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Structured Finance & Derivatives

Portugal

TELLES DE ABREU | ADVOGADOS

chambers.com

2019

Law and Practice

Contributed by TELLES DE ABREU | ADVOGADOS

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TELLES DE ABREU | ADVOGADOS is a full-service firm with national coverage and a local presence in the two main cities of Portugal: Lisbon and Porto. The team is comprised of eight lawyers: one partner, two of counsel, three associates and two trainees. In addition to the finance, projects

and capital markets practice area, other practice areas involved in structured finance and derivatives work are tax; digital, privacy and cybersecurity; and litigation/arbitration.

Authors



Bruno Azevedo Rodrigues, the firm's partner, is head of the finance, projects and capital markets department, with expertise in PPP/PFI, secured lending/project finance, collective investment schemes, M&A in the financial sector, financial regulation and private equity. He is a member of the Portuguese Observatory of Compliance and Regulation.



Sara Carpinteiro, an associate, practises in finance, projects and capital markets, with particular expertise in compliance, banking law, financial regulation and private equity.



Márcio Carreira Nobre, of counsel, is a member of the finance, projects and capital markets practice area and heads the sub-group for derivatives and structured finance. Márcio's expertise lies in derivatives, structured finance, M&A in the financial sector, financial regulation and private equity.

1. Structured Finance

1.1 Market Overview

The market standard on structured finance in Portugal is developed and harmonised and in line with the best international practices. In that sense, it is difficult to identify a clear trend in respect of the legal structures used. Although the securitisation submarket is likely to be one of the most active, particularly on what concerns performing and non-performing loan portfolios (both secured and unsecured), and other types of credits (including receivables), recently there has been an increase of IPOs and new alternative venture debt issuances.

In addition to that, due to the progressive digitalisation of the economy and penetration of "tech" players, we are noticing a bigger appetite from investors on tech-related companies. Today we may identify movements of companies who are open to raise funding through crowdfunding schemes, by resorting to ICOs or even by accessing alternative public markets such as Alternext or Euronext Growth through IPOs or other type of public offers.

This means that not only will the market have to deal with the reform of the legal framework, notably due to the most recent EU regulation applicable to securitisation, CRR and prospectus, but also the shape of the market itself is chang-

ing, starting with origination – which tends to include different players other than banks or traditional financial entities – and ending with new types of investors and investment schemes.

2. Acquisition Finance/Leveraged Finance

2.1 Transaction Structure, Players and Legal Regime

Regardless of the new possibilities that are arising in the market, one may say that the most common structures are still securitisation schemes (regarding loan portfolios) and the incorporation of a special purpose vehicle in order to ring-fence any potential liabilities of the acquirer either in relation to the seller or to third parties due to any contingency of the target which is not known. The most common type of finance instrument is still banking loans, either through syndicated loans or a traditional loan secured with shares of the SPV and/or the future shares to be acquired in the target. Other types of security or funding structures may be used depending on the specific characteristics of the target and of its business sector and, naturally, of the acquirer.

In respect of the finance parties we may identify a significant increase in the number of private equity firms licensed in

Portugal since the middle of 2017 who are currently in the process of launching their own private equity funds. Such evolution in the market, together with the recovery of the Portuguese economy, will lead to an expected increase in the number of transactions in the M&A and private equity sector. Nonetheless, we may expect that the value per transaction may not be as high as in past years, as most of the targets are companies.

There are no specific laws governing acquisition/leveraged finance transactions in Portugal, other than the general corporate rules and lending activity rules.

2.2 Documentation

Although the market standard on acquisition finance/leveraged finance transactions is sufficiently developed and harmonised, the documentation used on these transactions varies a lot depending on the acquirer, the target, the business sector, the type of security, if any, and methods of funding used.

In any case, in these transactions a special purpose vehicle is often used by the acquirer to try to ring-fence liability of the acquirer. Hence, corporate documentation for purposes of incorporation of special purpose vehicles is often a common part of the transaction documentation.

If funding is made through equity or quasi-equity the correspondent corporate documentation is also part of the transaction documentation, which includes corporate resolutions related to capital increases, shareholders' agreements, subscription agreements and other documented shareholders' commitments.

If funding is made through debt, the documentation used may assume many different forms.

Bonds and other debt securities may be a solution for the funding of an acquisition finance transaction, and in such case the documentation used may include: the term-sheet, the corporate resolution for issuance of the security, and an investment agreement (in cases where the subscription is ensured by an investor prior to the issuance).

