

NEWS

BANKING & FINANCE / CAPITAL MARKETS

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This is the first issue of the Banking & Finance and Capitals Markets Newsletter of VdA which, from now onwards and on semi-annual basis, aims at reporting the most significant legislative novelties and other developments in the financial sector, both on regulatory banking and capital markets matters, as well as conveying our views on relevant issues and activities occurred in these areas of practice.

The publishing of this Newsletter is, naturally, also following the sustained growth in these areas of practice by VdA which has been consolidating and strengthening its competences, client base and both internal and external recognition. Simultaneously, we believe that this Newsletter is also a way for our firm to perform what we see as a duty of citizenship, that of actively participating in the development of the market, a responsibility that we accept as a reference law firm in Portugal for these areas.

Already on the fourth quarter of 2007, we may view this as a very active year, filled with exciting transactions, with several relevant developments within a very particular market context. As specifically concerns the activity developed in Portugal, it has also been a year with an intense legislative evolution, giving place to new financial products and structures, stimulating us to remain permanently updated and posing the challenge of escorting the acceptance of the Portuguese jurisdiction by many international operators. Besides a retrospective analysis of the most relevant developments, we will look in this Newsletter towards the nearest horizon and anticipate legislative innovations which may bring relevant and, in some cases, substantial amendments generating the need for legal support increasingly comprehensive and efficient.

Within this logic, this issue of the Newsletter shall cover: (i) the venture capital's new regime, in which business angels are one of the main novelties; (ii) the new treatment to which positions taken in securitization transactions shall be awarded, namely in what concerns the requirements for true sale effects to be achieved; (iii) what we believe to be the most relevant practical innovation in the context of the much anticipated implementation of the Markets in Financial Instruments Directive (MFID): the tied agents and (iv) the interpretative doubts posed by the new vote imputation rules applicable

EDITORIAL

Pedro Cassiano Santos

to qualified shareholdings in Portuguese listed companies. We briefly review other legislative innovations from 2007 and stress a few issues in the pipe line to be approved or published soon.

In any event, this Newsletter represents, above all, our will to offer our clients quality services in areas of practice with an increasing sophistication of the market and its players, as well as, due to an ever more complex legislative environment, the need for more efficient and specialized legal advice. This is a challenge that we recognize to be very demanding but to which we intend to give a committed and continuous response.

We further wish this Newsletter to live up to the expectations of many readers, and for this goal to be achieved, I strongly believe in the value of comments and suggestions which readers may wish to convey. I therefore wish to thank in advance for all the feedback that may be sent to pcs@vda.pt, regarding both the matters we analyse in this Newsletter as well as any requests for other matters within the legal environment for these areas of practice to be covered. Thank you.

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MIFID AND THE TIED AGENTS

Two legal frameworks for the same agent?

Hugo Rosa Ferreira and Lara Reis

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The imminent implementation of the Markets in Financial Instruments Directive ("MiFID") requires a brief overview of the new Tied Agent ("Agent"), which will replace the *Prospector*, as currently set forth in the Portuguese Securities Market Commission (CMVM) Regulation no. 12/2000.

In what regards the list of financial intermediation activities allowed to the Agents, it will include investment promotion and ancillary investment services, reception/transmission of instructions/orders and placement of financial instruments, which represents an increase of the list of activities already allowed to the *Prospector*. In this respect, the maintenance of the obligation to act on behalf and under the full and unconditional responsibility of only one financial intermediary (or more, if on behalf the same financial group) should be stressed.

One of the new regime's most important novelties

will be the possibility to carry out financial activities within the territory of another Member State through the Agents, whether under the Freedom to Provide Investment Services regime, based on Agents established in the home Member State, or by establishing a branch, when using Agents established in the host Member State, in both cases under the "European passport" regime.

Another important novelty refers to the possibility of corporate entities to assume the role as Agents. Notwithstanding, this possibility may raise difficulties in what concerns harmonization between the banking services Promotion Agent ("*Promotor*") and the Agent, taking into consideration the regime set forth in the Bank of Portugal's Instruction no. 11/2001 (as amended). We have been informed that this issue is now being analysed by the financial supervision authorities (the Bank of Portugal, the CMVM and the

Portuguese Insurance Institute). We trust that the complementary nature of the activities carried out by the *Prospector* and the *Promotor*, as well as the frequent concentration of both types of agents in the same person, will determine the full harmonization thereof. These expected changes allow the inclusion of the Agent among the relevant factors responsible for the new European market regulation philosophy, subjacent to MiFID, in order to achieve important organizational and functional changes in financial intermediation.

