The International Capital Markets Review

Seventh Edition

Editor
Jeffrey Golden

The Law Reviews

© 2017 Law Business Research Ltd

THE INTERNATIONAL CAPITAL MARKETS REVIEW

Seventh Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2017
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Jeffrey Golden

THE LAW REVIEWS

© 2017 Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Anne Borthwick

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2017, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-92-8

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

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

© 2017 Law Business Research Ltd

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

www.TheLawReviews.co.uk

© 2017 Law Business Research Ltd

ACKNOWLEDGEMENTS

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

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY

BHARUCHA & PARTNERS

BORENIUS ATTORNEYS LTD

DE PARDIEU BROCAS MAFFEI

DLA PIPER MARTÍNEZ BELTRÁN

G ELIAS & CO

HOGAN LOVELLS BSTL, SC

INTERNATIONAL COUNSEL BUREAU

KING & WOOD MALLESONS

MAPLES AND CALDER

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

MORRISON & FOERSTER LLP/ITO & MITOMI

NIELSEN NØRAGER LAW FIRM LLP

PAKSOY

PETER YUEN & ASSOCIATES IN ASSOCIATION WITH FANGDA PARTNERS

PINHEIRO NETO ADVOGADOS

P.R.I.M.E. FINANCE FOUNDATION

REED SMITH

RUSSELL MCVEAGH

SIDLEY AUSTIN LLP

TOKUSHEV AND PARTNERS

© 2017 Law Business Research Ltd

URÍA MENÉNDEZ ABOGADOS, SLP

VIEIRA DE ALMEIDA

WEERAWONG, CHINNAVAT & PARTNERS LTD

© 2017 Law Business Research Ltd

CONTENTS

PREFACE.. vii
Jeffrey Golden

Chapter 1 AUSTRALIA.. 1
Ian Paterson

Chapter 2 BRAZIL.. 22
Ricardo Simões Russo, Gustavo Ferrari Chauffaille and Luiz Felipe Fleury Vaz Guimarães

Chapter 3 BULGARIA.. 30
Viktor Tokushev and Nataliya Petrova

Chapter 4 COLOMBIA.. 41
Camilo Martínez Beltrán and Sebastian Celis Rodríguez

Chapter 5 DENMARK.. 51
Peter Lyck and Brian Jørgensen

Chapter 6 FINLAND.. 62
Juha Koponen, Ari Syrjäläinen, Janni Hiltunen and Mark Falcon

Chapter 7 FRANCE.. 73
Antoine Maffei and Olivier Hubert

Chapter 8 GERMANY.. 103
Dennis Kunschke

Chapter 9 HONG KONG.. 113
Vanessa Cheung

Chapter 10 INDIA.. 128
Vishnu Dutt U

© 2017 Law Business Research Ltd

Chapter 11 IRELAND 139
Nollaig Murphy

Chapter 12 JAPAN 165
Akihiro Wani and Reiko Omachi

Chapter 13 KUWAIT 178
Abdullah Alharoun

Chapter 14 LUXEMBOURG 189
Frank Mausen and Henri Wagner

Chapter 15 MEXICO 212
René Arce Lozano, Mayuca Salazar Canales and Mariana Hernández Villarreal

Chapter 16 NEW ZEALAND 223
Deemple Budhia and John-Paul Rice

Chapter 17 NIGERIA 233
Fred Onuobia and Bibitayo Mimiko

Chapter 18 PORTUGAL 241
José Pedro Fazenda Martins and Orlando Vogler Guiné

Chapter 19 RUSSIA 253
Vladimir Khrenov

Chapter 20 SPAIN 267
David García-Ochoa Mayor and José María Eguía Moreno

Chapter 21 THAILAND 277
Patcharaporn Pootranon and Nattaya Tantirangsi

Chapter 22 TURKEY 286
Ömer Çollak and Ökkeş Şahan

Chapter 23 UNITED ARAB EMIRATES 299
Gregory J Mayew and Silvia A Pretorius

© 2017 Law Business Research Ltd

Chapter 24 UNITED KINGDOM 313
Tamara Box, Ranajoy Basu, Claude Brown, Caspar Fox, James Wilkinson, Tim Dolan, Adrian Brown, Winston Penhall and Daniel Winterfeldt

