The International Capital Markets Review

Tenth Edition

Editor
Jeffrey Golden

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THE INTERNATIONAL CAPITAL MARKETS REVIEW

TENTH EDITION

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PREFACE

Well, we did not see that one coming!

When the ninth edition of this volume appeared a year ago, we did not see the coming pandemic, lockdowns and working from home (WFH).

We knew even then that there would be new challenges ahead for the capital markets. We knew, for example, that key interbank offered rates (IBORs), benchmarks on which so much financial market activity relies, would be undergoing a period of change and that market participants would have to face up to the adoption of alternative rates and consider adjustments to legacy transactions based on LIBOR or other previously used pricing sources. No one said LIBOR migration would be easy. And that challenge has not gone away. The message from many key regulators is that, pandemic and other operational complications notwithstanding, the shift remains on track. LIBOR, supporting as it does hundreds of trillions of dollars of market activity, is slated for replacement by the end of 2021!

But we did not see and anticipate other challenges brought about by covid-19, basic as some of these may have been, and hidden as they may also have been, in notice provisions and other boilerplate buried in the back recesses of our transaction documents. How do you give effective notice to offices closed (often with the force of law) and with the decentralisation of WFH? If none of the methods contemplated by the parties' agreement can be used, may a different method be used instead?

Challenges though there may be, the capital markets have nonetheless shown their resilience. As I write this preface, Jack Ma's Ant Group has just filed for an initial public offering in Hong Kong and Shanghai that is expected to raise about US$30 billion, in what could be the world's largest offering ever.

And so international capital markets lawyers are still in business, still relevant. But our modus operandi may have changed a bit. In this world of WFH, we keep company with the books on our bookshelves more than we do with the other lawyers in the building. In circumstances such as these, there are ever more compelling reasons to keep this particular volume on our shelf. We can expect to turn more often to published answers when we cannot consult the practitioner in the office next door as easily.

As I have written before, 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 market (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based (even WFH), no longer enjoys the luxury – if ever it did – of focusing solely

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on a home market within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and increasingly technology permits practitioners to tackle international issues.

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities may often risk multi-jurisdictional impact, in which case, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is 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 offered by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations, both in light of what is or may currently be required in their own jurisdiction and also as to where things in that jurisdiction could, or should, best be headed (based on the best practice 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 us as practitioners to revise concepts, practices and advice in both our domestic and 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.

Not long ago, 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, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical aspects of our discussion and ground them in the specific example of 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), notwithstanding that traditional approaches to contract construction may have differed between courts in different jurisdictions.

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 at least to know how experienced courts have answered similar questions.

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There is no reason to think that ICM practitioners would be situated any differently, from judges in this regard or would be less in need of or benefit less from a comparative view when facing the often technical and complex problems confronting them. 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 and direct exchanges of information between lawyers from different jurisdictions. 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 to identify local counterparts in potentially relevant jurisdictions (with new jurisdictions having been added this year – Austria and Taiwan). And, in that case, I hope that reading the content of this book 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. As I wrote in the preface to the last edition, my admiration for our contributing experts 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 amid both the growing interdependence of our professional world and, now, the coronavirus pandemic and its impact on the global economy.

Best wishes for this difficult period. Stay safe, stay well and stay alert.

Jeffrey Golden
Joint Head of Chambers
3 Hare Court
London
October 2020

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Chapter 15

PORTUGAL

José Pedro Fazenda Martins, Orlando Vogler Guiné and Soraia Ussene[1]

I INTRODUCTION

Although the Portuguese economy had been recovering strongly since the end of the global financial crisis, the covid-19 pandemic has seen economic recovery in Portugal – and across the world – grind to a halt. Industrial production has contracted sharply and the unemployment rate has increased, while benchmark rates have headed towards new record lows. The pandemic has created acute funding needs for corporate entities and financial institutions, which have also had to increase loan loss provision. Public support has been widespread, with institutions such as the European Central Bank putting in place asset purchase programmes and other measures aimed at mitigating the effects of the pandemic on businesses and households. The covid-19 pandemic has dominated the political, regulatory and business agenda of Portuguese public and private entities for the greater part of 2020 and is expected to continue to do so for the months to come.

The Portuguese capital markets framework is substantially in line with the European legislation, which has been responsible for increasing harmonisation within the European Union. Notwithstanding, specific domestic laws and regulations may apply to specific instruments, their form of representation and transactions. Regulations issued by the Portuguese Securities Market Commission (CMVM), the Portuguese central securities depository Interbolsa and Euronext Lisbon should also be considered, since these national regulatory authorities may condense, adapt and interpret European legislation with a certain level of discretion.

The Securities Code (enacted by Decree-Law No. 486/99, as amended) establishes the framework for financial instruments, offers, financial markets and financial intermediation and has been the statute used to transpose a variety of important European directives (including any amendments thereto) into national law, such as the Transparency Directive,[2] the Takeover Directive,[3] the Settlement Directives[4] and the MiFID II Directive.[5] Other relevant statutes include the Companies Code (PCC) (as enacted by Decree-Law No. 262/86,

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

2 Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

3 Directive 2004/25/EC on takeover bids.

4 Directive 98/26/EC on settlement finality in payment and securities settlement systems.

5 Directive 2014/65/EU on markets in financial instruments.

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as amended; this governs the corporate rules on shares and bonds) and the Credit Institutions and Financial Companies Framework (enacted by Decree-Law No. 298/92, as amended, also heavily amended to transpose or adjust to EU legislation).

