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NEWSLETTER MOMENTUM

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EDITORIAL MOMENTUM

Mark Twain once said "History doesn't repeat itself, but it does rhyme." That could be taken as the motto for this new edition of Sérvulo's newsletter, that is dedicated to picture some of the recent manifestations of evolution in core areas of law. In many cases, legal developments occur in cycles and often new legal interventions are indeed inspired by recycled ideas from the past. As a starting point of this newsletter, Alexandra Valpaços presents an important overview of the expedited arbitration according to ICC rules. This is followed by an article from Sofia Thibaut on the prohibition on the issuance of bearer securities,

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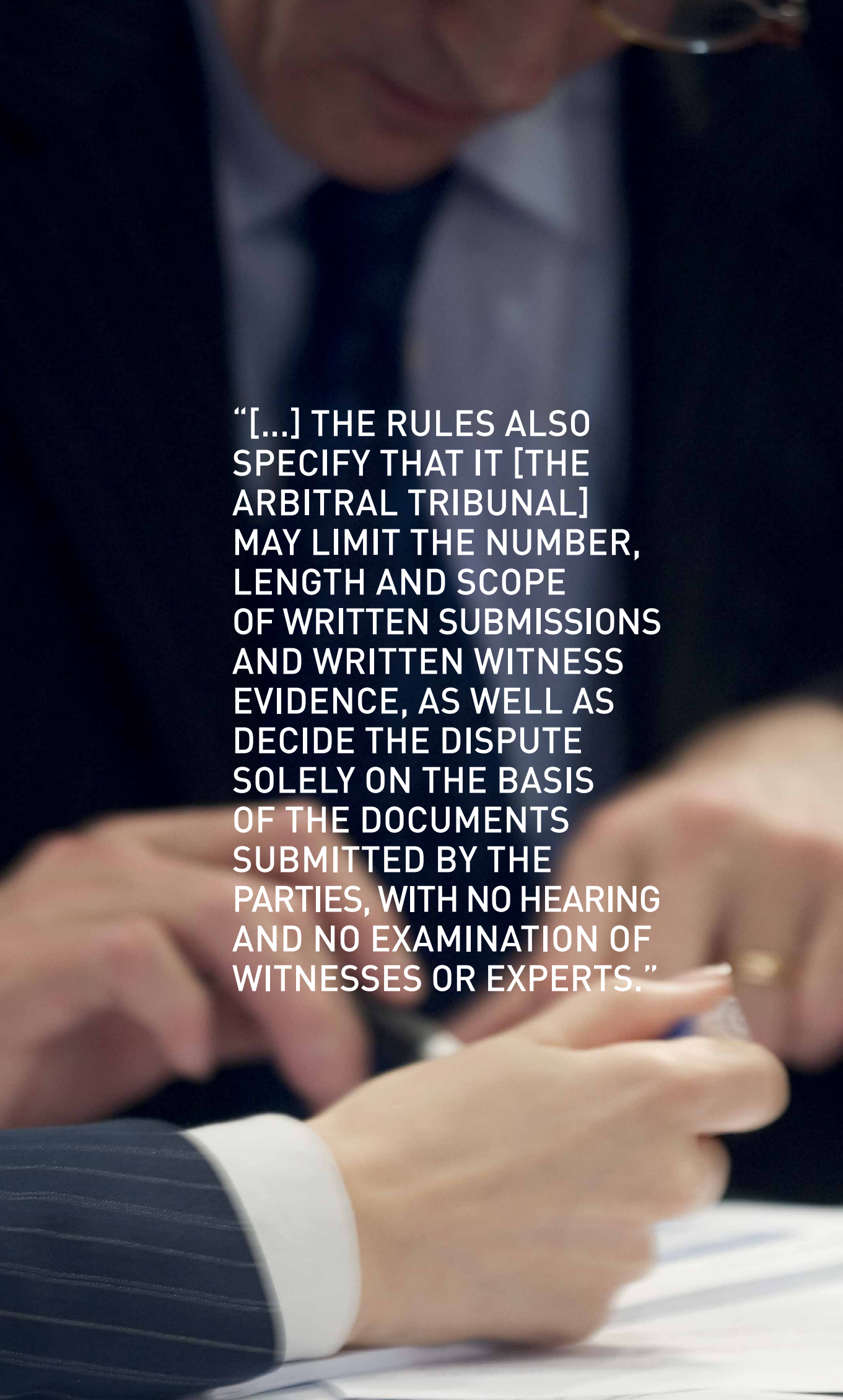
and the amendments of the Securities Code and the Commercial Companies Code. Both articles address topics with longstanding debate in the past. Miguel Gorjão-Henriques and Alberto Saavedra, from our EU and Competition department, discuss mortgage floors on their article and the position of ECJ as "the guardian of the EU Law". Teresa Pala Schwalbach, from our tax department chose to examine the latest controversy surrounding the qualification, for the purposes of the Municipal Property Tax of wind farms. The last article, written by Miguel Santos Almeida from the Corporate Crime and Regulatory Compliance department, is about the revision of the legal framework for sanctions concerning criminal and administrative infractions in the financial sector, a very hot topic in the aftermath of the most recent banking failures. Here again, a new law can be understood as a "rhyme" of other similar criminal law reforms in the past. Like Winston Churchill used to write "The farther backward you can look, the farther forward you are likely to see."



