

Portugal

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1 Other than transactions between dealers, what are the most typical types of over-the-counter (OTC) equity derivatives transactions and what are the common uses of these transactions?

Equity derivatives transactions in Portugal closely follow the trends, structures and purposes that prevail in international capital markets. Given the constraints of local banks to finance large investments in listed securities, significant investments have, in recent years, been conducted in this jurisdiction precisely on the basis of equity derivatives structures. These include, inter alia, the use of options, calls or total return swaps and pre-paid forwards used by current or prospective shareholders to finance or leverage large shareholdings, or otherwise hedge and monetise existing stakes in listed companies. In the context of particular corporate disputes or takeovers, equity derivatives have also been used to enhance the voting power of mandatory disclosure obligations, for example, or in order to mitigate the impact of voting caps enshrined in the issuer's by-laws. Equity swaps are also used to hedge exposures under employee benefit plans or to manage the risk of retail guaranteed investment products, as well as to reduce risks related to strategic initiatives such as mergers and acquisitions or capital raising.

2 May market participants borrow shares and sell them short in the local market? If so, what rules govern short selling?

The Portuguese regulatory framework of short selling is based on Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (Short Selling Regulation), which, since its approval, has been supplemented by several delegated regulations ruling on technical aspects necessary for its effective enforceability and to ensure compliance with its provisions, as well as by related implementation documents prepared by the European Securities and Markets Authority (ESMA). The Short Selling Regulation entered into force on 1 November 2012 and has the principal intention of regulating:

- the notification obligations (and exemptions) of net short positions (whenever reaching or falling below certain thresholds) in:
 - shares and other financial instruments linked to the issued share capital where the principal trading venue, in terms of turnover, is located in the EU; and
 - sovereign debt securities issued by member states or by the EU; and
- the prohibition of uncovered (naked) short selling of shares and sovereign debt.

Market participants may borrow shares and sell them short in the local market, provided that at least one of the conditions set out in the Short Selling Regulation aimed at ensuring that the shares will be available for settlement, is fulfilled.

3 Describe the primary laws and regulations surrounding OTC equity derivatives transactions between dealers. What regulatory authorities are primarily responsible for administering those rules?

OTC equity derivatives transactions are subject, in particular, to the following laws and regulations:

- the Portuguese Securities Code, approved by Decree-law No. 486/99, of 13 November 1999, as amended (PSC), which contains detailed

rules on disclosure obligations potentially triggered by equity derivatives (involving shares in listed companies), as well as several rules applicable to financial intermediaries related, in particular, to information duties concerning trading on financial markets;

- Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 (EMIR), which contains obligations applicable to counterparties that trade [in] OTC derivatives, such as reporting information to trade repositories, clearing, timely confirmation and exchange of collateral;
- the Short Selling Regulation;
- Decree-Law No. 105/2004 of 8 May 2004 (the Financial Collateral Act, which implemented Directive No. 2002/47/EC of 6 June 2002), which includes certain rules on the enforceability of close-out, netting and collateral arrangements; and
- the Portuguese Securities Market Commission (CMVM) Regulation No. 5/2008, as amended, which includes several provisions relating, inter alia, to disclosure obligations of qualified shareholdings, long positions in shares and those applicable to persons discharging managerial responsibilities.

Dealers in OTC derivatives must also consider additional regulations, such as the rules implemented by the International Swaps and Derivatives Association (ISDA).

The authority primarily responsible for supervising compliance with these rules is the CMVM.

4 In addition to dealers, what types of entities may enter into OTC equity derivatives transactions?

OTC equity derivatives are used and may be entered into by a wide variety of investors such as corporations, banks, insurance companies, other financial intermediaries (including broker and broker-dealers), asset managers and hedge funds, as well as individuals. Large shareholders, issuers of listed securities and public and non-public companies are also common counterparties in OTC equity derivatives transactions.

5 Describe the primary laws and regulations surrounding OTC equity derivatives transactions between a dealer and an eligible counterparty that is not the issuer of the underlying shares or an affiliate of the issuer. What regulatory authorities are primarily responsible for administering those rules?

See question 3.

6 Do securities registration issues arise if the issuer of the underlying shares or an affiliate of the issuer sells the issuer's shares via an OTC equity derivative?