Loans are also a standard form of funding and it is also common in Portugal to have such loans structured by seniority of tranches. Whenever there is more than one lender it is also common and advisable to have an intercreditor agreement.

In Portugal it is also common that more sophisticated borrowers use LMA documentation subject to English law, although this practice has been less used as a result of Brexit. In such cases of transactions of syndicated loans, the trend is to use LMA-based documentation adapted to Portuguese law standards and requirements.

2.3 Security

Types of Security

The security used in acquisition finance/leveraged finance transactions depends on the specific structure of the transaction, of the target and of the acquirer. In this sense, business sector practices and limitations may also have an impact on the security used in each transaction.

In asset deals the security used is typically a mortgage (in case of real estate) or a pledge (in case of movable property – eg, planes, boats).

In share deals, there are legal limitations in respect of financial assistance that limit the type of security granted. In any case it is common to divide the security used in two stages: the one granted before closing and the one granted after closing. Before the closing of the transaction, it is common for the acquirer to grant a pledge on the shares of the special purpose vehicle used for the transaction. Immediately after the closing it is common that the acquirer provides a pledge over the shares it owns in the target.

Other than this, security granted with a determined period of time prior to the onset of insolvency may be at risk of being set aside under Portuguese insolvency laws. Security may also be challenged on other grounds relating to insolvency.

Legal Restrictions

Provided that the assets or rights granted as security are transferable rights (ie, rights which one may sell or encumber without being in violation of public policy rules – this generally includes personal rights such as the right to image or personality), there are no restrictions or limitations to the type of assets that can be used as security.

Procedures/Requirements to Grant Security

The legal requirements for the creation of security vary on the basis of the type of asset granted as security.

In case of real estate, mortgages are granted by way of a public deed and must be registered with the real estate registry.

In case of security over shares, the approval of the company may be required (depending on the by-laws) and the filing of the security with the registry of issuance is required. Such registry of issuance may be organised by a depositary, by the company or by a central counterparty. In any case, such registry and filing is private and should not be made available to the general public. If the shares are represented by certificates the pledge created over the shares must also be registered in the certificates. In case of “*sociedades por quotas*” or Lda companies with dematerialised shares, represented by inscriptions on the public registry that is organised and kept by the Registry of Companies – which may be compared to a limited partnership – the pledge of shares

“quotas” can be agreed by means of a private document, but it is subject to registration with the Registry of Companies (public registry).

Enforcement of Security

The enforcement of security would naturally depend on the relevant contractual arrangements. However, in general the secured party (beneficiary) must file a court procedure to enforce security due to default.

In order to avoid judicial procedures, it is common that the secured parties (beneficiaries) try to establish contractual arrangements, to the extent permitted by law, to try to sell the assets granted as security to a third party and set-off the amount of debt with the proceeds of the sale. This sale to third parties requires the consent of the lender (which in certain cases may be previously established under the security agreement).

2.4 Restrictions and Limitations

The Portuguese jurisdiction has rather strict rules on financial assistance. This requires the parties to structure acquisition finance/leveraged finance transactions carefully in order not to affect the validity of the transaction.

In accordance with said financial assistance restriction, a company may not grant loans or in any other way provide funds nor provide security to a third party with the aim of allowing such third party to subscribe or in any way acquire shares of such company.

In addition to financial assistance limitations, the Company’s Code also foresees corporate benefit limitations, which basically result in the fact that companies are prevented from creating any kind of security in benefit of third parties unless such third party is a grouped company or there is an effective corporate benefit of the company that acts as guarantor.

2.5 Lender Liability

The Portuguese jurisdiction, in line with the EU rules and regulations, is very protective of consumers, including in the lending market. However, in the corporate lending market there are no significant specific legal duties for corporate lenders to be accounted for. Therefore, in general there are no potential lender-liability issues to be considered in Portugal.

2.6 Debt Purchase Transactions and Debt Trading

In accordance with the Portuguese law, a debtor who acquires its own debt would have its debt extinguished by law. However, this rule may be superseded by contractual arrangements. In that sense, subject to the contractual arrangements made, borrowers and financial sponsors may engage in debt purchase transactions, including acquisition of own debt, without affecting the existence of the debt. Notwithstanding, sectorial rules may apply in cases where the borrower is a

regulated entity, notably in the case of banks and calculations of capital adequacy and risk exposure.