Chapter 25 UNITED STATES 345
Mark Walsh and Michael Hyatte

Appendix 1 ABOUT THE AUTHORS 359
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 375

© 2017 Law Business Research Ltd

PREFACE

This book serves two purposes, one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a comparative law reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury, if ever it did, of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, the client certainly may have multijurisdictional ambitions or, even if unintended, its activities often may risk multijurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

But actually the second purpose that this book aims to serve is, ironically, to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local, but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory framework, thereby giving lawyers, in-house compliance officers, regulators, law students and law teachers also an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could or should best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in our domestic as well as international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

A week before writing this Preface, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, in the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the

© 2017 Law Business Research Ltd

more theoretical aspects of our discussion and ground them in the specific example of the capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual exchanges of information between lawyers from different jurisdictions directly. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the Appendices to this book may help identify local counterparts in potentially relevant jurisdictions (one new jurisdiction, Thailand, having been added this year). And, in that case, hopefully a pre-read of this book's content may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration of our contributing experts, as I wrote in the preface to the last edition, continues. It remains too a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amidst the growing interdependence of our professional world.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2017

© 2017 Law Business Research Ltd

Chapter 18

PORTUGAL

José Pedro Fazenda Martins and Orlando Vogler Guiné[1]

I INTRODUCTION

The Portuguese economy has been gradually improving, although some uncertainties still remain, since the conclusion of the Financial Assistance Programme in 2014, as to the financing conditions of the country and its financial institutions. The government, supported by a parliamentary left-wing alliance that was sworn in on 26 November 2015, has managed to retain the required majorities in Parliament.

The recapitalisation of Portuguese banks has been in the limelight over recent years, considering the high amounts of capital required for this purpose, fuelling the ongoing discussion about a solution (systemic or not) for non-performing loans (whether through a bad bank or management vehicle, and including market or private sales of such loans).

The Portuguese capital markets framework is substantially in line with European legislation. Specific laws may apply to specific instruments, their form of representation 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 establishes 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 Financial Companies Framework (enacted by Decree-Law 298/92, as amended) have been recently adjusted to transpose European legislation or, in certain cases, to improve the regime directly applicable to, or that may impact on, the capital markets.

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 currently being implemented and EU harmonisation developments, national banking laws are 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 divided in accordance with the activities and matters at stake), which are supervised by three different authorities:

a the Bank of Portugal, the Portuguese central bank, 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;

1 José Pedro Fazenda Martins is a partner and Orlando Vogler Guiné is a managing associate at Vieira de Almeida.

© 2017 Law Business Research Ltd

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 national insurance system. There is currently no ongoing discussion about this system of supervision, in contrast with discussions held in the past, when pundits proposed the adoption of a twin peak system.

The Portuguese authorities may apply sanctions to entities that fail to comply with the applicable laws. In general, resulting fines depend on the type of entity and activities carried out, as well as 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 given the collapse of some important Portuguese economic conglomerates, the supervisory authorities have been much more active in sanctioning market players, and, thus, the above-mentioned special court on regulatory matters was set up to enhance the capacity to respond to current regulatory demands. In recent years, authorities have imposed fines on several entities, including banking board members who were accused of hiding relevant accounting information.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

Resolution developments

Further to the resolution of Banco Espírito Santo, SA (BES) and the creation of the bridge bank Novo Banco on 3 August 2014, the Novo Banco sale process was launched by the Bank of Portugal and then suspended in September 2015, with a relaunch announced on 15 January 2016, through a 'strategic sale process' whereby the private equity firm Lone Star was selected as the buying entity of Novo Banco. 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 public interest, seeing as these were bonds issued by BES directly to qualified investors, with denominations of at least €100,000. This was a controversial but landmark decision across the EU, in a post-Bank Recovery and Resolution Directive environment, which led to the submission of several court oppositions by holders of said non-subordinated bonds.

