



# Securities Finance

An overview of regulation  
in 32 jurisdictions worldwide

# 2005



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# Portugal

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### Statutes and regulations

- 1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The regulatory framework applicable to the Portuguese capital markets is mainly set out in the Portuguese Securities Code, (Código dos Valores Mobiliários (CVM)). The CVM sets out the major rules and regulations applicable to the activity of these markets. Nevertheless, although complete, the CVM leaves the detailing of certain provisions to be completed by ministerial decree, regulations from the Portuguese Securities Market Commission (Comissão do Mercado dos Valores Mobiliários (CMVM)) and other regulatory instruments.

The following are the main decrees and regulations:

- Decree-law No. 486/99, as amended by Decree-law No. 61/2000, Decree-law No. 38/2003, Decree-law No. 107/2003 and Decree-law No. 66/2004 (approval and amendments to the CVM)
- Decree-law No. 394/99, as amended by Decree-law No. 8-D/2002 (securities markets managing companies)
- Decree-law No. 473/99, as amended by Decree-law No. 232/2000 and Decree-law No. 183/2003 (by-laws of the CMVM)
- CMVM Regulation No. 10/2000, as amended by CMVM Regulations Nos. 30/2000, 37/2000, 5/2001, 6/2001, 9/2002, 12/2002, 15/2002, 16/2002, 5/2003, 14/2003 and 5/2004 (offers and issuers)
- CMVM Regulation No. 4/2004 (disclosure duties)
- CMVM Regulation No. 12/2000, as amended by CMVM Regulations Nos. 17/2002, 02/2003 and 10/2003 (financial intermediaries)

Moreover, there is legislation specifically applicable to certain securities offered which must also be observed.

The CMVM is charged with the administration of these rules, being the public administrative entity with the main supervisory duties to assess compliance with the securities market rules. The CMVM has several regulatory duties, which are aimed at the development of the principles and rules set forth in the CVM and its secondary legislation. According to its statutes, the CMVM is an independent public entity, with administrative and financial autonomy.

### Public offerings

- 2 What regulatory or stock exchange filings are required to be made in connection with a public offering of securities? What information is required to be included in such filings and/or made available to potential investors in connection with a public offering of securities?

According to the CVM, a public offering of securities is deemed to exist if specifically addressed to individuals or legal entities resident or domiciled in Portugal and:

- the offering is made to unidentified addressees;
- the offering is made to all shareholders of a public company;
- the offeror, on or before the launching of the offering, carries out soliciting activities in connection with unidentified addressees, or is engaged in promotion or publicity activities regarding the offering; or
- the offering is made to more than 200 individuals or entities.

On the other hand, an offering will be considered to be a private placement whenever: none of the requirements of the public offering are fulfilled; the offering is exclusively aimed at institutional investors; or the offering is made by non-public companies to the majority of its shareholders, except if it is carried out pursuant to the conditions in (iii) above.

The rules to which all public offerings are subject are set out in the CVM and in some CMVM Regulations.

A public offering of securities in Portugal must adhere to several requirements and filings, namely the prior registration of certain documentation with the CMVM. Likewise, the listing of securities in the Portuguese stock exchange depends on the decision of the regulated market managing entity, on request by the relevant issuer. For further details, see 3 below.

The law demands that various information be included in the public offering, the listing launch announcement and in the relevant prospectus.

The launch announcement must refer to: a description of the securities to be offered and the type of public offering (ie subscription or sale public offering); the identification and participation of the financial intermediaries; the characteristics of the offering, such as the price and global amount of the offering; the nature and conditions of payment; the offering period; the pro-rata criteria; eventual conditions precedent; the prospectus' disclosure and distribution places; and the identification of the entity charged with the assessment and disclosure of the result of the offering.

The prospectus must include: identification of the individuals that are responsible for its content; the purposes of the offering; and the identification of the issuer and offeror and their activities, including data on the relevant corporate governance and bodies. In addition, if it is a distribution public offering, the prospectus must also contain the following information: the net

equity; financial situation and financial results of the issuer; and its evolution in the last three fiscal years or in the accounting periods since the issuer's incorporation; the conclusions of the auditor's report or opinion; the issuer's business development perspectives relating at least to the current financial year, in so far as they are relevant to the investment appraisal; the feasibility study, if applicable; and whether the securities are to be listed on a regulated market.

