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In-Depth: International Capital Markets (formerly The International Capital Markets Review) is an incisive overview of the legal and regulatory frameworks governing the capital markets in major jurisdictions worldwide. It offers practical guidance on a range of key issues, including the regulators' recent enforcement activities, prospectus requirements and other mandatory disclosures, tax considerations and much more.

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Portugal

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Summary

Introduction

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) (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 2023, including:

1. Decree-Law No. 27/2023 of 28 April 2023, which enacted the assets management regime, and through which certain directives are now implemented (replacing the earlier implementation laws), in particular Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Fund Managers, which sets out most of the rules relating to alternative investment funds (AIFs); CMVM Regulations 2/2015 and 3/2015, which set forth more specific rules regarding certain aspects of UCITS and AIFs and their fund managers, will soon be replaced by a new CMVM regulation. The changes promoted by the assets management regime are intended to simplify some regulatory aspects, and to stimulate the national asset management market's competitiveness and attractiveness through the simplification of management entities and undertakings for collective investment, the adapted statute for small management companies and, finally, the introduction of the possibility for AIFs to issue bonds and the introduction of the tied agent role in UCITS marketing.
2. Decree-Law No. 31/2022, of 6 May 2022, which transposes Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bonds public supervision (Covered Bonds Directive). This Decree-Law approves the new legal regime of covered bonds and, without prejudice to certain transitory provisions, this new regime entered into force on 1 July 2022, imposing substantial changes on the legal framework that was applicable to the issue of covered bonds. For further information on the new legal regime of covered bonds, see Section II.ii, 'Covered bonds'; and
3.

> 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, our national banking laws are largely in line with EU rules.

However, the Portuguese capital markets framework still has a number of specificities that should be taken into account. 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.

Our 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:

1. 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;
2. the CMVM, which is empowered to supervise the 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 acquired the competence to exercise prudential supervision over asset managers and collective investment undertakings; and
3. the Portuguese Insurance and Pension Funds Authority, 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 the breach. A supervisory authority's decision may be contested and submitted to the decision of a special court that exclusively decides on competition, regulation and supervisory matters.

Since the 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, with the above-mentioned special court on regulatory matters having been set up to enhance the capacity to respond to growing regulatory demands. In recent years, authorities have imposed fines on several entities, including banking board members accused of hiding relevant accounting information.

The year in review

i Developments affecting debt and equity

Equity markets

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

In 2023, the Portuguese market witnessed an equity raise by EDP – Energias de Portugal, SA and a voluntary general tender offer for the acquisition of Sonaecom SGPS, SA launched by Sonae SGPS, aiming to achieve more than 90 per cent of the voting rights of Sonaecom to delist the company. However, Sonae SGPS did not meet the target and the offer was withdrawn.

Special purpose acquisition companies

In 2020 and early 2021, the Portuguese financial community followed with interest the listing of special purpose acquisition companies (SPACs) in several European markets. In July 2021, ESMA issued a statement declaring 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. In addition, the CMVM published its understanding regarding the admissibility of SPACs in Portugal, which stated that the CMVM considers admissible the listing on Euronext Lisbon (the Portuguese regulated market) of shares representing the share capital of a SPAC and affirming that it is not prohibited by the Portuguese legislation.

Debt markets

The past few years have been strong years in the debt markets and Portuguese companies 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) and private placements (both listed and unlisted) continued to play an important part in the diversification of financing routes for the Portuguese economy.

