The International Capital Markets Review

Eleventh Edition

Editor
Jeffrey Golden

The Law Reviews

© 2021 Law Business Research Ltd

THE International Capital Markets Review

Eleventh Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Jeffrey Golden

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Alex Bagley

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Sarah Andreoli

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 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 was accurate as at October 2021, 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 – clare.bolton@lbresearch.com

ISBN 978-1-83862-792-8

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

ACKNOWLEDGEMENTS

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

3 HARE COURT CHAMBERS

AFRIDI & ANGELL

ALLEN & OVERY

CMS REICH-ROHRWIG HAINZ RECHTSANWÄLTE GMBH

DE PARDIEU BROCAS MAFFEI

G ELIAS & CO

GORRISSEN FEDERSPIEL ADVOKATPARTNERSELSKAB

INTERNATIONAL COUNSEL BUREAU

KING & WOOD MALLESONS

LEE AND LI, ATTORNEYS-AT-LAW

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

MORRISON & FOERSTER LAW OFFICES

NADER, HAYAUX & GOEBEL

NIEDERER KRAFT FREY LTD

PAKSOY

PINHEIRO NETO ADVOGADOS

SIDLEY AUSTIN LLP

VIEIRA DE ALMEIDA

© 2021 Law Business Research Ltd

CONTENTS

PREFACE.. v
Jeffrey Golden

Chapter 1 AUSTRALIA.. 1
Ian Paterson

Chapter 2 AUSTRIA.. 36
Martin Zuffer

Chapter 3 BRAZIL.. 48
Ricardo Simões Russo, Marcello Mammocci Pompilio, Felipe Morais Assunção and Vinícius Pimenta Seixas

Chapter 4 DENMARK.. 55
Rikke Schiøtt Petersen, Morten Nybom Bethe and Knuth Larsen

Chapter 5 FRANCE.. 67
Corentin Coatalem and Côme Chaine

Chapter 6 GERMANY.. 89
Stefan Henkelmann and Lennart Dahmen

Chapter 7 JAPAN.. 100
Akihiro Wani and Reiko Omachi

Chapter 8 KUWAIT.. 120
Abdullah Alharoun

Chapter 9 LUXEMBOURG.. 132
Frank Mausen, Henri Wagner, Paul Péporté and Franz Kerger

Chapter 10 MEXICO.. 160
Julián Garza, Gunter A Schwandt and Fernando Quezada T

© 2021 Law Business Research Ltd

Chapter 11 NIGERIA 169
Fred Onuobia, Ayodele Ashiata Kadiri and Lolia Biobele-Georgewill

Chapter 12 PORTUGAL 181
José Pedro Fazenda Martins, Orlando Vogler Guiné and Soraia Ussene

Chapter 13 RUSSIA 198
Vladimir Khrenov

Chapter 14 SPAIN 214
Charles Poole-Warren, Salvador Ruiz Bachs, Juan Hormaechea, Teresa Méndez, Alfonso Gutiérrez and Álvaro Rojo

Chapter 15 SWITZERLAND 229
François M Bianchi, Daniel Bono, Till Spillmann and Andrea Giger

Chapter 16 TAIWAN 238
Abe Sung and Mark Yu

Chapter 17 TURKEY 246
Ömer Çollak and Ökkeş Şahan

Chapter 18 UNITED ARAB EMIRATES 260
Silvia A Pretorius

Chapter 19 UNITED STATES 276
Alan Grinceri, Michael Hyatte and Sara von Althann

Appendix 1 ABOUT THE AUTHORS 301

Appendix 2 CONTRIBUTORS' CONTACT DETAILS 319

© 2021 Law Business Research Ltd

PREFACE

Well, is that light at the end of the tunnel?!

When the 10th edition of this volume appeared a year ago, it included an admission that we had been caught unawares by the pandemic, lockdowns and working from home (WFH).

Yes, there were then capital market challenges that had been anticipated, many of which continue. 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 around the time that this edition is scheduled to appear!

However, we did not see and anticipate other challenges brought about by the covid-19 pandemic, basic as some of these may have been – hidden as they may have been also 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?

Furthermore, is the pandemic itself an excuse for non-performance of financial market obligations? Does it trigger *force majeure* clauses in our contracts? Does it frustrate a relevant commercial purpose?