Pursuant to the CVM reform of 2004, in certain situations set forth in law, offering and listing prospectuses may be disclosed in a language commonly used within the financial markets, namely in case of foreign issuers.

- 3 What are the steps of the registration/filing process? Can an offering commence while review of the offering by the applicable regulatory authority is still in progress? How long does it typically take for the review process to be completed?

As mentioned above, public offerings must be previously registered with the CMVM. This prior registration request must be filed along with several documents, which include: a copy of the relevant resolution launching the offering; a copy of all the necessary corporate documents to duly identify the companies involved (issuer and/or offeror), their capacity and financial stability to initiate the public offering; a copy of the relevant agreements which may have been entered into within the scope of the public offering; and a draft of the public offer launch announcement and prospectus.

With regard to the listing of the offered securities, an application has to be filed with the relevant managing entity of the regulated market where the listing is requested, together with the necessary documentation to prove that all prerequisites have been met. These prerequisites mainly concern the capacity of the issuer to have securities listed, the procedures to be used to fulfil the disclosure duties, and the entity that will carry out the settlement of the securities.

Immediately after the registration decision, the public offering launch announcement and the relevant prospectus must be disclosed to the public, under the terms legally established. The public offering period may only commence on the day following such disclosure.

According to the CVM, the public offering registration decision, acceptance or refusal, shall be communicated by the CMVM within 30 days. Furthermore, it is possible to obtain a quicker decision if some documentation is filed with the CMVM, on an informal basis, prior to the registration of the public offering.

- 4 What, if any, are the publicity restrictions applicable to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

In general, any advertising activities/materials regarding public offerings must have been previously approved by the CMVM, and must comply with various general and specific requirements. Accordingly, all information regarding securities and public offerings that may influence investors' decisions must be complete, truthful, up to date, clear, objective and lawful. This rule is applicable even if the information is inserted in an advice, a recommendation, an advertisement or a rating notice, and regardless of the means of disclosure. In particular, the information regarding public offerings must also make reference to the existence or future availability of the prospectus, and be consistent with the content of the prospectus.

The CMVM may authorise prior advertising of the public offering, if it believes that the registration request is viable and that the said advertising does not cause any kind of disturbance within the market or to the addressees.

Finally, any type of securities advertising must comply with the general legal framework on advertisement.

- 5 Are there any special rules (for example relating to the issuance of new securities or the preferential subscription rights of existing security holders) that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There are no relevant rules that differentiate between primary and secondary offerings. Furthermore, no special liability issues arise for the seller of securities in a secondary offering, besides the general rules established on this issue, which are described in 18 and 19 below.

- 6 What is the typical settlement process for sales of securities in a public offering?

The typical settlement process for sales of securities in the clearing system adopted in the Portuguese stock exchange is based upon the rule of 'delivery versus payment'. Therefore, the liquidation of all stock exchange operations consists of: firstly, delivery of the securities object of the trade (physical settlement) by the seller to the buyer; and secondly, of delivery of the cash consideration, corresponding to said securities (financial settlement), by the buyer to the seller.

Frequently in public offerings, the settlement of the securities traded occurs in the last three business days of the offering period, since the results of the public offerings must be immediately disclosed once the offering period has ended.

#### Private placements

- 7 Are there specific rules for the private placement of securities? What procedures must be implemented to effect a valid private placement?

All private placements made by public companies and by issuers of listed securities are subject to a subsequent communication to the CMVM, for statistical purposes, within 10 business days from the date of relevant issue or of the registration of the relevant securities. This communication is made by filing a form containing the main facts related to the offering with the CMVM.

- 8 What information is required to be made available to potential investors in connection with a private placement of securities?

The disclosure duties set forth for public offers are not applicable in private placements.

- 9 Do any restrictions apply to the transferability of securities acquired in a private placement? Are there any mechanisms used to enhance the liquidity of securities sold in a private placement?

There are no restrictions applicable to the transferability of securities acquired in a private placement.

## Offshore offerings

- 10 What specific rules, if any, apply to offerings of securities outside the home jurisdiction in relation to an issuer in your jurisdiction?

According to the applicable rules, the approval of a prospectus relating to international public offers of securities of the same class, executed simultaneously or on approximate dates, falls within the competence of the supervisory authority of the member state of the EU in which the registered office of the issuer is located. Furthermore, according to the CVM, the capacity to issue, and the form of representation of the securities issued, are regulated by the personal law of the issuer, as is the content of such securities.