"[...] THE RULES ALSO SPECIFY THAT IT [THE ARBITRAL TRIBUNAL] MAY LIMIT THE NUMBER, LENGTH AND SCOPE OF WRITTEN SUBMISSIONS AND WRITTEN WITNESS EVIDENCE, AS WELL AS DECIDE THE DISPUTE SOLELY ON THE BASIS OF THE DOCUMENTS SUBMITTED BY THE PARTIES, WITH NO HEARING AND NO EXAMINATION OF WITNESSES OR EXPERTS."

THE ICC EXPEDITED ARBITRATION

The Arbitration Rules of the International Chamber of Commerce (ICC) are very often used, at a global scale, for solving commercial disputes between parties which agree on resorting to an arbitral tribunal. For that reason, the modifications to which the Arbitration Rules have recently been subject – – applicable since **1 March 2017** – should not be unnoticed, in particular, to companies which have entered into contracts with clients, suppliers and services' providers containing arbitration clauses.

One of such alterations was the setting up of a **more swift, simple and less expensive** arbitration procedure, composed by the so-called **«Expedited Procedure Rules»**.

The expedited procedure is characterised by the possibility of the International Court of Arbitration to appoint a **sole arbitrator** to conduct the procedure, **even if the parties agreed otherwise**. The sole arbitrator may also, within the time limit fixed by the Secretariat of the Court, be nominated by the parties.

But more than this prevalence of a sole arbitrator, it is the power vested in the arbitral tribunal by the new rules which simplifies and accelerates the arbitration: **the power of limitation of procedural acts**. Besides providing that the arbitral tribunal has discretion to adopt the procedural measures deemed appropriate, the Rules also specify that it may limit the number, length and scope of written submissions and written witness evidence, as well **as decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts**.

The promptness such powers of the arbitral tribunal may confer to arbitration is also revealed by the time limit to carry out the case management conference (15 days after the date on which the files were transmitted to the arbitral tribunal) and by the time limit within which the arbitral tribunal must render its final award (six months counting from the date of that conference).

In addition to the savings in time and costs resulting from the appointment of a sole arbitrator and the possibility of dismissing hearings, the Expedited Procedure Rules accommodate a **reduction of the arbitral tribunal's fees** and administrative expenses, in comparison with the values applicable to ICC common arbitrations.

The Expedited Procedure Rules are **automatically** applicable to arbitration agreements which *(i)* provide for the **application of ICC Rules** and *(ii)* have been **entered into after 1 March 2017**, *(iii)* in case **the amount in dispute does not exceed US$ 2.000.000**. They are also applicable, regardless the date of the agreement and the value of the dispute, if the parties so agree (opt-in).