According to Portuguese law, securities registration issues may arise in connection with public offers of securities. The Portuguese framework governing public and private offers will always apply in regard to any offer of securities, in whole or in part, addressed to individuals or entities domiciled or established in Portugal (regardless of the personal law of the offerer or the issuer or the law applicable to the securities being offered).

According to the PSC, a public offer of securities is deemed to exist whenever:

- (i) the offer is made in whole or in part to unidentified addressees;
- (ii) the offer is made to all the shareholders of a public company, even if its share capital is represented by registered shares;

- (iii) the offerer, on or before the launching of the offer, carries out prospecting and soliciting activities or collection of investment intentions in connection with unidentified addressees, or is engaged in promotion or publicity activities regarding the offer (in whole or in part); or
- (iv) the offer is made to at least 150 non-qualified investors resident or domiciled in Portugal.

Alternatively, a securities offer will be considered as a private placement or offer when none of the requirements for a public offer set forth above are met; the offer is made only to qualified investors; or the offer is made by private companies, to the majority of its shareholders, except for those cases described in point (iii) above in relation to public offers.

A public offer is subject to the obligation to publish a prospectus; the involvement of a financial intermediary authorised to provide the services of assistance and placement in public offers for distribution of securities; and the obligation to obtain prior approval by the CMVM of the marketing materials that are to be distributed in the context of the public offer. In contrast, a private offer of securities will only be subject to a subsequent communication with the CMVM for statistical purposes where the relevant securities become admitted to trading on a regulated market located in Portugal.

Considering the above, an OTC equity derivative agreement or transaction per se will not trigger securities registration issues (ie, Portuguese laws and regulations on public and private offers of securities).

This notwithstanding, it is worth mentioning that disclosure duties may arise in relation to OTC equity derivatives transactions (including those with financial settlement) on the holding of long positions in shares and the voting rights attached to qualified shareholdings, other than those applicable to persons discharging managerial responsibilities who have entered into this type of transaction. See question 9 for more detail.

7 May issuers repurchase their shares directly or via a derivative?

Issuers may acquire their own shares directly and indirectly via an equity derivative.

According to the Portuguese Companies Code (PCC), the articles of association of a company may prohibit the acquisition of own shares or limit the cases where it is allowed by law. Additionally, the legal regime applicable to the acquisition of own shares under the PCC shall also be considered. For example, as a general rule, a company is not entitled to acquire and hold own shares representing more than 10 per cent of its capital (save for certain exceptions legally provided) and the acquisition of own shares shall be approved by the general shareholders meeting, being subject to specific content requirements.

As regards securities admitted to trading in a regulated market, the following rules shall also apply:

- pursuant to the PSC, an issuer shall immediately inform the public of the acquisition or disposal of own shares, whenever, as a result thereof, the proportion of the same exceeds or falls below the thresholds of 5 per cent and 10 per cent; and
- according to CMVM Regulation No. 5/2008, as amended, issuers subject to Portuguese law shall notify the CMVM of any acquisition or disposal of own shares and shall also publicly disclose the following information:
 - the final position of the issuer over its own shares exceeding or falling below 1 per cent of its share capital or successive multiples thereof; and
 - all acquisitions and disposals, regardless of the net balance of the same, performed during the same stock market session, whenever they reach or exceed 5 per cent of the traded volume in that session.

Regarding financial assistance, the PCC provides that, as a general rule, a company cannot advance funds, make loans or provide security, with a view to the subscription, or acquisition by any other means, of its own shares by a third party. Agreements or unilateral acts in breach of this provision are deemed null and void. The PCC also sets out two exceptions to this rule:

- when the relevant transaction falls within the normal course of business of banks or other financial institutions (ie, an ordinary transaction within its corporate purpose, such as credit granting); and

- when provided by a company for the acquisition of its shares by or for the benefit of its employees or those of a company with which the issuer is in a control or group relationship, subject to certain requirements.

In general terms, the regulatory regime on financial assistance and own shares shall apply, alternatively, to each specific case, subject to assessment on who ultimately owns the relevant shares (if it is the issuer or a third party) and the ultimate purpose of the relevant transaction.

