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# Legal Update - 3rd Quarter 2022

Banking, Finance and Capital Markets Newsletter

October 14, 2022



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## New European Securities and Markets Authority (ESMA) Guidelines on suitability requirements under MiFID II

On September 23, 2022, the European Securities and Markets Authority (“ESMA”) published a [final report](#) containing new guidelines (ESMA35-43-3172) on the suitability requirements imposed by Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014 (“MiFID II”), which was transposed into the Portuguese Securities Code.

The assessment of suitability applies to the provision of any type of investment advice (whether independent or not) and to portfolio management.

These guidelines, which will revoke the previous guidelines on the same subject, aim to ensure a harmonized and consistent application of the suitability requirements, including on sustainability, particularly following the amendments made in the Commission Delegated Regulation (EU) 2017/565 of April 25, 2016 (“MiFID II Delegated Regulation”) regarding the sustainability preferences of investors.

In this context, the guidelines detail how investment firms, credit institutions and alternative investment fund management companies should implement the sustainability preference requirements to be incorporated into the suitability assessment they carry out when making investment recommendations or investment decisions regarding the client’s portfolio.

ESMA emphasizes that the guidelines are mainly addressed to cases where the services are addressed to non-professional clients. Accordingly, as far as professional clients are concerned, they should only apply where relevant.

The guidelines contain clarifications on the MiFID II Delegated Regulation, with an emphasis on the following matters:

- (i) Information to be provided to clients about sustainability preferences
- (ii) Collecting information from clients about sustainability preferences
- (iii) Assessment of sustainability preferences
- (iv) Organizational requirements

As to the information to be provided to clients regarding sustainability preferences, companies will have to help their clients understand the concept of sustainability preferences by clearly explaining the difference between products with and without sustainability characteristics and avoiding technical language. Companies should also inform their clients, in a clear and simple way, about the suitability assessment and its main objective, which is to enable the company to act in the best interest of the client.



Regarding collecting information from clients, firms will have to collect information about the preferences of clients for different types of sustainable investment products and understand the extent to which they will want to invest in these products.

The guidelines establish that the collection of information should be sufficiently granular to enable the client sustainability preferences to match the sustainability-related characteristics of the financial instruments in question. Therefore, firms must establish, implement and maintain appropriate policies, procedures and instruments to enable them to understand the key facts and characteristics of their clients, which is particularly important for know your client (KYC) and know your product (KYP) purposes.

As regards the assessment of sustainability preferences, after the firm has identified a range of suitable products for the client according to the criteria of knowledge, experience, financial situation and other investment objectives, it must identify the products that meet the client's sustainability preferences.

When a firm cannot meet a client's sustainability preferences, unless the client adapts its sustainability preferences, the firm may not recommend a financial instrument.

Also, if a client has no sustainability preferences (or does not indicate them), the firm may consider the client sustainability-neutral and recommend a financial instrument with or without sustainability-related features.

Regarding organizational requirements, firms will have to provide adequate training to their employees on sustainability topics and keep appropriate records of clients' sustainability preferences (if any) and any changes to them.

Firms' employees must also understand the role they play in the suitability assessment process and have the necessary skills, knowledge and expertise—including sufficient knowledge of the applicable regulatory requirements and procedures—to comply with their responsibilities.

The guidelines apply six months after their date of publication on the ESMA's website in all the official languages of the European Union (the "EU"), which should occur by March 2023.



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## Legislation: Banking and finance law

### Portuguese law

#### **Decree-Law 43/2022 – DR 126/2022, Series I of July 1, 2022**

Amending the operation rules of Banco Português de Fomento, S. A.

### EU law

#### **Commission Regulation (EU) 2022/1491 of September 8, 2022 – OJEU L -234, of September 9, 2022**

Amending Regulation (EC) 1126/2008 with respect to International Financial Reporting Standard 17.

#### **Council Implementing Regulation (EU) 2022/1230 of July 18, 2022 – OJEU L – 190 of July 19, 2022**

Implementing Article 2.3 of Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism by repealing Implementing Regulation (EU) 2022/147, which implemented Article 2.3 of Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

### European Central Bank (“ECB”) decisions and guidelines

#### **Decision (EU) 2022/1521 of the ECB of September 12, 2022 – OJEU L-11 of September 13, 2022**

On temporary adjustments to the remuneration of certain non-monetary policy deposits held with national central banks and the ECB.