Among the new regime's novelties there is the possibility to carry out financial activities within the territory of another Member State through the Agents as well as the possibility of the Agents to be corporate entity.

NEW TREATMENT OF EXPOSURE IN SECURITISATION TRANSACTIONS

Paula Gomes Freire

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As of January 1, 2008, when all transitory provisions relating to the introduction of the standard approach will cease to apply, the Bank of Portugal Regulation Nr. 7/2007 of April 18, which sets forth new capitalisation requirements for the positions undertaken by credit institutions and investment companies in the context of securitisation transactions, will be applicable to all such institutions and companies.

According to this Regulation (*Aviso*) (and a set of Instructions (*Instruções*) and *Cartas Circulares* complementing it), the own funds requirements applying in respect of the positions undertaken in the context of securitisation transactions are in first instance dependent upon the approach taken by the relevant originator for calculation of its

credit and collection risk own funds, i.e.: (i) the standard approach or (ii) the internal ratings approach. Upon assessment of the applicable approach, the crucial factor for determining the relevant own funds requirements in the context of these transactions continues to be that of the significant transfer of the risk inherent to the assets at stake in the context of the relevant transaction (*true sale*).

This transfer of risk can only be assumed in those transactions where, besides the conditions that already applied, certain new and more demanding conditions are met, such as: (i) no significant involvement of the originator in securitisation transactions (the global volume outstanding in respect of the assigned risk positions shall not

exceed 20% of the consolidated assets of the originator, accrued of all positions already assigned in the context of securitisation); and (ii) no implicit support by the originator to the transaction at stake (implicit support is deemed to exist when the transaction encompasses financial support mechanisms that exceed the initially contracted obligations, such as for example the sale of risk positions below market value).

In a nutshell, we are facing a new prudential framework for securitisation transactions which is more demanding and in line with capitalisation requirements that are essentially based on the material risks to which credit institutions are exposed. Basel II is showing as the new philosophy for banking activity regulation.

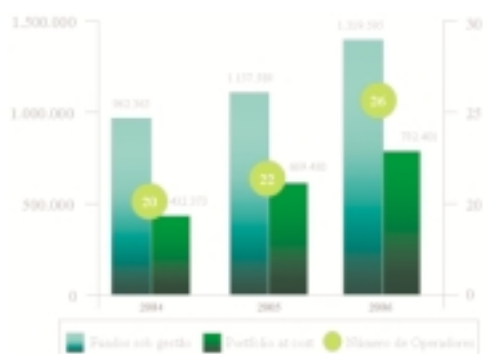


THE NEW VENTURE CAPITAL LEGAL FRAMEWORK

Pedro Simões Coelho and Orlando Vogler Guiné

On August 9, 2007, the Ministers' Cabinet approved several diplomas of great importance for the Portuguese capital markets, *inter alia* the new venture capital legal framework, which we trust will soon be published in the official gazette (*"Diário da República"*) and which we have chosen to elaborate herein in further detail.

The venture capital activity which consists essentially in investing with a profitable purpose, for a determined period of time, in companies with a high growth potential, has seen a great development in Portugal over the past few years, as you may see on the chart herebelow.



Source: APCRI

To further such development, last December the Ministry of Finance and the Portuguese Securities Exchange Commission (*"Comissão do Mercado de Valores Mobiliários"*, the *"CMVM"*) released for public consultation a draft for a new venture capital legal framework which main changes in relation to the current regime we refer to throughout the following paragraphs, including some adjustments resulting from inputs of the relevant industry and which have been included in the new regime.

One of the main innovations refers to the so-called business angels, private individuals willing to invest in venture capital. Such individuals may incorporate a limited liability company, of which they shall be sole shareholder, called Investor in Venture Capital (*"Investidor em Capital de Risco"*, the *"ICR"*), with the minimum share capital of €5,000 in force for this type of companies, subject to (non-public) registration with the CMVM. ICR will enjoy the same tax regime as Venture Capital Funds (*"Fundos de Capital de Risco"*, the *"FCR"*)

and, with the exception of management of FCR, may develop the same activities as Venture Capital Companies (*"Sociedades de Capital de Risco"*, the *"SCR"*).

