first or is to be treated as having priority under a deed of priority. However, some priority arrangements provide for different priorities in respect of different assets, or do not expressly rank one debenture ahead of another for these purposes. In such cases, the priority deed should contain a specific provision stating which debenture should be treated as having priority for the purposes of Sch.B1 to the Amended Act. Otherwise it may not be clear which QFCH has to give notice to the other before appointing.

Another priority issue under the new regime is where two lenders wish to enter into a priority arrangement and one lender has a pre-Act QFC and the other a post-Act QFC. The relevance of this is that the prescribed part for unsecured creditors (described above) will only apply in respect of the post-Act QFC. So a proportion of the post-Act QFC assets will have to be made available for unsecured creditors, whereas no such deduction must be made in respect of the pre-Act QFC. However, if the post-Act QFC is given priority to the pre-Act QFC, then the pre-Act QFC will lose its windfall advantage and will also be subject to the prescribed part.[27] Avoiding this potential outcome may require some creative thinking.

Conclusion

The amendments made by the Act are certainly welcome in terms of streamlining the previously cumbersome and expensive administration procedure. However, the real issue for secured lenders is the financial implications (which can be substantial) of the changes introduced by r.2.67 to tax, and given the advantages of administrative receivership to lenders who hold security over property (which is fairly standard), it is likely that we will continue to see their appointment for some time to come. As such, rumours of the death of administrative receivership may be somewhat premature.

27. See *Re Portbase Clothing Limited* [1993] Ch. 388 by analogy.

The New Regulatory Regime of Undertakings for Collective Investment

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Introduction

On October 17, 2003 the Portuguese Government published Decree-Law No.252/2003 establishing the new regime for undertakings for collective investment (UCI) in Portugal in compliance with Directives 2001/107 and 2001/108 of the European Parliament and of the Council, which amended Council Directive 85/611, thereby revoking the Portuguese legal regime currently in force.

However, the Government has taken this opportunity not only to adopt the new European mandatory legislation, but also to implement some new measures in order to modernise the Portuguese financial market in an effort to make it more euro-competitive.

This new regime has introduced serious amendments in two major areas concerning UCI development. On the one hand, it has brought in the UCI management companies regime, creating not only new market access rules, but also a wider circle of managing operations. On the other hand, it has also enabled the opening of undertakings for collective investment on transferable securities (UCITS) investment policies by enlarging the variety of assets in which it is possible to invest.

However, these changes were not made without some concerns regarding investor protection, namely concerning risk investments and information.

Nevertheless, one of the most significant changes announced in the Decree-Law proposal published by the Government, which was subject to comment from several entities, was not fully implemented. In fact, the initial proposal established the existence of UCI in the form of companies, the so-called SICAVs or SICAFs. However, although the new Decree-Law does refer to the possibility of incorporating these kinds of investment companies, this regime was not included in the upcoming legislation.

Major Changes

The recently published legislation establishes a new regime for management companies in order to develop their business performance and competitiveness.

One of the innovations of the European Directives regarding management companies was the need for authorisation from the regulator for their incorporation and the principle of mutual recognition amongst Member States.

In fact, the establishment of a necessary authorisation to develop management activities within the investment fund area was already provided for in Portuguese legislation, therefore the rules set forth in the Directive did not constitute a significant issue.

However, acknowledgment of the principle of mutual recognition was in fact a major step not only to enable home companies to grow and expand Europe-wide, but also to encourage European companies to develop their activities in Portugal. This will allow authorised management companies to carry on the services for which they have received authorisation from their home Member State by establishing branches or providing services.

Nevertheless, it is important to emphasise that this measure, although aimed at the development and growth of the European financial market, does not ignore the stability of the financial system, since the authorisation ensures investor protection and the solvency of management companies.

As far as mutual recognition is concerned, Portuguese law has chosen to regulate in a manner similar to what it had done for investment companies regarding the transposition of Directive 93/22, thereby creating a single regime with remissions to the rules applicable to credit institutions.

Although the changes described were important for the Portuguese financial scene, the most important amendment regarding management companies concerns the increase of its possible corporate purposes.

According to the new Decree-Law, management companies are now able not only to carry out the traditional activities regarding management of investment funds that were described in the existing law, but also to perform new managing activities.

The Law states that, complementary to the traditional managing activities, management companies, if authorised, may perform management of investment portfolios, including those owned by pension funds, on a discretionary client-by-client basis, in accordance with mandates granted by investors. Also, and if authorised to perform the referred portfolio management activities, these companies may develop non-core activities such as investment advice.