The Expedited Procedure Rules may be excluded *(i)* if the parties have agreed to opt out or *(ii)* if the ICC International Court of Arbitration, upon the request of a party or on its own motion, determines that it is inappropriate to solve the dispute in question with the expedited procedure. In any moment, the Court may also determine, after consulting the arbitral tribunal and the parties, that the Expedited Procedure Rules are no longer applicable to the case.

There is no doubt that this new arbitral procedure – new only in the ICC Arbitration Rules, since other international arbitral institutions, *e.g.* the ICSID[1], already provided similar rules – has the potential to solve disputes in a prompter and a more economic way.

However, it is up to all participants to prevent the Court and the arbitral tribunal's increased powers from jeopardising basic rights of reply and of presenting evidence, which no fair and equitable procedure may disregard, neither for efficiency nor for any other reasons.

1. International Centre for Settlement of Investment Disputes

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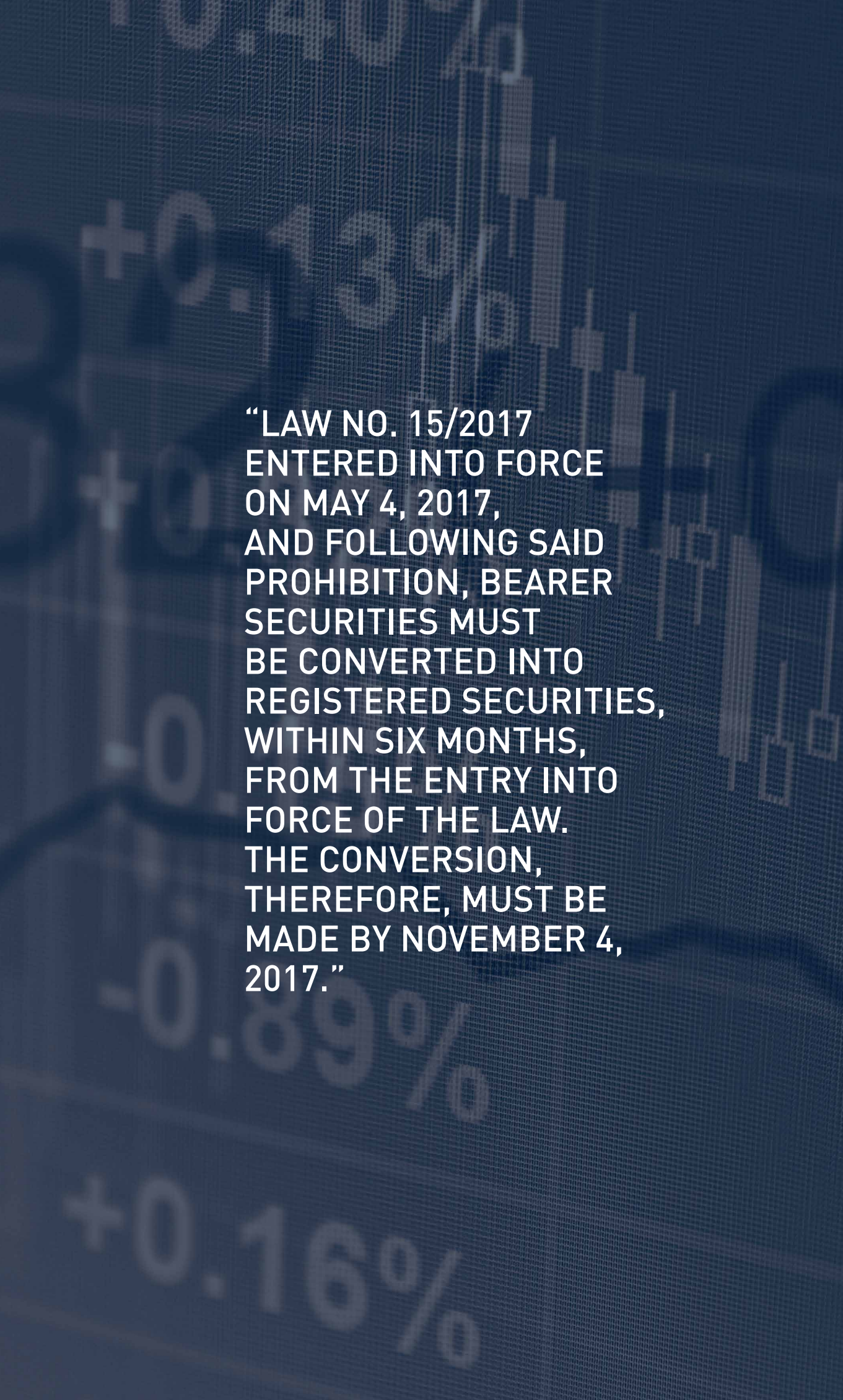