A considerable number of new or revised regulatory frameworks have affected the capital markets in Portugal during 2020, including:

a the new Prospectus Regulation[6] together with Delegated Regulations (EU) 2019/980 and 2019/979, both of 14 March 2019. Among other things, key changes in this context include:
- a prospectus summary as a new content requirement and length restrictions that will make the summary section more concise but more difficult to draft;
- material changes to the rules relating to risk factors, including European Securities and Markets Authority guidelines, to be taken into account; and
- the obligation for financial intermediaries to contact investors on the same day that a supplement is published.

In practice, the changes introduced by the Prospectus Regulation, which entered fully into force in July 2019, have turned out to be less stringent than had been anticipated from the draft. This has eased the adaptation of prospectuses to reflect revised disclosure standards under the Regulation;

b Law No. 69/2019 of 28 August, which provided for the execution in the Portuguese jurisdiction of Regulation (EU) 2017/2402 of 12 December 2017, which lays down a general framework for securitisations and creates a specific framework for simple, transparent and standardised securitisations;

c the SIGI regime, approved by Decree-Law No. 19/2019, which created and regulates real estate investment and management companies (SIGIs) and aligns practices regarding SIGIs with the best international practices on real estate transfer trusts.

d Decree-Law No. 144/2019 of 23 September, which amended and republished the legal framework for collective investment undertakings and, inter alia, granted the CMVM, as from 1 January 2020, full-scope powers to supervise investment funds and investment fund managers, as well as detailing several aspects regarding collective investment vehicles further aligning the national regime with the UCITS V and AIFMD directives;

e Law No. 7/2019 of 16 January, which published the new insurance and reinsurance distribution framework and implemented the Insurance Distribution Directive in Portugal, establishing new requirements for the authorisation and take-up of insurance and reinsurance distribution activities in line with the new European regulatory standard;

f Law No. 27/2020 of 23 July, which published the new pension funds and pension fund managers framework and implemented in Portugal Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision, thus reinforcing the regulatory requirements applicable to the pension fund sector and broadening the rights afforded to investors in those long-term savings vehicles;

g Law No. 50/2020 of 25 August, which transposes Directive (EU) No. 2017/828 on the rights of shareholders of listed companies with regard to the encouragement of their long-term engagement (known as the Shareholder Rights Directive II, or SRD II); and

6 Regulation (EU) 2017/1129 of 14 June 2017.

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h Regulation (EU) 2020/873 regarding certain adjustments to the Capital Requirement Regulation (CRR)[7] in response to the covid-19 pandemic (the CRR Quick Fix),[8] which applies from 27 June 2020, with the exception of the amendments to the calculation of the leverage ratio, which will apply from 28 June 2021. The purpose of the CRR Quick Fix is to encourage banks to continue lending to businesses and households during the crisis caused by the covid-19 pandemic and to absorb the economic shock of the pandemic. In this context, the CRR Quick Fix amends specific aspects of the CRR, such as by extending the transitional arrangements for mitigating the impact of the provisions of International Financial Reporting Standard 9 on regulatory reporting requirements, applying preferential treatment for publicly guaranteed loans under the prudential backstop for non-performing loans available under the CRR, delaying the application of the leverage ratio buffer for global systemically important institutions to 1 January 2023 and bringing forward the dates of application of certain reforms introduced by the CRR2.[9]

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 largely in line with EU rules.

The Portuguese capital markets framework still has a number of specificities (increasingly fewer, in light of EU harmonisation) that should be taken into account. The securities ownership regime is one of them. Under Portuguese law, legal ownership is not set immediately at the level of the accounts opened by financial intermediaries at the local central securities depository (CSD), but rather at a second level in the chain of custody, namely at the level of the accounts opened by clients at the financial intermediaries themselves. In practice, though, the system works well and most international investors hold Portuguese securities through indirect custody chains, going through Euroclear and Clearstream or other global custodians.

Another example with important practical implications is that the Portuguese tender offers regime is significantly wider in scope than the Takeover Directive given that in addition to equity securities, debt securities also fall within its purview (as is the case in some other jurisdictions). This means that typical debt securities tender offers will normally be restricted to professional investors in Portugal unless a securities takeover prospectus is approved and disclosed (in some cases, where the bonds are listed outside Portugal, this takes the form of a long-form information memorandum translated into Portuguese and resembling a prospectus).

7 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012.

8 Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 amending Regulations (EU) No. 575/2013 and (EU) 2019/876 as regards certain adjustments in response to the COVID-19 pandemic.

9 Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012.

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The financial regulatory 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 authorities:

a the Bank of Portugal (the country's 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 operating 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 (investment firms and credit institutions acting in a capacity that falls within the scope of MiFID II); and

c the Portuguese Insurance and Pension Funds Authority (ASF), which supervises the national insurance system.

Finally, 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 a 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 global financial crisis, and given the collapse of some important Portuguese economic conglomerates, supervisory authorities have been much more active in sanctioning market participants and 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

Tender offers

Given the relatively small size of the Portuguese market, with a reduced number of listed companies as compared with the capital markets of larger European economies, takeover bids, voluntary or compulsory, are not very common.

