The International Capital Markets Review

Sixth Edition

Editor
Jeffrey Golden

Law Business Research

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Jeffrey Golden

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Gideon Roberton

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EDITOR'S PREFACE TO THE SIXTH EDITION

There is a lesson from the international capital markets that took me, as a young ICM lawyer, a measure of time to both comprehend and appreciate. It was namely this: in matters legal, market participants have a marked preference for certainty above almost anything else. Even sometimes ahead of justice!

Market participants need to know where they stand.

You see, you can trade or structure around a position that you know to be certain, however undesirable that position may be, and whether or not you believe it to be fair. What is abhorred is not knowing what your position is. Eventually being told by a court after months or years of litigation, for example, that you were correct in your earlier view does not give a lot of comfort if, waiting on that answer, you stood 'naked' to a market that has moved on and significantly against you while you remained uncertain whether, when and to what extent to hedge your exposure or otherwise move in reliance on the position you had previously assumed.

Let me give you an extreme example of this preference for certainty over justice as it is reflected in the terms widely used by the derivatives markets when structuring a trade under my favourite contract form, the ISDA Master Agreement. There, a library of product-specific definitional booklets provide various terms tied to particular product markets, including details of pricing sources, relevant market conventions, and fallbacks and adjustments for when a given source may not be available and for other market disruptions. Relevant booklets can be incorporated into the parties' trade confirmations and thus added to the parties' contract on an 'as and when needed' basis.

Many of these booklets include a provision that is widely embraced for trades that base their prices on published and displayed screen rates. It provides, for example, that where a relevant rate for a pricing date is based on information from certain sources such as a Reuters screen page the rate is, as you might expect, subject to corrections made by that source – but only if the correction is made within one hour of the time when the relevant rate is first displayed.[1] After that, even if the displayed rate has an extra zero in it, and even if it is later corrected, the rate as it stood one hour out becomes the irrevocable basis for the relevant pricing of the transaction. That is the potentially harsh but, in order to ensure certainty, market-preferred position.

This desire for timely and reliable answers can also be seen by the considerable contractual privilege and discretion afforded, for example, to a non-defaulting party by allowing it to self-determine a close-out amount following its counterparty's default. That determination is subject to good faith and reasonableness. However, a conscious decision was taken that the number of issues subject to referral to court for determination, and the evidentiary basis on which those issues should be decided, would, in each case, be narrow. It was intended that it should be of no consequence if, perhaps with the benefit of hindsight, a better answer could be determined by the court. It was thought more important by the markets that an answer honestly derived by a party could be relied upon as final so that the party could move on.

Whether it is the measure of their claims following a default, the scope of their exposure to market risk, or the strength of their collateral credit support, market participants hate surprises. They need to know where they stand. They seek authoritative answers that can be relied upon. And they trust in the rule of law.

My former law partner, Philip Wood CBE, QC (Hon) recently published a fascinating book.[2] In it, Philip argues that the challenge set for our planet is survival, that the rule of law has supplanted religion in providing the basis for a morality that will be necessary to ensure that survival, and that it falls to lawyers to form a 'priesthood' capable of providing relevant answers, as well as preserving the certainty and order, that can contribute to that quest for survival.

And yet we look out at a marketplace with more than a little uncertainty at the moment (Brexit, a worrying US presidential election looming, equally worrying ongoing world political tensions and even conflict, a systemically relevant global financial institution facing crippling fines and a crisis of confidence, cyber insecurity, etc.). Perhaps not surprisingly then, the press reports that the value of initial public offerings has fallen by about a third this year when compared with last year in this period of market volatility and political uncertainty.

That is where this book comes in (with a new jurisdiction, Hong Kong, having been added). Our legal experts who have contributed have been tasked with promoting legal certainty through guidance about where matters relevant to the international capital markets stand in their home jurisdictions. They are our priests!

Join them, and take up Philip Wood's challenge. If you are reading this book, it is almost certainly because someone is looking to you for answers – looking to you to provide the legal certainty the capital markets seek.

1 See, e.g., 2006 ISDA Definitions, Section 7.6.

2 Philip R Wood, *The Fall of the Priests and the Rise of the Lawyers*, (Hart Publishing Ltd, 2016).

My admiration for our contributing experts continues, and of course I shall be glad if their collective effort proves helpful to our readers when facing the important challenge of framing the correct answers.[3]

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2016

3 Did I finally make it through a preface without mentioning the Global Financial Crisis?

Chapter 21

PORTUGAL

José Pedro Fazenda Martins, Orlando Vogler Guiné and Sandra Cardoso[1]

I INTRODUCTION

Since the conclusion of the Financial Assistance Programme agreed by the Portugal with the Troika in 2014, the economy has been slowly improving, although some uncertainties continue as to the financing conditions Portugal may face in the future. In the political context, a new government supported by a parliamentary left party alliance was sworn in on 26 November 2015, and has managed to retain the required majorities in Parliament.

