
Banking, Finance and Capital Markets

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EU regulation on sustainability-related disclosures in financial services sector

After entering into force on December 29, 2020, and apart from the applicable exceptions, Regulation (EU) 2019/2088 of the European Parliament and of the Council, of November 27, 2019, on sustainability-related disclosures in the financial services sector ("**Regulation (EU) 2019/2088**") became effective on March 10, 2021.

In the meantime, Regulation (EU) 2019/2088, which establishes harmonized rules on transparency regarding the integration of sustainability risks with environmental, social and governance (ESG) concerns, has been strengthened by Regulation (EU) 2020/852 of the European Parliament and of the Council, of June 18, 2020, on establishing a framework to facilitate sustainable investment (the "**Taxonomy Regulation**"). The Taxonomy Regulation promotes categorizing the qualification of an economic activity as sustainable from an environmental standpoint.

Considering the beginning of the effects of Regulation (EU) 2019/2088, it is worth reflecting on:

- its subjective scope and some of the imposed conducts; and
- the reaction of entities subject to this regulation, particularly (a) financial market participants (e.g., management companies of collective investment undertakings, credit institutions and investment firms that provide portfolio management); and (b) financial advisers (certain entities that provide insurance advice on insurance-based investment products, and certain entities that provide investment advice).

However, despite the broad range of entities encompassed by Regulation (EU) 2019/2088, it does not apply to investment firms providing investment advice employing less than three people, among others, although it is possible that, through national regulatory and legislative action, these and other entities may become subject to its provisions.

Even if the subject entities cannot disregard the programmatic contents of Regulation (EU) 2019/2088 under the pretext of not existing, on the part of the relevant clients, interests or concerns as to sustainability matters, as they are obliged to publish on their websites the information and reasons for not considering the adverse impacts of investment decisions on sustainability factors, including information on whether and when they intend to consider these adverse impacts, in reality, this obligation is derogated with regards to larger entities (i.e., financial market participants with an average of 500 employees during the fiscal year), under article 4(1 and 3) of Regulation (EU) 2019/2088.

Also, certain disclosure obligations are weakened by the absence of a final version of the regulatory technical standards (RTS), which aim to develop Regulation (EU) 2019/2088 and assist with qualifying concepts essential for compliance with the disclosure obligations. The project RTS have been prepared by the European Banking Authority ("**EBA**"), the European Insurance and Occupational Pensions Authority ("**EIOPA**") and the European Securities and Markets Authority



(“**ESMA**”), which determined the need for the European and national supervisory authorities, which include the Portuguese Securities Market Commission (“**CMVM**”) and the Portuguese Insurance and Pension Funds Supervisory Authority (“**ASF**”), to encourage the use of the draft RTS as a reference when applying Regulation (EU) 2019/2088 during the transitory period, from March 10, 2021, to January 1, 2022.

Regarding the implementation of Regulation (EU) 2019/2088 and the fulfilment of the obligations arising from the regulation, the subject entities faced additional difficulties due to the required measures being integrated into core aspects of the subject entities' activity, such as the review of remuneration policies, risk management and investment decision-making. For instance, before providing advice, financial advisers must disclose how they consider sustainability risks in the process of selecting the financial product presented to end-investors, even if the end-investors did not request this or even want it. Thus, it might prove arduous to integrate these concerns into the systems and procedures already in place for product governance, suitability and appropriateness assessment and the testing of requirements and needs (particularly within the context of relationships previously established with clients).

Even before Regulation (EU) 2019/2088 came into effect, the national supervisory authorities tried to assess with the subject entities their levels of preparation, focusing on (i) integrating sustainability factors into the investment decision-making processes; (ii) managing risks arising from this integration; and (iii) the mechanisms for disclosing periodic information.

It is expected that the subject entities' adaptation to Regulation (EU) 2019/2088 will be a demanding period, both due to the considerable set of duties imposed, as well as the uncertainty as to how these duties will be implemented in the existing organizational and procedural structures.

Money laundering and terrorist financing risk factors

A. EUROPEAN BANKING AUTHORITY GUIDELINES

The EBA has published revised guidelines on customer due diligence and the factors that credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (the “**Guidelines**”).

Particularly relevant to the current pandemic situation, the Guidelines introduced considerations regarding non-face-to-face relationships and the use of innovative technological means for customer verification.