As far as market manipulation issues are concerned, according to Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 (which repeals Commission Regulation (EC) No. 2273/2003 of 22 December 2003 with effect from 3 July 2016), the prohibition of market manipulation does not apply to trading in own shares in buy-back or repurchase programmes (subject to the restrictions on the acquisition of own shares set out under Portuguese law) and provided that certain conditions set forth in said Regulation are duly met (including, inter alia, that all details of the buy-back programme must be previously disclosed and the transactions notified to the competent authority of the negotiation platform and subsequently publicly disclosed as being part of the buy-back programme). Moreover, in order to benefit from this exemption, the buy-back programme shall solely pursue one of the purposes provided by law (eg, share capital reduction of an issuer).

It is worth mentioning that Commission Regulation (EC) No. 2273/2003 (which is still in force) includes similar requirements to those mentioned above, although with certain specificities: in particular, it states that the issuer shall not, during its participation in a repurchase programme, sell its own shares during the life of the programme; trade during a closed period; and trade when the issuer has decided to delay the public disclosure of inside information.

Furthermore, the PSC provides for additional safe harbours within buy-back programmes in relation to disclosure of inside information and insider dealing.

8 What types of risks do dealers face in the event of a bankruptcy or insolvency of the counterparty? Do any special bankruptcy or insolvency rules apply if the counterparty is the issuer or an affiliate of the issuer?

In the context of OTC equity derivatives, the main risk in the event of a bankruptcy or insolvency of a Portuguese counterparty would be related to the enforceability of arrangements providing for the netting of termination amounts in determining a single termination amount upon the occurrence of such an event. This is a complex legal issue that requires a case-by-case analysis of the underlying contractual documentation, of the laws governing the contractual arrangements and the *lex situs* of any collateral. In any event, for non-Portuguese governed derivatives (contemplating close-out netting provisions), the overriding principle is that Portuguese insolvency laws will defer to the relevant applicable law and, as such, will recognise the enforceability of any such netting arrangements to the extent that it is mandated by the relevant governing law. Moreover, following the implementation of the Financial Collateral Act and Decree-Law No. 70/97, of 3 April 1997 (the Netting Law), the robustness of this kind of arrangement has been further enhanced.

As regards counterparties that qualify as banks or credit institutions, it should also be noted that Portugal has recently implemented the EU Banking Resolution Directive, and as a result the enforceability of netting arrangements is subject to specific provisions, which may have an impact on the transactions entered into with the counterparty subject to such measures.

9 What types of reporting obligations does an issuer or an affiliate of the issuer face when entering into an OTC equity derivatives transaction on the issuer's shares?

To the extent that the issuer sells own shares pursuant to the OTC equity derivative, the reporting obligations set out in question 7 will apply.

In addition, provided that it acquires a long economic position under an OTC derivative, the issuer may be required to disclose such position to the CMVM and the market – see question 14 for details on the disclosure obligations that may be triggered in connection therewith.

10 Are counterparties restricted from entering into OTC equity derivatives transactions during certain periods? What other rules apply to OTC equity derivatives transactions that address insider trading?

Trading of equity derivatives in possession of material, non-public information may constitute insider trading and is, as such, restricted. Insider trading constitutes a criminal offence under Portuguese law, punishable by fine and imprisonment, which is defined as follows: whoever holds inside information (meaning information of a precise nature that has not been made public, directly or indirectly relating to one or more issuers or to one or more securities or financial instruments, which, if it were made public, would be likely to have a significant effect on the prices of those securities or financial instruments) and who passes this information onto someone else or, based on this information, trades or advises someone to trade in securities or other financial instruments, or orders its subscription, acquisition, sale or exchange, directly or indirectly, for itself or someone else, may be punished by imprisonment or a fine. This will obviously require a case-by-case analysis in order to ascertain whether the conditions for the relevant information to be deemed as inside information (and therefore trigger the restriction on trading) are met.

In addition, financial intermediaries and market members are required under the law to act with the utmost business integrity, abstaining from participating in operations or practising acts likely to put at risk the regular functioning, transparency and credibility of the market. Failure to comply with this duty constitutes a very serious administrative offence subject to a fine.

11 What additional legal issues arise if a counterparty to an OTC equity derivatives transaction is the issuer of the underlying shares or an affiliate of the issuer?

The CMVM has issued certain guidelines on the acquisition of listed shares by issuers, both directly and indirectly – the CMVM Recommendations on Trading of Own Shares and Similar Transactions – that impose additional requirements. According to these Recommendations, the issuer, whenever entering into those transactions, shall instruct the financial intermediaries so as to avoid the carrying out of such orders at sensitive times for trading, in particular at the opening or closing of a trading session; avoid trading treasury stock at times when there are disturbances in the market or under any circumstances that could potentially influence or affect the price of the shares; and abstain from trading treasury stock whenever the disclosure of inside information or financial results is imminent.