Considering the stress that the financial crisis created within the last few years on the balance sheets of lenders and the more demanding rules on own funds and risk taking to which lenders are subject, the debt trading market (including non-performing loans) has increased significantly within the last few years. Currently, with the Portuguese economy taking the first steps to exit the financial and economic crisis to which it has been subject, and in view of the referred framework, the debt market is facing a significant increase, with new players investing in Portugal and with more relevant transactions being entered on that market.

2.7 Certain Funds Concept

There is no such concept under Portuguese law.

2.8 Financial Restructuring

By the closing of the last year, one of the most significant restructuring transactions related to the bridge bank Novo Banco, which resulted from the resolution measure applied by the Bank of Portugal to Banco Espírito Santo. The creation of the bridge bank Novo Banco was itself a significant financial restructuring considering the impact of such resolution measure in all the assets and liabilities which were transferred to Novo Banco. However, in addition to this, the liability management exercise conducted by Novo Banco, which involved the acquisition of EUR500 million in own debt, was a major financial restructuring that allowed the successful closing of the acquisition of Novo Banco by the private equity fund Lone Star.

Considering the current global economy in which we are all involved, any financial restructuring will have a multitude of effects in different jurisdictions which require a global legal approach to such type of transactions. In addition to this, the current pace of creation issuance of regulatory legal framework, either at an EU level or a national level, creates an environment where any financial restructuring may be affected by different regulations, particularly when the entities subject to such restructuring are from the financial sector. This is certainly a challenging issue which legal advisers must keep an eye on when creating legal structures for financial restructurings.

2.9 Reform

We do not anticipate any legal changes to this regime that will impact acquisition finance/leveraged finance transactions.

3. Securitised Debt

3.1 General

Laws and regulations

Securitisation is a regulated activity in Portugal (Decree-Law No 453/99 of 5 November – the “Securitisation Law”) being the securitisation transactions and the funds and respective management entities subject to the supervision of the Portuguese Securities Commission (“*Comissão do Mercado de Valores Mobiliários*” – CMVM).

In accordance with the said rules and regulations, securitisation transactions are subject to the CMVM prior to authorisation and the activity of securitisation funds and of management entities is subject to its ongoing supervision.

As a general feature of the Securitisation Law, it is also important to highlight that securitisation transactions must comply with a principle of neutrality with respect to consumers whose loans are being included in a securitisation. This means that credit institutions entering into securitisation transactions are granted management rights for the portfolio of securitised receivables.

Types of Asset/Receivables

Securitisations have been used for banks to manage their liquidity and funding management by converting loans to clients into liquid funds and by those means also managing their client risk and increasing their lending ability. This means that a significant part of the securitised receivables in Portugal are composed of the loans resulting from the regular lending activities of banks.

Since the enactment of the Securitisation Law, securitisations have included mainly the securitisation of residential mortgage-backed securities (RMBS). However, this has also been a funding tool for credit institutions specialised in other types of credit such as consumer loans and auto loans, which have also constituted a significant part of the securitisation transactions made in Portugal since the early days of the Securitisation Law.

Within the last few years, other credits have been used by companies and public entities, with electricity receivables and water utility receivables. Banks have also included other types of credits in their securitisation transactions and most recently the market has seen securitisation of portfolios composed of corporate and consumer loans or even non-performing loans.

Risk-retention Requirements

The Securitisation Law does not foresee any risk retention requirements. However, Regulation (EU) 2017/2402 lays down a general framework for securitisation. As a general rule the originator, sponsor or original lender of a securitisa-

tion shall retain on an ongoing basis a material net economic interest in the securitisation of not less than 5%.

Notwithstanding, this new regulation shall apply directly in all member states from 1 January 2019 and, in respect of the risk retention requirement, its applicability will be dependent on the issuance of regulatory technical standards to specify in greater detail the risk-retention requirement.

3.2 Asset Transfer

The Securitisation Law establishes no particular formalities for an assignment of receivables. For those purposes, the transfer is legally achieved by a written agreement between the parties. This legal simplicity for the full transfer of assets is also applicable to mortgage assets or other guarantees subject to registration under Portuguese law, where a notarial deed would otherwise be required.