In relation to SCR, we outline that the respective minimum share capital shall be reduced to €250,000, in case its exclusive object is the management of FCR, in harmony with the minimum share capital of undertakings for collective investment in transferable securities management companies, while the current €750,000 minimum share capital requirement shall only be applicable in case the SCR hold their own portfolio.

As to the FCR, the current distinction between Venture Capital Funds for Qualified Investors (*"Fundos de Capital para Investidores Qualificados"* or *"FIQ"*) and Venture Capital Funds for Public Distribution (*"Fundos de Capital de Risco para Comercialização ao Público"* or *"FCP"*) is eliminated, having regard that none of the 42 FCR currently constituted in Portugal followed the FCP form. Instead of selecting investors based on their nature, there will be a minimum legal participation unit subscription amount of €50,000 for such purposes. We also note that, besides an increase of the minimum capital of the FCR to €2,500,000, the listing of their participation units in a non-regulated market and the merger and spin-off of FCR will be directly foreseen in the law. In what concerns the investment policy, we outline that the maximum period of time for investing in a certain company, of 10 years for SCR and FCR and 5 years for ICR, may exceptionally be extended by the CMVM and will not be applicable to companies which are instrumental to respective activities (and which shares may account for up to 10 per cent of the SCR, FCR and ICR's assets). We also note that the SCR will be able to invest up to 33 per cent of their assets in FCR managed by other entities and that the FCR will be able to invest the same percentage of their assets in other FCR. By regulation, the CMVM may determine a special regime for FCR that invest the majority of their assets in other FCR.

Finally, a one year time-frame for the existing SCR and FCR to adapt to the new legal framework was foreseen in the law's draft, which seeming an appropriate period is expected to be kept in the final version of the law.

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THE "BOOMERANG" EFFECT OF PARAGRAPHS 20.1 h) AND 20.4 OF THE PORTUGUESE SECURITIES CODE ("PSC")

Helena Vaz Pinto

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Consider, for instance, A, B and C, shareholders of a company listed on Eurolist by Euronext Lisbon, each holding shares corresponding to the following voting rights: A - 1%; B - 0,5%; C - 0,9%.

Imagine C has a pre-emption right over B's shares, who in turn has a pre-emption right over A's shares. On a first analysis of paragraphs 20-1-h) and 20-4 of the PSC, one is likely to conclude that A's voting rights (1%) are attributable to B, whose voting rights are deemed to increase from 0.5% to 1.5%. This shareholding is, on the other hand, considered to be attributable to C who, further to his 0,9% holding, ends up with a deemed total shareholding stake of 2.4%. As the 2% threshold is surpassed, the new 2.4% "substantial shareholding" shall be notified by C and publicly disclosed (in accordance with the general terms of articles 16 and 17 of the PSC).

Although it may seem odd (and, on a certain perspective, arguable) the attribution to C of the voting rights held by B and A, this seems to clearly result from said paragraph 20-1-h), ex-vi paragraph 20-4. Even stranger is the fact that the attribution of voting rights under paragraph 20-1-h), under a certain interpretation of the law, appears to be made on a reciprocal basis.

This is to say that there is a "boomerang" effect on the attribution of voting rights, which results on the 2.4% shareholding attributable to C, being bounced back and thus successively attributed to B and to A. Accordingly, unless each of these shareholders demonstrates to the CMVM, in accordance with paragraph 20-5 of the PSC, that they are not acting in concert (*"concertação"*), each of their new "substantial shareholding" shall also be notified and disclosed to the market.

In light of the above, one may wonder whether the Portuguese legislator has not gone a bit too far, and if this new mechanism for calculation of voting rights attributed to a given shareholder, instead of clarifying, is not a source of confusion to the market and its players.

ALREADY PUBLISHED...

