualified shareholders'[8] credits over BES were retained at the 'bad bank'.

Resolution measures do not correspond with bankruptcy or insolvency proceedings. In addition, under the Portuguese resolution regime, the application by the Bank of Portugal of any resolution measure determines the suspension, for a period of 48 hours after the time the suspension is notified or, if prior to this, the public announcement of the decision by the Bank of Portugal, of the close-out rights enshrined in netting agreements of contracts to which the targeted credit institution is a party, when the exercise of such right is based on the application of the resolution measure in question, except if the close-out rights are agreed by the parties in financial guarantee contracts. The law also states that after such period, and as regards the agreements that have been transferred to the bridge bank, the close-out rights enshrined in netting agreements cannot be exercised by the credit institution's counterparties based on the application of the resolution measure.

Notwithstanding the foregoing, ISDA has reacted and:

> *… based on best available information including confirmation from Banco de Portugal that more than 75 per cent of all bonds and loans had been transferred to Novo Banco SA, resolved that a Succession Event had occurred with respect to Banco Espirito Santo SA.*[9]

This means that Novo Banco is qualified by ISDA as the sole successor to BES under all CDS contracts referencing BES, and the reference entity under those credit default swaps will then be Novo Banco rather than BES. We would expect the same logic to be followed under the relevant ISDA master agreements.

Own-funds regulations

Regulation 575/2013 establishes uniform rules concerning general prudential requirements with which institutions supervised under Directive 2013/36/UE must comply, including on own-funds requirements relating to entirely quantifiable, uniform and standardised elements of credit risk, market risk, operational risk and settlement risk, requirements limiting large exposures, and public disclosure requirements.

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7 The relevant Bank of Portugal deliberations are available (in Portuguese) at www.bportugal.pt, and a number of FAQs and other information, including on the perimeter, have been made available (also in English).

8 Two per cent or higher, or those who were qualified shareholders of BES within the past two years.

9 See http://dc.isda.org/cds/banco-espirito-santo-sa.

The Regulation establishes the conditions that must be met for an item to be qualified as common equity Tier 1 capital, additional Tier 1 (AT1) capital or Tier 2 capital. Commission-Delegated Regulation 241/2014, supplementing Regulation 575/2013 with regard to regulatory technical standards for own-funds requirements for institutions, namely for AT1, are applicable to incentives to redeem and to conversion or write-down of the principal amount. Portuguese banks have already started to look into the new features for subordinated and hybrid instruments, and incorporating the same in their EMTN Programmes, but so far no transaction has been launched. Please note that it is possible that the Bank of Portugal may apply certain additional requirements, such as deferred interest payments on Tier 2 capital instruments. The market would also benefit if some tax aspects regarding AT1s – particularly on the tax deductibility of coupon payments – are fully clarified by the tax authorities.

ii Developments affecting derivatives, securitisations and other structured products

Regulation 648/2012 and the relevant implementing regulations and delegated regulations (together, 'EMIR') have been enacted, aiming to establish a safer and sounder legal framework, and enabling the EU to fulfil its G20 commitments on OTC derivatives.

EMIR entails a set of contractual and procedural changes to the OTC business that financial intermediaries and their clients have been implementing, as EMIR imposes a set of reporting and risk compensation or management obligations. The reporting obligations set out are applicable to every entity that is party to a derivative transaction and ensures that information on all European derivative transactions ought to be reported to trade repositories and be accessible to supervisory authorities, including the European Securities and Markets Authority (ESMA). Additionally, EMIR requires that standard derivative contracts be cleared by central counterparties (CCPs) in certain cases, and establishes prudential requirements for these CCPs.

Under EMIR, counterparties are classified as financial counterparties (FC) and non-financial counterparties (NFC). The latter are further subdivided into counterparties above the 'clearing threshold' (NFC+) or counterparties below it (NFC-), depending on the gross notional value of the agreed OTC transactions; less demanding terms apply to NFC-. On the other hand, FCs should be able to rely on representations and warranties provided by NFCs in relation to their respective classification, and the market has operated accordingly.

Despite EMIR's implementation into national law not being required, the obligation to ensure supervision of the fulfilment of duties and to determine the applicable sanctions in the event of infringement lies with each Member State. Accordingly, Decree-Law 40/2014 was enacted. Thereunder, the Bank of Portugal, the CMVM and the ISP have been appointed as the competent authorities for the supervision of FCs subject to their respective supervision and the CMVM as the national competent authority for the supervision of NFCs, for the authorisation and supervision of CCPs and for verifying the authenticity of ESMA decisions that may apply sanctions to trade repositories.

EMIR local action

Furthermore, Decree-Law 40/2014 lays down a legal regime applicable to CCPs, which is complementary to that of EMIR, and expands on the Securities Code regime.

It contains the rules on CCP corporation types, number of shareholders, attribution of voting rights, invalidity of resolutions, fit-and-proper assessment, exercise of CCP activity, activities of management members and employees, and notification obligations towards the CMVM.

