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A few months after the applicable deadline, Portugal has implemented the EU directive on financial collateral arrangements (Directive 2002/47/EC). This was made through Decree Law 105/2004 of May 8 2005, which, insofar as collateral granted in the context of financial collateral arrangements is concerned, translated into big changes to the creation and enforcement of collateral compared to the general rules set out in the Portuguese Civil Code.

These changes mostly benefit financial institutions, in particular those that usually grant credit to other financial institutions, public entities and corporate clients.

Given that Portugal has opted out the exclusion from the scope of the Directive for financial collateral arrangements where one of the parties is a regular corporate entity, the enactment of the Decree is good news for those involved in corporate finance deals.

Overview of the Decree

Financial collateral arrangements

The financial collateral arrangements are characterized in light of the following aspects:

- The parties must be:
 - (a) public entities;
 - (b) the Bank of Portugal, other central banks, the ECB, the International Monetary Fund, the Bank for International Settlements, multilateral development banks, or the European Investment Bank;
 - (c) financial institutions subject to prudential supervision;
 - (d) a central counterparty, settlement agent or clearing house, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by the applicable national legislation;
 - (e) a person, other than a natural person, who acts in a trust or representative capacity on behalf of one or more persons, including any bondholders or holders of other forms

of debt securities or any institution as defined in points (a) to (d); or

(f) corporate entities, provided that their counterparty is an entity falling within the categories listed in (a) to (e).

- The secured obligations must correspond to the delivery of cash or financial instruments (including securities).
- The assets given as collateral must be cash (that is, the balance of a bank account or similar credits) or financial instruments (including securities) and must be under the beneficiary's control (even if this is a joint control with the grantor of collateral). Portugal has opted out the exclusion of collateral consisting of own shares of the collateral-giver from the list of eligible assets.
- The provision of the collateral must be evidenced through a written document.

Financial collateral

The collateral granted in the context of the agreements that meet the necessary requirements to be regarded as financial collateral arrangements is defined as *financial collateral*, and can be construed either as a title transfer financial collateral arrangement or as a financial pledge, depending on whether the beneficiary of the collateral acquires or title to the assets given as collateral.

Title transfer financial collateral arrangements

Because the Portuguese civil code provides for a *numerus clausus* system for rights *in rem*, there had been a wide and ongoing debate as to the intrinsic validity of contractual structures resorting to fiduciary transfer concepts, such as the concept of assignment and transfer by way of security.

This new piece of legislation has – insofar as financial collateral is concerned – cleared up this matter, removing the underlying uncertainty by expressly recognizing the validity of fiduciary transfers by way of security.

Financial pledge

The financial pledge is another area where key innovations have arisen. Such innovations include the possibility of the parties agreeing:

- on the granting to the beneficiary or creditor of a right to use

(that is, dispose of) the pledged assets, notwithstanding its obligation to return equivalent assets if the security provider fulfils the secured obligations; and

- that, in an event of default, the beneficiary or creditor can apply the assets given as collateral directly towards payment for the secured obligations, with no need to resort to judicial enforcement and/or the sale of such assets. This possibility sets aside the general prohibition of direct application of assets given as security towards satisfaction of the secured obligations (*pacto comissório*) that, up to now, would apply in this type of situation.

Effectiveness of collateral on insolvency

A special regime has been adopted that safeguards the validity and effectiveness of these types of collateral in the event of insolvency of the collateral provider. The collateral is therefore valid and effective, even if it is provided on the date on which insolvency proceedings are initiated or during the hardening periods before that date.

In a nutshell, these new rules favour a speedy recovery of credits, contributing to added safety in respect of credit granting transactions that are collateralized by movable assets, as is usually the case with domestic and international corporate finance transactions.