The financial sector still faces some difficulties, as described below, which has led in severe cases to the application of resolution measures by the Bank of Portugal during the past two years. The recapitalisation of Portuguese banks has been in the limelight this year, considering the high amounts of capital required for this purpose, including a discussion about a possible bad bank or management vehicle for non-performing loans.

The Portuguese framework on capital markets is substantially in line with European legislation. 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 Euronext Lisbon should also be considered. The Securities Code (enacted by Decree-Law 486/99, as amended, which provides the framework for financial instruments, offers, financial markets and financial intermediation), the Companies Code (as enacted by Decree-Law 262/86, as amended) and the Credit Institutions and the Financial Companies Framework (enacted by Decree-Law 298/92, as amended) on the banking side have been adjusted recently to transpose European legislation or, in certain cases, to improve the regime directly applicable or that may impact the capital markets (for instance, as described below, in respect of the bonds regime).

1 José Pedro Fazenda Martins is of counsel, Orlando Vogler Guiné is a managing associate and Sandra Cardoso is an associate at Vieira de Almeida & Associados, Sociedade de Advogados, SP RL.

Regulations, notices and instructions issued by the CMVM or the Bank of Portugal may also be relevant. Bearing in mind the banking union that is being implemented and the EU harmonisation developments, the national banking laws are naturally much in line with EU rules.

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:

a the Bank of Portugal, which is the central bank and which has a prudential function (in coordination with the European Central Bank, particularly for the largest Portuguese banks) and market conduct powers to supervise matters related to credit institutions and financial companies acting in Portugal;

b the CMVM, which is empowered to supervise the market conduct of financial markets, issuers of securities, and financial instruments and financial intermediaries; and

c the Portuguese Insurance and Pension Funds Authority (ASF), which supervises the insurance system. There is currently no ongoing discussion about this system of supervision, in contrast with discussions held in the past, where pundits proposed the adoption of a twin peak system.

Portuguese authorities may apply sanctions to entities that do not comply with the applicable laws. In general, 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.

Since the financial crisis, and considering also the collapse of some important Portuguese economic conglomerates, the supervisory authorities have been much more active in sanctioning market players, and the above-mentioned special court on regulatory matters was set up to enhance capacity to respond to 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.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Resolution developments

The past few years have been challenging for the Portuguese capital markets. Further to the resolution of Banco Espírito Santo, SA (BES) and the creation of the bridge bank Novo Banco on 3 August 2014, the Bank of Portugal is conducting a sale process (which was first launched and then suspended in September 2015, with a re-launch being announced on 15 January 2016) consisting of two simultaneous tracks: a 'strategic sale process' aimed at strategic investors, and a 'market sale process, which may consist of an offer to other investors and the listing of the shares. The final choice between the two tracks is yet to be announced.

On 29 December 2015, the Bank of Portugal announced its decision to retransfer certain non-subordinated bonds from Novo Banco to BES.[2] The selection of such bonds was based, in accordance with the Bank of Portugal's resolution, on the public interest, as these were bonds that were issued by BES directly to qualified investors with denominations of €100,000. This was a controversial but landmark decision across the EU in a post-Bank Recovery and Resolution Directive environment.

On 20 December 2015, the Bank of Portugal applied a resolution measure to Banif - Banco Internacional do Funchal, SA (Banif), which resulted in the acquisition by Banco Santander Totta, SA (BST) of a set of rights and obligations that constituted assets, liabilities, off-balance sheet items and assets under the management of Banif, as listed in the relevant resolution passed by the Bank of Portugal.[3] Differently from the resolution applied to BES (bridge institution tool), the measure applied to Banif consisted of the sale of business tool, whereby the overall activity of Banif was transferred to BST, as mentioned above, except the assets transferred to an asset management vehicle (first called Naviget, SA, renamed Oitante, SA) set up in this context.

Tender offers

Given the relatively small size of the Portuguese market, only three takeover bids have been announced since the second semester of 2015.