Additionally, Decree-Law 40/2014 establishes a sanctions framework applicable to FCs and NFCs (and board members) in the event of breaches of the obligations set out in EMIR. The sanctions foreseen in Decree-Law 40/2014 are applicable in the event of breaches of the reporting obligations described above regarding derivative contracts covered by EMIR or of the risk-mitigation techniques for OTC derivative contracts not cleared by CCPs. The framework punishes both intentional and negligent offences, and foresees the possible imposition of ancillary sanctions, such as bans or prohibition of activities related with the offences for a period of up to three years. The level of fines applicable to FCs is higher than to NFCs. The former ranges between €3,000 to €5 million, while the latter ranges between €600 and €1 million. The amendments introduced to the Securities Code by Decree-Law 40/2014 have resulted in an aggravation of the sanctions framework applicable to CCPs.

In order to comply with the EMIR requirements concerning, for instance, the disclosure of information to trade repositories or to ESMA, counterparties in Portugal are amending their ISDA master agreements (or local law master agreements, or both) or are adhering to the ISDA protocols or agreements in relation to NFC representation, portfolio reconciliation, dispute resolution, disclosure and reporting delegation.

iii Cases and dispute settlement

During the past year the swaps business has also been a hot topic in the media, politics and financial world, as well as on the legal side. In February 2014, the parliamentary commission on swaps entered into by public (state) companies and other entities ended. These were extensive hearings, including bankers involved, and the commission operated in the context of negotiations that such companies and entities were pursuing with their swap counterparties aimed at terminating the swaps (more complex or less complex) and managing the underlying exposures. A number of swaps have been terminated by mutual agreement, but this sequence of events certainly entails that in the future counterparties dealing with public companies and entities will seek additional safeguards and undertake further diligence prior to entering into new swaps.

On the legal side, there have been important developments in the jurisprudence concerning swaps entered into between banks and their clients. Banks in the Portuguese market have been contracting swaps with clients in the past decade as follows:

a under Portuguese law (and jurisdiction) governed master agreement, based on the ISDA master agreement principles, but shorter and less complex; and

b under the standard ISDA master agreements.

The latter alternative has been typically followed by bigger corporates (or public sector entities, as mentioned above) with wider experience in the financial markets, while the former has been more used for smaller clients and SMEs, relatively less experienced in the financial markets.

Notwithstanding the foregoing, any of the alternatives could be, and have in practice been, employed also with the other group of clients (i.e., an ISDA master agreement with SMEs or a more streamlined master agreement with bigger corporates). Cases have been brought to court essentially by SMEs, and particularly in respect of interest rate swaps (IRS) entered into prior to the financial crisis (when the interest rates were substantially higher), given that, in light of current interest rates, it is now the bank and not the company which has benefited.

Highlighted case law

In a landmark case,[10] the Supreme Court of Justice decided that a swap can be subject to the general civil law principle *rebus sic standibus*, according to which an agreement may be subsequently terminated or modified in light of certain future and unforeseeable circumstances. It was an older swap and the Supreme Court understood that the financial crisis back in 2008/2009 could qualify for such exceptional circumstances. Naturally, it could also be argued that this financial crisis was unforeseeable for both clients and banks, and banks would accordingly also be able to resort to this principle in all its credit contracts, such as long-term mortgage loans – the impact this would have on the economy would be tremendous, so one could argue whether the court was not somehow one-sided in this discussion. Another point noted by the Supreme Court was that the swap was not well balanced, with certain rights being ascribed to the bank but not, to the same extent, to the client; however, it should be highlighted that the court did not qualify the swap as a gaming or gambling, which has been an argument raised in the legal literature and other jurisprudence to sustain the illegality of swaps. Accordingly, it will in any event be useful for banks to exercise extra care and diligence, securing upfront or during the life of the swap evidence that it relates to actual hedging by the client, and always complying with all its MiFID duties. Obviously, when the bank's counterparties are large corporates or other well-informed entities, the tendency by the courts to sustain illegalities or judge against banks should be reduced.

Note that all the cases discussed above are, to our knowledge, restricted to Portuguese law swaps. However, recently, the Lisbon Court of Appeals ruled,[11] in respect of an English-law governed swap, with the typical jurisdiction of English courts (entered into under an ISDA), that the submission to the English courts was unduly burdensome for the client, thus deeming the clause null and acknowledging jurisdiction of Portuguese courts. We will not discuss here the merits (or demerits) of this decision and the danger it may entail the predictability of future decisions (it will certainly be much more difficult for a Portuguese court to judge correctly under English law than an English court, and we hope that at least this will not serve as an excuse to apply Portuguese law to English-law governed swaps). Once again, parties should be aware of this type of jurisprudence, particularly when negotiating swaps with smaller or SME clients. Evidence that the English jurisdiction clause was properly explained to the client and even negotiated will be useful if the English-law swap is challenged in courts in the future.