Sustainable finance is a hot topic in Portugal and Portuguese companies have welcomed this trend. In October 2022, Mota-Engil SGPS, SA, a public company listed on Euronext Lisbon and in the Portuguese Stock Index, launched a public subscription offering of up to €70 million maturing in 2027 through a subscription offer with one exchange offer. This was Mota-Engil's second sustainability-linked deal (and the second sustainability-linked bonds public offer prospectus approved in Portugal), whereby the company undertook to promote the improvement of one key performance indicator (KPI) (rate of non-fatal work accidents resulting in leave of absence). One of the most innovative aspects of this transaction was the granting of a potential additional remuneration to the noteholders, in the amount of €1.25 per issued note in accordance with the green Bond Framework published on its official website and supported by a second-party opinion. In June 2023, EDP issued green debt instruments in the amount of €750 million each, maturing in 2028 and with a coupon of 3.875 per cent of its programme for the issuance of debt instruments. if Mota-Engil fails to comply with the sustainable performance target established for the defined KPI. Following this deal, in November 2022, Greenvolt issued up to €50 million with a fixed gross interest rate of 5.2 per cent per year Following this deal, in November 2022, Greenvolt issued up to €50 million with a fixed gross interest rate of 5.2 per cent per year in accordance with the green bond framework published on its official website and supported by a second-party opinion. In June 2023, EDP issued green debt instruments in the amount of €750 million each, maturing in 2028 and with a coupon of 3.875 per cent per its programme for the issuance of debt instruments.

Portuguese football team companies also continued to resort to the market to finance themselves through the issuance of debt. In May 2023, Sport Lisboa e Benfica issued a public subscription offer of up to €50 million with a fixed gross interest rate of 5.75 per cent per year, followed by a public subscription offer of FC Porto of up to €55 million with a fixed gross interest rate of 6.25 per cent per year.

In June 2023, the autonomous region of the Azores issued a five-year fixed-rate senior bond in the amount of €230 million, aimed at refinancing its existing debt.

Finally, Portuguese corporate companies continue to update their programmes (such as commercial paper) and have them listed in the Spanish alternative fixed-income market (MARF) as this is a multilateral trading facility and not a regulated market in accordance with MiFID II, given that MARF has a diversified investor base, allowing for additional financing possibilities.

ii Developments affecting derivatives, securitisations and other structured products

Derivatives

Regulation (EU) 2019/834 (EMIR Refit)[7] entered into force in June 2019 after overcoming the major 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, as well as the challenges presented by MiFID II in 2018, including, inter alia, the obligation to trade certain classes of derivatives through trading venues, and certain pre and post-transaction information requirements. The EMIR Refit made significant amendments to simplify the documentary process, introducing a new counterparty category (namely the small financial counterparty) and reducing 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.

Since September 2016, initial margin rules for non–cleared derivative transactions had been progressively entering into force, with an increasing number of market participants being subject to the requirement each year – the phase-in of initial margin rules was concluded with the implementation of Phase 6, which became effective as of 1 September 2022, covering users of derivatives with an aggregate average notional amount of non-centrally cleared OTC derivatives above €8 billion. These rules have required firms to put in place robust governance and project management structures to continuously monitor their exposure under ongoing derivatives' transactions. In this regard, market participations should be further aware that the three-year derogation from margin rules in respect of non-centrally cleared OTC derivatives that are single-stock equity options or index options is expected to expire in January 2024,[8] and that the temporary exemption from clearing and margin requirements for cross-border intragroup transactions under EMIR is expected to expire in June 2025.

The market was also impacted by the EU Benchmark Regulation, which established that only compliant benchmarks provided by an authorised administrator (an EU authorised administrator, or a third-country benchmark if it is included in a register maintained by ESMA) 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 were required to review existing agreements accordingly – for example, by transitioning away from EONIA (which ceased being published in January 2022) to the €TR, as well as from the US dollar Libor (which ceased being published in June 2023) to the Secured Overnight Financing Rate. Further to Commission Implementing Regulation (EU) 2021/1847 of 14 October 2021 and Commission Implementing Regulation (EU) 2021/1848 of 21 October 2021 covering the designation of a statutory replacement for certain settings of the Swiss franc Libor and of a replacement for the benchmark Euro overnight index average, respectively, the European Commission adopted, on 14 July 2023, a delegated regulation extending until 31 December 2025 the EU Benchmark Regulation transitional period during which EU supervised entities can still use third-country benchmarks that are not on the ESMA register – this delegated regulation shall only be in force upon publication in the Official Journal.

In addition, market participants have had to adapt their operations and existing agreements to the changes brought about 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 mindful 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, since changes made to EU EMIR after 31 December 2020 do not automatically carry over to UK EMIR. In March 2022, ESMA announced its decision to extend the application of the recognition decisions under Article 25 of EMIR for the three UK central counterparties (CCPs) (ICE Clear Europe, Ltd, LCH Ltd and LME Clear Ltd) until 30 June 2025.