On the banking side, after a first unsuccessful attempt in February 2015, the Spanish bank CaixaBank preliminarily announced a second public general and voluntary takeover bid for the acquisition of BPI in April 2016. CaixaBank was already a major shareholder of Banco BPI, holding just below half of the share capital and voting rights. The first attempt failed because one of the conditions to which the offer was subject (the removal of the currently applicable 20 per cent voting rights cap in BPI's by-laws) was not met. The April 2016 takeover bid is subject to the same condition, but the legal framework for maintaining and removing voting caps and supermajorities set out in financial institutions' by-laws has now changed. According to the new regime, established by Decree Law No. 20/2016, voting caps and supermajorities may be removed with a resolution of the shareholders' meeting. If the board of directors takes the initiative in making a proposal for the adoption of such resolution by the shareholders' meeting, it can be passed with the votes cast without any voting cap and without the need to meet any supermajorities. This is exactly what happened in the case of BPI, where the board of directors made a proposal to the shareholders to amend the by-laws and to remove the voting caps. In September 2016, the shareholders of BPI approved the removal of the voting rights cap. Pursuant to such decision, the preliminary voluntary takeover bid announced by CaixaBank was converted into a mandatory general takeover bid.

The general and voluntary takeover bid of Glintt, announced in September 2015 by Farminveste, its majority shareholder, was concluded in 2015, and the offeror reached, as a result of such bid, a total holding of 73 per cent. The most recent takeover transaction that has been preliminary announced is the partial and voluntary takeover bid of Cipan (a public limited company), announced in August 2016 by Chartwell, a shareholder of Cipan.

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2 Available at www.bportugal.pt/en-US/OBancoeoEurosistema/Esclarecimentospublicos/Documents/Deliberation20151229_retransfer.pdf.

3 Available at www.bportugal.pt/en-US/OBancoeoEurosistema/ComunicadoseNotasdeInformacao/Documents/Deliberacao20151220_23h30_EN.pdf.

At the end of September 2016, the previous major shareholder of Cipan sold its shareholding position (about 85 per cent of Cipan's voting rights and share capital) to Lusosuan. Further to this acquisition, Lusosuan announced a mandatory takeover bid for all the remaining shares of Cipan.

As per the Securities Code, the consideration offered in mandatory takeover bids may not be less than (1) the highest price paid by the offeror for acquisition of securities of the same category (or by any related party as determined by Article 20(1) of the Securities Code) in the six months immediately prior to the preliminary announcement of the takeover bid, and (2) the weighted average price of the securities traded in a regulated market in the six months immediately prior to the preliminary announcement of the takeover bid. Whenever these criteria do not ensure a justified or fair consideration or it is not possible to apply such criteria, CMVM may decide that the consideration will be determined by an independent auditor to be appointed. The consideration is deemed unfair when the highest price results from private deal, if the market for the relevant securities is not liquid or if the market price of the securities has been effected by exceptional events. In this case, CMVM announced that the consideration should be determined by an independent auditor (yet to be appointed) given that the shares of Cipan are not admitted to trading and, thus the highest price resulted from a private deal.

It is too early to anticipate whether both takeovers will be registered and dealt with as competing offers.

Public offers

Recourse to the capital markets by non-financial Portuguese companies continued up to the end of 2015 and into the first semester of 2016. This included a share capital increase by Mota-Engil in December 2015, as well as a public subscription offer of bonds by one of the major listed football companies (Sport Lisboa e Benfica – Futebol, SAD) in 2016, with demand largely exceeding the offer amount.

We would highlight, however, that, pursuant to a resolution approved in October 2015 by the Council of Ministers allowing government bonds to be placed under public offer, thus allowing retail investors to become part of this market segment, which was previously restricted (as far as the primary market is concerned) to institutional investors, two public offers of floating rate bonds (OTRV) were successfully made for a total amount of €1.95 billion and the bonds were admitted to trading on the regulated market of Euronext Lisbon. The transactions closed in April and July 2016.

Debt markets – other remarks

This year has continued to see some activity, including private placements (both with and without listing). We would highlight EDP's recent Euro medium-term note (EMTN) issuance of €1 billion (1.125 per cent) (instruments due on 12 February 2024).

In April 2016, through the placement of new debt issuances, the Navigator Company (formerly Portucel) opted to reimburse its Portucel senior notes 5.375 per cent ahead of their maturity (due in 2020), a high-yield transaction placed in 2013 that was a landmark transaction as it was issued in global note form but deposited with the local clearing, settlement and depositary system (CSD) (Interbolsa). This sort of structure presents a number of complex legal challenges, which have been successfully overcome. Again in April 2016, a new transaction in such format was set up and successfully closed with the deposit of the global note with Interbolsa, broadening the funding routes made available, in this case, to African sovereign issuers (using an special purpose vehicle (SPV) structure in this case).

ii Developments affecting derivatives, securitisations and other structured products

Asset-backed securities (ABS) and covered bonds

We have also been seeing some activity in securitisation, being the securitisation bonds typically admitted to trading on the Euronext Lisbon market (when listed). These are both retained and market deals, with a range of different asset classes, including electricity receivables, as well as the more traditional bank assets, both in the performing (residential mortgage-backed securities, consumer loans) and non-performing segments.