In accordance with the announcement disclosed by the Bank of Portugal[3] on 31 March 2017, Lone Star is required to make a capital injection into Novo Banco in the amount of €1,000 million (€750 million upon completion of the transaction and a further €250 million within the following three years). Through these capital injections, Lone Star will come to hold 75 per cent of Novo Banco's share capital (the Portuguese Resolution Fund,[4] an entity financed by the Portuguese financial entities, will hold the remaining 25 per cent

2 Available at www.bportugal.pt/en-US/OBancoeoEurosistema/Esclarecimentospublicos/Documents/Deliberation20151229_retransfer.pdf.
3 Available at https://www.bportugal.pt/en/comunicado/press-release-sale-novo-banco.
4 *Fundo de Resolução.*

© 2017 Law Business Research Ltd

of Novo Banco's share capital). The completion of this sale depends on the obtaining of the usual European regulatory authorisations (including from the European Central Bank and the European Commission), as well as the performance of a liability management exercise, aimed at enhancing Novo Banco's own funds ratio. This liability management exercise was launched by Novo Banco, as described below, with a view to generating at least €500 million of eligible own funds for the calculation of the CET1 ratio. Although the minimum condition established for the liability management exercise was not met, Lone Star and the Portuguese Resolution Fund have agreed to deem satisfied such condition and all conditions precedent set out in the sale and purchase agreement of 75 per cent of Novo Banco's share capital.[5] On 18 October, the conclusion of the sale of 75 per cent. of Novo Banco's share capital was announced.[6]

On 20 December 2015, the Bank of Portugal applied a resolution measure to Banif – Banco Internacional do Funchal, SA, which resulted in the acquisition by Banco Santander Totta, SA (BST) of a set of rights and obligations constituted by 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.[7] Unlike the resolution applied to BES (bridge institution tool), the measure applied to Banif consisted in the sale of a business tool, whereby Banif's overall activity was transferred to BST, as mentioned above, except those assets transferred to an asset management vehicle (Oitante, SA) set up in this context. Further to said resolution measure, on 30 December 2016, Oitante, SA sold to BST 100 per cent of the share capital of Gamma – Sociedade de Titularização de Créditos, SA, a securitisation company that is part of the former Banif group.

Tender offers

Given the relatively small size of the Portuguese market, takeover bids are not very common; nevertheless, since the second semester of 2016 up to September 2017 some takeover bids have been preliminarily announced.

As regards the banking sector, the Spanish bank CaixaBank (which was already a major shareholder of Banco BPI, holding just under half of its share capital and voting rights) concluded the public, general and mandatory takeover bid for the acquisition of Banco BPI, SA (BPI), preliminarily announced in April 2016, following a first attempt back in 2015 that was unsuccessful owing to the conditions to which such offer was then subject – removal of the voting rights cap in BPI's by-laws – not having been met. The legal framework for maintaining and removing voting rights caps in financial institutions' by-laws has since changed, and a shareholders' meeting resolution is now sufficient to remove such voting rights cap. The board of directors of a financial institution is also allowed to propose that the shareholders' meeting resolve on this removal without applying any voting rights cap or supermajorities established in the financial institution's by-laws. Given that BPI's board of directors proposed such a resolution to the institution's shareholders' meeting and that the shareholders subsequently approved the removal of the voting rights cap, the preliminary voluntary takeover bid announced by CaixaBank was converted into a mandatory general

5 Available at http://web3.cmvm.pt/sdi/emitentes/docs/FR66003.pdf.
6 Available at http://web3.cmvm.pt/sdi/emitentes/docs/FR66141.pdf.
7 Available at https://www.bportugal.pt/en/comunicado/press-release-banco-de-portugal-sale-banif-banco-internacional-do-funchal-sa.