The transfer of the securities is governed by the law of the state of the managing entity of the centralised registry system in which the relevant securities are registered. Should the relevant securities not be integrated into such a system, the transfer is ruled by the law of the state of the custodian entity in which the same securities are registered or deposited. In all other cases, the transfer of securities is subject to the personal law of the issuer.

Therefore, should the issuer be a Portuguese entity, Portuguese law will govern the issue and offering, and also the CMVM shall be competent to approve the relevant offering prospectus.

## Particular financings

- 11 What special considerations, if any, apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Pursuant to the amendments of the CVM introduced in 2004, a new 'open-ended' concept of securities was introduced into Portuguese securities law. All documents representing homogeneous legal situations that may be transferred in the securities market shall be deemed as securities. Therefore, pursuant to the 'open-ended' concept, the law has clarified that exchangeable securities may be issued, according to the general terms and conditions applicable to offerings in Portugal.

In addition to this amendment, the CVM now expressly foresees that warrants are one of the different types of securities admitted under Portuguese law. Depositary shares, however, do not exist as securities, pursuant to the CVM.

There are no special rules that justify special considerations as far as the above-mentioned securities are concerned.

## Underwriting arrangements

- 12 What types of underwriting arrangements are commonly used?

In Portugal, all public offers must take place through a financial intermediary that provides assistance and placement services. Underwriting agreements may be one of three different kinds: placement, underwriting, and guarantee of placement.

In 'placement' agreements, only the financial intermediary assumes the obligation to use its 'best efforts' to distribute the securities that are being offered.

In 'underwriting' agreements, the financial intermediary undertakes to acquire the securities that are being offered and to place them on its own account and risk, pursuant to the terms and conditions agreed with the issuer. Furthermore, the intermediary undertakes to transfer to the investors that acquire the securities all patrimonial rights attached to the securities that may arise after the date of the underwriting agreement.

In 'guarantee of placement' agreements, the financial intermediary undertakes to acquire all securities that are not subscribed or acquired by the investors addressees of the public offer.

It should be noted that none of these agreements may be executed simultaneously.

- 13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

There are no specific or typical clauses nor specific requirements in underwriting agreements under Portuguese law, apart from those already described in 12 above.

- 14 What additional regulations, if any, apply to underwriting arrangements?

Besides the general rules applicable to financial intermediaries set forth in the CVM, all financial intermediaries must comply with the terms and conditions established in the CMVM Regulation 12/2000 (as amended), namely the obligation to be registered with the CMVM in order to be able to carry out their activities. Moreover, the person individually responsible for all issues relating to the rendering of assistance and placement services in a public offer, is also subject to registration with the CMVM.

Therefore, as a result of the obligation for all foreign financial intermediaries to be registered with the CMVM to be able to operate in Portugal, all duties specified in the applicable Portuguese law must also be complied with by these financial intermediaries.

## Ongoing reporting obligations

- 15 In what instances does an issuer of securities become subject to ongoing reporting obligations?

Pursuant to the applicable Portuguese rules, only issuers of listed securities are charged with disclosure duties, and are obliged to file with the CMVM, and the stock exchange managing entity, various elements concerning their corporate governance.

- 16 What information is a reporting company required to make available to the public?

The issuers must publish the management report, annual accounts, the legal certification of the accounts and other accounting documents required by law or regulation up to 30 days after their approval. Besides these, issuers must also publish the report of an auditor registered with the CMVM (except in special cases) expressing an opinion on the abovementioned accounts.

The issuer of listed securities must also publish information relating to the activity and results of the first semester of the financial year, within three months after the term of this semester. This information must contain the necessary details that allow investors to reach a reasonable assessment as to the development of the activity and the results of the issuer, from the end of the previous financial year together with, if possible, the foreseeable developments of the financial year including, in particular:

- any specific factors that have influenced its activity and results; and
- a comparison of the elements presented with the corresponding figures of the previous financial year.

Issuers must also disclose all information regarding relevant facts that may significantly influence the listing of their securities, pro-

vided these facts are not usually accessible to the public. Furthermore, all relevant facts related to corporate governance must be disclosed to the CMVM, the stock exchange managing company and to the public, notably: amendments to by-laws; summoning of shareholders' general meetings; distribution of dividends; alteration in the rights inherent to the relevant securities; and issue of other securities.