As a side note, a trend we have been seeing in existing transactions has been the amending of the conditions of some securitisation bonds to expressly clarify that the interest payments are floored at zero per cent if the application of the coupon formula results in a negative cash flow. If an amendment to the conditions is not feasible (i.e., transactions not retained), some issuers have undertaken to apply a zero per cent floor. These amendments relate to the European Central Bank interest rate policy and should be taken into consideration in future issuance documents.

Covered bonds have continued to play a role in the Portuguese capital markets, with transactions coming to market, and not just being issued for retention or collateral purposes.

It is worth noting that, following the conversion of BII's covered bonds into (simplified) pass-through covered bonds, which we reported on 2014, Novo Banco established, at the beginning of October 2015, a conditional pass-through covered bonds programme more closely structured in line with international precedents. Furthermore, this programme was established by Novo Banco in the form of a bridge bank, which we also see as a positive innovative feature. In July 2016, Montepio amended, through a liability management process and the approval of a new base prospectus, its programme, converting it into a pass-through structure. Experience has shown that, given the statutory regime of covered bonds in Portugal (and we would expect the same issue to arise at some point in Germany if this type of product is used), it is recommendable to include a repurchase commitment from the issuer, given separately from the terms and conditions of the bonds, to allow investors to have a senior unsecured right to have their bonds redeemed in cases where the bonds go into pass-through mode, notably in the event of non-payment. The public offer regime may need to be considered and properly managed (or avoided). The first issuances into the market under these programmes are now expected.

Liability management exercises

During 2016, the Portuguese market witnessed some transactions with the purpose of managing and restructuring the balance sheets of Portuguese issuers.

Besides a tender (exchange) offer undertaken in respect of Cimpor securities and a tender offer by REN, following the trend of a BCR transaction last year, the tender offer undertaken by Novo Banco should be particularly highlighted. In light of the specificities of the Portuguese conflict of laws rules, it was possible to structure this transaction so it comprised both institutional (qualified) and retail (non-qualified) investors, albeit under the regulatory requirement to include certain information on the issuer, its prospects and pricing in the tender offer memorandum, but without the need to have a public offer prospectus approved by the CMVM.

Changes in debt securities legislation

As described in the last years' chapter, the Companies Code was amended, in particular in relation to the legal regime of bonds, by Decree-Law No. 26/2015, of 6 February. We summarise below the impact of the most relevant changes since 2015.

An important amendment was introduced to Article 348 of the Companies Code, extending the exceptions to the general rule of more than one year of commercial registration for a company to issue bonds by including the possibility of an auditor report, issued under certain terms, as an exception. In particular, the auditor issuing such report needs to be registered with CMVM, and the report must not date to more than three months prior to the issue of the bonds. This new exception has been successfully tested, including with the registration of the relevant bonds with Interbolsa. For instance, newly incorporated SPVs may have recourse to this new venue to issue bonds.

Additionally, a number of changes were made to Article 349 of the Companies Code, the most relevant being, in our view, the inclusion of a wholesale exemption inspired by the Prospectus Directive. Currently, bond issuances with a denomination per bond or a subscription price per investor of at least €100,000 are not subject to any limitation for issuing bonds based on the company's financial situation or autonomy. This exemption is now contributing to opening up the institutional segment of bond market to a wider range of issuers.

The rules applicable to the common representatives of bondholders were also amended with positive impacts in the Portuguese market. Notably, similarly to the regime governing covered bonds and securitisation transactions, a financial intermediary or an entity authorised to provide investor representation services in an EU Member State (i.e., professional trustees) may now also undertake the role of common representative. In light of these amendments, trust and agency professionals have already been engaged for some ordinary bond transactions, giving investors the benefit of professional assistance in their representation in relation to issuers and a wider choice of entities to perform the role of common representative.

Additionally, the independence criteria applicable to the common representative were further clarified, and now include a prohibition on appointing an entity that holds, directly or indirectly, 2 per cent or more of the share capital of the issuer, that is in a group or control relationship with the issuer, or that provided legal or financial services to the company or the financial intermediaries or promoters involved in the transaction.