Notwithstanding the above, the assignment of any rights over real estate or other assets subject to registration is only effective against third parties if it is duly registered in the relevant public registry. For purposes of registration of such assignment with the relevant public registry, in case of mortgage loans the Securitisation Law requires that signatures in the assignment agreement are legally certified.

Under the general rules of the Portuguese Civil Code an assignment of receivables requires the sale/transfer to be notified to the underlying debtors in order for a true sale to occur and the sale/transfer to be effective against them. However, the Securitisation Law establishes an exception to the general rule and the transfer/sale of receivables under a securitisation transaction does not require the transfer/sale to be notified to the underlying debtors.

Personal data is necessarily transferred with the sale and transfer of receivables. Therefore, the parties involved must comply with the requirements of Regulation (EU) 2016/679 (“GDPR”) and the related legislation. Up to this date, the legislation for the full implementation of the GDPR has not yet been adopted in Portugal.

Under The Securitisation Law, a transfer of receivables is deemed a true sale as the creditor is the sole entity entitled to claim the acquired receivables.

3.3 Issuance Vehicle

Trusts are not recognised in Portugal. The Portuguese Securitisation Law establishes two structures of issuance of securities: (i) the securitisation funds structure, or (ii) securitisation companies structure.

Under the securitisation fund structure (“*fundo de titularização de créditos*” – “FTC”) a fund, which is an autonomous set of portfolio of receivables held jointly by the holders of the units issued by the FTC who are not liable for any losses

of such fund. FTCs are managed by a fund manager who is also regulated under the Portuguese Securities law.

The securitisation companies structure (“*sociedades de titularização de créditos*” – “STC”) must adopt the form of a public liability company (“*sociedade anónima*”).

FTCs are not subject to minimum capitalisation requirements. However, FTC managers must have a minimum share capital of EUR250,000 and are subject to specific own funds requirements (0.5% net value of all funds managed, when such funds are up to EUR75 million of assets under management and 0.1% of any amount exceeding EUR75 million). These capitalisation requirements are the same for STCs.

STCs and FTCs managers must both be public liability companies (“*sociedade anónima*”); the incorporation of both such types of companies is subject to the CMVM approval.

STCs must also have an exclusive corporate purpose of carrying out securitisation transactions by acquiring, managing, transferring and issuing securitisation securities. Qualifying shareholdings in an STC may only be subscribed by shareholders who meet certain fit and proper criteria established by law. In order to ensure a sound and prudent management of the company, members of corporate bodies are subject to similar fit and proper criteria.

STCs may issue different securitisation securities with the receivables related to such issuance being ring-fenced against other liabilities of the company. On that basis, STCs may work as compartment companies.

Under the Securitisation Law the transfer/sale of receivables constitutes a true sale and in that sense there is no consolidation with the assets of the originator.

3.4 Bankruptcy Remoteness

Whether in an STC or FTC structure, the securitisation vehicles foreseen in the Securitisation Law are bankruptcy remote.

The receivables transferred to the STC under a securitisation are exclusively used to reimburse the securitisation securities. Moreover, the holders of the securitisation securities have a special creditor privilege over the receivables related to the issuance of such securities. The fact that STCs have an exclusive corporate purpose of carrying out securitisation transactions and that they may only fund their activity through the issuance of securitisation securities helps to construe these bankruptcy remote vehicles where the risk of bankruptcy is directly related with the risk of failure of the receivables used in the securitisation transaction.

In the case of an FTC, such type of vehicles are not subject to insolvency rules. In any case, the receivables owned by

the FTC and any amounts received thereunder may not be consolidated with the fund manager, nor are they available to be claimed by creditors of the fund manager.

The sale/transfer of receivables from the originator to an STC may only be reversed in situations where the sale/transfer of receivables is made with fraud – ie, with the intention of causing harm or losses to the creditors of the originator.

3.5 Reform

In 2006 the CMVM conducted a public consultation on a proposal to amend the Securitisation Law and changes to the Securitisation Law were highly expected by the market at that time. However, no amendments were made and no reforms are currently expected or anticipated from a national law perspective.

However, one may expect that a new set of European Union rules and regulations, including Regulation (EU) 2017/2402, will have an impact on securitisation transactions in future.

