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# Legal Update – 1st Quarter 2024

Portugal | Banking, Finance and Capital Markets Newsletter

1st Quarter 2024

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## Directive (EU) 2024/927 of the European Parliament and of the Council of March 13, 2024

On March 26, 2024, Directive (EU) 2024/927 of the European Parliament and of the Council of March 13, 2024 (“**Directive (EU) 2024/927**”) was published. Directive (EU) 2024/927 amends (i) Directive 2011/61/EU, commonly referred to as the Alternative Investment Fund Managers Directive, or simply AIFMD (the “**AIFM Directive**”); and (ii) Directive 2009/65/EC, commonly referred to as the Undertakings for Collective Investment in Transferable Securities Directive, or simply UCITS (the “**UCITS Directive**”).

Directive (EU) 2024/927 entered into force on April 15, 2024, and Member States have two years—until April 16, 2026—to transpose and apply it, except for the provisions on information reporting, for which they are given three years (i.e., until April 16, 2027). The transposition and application of Directive (EU) 2024/927 will require the amendment of the Asset Management Regime (the “**RGA**”), which entered into force on May 28, 2023.

The main amendments that Directive (EU) 2024/927 introduces to the AIFM Directive and the UCITS Directive are as follows:

- 1) Clarification of the rules on the delegation or outsourcing of services by the managers of alternative investment funds (“**AIFs**” or, according to the wording of the RGA, “alternative investment undertakings,” or simply AIUs) and the managers of undertakings for collective investment in transferrable securities (“**UCITS**”), as well as the strengthening of the duty to inform competent authorities about delegation or outsourcing.
- 2) Revision of the requirements for authorizing the marketing, within the European Union (“**EU**”), of units of AIFs established in third countries.
- 3) Revision and strengthening of management companies’ reporting duties to the competent authorities.
- 4) Streamlining of crossborder access to depositary services.
- 5) Clarification of the rules applicable to management companies of loan-originating AIFs.
- 6) Harmonized approach to the use of liquidity management instruments throughout the EU.
- 7) Increase in authorized services for AIF management companies.

In this newsletter, we will first highlight the main amendments that Directive (EU) 2024/927 has introduced and anticipate their impact on the activities of AIF and UCITS management companies, as well as on the AIFs and UCITS themselves, following their transposition and application in Portuguese law.



## CUATRECASAS

### 1) Clarification of the rules on the delegation or outsourcing of services by the managers of AIFs and UCITS, as well as the strengthening of the duty to inform competent authorities about delegation or outsourcing.

Regarding the delegation or outsourcing of services to third parties, Directive (EU) 2024/927 makes three important clarifications for each management company and the AIF it manages:

- (a) **AIFM Directive:** The **delegation rules** provided for in the AIFM Directive will now **apply to all the functions listed in annex 1** of the AIFM Directive and the list of ancillary services provided for in **Article 6.4** of the AIFM Directive.
- (b) **AIFM Directive/UCITS Directive:** As AIFs and UCITS are not always marketed directly by the respective management company but by one or more distributors, either on behalf of the management company or in its own name, Directive (EU) 2024/927 clarifies that **whenever marketing is carried out by a distributor in its own name, it is not to be considered a delegation or outsourcing of services. Therefore, the delegation rules established in the AIFM Directive or the UCITS Directive—as applicable—will not apply.**
- (c) **AIFM Directive/UCITS Directive:** The **reporting duties** of management companies to the competent authorities—the Portuguese Securities Market Commission (the “**CMVM**”) and the Bank of Portugal—regarding delegation and outsourcing are **intensified.**

### 2) Revision of the requirements for authorizing the marketing, within the EU, of units of AIFs established in third countries.

Directive (EU) 2024/927 introduces three main amendments to the AIFM Directive:

- (a) The marketing of units of AIFs established in third countries is subject to the condition that, under the terms and for the purposes of the AIFM Directive, among others, the third country where the AIF is established is not included in the Financial Action Task Force’s (“**FATF**”) Non-Cooperative Countries and Territories list. As the FATF created the list, its assessment applies. However, Directive (EU) 2024/927 determines that the list of countries that should now be considered for the purposes of obtaining authorization to market units of AIFs established in third countries in the EU should be defined by the Commission through a delegated act under Article 9.2 of Directive (EU) 2015/849. Currently, this list is contained in the current version of Commission Delegated Regulation (EU) 2016/1675 of July 14, 2016.