This increase in activities to be performed by these companies will surely be reflected in the organisational structure of Portuguese financial groups, since these activities are already being performed by other related companies resulting in higher costs.

The amendments concerning management companies are nevertheless supported by rules that set aside the stability of those companies and define tighter measures concerning possible conflicts of interest between the fund and its managing company.

Also in accordance with these amendments, and taking into consideration the inevitable structural changes in the management companies, it was decided to establish a regime for the minimum initial capital and amount of own funds. Although more flexible than the revoked legislation, the results are far from the minimum set forth in the European Directive, since a high criteria of capital demands for coverage of operating risks was provided for.

Finally, concerning the activities of management companies, the new legislation has determined for the first time the conditions under which specific tasks and functions may be performed by other delegated companies in order to increase the efficiency of the business. Although it is not stated which activities may be developed by delegated companies, the new legislation sets forth a number of principles that must be followed when engaging in such practices.

- The management company must not globally delegate its functions to one or more third parties, so as to become a letterbox entity, thereby hindering effective supervision of the management company by the regulator.
- The management company must be responsible for and control the activities of the delegated company, including the setting of a periodic definition of investment criteria.
- The delegated companies must be qualified and able to develop the managing activities. Therefore, according to the new Decree-Law, they must be financial intermediaries registered and authorised to perform the management of investment portfolios on a discretionary client-by-client basis, in accordance with mandates granted by investors, or undertakings for collective investment managing.
- The delegated companies cannot be the depositaries or any company whose interests may collide with the managing companies or the investors.

Another quite significant change resulting from this new legislation was the establishment of a more flexible funds investment policy by widening the permissible investment purposes in order to allow investment in sufficiently liquid financial instruments other than transferable securities.

Following the instructions of the European Directive, the new national legislation now allows funds to be invested in different assets including: money market instruments (such as treasury bills, certificates of deposit, commercial paper, medium-term notes and other negotiable short-term debt certificates); units of UCITS authorised according to Council Directive 85/611 or other collective investment undertakings of the open-ended type equivalent to UCITS; financial derivative instruments dealt or not in regulated market and bank deposits maturing in no more than 12 months.

This measure has broadened the possibilities for investment of UCITS, giving them a new place among other investment opportunities available in the market. Although more complex, UCITS now represent a more diverse possibility of investment according to market necessities.

Also, this will allow different kinds of funds to flourish not only in the Portuguese market but also throughout the European market, such as funds of funds, money-market funds, index funds, derivative funds or mixed funds.

However, such benefits do not come without some restrictions. In fact, by establishing more flexible UCITS investment policies, the Government has also established more complex measures regarding investment risk hazards. Therefore, the laws that established simple amount restrictions concerning funds investments in one single entity have expanded to establish not only such limits in general, but also to consider the kind of investment, bearing in mind the responsibilities of such entities to the fund. Also, on this subject, the establishment of limits concerning investments in several companies linked by consolidated accounts was very important, given that they might constitute a serious hazard to the fund.

In another significant area, the new Decree-Law sets forth the European rules for information provided to investors, namely concerning the simplified prospectus which is now the main instrument for distribution. However these amendments do not constitute a paramount change in the regime, since Portugal has already been dealing with this kind of prospectus since 1999. A full prospectus is still required, and must be available to the investors at all times, although not necessarily distributed to the public.

The Decree-Law enters into force in January 2004 and, although both Directives allow for a later deadline, the Portuguese Government decided that all UCI should be subject to this law by January 2006.

Meanwhile, these rules will be applicable to all new UCI to be incorporated in Portugal as of January 2004 and to those already incorporated and whose management companies request the regulator's approval of the necessary amendments to the managing rules and the prospectus, clearly stating that those changes are being carried out in order to adapt the fund to the new legislation.

Conclusion

This new legislation has been implemented in several Member States throughout 2003, and therefore we expect the European financial market to offer exciting new changes in 2004.

In fact, the aim of such legislation is to ensure the free cross-border marketing of the units of a wider range of collective investment undertakings in order to develop the financial market equally in all Member States, while providing a uniform minimum level of investor protection.

By implementing these Directives the Portuguese Government has made great strides towards the liberalised European market providing for the existence of modern and dynamic management companies to circulate freely. Moreover, it has enabled more flexible and complex UCITS investment policies, creating new investment opportunities. All this without neglecting the importance of rules concerning risks and information, in order to protect not only the investor but primarily the market.