The mandatory information concerning the issuers of listed securities must be disclosed through publication in a national newspaper, in the information disclosure system of the CMVM and in the Official Gazette of the Portuguese stock exchange.

Pursuant to the CVM reform of 2004, in certain situations set forth by law, for the purposes of reporting duties, financial information may be disclosed in a language commonly used within the financial markets, namely in the case of foreign issuers.

### Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

According to the CVM, whoever discloses false, incomplete, exaggerated or biased information, carries out operations of a fictitious nature or executes other fraudulent practices capable of artificially affecting the normal functioning of the securities markets, shall be punished by fine or imprisonment for a maximum of three years.

Pursuant to the CVM, the acts referred to in the previous paragraph include acts that may change the regular conditions of price development, the regular conditions of offer or demand of securities or other financial instruments, or the normal conditions of launch and acceptance of a public offer.

### Liabilities and enforcement

18 What are the most common bases of liability for a securities transaction?

One of the most common bases of liability in a public offer is liability for the information contained in the offering and listing prospectus.

The following are liable for damages caused by any errors or inaccuracies in the prospectus, except in the event that they can prove they acted without fault or that the addressee knew or should have known such errors or inaccuracies:

- The offeror
- Members of the offeror's management body
- The issuer
- Members of the issuer's management body
- Promoters, in the case of an offer for subscription of the incorporation of the company
- Auditors or other accountants that may have certified or verified the accounting documents on which the prospectus is based
- Financial intermediaries
- Any other entities that may be identified in the prospectus as responsible for its content

There are also other situations in which there is a liability independent of faulty conduct: the ones described in (ii), (vii) and (viii) above, in which the offeror is held responsible; the ones described in (iv), (v) and (vi) above, in which the issuer is held responsible; and the leader of the placement consortium, if applicable.

The CVM also illustrates some conducts that are deemed to be misdemeanours under the context of a public offer. The following are punishable infringements to the securities law:

- The launching of a public offer that has not been previously registered with the CMVM
- The disclosure of the public offer or of the offering prospectus before the disclosure of the corresponding launch announcement or the CMVM's approval
- The disclosure of privileged information regarding a public offer

Likewise, the failure to comply with several duties (for instance non-disclosure of the offering prospectus, price, interest rate, results and other essential elements of the public offer) established for the proceedings of a public offer is also punished by law. Other conduct, for example executing a public offer without the assistance of a financial intermediary or the solicitation of investors' intentions before the registration of the public offer, are classified as misdemeanours by the CVM.

19 What are the main mechanisms for seeking remedies and sanctions for improper securities activities (for example, civil litigation, administrative proceedings or criminal prosecution)?

The CVM sets forth several situations in which civil responsibility may occur when one is acting in the securities market and does

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not comply with the established rules, causing damage to the regular functioning of the market and to other investors. Furthermore, the types of conduct that may be considered as crimes against the regular functioning of the market are defined in the CVM. These types of conduct are punishable by imprisonment of up to a maximum of three years. The CVM also foresees other conduct that, although not constituting a crime, may be deemed to be a misdemeanour and thus punished with fines that may amount to €2.5 million.

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#### Current proposals for change

20 Are there current proposals to change the regulatory or statutory framework governing securities transactions?

The most likely changes to Portuguese securities law is with respect to the implementation of the EU Directives, in particular the Prospectus Directive (Directive 2003/71/EC) which shall be implemented by 1 July 2005. As of this date (EC) Regulation 809/2004 sets out the application rules of the referred Directive.

According to CMVM's current understanding is that, although not formally expressed in writing, until 1 July 2005, issuers that make public offers of securities, and/or request their listing in a regulated market operating in Portugal, may choose to adopt the prospectus structure provided in the current internal regulations (CVM and CMVM Regulation 10/2000). Alternatively, they may choose to adopt the prospectus structure established in the EU legislation. Issuers following the first route must amend the prospectus from 1 July 2005 in order to meet the requirements of the abovementioned (EC) Regulation 809/2004.

Moreover, the Portuguese government through its Finance Ministry submitted to public consultation, between 5 May and 31 May 2004, a project of the Decree/Law for the purposes of the implementation of the provisions of the Market Abuse Directive (Directive 2003/6/EC) into Portuguese law, amending several provisions of the Portuguese Securities Code. This project has not yet been approved.

Other amendments to Portuguese securities law are expected to occur by virtue of the approval of the new directive on takeover bids and the transparency rules of the markets.