“LAW NO. 15/2017 ENTERED INTO FORCE ON MAY 4, 2017, AND FOLLOWING SAID PROHIBITION, BEARER SECURITIES MUST BE CONVERTED INTO REGISTERED SECURITIES, WITHIN SIX MONTHS, FROM THE ENTRY INTO FORCE OF THE LAW. THE CONVERSION, THEREFORE, MUST BE MADE BY NOVEMBER 4, 2017.”

PROHIBITION OF ISSUANCE OF BEARER SECURITIES
LAW NO. 15/2017, OF MAY 3

Law no. 15/2017, of May 3, imposes the prohibition on the issuance of bearer securities, and it amends the Securities Code and the Commercial Companies Code. Pursuant to the terms of Article 2 of Law no. 15/2017, issuing bearer securities is now prohibited from the date of entry into force of said law.

Law no. 15/2017 entered into force on May 4, 2017, and following said prohibition, bearer securities must be converted into registered securities, within six months, from the entry into force of the law. The conversion, therefore, must be made by November 4, 2017.

As of this date, Law no. 15/2017 provides for the prohibition of the transfer of bearer securities, as well as the suspension of the right to participate in the distribution of results associated with bearer securities.

According to the terms of Article 3 of Law no. 15/2017, the conversion of the bearer securities in circulation into registered securities shall be subject to regulation by the Government within 120 days of the entry into force of the law in question (i.e. until September 4, 2017).

As a consequence of the prohibition provided for in the law under analysis, the relevant diplomas in this area were amended. The Securities Code was amended as regards its Articles 52 and 97 (1), as follows:

- *Article 52 - Registered securities*
  All securities are registered securities, the issuance of bearer securities no longer being allowed.

- *Article 97 - Indications on securities*
  1 - In addition to the indications referred in points a) and b) of (1) of Article 44, securities must contain the following elements:
  a) Order number;
  b) Number of rights represented by the security and, where applicable, total nominal value
  c) Identification of the holder.

The amendment to the Companies Code affected Articles 272, point d), 299 and 301, as follows:

- *Article 272 - Mandatory content of the contract*
  The company contract must contain the following elements in particular:
  [...] d) The registered nature of the shares;

- *Article 299 - Registered shares*
  Shares are registered, the issuance of bearer shares no longer being allowed.

- *Article 301 - Coupons*
  Shares may be provided with coupons for the collection of dividends.

The revocatory rule, contained in Article 6 of Law no. 15/2017, affects the following legal provisions:

- *Article 52 (2), Articles 53 and 54, Article 63 (1), point a), Article 101 and Article 104 (1), of the Securities Code; and*

- Article 299 (2), and Article 448 of the Commercial Companies Code.

As a result of the revocation of Article 448 of the Commercial Companies Code, Law no. 15/2017 should have provided for the amendment of paragraph 5, of Article 528, of the same law, as regards administrative offences.

The main purpose of the prohibition on the existence of bearer securities, together with the short time frame for its implementation, shows a clear desire to replace the inherent opacity of the bearer nature of these securities for greater transparency and control over the effective ownership of the securities and their transfer, in line with European rules on the prevention of money laundering and financing of terrorism.