Transposing this amendment into Portuguese law should mean revising articles 157, 158, 160, 161 and 162 of the RGA.



- (b) As an additional requirement for authorizing the marketing of units of AIFs established in third countries, Directive (EU) 2024/927 also provides that the third country where the AIF is established must not be included in annex 1 of the Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. Transposing this additional requirement into Portuguese law should also result in revising the RGA articles mentioned above.
- (c) Lastly, the amendments referred to in points (a) and (b) will also apply to depositaries established in third countries. Therefore, transposing these amendments into Portuguese law will also mean revising article 159 of the RGA.

### 3) **Revision and strengthening of management companies' reporting duties to the competent authorities.**

Directive (EU) 2024/927 introduces **significant amendments** to the AIFM Directive and the UCITS Directive **regarding management companies' reporting duties to the competent authorities** (the CMVM and the Bank of Portugal), including the following:

- (a) Regarding **delegation and outsourcing**, management companies are now required to report to the competent authorities of the Member State of origin any information concerning delegation agreements relating to portfolio management or risk management functions. In addition to this information, they will also be required to provide a list of all Member States where units or shares of the AIF are actually marketed by the management company or by a distributor acting in its name.
- (b) AIF management companies are now required to disclose to investors, periodically, the composition of the portfolio of loans granted and, annually, all direct or indirect fees, charges, and expenses payable by investors. They are also required—again on an annual basis—to disclose information about any parent company, subsidiary, or special-purpose entity used in connection with the AIF's investments, either by the management company or in its name.
- (c) UCITS management companies are required to submit periodically to the competent authorities of the Member State of origin **reports** on the markets and instruments in which they trade in the name of the UCITS they manage. Also, for each of the UCITS they manage, management companies must provide information on the instruments in which they trade, the markets of which they are members or in which they actively trade, and the exposures and assets of the UCITS. This information must include the identifiers necessary to connect the data supplied about assets, UCITS, and management companies with other sources of supervisory or public access data. Management companies must also report, for each UCITS managed, the liquidity management mechanisms, the current risk profile, the total amount of leverage used by the UCITS, and the results of stress tests carried out.



## 4) Streamlining of crossborder access to depositary services

- (a) In the context of the **AIFM Directive**, Directive (EU) 2024/927 expressly allows Member States to empower their respective competent authorities to **authorize the appointment of a depositary established in a Member State** other than the one where the AIF has its headquarters or branch, provided certain conditions are met and prior approval of the competent authority of the AIF is obtained. Whenever the appointment of a depositary established in another Member State is authorized, the competent authority must report this fact to the European Securities and Markets Authority (“**ESMA**”). However, this amendment must not be understood as the introduction of a full “depositary passport,” as the appointment of the depositary is contingent on (i) compliance with all the conditions provided for in the AIFM Directive, (ii) prior authorization of the competent authority of the AIF, and (iii) communication to ESMA.
- (b) Regarding the **AIFM and UCITS Directives**, Directive (EU) 2024/927:
  - (i) extends the depositary regime to include central securities depositories (“**CSD**”) in the custody chain when they provide custody services to the AIFs and UCITS; and
  - (ii) allows the services provided by a CSD that participates in the securities clearance system operated by another CSD, or that uses a third party or intermediary that participates in the securities clearance system operated by another CSD in relation to a securities issue (the investing CSD), to be considered an **outsourcing/delegation of the depositary’s custody**.

Directive (EU) 2024/927 also clarifies that outsourcing by a depositary to a CSD does not constitute outsourcing of custody when the CSD provides initial securities registration in a centralized registration system or the structuring and administration of a centralized securities system (the issuing CSD).