The most important ones from the past year are described below.

In January 2020, Cofina – SGPS, SA (Cofina), one of the country's largest media companies, with a particular focus on the print segment, announced an increase in its share capital of over €85 million to € 110,641,459.05, through an offering to existing holders of Cofina shares in accordance with their pre-emption rights, and to other investors acquiring subscription rights through the issuance of 188,888,889 new ordinary, book-entry and registered shares, without nominal value The subscription price was set at € 0.45 per share, corresponding to the issue value, with no premium, and representing a discount of approximately 2.52 per cent on the theoretical ex-rights price based on the closing price of Cofina shares on Euronext Lisbon on 29 January 2020.

The offer intended to partially finance the acquisition of the direct stake of Promotora de Informaciones, SA in Vertix SGPS SA and indirectly in Grupo Media Capital, SGPS,

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SA, merging the two groups – Cofina and Media Capital. The acquisition had already been validated by the Competition Authority and the Regulatory Authority for the Media, as had Cofina's debt restructuring after the acquisition.

However, by the end of the subscription period, 20 February 2020, the number of shares subscribed had not reached the public offering's target share total because of a 'deterioration of market conditions' as a result of the coronavirus pandemic. Consequently, pursuant to Article 128 of the Securities Code, Cofina presented the CMVM with an application for revocation of the offer, but this application was rejected by the CMVM, which requested further information. Further, because of the adverse conditions created by the pandemic, the CMVM agreed to a modification of the offer in respect of its terms, subscription price and objective. This is the first time that a modification of the conditions of an offer on the basis of Article 128 of the Securities Code has been considered by the CMVM and, following its refusal of Cofina's application, revocations based on the same principle are still without precedent in the Portuguese market.

As at October 2020, Efanor Investimentos has launched a couple of public tender offers for Sonae companies. Subject to fulfilment of the legal criteria, Efanor Investimentos is considering a squeeze-out, or a delisting, pursuant to the PCC. It is now established and accepted practice that companies can still be delisted even if the requirements for a squeeze-out under the PCC are not met.

On 15 July 2020, EDP – Energias de Portugal, SA (EDP) announced a capital increase corresponding to a maximum of 309,143,297 new shares with the objective of being able to partially finance the acquisition of 75.1 per cent of the Spanish company Viesgo at a reported valuation of approximately €2.7 billion. The subscription price per new EDP share was €3.30 per share. Although the summary was published in Portuguese, the offer prospectus was presented in English, which facilitated placing the offer with institutional investors, and the success of the offer marks an important achievement and step forwards after the failed public offer by Sonae MC, SGPS, SA back in 2018. This capital increase has been underwritten by a banking syndicate. However, unlike the offer launched by Cofina, the effectiveness of the EDP share capital increase was not conditional on the completion of the aforementioned acquisition. This was a large capital increase by a listed company and an important current event on the equity market in Portugal.

Debt markets

Both 2019 and 2020 have been strong years in the debt markets for non-financial Portuguese companies, which have continued to seek recourse to the retail capital markets. Government bonds also continued to be placed under public offers, thus allowing retail investors to continue their exposure to this market segment, which had been previously restricted to institutional investors (as far as the primary market was concerned).

Private placements (both with and without listing) continued to play an important part in the diversification of financing routes for the Portuguese economy.

In December 2019, Transportes Aéreos Portugueses, SA issued 3,483 senior notes under US Regulation S and 267 senior notes under US Regulation 144A, at a rating of 5.625 per cent, with a nominal value of €100,000 each, and a total nominal value of €375 million, due on 2 December 2024. This was an innovative deal as the notes were made available to US investors in book-entry form through Interbolsa, which is widely used and well known in the Eurobond market but not for issuances into the United States, where qualified investors are typically reliant on global notes. The notes were registered through Interbolsa pursuant to

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Portuguese Decree-Law No. 193/2005 of 7 November, which establishes a special tax regime for debt securities issued by Portuguese resident entities and applies if the notes are registered in a centralised system for securities managed by an entity that is a resident for tax purposes in Portugal (which was the case).

In July 2020, Sport Lisboa e Benfica – Futebol SA launched a public subscription offer with a total nominal value of up to €50 million. Despite being the first public offering in the Portuguese market following the outbreak of the covid-19 pandemic, this was a successful operation, with a demand 40 per cent greater than the offer after the issuer decided to opt for the aggregate nominal amount increase. This transaction involved a retail bond issue with an aggregate global amount increase mechanism that permitted the issuer to fine-tune the offer according to demand, in a context of uncertainty triggered by the new coronavirus and the severe restrictions it imposed.

Furthermore, the current pandemic does not seem to have discouraged institutional investors from investing in debt securities. In April 2020, RAA – Região Autónoma dos Açores (RAA) issued €180 million fixed-rate senior bonds with maturity in 2027 aiming to refinance existing debt and contribute to the reduction of RAA's overall financing costs. Despite the challenges faced by the international capital markets at the time of launch because of the covid-19 pandemic, the entire aggregate amount was successfully placed with eligible counterparties and professional clients, with demand clearly exceeding the offer.