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COURT OF JUSTICE ON MORTGAGE FLOORS: NULLITY OF ABUSIVE CLAUSES MUST BE GUARANTEED RETROACTIVELY

Contractual aspects are always subject to innumerous jurisprudence and the falling of interest rates and benchmarks in mortgage loan agreements has raised several problems. One of the solutions implemented by financial institutions constitutes the adoption of so-called **"floor clauses"**, which the Spanish courts considered abusive, albeit without taking into account their full effects. In this respect, the compatibility of Spanish jurisprudence with the Directive on unfair terms was judged by the European Court of Justice ("ECJ"), on December 21, 2016, in response to preliminary rulings.

In Spain several credit institutions adopted clauses which provide that, even if interest rates fall below a certain threshold (or "floor") defined in the agreement, the consumer must continue to pay minimum interest equivalent to that threshold, without being able to benefit from a lower rate.

The Spanish Supreme Court (*Tribunal Supremo*), in 2013 and 2015, declared the invalidity of the 'floor clauses', but decided to exclude the retroactive effects of the nullity on the basis of the principle of legal certainty (*ex nunc*).

In this context, two Spanish lower courts asked the ECJ whether the Tribunal Supremo's jurisprudence was compatible with Directive 93/13/CEE on unfair terms.

The ECJ's response was clear: Rules protecting consumers are of public policy nature and national courts shall reaffirm the legal consequences arising from the abusive nature of any such clauses, thus precluding the ability to modify the scope of the clauses or to limit the nullity effects. The ECJ held that «while it is for the Member States to define the detailed rules under which the unfairness of a contractual clause is established (...), the fact remains that such a finding must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed».

National courts are entitled to hold that their judgments were not to affect situations in which judgments with the force of *res judicata* had been given, or in cases in which consumers have not brought their claims in respect of the domestic procedural rules, such as the rules on reasonable limitation periods or time-limits. Notwithstanding this, it is for the ECJ and not for the Member States to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of an EU rule.

Consequently, the ECJ decided that the national courts should not follow the Tribunal Supremo's decision on the limitation of the effects, as it contravenes EU law. So, «the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts».

The ECJ case law enhances the Court's role as guardian of the EU law, reaffirming the freedom of the judiciary to use the preliminary references mechanism even when it contravenes the national Supreme Courts established case law.

We believe that the effect of such precedent is limited in the Portuguese legal order, at least in the banking sector. It should be recalled that EU law respects the autonomy of national procedural law, as long as the principles of equivalence and effectiveness are complied with. However, this judgment is of major practical importance in all areas of the economy.

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MUNICIPAL PROPERTY TAX ON WIND FARMS
A CRITICAL LOOK AT THE SUPREME ADMINISTRATIVE COURT'S DECISION OF 15 MARCH 2017

For some years now, there has been a controversy surrounding the qualification, for the purposes of the Municipal Property Tax (hereinafter "Property Tax" or "IMI"), of wind farms.

Pursuant to the Property Tax Code, ***"the tax is levied on the taxable value of rural and urban buildings located on Portuguese territory"***.

Moreover, the same Code states that ***"a building is any fraction of the territory, covering water, plantations, buildings and constructions of any nature incorporated or established therein, on a permanent basis, as long as it forms part of the estate of a natural or legal person and, under normal circumstances, has economic value (...)".***

With Administrative Notice 8/2013, the Tax Authority ("TA") expressed its opinion that each wind turbine and each substation of a wind farm are independent units in functional terms. Therefore, they fall within the definition of building and, consequently, are subject to IMI.

> "THIS DECISION IS, OF COURSE, FAVOURABLE TO TAXPAYERS AND IT IS EXPECTED THAT FUTURE DECISIONS ON THE CASE-LAW WILL ACCOMPANY THIS UNANIMOUS DECISION BY THE STA."

This position gave rise to additional Property Tax assessments by the TA that most owners of wind farms contested, one of the main reasons being the fact that, on an individual basis, the elements of a wind farm – such as wind turbines and substations – – had no economic value and, therefore, could not be regarded as buildings and, as such, as be subject to IMI.

This controversy reached the courts and, for the first time, on March 15, the Supreme Administrative Court ("STA") ruled on the issue.