The global health – not to mention environmental – challenges around us at the moment beg a coordinated international strategy. However, the all-too-often fragmented response we have been seeing has been anything but encouraging. Fragmentation in the financial market regulatory arena also, including Brexit and other devolutionary pressures and juridical competition that have followed, now seems to be the order of the day.

Challenges though there may be, however, the capital markets continue to show their resilience. As I write this preface, share prices and indices are at, or have recently reached, record highs in leading global markets. IPOs for the likes of Robinhood Markets and Krispy Kreme continue to cause excitement and capture headlines.

International capital markets lawyers are still in business, still relevant, although, our *modus operandi* may have changed slightly. While financial institutions and law firms are cautiously encouraging a return to the office (at least for the fully vaccinated), technology and our recent experience by necessity of remote working has encouraged more self-sufficiency.

© 2021 Law Business Research Ltd

In a world of WFH, we keep company with the books on our shelves more than the other lawyers in the building. In such circumstances, there are ever more compelling reasons to keep this particular book on that shelf or otherwise remotely accessible through the digital platform maintained by *The Law Reviews*. We can expect to turn more often to published answers when we cannot as easily consult the practitioner in the office next door.

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

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities often may risk multi-jurisdictional 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!'

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 presented 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 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 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

© 2021 Law Business Research Ltd

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 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. 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. My admiration for 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 amid the growing interdependence of our professional world – and now the coronavirus pandemic and its impact on the global economy.

Is that light at the end of the tunnel? Let's hope so.

In the meantime, best wishes for this difficult period. Stay safe, stay well and stay alert.

Jeffrey Golden
Joint Head of Chambers
3 Hare Court
London
October 2021

© 2021 Law Business Research Ltd

Chapter 12

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 are 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 implementing asset purchase programmes and other measures aimed at mitigating the pandemic's effects 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 2021 (as it did in 2020), but hopes of economic recovery are strong, boosted by the support package put together at EU level.

The Portuguese capital markets framework is substantially in line with European legislation, which has been responsible for greater harmonisation across 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 Shareholders' Rights Directive,[2] the Transparency Directive,[3] the Takeover Directive,[4] the Settlement Directives[5] and the MiFID II Directive.[6] Other relevant statutes include the Companies Code (PCC)

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 (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

3 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.

4 Directive 2004/25/EC on takeover bids.

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

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

© 2021 Law Business Research Ltd

(as enacted by Decree-Law No. 262/86, as amended, which 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 Portuguese capital markets during 2021, including:

a the new Regulation (EU) 2021/337 of the European Parliament and of the Council of 16 February 2021, amending Regulation (EU) 2017/1129 as regards the EU Recovery Prospectus and targeted adjustments for financial intermediaries and Directive 2004/109/EC as regards the use of the single electronic reporting format for annual financial reports, with a view to supporting recovery following the covid-19 pandemic. Among other things, key changes in this context include:
  - from 18 March 2021 to 31 December 2022, a waiver of the obligation to draw up a prospectus to offer securities to the public or for their admission to trading on a regulated market, where the total aggregate consideration in the European Union for the securities offered is less than €150 million per credit institution calculated over a period of 12 months (subject to other specific requirements);
  - introduction of the EU Recovery Prospectus as a short-form prospectus that addresses the economic and financial issues specifically raised by the covid-19 pandemic;
  - from 18 March 2021 to 31 December 2022, and further to other legal amendments, where the prospectus relates to an offer of securities to the public, investors are entitled to withdraw their acceptances, within three working days (instead of two working days) after the publication of the supplement; and
  - for financial years beginning on or after 1 January 2020, all annual financial reports shall be prepared in a single electronic reporting format, provided that a cost-benefit analysis has been undertaken by the European Supervisory Authority;

b Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (as amended and supplemented by Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment) (SFDR) entered into force in respect of the level-1 disclosures. The second stage of the SFDR – the level-2 disclosures – is expected to enter into force at the beginning of 2022. In-scope asset managers and financial advisors will have to start disclosing ESG factors periodically and align their disclosures with the EU Taxonomy Regulation and the regulatory technical standards (RTS) currently being drawn up by the Commission and the European Supervisory Authorities;

c Decree-Law 50/2021 of 30 July on the extension of the moratorium for mortgage loans, consumer credit and for beneficiaries operating in sectors particularly affected by the covid-19 pandemic, in cases where beneficiaries were already covered by the moratorium from 1 October 2020 (instead of 30 September 2021) to 31 December 2021. This framework shall be subject to the reactivating of the regulatory and supervisory framework established by the EBA guidelines of 2 April 2020 on payment moratoria;

d Decree-Law No. 70-B/2021 of 6 August, establishing protective measures for banking clients who are covered by exceptional and temporary credit protection measures, such as a moratorium for mortgage loans or consumer credits, which stipulates that credit institutions, financial companies, payment institutions and electronic money