12 What types of taxation issues arise in issuer OTC equity derivatives transactions and third-party OTC equity derivatives transactions?

Regarding individuals, there is no difference in tax treatment between listed derivatives or OTC. Additionally, the tax treatment does not vary depending on the underlying assets or the tax residency of the issuer (for residents). In addition, the tax treatment does not vary depending on the length of the position (short term versus long term) or the proximity of a coupon payment date of the underlying.

The income generated by an equity derivative, such as an option, will be qualified as a capital gain (provided such income is not generated in the course of a business activity, in which case such income will be qualified as business and professional income) for personal income tax (PIT) purposes. As a capital gain, such income will be taxed at 28-per-cent flat rate, although Portuguese resident individuals may opt for the application of the general PIT progressive rates (14.5 per cent to 48 per cent, plus surtaxes). Contrarily, whenever such income is generated in the course of a business activity it will be subject (without any option for the taxpayer) to the general PIT progressive rates (listed above) in the case of Portuguese residents, and a flat rate of 25 per cent in the case of non-residents in Portugal.

The taxable income will be computed on a yearly basis and will correspond to the net income derived from all the operations related to the equity derivative. The net income generated by the derivative will be considered in the year it is received for the computation of the balance between capital gains and losses. Losses regarding derivatives that are sold to entities that reside in tax havens are not deductible against capital gains. Capital losses may be carried forward for a maximum period of five years, but are only deductible against capital gains that are obtained during that

period and provided the taxpayer has opted to subject the income to the general PIT progressive rates.

At the level of the seller, any premium received will be qualified as capital gain and taxed as described previously. The premium will be considered for the computation of the positive taxable balance between capital gains and losses in the year the same is paid. At the level of the buyer, any premium paid to the original seller will be considered as part of the acquisition price of the derivative (provided its payment can be proved by way of documentary evidence) for the purposes of computation of his or her own capital gain once the buyer sells the product to a third party.

It should be noted that, in Portugal, taxation of individuals depends on the income actually paid or the payment that is due to the individual. As a rule, unrealised capital gains or losses are not considered for personal taxation purposes.

As regards corporate entities, subject to corporate income tax (CIT), determination of the taxable profit arising from equity derivatives is similar to the regime described for individuals. This is especially true as regards non-resident entities investing in Portuguese derivatives. However, in the case of Portuguese resident CIT taxpayers, if the underlying equity asset is traded in an active market (ie, a market in which transactions for the asset or liability take place with sufficient frequency and volume to provide pricing information on an ongoing basis), the derivative may be valued in the company's account according to the fair value measurement approach. In this case, the annual profits and losses arising from the variations in the fair value measurement may be considered for tax purposes. This is the only case when unrealised capital gains or losses may be considered for tax purposes.

As regards capital gains (or fair value gains) resulting from equity derivatives, resident CIT taxpayers will be taxed at a rate of 21 per cent, with an additional municipal surtax of up to 1.5 per cent (depending on the municipality) and state surcharge (on taxable profits of over EUR €1.5 million, of rates between 3 per cent and 7 per cent, the maximum rate being applicable on taxable profits above €35 million). Non-resident CIT taxpayers will be taxed at a flat rate of 25 per cent.

13 Describe the liability regime related to OTC equity derivatives transactions. What transaction participants are subject to liability?

A financial intermediary is subject to special civil liability rules set out in the PSC, which will apply to the entry into equity derivatives. According to this special liability regime, a financial intermediary is civilly liable for the damage caused to any person whenever its legal duties are not properly fulfilled and, in such context, the financial intermediary's fault is presumed whenever damages emerge from the violation of duties or the breach of contractual or precontractual obligations, as well as from the breach of information duties. It should be noted that the extent of the financial intermediaries' duties depend on the nature of the client as a qualified or a non-qualified investor, as defined under Portuguese law. The PSC sets out the administrative and criminal liability regime arising from insider trading and market manipulation, whereas the PCC lays down the civil liability regime (payment of compensation) of insider trading. In any case, all transaction participants are potentially subject to civil, administrative and criminal liability under the applicable Portuguese laws and regulations.