Transparency and commercial practices

Decree-Law no. 51/2007, of March 8 2007, regulates the commercial practices and guarantees the transparency of the information rendered by credit institutions in mortgage credit agreements and establishes limits to the commissions charged by credit institutions on early reimbursement and prohibits the debit of any charge or additional expense in connection thereto, as well in connection with the transfer of the mortgage credit to another institution. Additionally, the Decree-Law establishes that the annual percentage rate (APR) of these agreements shall be calculated in the terms established in Decree-Law no. 220/94, of August 23 1994, and cover all the promotional conditions associated to the same.

Adequacy of own funds

Decree-Law no. 103/2007, of April 3 2007, transposes Directive no. 2006/49/CE to the Portuguese regulatory system, establishing the own funds adequacy requirements applicable to credit institutions, extending the same to investment companies, as well as the corresponding calculus rules and prudential supervision regime.

Access to the activity as a credit institution and the exercise thereof

Decree-Law no. 104/2007, of April 3 2007, transposes Directive no. 2006/48/CE to the Portuguese regulatory system, and is related with the access to the activity as a credit institution and the exercise thereof, adjusting the regulatory framework to the new reality of financial services, implementing adequacy rules for own funds and risk limits defining own funds and providing that they shall need to be sufficient to meet the various risks inherent to credit institutions' activity.

Interest Rate

Decree-Law no. 171/2007, of May 8 2007, extends the regime established in Decree-Law no. 240/2006, of December 22 2006 (on interest rate rounding rules when applicable to mortgage credit agreements), to the credit and financing agreements not covered by such law and covering among other leasing, long term rentals and factoring agreements.

Bank Transfers

Bank of Portugal Notice no. 12/2007 establishes that credit institutions are obliged to make available to the ordering of credit transfers through automatic terminals, visual access to the identity of the beneficiary to whom the bank identification number or account number inserted pertains, before the transaction is confirmed. This measure is adopted as a consequence of the approval of Decree-Law no. 41/2000, of March 17 2000, which requires that the relevant institutions provide the transfer's beneficiary with a reference allowing him to track the transfer.

Deposits and transfers

Bank of Portugal Instruction no. 4/2007, of March 15 2007, was published following the approval of Decree-Law no. 18/2007, of January 22 2007, which

sets forth new principles applicable to the value date of any operation regarding deposit accounts and money transfers in euros, and determines their effect within the period necessary to make the funds available to the beneficiary. This Instruction also amends Bank of Portugal Instruction no. 25/2003, which regulates the Interbanking Compensation System (*Sistema de Compensação Interbancária (SICOI)*).

SOON...

Transparency of the companies with securities admitted to market negotiation

The meeting of the Council of Ministers held August 8, approved the Decree-Law which shall transpose the directives regarding the financial sector, financial markets and instruments (DMIF) and transparency requirements of companies with securities admitted to trade in regulated markets (Transparency Directive). Regarding DMIF, a more demanding system is introduced with the implementation of *know your customer* and *best execution* principles. In what respects the organization of investment companies and the behaviour duties when rendering investment services to clients. As to the Transparency Directive, the rendering of financial information is perfected, the rules regarding the disclosure of acquisitions or disposal of significant voting rights percentages are improved, endeavouring to remove the obstacles to cross-border investment created by the deficient disclosure of information.

Securitisation Regime

Following the public consultation of a preliminary draft of the Securitisation Regime amendment in the end of 2006, a significant reform of the actual regime applicable to securitisation operations is expected to occur soon but already in 2008. Besides detail adjustments to enforce the flexibility of the current securitisation vehicles, a significant modification is expected to occur with the enlargement of the assets that may be securitized, which shall, besides the classic credits, include cash flows, present or future, as well as risks associated therein. With this market segment having given proofs of its maturity, it is expected that the early legislative reform enforces the diversity, not only of the securitised assets, but also of the securitisation structures used up to now.

Insurance Contract Law

The preliminary draft of the Insurance Contract Law, which entails a long expected insurance legal reform, was recently submitted to public consultation. The draft is based in an adjustment of the provisions currently in force on this matter, updating and connecting different concepts of the several diplomas which regulate the said contract, fulfilling certain shortcomings and, moreover, allowing the insurance contract's legal framework to become more accessible. Regarding financial products, the future law shall include the regulatory framework of the credit insurance, collateral insurance, as well as of insurance capitalisation and structured instruments (which include unit linked life assurances), which shall therefore become subject to a sole legal text.