Regarding the latter, the Guidelines caution that obliged entities should assess whether these solutions can address money laundering risks, or perhaps exacerbate them. As part of this assessment, obliged entities are expected to consider potential ICT and security risks, the reliability of the tools, compliance with the data protection legislation, and the potential impersonation fraud or documentation falsification by the customer.



B. BANK OF PORTUGAL INSTRUCTION 2/2021

In this context, Bank of Portugal Instruction 2/2021 on low and high-risk factors for money laundering and terrorist financing and specific simplified or enhanced identification and due diligence measures (the "**Instruction**") was also published, which aims to reinforce the Guidelines.

One of the main aspects of the Instruction relates to the (already known) duty to apply, in increased risk circumstances, the enhanced measure for verifying the origin of customers' funds. Due to uncertainty in the market on how to implement this verification, the Instruction gives examples of documents that obliged entities may collect for that purpose.

Another important aspect is that the Instruction includes in its annexes lists of reduced or increased risk factors, which aim to assist obliged entities with preparing their risk matrices for the prevention of money laundering and terrorist financing.

Legislation: Banking and finance law

National law

Decree-Law 9/2021 – Official Journal 20/2021, Series I, of January 29, 2021

Approves the Economic Misdemeanor Legal Framework and amends Decree-Law 246/2007, of June 26, 2007, which establishes the legal framework for (i) issuing coins; (ii) putting coins into circulation; and (iii) commercializing coins.

Regulation 2239/2021 – Official Journal 24/2021, Series II, of February 4, 2021

General Directorate of Treasury and Finance publishes the subsidiary default interest rates in effect in the first half of 2021: (i) a 7% rate applies to credits held by commercial companies, individual or legal persons, under the terms of § 3 of article 102 of the Commercial Code; and (ii) a 8% rate applies to credits held by commercial companies, individual or legal persons, under the terms of § 5 of article 102 of the Commercial Code and of Decree-Law 62/2013, of May 10, 2013.

European Union law

Commission Regulation (EU) 2021/25, of January 13, 2021 – EU Official Journal L-11, of January 14, 2021

Amends Regulation (EC) 1126/2008, adopting certain international accounting standards under Regulation (EC) 1606/2002 on International Accounting Standard (IAS) 39 (*Financial Instruments: Recognition and Measurement*), and International Financial Reporting Standards (IRFS) 4 (*Insurance contracts*), 7 (*Financial Instruments: Disclosures*), 9 (*Financial Instruments*) and 16 (*Leases*).



Commission Delegated Regulation (EU) 2021/539, of February 11, 2021 – EU Official Journal L-108, of March 29, 2021

Amends, regarding certain regulatory technical standards for specifying the methodology for identifying global systemically important institutions and defining subcategories of global systemically important institutions, Delegated Regulation (EU) 1222/2014, supplementing Directive 2013/36/EU, on access to credit institutions' activities and the prudential supervision of credit institutions and investment firms.

Commission Delegated Regulation (EU) 2021/517, of February 11, 2021 – EU Official Journal L-104, of March 25, 2021

Amends, regarding the arrangements for paying the contributions made to the administrative expenditures of the Single Resolution Board, Delegated Regulation (EU) 2017/2361, on the final system of contributions to the administrative expenditures of the Single Resolution Board.

Commission Delegated Regulation (EU) 2021/424, of December 17, 2019 – EU Official Journal L-84, of March 11, 2021

Amends, regarding the alternative standardized approach for market risk, Regulation (EU) 575/2013 of the European Parliament and of the Council, of June 26, 2013, on prudential requirements for credit institutions and investment firms, and amends Regulation (EU) 648/2012 (“**Regulation (EU) 575/2013**”).

Bank of Portugal Instructions

Instruction 6/2021 – Official Bulletin 3/2021, Supplement, of March 30, 2021

Amends Instruction 3/2015, which establishes uniform rules on implementing the Eurosystem monetary policy framework.

Instruction 5/2021 – Official Bulletin 3/2021, Supplement, of March 30, 2021

Amends Instruction 7/2012, which establishes temporary measures relating to the eligibility of collateral assets for Eurosystem credit operations.

Instruction 4/2021 – Official Bulletin 3/2021, of March 15, 2021

Regulates the management and reporting of operational and security risks, by payment service providers, implementing the requirements of the EBA Guidelines, including the duty to report annually on the assessment of the operational and security risks of the payment services provided.