Also in April, and for the second time in 2020, EDP issued a €750 million seven-year 'green' bond under EDP and EDP Finance BV's Programme for the Issuance of Debt Instruments, with a coupon of 1.625 per cent, which corresponds to a yield of 1.719 per cent. The issue is intended to finance or refinance, in whole or in part, the EDP group portfolio of eligible green projects, which consists of renewable projects (wind and solar) as defined in EDP's 'Green Bond Framework'. More than 300 investors participated in the transaction, of which more than 80 per cent were accounted for by asset managers, pension funds and insurance companies, and with some geographical diversification (30 per cent in the United Kingdom, 20 per cent in France and 15 per cent in Germany and Austria).

In June 2020, Galp Energia, SGPS, SA issued under its Euro Medium Term Note (EMTN) Programme €500 million and a coupon of 2 per cent. This was the first issue for Galp since 2017, and the positive outcome was particularly notable considering that this transaction took place in the context of the covid-19 pandemic.

Admission to trading of Portuguese law-governed securities on the Spanish alternative fixed-income market (MARF) continues to be a trend as MARF is a multilateral trading facility and is not a regulated market in accordance with the provisions of MiFID II. It is a very attractive market for Portuguese law-governed companies as it has a diversified base of investors and allows for additional financing possibilities.

The EMTN programmes of Portuguese issuers have been undergoing adjustments in line with the EU Prospectus Regulation. Most issuers updated their programmes prior to the entry into force of the new Regulation in 2019, enabling these programmes to be ready for use in the international markets once the interest rate environment changes.

Developments relating to the covid-19 pandemic

The covid-19 pandemic has had and continues to have a serious impact on financial markets. As public authorities in Portugal, the European Union and around the world look for ways to mitigate its negative effects and ensure business operations can continue, both ESMA and

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the CMVM have issued recommendations for financial market participants.[10] They have stressed that companies should assess the potential impacts of covid-19 on their businesses, including through business continuity planning, and keep their shareholders informed in this respect as required by applicable law. Their recommendations also cover market disclosure and financial reporting. Issuers of financial instruments that are listed companies may be subject to additional information and disclosure obligations towards their investors. If the impacts of the covid-19 pandemic are capable of affecting investors' assessments, information of this kind could be deemed 'privileged information'. This classification attracts certain legal requirements that are applied on a case-by-case basis, particularly in relation to the accuracy of the information and its sensitivity regarding the price of the relevant financial instrument. Unless legally exempted, privileged information must be disclosed immediately. In addition, depending on their materiality, non-financial impacts regarding company stakeholders other than shareholders (for example, employees, suppliers and customers) may have to be included in non-financial reports as part of companies' non-financial reporting obligations. The CMVM has also strongly recommended that 'issuers' general meetings take place using telematic means and that preparatory interactions are based on the use of electronic and remote means of communication' to promote the safety of those involved.[11] Virtual meetings for both shareholders and boards of directors were already a possibility under existing Portuguese law (unless prohibited in the company's articles of association) so long as the authenticity of the statements and the security of communications were ensured and the meeting content and intervening parties were recorded.[12] The outbreak of the covid-19 pandemic has seen virtual general meetings being widely used among listed and unlisted companies in Portugal. This trend may continue post-pandemic and evolve into, for instance, mixed types of attendance with both on-site and remote attendees at the same meeting. The CMVM has certainly expressed support for these alternative ways of arranging meetings, which 'allow the exercise of shareholders' rights to be compatible with high standards of safety, health and well-being of all those involved'.

ii Developments affecting derivatives, securitisations and other structured products

Derivatives

After the big challenge of adjusting to variation margin requirements for financial counterparties and non-financial counterparties (NFCs) above the clearing threshold and clearing requirements for certain interest rate derivatives and credit default swaps (under the European Market Infrastructure Regulation framework) in 2017, and also challenges presented by MiFID II in 2018, including, inter alia, obligations to trade certain classes of derivatives through trading venues and certain pre- and post-transaction information requirements, Regulation (EU) 2019/834 (the EMIR Refit)[13] entered into force in

10 ESMA, 'ESMA Recommends action by financial market participants for COVID-19 impact' (11 March 2020) https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact; CMVM, 'CMVM Decisions and Recommendations on Covid-19' (20 March 2020) https://www.cmvm.pt/en/Comunicados/communiques/Pages/20200320mc3.aspx?v=.

11 CMVM, 'Recommendations in the context of holding General Meetings' (20 March 2020), https://www.cmvm.pt/en/Comunicados/communiques/Pages/20200320mc2.aspx.

12 Articles 377(6)(b) and 410 PCC, respectively.

13 Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No. 648/2012 as regards the clearing obligation, the suspension of the clearing obligation,

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June 2019. The EMIR Refit made significant amendments to simplify the documentary process, introducing a new counterparty category (the small financial counterparty) and the reduction of certain burdens, including the reporting requirement for small non-financial counterparties; as of 17 June 2020, financial counterparties became legally liable for the timely and accurate reporting of over-the-counter (OTC) derivatives contracts on behalf of both themselves and their NFC clients. In addition, market participants also have to adapt their operations and existing agreements to the changes occasioned by Brexit, which will become fully effective when the transition period ends on 31 December 2020.