## 5) Clarification of the rules applicable to management companies of loan-originating AIFs

Directive (EU) 2024/927 introduces the following into the AIFM Directive:

- (a) The definitions of “loan origination” and “loan-originating AIFs,” clarifying that the AIF may grant a loan (i) directly, as the initial lender; or (ii) indirectly, through a third party or a special-purpose vehicle (SPV), which will give rise to a loan on behalf or in the name of the AIF. Also, the **notion of “loan origination”** is extended to include all cases where the AIF management company or the AIF itself participates in structuring the loan or in defining or approving its characteristics before being exposed to it.



## CUATRECASAS

- (b) **Leverage limits** of (i) 175% for open-ended loan-originating AIFs, and (ii) 300% for closed-ended loan-originating AIFs. European lawmakers also reserve the option to establish stricter leverage limits for national lawmakers “where necessary to ensure the stability and integrity of the financial system.”
  - (c) Prohibition of an AIF granting loans to the depositaries or any entities to which the depositary has subcontracted functions relating to that AIF.
  - (d) **Obligation to withhold, on an ongoing basis, 5% of the notional value of the loans** granted by the loan-originating AIF and subsequently transferred to third parties. This rule aims to prevent loan-originating AIFs from granting loans solely for the purpose of transferring those loans or risk exposures in full to third parties.
  - (e) **Limitation of loans granted** by loan-originating AIFs to a single borrower that is a financial institution, another loan-originating AIF, or a UCITS, **up to 20% of the loan-originating AIF’s total capital.**
- 6) **Harmonized approach to the use of liquidity management instruments throughout the EU**
- (a) **AIFM Directive/UCITS Directive:** Management companies are **required to choose at least two of the liquidity management instruments** provided for in (i) annex V, points 2-8 of the AIFM Directive (for open-ended AIFs); or (ii) annex II-A, points 2-8 of the UCITS Directive (for UCITS).
  - (b) As an **exception** to the above rule, Directive (EU) 2024/927 allows the management company to choose only one liquidity management instrument for AIFs and UCITS that are money market funds.
- 7) **Increase in authorized services for AIF management companies.**

Directive (EU) 2024/927 has increased the range of ancillary services set out in the AIFM Directive that can be provided by AIF management companies, allowing Member States to authorize an AIF management company to provide, as an ancillary service, benchmark administration and credit servicing.

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## Legislation: Banking and finance Law

### EU law

**Commission Delegated Regulation (EU) 2024/896 of March 13, 2024 – OJEU L of March 19, 2024** Amending Regulation (EU) 260/2012 of the European Parliament and of the Council of March 14, Regulation (EU) 2021/1230, Directive 98/26/EC of the European Parliament and of the Council of May 19, and Directive (EU) 2015/2366 of the European Parliament and of the Council of November 25, 2015, on direct debit transfers in euros.



## Bank of Portugal notices

### **Notice 2/2024 of March 15, 2024 - Official Gazette of the Republic of Portugal 54/2024, Series II, Part E of March 15, 2024**

Revoking and substituting Bank of Portugal Notice 3/2015 of November 2 in light of regulatory developments in recent years and the experience gained in developing, implementing and assessing recovery plans.

### **Notice 1/2024 of February 6, 2024 - Official Gazette of the Republic of Portugal 26/2024, Series II, Part E of February 6, 2024**

Regulating the application of limits on electronic payment transactions, where the Tax and Customs Authority and the Treasury and Debt Management Agency (*Autoridade Tributária e Aduaneira* and *Agência de Gestão da Tesouraria e da Dívida Pública - IGCP, E. P. E*) are the beneficiaries, by payment service providers established in Portugal.

## Bank of Portugal instructions

### **Instruction 4/2024 of March 15, 2024**

Amending Instruction 27/2012, which regulates the reporting of statistics to the Bank of Portugal.

### **Instruction 3/2024 of March 6, 2024**

Releasing, for the 2nd quarter of 2024, the maximum fees to be charged for consumer loan agreements under Decree-Law 133/2009 of June 2.

### **Instruction 2/2024 of February 8, 2024**

Amending Instruction 8/2018, which regulates the interbank clearance system (SICOI).

### **Instruction 1/2024 of February 1, 2024**

Amending Instruction 8/2018, which regulates the interbank clearance system (SICOI).