Further to the key regulations described above, there are upcoming regulatory changes that market participants should be aware of.

On 7 December 2022, the European Commission published a proposal for a regulation to amend EU EMIR (EMIR 3.0),[9] which includes, among other things:

1.

prescriptive measures aiming at favouring the relocation of clearing in the EU (e.g., an obligation for parties to have an active account with an EU CCP and new prudential requirements to reduce any excessive exposure);

2. incentives to increase the liquidity of EU clearing and CCPs (e.g., additional transparency and predictability of CCP models and simplification of authorisation and recognition procedures of CCPs);
3. review of exemptions for the clearing obligation or bilateral margin (e.g., exemption of intragroup transactions, introducing a negative list of specific countries instead of the current system of equivalence and permanent exemptions for transactions with pension scheme arrangements established in a third country where there is a national exemption from the clearing obligation);
4. additional tools to manage the recognition of third-country CCPs (e.g., the possibility of the European Commission to waive the requirement for a third country to have a regulatory framework equivalent to EMIR for the recognition of third-country CCPs and the possibility of ESMA to establish more proportionate cooperation modalities); and
5. the addition of bank guarantees and public guarantees as eligible collateral for margin requirements.

On 13 June 2023, the European Parliament published proposed amendments to the EMIR 3.0 original proposal, mostly covering the following topics:

1. the possible removal of the NFC intragroup reporting exemption;
2. the extension of trade reporting obligations to non-EU members of EU groups;
3. the incorporation of a temporary margin exemption for single-stock options and equity index option; and
4. the removal of Article 13 of EMIR (which permits substituted compliance[10]), the conditional clearing exemption for post-trade risk reduction transactions and credit default swaps from the active account requirement.

Again in December 2022, ESMA further published guidelines and technical documentation on reporting under EMIR Refit (Guidelines) with the aim of clarifying the legal provisions on reporting and data management and providing practical guidance on their implementation for market participants. The Guidelines will apply from 29 April 2024.[11] In relation to derivatives reporting obligations and trade repositories' obligations, going forward, EU entities will also need to consider any guidance published by their national competent authority.

Finally, in June 2023, and after extensive negotiations, the European Parliament and the Council have reached a political agreement on the 2021 EU Banking Package (comprising the Capital Requirements Regulation (CRR III), the Capital Requirements Directive (CRD VI) and a separate legislative proposal to amend the CRR regarding resolution), which had been proposed by the European Commission on 27 October 2021. With a focus on finalising Basel III and implementing Basel IV requirements, improving sustainability by contributing to the green transition and strengthening banks' resilience, the proposed regulatory changes will apply to financial institutions in relation to their capital requirements, risk assessment models and prudential supervision, therefore also impacting derivatives trading. The new rules amending the CRR are expected to apply from 1 January 2025 (with certain elements of the regulation phasing in over the coming years) and changes to the CRD will have to be transposed by Member States by mid-2025.

Asset-backed securities

Although the securitisation market has remained active during the past few years, there was a resurgence in performing securitisations as from 2021, with a variety of public transactions being completed and with different type of assets or receivables being securitised, including mortgage-backed loans, motor vehicle loans and consumer 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). As from the second quarter of 2022, the Portuguese market has witnessed:

1. in September 2023, a €206.7 million cash securitisation of credit cards receivables originated by WiZink Bank, SAU – Sucursal em Portugal.
2. in June 2022, a €203.3 million cash securitisation of auto loan credits originated by 321Crédito, Instituição Financeira de Crédito, SA;
3. in September 2022, a €650 million cash securitisation of consumer loan credits originated by Banco Santander Totta, SA; and
4. in November 2022, a €331.2 million cash securitisation under the name RMBS Belem No. 2 of prime owner-occupied residential mortgage loans originated by UCI's branch in Portugal.

Additionally, with regards to non-performing loans (NPLs), following the milestone Évora deal completed by Caixa Económica Montepio Geral in November 2017 (the first NPL listing prospectus in southern Europe), which collapsed in 2023, similar deals were launched thereafter. 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. We are now seeing some of the notes issued under these deals being redeemed early and included in newly established securitisation transactions.