Asset-backed securities

Although the securitisation market has been active during the past three years, it has witnessed a further resurgence in performing securitisations in 2020 and a variety of transactions have already been completed. 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 assets or receivables being securitised, including mortgage-backed loans, motor vehicle loans and credit card receivables. The transaction structures used are, in certain cases, becoming more complex and we have again seen derivatives being used to hedge interest rate risks (but in the form of a cap rather than an ordinary swap).

Non-performing loans (NPLs) are still a hot topic in the Portuguese financial system and securitisations have been playing a role in solving this, even though most of the transactions are still made in a whole loan sale format. Following the Évora deal by Caixa Económica Montepio Geral in November 2017 (the first NPL listing prospectus in southern Europe), similar deals were also launched in 2018 and 2019: Guincho Finance in November 2018, originated by Caixa Económica Montepio Geral; and Gaia Finance in May 2019, originated by Banco Santander Totta. This type of structure, which is particularly complex, requires the inclusion of a real estate asset management company, a monitoring agent and a servicing committee in the structure.

For the first time in years, a synthetic securitisation was launched in May 2019 by a Portuguese bank in compliance with the CRR, including the requirement that the proceeds from the notes are deposited or otherwise controlled. In respect of securitisations, and particularly now in relation to performing loans, the Securitisation Regulation,[14] which established a general securitisation framework at the EU level and has proved particularly relevant, became applicable for all securitisation products as of 1 January 2019. Also of note, the CRR Amendment Regulation[15] will make the capital treatment of securitisations for banks and investment firms more risk-sensitive and better suited to reflect properly the specific features of simple, transparent and standardised securitisations.

On 30 April 2020, the Portuguese market saw the RMBS Green Belém No. 1, a €392 million securitisation of residential mortgage credits originated by Unión de Créditos

the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

14 Regulation (EU) 2017/2402 laying down a general framework for securitisations and creating a specific framework for simple, transparent and standardised securitisations.

15 Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms.

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Inmobiliarios Establecimiento Financiero de Credito – Sucursal em Portugal, the bonds for which were issued by TAGUS – Sociedade de Titularização de Créditos, SA. The bonds were admitted to trading on Euronext Lisbon. This was the first securitisation transaction by Unión de Créditos Inmobiliarios Establecimiento Financiero de Credito in Portugal (UCI Portugal) and the first public securitisation of loans in the Portuguese market to be made under the Securitisation Regulation and the amended Portuguese Securitisation Law. It was also the first securitisation in Portugal to be labelled 'simple, transparent and standardised' (STS) under the Securitisation Regulation and the first green RMBS securitisation in the Iberian peninsula (and a number of other jurisdictions). UCI Portugal has committed to use the proceeds from the deal to fund earmarked green building initiatives and sustainable finance projects in the region. In addition, this was the first securitisation to be successfully completed within the context of the covid-19 pandemic, with states of emergency or similar having been declared in various countries around the world, including Portugal.

In July 2020, Victoria Finance No. 1, a cash flow securitisation of a revolving portfolio of credit card receivables originated by WiZink Bank SAU – Sucursal em Portugal, for an initial amount of €505 million entered the Portuguese market. This was the first securitisation of credit card receivables in Portugal and the first securitisation by WiZink Bank.

Also in July 2020, the Portuguese market was presented with the Silk Finance No. 5 deal, a €610 million revolving cash securitisation of motor vehicle loan credits issued by Banco Santander Consumer Portugal, SA (BSCP).

Following the successful RMBS Green Belém No. 1, Silk Finance No. 5 was the second STS-compliant securitisation transaction in the Portuguese market and it was also structured in such a way as to achieve significant risk transfer.

Covered bonds

Covered bonds continue to play a part in the Portuguese capital markets, with some 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 2017, the first issue of pass-through covered bonds (i.e., covered bonds that in certain events convert the redemption structure into a product more like asset-back securities) placed in the market by a Portuguese issuer had taken place.

On 12 March 2018, the European Commission published a proposal for a directive on the issue of covered bonds and covered bond public supervision.[16] In November 2019, the European Parliament and the Council adopted the legislative package for the new Covered Bond Directive (CBD)[17] and a new related Regulation (the CB Regulation).[18] The new CBD and CB Regulation were published in the Official Journal on 18 December 2019 and came into effect on 7 January 2020. The CBD has to be implemented in national regulation by 8 July 2021 and covered bond issuers must apply national implementing regulation, at the

16 Proposal for a Directive of the European Parliament and of the Council on the issue of covered bonds and covered bond public supervision and amending Directive 2009/65/EC and Directive 2014/59/EU.

17 Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU.

18 Regulation (EU) 2019/2160 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) No. 575/2013 as regards exposures in the form of covered bonds.

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latest, from 8 July 2022. The CBD replaces current Article 52(4) of the UCITS Directive[19] and establishes a revised common baseline for the issue of covered bonds for EU regulatory purposes (subject to various options that Members States may choose to exercise when implementing the CBD through national laws).