14 What stock exchange filings must be made in connection with OTC equity derivatives transactions?

Typically, OTC equity derivatives, owing to their nature as off-market transactions, do not trigger stock exchange filings.

This notwithstanding, following the implementation of the MiFID into Portuguese legal order, financial intermediaries are bound to immediately disclose to the public OTC transactions carried out over securities admitted to trading in a regulated market, under the terms set out in articles 316 and 221 of the PSC and Commission Regulation (EC) No. 1287/2006 of 10 August 2006, via their own websites or the stock exchange (Euronext Lisbon) website, in similar terms binding upon the stock exchange in relation to transactions carried out in the regulated market.

Concerning reporting obligations arising from OTC equity derivatives, it is also worth mentioning that these may trigger disclosure duties for the purposes of qualified holdings, provided that certain notifiable thresholds are crossed (ie, exceeding or falling below 2 per cent, 5 per cent,

10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, half, two-thirds and 90 per cent of voting rights), under the following circumstances:

- a counterparty is entitled to acquire, through physical settlement, the underlying shares;
- a counterparty has entered into an agreement concerning the voting rights attached to the underlying shares, or otherwise has the right to acquire, dispose of, direct, influence or control the exercise of the voting rights attached to the underlying shares, or bears the economic risk of the investment in the underlying shares;
- in the course of the implementation of Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 (the Transparency Directive), the CMVM issued a General Statement of Opinion, dated 26 November 2015, on the vertical effect of certain provisions of the Transparency Directive, according to which disclosure duties concerning qualified shareholdings resulting from the holding of financial instruments (including financial instruments with financial settlement) shall be applicable whenever reaching, exceeding or falling below certain notifiable thresholds of voting rights attached to their underlying shares (which differ slightly from the thresholds already implemented under Portuguese law).

Additionally, in connection with the holding of long economic positions under CMVM Regulation No. 5/2008, as amended, any entity reaching or exceeding a long economic position of 2 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 40 per cent, 45 per cent, half, 55 per cent, 60 per cent, two-thirds, 70 per cent, 75 per cent, 80 per cent, 85 per cent and 90 per cent of the share capital of an issuer subject to Portuguese Law, whose shares are admitted to trading on a regulated market located or operating in Portugal, or reduces its position to a value lower than any of the above thresholds, shall notify the CMVM and the relevant company, with the latter being bound to publicly disclose the information to the public.

15 What types of documents are typical in an OTC equity derivatives transaction?

OTC equity derivatives are typically governed by master agreements, in particular by an ISDA Master Agreement as amended by a schedule, which regulate the main terms (eg, events of default, termination events) of the legal relationship between the parties. Although each transaction is part of the master agreement, key dates, elections and specific terms of each transaction are referred to in a confirmation. In case the counterparties trade with each other before a master agreement is signed, the trade is recorded in a long-form confirmation where the parties agree to use their best endeavours to put an ISDA Master Agreement in place and, until then, the ISDA form is deemed to be incorporated in the confirmation. When dealing with ISDA documentation it is also common to consider product definitions (eg, 2002 ISDA equity derivatives definitions). Finally, in case OTC transactions are collateralised, the ISDA Credit Support Annex is also used to document bilateral security arrangements between counterparties for transactions documented under ISDA Master Agreements.

16 For what types of OTC equity derivatives transactions are legal opinions typically given?

Whenever the counterparties enter into a master agreement that governs the transactions entered into between them, a legal opinion on capacity and authority is typically given. It is also common to have legal opinions on the enforceability of netting provisions in this jurisdiction. Whenever collateral arrangements are agreed, in particular in case the security granted as collateral is located in a different jurisdiction, it is also common to have legal opinion on the enforceability of the collateral arrangement.

17 May an issuer lend its shares or enter into a repurchase transaction with respect to its shares to support hedging activities by third parties in the issuer's shares?

A lending or repurchase transaction would be subject to the restrictions on the acquisition of own shares or financial assistance set out in question 7 (in addition to corporate restrictions applicable to the disposal of own shares, including but not limited to shareholders' approval).

Additionally, when entering into this type of transaction, market manipulation provisions shall be considered, in particular whenever they are able to produce variations in the market price for the shares.

18 What securities registration or other issues arise if a borrower pledges restricted or controlling shareholdings to secure a margin loan or a collar loan?