© 2017 Law Business Research Ltd

takeover bid. This takeover bid was registered by the CMVM on 16 January 2017 and, following its launch, CaixaBank reached a total holding of 84.51 per cent of BPI's share capital.

In addition, on 4 July 2017, Montepio Geral – Associação Mutualista (MGAM) preliminarily announced a public, general and voluntary takeover bid for the participation units representing the participation fund of the then savings bank Caixa Económica Montepio Geral (CEMG). MGAM offered €1 per participation unit, which represents a very significant premium when compared to the average price of the participation units in the six months prior to the preliminary announcement. Although this is a high premium, the Portuguese Securities Code does not provide a cap for the consideration offered in takeover bids, only a floor for the consideration offered in mandatory takeover bids, thus fostering the protection of investors' interests. In accordance with the Portuguese Securities Code, the consideration offered in mandatory takeover bids may not be less than (1) the highest price paid by the offeror for the 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, the 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 a private deal, when the market for the relevant securities is not liquid, or when the market price of the securities has been affected by exceptional events.

This takeover bid ended on 8 September 2017 and, as a result, MGAM directly held 98.28 per cent of CEMG's participation fund, and, further to the transformation of CEMG into a *sociedade anónima* public limited liability company and the conversion of the participation units into common shares, MGAM now owns 99.7 per cent of CEMG's total share capital. MGAM launched a permanent order to buy the common shares that the previous holders of participation units and then holders of common shares, as per the transformation mentioned above, did not dispose of in the context of the takeover bid. This permanent order to buy is intended to provide an exit mechanism for said holders, thus allowing MGAM to become the sole shareholder of CEMG. In addition, a request for the loss of public company status[8] was submitted by CEMG to the CMVM and was subject to a decision of CEMG's shareholders. On 9 October 2017, CEMG's general meeting of shareholders approved by more than 99 per cent the loss of public company status, which was then authorised by the CMVM on 13 October 2017.

In the energy sector, on 5 July 2017, EDP – Energias de Portugal, SA – announced the launch of a general and voluntary takeover bid for the acquisition of the shares issued by EDP Renováveis, SA, with a consideration price of €6.75 per share. In accordance with the takeover bid documents disclosed, in the event that EDP achieved 90 per cent of the share capital and voting rights of EDP Renováveis, a request would be submitted for the delisting of EDP Renováveis' shares from the regulated market of Euronext Lisbon and a permanent order to buy the remaining shares would be set up for a period of three to six months.

As per the results notice disclosed on 4 August 2017, EDP acquired 43,907,516 of EDP Renováveis' shares, corresponding to 5.03 per cent of its share capital, which, added to the

8 *Perda de qualidade de sociedade aberta.*

© 2017 Law Business Research Ltd

shares already held by EDP, made up a total amount of 720,191,372 shares, corresponding to 82.56 per cent of EDP Renováveis' voting rights, just falling short of the 90 per cent threshold required to request the delisting of EDP Renováveis' shares.

A partial and voluntary takeover bid of Cipan (a public limited company) was preliminarily announced in August 2016 by Chartwell, a shareholder of Cipan. At the end of September 2016, Cipan's previous major shareholder 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 of Cipan's remaining shares. Chartwell then submitted a request to the CMVM to withdraw this preliminary takeover bid announcement, arguing that there had been a change in the circumstances based on which the takeover bid was preliminarily launched. This request was not accepted by the CMVM and the two takeover bids were launched on the same day. The takeover bid launched by Chartwell was subject to it acquiring 10 per cent (given that this was a voluntary takeover, such a condition could be established) of Cipan's share capital and voting rights – a requirement that was not met during the takeover bid period, thus rendering the offer ineffective. The takeover bid launched by Lusosuan resulted in it acquiring approximately 2 per cent of Cipan's voting rights, which saw it increase its shareholding to 87 per cent of Cipan's share capital and voting rights.