© 2021 Law Business Research Ltd

institutions that have entered into credit agreements concerning real estate secured by mortgage or consumer credit agreements shall perform a special monitoring process on banking clients who have benefited, before the entry into force of Decree-Law No. 70-B/2021, from an exceptional credit protection measure under Decree-Law No. 10-J/2020 or a private general moratorium on payments and which also allows banking clients who benefit or have benefited from exceptional credit protection measures to have access to, and be included in, the extrajudicial procedure for the regularisation of default situations; and

e 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 applied from 27 June 2020, with the exception of the amendments to the calculation of the leverage ratio, which applied from 28 June 2021. The purpose of the CRR Quick Fix is to encourage banks to continue lending to businesses and households during this current crisis and to absorb the economic shock of the pandemic. In this context, the CRR Quick Fix amends specific aspects of the CRR, 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 application dates of certain reforms introduced by the CRR.

Meanwhile, a comprehensive proposal for amending the Portuguese Securities Code came to light. If approved by Parliament, this proposal may bring important changes on matters regarding issuers and public offers. One coveted proposal is the possibility of classes of shares attaching multiple voting rights.

Regulations, notices and instructions issued by the CMVM or the Bank of Portugal may also be relevant. Bearing in mind the banking union 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 that should be taken into account, although these are increasingly fewer in light of EU harmonisation. The securities ownership regime is one of these specificities. 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 with the financial intermediaries themselves. In practice, the system works seamlessly 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 the Portuguese tender offer regime's significantly wider scope compared with that of the Takeover Directive. In addition

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, 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.

© 2021 Law Business Research Ltd

to equity securities, debt securities fall within its purview (as is the case in some other jurisdictions). This means that typical debt securities tender offers are normally restricted to professional investors in Portugal, unless a securities takeover prospectus is approved and disclosed (in cases where bonds are listed outside Portugal, this takes the form of a long-form information memorandum translated into Portuguese and resembling a prospectus).

The financial regulatory system is composed of three pillars (following the same structure as the European supervisory system and divided according to the activities and matters at stake), which are supervised by three main 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, which, in 2020, also gained the competence to exercise prudential supervision over asset managers and collective investment undertakings; 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. Fines generally 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 resulting collapse of some important Portuguese economic conglomerates, supervisory authorities have been very active in the enforcement and sanction of 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 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, which has a reduced number of listed companies as compared with the capital markets of larger European economies, takeover bids, either voluntary or compulsory, are not very common.

The most significant ones of the past year are outlined 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 a share capital increase 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 registered shares, without nominal value. The subscription price was set at €0.45 per share, corresponding to

© 2021 Law Business Research Ltd

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 was 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, SA, thus merging the two groups: Cofina and Media Capital. The acquisition had already been validated by the Portuguese 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 covid-19 pandemic. Consequently, pursuant to Article 128 of the Securities Code, Cofina submitted an application to the CMVM requesting the revocation of the offer. This application was rejected by the CMVM, which requested further information. However, because of the adverse conditions created by the pandemic, the CMVM eventually agreed to the modification of the offer in respect of its terms, subscription price and objective. This was the first time that modification of an offer's conditions, based on Article 128 of the Securities Code, was 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. Notwithstanding this, the CMVM considered that Pluris Investments, SA and Vertix SGPS SA had exercised, in concert (and until Vertix SGPS SA's disposal of its entire stake), dominant influence over Grupo Media Capital, SGPS SA, in the context of and pursuant to the agreement entered into between them. As a result, the dominant influence exercised until then by Promotora de Informaciones, SA over Grupo Media Capital, SGPS SA became jointly attributable to Vertix SGPS SA and Pluris Investments, SA, the latter being under an obligation to launch a takeover bid under the PSC. Therefore, Pluris Investments, SA's offer, being subject to the mandatory regime of takeover bids, was aimed at all Grupo Media Capital, SGPS, SA's shares that were not held by Pluris Investments, SA (constituting 69.78 per cent of the shares that represented Grupo Media Capital, SGPS, SA's share capital).