Instruction 3/2021 – Official Bulletin 2/2021, 3rd Supplement, of March 10, 2021

Discloses the maximum rates to be applied to consumer credit agreements, under Decree-Law 133/2009, of June 2, 2009, in the second quarter of 2021.

Instruction 2/2021 – Official Bulletin 2/2021, 2nd Supplement, of February 26, 2021

On the reduced and increased risk factors on money laundering and terrorist financing, and specific customer due diligence, simplified and enhanced measures. See above.



Instruction 1/2021 – Official Bulletin 1/2021, of January 15, 2021

Revokes Instruction 2/2007, which provided for the submission of informative elements on the development of a credit portfolio.

Bank of Portugal Circular Letters

Circular Letter CC/2021/00000008 – Official Bulletin 3/2021, of March 15, 2021

Discloses, under no. 9 of Instruction 18/2015, (i) the reporting templates for financing and capital plans; (ii) an overview of the financial and macroeconomic scenario; and (iii) other guidelines institutions are required to complete for the financial exercise and submission of information with the reference date of December 31, 2020

Circular Letter CC/2021/00000006 – Official Bulletin 2/2021, Supplement, of February 22, 2021

Discloses instructions on using BPnet in electronic communications within market conduct inspection activities.

European Central Bank (ECB) Acts

Regulation (EU) 2021/379 of the ECB, of January 22, 2021 – EU Official Journal L-73, of March 3, 2021

Establishes the reporting requirements for statistical information on credit institutions and monetary financial institutions' balance sheet items, among others, to the relevant national central banks.

Regulation (EU) 2021/378 of the ECB, of January 22, 2021 – EU Official Journal L-73, of March 3, 2021

Establishes the minimum reserve requirements for credit institutions and branches of credit institutions established in Member States whose currency is the euro.

European Banking Authority (EBA) Acts

Guidelines on money laundering and terrorist financing risk, of March 1, 2021

See above.

Guidelines on the conditions for the alternative treatment of “tri-party repurchase agreements” exposures, of February 16, 2021

Guidelines on the conditions for applying the alternative treatment of exposures related to tri-party repurchase agreements for large exposure purposes, including on the conditions and frequency for determining, monitoring and revising the limits applicable to the securities issued by the collateral issuer, as specified by the relevant institution, under Regulation (EU) 575/2013.

Decision on information required for monitoring Basel supervisory standards, of February 16, 2021

Decision on information required for monitoring the Basel III supervisory standards, under which the nature of the monitoring exercise conducted by EBA, in coordination and in parallel with the Basel Committee on Banking Supervision, changes from voluntary to mandatory, in December 2021



(establishing the criteria for determining the credit institutions subject to the mandatory monitoring exercise).

Legislation: Insurance and pension funds law

National law

Ordinance 62/2021 – Official Journal 53/2021, Series I, of March 17, 2021

Establishes the requirements for civil liability insurance agreements arising from providing trust services.

Ordinance 59/2021 – Official Journal 52/2021, Series I, of March 16, 2021

Amends the regulation on crop insurance and accident offsetting, approved as an annex to Ordinance 65/2014, of March 12, 2014.

Ordinance 2/2021 – Official Journal 1/2021, Series I, of January 4, 2021

Establishes the covers, conditions and capital requirements applicable to the civil liability insurance provided under article 10 of Decree-Law 58/2018, of July 23, 2018, to be contracted by operators of unmanned civil aircrafts.

European Union law

Commission Delegated Regulation (EU) 2021/473, of December 18, 2020 – EU Official Journal L-99, of March 22, 2021

Supplements regulatory technical standards, specifying the requirements for information documents, costs and fees included in the cost cap, and risk-mitigation techniques for the pan-European Personal Pension Fund, Regulation (EU) 2019/1238, on pan-European Personal Pension Products.

Commission Implementing Regulation (EU) 2021/178, of February 8, 2021 – EU Official Journal L-53, of February 16, 2021

Provides technical information for calculating technical provisions and basic own funds for reporting with reference dates from December 31, 2020, to March 30, 2021, under Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance.