Finally, and also inspired by the regime governing covered bonds and securitisation transactions, the Companies Code was amended to allow the appointment of a common representative in the issuance documents, subject to the bondholders' right to remove such representative and appoint a new representative, therefore avoiding not having an appointed representative at the time of issue, or having to apply alternative and more complicated procedures.

Changes in banking law

An innovative amendment to the Legal Framework of Credit Institutions and Financial Companies was introduced this year by Decree-law 20/2016, of 20 April with the purpose of bringing more efficiency to the market for corporate control of credit institutions and to foster investment in the banking system. According to this new legal provision, shareholders of credit institutions should, at least every five years, review the limitations to holdings and exercising of voting rights enshrined in the by-laws (e.g., the voting caps). Therefore, a proposal for a shareholders' resolution either to maintain or to remove limitations to holdings and the exercising of voting rights set out in the by-laws should be submitted to a general shareholders' meeting and voted on at least once every five years. Maintenance of the said limitations can be achieved by the rejection of a proposal to remove them.

The aforementioned Decree-Law contains a specific transitory provision determining that credit institutions should convene a general shareholders' meeting to discuss the said limitations before the end of 2016.

Should the five-year period end without a shareholders' resolution adopted on the matter, the existing limitations will expire. Where a proposal for such a resolution is submitted to the shareholders by the board of directors of a credit institution, no voting caps or by-law supermajorities will apply to the deliberation, which is to a great extent a solution inspired in the breakthrough rule put forward by the Takeover Directive.[4]

The new legal framework opened up fresh opportunities for the takeover bid announced by CaixaBank over BPI (see Section II.i, 'Tender offers', *supra*).

Own-funds regulations

In last year's chapter, we addressed the changes to the own-funds regime, notably as per Regulation (EU) No. 575/2013 establishing rules on common equity Tier 1 capital, additional Tier 1 (AT1) capital and Tier 2 capital.

In the meantime, the Portuguese market for the issuance of Tier 1 and Tier 2 capital instruments has had a modest kick off. Further to the implementation of new features for subordinated and hybrid instruments under the Portuguese EMTN programmes, AT1 issuances by Portuguese banks have been concluded during the year. These were privately placed (and intra-group) issuances, and so far none have been admitted to trading on a regulated market. None of these issues included the conversion feature, and key tax matters (for market transactions) were unsolved at the time of these AT1 issuances, in particular with (no) deductibility of coupon payments and (no) availability of the withholding tax exemption.

In the meantime, the proposal of the Portuguese State Budget for 2017 contains an amendment to the Corporate Income Tax Code, which allows the tax deductibility of income paid under AT1 instruments. An amendment to Decree-law 193/2005 is also foreseen and determines that the income paid under AT1 instruments will not be subject to withholding tax in Portugal. Unfortunately, these amendments are not foreseen for AT1 instruments with a conversion feature (only write-down AT1 instruments).

Note that the State Budget is typically only published in the last business day of the year, even if it was approved before. At this stage, we do not anticipate any difficulties to approve the amendments identified above and we expect some improvements in the Portuguese market of AT1 instruments after the entry into force of said amendments.

A public offer of a Tier 2 capital was recently concluded and the instruments were issued and listed on Euronext Lisbon and on the Luxembourg Stock Exchange. As mentioned in last year's chapter, a deferral of payments clause is no longer required by the Bank of Portugal, further to the Bank's opinion addressing this matter following discussions and valid legal arguments put forward by the banking community during the past year.

4 Directive 2004/25/EC.

Tier 3 capital instruments continue to be discussed in the market, and some debt programmes are being adjusted in accordance with the new TLAC/MREL requirements that shall be applicable. For now, the Tier 2 language in the terms and conditions of programmes are being amended (to foresee the possibility of issuing instruments that rank in between senior instruments and Tier 2 instruments, and that are bail-in-able ahead of senior debt), but new issues of Tier 3 capital instruments will, in practice, depend on older Tier 2 instruments having been redeemed or discontinued. Additionally, it should be reminded that the template of post-issuance notification to the Joint Supervisory Team/ECB includes a line to explain the conformity of Tier 2 instruments with a possible issue of Tier 3 instruments.

One final matter to mention is the special regime established in 2014 for deferred tax assets (DTAs), according to which DTAs based on costs and negative net worth variations arising from credit impairment losses and post-employment or long-term employment benefits may be converted into tax credits where annual negative net results are recorded in credit institutions' individual accounts will be phased out. In fact, Law No. 23/2016 of 19 August sets out that such DTAs recorded from 2016 onwards cannot be converted into tax credits, meaning that new DTAs of such kind are no longer eligible for common equity Tier 1 capital. However, DTAs recorded before 2016 are not impacted.