Faced with a competing offer, Cofina decided to revoke its offer for Grupo Media Capital, SGPS, SA, having disclosed its intention to the market on 20 July 2021.

In April 2021, EDP Renováveis SA (EDPR) announced the successful completion of an accelerated bookbuilding (the ABB) of €1,500,250,000, through the placement of 88,250,000 shares with institutional investors, which represented 10.1 per cent of the existing share capital, at a price of €17.00 per share, implying a 9.3 per cent discount on the market closing price. To facilitate the completion of the ABB, EDP – Energias de Portugal SA (EDP) lent 88,250,000 EDPR shares to Citigroup Global Markets Europe AG and Morgan Stanley Europe SE. Subsequently, EDPR's Board of Directors approved a capital increase of €1,500,250,000, through the issuance of 88,250,000 shares at a subscription price of €17.00 per share, which was fully subscribed by the Banks and which subsequently returned these 88,250,000 EDPR shares to EDP.

In May 2021, the Portuguese market witnessed the public subscription offer and admission to trading on Euronext Lisbon of up to 100 million new ordinary nominative book-entry shares, with a nominal value of €1 each, representing approximately 29.63 per cent of the share capital of Mota-Engil, SGPS, SA (a company listed on Euronext Lisbon and quoted on the PSI-20). This offer was launched, among other reasons, to allow China Communications Construction Co, Ltd to become the holder of a stake equal to or greater

© 2021 Law Business Research Ltd

than 30 per cent of the share capital of Mota-Engil, SGPS, SA following a strategic cooperation. The corresponding prospectus was one of the first to benefit from the recently approved EU recovery scheme, in accordance with Article 14-A of Regulation (EU) No. 2017/1129 of the European Parliament and of the Council of 14 June 2017, as amended.

In June 2021, Maxirent - Fundo de Investimento Imobiliário Fechado issued 3,478,875 new units, with a subscription price of €11.4836 per unit, corresponding to the global issue amount of €39,950,008.95, pursuant to the capital increase settled on 19 February 2021. This was the first admission to trading prospectus relating to Portuguese real estate investment funds prepared and approved under the Prospectus Regulation, posing significant challenges in terms of articulation between the standardised European prospectus regime and the specificities of the local real estate investment fund's legal framework.

In July 2021, Greenvolt – Energias Renováveis, SA (Greenvolt) launched its initial private offering and admission to trading of its share capital increase of up to €205,499,998.56 on Euronext Lisbon, by means of a contribution in cash of €149,499,998.56 and a contribution in kind of €56 million (such contribution in kind resulted from Greenvolt's merger with V-Ridium Power Group, Sp. z.o.o, a Polish renewables company) on Euronext Lisbon. The Offering Price was set at €4.25 per share, implying a pre-money market capitalisation of approximately €319 million, following a successful over-subscribed bookbuilding with qualified and institutional investors. An over-allotment option of up to 15 per cent of the number of base offering shares was exercised by the Managers in full. This transaction and Greenvolt itself also applied for, and successfully obtained, an ESG rating from Sustainalytics.

SPACs

In 2020 and early 2021, the Portuguese financial community followed with interest the listing of Special Purpose Acquisition Companies (SPAC) in several European markets. Despite no similar listing having yet taken place in Portugal, the intention of the CMVM to take a regulatory approach to SPACs was also acknowledged by investors. Meanwhile, in July 2021, ESMA issued a statement on the matter that, while making the case for increased transparency and quality disclosures on relevant matters, such as conflicts of interests, SPAC shares are subject to MiFID product governance, limiting, in practice and to a certain extent, its access to retail clients of financial institutions. We take the view that if shares of SPACs that follow in substance the transparency requirements laid down in ESMA's statement, then distributors may include retail clients in the positive target market of such instruments.

Debt markets

The past three years 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 listed and not listed) continued to play an important part in the diversification of financing routes for the Portuguese economy.

