INFORMATIVE NOTE

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CHANGES TO THE COMMERCIAL COMPANIES

REVISION OF THE RULES ON ISSUANCE OF PREFERENCE SHARES AND BONDS

In compliance with what was agreed with the European Commission, the European Central Bank and the International Monetary Fund under the 11th Regular Revision of the Programme of Economic and Financial Assistance to Portugal, Decree-Law no. 26/2015 was published on 6 February of this year.

In compliance with what was agreed with the European Commission, the European Central Bank and the International Monetary Fund under the 11th Regular Revision of the Programme of Economic and Financial Assistance to Portugal, Decree-Law no. 26/2015 was published on 6 February of this year. Under this new law, the Government has implemented a set of long-awaited measures which have two principle objectives. The first is to create an environment more favourable to the approval of corporate recovery plans by introducing changes to the *Sistema de Recuperação de Empresas por Via Extrajudicial* ("SIREVE"), the Out-of-court System for Recovery of Companies, and to the *Processo Especial de Revitalização* ("PER"), the Special Revitalisation Process. The second is to create alternatives to bank financing, particularly by extending the options for financing through hybrid capital instruments and by revising the rules applicable to issuing bonds.

Here, we will deal with the second set of innovations – introduced through changes to the rules on issuing preference shares and bonds set out in the Commercial Companies Code. We will address the rest of the innovations in as separate newsletter [1].

[1] Newsletter about "Changes to the 'SIREVE' and 'PER' "available here.

PREFERENCE SHARES WITHOUT VOTING RIGHTS

The changes introduced here are twofold. First, they perfect the legal framework established in articles 341 and following of the Commercial Companies Code (including clarification of its wording). Second, they make the system more flexible by expressly allowing the issuance of preference shares with different configurations.

To achieve this, the new law provides that a company's articles of association (bylaws) may authorise the issue of preference shares without voting rights up to one half of the value of the share capital. These shares give the right to a priority dividend of not less than 1% (replacing the previous limit of 5%) of the respective nominal value (or, in the absence of this, of its issue value, less any share premium).

The new law also expressly provides that the dividend may consist of an additional dividend, which, besides being paid with priority, must be in addition to the ordinary dividends. The articles of association (bylaws) may provide that, in the case of preference shares without voting rights that are subscribed exclusively by qualified investors, within the meaning of the Portuguese Securities Code, and which are not admitted to trading on a regulated market, that the privilege is restricted, precisely, to the additional dividend (without participation in the remainder of the dividends to be attributed to all the shares).

It is precisely in respect of preference shares without voting rights subscribed exclusively by qualified investors that the margin for setting parameters increases most. The new law allows the articles of association (bylaws) to: (i) exclude or regulate in a variety of ways the framework for the priority dividend that is not paid in a certain financial year; (ii) provide that the priority dividend corresponding to financial years in which no distributable profits have been earned is deemed lost; (iii) provide that preference shares are converted into ordinary shares in the circumstances specified in the conditions of issue (these circumstances are related to a deterioration in the financial situation of the company that calls into question the payment of the priority dividend), (iv) provide a number of financial years different to the general rule (two financial years), but no longer than five financial years, for the purposes of attributing voting rights for failure to pay the priority dividend in full.

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When it comes to redeemable preference shares, an obligation is introduced, as from redemption, that an amount equal to the nominal value of the redeemed shares (or, in the absence of a nominal value, equal to the issue value) must be placed in a special reserve. This amount may only be used for incorporation in the share capital, without prejudice to it being eliminated if the share capital is reduced.

Finally, the law expressly allows the articles of association (bylaws) to provide for the issuance of preference shares (with a right to a priority dividend or other special property rights) which ordinarily grant voting rights.

BONDS

The aim of new rules on bonds is also to perfect the existing framework as well as to create additional flexibility.

The issuance of bonds by public limited companies is now dependent on the company presenting, after the issue, a debt to equity ratio equal to or greater than 35%, calculated on the basis of (i) the balance sheet of the last financial year, as long as it was closed in the 6 months preceding the date of issuance of the bonds, (ii) the special balance sheet, as of a date not earlier than the quarter preceding the date of issuance of the bonds, or (iii) the balance sheet of the first half of the financial year in which the bonds are issued, if the company is required to publish half-yearly accounts. Compliance with the debt to equity ratio is verified by an opinion of the audit board, the single auditor, or the statutory auditor (chartered accountant).

ANDRÉ PRÍNCIPE
(detail)
S/ Título da série Tunnels, 2005
Prova de branqueamento de corante
66 x 100 cm
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However, there are exceptions to the general rule set out above. The limit (ratio) indicated above does not apply to (i) companies that issue shares admitted to trading on a regulated market, (ii) companies that present a risk rating of the issue, or of the issue programme, or of the company, in this case, for the type of credit that includes the bonds to be issued, attributed by a rating agency registered at the European Securities and Markets Authority (ESMA) or recognised as an External Credit Assessment Institution by *Banco de Portugal*; (iii) issues with reimbursement assured by special guarantees set up in favour of the bondholders, (iv) issues with a denomination per unit (unit value) equal to or greater than EUR 100,000 (one hundred thousand euros), or the equivalent to this value in another currency, and (v) issues that are fully subscribed by qualified investors, within the meaning of the Portuguese Securities Code, and as long as the bonds issued are not subsequently placed, directly or indirectly, with non-qualified investors.

Furthermore, the range of persons or entities qualified to take on the role of joint representative of the bondholders (for example, financial intermediaries) is broadened. At the same time, the independence requirements for those chosen become more demanding with an increase in the number of situations of incompatibility.

The new rules also allow the liability of the joint representatives to be limited, except in cases of intentional misconduct or gross negligence. The limitation may not be lower than ten times the respective annual remuneration.

On a different but certainly no less important point, new types of bonds are introduced. Among others, the following types of bonds can now be issued: (i) bonds convertible into ordinary or preference shares, with or without voting rights, or into other securities issued or held by the issuing company (for example, autonomous warrants); (ii) bonds that confer credit rights of a subordinate nature; (iii) bonds that result from the conversion of other credits of shareholders or third parties over the company; (iv) bonds that present special guarantees over assets or revenue of the issuer or of a third party; and, in general, (v) bonds that combine one or more of the characteristics of the various types of bonds provided for by the law (including those expressly listed). In line with this, the door is open to issuing other debt securities, to which the rules for bonds will apply *mutatis mutandis*.

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Finally, on a point with current relevance, the reference to the composition with creditors is replaced by a mention of the recovery or insolvency plan. The revised law provides that when such a plan is approved for a company issuing bonds convertible into shares in the context of a PER (special recovery process) or insolvency, the right to convert the bonds into shares may be exercised immediately after the formal approval of the plan, in the conditions established therein.

These changes come into force on 2 March 2015.

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