A borrower that pledges shares in a Portuguese listed company to secure a loan will require a registration of such security interest in the relevant securities account in their name. Under Portuguese law, a pledge of securities does not in itself trigger a transfer of ownership of the underlying collateral. Moreover, a pledge of listed shares will not trigger a disclosure obligation on the side of the pledgee if, and to the extent that, the pledgee is not entitled to exercise the voting rights inherent to the pledged shares and is not granted a disposal right of the pledged shares. When such exercise becomes contractually possible (eg, following an enforcement of the security), then the pledgee will be required to disclose the voting rights to the extent the relevant thresholds are crossed.

Additionally, under Portuguese law, persons discharging managerial responsibilities, as well as persons closely associated with them, shall notify the issuer and the CMVM of every transaction conducted on their own account, or on behalf of third parties, or by third parties on their behalf, relating to shares or other financial instruments linked to shares of the relevant issuer, including the creation of a pledge over the issuer's shares.

19 What is the structure of the market for listed equity options?

There is a regulated market for futures and options named 'Mercado de Futuros e Opções' (Futures And Options Market). The futures and options market is regulated by Euronext Lisbon, Sociedade Gestora de Mercados Regulamentados SA, the management company of regulated markets. LCH Clearnet SA provides clearing services to this market.

20 Describe the rules governing the trading of listed equity options.

The main pieces of legislation that may be applicable in connection with listed equity options are: the PSC, in particular, the provisions on listed financial instruments, regulated markets and multilateral trading systems; CMVM Regulation No. 3/2007 on regulated markets and multilateral trading systems, which defines, in particular, the elements to be included in the general contractual terms of listed equity derivatives and information to be provided to the CMVM; and EMIR, as regards record-keeping obligations for investment firms, transaction reporting, market transparency and admission of financial instruments to trading.

The rules approved by Euronext and Euronext Lisbon, in particular Euronext Rule Book I – Harmonised Rules (Rule Book I) and Euronext Rule Book II – Non-Harmonised Market Rules (Rule Book II), currently in force, and notices and instructions relating to Euronext derivatives markets.

21 What categories of equity derivatives transactions must be centrally cleared and what rules govern clearing?

As regards listed equity derivatives, under article 258(4) of the PSC, transactions traded in regulated markets and multilateral trading systems concerning certain financial instruments, such as options, futures, swaps and other derivative contracts, shall be cleared through a central counterparty. Accordingly, equity derivatives traded in the Portuguese regulated market shall be centrally cleared.

Moreover, EMIR includes the obligation to centrally clear certain classes of OTC derivative contracts through central counterparty clearing. ESMA shall develop and submit to the Commission for endorsement draft regulatory technical standards specifying, in particular, the class of OTC derivatives that should be subject to the clearing obligation. According to the ESMA website, these have not, thus far, been proposed.

Clearing is mainly governed by the PSC, EMIR and CMVM Regulation No. 5/2007 and LCH Clearnet rules and regulations.

22 What categories of equity derivatives must be exchange-traded and what rules govern trading?

There are no mandatory requirements under Portuguese law regarding which equity derivatives must be exchange-traded. From a market perspective, the list of operations to be traded in each regulated market shall be defined by the respective management entity, which for the Portuguese derivatives market is Euronext Lisbon. There is a list of equity futures concerning several Portuguese entities. There is no list of stock options in Euronext Lisbon. An equity index derivative contract named 'PSI 20 Index Future' is also available.

Trading is mainly governed by the PSC, CMVM Regulation No. 3/2007, Rule Book I, Rule Book II and notices and instructions relating to the derivatives market managed by Euronext Lisbon, including Instruction LI7-01 – Suspension and Interruption from Trading of Future Contracts and their Underlying Assets.

23 Describe common collateral arrangements for listed, cleared and uncleared equity derivatives transactions.

Listed equity derivatives transactions traded in the Portuguese regulated market shall be cleared through LCH Clearnet. In this regard, the provisions of the Clearing Rule Book of 18 February 2016 (Clearing Rule Book) shall apply.

LCH Clearnet shall be entitled to impose additional margin requirements as it reasonably deems useful or necessary and the clearing members must ensure that the amount of collateral is transferred or, as the case may be, guaranteed. According to the Clearing Rule Book, 'collateral' is defined as any security, cash, or Central Bank guarantee, as specified in an instruction, pledged, granted or transferred outright to LCH Clearnet.