According to this unanimous decision, ***"the constituent elements and component parts of a wind farm cannot by themselves be regarded as urban buildings (...). In so far as they do not constitute economically independent items, that is to say, they do not have sufficient capacity to develop an economic activity on their own (...)"***.

This decision is, of course, favourable to tax-payers and it is expected that future decisions on the case-law will accompany this unanimous decision by the STA. To this extent, this could be considered a "win" campaign against the position hitherto advocated by the TA.

Notwithstanding the above, our view on the position adopted by the STA is, at this stage, cautious.

First off, a careful analysis of the decision at stake will show that the **STA seems to leave the door open to the possibility that, in certain circumstances, a wind farm may be qualified as a building**.

In addition, and in what almost seems like an anticipation of this judicial precedent, on January 11, 2017, Ordinance 11/2017, of January 9, was published, listing the typologies of urban buildings that should be subject to evaluation according to the method of the cost added to the value of the land, including electro-production centres and electricity transformation facilities.

To this extent, **notwithstanding the taxpayers' recent victory in court, their (our) lives may not become easier in the future, since it can be understood that the combined implementation of Ordinance 11/2017, together with a careful analysis of the wording of the STA judgment, may grant the TA new mechanisms and arguments to continue seeking tax revenue on wind farms**.

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REVISION OF THE LEGAL FRAMEWORK FOR SANCTIONS CONCERNING CRIMINAL AND ADMINISTRATIVE INFRACTIONS IN THE FINANCIAL SECTOR

In an effort to improve the material and adjectival solutions enshrined in Portuguese law, this revision adapts the national regime to the new European framework for market abuse, fully transposing the new Market Abuse Directive (Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse – **«MAD»**) and also adapting Portuguese law to the Market Abuse Regulation (Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse – **«MAR»**).

1. MARKET MANIPULATION AND INSIDE INFORMATION

The **crimes against the markets** classically provided for in the PSC (*market manipulation and insider dealing*) are, with this revision, subject to specific changes, in order to cover **new types of phenomena** (*e.g.*, benchmarks, emission allowances or spot commodity contracts) and to **extend the list of criminal acts** under Portuguese law (e.g., the cancellation or the amendment of an order, or the attempt to cancel or amend an order, may constitute insider dealing).

Furthermore, in cases where the agent's conduct provokes or contributes in an effective way to an artificial alteration of the regular functioning of the markets, the maximum penalty applicable to the crime of **market manipulation** is now of **8 years of imprisonment** (instead of the previous 5 years).

Among the main changes introduced by the reform, it is also worth mentioning the introduction of the new crime of **using false or misleading information in the capture of investment**. In this crime, punishable by imprisonment from 1 to 8 years, the conduct subject to criminalisation consists in the act of deciding or deliberating a capture of investment, for the entity itself or for a third party, with the use of false or misleading economic, financial or legal information. This new legal provision corresponds, however, to the introduction of a new market crime into Portuguese law without the existence of a proper European command or directive that necessarily imposes it, and also without having other Member States accompanying Portugal in this measure, as it is a crime existing in only three other European jurisdictions (namely, Germany, Italy and Spain). In this vein, even though MAD contains guidelines for strengthening criminal sanctions, the addition to the national regime of this new crime constitutes a clear case of ***gold-plating*** that could have perverse effects on the Portuguese capital markets, such as discouraging potential offers aimed at the Portuguese markets.

LAW NO. 28/2017, OF MAY 30, WHICH AMENDS THE PORTUGUESE SECURITIES CODE («PSC») AND DECREE-LAW NO. 357-C/2007, OF OCTOBER 31, ENTERED INTO FORCE ON JUNE 30, BRINGING ABOUT A VERY SIGNIFICANT REFORM OF THE LEGAL FRAMEWORK FOR SANCTIONS IN THE FINANCIAL SECTOR.

2. STRENGTHENING OF THE APPLICABLE SANCTIONS

The catalogue of penalties for administrative offences is also subject to change as regards its typology and extension, with a notable strengthening in terms of amounts and duration of fines and ancillary sanctions.