4. Other Asset-based Lending

4.1 Factoring

In Portugal, Decree-Law No 171/95 dated 18 July (the “Factoring Law”), as subsequently amended, governs the activity of factoring companies, as well as the factoring agreements. According to this legal regime: (i) the factoring activity consists of the short-term acquisition of credits that derive from the sale of products or the rendering of services, in both internal and external markets, and (ii) the factoring agreement must be executed in writing and shall specify the relationship between the factor and the respective counterparty in the factoring agreement. Additionally, the provisions foreseen in the Legal Framework of Credit Institutions and Financial Companies (Decree-Law No 298/82 dated 31 December, as subsequently amended), as well as those foreseen in the Portuguese Civil Code, shall be applicable in all matters not governed by the Factoring Law.

The factoring market in Portugal is mostly composed of recourse factoring transactions and the assignors in factoring transactions are mostly small and medium-sized enterprises (“SMEs”). Considering the Portuguese corporate market, which is mostly constituted by SMEs, and the general difficulty of Portuguese companies to have access to funding, banks tend to favour the use of recourse factoring by offering better rates and market conditions to assignors. The referred features of the Portuguese market tend to favour this type of factoring where banks have the ability to recover the financed amounts from assignors in case of default by the original debtor, thus decreasing the inherent credit risk. In accordance with the Factoring Law, the payment to the assignor in the factoring agreement is generally due on the maturity date, as specified in the factoring agreement.

However, the regime also enables the payment in advance, in whole or in part, of the transferred credits, or to allow the anticipated payment by other credit institution, by using collateral or other.

Transfer of receivables in Portugal is an assignment, which means that, in general, transfers may occur without any particular formalities or without the consent of the original debtor. Therefore, the transfer of receivables is subject to the general principle of “freedom of contract”, which means that the parties in an agreement are free to set out the content of said agreement, according to their interests and within the limits of the law. However, the provisions of the Portuguese Civil Code specify that the transfer of receivables becomes effective before the debtor after notification to the same or if the debtor accepts the transfer.

For a sale/transfer of receivables to be fully effective towards the debtor it must be notified to the latter. If said notification is not served to the debtor, the assignor keeps all its rights against the debtor.

As long as the transfer of receivables is agreed between the assignor and the assignee and subsequently notified to the original debtor, it shall be considered a “true sale” for the purposes of a factoring transaction.

Finally on this topic, we do not anticipate any legal changes to this regime that will impact factoring transactions.

4.2 Covered Bonds

Covered bonds (“*obrigações hipotecárias*”) are regulated by Decree-Law No 59/2006 dated 20 March (the “Covered Bonds Law”). The Covered Bonds Law established the legal framework for covered bonds, creating a new type of securities under Portuguese law, which are reimbursed through a pool of assets which serve as security and are ring-fenced against other liabilities of the issuer. This regime also created the public sector covered bonds, which essentially follows the same legal framework of covered bonds with the particular feature that the pool of assets which may serve as collateral include receivables over or guaranteed by public entities of central, regional or local administration of any European Union member country. The Covered Bonds Law also created a new credit institution: the mortgage credit institutions. These are entities with the exclusive corporate purpose of offering mortgage lending or the acquisition of mortgage loans or loans from the public sector or guaranteed by entities of the public sector.

The issuance of covered bonds has been particularly active within the last few years because of the financial crisis, as Portuguese retail banks have used covered bonds and the public sector covered bonds to obtain funding from the European Central Bank under the purchase programme.

Covered bonds have been typically collateralised by residential mortgage cover pools.

The receivables used for the cover pool of covered bonds are exclusively used to reimburse the bonds. This means that the receivables used for the covered pool may not be used for the payment of any other liabilities other than the reimbursement of the covered bonds. Moreover, the holders of the covered bonds have a special creditor privilege over the receivables used for the cover pool.

In accordance with the Covered Bonds Law the financial risk of the originator is covered by law as it establishes a strict segregation of the receivables composing the cover pool from any other liabilities of the originator.

In case of an insolvency of the issuer the sale/transfer of receivables from the originator to the issuer may not be reversed by the insolvency liquidator except in situations where the sale/transfer of receivables is made with fraud (ie, with the intention of causing harm or losses to the creditors of the originator).

Currently, there are no known pending reforms which will impact covered bonds transactions.

4.3 Other Secured Bonds

It is not common to have issuance of bonds made by Portuguese entities and secured by a pledge of assets of the issuer. Notwithstanding, it is common to have the issuance of bonds from foreign entities which are guaranteed in whole or in part by assets of the issuer and which are marketed in Portugal; such issuances are usually not subject to Portuguese law.