## Bank of Portugal circulars

### **Circular Letter CC/2024/00000004 of February 15, 2024**

Releasing, in accordance with point 9 of Instruction 18/2015 of January 15, the reporting models for financing and capital plans, the description of the macroeconomic and financial scenario, and other necessary reporting guidelines for institutions.

### **Circular Letter CC/2024/00000006 of February 1, 2024**

Announcing the termination of the effects of the Bank of Portugal regulations on covered bonds and public sector bonds.

## European Banking Authority (“EBA”) acts

### **EBA guidelines of March 5, 2024**

On national lists or registers of credit servicers under Directive (EU) 2021/2167 of the European Parliament and of the Council of November 24, 2021.



## **EBA report of February 12, 2024**

Peer review follow-up report (EBA/REP/2021/24) on prudential assessment of the acquisition of qualifying holdings in credit institutions.

## **EBA, EIOPA and ESMA joint report of February 1, 2024**

Joint report of the European supervisory authorities on the 2023 stocktaking of BigTech direct financial services provision in the EU.

## **EBA report of January 16, 2024**

On specific aspects of the net stable funding ratio (NSFR) framework under Articles 510.4, 510.6 and 510.9 of Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013.

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## **Legislation: Insurance and pension funds law**

### **EU law**

#### **Commission Delegated Regulation (EU) 2024/896 of March 20, 2024 – OJEU L of March 20, 2024**

Amending Directive (EU) 2016/97 of the European Parliament and of the Council on insurance distribution regarding the regulatory technical standards adapting the base amounts in euro for professional indemnity insurance and for financial capacity of insurance, reinsurance and ancillary insurance intermediaries.

#### **Commission Implementing Regulation (EU) 2024/456 of February 7, 2024 – OJEU L of February 8, 2024**

Laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from December 31, 2023, until March 30, 2024, in accordance with Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance.

### **Insurance and Pension Funds Supervisory Authority (“ASF”) regulatory standards**

**Regulatory Standard 2/2024-R of February 6** Establishing the quarterly capital update indices for the “Fire and natural elements” category starting or maturing in the second quarter of 2024. The standard is pending publication in the Official Gazette of the Republic of Portugal.

### **ASF circulars**

#### **Circular 6/2024 of March 5, 2024**

Providing recommendations on specific insurance risk mitigation techniques in calculating the solvency capital requirement.

#### **Circular 5/2024 of January 23, 2024**

Communicating the amendments to the file and reporting instructions (*modelos\_estabilidade\_financeira* and *instruções\_modelos\_estabilidade\_financeira*) resulting from the update of additional information requirements for financial stability purposes, as well as the need to make adjustments to the files and the respective reporting instructions.





### **Circular 4/2024 of January 16, 2024**

Communicating the amendments to the file and reporting instructions (*NotasES, ATecnica Nao Vida, ATecnica Vida Contratos de Seguro, ATecnica Planos de Pensoes, AComportamental\_Sucursais, RelatorioGestaoReclamacoes* and *Indicadores Comportamentais Seguros*).

### **Circular 3/2024 of January 18, 2024**

Communicating the amendments to the file and reporting instructions (*Modelos\_BCE* and *Instruções\_Modelos\_BCE*). These amendments resulted from updating the additional information requirements to comply with those provided for in Regulation (EU) 1374/2014 of the European Central Bank of November 28.

### **Circular 2/2024 of January 4, 2024**

Communicating the amendments to the ad-hoc cyber risks component of the RiskOutlook survey, which assesses the risks of the insurance and pension funds sectors.

These amendments were mainly aimed at reflecting the inputs gathered and the experience gained in the first edition of the ad-hoc cyber risks component of the RiskOutlook survey.

### **Circular 1/2024 of January 4, 2024**

Providing instructions on the information to be provided in case of changes to insurance premiums. On March 29, 2023, the ASF recommended a set of best practices applicable to payment notices and other aspects related to possible contractual changes to ensure the protection of policyholders, insured persons, beneficiaries, and injured third parties. Based on the information that the ASF received regarding the implementation of these measures, it decided to recommend a phased approach to the necessary actions by insurers, defining the procedures that should be considered a priority.