The recently approved CBD is essentially designed to establish a common legal ground (not as heavily rules-based as the market feared) and to legally acknowledge existing market practices (leveraging significantly the work done by the European Covered Bonds Council). The changes include, inter alia, investors' access to information regarding the cover pool, a baseline covered bonds definition (dual recourse, segregation of assets, bankruptcy remoteness, public supervision, liquidity buffer) and the use of a European Covered Bond Label. Given that the CBD appears to be substantially aligned with Portuguese law and market practices, we would not expect it to affect the market materially, but Portuguese issuers will have to include specific adjustments in their covered bonds programmes for objective and specified triggers (i.e., in relation to soft-bullet and pass-through structures).

The second part of the harmonisation package (the amendments to the CRR) will be directly applicable in the EU from 8 July 2022 by way of the CB Regulation, which amends Article 129 of the CRR. The amendments add requirements on minimum overcollateralisation and substitution assets and will strengthen the requirements for covered bonds to be granted preferential capital treatment.

UK-based common representatives in existing Portuguese transactions post-Brexit

The common representative is a party in different types of bond issues that conducts the professional representation of investors. Its role resembles that of a trustee in certain Anglo-Saxon jurisdictions; several UK-based entities act both as common representatives in Portuguese law-governed issues and as trustees in English law-governed issues. The common representative is *ab initio* appointed by the issuer, although the noteholders reserve the right to replace the appointed entity. Whether a common representative is or must be appointed depends on the type of transaction: covered bond issues are required by law to have a common representative appointed; securitisations are not required to have a common representative one, although one is usually appointed; EMTN programmes are also not required to have a common representative and one is not usually appointed.

The departure of the United Kingdom from the European Union and the fast approaching end of the transition period, scheduled for 31 December 2020, have raised concerns over UK-based entities' future ability to perform their roles as common representatives in existing Portuguese law-governed transactions. Portuguese law, notably Article 347(2) of the PCC, states that the common representative 'shall be a law firm, a statutory audit firm, a financial intermediary, an entity authorised to provide investor representation services in any Member State of the European Union or an individual with full legal capacity, even if he/she is not a bondholder'. This may mean, notably for new transactions, that only those entities incorporated in a Member State of the European Union and that provide investor representation services (whether or not on a regulated basis) are allowed to act as common

19 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

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representatives in issues governed by Portuguese law, which from 1 January 2021 would exclude UK-based entities. There may be further developments on this front following discussions with the Portuguese regulator.

The market has already begun to adapt, with EU-based entities being appointed as common representatives in new securitisations and debt programmes. However, existing Portuguese law-governed transactions may face some hurdles as UK-based common representatives will have to be replaced with EU entities. The replacement of a common representative represents a cost to both the issuer and the bondholders, not least because it requires adjustments and possible renegotiation of the transaction documentation for each operation. In addition, although the issuer appoints the common representative *ab initio*, the common representative may only be replaced through a bondholders' resolution.[20] The issuer is prohibited from voting at noteholders' meetings for simple bond issues even where it retains part of the issued notes pursuant to Article 354 of the PCC. The documentation in securitisations usually also prohibits the originator from voting in noteholders' resolutions. An exception applies to covered bond issues, where an issuer retaining part of the covered bonds issued is not subject to the same type of voting restriction.[21]

This may attract logistical difficulties in setting up meetings and selecting a suitable replacement common representative.

Conversely, Portuguese transactions governed by English law (as is the case for many Portuguese issuers' EMTN programmes) might not face hurdles of this kind even though the transactions involve certain aspects of Portuguese law (for example, with respect to the form and transfer of notes and the Interbolsa procedures for the exercise of rights under the notes). The market interpretation seems to be that the trustee exists as a contractual entity that does not fall within the scope of the Portuguese corporate legal framework applicable to common representatives. In this light, English law-governed debt issues by Portuguese issuers should not be required to substitute their UK-based trustees after 31 December 2020.

Own-funds regulations and senior non-preferred instruments

Following the first Additional Tier 1 (AT1) capital instruments issuance placed in the market in 2017 (€500 million by Caixa Geral de Depósitos), with a write-down (and up) feature rather than a conversion, banks subsequently started to issue Tier 2 capital instruments in the market, both later that year and in 2018. Banco Comercial Português, Caixa Geral de Depósitos and Novo Banco all successfully approached the market. In January 2019, Banco Comercial Português also issued successfully €400 million of AT1 capital and later, in September 2019, Banco BPI issued AT1 capital instruments of a nominal amount of €275 million. The features of the AT1 instruments have been set to fulfil the conditions laid down in the CRR after the entry into force of the CRR2. This was the first issue of AT1 instruments following the entry into force of this Regulation.

The CRR2, the CRD V,[22] both of 20 May 2019, and BRRD 2[23] entered into force on 27 June 2019. Member States must adopt and publish the measures necessary to comply with CRD V by 28 December 2020, although the majority of provisions will only apply from

20 Article 358(1) PCC.
21 See Article 10(2) of Decree-Law No. 59/2006, of 20 March 2006, as amended.
22 Directive (EU) 2019/878.
23 Directive (EU) 2019/879.