Concerning the **main sanctions**, the framework of the fines applicable to **less serious misconduct** has doubled from € 2,500.00 to € 5,000.00 (minimum limit of the penalty) and from € 500,000.00 to € 1,000,000.00 (maximum sentence). On the other hand, with regard to the **major offences**, they are now punishable with a maximum limit of 10% of turnover, with the exception of the offences resulting from market manipulation and the use or transmission of inside information, which are punishable by a fine up to 15 % of the turnover of the infringing entity.

In turn, the catalogue of **ancillary penalties** has also been widened to include *(i)* the prohibition of trading

on one's own account, and *(ii)* the cancellation of registrations or the revocation of authorisations for the exercise of management, directorship or supervisory functions in entities subject to the supervision of the Portuguese Securities Market Commission (CMVM - - *Comissão do Mercado de Valores Mobiliários*) .

Moreover, the provisions regarding the **exclusion of the legal person's administrative liability** has also been subject to changes, it now being necessary, in order to exclude said liability in cases in which the agent acts against orders or instructions of the legal person, for said orders or instructions to be precise and specific and to have been transmitted to the agent, in writing, before the fact.

3. PROCEDURAL AMENDMENTS

Guided by the aim to clarify and to simplify the procedure, some changes were also introduced into the procedural domain. Within this context, particular mention should be made of the establishment of a **new regime of extraordinary attenuation of the sanction based on a system of confession and collaboration** by the defendant. The application of this new regime could lead to:

i. the reduction of the maximum and minimum limits of fines by one-third when the defendant confesses to the facts of which he or she is accused, provides relevant information in order to reveal the truth of facts or effectively assists in the production of evidence that is decisive for establishing the facts or for identifying other perpetrators;

ii. the reduction by half of said limits when the defendant simultaneously confesses and contributes to the confirmation of the facts or to identifying other perpetrators.

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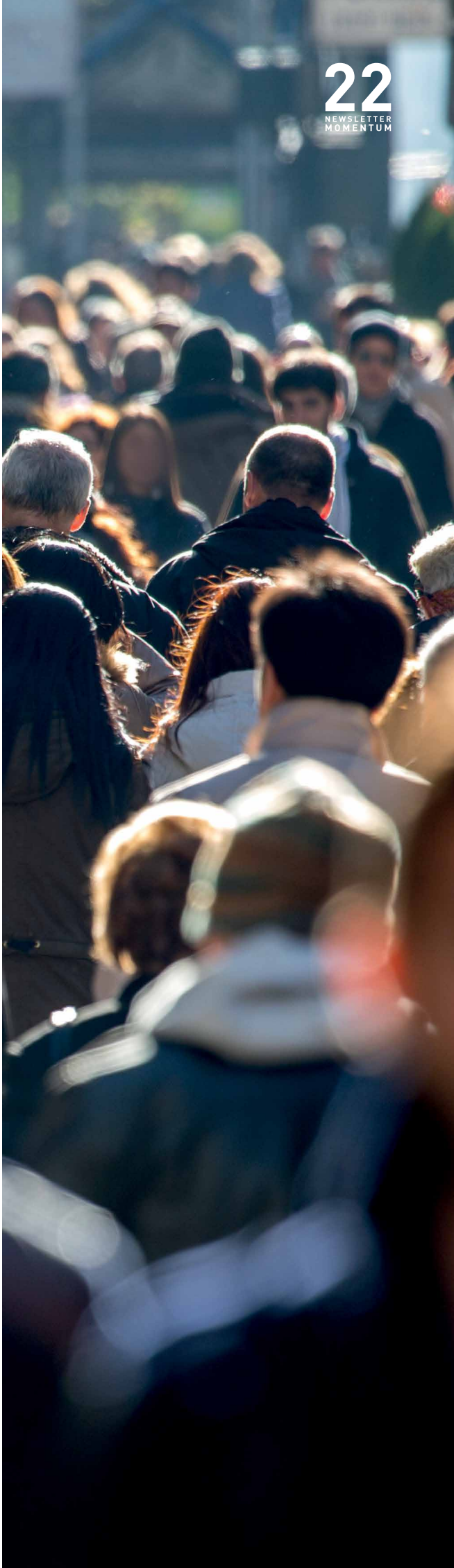