In the media sector, Meo – Serviços de Telecomunicações e Multimédia, SA (Meo) preliminarily announced a mandatory takeover bid over the shares of Grupo Media Capital, SGPS, SA on 14 July 2017, as a result of its acquisition of the total capital of the company that held more than 90 per cent of the voting rights of Grupo Media Capital. This takeover bid is subject, among other conditions, to the approval or non-opposition of the Portuguese Competition Authority and of ERC (the Portuguese media regulatory authority). The CMVM issued a decision determining the appointment of an independent auditor (which is yet to be appointed) to establish the consideration to be offered by Meo, given that the CMVM considered that none of the above-mentioned criteria to define the consideration price was applicable, seeing as the liquidity of Grupo Media Capital's shares was not enough and the highest price paid for the acquisition of such shares resulted from a private deal.

A mandatory general takeover bid was launched by Investéder, Investimentos, Lda over the common shares and preferential shares (carrying voting rights, owing to the fact that the target company had not distributed dividends over the past years) of SDC – Investimentos, SGPS, SA, subject to, among other conditions, the target company's disposal of the voting rights held in some of its subsidiaries. Although the offeror held no shares in the target company, it was its main creditor, after having acquired the credits held by financial institutions in the target company and its subsidiaries. As per the results notice disclosed on 5 June 2017, the offeror acquired 73.64 per cent of the target company's voting rights and share capital.

Public offers

Non-financial Portuguese companies continued to seek recourse to the capital markets up to the end of 2016 and into the first semester of 2017. As in past years, this included public subscription offers of bonds by two of the major listed football companies, Sport Lisboa e Benfica – Futebol, SAD (in May 2017) and Futebol Clube do Porto – Futebol, SAD.

Government bonds also continued to be placed under public offer, thus allowing retail investors to enter this market segment, which had been previously restricted (as far as the primary market was concerned) to institutional investors. Public offers of floating rate bonds

© 2017 Law Business Research Ltd

(OTRV) were successfully made in 2017, for a total amount of €2.2 billion, and the bonds were admitted to trading on the regulated market of Euronext Lisbon. The transactions closed in April and July 2017.

Debt markets – other remarks

The past few years have continued to see some activity in this respect, including private placements (both with and without listing). In the non-financial sector, we would highlight the issue of eurobonds by Impresa and José de Mello Saúde in 2017, placed to institutional investors.

In addition, Caixa Geral de Depósitos, SA (CGD) issued €500 million (Additional Tier 1 instruments) within the context of its recapitalisation programme, as detailed below.

As regards the EMTN programmes of Portuguese issuers, it is noteworthy that the update of most programmes occurred or is scheduled to occur during the second semester of 2017, including updates to the programme in light of the prohibition on issuing bearer securities, as a result of the recent change to the Portuguese securities regime mentioned below.

ii Developments affecting derivatives, securitisations and other structured products

Derivatives

As is the case throughout the EU, the most relevant development was the entering into force of the 'variation margin' requirement for FC and NFC+, at the beginning of March 2017. This entailed amendments to and the negotiation of new CSAs to the ISDA master agreements, adjusting the terms of collateral exchange to the requirements under Commission Delegated Regulation (EU) No. 2016/2251. In the Portuguese market, the preference has been to keep only one CSA in place, for legacy and new derivatives, negotiated bilaterally, even though some of the international investment banks have been resistant to this approach.

Asset-backed securities (ABS)

The securitisation market has been active during 2017, and a variety of transactions has already been completed, while others are still being negotiated or announced. These included transactions listed on the regulated market of Euronext Lisbon, both retained and placed in the market (at least some tranches of the transactions), with a variety of different assets or receivables being securitised, including electricity receivables and traditional banking loans (for instance, mortgage-backed loans and consumer loans – both performing and non-performing loans). The transaction structure is, in certain cases, becoming more complex, since the tendency is to turn to hedging instead of swaps (as seen a few years ago).

There has been intense discussion in Portugal on the topic of non-performing loans, which, owing to their number and weight, are currently undermining the performance of Portuguese financial institutions. This discussion has notably revolved around the search for a systemic solution to the problem, including a common NPLs management platform.