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28 June 2021. Regarding senior non-preferred instruments, Directive (EU) 2017/2399[24] was finally transposed into the Portuguese legal framework by Law No. 23/2019 and has established that claims in respect of all deposits shall benefit from a general credit privilege over the movable assets of insolvent entities and a specific credit privilege over their immovable assets. Portuguese issuers have therefore been updating their programmes in terms of eligible instruments in accordance with the new CRR rules provided by the CRR2. Accordingly, in November 2019, Caixa Geral de Depósitos, SA issued €500 million of senior non-preferred capital instruments, in compliance with the CRR. As the first issuance of senior non-preferred debt, this was a milestone in the Portuguese capital markets and it establishes the path for new issuances of this type of instrument.

MiFID II

The MiFID II and MiFIR legislative package entered into force in 2018 and has been implemented in national law. Whereas MiFIR was directly applicable in Portugal, MiFID II was transposed into Portuguese law by means of Law No. 35/2018 of 20 July only after months of delay in the legislative process and finally entered into force on 1 August 2018. This law has amended various legal regimes that form the basis of the organisation and functioning of Portuguese financial markets, among which is the Securities Code.

The aim of this new regulatory package was to ensure greater transparency for all market participants, while also increasing market safety, efficiency and fairness, implementing enhanced governance for trading venues, on-exchange trading of standardised derivatives, more intensive regulation of commodity derivatives and greater consolidation of market data.

Investor protection has been stepped up through the introduction of new requirements on product governance and intervention and independent investment advice, improved pre and post-trade transparency, the extension of existing rules on structured deposits and an improvement in requirements in a variety of areas, such as the responsibilities of management bodies, cross-selling, staff remuneration, inducement and information, more extensive transaction reporting, conflicts of interest and complaints handling. For independent discretionary portfolio management and investment advice segments, for instance, this implies revisiting the fee structures and arrangements that have been in place up to now and a global review of their procedures and documentation. Product governance has also been a very significant challenge.

The PRIIPs Regulation

According to the PRIIPs Regulation, a packaged retail and insurance-based investment product constitutes any investment where, regardless of legal form, the amount payable or repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets that are not directly purchased by the retail investor.

The PRIIPs Regulation pursues the objective of increasing the transparency and comparability of investment products through the issue of a standardised short-form

24 Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy.

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disclosure document – the PRIIPs key information document (KID) – thereby making it easier for retail investors to understand and compare the key features, risks and costs of different products within the PRIIPs scope.

Law No. 35/2018 was used to implement the PRIIPs Regulation in national law in Portugal. The new regime defines, inter alia:

a the competent supervisory authorities, depending on the nature of the investment product in question (the CMVM, the Bank of Portugal or the ASF);
b a prohibition on the advertising of PRIIPs without the prior approval of the competent supervisory authority;
c a prohibition on making the execution of deposit contracts dependent upon the acquisition of financial instruments, insurance contracts or other financial savings and investment products that do not ensure the invested capital at all times; and
d the obligation to notify the competent supervisory authority of the PRIIP-related KID prior to the date it will become available to the public or modified.

The PRIIPs Regulation has to be read in conjunction with Law No. 35/2018 and CMVM Regulation 8/2018, which applies exclusively to PRIIPs (whose issuance, trading or provision of consulting services is supervised by the CMVM) and which regulates PRIIPs information and trading obligations, specifically:

a the information to be made available;
b the language and features of the KID;
c the content of PRIIP advertising and prior notification of the KID;
d protection measures for non-professional investors; and
e communication and registration duties.

iii Cases and dispute settlement

In addition to the derivatives litigation and a prospectus case discussed below, we would highlight that the resolution measure applied to Banco Espírito Santo (BES) (and to Banif) entailed a significant amount of litigation, for various reasons and involved different stakeholders, but this did not prevent the Novo Banco sale process being concluded in October 2017. We expect to report further on the outcomes of these disputes in the coming years. Nevertheless, in an important case in the United Kingdom, *Goldman Sachs International v. Novo Banco SA*, it was confirmed that litigation regarding this particular resolution measure, including in relation to English law contracts, should be decided by the Portuguese courts. It was decided that it was not for the court to interfere in the exercise of resolution powers by the Bank of Portugal (the national resolution authority) and thus there were no grounds to pursue the case in the English courts.

More recently, two legal proceedings related to the sale of Novo Banco were concluded by the Lisbon Administrative Court, one of which was initiated by a BES shareholder and the other by several holders of subordinated bonds issued by BES. The proceedings were aggregated and designated as pilot proceedings. In both legal proceedings the plaintiffs challenged the validity of the resolution measure applied to BES on the basis of alleged illegalities and constitutionality issues. On 12 March 2019, the Lisbon Administrative Court fully dismissed the plaintiffs' claims.

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Highlighted case law

By way of providing context on derivatives, banks operating in the Portuguese market have been contracting swaps with clients during the past decade as follows: under master agreements governed by Portuguese law based on shorter and less complex versions of the International Swaps and Derivatives Association (ISDA) master agreement principles; and under standard ISDA master agreements. The latter alternative has typically been 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 by smaller clients and by small and medium-sized enterprises (SMEs) that are relatively less experienced in the financial markets and more inclined to sue banks when an underlying asset evolves negatively.

During the past few years, several cases involving interest rate swap agreements have been analysed and decided by the Portuguese Supreme Court of Justice (STJ), essentially those related to disputes with SMEs.

In past cases, particularly during the global financial crisis, the STJ has acknowledged the validity of derivative contracts and the applicability of a swap termination because of an abnormal change in circumstances. Following the covid-19 crisis, we expect that new cases regarding abnormal changes in circumstances may arise in the Portuguese courts.