5. Credit-linked Notes

5.1 Main Structures

Credit-linked notes (CLN) are deemed a complex financial product under CMVM Regulation No 2/2012. This means that the marketing of such products is subject to strict rules in terms of advertising and information to investors.

Notwithstanding Regulation No 16/2002 of the CMVM, such securities are acknowledged by the CMVM as non-typical securities of a contractual nature. However, Portuguese law does not offer as much flexibility as other jurisdictions and said products are not typically issued or construed under Portuguese law. This means that there is not much market experience in respect of these products for issuer or structure-related issues.

5.2 Parties Acting as Protection Seller/Issuer/Investors

In accordance with Regulation No 16/2002 of the CMVM, the issuers of such securities may only be banks, Caixa

Económica Montepio Geral, Caixa Central de Crédito Agrícola Mútuo and any other entity, provided that the notes are guaranteed either by a bank subject to supervision rules equivalent to the ones of the European Union or by a parent company.

5.3 Structures Involving Issuances via an SPV and/or a Trust

There is no relevant precedent experience on issuance of a CLN which may allow us to describe a market standard in this respect. Notwithstanding, it is possible to say that typically the assignment of receivables under the Portuguese Civil Code would be sufficient to have a true sale of receivables in order to allow a complete transfer of cash-flows.

5.4 Reference Portfolios

In accordance with Regulation No 16/2002 of the CMVM the underlying assets included in the credit-linked notes must include listed debt securities from a third party.

5.5 CLN Transactions

There is no relevant precedent experience on issuance of a CLN which would allow us to describe a market standard in this respect.

5.6 Privately Placed or Publicly Offered CLNs

CLNs offered in Portugal, although not issued under Portuguese laws, tend to be privately placed.

5.7 Main Transparency Requirements

Under Regulation No 16/2002 of the CMVM, CLNs require full disclosure of the securities' characteristics and of the risks associated to the investment in such financial product under the prospectus which must be prepared for purposes of marketing of those securities.

5.8 Pending Reform

Currently, there are no known pending reforms which will impact CLN transactions.

6. Structured Products – Notes, Warrants and Certificates

6.1 General

Structured products issued and offered in Portugal tend to comprise structured bonds, warrants, dual products, derivatives, unit-linked, participation units under alternative investment funds and trading in electronic platforms.

Due to the financial crisis of the last few years and the scandals that have occurred in Portugal related to the banks which needed intervention by the Bank of Portugal or which went bankrupt, these days common retail banks tend to have their retail activity more limited to the traditional banking activity (eg. deposits and loans). This is mainly due to inter-

vened banks who had a relevant activity of misplacing or misselling complex financial instruments to non-informed clients who lost their savings (or part of their savings) and which caused the sale of complex financial products to be a relevant regulatory and reputational risk.

These days, investment banks and retail banks with a strong investment banking position in the market are the more active players in the market.

6.2 Legal and Regulatory Regime

The Portuguese financing market is characterised by a vast set of rules and a complex legal and regulatory regime in relation to structured products. This regime includes the rules regarding information and transparency requirements within the scope of financing activity, the legal requirements in connection to products and operations commonly designated as “unit-linked” and the legal requirements for the information to be provided within the scope of marketing of complex financing products. In any case, such rules are focused on establishing information duties for offerors of complex financial products in order to ensure that investors are well informed of the features of such products.

The marketing of structured products is subject to CMVM's prior approval: the issuer and the entity which intends to market a specific product to an investor are required to provide the key information regarding each specific product to CMVM, prior to the offering of the products to investors. CMVM will, in turn, analyse the viability related to the trade of such products. It is important to note, however, that the CMVM does not issue any opinion on the products or on the quality of the information provided under the information documents provided in relation to such products.

All advertising and information related to the offer of complex financial instruments is subject to the CMVM prior approval. However, the intervention of the CMVM in the marketing of complex financial products is limited to such advertising approval. Notwithstanding, the CMVM has been establishing protocols with banks offering complex financial products to clients with a view of limiting the offering of those products to retail customers outside of a contract of investment advisory or of management of portfolios.

6.3 Documentation

The issuance and offering of complex financial products is subject to different documentation requirements: regarding the issuance of complex financial products, derivatives shall be governed by the respective agreement and securities shall be based, inter alia, on the corporate resolution for issuance of such securities; the subscription of securities which qualify as complex financial products is also subject to the terms of the subscription document (in case of a public offer). Regardless of the nature of the complex financial product, entities offering such products must also prepare the infor-

mation documents for investors with key information (Key Information Document in case of PRIIPs Regulation or Key Investor Information Document in case of MiFID II).