### **European Insurance and Occupational Pensions Authority (“EIOPA”)**

EIOPA report on the application of the Insurance Distribution Directive of January 15, 2024.

Among other topics, the report examines the changes in the structure of the insurance intermediaries market, as well as cross border activity patterns, and investigates the directive’s impact on small- and medium-sized enterprises operating as insurance intermediaries. The report also includes a detailed analysis of the structure of the insurance intermediaries market in each country.



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## Legislation: Securities and capital markets law

### EU law

#### **Proposal for a directive of the European Parliament and of the Council**

Amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds.

#### **Directive (EU) 2024/927 of the European Parliament and of the Council of March 13, 2024 - OJEU Series L of March 26, 2024**

Amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds.

#### **Directive (EU) 2024/790 of the European Parliament and of the Council of February 28, 2024 - OJEU Series L of March 8, 2024**

Amending Directive 2014/65/EU on markets in financial instruments to improve transparency on markets in financial instruments and the international competitiveness of the Union's capital markets.

#### **Commission Delegated Regulation (EU) 2024/912 of December 15, 2023 - OJEU Series L of March 25, 2024**

Supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of managers of alternative investment funds (AIFMs).

#### **Council Delegated Regulation (EU) 2024/911 of December 15, 2023 - OJEU Series L of March 25, 2024**

Supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to regulatory technical standards specifying information to be notified in relation to the cross-border activities of management companies and undertakings for collective investment in transferable securities (UCITS).

#### **Council Delegated Regulation (EU) 2024/450 of October 26, 2023 - OJEU Series L of February 7, 2024**

Supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum elements to be included in a business reorganization plan and the criteria to be fulfilled for its approval by the resolution authority.

#### **Council Delegated Regulation (EU) 2024/358 of September 29, 2023 - OJEU Series L of January 22, 2024**

Supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying requirements on credit scoring of crowdfunding projects, pricing of crowdfunding offers, and risk management policies and procedures.



## Portuguese law

### **Council of Ministers Resolution 1-A/2024**

Authorizing the Treasury and Debt Management Agency to issue public debt in accordance with the limits established in the State Budget Law for 2024.

### **Rectification Declaration 176/2024/2**

Rectifying CMVM Regulation 7/2023, published in the Official Gazette of the Republic of Portugal, 2nd series, no. 250, 2nd supplement, of December 29, 2023, which regulates the RGA.

## CMVM circulars

### **Circular 005/2024 of February 20, 2024**

Annual 2024 issuer circular on issuer-related initiatives for 2024.

### **Circular 004/2024 of February 20, 2024**

Annual 2024 financial intermediation circular on financial intermediation-related initiatives for 2024.

### **Circular 003/2024 of February 20, 2024**

Annual 2024 asset management circular on asset management-related initiatives for 2024.

### **Circular 002/2024 of February 19, 2024**

Communicating the Corporate Sustainability Reporting Directive (CSRD) obligations for auditors. These circular aims to inform statutory auditors and statutory auditing firms about the obligations they may face by providing sustainability report reliability guarantee services.

### **Circular 001/2024 of February 7, 2024**

Providing recommendations to be considered by management companies, depositaries, and auditors in the process of valuing subsidiaries that are included in the portfolios of venture capital AIFs.

## ESMA

### **Public statement of March 27, 2024, on the clearing obligation for third-country pension scheme arrangements**

Issuing a public statement on the de-prioritization of supervisory actions related to the clearing obligation for third-country pension scheme arrangements (TC PSA) until the European Market Infrastructure Regulation (“EMIR”) review has been concluded.

### **Guidelines on the Markets in Financial Instruments Regulation (“MiFIR”) guidelines of March 27, 2024**

Practical guidelines to support the transition and consistent application of the reviewed MiFIR.

### **Consultation of March 26, 2024, on regulatory techniques**

Launching a consultation on the draft regulatory technical standards related to the registration and supervision of external valuers under the EU Green Bonds Regulation.

### **Final report of March 25, 2024, on the Markets in Crypto-Assets Regulation (“MiCA”)**

Publishing its first final report on MiCA.