Case law has also addressed choice-of-forum clauses, having decided that choice of jurisdiction based on the applicable EU civil procedure rules (notably, the Recast Brussels Regulation[25]) prevails over Portuguese domestic law, therefore acknowledging the validity of clauses attributing jurisdiction to the courts of England.

In another judicial decision, the Lisbon Court of Appeal ruled that not only shareholders that have decided to tender their shares to a bidder in a takeover are protected by prospectus liability. Rather, any investor, either buyer or seller, that relied on the information inserted by a bidder in a prospectus may claim for damages against the bidder.

iv Relevant tax and insolvency law

Tax considerations

The relevant tax issues will naturally depend on the kind of transaction at stake.

In particular in respect of corporate finance-type transactions, it is important to remember that where financing with links to Portugal is contemplated, certain tax contingencies must be considered. In particular, account should be taken of any withholding tax on interest payments (as a general rule, 28 per cent for natural persons and 25 per cent for legal persons), including for non-residents (i.e., individuals, companies and even financial institutions). Another important aspect is the possible application of stamp duty when some sort of financing is granted (up to 0.6 per cent of the capital, depending on the maturity) and when paying financial interest and fees (4 per cent of each payment).

In the case of a bond issue, these taxes may not apply or may be applied to a lesser extent. Under Decree-Law No. 193/2005 of 7 November, there is an exemption from withholding tax on interest payments to be made to non-residents if the stated requirements and formalities are met, including being registered in a CSD recognised by law (such as Interbolsa). Similarly, since bonds are a capital market instrument, stamp duty is not applicable to bond financing or to applicable interest payments, as that would restrict the free movement of capital within

25 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

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the European Union. In any case, it should be borne in mind that in the case of secured financing and if no stamp duty is levied on the financing, stamp duty may be payable on the security package and on financial fees.

Outline of the Portuguese insolvency regime

The Portuguese Insolvency and Companies Recovery Code, established under Decree-Law No. 53/2004, has been amended and updated regularly and contains provisions similar to those that can found in the insolvency regimes of most jurisdictions, aimed at tackling the usual concerns arising in insolvency cases. Besides regulating insolvency proceedings, the Code also sets out a special recovery proceeding, the aim of which is to promote the rehabilitation of debtors facing financial difficulties but that prove to still be economically viable, by providing a moratorium on any creditor action while a recovery plan is being agreed. This special recovery proceeding constitutes a standalone urgent judicial proceeding based on out-of-court negotiations that are later confirmed by a court.

As usual, the law provides for hardening periods (which are backwards-counting periods from the insolvency proceeding and in respect of which legal contracts may be resolved or terminated with retroactive effect), which notably depend on the date of contracting and the particular circumstances under which the relevant legal contracts were entered into; this includes a 60-day hardening period in respect of security provided with the relevant financing commitment (if these are after the financing, the period is six months). Financial collateral arrangements are excluded from the scope of the Code.

There have been recent legal amendments and additional statutes to enhance the recovery prospects of viable companies, which should be analysed in the context of potential restructurings.

v 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 eligible as a securities settlement system for the purposes of the short-term European paper (STEP) and STEP label,[26] the aim of which is to enhance the market and collateral prospects for Portuguese commercial paper issuers.

vi Other strategic considerations

Certain negative developments in the market during the past few years underline the importance for systemic entities and listed companies to have robust compliance and risk management systems in place. Increased public pressure on official institutions has resulted in more intense scrutiny by the supervisory authorities, including the CMVM, regarding:

a prospectus review and approval, but there is now a relevant trend at the CMVM to focus on quicker and more predictable reviews and calendar planning;

b complex financial products placement and relevant documentation;

c rules of conduct; and

d corporate governance.

26 STEP programmes must fulfil certain criteria to be STEP-compliant and therefore eligible to apply for a STEP label.

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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 in recent years, as mentioned above. As noted above, it should always be borne in mind that in Portuguese corporate finance transactions there may be relevant tax issues to be taken into account and the bond route may be a way to overcome the hurdles encountered.

III OUTLOOK AND CONCLUSIONS

The lockdown measures implemented in the context of the covid-19 pandemic have caused a series of adverse economic effects of such intensity and breadth that states have been forced to intervene. This has been seen in the moratorium on loans to protect debtors facing difficulties as a result of the pandemic and in the social distancing measures imposed by the authorities. The government approved Decree-Law No. 10-J/2020, establishing a temporary legal moratorium on certain financing agreements, with a view to protecting the liquidity of companies and families and extending the duration of loan agreements with full payment at the end of the contractual term. This regime will be in force until 30 September 2021. This current scenario will doubtless have an impact on companies' and families' cash flow, in the global economy, the financial system and debt markets; however, it may also bring new investment opportunities.

Although we have witnessed an active economic environment in Portugal in terms of new deals (with strong issues of debt, equity and asset-backed securities), even after the onset of the covid-19 pandemic, we are now beginning to see some issuers using consent solicitations, which is an alternative liability management option, amending certain terms and conditions of the instruments or facility agreements (such as financial ratios to tackle certain existing or prospective financial impacts).

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Appendix 1

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