6.4 Distribution

In Portugal, distribution agreements are a common practice in the market of complex financial products but are not required by law or the regulators. However, if an issuer intends to use the services of a distributor it must ensure that such distributor complies with the same duties to which it is bound by law.

In order for the distributors of complex financing products to comply “back-to-back” with the same duties of the issuers of the products, they must have procedures to ensure that they comply with the following duties: (i) to assess the investors’ profile; (ii) to make the information documents available to be delivered to potential investors before the effective trade of the products; and (iii) to make sure the suitability tests are effectively and efficiently implemented.

Distributors providing a distribution service on a professional basis are usually compensated for the services rendered. However, although in Portugal the general principle of “freedom of contract” prevails, which means that the parties in an agreement are free to set out the content of said agreement according to their interests and within the limits of the law, there are important restrictions to the calculation of distributor compensation.

In view of the above, there are some limitations to incentives received or to be paid, which means that remunerations, commissions or benefits can only be paid or received whenever there is an additional service or a higher level service rendered to the client and as long as such incentive does not interfere in the investment company’s obligation to act in the best interest of the client.

6.5 Listing and Trading Distribution

In Portugal complex financial products tend to be offered privately – ie, directly from the issuer or the distributor to their own contacts or clients, as the case may be. Therefore, in Portugal there is not a very active market for the listing and trading of complex financial products. Notwithstanding, many banks have their own trading platforms which are managed by them or by other institutions (eg, white label platforms).

6.6 Prospectus Liability, Regulatory and Criminal Sanctions

The execution of any public offering of securities in Portugal must be preceded by the disclosure of a prospectus to investors.

The prospectus shall contain complete, true, accurate, clear, objective and lawful information which allows its recipients to consciously decide whether or not to take the offer.

In accordance with the Portuguese Securities Code, the following may be held liable for the damages caused by any information of the prospectus which is not true, accurate, clear, objective and lawful:

- the offeror;
- the members of the administration body of the offeror;
- the issuer;
- the members of the administration body of the issuer;
- the promoters (if applicable);
- the members of the supervisory body, audit firms and the statutory accountants;
- the financing intermediaries responsible for the support to the offer.

Other individuals who accept to be appointed in the prospectus as being liable for its content may also be held liable.

The regime of the Portuguese Securities Code establishes that the liability is objective, as well as the regime of joint liability, and that the compensation shall reconstitute investors of the loss suffered.

According to Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, the persons responsible for the prospectus, and any supplement thereto, shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

The responsibility for the information given in a registration document or in a universal registration document shall attach to the persons mentioned above only in cases where the registration document or the universal registration document is in use as a constituent part of an approved prospectus.

6.7 Reform and Trends

In the aftermath of MiFID II and subsequent legislation and regulation, Portuguese regulators have been reviewing the Portuguese Securities Code and other related legislation in order to make it compliant and consistent with EU directives and regulations. In this sense, Portuguese regulators are following the EU trend and promoting a greater protection of investors and of the financial markets.

The Law No 35/2018 dated 20 July recently amended the rules for the trade of financing products and of the organisation of financing intermediaries, adopting MiFID II rules and other related regulation.

7. OTC Derivatives

7.1 Regulatory Restrictions

Derivatives may be traded over-the-counter or on an organised exchange.

Derivatives traded on an organised market are regulated according to general contractual clauses imposed by the respective market managers. However, such contractual clauses must be subject to prior communication to the Portuguese Securities Market Commission and to the prior approval of Bank of Portugal if the underlying asset of the transaction is an instrument of the money markets or foreign exchange market.

Regarding OTC derivatives, although they are becoming more and more regulated since the 2008 financial crisis, up to this date no licence or regulatory approval is required. However, there are several court decisions in Portugal ruling on the legal validity of OTC derivatives; although most of them admit that OTC derivatives are legal and valid, there are a few where the court ruled in the sense where derivatives of a speculative nature would be in breach of Portuguese constitutional principles such as the principles of economic politics of fighting speculative trading.