## **Consultation of March 25, 2024, on MiCA**

Publishing its third consultation package under MiCA.

## **Public statement on reporting requirements under RTS28 of February 13, 2024**

Issuing a public statement clarifying market participants about their reporting duties under RTS28 until the full application of the new MiFID II rules.

## **Publication on the requirements established by the Market Abuse Regulation (“MAR”) of February 6, 2024**

Raising awareness—with competent national authorities—about the requirements established by the MAR that apply when posting investment recommendations on social media. They are also warning about the risks of market manipulation in these posts.

## **New Q&As of February 2, 2024**

Publishing a new set of questions and answers on the regulation on credit reporting agencies, the EMIR, MiCA, and MiFIR.

## **Publication of data for bond liquidity assessment (quarterly) and systematic internalizer calculations of February 1, 2024**

Publishing the latest data for (i) bond liquidity data (quarterly); (ii) systematic internalizer (SI) calculations for various instruments, including equity, equity-like instruments, bonds, and other non-equity instruments; and (iii) the consolidated tape provider (CTP) under MiFID II and MiFIR.

## **Report of January 30, 2024, on the alternative investment fund market in the EU**

Publishing a report on the AIF market in the EU, along with an article on the risks associated with leveraged AIFs in the EU.

## **Final drafts on the first set of rules under the Digital Operational Resilience Act (“DORA”) for information and communication technologies (“ICT”) and third-party risk management and for incident reporting of January 17, 2024**

The three European supervisory authorities (EBA, EIOPA and ESMA) published the first set of the final drafts of technical standards under the DORA. These standards aim to bolster the operational resilience of the EU’s financial sector by strengthening the ICT frameworks for risk management and incident reporting and third-party financial entities.

## **Analysis of the exposure to real estate risk in EU securities markets and investment funds of January 10**

Publishing its initial analysis of the exposure of the EU’s securities and markets sector and asset management to the real estate sector.

## **Consultation on draft implementing technical standards on the functions of the collection bodies and the functionalities of the European Single Access Point of January 8, 2024**

The three European supervisory authorities (EBA, EIOPA and ESMA) published a consultation paper on draft implementing technical standards (“ITS”) for the functions of the collection bodies and functionalities of the European Single Access Point (“ESAP”). These ITS and the requirements they establish aim to enable future users to make effective use of the comprehensive financial and sustainability information centralized in the ESAP.



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## Selected Caselaw

### EU caselaw

**Judgment of the Court of Justice of the European Union (“CJEU”) March 14, 2024 (Case C-536/22)**  
Ruling on three preliminary issues.

Regarding the first issue, the CJEU clarified that Article 25—on early repayment of credit agreements—of Directive 2014/17/EU of the European Parliament and of the Council of February 4, 2014, on credit agreements for consumers relating to residential immovable property (“**Directive 2014/17/EU**”) must be applied when a consumer terminates their mortgage credit agreement in accordance with national law and meets their obligations in advance.

Concerning the second issue, the CJEU concluded that the first subparagraph of Article 25.3 of Directive 2014/17/EU should not be interpreted as conflicting with national laws that compensate lenders for early mortgage loan repayment. This compensation can account for the lender’s lost profits caused by the early repayment, particularly the contractual interest they would have received over the remaining loan term. However, the CJEU emphasized that (i) the compensation must be fair and objective, without exceeding the financial loss suffered; and (ii) no penalty can be imposed on the consumer for the early repayment.

Lastly, the CJEU further clarified that, under Article 25.3 of Directive 2014/17/EU, Member States must ensure that lenders’ calculations of lost profits considering the fixed income from the amount repaid in advance must lead to fair and objective compensation that does not exceed the lender’s financial loss and avoids penalizing the consumer.

**Judgment of the General Court (Third Section) of February 28, 2024 (ECLI:EU:T:2024:127)**  
Ruling on the specific attributes of the European Central Bank (“**ECB**”) regarding its competence for prudential supervision of credit institutions and investment firms—namely, for imposing penalties and administrative measures.