In the mean time, some banks have been selling some of their non-performing loans; a relevant transaction (unsecuritised) in this regard being the sale of €476 million non-performing loans to the private equity fund Bain Capital Credit by CGD. On 6 November, Caixa Económica Montepio Geral announced that it has placed in the market, under competitive conditions, a portfolio of non-performing loans with a total value of approximately €580 million. This transaction was structured through a securitisation named

© 2017 Law Business Research Ltd

Evora Finance where JP Morgan acted as sole arranger and placement agent. This is the first securitisation carried out in Portugal of a non-performing loans portfolio with public ratings assigned (Moody's and DBRS). On our side, we would expect this to set a precedent and for other similar transactions to be structured and launched, and so contributing to solving the high NPLs ratio that a number of Portuguese banks still hold on their books.

Covered bonds

Covered bonds continue to play a role in the Portuguese capital markets, with several issuances on the banking side, including syndicate issuances. Pass-through covered bonds programmes have also been set up by Portuguese issuers. By the end of October, the first issue of pass-through covered bonds placed in the market by a Portuguese issuer had taken place.

As mentioned above in respect of EMTN programmes, covered bond programmes are also being updated with a view to removing bearer covered bonds.

The market is now expecting the results of the works currently being developed by the European Commission on a proposal for a common EU minimum covered bonds framework. It remains to be seen whether the industry's strong concern with EU legislation being drafted on a principle basis (rather than a detailed rule basis) will actually be met by the European institutions.

Liability management exercises

During 2017, the Portuguese market witnessed transactions with the purpose of managing and restructuring the balance sheets of Portuguese issuers.

Novo Banco has launched a tender offer/consent solicitation to holders of certain series of securities, including series still issued within the former BES group, to tender their securities for purchase by the bank for cash and to approve, by extraordinary resolutions, certain amendments to the terms and conditions of each series of securities. In addition, fixed-term deposits were also offered to the beneficial owners of the securities subject to the tender offer/consent solicitation. At the meetings convened to resolve such amendments to the terms and conditions, most of the series voted on said amendments (although not all that voted approved them).

It is worth noting that this transaction is far more complex than the cash tender offer launched by Novo Banco in 2016. Furthermore, and as with the 2016 transaction, although these transactions are not subject to the CMVM's supervision (seeing as the securities being targeted are not admitted to trading on a Portuguese regulated market), the contents of the disclosed documents resemble the contents of a tender offer prospectus, including, in particular, similar responsibility statements and a risk factors chapter, the documents also being disclosed in a Portuguese version.

As mentioned above, and despite the results of the liability management exercise, the sale of Novo Banco's share capital was concluded on 18 October.

Changes in debt securities legislation

As was made reference to in last year's chapter, the changes introduced to the Companies Code, as far as the legal regime on bonds is concerned, have been successfully implemented, and new issuers now have recourse to the bonds market, mostly through private deals, thus becoming an alternative to the traditional loan financing granted by credit institutions.

Law No. 15/2017, of 3 May, has prohibited the issuance of bearer securities, and currently only registered securities can be issued by Portuguese issuers. In addition, outstanding bearer

© 2017 Law Business Research Ltd

securities must be converted into nominal securities until 4 November 2017. The applicable mechanism was published on 25 September, and on 26 September a regulation was issued by Interbolsa (providing additional details on the mechanisms of the request for such conversion of securities registered with Interbolsa). After the transitional period, dividends and interest due on bearer securities not converted will not be distributed to the holder of such securities, but will rather be deposited in one entity on behalf of the issuer. It is, therefore, expected that issuers will swiftly proceed to convert outstanding bearer securities. Naturally, this regime was thought out by the Portuguese legislator taking into account the country's specific system, which may differ from the securities rules applicable in other jurisdictions.