In October 2020, the Autonomous Region of the Azores (RAA) issued a €180 million fixed-rate senior bond, with maturity in 2026, aimed at refinancing existing debt and contributing to the reduction of RAA's overall financing costs. Despite the challenges faced by the international capital markets at the time of the launch owing to the covid-19

© 2021 Law Business Research Ltd

pandemic, the entire aggregate amount was successfully placed with eligible counterparties and professional clients, with demand clearly exceeding the offer, and the RAA was able to raise the necessary funds without a state guarantee being issued.

In May 2021, FC Porto – Futebol, SAD issued a public subscription offer of up to 7 million bonds with a nominal unit value of €5 and an initial overall value of up to €35 million, which was further increased to €65 million, representing the bond loan named FC PORTO SAD 2021-2023. This transaction involved a retail bond issue with a placement syndicate composed of eight banks and represented the largest bond issue by a SAD in Portugal. In June 2021, SIC – Sociedade Independente de Comunicação, SA launched a public subscription offer of up to 1 million bonds with a nominal unit value of €30 and a total overall value of up to €30 million, representing a bond loan, through a public subscription offer of SIC 2021-2025 Bonds and a voluntary partial exchange offer of bonds that represented the bond loan named SIC 2019-2022 Bonds (*Obrigações* SIC 2019-2022) for SIC 2021-2025 Bonds.

In July 2021, Sport Lisboa e Benfica – Futebol SA launched a public subscription offer of up to 7 million bonds with a nominal unit value of €5 and an initial overall value of up to €35 million. This transaction involved a retail bond issue with a placement syndicate composed of 11 banks.

Finally, on 6 September 2021, EDP – Energias de Portugal. SA priced two green fixed to reset rate subordinated notes issuances: one in the total amount of €750 million, with an early redemption option exercisable by EDP five years and three months after the issue date, final maturity date in March 2082 and a yield of 1.6 per cent up to the first reset date falling five years and six months after issuance; and the second in the total amount of €500 million, with an early redemption option exercisable by EDP seven years and nine months after the issue date, final maturity date in March 2082 and a yield of 1.95 per cent up to the first reset date falling eight years after issuance. Similar to the issuances executed in January 2021, January 2020 and January 2019, the instruments are unsecured, senior only to EDP's ordinary shares and junior to its senior debt obligations. Their key features include the optional deferral of interest, which is cash-cumulative and compounding, as well as subject to compulsory payment events.

The 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 not a regulated market in accordance with MiFID II and Portuguese law-governed companies continue to update their programmes (such as commercial paper) in this market, given that it has a diversified investor base and allows for additional financing possibilities.

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 the continuity of business operations, both ESMA and the CMVM issued recommendations for financial market participants.[9] They have advised companies to assess the potential impacts of covid-19 on their businesses, including through business continuity planning, and to keep their shareholders informed in this

9 ESMA, 'ESMA Recommends action by financial market participants for COVID-19 impact' (11 March 2020), available at https://www.esma.europa.eu/press-news/esma-news/esma-recommend

© 2021 Law Business Research Ltd

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 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 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.[10] 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), provided that the authenticity of the statements and security of communications were ensured and that the meeting content and intervening parties were recorded.[11] The outbreak of the covid-19 pandemic saw virtual general meetings being increasingly 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 participants attending the same meeting. The CMVM has openly expressed its support for these alternative ways of holding 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 overcoming 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 the 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)[12] entered into force in June 2019. The EMIR Refit made significant amendments to simplify the documentary process, introducing a new counterparty category (the small financial counterparty) and the

s-action-financial-market-participants-covid-19-impact; CMVM, 'CMVM Decisions and Recommendations on Covid-19' (20 March 2020), available at https://www.cmvm.pt/en/Comunicados/communiques/Pages/20200320mc3.aspx?v=.

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

11 Articles 377(6)(b) and 410 of the PCC, respectively.

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

© 2021 Law Business Research Ltd

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. The market was also impacted by the EU Benchmark Regulation, which established that only compliant benchmarks provided by an authorised administrator could be used in new financial instruments or contracts, from 1 January 2020 onwards. Since not all benchmarks typically used in the financial markets comply with these requirements, market participants must review existing agreements accordingly; for example, by transitioning away from EONIA (which will continue to be published until January 2022) to the €TR. In addition, market participants have also had to adapt their operations and existing agreements to the changes brought by Brexit, which became fully effective on 31 December 2020. Although part of the EU legislation affecting derivatives trading has been onshored in the United Kingdom through the European Union Withdrawal Act 2018 (as amended), market participants must be thoughtful of certain existing differences (and future divergences) between the EU and UK regimes, namely as regards the mutual recognition of clearing houses, satisfaction of trading obligations, exemptions as to clearing, disclosure and reporting obligations, position limits and the characterisation of OTC derivatives.