Portuguese banks are also active in the synthetic securitisation market, and, among other things, in August 2023 another successful transaction in an amount of €103 million of performing senior secured and unsecured loans was completed. This transaction transferred the risk to the underlying assets, resulting in a reduction of the risk-weighted assets associated with the pool, and was structured in accordance with the new EU simple, transparent and standardised (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.

Covered bonds

Covered bonds continue to play a significant role in the Portuguese capital markets, with some issuances on the banking side, including syndicate issuances.

As stated above, the Covered Bonds Directive was implemented in Portugal through the new legal regime of covered bonds, imposing substantial changes on the legal framework that was applicable to the issue of covered bonds, including (1) the supervision of grandfathered covered bonds being transferred from the Bank of Portugal to the CMVM from 1 July 2022; and (2) regarding liquidity buffer requirements.

Furthermore, there are some hot topics pertaining to this new legal regime of covered bonds, such as extendable maturities schemes, liquidity buffers and cover pool monitors. This regime was further supplemented by CMVM Regulation No. 2/2023, which repeals the regulatory notices of the Bank of Portugal on covered bonds that have been applicable to date, and which focuses only on those aspects that are directly subject to the legal regime of covered bonds, namely:

1. the instructive and ancillary elements for the purpose of authorising covered bond programmes;
2. the criteria for legal, contractual or voluntary over-collateralisation;
3. the issuer's information duties towards the CMVM;
4. the document preservation duties related to the programmes;
5. the common representative's right of access to information about the cover pool;
6. the means of sending and disclosing information relating to covered bond programmes;
7. the procedures for the replacement of the programme's credit manager; and
8. the fee due and payable for the authorisation of covered bond programmes.

Regarding the extendable maturity scheme, albeit this has been present in all Portuguese covered bond programmes from the outset, and notwithstanding the legal omission regarding it, there are certain information and substantive requirements that need to be met. In addition, extensions shall be automatic and can only be triggered by revocation of the authorisation of the credit institution (which leads to the declaration of insolvency and liquidation) or foreseeable or actual failure of payment of the principal or interest under the covered bonds due on the (initial) maturity date that is not remedied within the deadline (if any) established in the conditions of the issue or programme, not more than 10 business days. The extension and underlying reason shall be notified to the CMVM 10 days in advance or, if that is not possible, as soon as possible; the CMVM has the power (although not discretionary) of opposing the extension within the following 10 days. Although the law has not expressly stated the position of a notification to the CMVM after the 10th day before the extension date, our interpretation, now agreed with by the CMVM, is that pending a decision from the CMVM, the covered bonds automatically extend.

The new legal regime of covered bonds contains a novelty in respect of liquidity buffers: issuers shall have a liquidity buffer covering expected net liquidity outflows within the following 180 days (which shall be composed of Level 1, 2A or 2B liquid assets, each as defined in the Regulation No. 2015/61).

Finally, regarding the cover pool monitor, Portugal opted in to the possibility to continue to have an external cover pool monitor (while also allowing the option for an internal unit, in accordance with the Covered Bonds Directive requirements for that option). However, there are some constraints for issuers caused by the new legal regime of covered bonds, which entails a few changes in relation to the old Covered Bonds Law:

1. the cover pool monitor cannot be the issuer's auditor or have been its auditor in the past two years;
2. it can remain in office up to 10 consecutive years; and
3. it must provide an annual report by 31 March each year and a report, in similar terms as the annual report, 10 business days before a new programme is established or converted.

Portuguese banks have been converting their previous covered bonds programmes under the new framework. Banco Santander Totta, SA was first to apply for a conversion in March 2023, and thereafter, the bank has successfully placed two syndicated issues with institutional investors in an amount of €750 million covered bonds in April 2023 and €850 million in September 2023. Banco BPI, SA also converted its covered bonds programme in June 2023 and successfully placed €500 million in September 2023 with institutional investors. These issues already benefit from the premium covered bonds label. Further, in July 2023, Caixa Económica Montepio Geral converted its conditional pass-through covered bonds programme, and the remaining Portuguese banks are expected to convert their programmes until the end of the year.