Own-funds regulations

In last year's chapter, we addressed the changes to the own-funds tax regime contained in the Portuguese State Budget proposal for 2017, notably to allow the tax deductibility of income paid under AT1 instruments, but regrettably not applying to AT1 instruments with a conversion feature (only to write-down AT1 instruments). Said changes were approved and, as mentioned, led to the CGD's AT1 capital instruments issuance, the first issuance by a Portuguese issuer not fully retained. This issue was admitted to trading on a non-regulated market, thus not requiring a prospectus approved by a competent authority, under the EU Prospectus framework, which represents a faster route to these complex transactions addressed to institutional investors. AT1 capital instruments with a conversion feature are yet to be issued by Portuguese issuers, mainly because of the applicable tax regime and the additional criteria needed to be met in terms of authorisation to issue capital or the terms of its conversion. Also, no Tier 2 capital instruments have been issued recently.

Tier 3 capital instruments continue to be discussed in the market, and upcoming news is expected until the end of 2017.

Other law remarks

In the second semester of 2017, relevant legislation was approved in the corporate and insolvency domains aimed at increasing the competitiveness of Portuguese companies. As such, several amendments were introduced to the Portuguese Companies Code and the Portuguese Insolvency Code by Decree-Law No.77/2017, of 30 June. In particular, these amendments are intended to provide additional measures allowing for alternative forms of leveraging of financing and private investment, as well as a greater dynamism of the capital markets.

In the context of this framework, the following measures have been approved, among others:

a a procedure for converting shareholder loans into share capital (a simplified mechanism applicable to the increase of companies' share capital through the conversion of loans granted by shareholders to the company. The effectiveness of the mechanism is only subject to the shareholders' non-opposition);

b the creation of special investment SIMFE[9] vehicles;

c the creation of 'short-term debt certificates'; and

d regulation of the electronic minutes book.

9 *Sociedades de Investimento Mobiliário para Fomento da Economia.*

© 2017 Law Business Research Ltd

In addition, the legal framework applicable to commercial paper was also amended by Decree-Law No. 77/2017, of 30 June, which solved some of the matters being discussed in this context. For instance, these instruments were previously required to have a maturity shorter than 365 days, whereas the new framework now allows a maturity of up to 397 days. Given the relevance of the amendments introduced, the CMVM disclosed a FAQs document (available only in Portuguese).[10]

AIFMD

After considerable delay, the AIFMD[11] was finally implemented in Portugal in 2015 through two separate pieces of legislation and regulation:

a Law No. 16/2015, of 24 February 2015, already amended twice, mainly in order to implement Directive UCITS V and CMVM Regulation 2/2015, governing undertakings for 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 No. 18/2015, of 4 March 2015, governing venture capital and other types of investment, as well as CMVM Regulation 5/2015, further detailing this matter.

Nonetheless, only in respect of (b) did the Portuguese legislator foresee the application of a lighter regime in relation 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 applicable to fund managers and not the funds themselves, the Portuguese legislator took the opportunity to amend a number of fund rules, with a particular emphasis on real estate investment funds. We would say that the most significant changes were the amendments introduced to real estate evaluation, which shortened the general time frames for real estate appraisals from two years to one year (in the case of some open-ended funds, six months, and subject to a number of exceptions across all funds) and established that the accounting value of real estate in fund portfolios should be the average of the two appraisals. In this regard, Law No. 153/2015, which sets out the regime applicable to real estate appraisers, was published on 14 September 2015, unifying under one statute the requirements applicable throughout the financial sector (banking, insurance, capital markets).

The filing of fund managers' updates with the regulators are, as mentioned last year, for the most part still pending, given the number of filings submitted and that need to be reviewed, as well as the fact that the relevant Portuguese regulators (Bank of Portugal and the CMVM) have adopted a strict approach when it comes to the reauthorisation of such entities. However, these regulators have issued a joint statement confirming that the pending nature of the reauthorisation procedure under the AIFMD does not affect the continuation of their operations.

10 http://www.cmvm.pt/pt/AreadoInvestidor/Faq/Pages/faq_papel_comercial_07092017.aspx.