Asset-backed securities

Although the securitisation market has remained active during the past four years, in 2021, it has shown a further resurgence in performing securitisations, following the trend of 2020, with a variety of transactions having 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 an important role in solving this, even though most transactions are still being 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 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.

Following the synthetic securitisation launched in May 2019 by a Portuguese bank, on 26 July 2021, the Portuguese market witnessed a multi-jurisdictional synthetic securitisation of €3.05 billion of performing senior secured and unsecured Portuguese loans originated by a Portuguese bank in the normal course of business. This transaction transferred the risk on to the underlying assets, resulting in a reduction of risk-weighted assets (RWAs) associated with the pool, and was structured in accordance with the new EU STS on-balance sheet, as per Article 26(a)1 of the 15 December 2020 amendments to Securitisation Regulation 2017/2402. PCS, as a third-party verification agent, successfully verified the criteria and confirmed the STS label, making Project Castelo the group's first public (market) issuance of a synthetic STS securitisation.

© 2021 Law Business Research Ltd

Following the first securitisation in Portugal to be successfully labelled, in April 2020, as simple, transparent and standardised (STS) under the Securitisation Regulation and the first green RMBS securitisation in the Iberian peninsula (RMBS Green Belém No. 1), involving a €392 million securitisation of residential mortgage credits originated by Unión de Créditos Inmobiliarios Establecimiento Financiero de Credito – Sucursal em Portugal, this type of transaction is expected to become a trend in the Portuguese market. In fact, as issues related to sustainability and ESG gain prominence, it is expected that issuers will increasingly seek these types of solutions in response to investor demand. Although not entirely related to this topic, in the equity market we have also noted a rise in sustainability and ESG awareness, with the listing of Greenvolt – Energias Renováveis, SA on Euronext Lisbon with a +500 million market cap.

In August 2020, the Portuguese market was presented with Silk Finance No. 5, a €610 million revolving cash securitisation of auto loan credits originated by Banco Santander Consumer Portugal, SA, with securitised bonds issued by TAGUS - Sociedade de Titularização de Créditos, SA. Silk Finance No. 5 was the second securitisation transaction in the Portuguese market to be labelled an STS and the first Portuguese transaction to achieve significant risk transfer (SRT) on a consolidated basis under Regulation No. 575/2013, as amended. Following this deal, in July 2021, the Finance No. 2 was brought to the Portuguese market. This involved a cash flow securitisation of a revolving portfolio of auto loan credits originated by Banco Credibom, SA, for an initial amount of €750 million, and was the third securitisation transaction in the Portuguese market to be labelled an STS.

Covered bonds

Covered bonds continue to play a role 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 similar to asset-back securities) was placed in the market by a Portuguese issuer.

On 12 March 2018, the European Commission published a proposal for a directive on the issue of covered bonds and covered bond public supervision.[13] In November 2019, the European Parliament and the Council adopted the legislative package for the new Covered Bond Directive (CBD)[14] and a new related Regulation (CB Regulation).[15] 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 had to be implemented in national regulation by 8 July 2021 and covered bond issuers must apply national implementing regulation at the latest by 8 July 2022. The CBD replaces current Article 52(4) of the UCITS Directive[16]

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

14 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, amending Directives 2009/65/EC and 2014/59/EU.

15 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.

16 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.

© 2021 Law Business Research Ltd

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 rule-based as the market had feared) and to legally acknowledge existing market practices (significantly leveraging the work carried out 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 materially affect the market, 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). Developments in the legislative process are currently awaited and market consultation is expected. To date, the Bank of Portugal has been responsible for supervising covered bonds, with the CMVM assuming the role of supervisory authority only in issuances of covered bonds. However, it is expected that the CMVM will assume full supervision in the future.

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 introduce requirements on minimum over-collateralisation 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 and 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 appointed by the issuer *ab initio*, 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 an appointed common representative; securitisations are not required to have a common representative, although one is usually appointed; EMTN programmes are also not required to have a common representative and one is not usually appointed.