10 Decision No. 1387/11.5TBBCL.G1.S1, 10 October 2013.

11 Decision No. 877/127TVLSB.L1-1, 10 April 2014.

iv Relevant tax and insolvency law

There have been no recent changes to insolvency laws, but there have been important developments on the tax front.

Withholding tax exemption

Back in 2005, Decree-Law 193/2005 achieved an important milestone in the Portuguese tax legal framework relating to debt instruments. Until then, Portuguese corporates and banks addressed the international debt markets through issuances made by their foreign subsidiaries, then channelling the funds to Portugal through intercompany loans or otherwise, which required a more complex and costly structure. The underlying reason was the mandatory general withholding tax applicable to interest payments under the debt securities, including to non-residents. This Decree-Law allowed non-residents not be subject to withholding, provided that certain certification and other requirements were met, including non-residency in blacklisted (tax haven) jurisdictions. This new legal regime boosted the issuance of debt instruments by Portuguese companies directly out of Portugal – the 'Interbolsa Notes', since one of the requirements was the centralisation of the issue with the local central securities depository, Interbolsa.

In December 2013, amendments were made to the Decree-Law 193/2005. On one side, the scope of eligible debt instruments was enlarged, now also encompassing commercial paper. On the other, certain requirements were loosened or dropped, including the fact that there is no longer the requirement for non-resident entities (instrument holders) not to be held in part (20 per cent) by residents, and tax haven jurisdiction investors are allowed to benefit from the regime if the jurisdiction has a double-taxation treaty or a tax information agreement in place with Portugal. Also, the requirement for primary local centralisation (settlement) no longer applies, so issuances may be directly integrated in international clearing systems such as Euroclear and Clearstream.

Direct centralisation outside Portugal raised important legal and tax procedural challenges, however, including the need for a local paying agent or a tax representative of the international paying agent. In any case, there has already been a debt issuance under this new alternative regime: the US$4.5 billion issued by the Republic of Portugal, under its €15 billion EMTN Programme in July 2014.

Finally, it is worth mentioning that, in accordance with their notice 4/2014, the tax authorities have confirmed that securitisation notes issued by Portuguese securitisation companies can benefit from this amended Decree-Law regime, thus benefiting from a wider range of exemptions for non-residents than under the securitisation tax regime.

Deferred tax assets

Also on the tax front, it is worth noting that, following the most recent Basel III developments and initiatives in other jurisdictions, a special regime on deferred tax assets (DTAs) has been approved. There are some differences comparing to precedents in other countries. The regime was made available to both financial institutions and ordinary companies, and the interested entities will need to apply within 10 days of publication of the legal regime. BCP and BPI already approved, by a shareholders' resolution, its adherence to this special regime.

DTAs will be fully or partially converted into tax credits (of the entity towards the state) if the relevant entity has losses occurring in the relevant tax year or if it becomes insolvent, liquidated, etc. Where conversion takes place due to losses, this will entail the creation of a special reserve within its own funds available to meet exercised conversion rights. The state may dispose such conversion rights to third parties, but current shareholders have a statutory acquisition right (legal call option) to acquire the conversion rights. Law 63-A/2008 (the Recapitalisation Law) provides for a similar call option for shareholders of recapitalised banks where the state became a shareholder (first tested last July, for the €700 million shares of Banif held by the state). Important features of the regime are still to be regulated by the government.

v Other strategic considerations

The fact that Portugal is a small market within Europe should be taken into account when capital market transactions are undertaken. Given the size of the market and the reduced number of players, information can be expected to be quickly disseminated among relevant market operators. For the same reason, and also taking into account the most recent developments in the market and the increased public pressure on regulators, more intense scrutiny by supervisory authorities – including the CMVM – should be expected (prospectus review and approval, complex financial products placement and relevant documentation, rules of conduct, etc.).

Given the rapidness of approval of the securities laws in Brussels, in the form of Regulations and Directives, a cautious regulatory approach should be taken. Note that a number of Directives are still to be implemented, including the AFIMD,[12] which was supposed to have been implemented by July 2014.

III OUTLOOK AND CONCLUSIONS

As mentioned, Portugal has exited the Economic Adjustment Programme, but is still a challenging environment, particularly in light of the GES crisis. This is also, however, a time for opportunities, as Portugal has recently seen competitive tender offers and high-level acquisitions in the market. The bridge bank that came out of the resolution is to be sold as soon as possible. This new environment also brings new legal challenges, but they will certainly not be an obstacle for executing interesting transactions in the market, both on the equity and the debt (and hybrids) sides.

Finally, there is likely to be increasing securities law litigation in the courts from retail investors, subordinated creditors and shareholders, but also from senior creditors affected by developments in the market in recent months.

12 Directive 2011/61/UE.

Appendix 1

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