Other banking remarks

As noted in last year's chapter, Law 102/2015 of 24 August 2015 regulates crowdfunding for the first time in Portugal. Crowdfunding is defined as a financing alternative for entities, their activities or projects that involves raising investment from one or more individual investors upon registration with (online) electronic platforms.

CMVM Regulation No. 1/2016, of 5 May further develops the crowdfunding regime regarding electronic platforms' managing entities registration procedure and the establishment of investment limits. These provisions also foresee a range of duties by crowdfunding beneficiaries, including a set of obligations about information disclosure on investors, crowdfunding electronic platforms and the CMVM. The Regulation shall only apply to equity or debt crowdfunding.

On the soft law front, the Bank of Portugal affirmed, through a circular letter of 3 March 2015, that interest rates in loan agreements, having an underlying reference index, should follow their respective evolution even if such evolution is negative. The Bank of Portugal based this position on particular statutes, but this was issued in the form of a letter and is not legally binding to credit or other institutions. However, the Bank further admits that legal solutions may be implemented to overcome this effect, for instance through derivatives. There have been parliamentary discussions on this matter as well.

We believe this matter will continue to be discussed, as it may impact several contracts between banks and consumers. From our perspective, one should also take into account the onerous nature of bank loans as well as other legal principles. Portuguese law expressly admits the possibility to modify the interest rate in the regime applicable to general contractual conditions. Furthermore, the Civil Code foresees the *rebus sic standibus* rule. Considering the above, a negative interest rate or even a zero interest rate scenario does not appear to us as a legitimate result from a legal perspective, irrespective of the negative evolution of the index and the relevant agreement being silent on this.

Even though said circular letter does not apply to bonds issuances, some bonds issuers are considering including in the relevant terms and conditions or forms of final terms, for the avoidance of doubt, that a negative or zero interest rate will not apply to such bonds. In any case, even if no such provision is foreseen, the issuer should always have the right to waive the benefit of a negative index and ascribe to it a zero amount.

AIFMD

After considerable delay, the AIFMD[5] was finally implemented last year in Portugal through two separate pieces of legislation and regulation:

a Law 16/2015 of 24 February 2015 and CMVM Regulation 2/2015, governing undertakings for the collective investment in transferable securities funds and their respective fund managers, and alternative investment funds and their respective fund managers (generally including real estate investment funds); and

b Law 18/2015 of 4 March 2015, governing venture capital and some other sorts of investment.

A CMVM regulation governing venture capital was also published. Only in respect of (b) did the legislator foresee a lighter regime applicable to fund managers who do not manage assets in excess of €500 million or, if leveraged, €100 million.

Even though the AIFMD addresses the regulation of fund managers and not the funds themselves, the Portuguese legislator took the opportunity to amend a number of fund rules, with particular emphasis on real estate investment funds. We would say that the most significant changes were the amendments to real estate evaluation, shortening the general time frames for real estate appraisals from two years to one year (for some open-ended funds, six months, and subject to a number of exceptions in all funds) and determining that the accounting value of real estate in funds' portfolios should be the average of the two appraisals. In this context, a new legal regime applicable to real estate appraisers was published on 14 September 2015, unifying under one law the requirements applicable throughout the financial sector (banking, insurance, capital markets).

Filings of the updates of fund managers with the regulators is in many cases still pending, given the amount of filings that have taken place and need to be reviewed, but this does not affect the continuance of their operations.

Transparency Directive

The latest amendments to the Transparency Directive[6] were implemented through Decree-Law 22/2016 of 3 June. The new framework pursues simplification and mitigates short-termism by abolishing the obligation of listed companies other than financial institutions to publish quarterly financial statements. Nevertheless, it is expected that some blue chip companies will opt in and continue to publish quarterly reports in an effort to provide analysts and investors with ongoing information about their performance.

As regards long economic positions acquired and held via derivative instruments that have listed shares as underlying assets, these are now accounted for by law in the calculation of qualified shareholdings, which implies that holding such long positions can also contribute to triggering the duty to launch a mandatory takeover bid over a listed company once the

5 Directive 2011/61/EU.

6 Directive 2013/50/EU, amending Directive 2004/109/EC.

thresholds for a mandatory bid are crossed. The new regime also provides for the traditional Transparency Directive custodian exemption (under which shares are held only as a mere custodian on behalf of clients with no voting discretion).

It is also worth noting that domestic listings and offering prospectuses may now be written in a language accepted by the CMVM, rather than only in Portuguese. In principle, the CMVM is not limited to choosing English when making a decision on the concept of 'accepted language'.