The United Kingdom's departure from the European Union and the end of the transition period 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 means, 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 representatives in issues governed by Portuguese law, which from 1 January 2021 excludes UK-based entities.

The market has already begun to adapt, with EU-based entities being appointed as common representatives in new securitisations and debt programmes. In addition, some

© 2021 Law Business Research Ltd

existing Portuguese law-governed transactions have already replaced the UK-based common representatives 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 the possible renegotiation of the transaction documentation for each operation. Furthermore, although the issuer appoints the common representative *ab initio*, the common representative may only be replaced through a bondholders' resolution.[17] 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.[18]

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

However, with a view to softening the impacts of Brexit and guaranteeing a smoother transition, preventing the inexistence of a legal framework after the United Kingdom's exit, Decree-Law No. 106/2020 was approved, which established a set of rules applicable to the field of financial services, after the end of the transitional period, foreseen in the United Kingdom's Withdrawal Act. Pursuant to the aforementioned Decree-Law, credit institutions and investment firms authorised in the United Kingdom to provide ancillary services and investment activities and/or services, operating in Portugal under the right of establishment and the freedom of provision of services, may continue to provide such services to investors in Portugal after the end of the transitional period provided for in the United Kingdom's Withdrawal Act. In order to do so, credit institutions and investment firms authorised in the United Kingdom had to, within three months of the end of the transition period, terminate any current agreements or request authorisation to maintain their activity in Portugal; the latter to be submitted within six months after the end of the transition period.

Conversely, Portuguese transactions governed by English law (as is the case of many Portuguese issuers' EMTN programmes) may 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. As such, English law-governed debt issues by Portuguese issuers were not 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, no further AT1 instruments with a conversion feature have been issued in the market. Other Portuguese banks, including Banco Comercial Português, Caixa Geral de Depósitos and Novo Banco, subsequently started to issue capital instruments – both AT1 and Tier 2 – in the market. This includes capital instruments issued pursuant to the CRR2, as mentioned below.

17 Article 358(1) PCC.

18 See Article 10(2) of Decree-Law No. 59/2006 of 20 March 2006, as amended.

© 2021 Law Business Research Ltd

The CRR2, the CRD V,[19] both of 20 May 2019, and BRRD 2[20] entered into force on 27 June 2019. Member States were obliged to adopt and publish the measures necessary to comply with CRD V by 28 December 2020, although most provisions have only become applicable from 28 June 2021. Regarding senior non-preferred instruments, Directive (EU) 2017/2399[21] was finally transposed into the Portuguese legal framework by Law No. 23/2019, which 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 updated 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. This first issuance of senior non-preferred debt has represented a milestone in the Portuguese capital markets and has established the path for new issuances of this type of instrument. To date, other Portuguese banking groups have made recourse to these instruments, but on a private and intra-group level.

MiFID II

The MiFID II and MiFIR legislative package entered into force in 2018 and has been incorporated into 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 after months of delay in the legislative process, having finally entered into force on 1 August 2018. This law has amended various legal regimes, structuring the organisation and functioning of the 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, by 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, as well as independent investment advice, improved pre- and post-trade transparency, the extension of existing rules on structured deposits and stronger 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 along with a global review of their procedures and documentation. Product governance has also posed a very significant challenge.

19 Directive (EU) 2019/878.

20 Directive (EU) 2019/879.

21 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.

© 2021 Law Business Research Ltd

The PRIIPs Regulation

According to the PRIIPs Regulation, a packaged retail and insurance-based investment product constitutes any investment where, regardless of its 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 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.

Annex II to Law No. 35/2018 was used to further regulate the application of the PRIIPs Regulation in Portugal and 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 marketing materials by 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 on which it will become available to the public or it is amended.

The PRIIPs Regulation must be read in conjunction with Annex II to Law No. 35/2018 and CMVM Regulation 8/2018, the latter applying exclusively to PRIIPs whose issuance, trading or provision of consulting services is supervised by the CMVM and regulating 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 prospectus case discussed below, we 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 without this having prevented the Novo Banco sale process from being concluded in October 2017. We expect to report further on the outcomes of these disputes in the coming years. Nevertheless, an important case in the United Kingdom, *Goldman Sachs International v. Novo Banco SA*, confirmed that litigation regarding this 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 that 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

© 2021 Law Business Research Ltd

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 based on alleged illegalities and constitutionality issues. On 12 March 2019, the Lisbon Administrative Court fully dismissed the plaintiffs' claims.