Insurance and Pension Funds Supervision Authority (ASF) Regulatory Standards

Regulatory Standard 2/2021-R – Official Journal 52/2021, Series II, Part E, of March 16, 2021

Amends the accounting legal framework applicable to insurance and reinsurance companies, as established in the Accounting Plan for Insurance Companies approved as an annex to Regulatory Standard 10/2016-R.

Regulatory Standard 13/2020-R – Official Journal 17/2021, Series II, Part E, of January 26, 2021

Regulates the legal framework on insurance and reinsurance distribution, approved by Law 7/2019, of January 16, 2019.



Insurance and Pension Funds Supervision Authority (ASF) Circulars

Circular 1/2021, of February 26, 2021

Provides information on the duties to which operators covered by Regulation (EU) 2019/2088 are subject, as well as on the date these duties apply. It also clarifies the ASF's view on the time-gap between the regulation's application date and the proposed application date of the regulatory technical standards that implement it.

Legislation: Securities and capital markets law

European Union law

Regulation (EU) 2021/168 of the European Parliament and of the Council, of February 10, 2021 – EU Official Journal L-49, of February 12, 2021

Amends (i) Regulation (EU) 2016/1011, on indices used as benchmarks in financial instruments and financial contracts and to measure the performance of investment funds, regarding the exemption of certain third-country spot foreign exchange benchmarks and the designation of replacements for certain benchmarks in cessation; and (ii) Regulation (EU) 648/2012, on over-the-counter derivatives, central counterparties and trade repositories ("**Regulation (EU) 648/2012**"), clarifying that legacy contracts will not be subject to clearing or margin requirements if those contracts are amended for the sole purpose of replacing the benchmark they reference against the background of a benchmark reform.

Regulation (EU) 2021/23 of the European Parliament and of the Council, of December 16, 2020 – EU Official Journal L-22, of January 22, 2021

Establishes rules and procedures relating to the recovery and resolution of central counterparties ("CCPs") authorized under Regulation (EU) 648/2012, as well as rules relating to arrangements with third countries in the field of recovery and resolution of CCPs. Amends several regulations and directives, including Regulation (EU) 648/2012 and Regulation (EU) 600/2014, on markets in financial instruments, and Directive 2014/59/EU, establishing a framework for the recovery and resolution of credit institutions and investment firms.

Commission Delegated Regulation (EU) 2021/528, of December 16, 2020 – EU Official Journal L-106, of March 26, 2021

Supplements, regarding the minimum information content in the document to be published for a prospectus exemption relating to a takeover through an exchange offer, a merger or a division, Regulation (EU) 2017/1129, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

Commission Implementing Regulation (EU) 2021/451, of December 17, 2020 – EU Official Journal L-97, of March 19, 2021

Establishes implementing technical standards, relating to supervisory reporting of institutions, for the application of Regulation (EU) 575/2013, defining uniform reporting formats and templates,



instructions on and a methodology for how to use those templates, the frequency and dates of reporting, the definitions and the informatic solutions for the reporting. Repeals Implementing Regulation (EU) 680/2014.

Commission Implementing Regulation (EU) 2021/453, of March 15, 2021 – EU Official Journal L-89, of March 16, 2021

Establishes implementing technical standards relating to specific reporting requirements for market risk, for the application of Regulation (EU) 575/2013. Amended by the corrigendum dated March 26, 2021, which added Annex III, pertaining to the single data point model and validation rules.

Commission Delegated Regulation (EU) 2021/237, of December 21, 2020 – EU Official Journal L-56, of February 17, 2021

Amends, regarding the date on which the clearing obligation takes effect for certain types of contracts, the regulatory technical standards established in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178, supplementing Regulation (EU) 648/2012, on regulatory technical standards on the clearing obligation.

Commission Delegated Regulation (EU) 2021/236, of December 21, 2020 – EU Official Journal L-56, of February 17, 2021

Amends, regarding the timing of when certain risk management procedures will start to apply for the purpose of exchange collateral, the technical standards established in Delegated Regulation (EU) 2016/2251, supplementing Regulation (EU) 648/2012 on regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a CCP.

Commission Implementing Decision (EU) 2021/85, of January 27, 2021 – EU Official Journal L-29, of January 28, 2021

Establishes the equivalence to the requirements of Regulation (EU) 648/2012 of the regulatory framework of the United States of America for CCPs that are authorized and supervised by the U.S. Securities and Exchange Commission.