Funds (including securitisation funds and alternative investment funds), insurance companies and pension funds may only enter into OTC derivatives with the aim of hedging financial risks. Therefore, any derivatives of a speculative nature which are entered by any of such entities may be deemed null and void as they are not within the scope of the capacity of those entities.

7.2 Standardised Master Agreements/Security Agreements

The Portuguese Association of Derivative Financing Instruments (“*Associação Portuguesa de Instrumentos Financeiros Derivados*” – “APIFD”) has published a master agreement entitled “*Contrato-Quadro de Instrumentos Financeiros e Derivados – OTC*” (“CQIFD”) with the aim of establishing a master agreement subject to Portuguese jurisdiction.

CQIFD is a master agreement governing the transactions of derivatives in the OTC market, establishing a unique legal framework applicable to the various OTC derivatives transactions and determining certain credit aspects between the parties, as well as the rules applicable in case of anticipated maturity.

Notwithstanding, the adherence of the market stakeholders to the use of this master agreement has been very limited. It may be fair to say that this agreement has been mainly used for banks to enter into derivatives agreement with their clients which are Portuguese companies not used to dealing with the ISDA Master Agreements.

The limited use of this master agreement does not allow us to take any views in respect of the enforceability of such agreements. In any case, as mentioned above, derivatives have been subject to court rulings which, in some cases, have ruled over the nullity of speculative derivatives under Portuguese law. In that sense, trading on derivatives with Portuguese counterparties which are not entities from the financial sector require a thorough legal assessment of the risks involved.

7.3 Netting and Close-out Provisions

Since the adoption of Decree-Law No 70/97 dated 3 April, which governs matters related to compensation within the scope of agreements on financing instruments, Portugal is considered a “netting-friendly jurisdiction”. Hence, there is no specific circumstance where the automatic early termination clause is recommended.

ISDA issues a yearly opinion for ISDA Members with the opinion on the enforceability of the netting and close-out provisions.

In accordance with such opinion, Article 119 of the Portuguese Insolvency and Corporate Recovery Code (“CIRE”) states that any provision foreseeing that the situation of insolvency of one of the parties by itself is a termination event or an event entitling the counterparty to a right of compensation, or a right to terminate in different terms from those foreseen in CIRE shall be considered null and void, which means that, generally, there are certain limitations on the possibility of termination of bilateral agreements with continuing performance merely upon the insolvency of the counterparty.

Nevertheless, the limitations on termination upon insolvency are not preventive of insolvency events configuring just cause for termination of a given contract (eg, early termination events under the Master Agreements), taking into account the nature and characteristics of the particular contractual obligations in question.

Concerning the provision of the ISDA Master Agreement on the termination of transactions upon the insolvency of a Portuguese counterparty, it is understood that the complexity, specificity and implication of the ISDA Master Agreement and the transactions to be contemplated thereunder, in conjunction with the provisions of the Decree-Law No 70/97, dated 3 April (ie, the specific Portuguese statute concerning the enforcement of netting in respect of bilateral agreements

in financial instruments) would be sufficient to sustain that they are valid and enforceable under Portuguese Law, by virtue of their nature and characteristics, as per Article 119, No 3 CIRE.

7.4 Stay Acknowledgment

Within the context of the implementation in Portugal of the Banking Recovery and Resolution Directive (Directive 2014/59/EU), the Legal Framework of Credit Institutions and Financial Companies (Decree-Law No 298/82 dated 31 December, as subsequently amended) established a legal stay power of the Bank of Portugal which is automatically triggered as a result of the application of a resolution measure.

As mentioned, the stay powers are automatically triggered by law as a result of a resolution measure applied by the Bank of Portugal.

Therefore, following the application of a resolution measure, the entities in a contract where the credit institution is subject to resolution measure may not:

- enforce guarantees or collateral, file insolvency proceedings, or exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by (i) a subsidiary of the resolved entity whose obligations are guaranteed or otherwise supported by the parent undertaking or by any group entity, or (ii) any group entity, which includes close-out netting or cross-default provisions;
- obtain possession, exercise control or enforce any security over any property of the credit institution subject to a resolution measure or of any group entity, or modify, restrict or suspend its contractual rights, in relation to a contract which includes close-out netting or cross-default provisions.

TELLES | ADVOGADOS

Rua Castilho, 20, 6th floor
1250-069 Lisbon

Tel: +351 21 030 88 30
Fax: +351 21 030 88 39
Email: b.azevedo@telles.pt
Web: <https://www.telles.pt/>

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