11 Directive 2011/61/EU.

© 2017 Law Business Research Ltd

MiFID II

A challenge still to be dealt with on the securities law front by financial intermediaries over future years is the implementation of MiFID II.[12] This is a demanding area, particularly in what concerns rules on costs, charges and (especially) inducements, and more so in respect of independent discretionary portfolio management or investment advice. It is expected that financial intermediaries may need to revisit the fee structures and arrangements they currently have in place in order to avoid a negative outcome, and some are already engaged in a global review of their procedures and documentation.

A proposal for the implementation of MiFID II is already being discussed and, as such, no major delays are expected at this stage.

iii Cases and dispute settlement

During the past year, and as mentioned in past editions, the swaps business and corresponding court cases have continued to be a hot topic in Portugal. Banks operating in the Portuguese market have been contracting swaps with clients over the past decade as follows: under master agreements governed by Portuguese law, 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 adopted by larger corporations (or public sector entities, as mentioned above) with wider experience in the financial markets, while the former has been more frequently used for smaller clients and by 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.

Several court cases between Portuguese banks and state-owned companies were pending until 2017. These cases were resolved by the reaching of an understanding between the Portuguese state and said Portuguese banks, whereby most of the costs involved were, directly or indirectly, split between the parties.

The application of the resolution measure to BES entailed a significant amount of litigation, for varied reasons and involving different stakeholders, but this did not prevent the sale process to be concluded in October 2017.

Highlighted case law

During the past few years, several cases involving 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 because of an abnormal change in circumstances, and also highlighted the importance of securing a balanced contract.

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

12 Directive 2014/65/EU.

© 2017 Law Business Research Ltd

More recently, case law has also addressed choice of forum clauses, having decided that choice of jurisdiction based on the applicable EU civil procedure 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.

Further to said decisions, the same understanding has been confirmed in several other court cases.

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

In the aftermath of the Grupo Espírito Santo (GES) crisis, intense discussions and conflicts arose within Portugal Telecom (now Pharol) when it was discovered that it had invested approximately €900 million in GES commercial paper. This led to the renegotiation of its merger terms with Oi, and is now also expected to lead to litigation against former corporate body members, including executive directors. Even though Portugal has had (in the books, at least) a fiduciary duties regime comparable to those of the most modern jurisdictions and a business judgement rule (much in line with the US experience) in place since 2006, these rules have not yet been truly tested in the context of a major case. This appears to be the time for such a test, following the issuer's shareholders' meeting held in July 2015 and the subsequent filing of the first set of claims.

iv Role of exchanges, central counterparties and rating agencies

The Target 2 Securities system has entered into force and is already 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, aimed at enhancing the market and collateral prospects for Portuguese commercial paper issuers.

vi Other strategic considerations

Certain negative developments in the market over the past few years underline the importance for systemic entities and listed companies of having robust compliance and risk management systems in place. The increased public pressure on official institutions has resulted in more intense scrutiny by the 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.

The internal governance arrangements of listed firms and financial institutions, and the assessment of the suitability of those who hold positions in credit institutions and corporate bodies, increasingly tend to be on the regulators' radar.

Investor activism and securities law litigation have also increased over recent years, as mentioned above .

© 2017 Law Business Research Ltd

III OUTLOOK AND CONCLUSIONS

The current environment in Portugal is still challenging, owing to the country's small size, the conditions of the Portuguese economy and the effects of the crises that undermined some Portuguese issuers. This situation will bring legal challenges; however, these are expected to be proportional to the investment opportunities that may arise, as the recent increased activity in the Portuguese mergers and acquisitions market would seem to suggest.

© 2017 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

JOSÉ PEDRO FAZENDA MARTINS

Vieira de Almeida

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 in 2011 and is a partner 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

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 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 has 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.

VIEIRA DE ALMEIDA

Rua Dom Luis I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
jpfm@vda.pt
ovg@vda.pt
www.vda.pt

© 2017 Law Business Research Ltd

Strategic Research Sponsor of the
ABA Section of International Law

ISBN 978-1-910813-92-8

© 2017 Law Business Research Ltd