Corrigendum to Regulation (EU) 2019/876 of the European Parliament and of the Council, of May 20, 2019 – EU Official Journal L-65, of February 25, 2021

Rectifies the regulation identified above, which amends Regulation (EU) 575/2013, regarding the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) 648/2012.

**Securities and Exchange Commission (CMVM) Circulars
Circular of March 4, 2021**

Circular on implementing the new regular reporting duties to CMVM under (i) CMVM Regulation 6/2020, on multiple reporting duties; (ii) CMVM Regulation 7/2020, on providing information to the CMVM about complaints filed by non-professional investors; (iii) CMVM Regulation 8/2020, on providing information to the CMVM about price lists for non-professional investors, marketing and



charges of collective investment undertakings; and (iv) CMVM Regulation 9/2020, on the internal control and governance systems' self-assessment report.

Circular of February 18, 2021

Circular on the duty to assess the appropriateness of operations under Directive 2014/65/EU on markets in financial instruments, notably tests on the investors' knowledge and experience (appropriateness) and their investment objectives and financial situation (suitability).

European Securities and Markets Authority (ESMA) Acts

Final report on draft regulatory technical standards on sustainability-related disclosures in the financial services sector, of February 4, 2021

Final report on draft regulatory technical standards (RTS) issued by the EBA, the EIOPA and the ESMA, on the content, methodologies and presentation of disclosures related to sustainability in the financial services sector, under Regulation (EU) 2019/2088.

Final report on regulation for taxonomy-alignment of non-financial undertakings and asset managers, of March 1, 2021

Final report with advice on regulating the obligations established in article 8 of the Taxonomy Regulation, on the information to be provided by non-financial undertakings and asset managers to comply with their disclosure obligations under Directive 2013/34/EU, on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

Joint Opinion on jurisdictional scope under the Securitization Regulation, of March 25, 2021

Joint opinion of the EBA, the EIOPA and the ESMA on the jurisdictional scope of application of Regulation (EU) 2017/2042, with a view to clarifying, among other aspects, the scope of application of the provisions regarding the obligations of third-country parties to a securitization.

Selected case law

National case law

Judgment of the Supreme Court of Justice, of January 26, 2021 (proceedings 20767/16.3T8PRT-A.S2)

Faced with the question of whether, relating to a bank loan, the obligations that envisage simultaneously repaying and remunerating the principal, are unitary obligations, even if intended to fulfil a double function (repayment and remuneration of the loaned capital), the Supreme Court of Justice ("SCJ") held that, to prevent creditors from excessively accumulating their claims, and to protect the debtor from the accumulation of its debt, the five-year statute of limitation period under article 310, subsections d) and e) of the Portuguese Civil Code will apply.



According to the prevailing doctrine, the SCJ ruled that breach of one of the instalments, when the repayment obligation is divided or split, fulfils the provision of article 781 of the Portuguese Civil Code, even if the non-compliance pertains to an instalment through which principal is simultaneously repaid and remunerated.

Thus, the SCJ decided "*that the non-fulfilment of an instalment entails the acceleration of the remaining instalments is not relevant to the problem in question, because, in that case, the limitation period will relate to each of the amortization quotas and not to the whole debt.*"

European case law

Judgment of the European Court of Justice, of January 26, 2021 (joined cases C-422/19 and C-423/19)

The European Court of Justice ("ECJ") interpreted European Union law in the sense that, regardless of whether the European Union exercises its exclusive competence in the area of monetary policy, Member States whose currency is the euro cannot adopt a provision that establishes legal rules governing the status of legal tender of euro banknotes.

However, the ECJ considered that the approval of national legislation that excludes the possibility of discharging a statutorily imposed payment obligation in banknotes denominated (cash payments) in euro was not precluded, if this legislation:

- (i) does not have the object or effect of establishing legal rules governing the status of the legal tender of these cash payments;
- (ii) does not lead, in law or in fact, to the abolition of those banknotes, particularly by calling into question the possibility, in general, of discharging a payment obligation in cash;
- (iii) has been adopted for reasons of public interest;
- (iv) is appropriate for attaining the public interest objective pursued; and
- (v) does not go beyond what is necessary to achieve that objective, and other lawful ways to discharge the payment obligation are available.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our Task Force by email TFcoronavirusPT@cuatrecasas.com or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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