In relation to OTC equity derivatives, it is also common to have collateral arrangements in place, which encompass securities or cash. Such collateral arrangements are typically financial collateral arrangements, such as a financial pledge or title transfer financial collateral arrangements, being governed by the Financial Collateral Act. These types of collateral are typically documented in a Credit Support Annex published by ISDA.

24 Must counterparties exchange collateral for some categories of equity derivatives transactions?

There are no specific provisions stating the obligation to exchange collateral for certain categories of equity derivatives transactions. Nevertheless, as regards listed equity derivatives transactions, LCH Clearnet may require initial margins and variation margins to cover clearing members' obligations. Additionally, for the purposes of OTC equity derivatives, under EMIR, both financial and non-financial counterparties shall, under certain circumstances, have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivatives contracts (article 11(3) of the EMIR).

25 What is the territorial scope of the laws and regulations governing listed, cleared and uncleared equity derivatives transactions?

Laws and regulations governing listed equity derivative transactions, in particular the PSC and Rule Book II, shall apply to transactions traded in the Portuguese regulated market for derivatives regardless of the jurisdiction of the counterparties.

As regards OTC derivatives transactions, assuming that at least one of the parties entering in the agreement (eg, a master agreement) is organised under the laws of Portugal, as a general rule, the contract shall be governed by the law chosen by the parties, which may not be Portuguese law. However, it should be noted that in a situation of insolvency of the Portuguese entity, the relevant insolvency procedure would be subject to Portuguese law. In case neither counterparty is located in Portugal, but one party is guaranteed by a Portuguese entity, Portuguese laws and regulations would not apply, except in case the security is located in Portugal.

In case neither party is in Portugal but the underlying shares are admitted to trading in Portugal, it should be mentioned that Portuguese mandatory rules shall be applicable to situations, activities and acts that have a relevant connection with the Portuguese territory, regardless of the governing law of the contract, which, for example, is deemed to be the case with reporting obligations and disclosure duties relating to those shares.

26 What legal issues arise in the design and issuance of structured products linked to an unaffiliated third party's shares or to a basket or index of third-party shares? What additional disclosure and other legal issues arise if the structured product is linked to a proprietary index?

For securities registration issues that, under Portuguese law, may arise in connection with public offers of securities, see question 6.

As regards the design and issuance of structured products, the legal regime of complex financial products (CFPs) shall be considered. Decree-law No. 211-A/2008 of 3 November 2008 and CMVM Regulation No. 2/2012 address specific issues concerning advertising and marketing of CFPs. Warrants, CFDs, forex forward and unit-linked products are also

Update and trends

Since 2008, interest rates have significantly decreased. Some companies that have suffered losses through interest rate swaps have sued banks in order to be able to terminate transactions. Some final decisions from the Supreme Court have considered that an abnormal change of circumstances had occurred and therefore the transactions shall be deemed retroactively terminated as of the occurrence of said change (Process No. 1387/11.5TBBCL.G1.S1, dated 10 October 2013) and that the transactions are contrary to public policy and good practices and therefore shall be deemed null and void (Process No. 531/11.7TVLSB.L1.S1, dated 29 January 2015). Owing to the close connection of some types of equity derivatives with interest rate derivatives (eg, equity swaps), these judicial cases shall duly be taken into consideration.

It is also worth mentioning Regulation (EU) 2015/2365, which entered into force on 12 January 2016 (although some provisions are due to take effect in the future), which has implemented rules on securities financing transactions (eg, repos) and of reuse of the financial instruments that have been granted as a guarantee.

The implementation of the Transparency Directive (delayed but undergoing) into Portuguese legal order should be noted, as this is likely to have an impact, among other aspects, on disclosure duties in relation to equity derivatives.

Finally, ESMA recently launched a public consultation on the PRIIPs Level 2 regulation with the aim of making a KIID available for every packaged product investors wish to invest in, including in relation to listed equity derivatives. The proposed one size-fits-all approach raises a number of practical issues that call upon stronger harmonisation efforts among member states, where different approaches for these types of products are still in place.

of the examples of CFP. CMVM Regulation No. 2/2012 applies to CFPs offered to at least five retail investors established or resident in Portugal. In particular, according to this Regulation, a key information document (KIID) must be prepared and sent to the CMVM for review before starting the marketing of a CFP. In addition, all advertising materials relating to CFPs shall be previously approved by the CMVM.