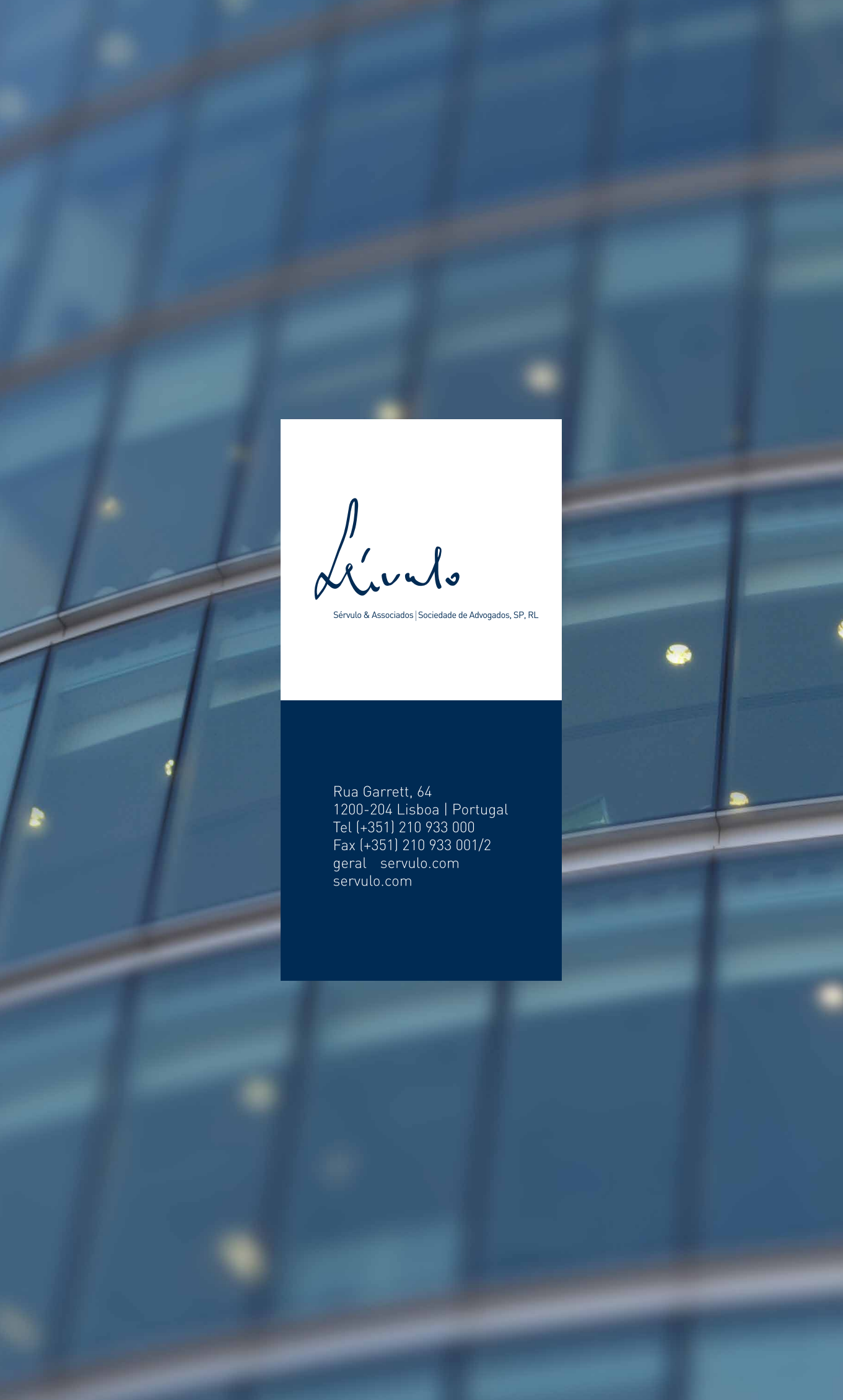

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