The case concerned an Austrian credit institution that faced an administrative penalty of €630,000 from the ECB under Article 18.1 of Council Regulation (EU) 1024/2013 for an infringement of Article 395.1 of Regulation (EU) 575/2013 of the European Parliament and of the Council for exceeding the major risk limits established by that provision on an individual and consolidated basis.

In this appeal, the General Court stated that it may be noted that the pecuniary administrative penalties imposed under Article 18.1 of Council Regulation (EU) 1024/2013 are limited to fines that the European Commission may impose under Article 23.2 of Council Regulation (EC) 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union and are of an equivalent nature and level of severity. Those penalties have the same dissuasive purpose, as expressly stated in Article 18.3 of Council Regulation (EU) 1024/2013, under which the “penalties applied shall be effective,



proportionate and dissuasive,” and the same inflexibility as regards the amount, which may be set at up to 10% of the total annual turnover of the credit institution in question.

While it is true that, because of this difference in nature, the competent authority’s obligation to consider all the circumstances cannot necessarily have the same intensity when an administrative measure is involved, such as the imposition of recovery interest or an administrative penalty or, *a fortiori*, a pecuniary administrative penalty, it is no less true that the scope of Article 70 of Directive 2013/36/EU of the European Parliament and of the Council is not limited to administrative penalties, but also includes administrative measures.

In the case at hand, the General Court concluded that the ECB adopted the decision because it considered that the imposition of recovery interest was automatic and did not comply with the principle of proportionality based on an analysis of all circumstances.

### Portuguese caselaw

#### **Judgment of the Supreme Court of Justice of February 29, 2024 (Case 11789/21.3T8PRT.P1.S1)**

Ruling on a group insurance policy. In the case in question, the policyholder failed to communicate a clause that limited coverage of the insured risk, despite being obligated to do so for the clause to be excluded from the insurance contract.

The court cited Article 91 of the CJEU Rules of Procedure, which states that CJEU judgments are binding from the day they are delivered in the Member States and apply retroactively from the moment the interpreted rule enters into force, including those given in response to a reference for a preliminary ruling.

The CJEU stated that the “finding could not be called into question by national legislation, such as that to which the referring court makes reference, pursuant to which a policyholder who fails to comply with the obligation, incumbent on the policyholder by virtue of that legislation, to notify the consumer of the contractual terms, may have to pay compensation in respect of the damage suffered as a result of that lack of notification without, however, restoring the legal and factual situation that the consumer would have been in if he or she had benefited from that cover. That legislation, which concerns the consequences, in respect of civil liability, of that failure to notify, could not affect the unenforceability of a contractual term classified as unfair with regard to the consumer, pursuant to Directive 93/13.”

Based on the CJEU’s decision in Case C-263/22 on April 20, 2023, the non-communication of a clause that limits the coverage of the insured risk by a policyholder of a group insurance policy, who was obligated to communicate the clause, can be used against the insurer to exclude the clause from the insurance contract.

The plea of breach of contract (article 428 of the Civil Code) applies to synallagmatic obligations and considers the principles of good faith and abuse of rights (articles 762.2 and 334 of the Civil Code). This plea is admitted in the context of co-linked contracts, which are interpreted as a “unitary concept.”



## CUATRECASAS

Article 145-O.6 of the General Regime for Credit Institutions and Financial Companies (RGICSF), which was approved by Decree-Law 298/92 of December 31 and amended by Decree-Law 31-A/2012, provides a safeguard for complex synallagmatic relationships such as co-linked contracts.

Following the Bank of Portugal's resolution action against *Banco Espírito Santo S.A.* ("**BES**"), a new bank called Novo Banco was created. BES's entire business was transferred to this new bank, including its assets and liabilities, off-balance sheet items, and assets under management. However, this measure did not exclude from the transfer to Novo Banco the protection duties that were originally the responsibility of BES and were part of a complex obligations relationship.

As a bridge bank, Novo Banco must be considered a successor to the rights and obligations of the original credit institution (BES), unless these were specifically excluded from the transfer by the Bank of Portugal's decision. This means that the contractual position was transferred to Novo Banco, and under article 431 of the Civil Code, the plea can be raised against anyone who takes the place of either party under the contract regarding their rights and obligations.

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