Own-funds regulations and senior non-preferred instruments

The CRR II, the CRD V (both of 20 May 2019) and BRRD II 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[12] was transposed into the Portuguese legal framework by Law No. 23/2019, which establishes 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 II rules.

Accordingly, in November 2019, Caixa Geral de Depósitos, SA issued €500 million of senior non-preferred capital instruments, compliant 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. CGD issued more senior debt (preferred and non-preferred), and, in 2021 and more recently, issued sustainability senior preferred instruments, which were admitted to trading on the Luxembourg Stock Exchange and placed with retail investors. Following this trend, Novo Banco, SA pursued the same path and returned to issuing senior preferred instruments with two issuances of senior fixed/floating rate senior preferred notes, both admitted to trading on Euronext Dublin and place with retail investors. This trend has continued, and in June 2023, the Portuguese market witnessed an issue of senior preferred debt linked to social sustainability in an amount of €200 million by Caixa Central de Crédito Agrícola Mútuo, CRL, placed with more than 40 institutional investors. Following that, in September 2023, Banco Comercial Português, SA successfully issued senior preferred debt securities eligible for the minimum requirement for own funds and eligible liabilities under its euro note programme in an amount of €500 million, for three years.

Furthermore, to date, other Portuguese banking groups have made recourse to these instruments, but on a private and intragroup level.

The Undertakings for Collective Investments Law

Activity involving the management, investment and marketing of AIFs is now mainly regulated by the assets management regime. Also of particular relevance is the Securities Code.

The new assets management regime entered into effect on 28 May 2023, and a new regulation from the CMVM, which will further detail certain provisions included in the assets management regime, is currently under public consultation.

Again in 2023, the CMVM registered the first Portuguese AIF qualified as 'dark green' under Article 9 of 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, allowing it to buy land in burnt or desertified areas to restore ecosystems, as well as fauna and flora biodiversity, while offering *in specie* remuneration to certain participants interested in offsetting their emissions and monetising the remaining carbon sequestration potential of their assets to increase the fund's profitability.

In the past two years, two financing programmes were launched through funds from the capitalisation and resilience fund: Programa Consolidar and Programa Venture Capital. The first programme has an endowment of €500 million and the second programme has an endowment of €400 million. They are intended to support the subscription of venture capital funds for investment in small and medium-sized enterprises (SMEs) and mid caps, which have been important instruments to support these funds, in parallel with private monies.

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 involving different stakeholders. This did not, however, prevent the successful conclusion of the Novo Banco sale process in October 2017. We expect to continue to report 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 the resolution measure, including in relation to English law contracts, should be decided by the Portuguese courts. The court stated that there were no grounds to pursue the case in the English courts or to interfere in the Bank of Portugal's exercise of its resolution powers as the national resolution authority.

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 based on alleged illegalities and constitutionality issues. On 12 March 2019, the Lisbon Administrative Court fully dismissed the plaintiffs' claims. All existing proceedings are still suspended. Following the CJEU decision for both pilot proceedings of 5 May 2022 in relation to the preliminary questions raised by the Portuguese Supreme Administrative Court, on 9 March 2023 the Portuguese Supreme Administrative Court issued a decision dismissing the plaintiffs' appeal in each of the pilot cases, thereby confirming the favourable decision that had been issued by the Lisbon Administrative Court on 12 March 2019.

There was also a proceeding challenging a specific decision related to the re-transfer of the subordinated bonds by a decision of Bank of Portugal dated 29 December 2015; the Court dismissed the claims of the plaintiffs, and the decision is final as no appeal was filed.

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 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.

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[13]) 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).

In the case of a bond issue, these taxes may not apply or may be applied to a lesser extent. Decree-Law No. 193/2005 of 7 November provides 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 standalone 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.

v Role of exchanges, central counterparties and rating agencies

The Target 2 Securities system entered into force in 2015 and is 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,[14] 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:

1. prospectus review and approval, although there is now a trend within the CMVM to focus on quicker and more predictable reviews and calendar planning;
2. complex financial products placement and relevant documentation;
3. rules of conduct; and
4. 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, are topics increasingly 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.