MiFID2

A challenge that financial intermediaries on the securities law front are expected to face in future years is the implementation of MiFID2.[7] We anticipate and would advise that this will be a gradual process, with entities adjusting even before the formal or legal implementation of MiFID2 in Portugal. One of the key areas seems to be the more demanding rules on costs, charges and (especially) inducements, and more so in respect of independent discretionary portfolio management or investment advice. Financial intermediaries may need to revisit the fee structures and arrangements that they have in place to avoid a negative outcome.

Solvency II

The implementing legislation of the Solvency II Directive[8] was finally published on 9 September 2015 (Law 147/2015), entering into force on 1 January 2016 subject to a number of transitional provisions. The Portuguese legislator and regulator had been anticipating a number of features of Solvency II over the past few years, so in many fields the expected impact should not be as big as it will be in some other jurisdictions. In any case, and considering, *inter alia*, that Solvency II focuses greatly on the market risk inherent to the assets in which insurance companies have invested, we expect Solvency II to have an impact in terms of regulatory capital requirements imposed on the Portuguese insurance sector. This might lead to the need to set up, through the capital markets or otherwise, eligible capital instruments to enhance Portuguese insurance companies' capital position.

There has been some discussion on whether certain regulations, or provisions thereof, of ASF (the insurance regulator) still continue to apply after the Solvency II transposition, the conclusion being that some of them (e.g., regarding portfolio composition) should no longer be deemed applicable on a case-by-case basis, even though still appearing on the regulator's website.

On the other hand, Solvency II heavily restricts, due to its capital charges, investment in ABS (differently from the US, for instance), which is not welcome news when in Portugal and across the EU efforts are being made to revive the ABS market, also within the context of the Capital Markets Union initiative.

iii Cases and dispute settlement

During the past year, the swaps business has continued to be a hot topic. Banks in the Portuguese market have been contracting swaps with clients in the past decade as follows:

7 Directive 2014/65/EU.

8 Directive 2009/138/EC.

under Portuguese law (and jurisdiction) governed master agreements, based on the International Swaps and Derivatives Association (ISDA) master agreement principles, but shorter and less complex; and 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 small and medium-sized enterprises that are relatively less experienced in the financial markets and more tempted to sue banks when an underlying asset evolves negatively.

Highlighted case law

During the past few years, several cases concerning interest rate swap agreements were analysed and decided by the Portuguese Supreme Court of Justice (STJ).

In 2013, the STJ acknowledged the validity of derivative contracts and the applicability of a swap termination due to an abnormal change in circumstances, and also highlighted the importance of securing a balanced contract.

Following this decision, in 2015, two cases were noteworthy for clarifying a range of issues that had been extensively discussed among the legal community, as reported in last year's chapter. The STJ affirmed derivatives as legally valid financial instruments, recognised as such under EU and national law, and no longer qualifying swaps as gambling or betting contracts, in a clear contribution to the stability of the financial system.

More recently, case law has also addressed choice of forum clauses, deciding that the choice of jurisdiction based on the applicable civil procedure EU rules (notably, Regulation (EU) No. 1215/2012) prevails over Portuguese domestic law, therefore acknowledging the validity of clauses attributing jurisdiction to the courts of England.

First real test to fiduciary duties and business judgement rule to come

In the aftermath of the GES crisis there were intense discussions and conflicts within Portugal Telecom (now Pharol) when it was found that it had invested approximately €900 million in GES commercial paper. This led to the renegotiation of the merger terms with Oi, and is now also expected to lead to a number of litigations to be initiated against former corporate body members, including executive directors. Even though Portugal has had (in the books, at least) a fiduciary duties regime at the level of the most modern jurisdictions and a business judgement rule (much in line with the US experience) in place since 2006, these rules have, however, not yet been really tested in a big case. It seems now will be the time for this following the issuer's shareholders' meeting in July 2015, and the filing of the first set of claims that took place thereafter.

iv Measures to facilitate inflows of fresh equity to companies

Council of Ministers Resolution 100/2015 of 23 December set up a special structure under the coordination of the Minister of Economic Affairs tasked, *inter alia*, with assessing the current instruments to raise capital and to propose detailed measures that allow the streamlined access of companies to new equity. It is expected that the outcome of the work of such special structure may have a positive impact in removing gold-plating and some other legal and regulatory hurdles to investment and capitalisation that arise from the currently non-harmonised and specific Portuguese legal requirements.

v Role of exchanges, central counterparties and rating agencies

The Target 2 Securities system has entered into force and is currently applicable. For this purpose, Interbolsa published Regulation 2/2016. Interbolsa also became an eligible securities settlement system for the purposes of the STEP/Step Label, which will certainly enhance the market and collateral prospects for Portuguese commercial paper issuers.

vi Other strategic considerations

It is expected that financial downside risks, the dismaying prospects for some relevant emerging markets and the lacklustre performance of the eurozone may keep balance sheets under stress, and thus create attractive transactional and business opportunities across different economic sectors. Pragmatism is bound to prevail over ideological considerations, and the environment for mergers and acquisitions and direct investment is also expected to improve.