With regard to disclosure duties, see question 14. Note that financial instruments (including structured products) with an index or basket of shares as an underlying asset are only relevant for the purposes of the disclosure of a long economic position on shares whenever a given listed share represents more than 20 per cent of the total value of the basket or index.

From a tax perspective, no specific issues arise from the issuance (or transactions) regarding structured products, regardless of how the structured product is designed. However, if the product is issued or subject to transactions through a Portuguese resident financial institution, this entity is legally bound to inform the Portuguese tax authorities of the transaction. Additionally, in the case of individuals, the PIT Code establishes a reporting obligation regarding all transactions that may give rise to a taxable gain or loss, regardless of the territory, of issuance of the structured product. The transaction should be reported in the individual's annual tax return.

27 Describe the liability regime related to the issuance of structured products.

The rules on liability for the contents of the prospectus (article 149 of the PSC) shall apply mutatis mutandis to the liability for marketing and advertising materials relating to structured products. Accordingly, even if the issuer acted without fault, it is liable for the contents of such materials and for ensuring compliance with the principles regarding the quality of information set out in the PSC (ie, accurate, updated, clear, objective and legal information).

This is in line with the Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), which states that the PRIIP manufacturer shall incur civil liability whenever the KIID contains misleading, inaccurate or inconsistent information vis-à-vis the relevant parts of legally binding precontractual and contractual documents or with the applicable legal requirements.

In addition to the above, according to CMVM Regulation No. 2/2012 on CFPs, the obligation to deliver the KIID to investors lies with the distributor or marketing entity of the PFC, who, furthermore, is liable for ensuring that the informative document complies with the CMVM Regulation and the principles regarding the quality of information set out above.

28 What registration, disclosure, tax and other legal issues arise when an issuer sells a security that is convertible for shares of the same issuer?

Regarding securities registration issues that, under Portuguese law, may arise in connection with public offers of securities, see question 6.

Convertible bonds at the holder's option shall be governed by the PCC, whereas convertible securities at the issuer's option or mandatory convertibles are governed by CMVM Regulation No. 15/2002, as amended.

The legal regime applicable to convertible bonds under the PCC was drafted exclusively for bonds convertible into shares of the issuer, where a share capital increase of the issuer of the bonds would be required (a share capital increase would not be required only to the extent that own shares held by the issuer would be sufficient to satisfy all conversion requests). Shareholders are granted a pre-emption right in the subscription of bonds convertible into shares under the PCC, as well as in case of the subscription of mandatorily convertible securities, according to CMVM Regulation No. 15/2002.

Regarding disclosure duties, as a general rule, convertible bonds and mandatorily convertible securities do not fall under any of the categories of article 20 of the PSC and therefore do not result in the voting rights attached to the relevant shares being considered in the calculation of a qualified shareholding if, and until, physical delivery of the shares actually occurs.

29 What registration, disclosure, tax and other legal issues arise when an issuer sells a security that is exchangeable for shares of a third party? Does it matter whether the third party is an affiliate of the issuer?

Regarding securities registration issues that, under Portuguese law, may arise in connection with public offers of securities, see question 6.

The prevailing doctrine sustains the understanding that article 365/1 of the PCC provides for two types of convertible bonds: those that are convertible into the shares of the issuer; and those that are exchangeable into the shares of a third company (which are presumably held by the issuer of the bonds). In the second instance, the exchange of the bonds does not give rise to a share capital increase of either the issuer of the bonds or the issuer of the shares into which the bonds are exchangeable.

The regime specifically set out in the PCC for convertible bonds should not be deemed to apply to exchangeable bonds, which should remain subject to the general legal framework set out in the PCC for classical bonds. However, owing to the fact that the law does not specifically provide for a legal regime applicable to exchangeable bonds as such, it can be argued that in cases where the bonds are mandatorily exchangeable (and not in cases where they are exchangeable at the option of the bondholders) should instead be submitted to the legal regime applicable to mandatorily convertible securities set out in CMVM Regulation No. 15/2002.

Regarding disclosure duties, as a general rule, exchangeable bonds for shares of a third party with physical settlement would, in principle, result in the attribution of voting rights for its holder, giving rise to disclosure of a qualified shareholding upon reaching, exceeding or falling below a notifiable threshold.

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