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) 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 (essentially those related to disputes with SMEs) have been analysed and decided by the Portuguese Supreme Court of Justice (STJ).

In these cases, particularly during the global financial crisis, the STJ acknowledged the validity of derivative contracts and the applicability of a swap termination owing to an abnormal change in circumstances. Following the covid-19 pandemic, we expect an emergence of new cases in the Portuguese courts regarding abnormal changes in circumstances.

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[22]) 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 type of transaction at stake.

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. For instance, 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).

22 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).

© 2021 Law Business Research Ltd

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 markets instrument, stamp duty is not applicable to bond financing or to applicable interest payments, seeing as that would restrict the free movement of capital within 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 regularly amended and updated and contains provisions similar to those found in the insolvency regimes of most jurisdictions, aimed at tackling the usual concerns arising in insolvency cases. In addition to regulating insolvency proceedings, the Code sets out a special recovery procedure, 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 procedure constitutes urgent stand-alone legal proceedings based on out-of-court negotiations that are later confirmed by a court.

As usual, the law provides for hardening periods (backward counting periods from the insolvency proceedings 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.

Legal amendments and additional statutes have been recently introduced 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. Interbolsa published Regulation 2/2016 for this purpose. Interbolsa also became eligible as a securities settlement system for the purposes of the short-term European paper (STEP) and STEP label,[23] 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 have underlined the need for systemic entities and listed companies to have robust compliance and risk management systems in place. Growing public pressure on official institutions has resulted in more intense scrutiny by the supervisory authorities, including the CMVM, regarding:

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

© 2021 Law Business Research Ltd

a prospectus review and approval, although there is now a trend within 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.

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 noted above, it should always be borne in mind that in Portuguese corporate finance transactions there may be relevant tax issues to be considered 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 intervention 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 Portuguese 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 was in force until 30 September 2021 and was then extended by Law No. 50/2021 of 30 July until 31 December 2021. The current scenario will doubtless have an impact on companies' and families' cash flow, 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 have also seen 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).

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

JOSÉ PEDRO FAZENDA MARTINS

Vieira de Almeida

José Pedro Fazenda Martins has a master of laws degree from the University of Lisbon's faculty of law and is a former head of the issuers and corporate finance team of the Portuguese Securities Market Commission (CMVM). He joined Vieira de Almeida in 2011 and is a partner in the banking and finance practice, where he regularly advises on the capital market sector's most complex cases. He has been actively involved in privatisations, initial public offerings, takeover bids and corporate governance issues. He is a former assistant professor at the University of Lisbon's faculty of law and has published several articles and been a speaker at several conferences in the field of securities law. He is a founding member of the Securities Law Institute of the University of Lisbon.

ORLANDO VOGLER GUINÉ

Vieira de Almeida

Orlando Vogler Guiné has a law and a business law master's degree from the University of Coimbra's faculty of law and a postgraduate degree in securities and business law from the University of Lisbon's faculty of law. He joined Vieira de Almeida in 2006 after an internship with the Portuguese Securities Market Commission (CMVM). Since then, he has been actively involved in capital market transactions at Vieira de Almeida, including takeovers, liability management, asset-backed securities, debt, hybrid and share issues, and in initial public offerings and accelerated book-building, bank recapitalisations and resolutions, undertakings for collective investment and derivatives, assisting leading institutions in the financial and non-financial sectors. In parallel with 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 Institute for Business and Labour Law (IDET) of the University of Coimbra's faculty of law and of the think tank Governance Lab.

© 2021 Law Business Research Ltd

SORAIA USSENE

Vieira de Almeida

Soraia Ussene has a law degree from the University of Lisbon's faculty of law, a master's degree in corporate law from the Catholic University of Portugal and a postgraduate degree in securities from the University of Lisbon. She joined Vieira de Almeida in 2015 and since then has been actively involved in capital market transactions, including liability management, asset-backed securities and debt issues, and in initial public offerings.

VIEIRA DE ALMEIDA

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

© 2021 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-792-8

© 2021 Law Business Research Ltd