Some recent negative developments in the market underline the relevance for systemic entities and listed companies to have in place robust compliance and risk management systems. The increased public pressure on official institutions (and with the BES/GES crisis, and other still very fresh cases such *Portugal Telecom*) will result in more intense scrutiny by supervisory authorities, including the CMVM, namely regarding:

a prospectus review and approval;
b complex financial products placement and relevant documentation;
c rules of conduct; and
d corporate governance.

Internal governance arrangements of listed firms and financial institutions, and the assessment of the suitability of holders of positions in credit institutions and corporate bodies, increasingly tend to be on the regulators' radar.

Given the speed of approval of securities legislation in Brussels in the form of regulations and directives, a cautious regulatory approach should be taken as the legal regime is constantly subject to changes. In any case, there is great expectation regarding the developments and outcome of the Capital Markets Union initiative from the European Commission, particularly considering that Portuguese companies are very highly dependent on banking credit while Portuguese banks are still facing significant challenges and needs for deleverage.

Finally, as different types of investors have had to bear heavy losses in listed shares and bonds, there is likely to be increasing securities law litigation in the courts by retail investors, subordinated creditors and shareholders, but also by senior creditors affected by developments in the market in the past couple of years. Investor activism is also likely to increase.

III OUTLOOK AND CONCLUSIONS

As previously mentioned, Portugal has exited the Economic Adjustment Programme, but the new environment is still challenging. It will also bring legal challenges, which are, however, proportionate to the investment opportunities that may arise, as the increased activity in the Portuguese mergers and acquisitions market shows.

Appendix 1

ABOUT THE AUTHORS

JOSÉ PEDRO FAZENDA MARTINS
Vieira de Almeida & Associados, Sociedade de Advogados, SP RL
José Pedro Fazenda Martins has a master's of law degree from Lisbon Faculty of Law, and is a former head of the issuers and corporate finance team of the CMVM. He joined Vieira de Almeida & Associados in 2011 as of counsel of the capital markets practice. He has been actively involved in privatisations, IPOs, takeover bids and corporate governance issues. He is a former professor–assistant at the Lisbon Faculty of Law, has published several articles, and has been a speaker at several conferences in the field of securities law. He is a founding member of the Securities Law Institute of the Lisbon Faculty of Law.

ORLANDO VOGLER GUINÉ
Vieira de Almeida & Associados, Sociedade de Advogados, SP RL
Orlando Vogler Guiné has a law and a business law master's degree from the Coimbra Faculty of Law, and a postgraduate degree in securities and business law from the Lisbon Faculty of Law. He joined Vieira de Almeida & Associados in 2006, after an internship with the Portuguese Securities Commission (CMVM). He has been actively involved in capital market transactions there since, including takeovers, liability managements, asset-backed securities, debt, hybrid and share issues, including IPOs and ABBs, bank recapitalisations and resolution, undertakings for collective investment, and derivatives, assisting some leading institutions in the financial and non-financial sectors. Besides his professional work, he has been a guest lecturer on postgraduate and master's courses, and at several conferences, and published works on securities and company law. He is a member of the Business Law Institute (IDET – Coimbra Faculty of Law) and of the Portuguese/Swiss Chamber of Commerce.

SANDRA CARDOSO
Vieira de Almeida & Associados, Sociedade de Advogados, SP RL
Sandra Cardoso has a law degree from the New University of Lisbon Faculty of Law, LLM from the Erasmus University in Rotterdam and a postgraduate degree in securities law from the Lisbon Faculty of Law. She joined Vieira de Almeida & Associados in 2013,

after working at the Portuguese Securities Commission (CMVM) since 2009. She has been actively involved in capital market transactions, including takeovers, liability managements, asset-backed securities, debt and hybrid instruments, IPOs and derivatives. She has also been a speaker at various conferences.

VIEIRA DE ALMEIDA & ASSOCIADOS, SOCIEDADE DE ADVOGADOS, SP RL

Av Duarte Pacheco 26
1070-110 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
ovg@vda.pt
sic@vda.pt
www.vda.pt