Outlook and conclusions

Housing transactions started falling quarter-on-quarter and decelerating year-on-year in the second quarter of 2022, reflecting tighter financing conditions as the European Central Bank increased policy rates between 2022 and 2023. Some deceleration in economic activity in Europe and continued supply constraints also contributed to this trend. This entails downside risks to the housing sector and the mortgage market since, as of July 2023, 97 per cent of the stock of loans is associated with a variable or mixed interest rate regime.

The ratio of NPLs in housing credit has been decreasing since the first quarter of 2016, from a peak of 7.4 per cent of total mortgage loans at that time to 1.1 per cent in the first quarter of 2023. This decrease has been supported by a reduction of the unemployment rate, by favourable financing conditions (until 2022), by the impact of the above-mentioned macroprudential measures, and by policy support measures aimed at mitigating the impacts of the covid-19 pandemic and the war in Ukraine. These policy support measures include credit lines with guarantees, tax and social contribution reliefs, loan moratoria, labour income support through a simplified layoff regime and direct income transfers, among other things.

In 2023, the government announced new policy measures aimed at increasing the supply of affordable houses. These measures include:

1. a ban on new golden visas;
2. new constraints on short-term rentals, including a new 'special contribution' and a ban on new licences (with the exception being in rural areas);
3.

simplifying licensing procedures and allowing commercial and services properties for housing;

4. a price ceiling (maximum increase of 2 per cent) on new residential rent contracts; and
5. an increase in housing supply by bringing vacant properties to the market (including tax incentives, credit lines, supply of public properties, government sub-rentals and, exceptionally, compulsory rentals of vacant private properties).

In September 2023, the government proposed a temporary mechanism aimed at lowering and stabilising monthly mortgage payments that were contracted under a variable rate regime or a mixed rate regime. It will apply to mortgage contracts with at least five years' residual maturity. Mortgage payments will be fixed for a period of two years, using 70 per cent of the 6m Euribor as a reference rate. After this period, the initial conditions apply.

Overall, we have witnessed the resurgence of an active economic environment in Portugal in terms of new deals (with strong issues of debt securities), and other transactions were reopened (mainly regarding asset-backed securities). We have also seen some issuers using consent solicitations, which are 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).

Endnotes

1 José Pedro Fazenda Martins is a partner, Orlando Vogler Guiné is of counsel and Soraia Ussene is a senior associate at Vieira de Almeida. ^ Back to section

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. ^ Back to section

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. ^ Back to section

4 Directive 2004/25/EC on takeover bids. ^ Back to section

5 Directive 98/26/EC on settlement finality in payment and securities settlement systems. ^ Back to section

6 Directive 2014/65/EU on markets in financial instruments. ^ Back to section

7 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 (CCP), the registration and supervision of trade repositories, and requirements for trade repositories. ^ Back to section

8 Pursuant to the latest proposed amendments to the EMIR 3.0 proposal (see below), rather than continuing to extend the existing exemption, the EU would include a temporary margin exemption under the EU margin rules subject to the terms of an ESMA report to be published every two years on the treatment of these options by other jurisdictions and including a conclusion on whether the EU exemption should be kept or removed. In the UK, a consultation paper with the proposal by the Prudential Regulation Authority and the Financial Conduct Authority covering the extension of the UK temporary exemption has been published this summer, being the responses presented thereto (and submitted until 18 October 2023) currently under consideration. ^ Back to section

9 The legislative process review should take from 12 to 18 months. The EMIR 3.0 proposed changes do not apply to UK EMIR. ^ Back to section

10 The substituted compliance regime allows market participants to fulfil their EU EMIR obligations in relation to a transaction if one of the counterparties is established in an equivalent third country. ^ Back to section

11 UK EMIR refit reporting requirements will come into effect on 30 September 2024, although there will be a six-month period for counterparties to update their outstanding derivative reports in line with the new requirements, which will end on 31 March 2025. ^ Back to section

12 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 the insolvency hierarchy. ^ Back to section

13 STEP programmes must fulfil certain criteria to be STEP-compliant and therefore eligible to apply for a STEP label. ^ Back to section

14 ibid. ^ Back to section

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