#### **Guideline (EU) 2022/1378 of the ECB of July 28, 2022 – OJEU L-163 of August 8, 2022**

Amending Guideline 2008/596/EC on the management of the foreign reserve assets of the ECB by the national central banks and the legal documentation for operations involving such assets.

### Bank of Portugal instructions

#### **Instruction 15/2022 – Official Bulletin 9/2022, Supplement of September 28, 2022**

Amending Instruction 7/2021 insofar as it concerns the accompanying elements for requests for authorization as members of management and supervisory bodies, holders of key control functions, and managers of branches established in countries that are not EU Member States, particularly the questionnaire requested for this purpose, which is available on the IMAS Portal.

#### **Instruction 14/2022 – Official Bulletin 8/2022, Supplement of September 1, 2022**

Publishing, for the first quarter of 2022, the maximum rates to be applied in consumer credit agreements under Decree-Law 133/2009 of June 2.

#### **Instruction 13/2022 – Official Bulletin 7/2022, 2nd Supplement of August 5, 2022**

Regulating the reporting of statistical information to the Bank of Portugal for compiling securities statistics on securities portfolios, and, effective from January 31, 2023, revoking Bank of Portugal Instruction 31/2005.



## **Bank of Portugal circulars**

### **Circular CC/2022/00000013 – Official Bulletin 7/2022, Supplement of July 28, 2022**

Announcing, after the release of the Financial Action Task Force (“**FATF**”) statements (June 2022 plenary meeting), the adoption of countermeasures commensurate with the very high risk of money laundering and terrorist financing in respect of the Democratic People’s Republic of Korea (North Korea) and the Islamic Republic of Iran, and highlighting the publication of the “**FATF** Statement on the Russian Federation” on June 17, 2022.

## **Bank of Portugal public consultations**

### **Bank of Portugal public consultation 6/2022 of September 2, 2022**

The Bank of Portugal launched a public consultation until October 17, 2022, on its draft instruction for the communication of information to consumers regarding the signing of credit agreements.

### **Bank of Portugal public consultation 5/2022 of August 9, 2022**

The Bank of Portugal launched a public consultation until September 21, 2022, on its draft instruction defining the regulatory framework applicable to payment institutions and electronic money institutions, revoking Instruction 27/2009 and Instruction 14/2014.

## **Bank of Portugal press releases**

### **Bank of Portugal press release of August 1, 2022**

On the supervision of credit intermediaries, which resulted in the authorization of 91 credit intermediaries being revoked.

## **European Banking Authority (“EBA”) acts**

### **EBA report of September 30, 2022**

Mandatory Basel III report on the impact its full implementation will have on EU banks in 2028.

### **EBA Guidelines of September 27, 2022**

On transferability to support the resolvability assessment for transfer strategies.

### **EBA Report of September 20, 2022**

Specifying minimum performance-related triggers for simple, transparent, and standardized (STS) on-balance-sheet securitizations that feature non-sequential amortization.

### **EBA Report of September 15, 2022**

Annual Funding Plans Report highlighting strong deposit growth and an increase in public sector sources of funding in 2021.

### **Joint Report of the European Supervisory Authorities (“ESAs”) of September 12, 2022**

Joint Risk Report, in which the ESAs highlight the deteriorating economic outlook, high inflation and rising energy prices and advise national supervisors and financial institutions to prepare for the challenges ahead.



## **Joint Report of the ESAs of September 12, 2022**

On the risks and vulnerabilities in the EU financial system.

## **EBA Report of September 1, 2022**

On the functioning of anti-money laundering and counter-terrorist financing colleges in 2021.

## **EBA Guidelines of July 29, 2022**

On the criteria for the exemption of investment firms from liquidity requirements under Article 43.4 of Regulation (EU) 2019/2033 of the European Parliament and of the Council of November 27, 2019.

## **Joint report of the ESAs of July 28, 2022**

On the extent of voluntary disclosure of sustainability-related information in the financial sector under Regulation (EU) 2019/2088 of the European Parliament and of the Council of November 27, 2019.

## **Joint report of the ESAs of July 28, 2022**

Annual report of the ESAs on the extent of disclosure of voluntary information under Article 18 of 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.

## **EBA Guidelines of July 22, 2022**

On the use of certain exemptions included in the large exposure regime, analyzing banks' use of the various exemptions from different perspectives and quantifying the impact of a potential elimination of individual exemptions.

## **ESMA and EBA joint guidelines of July 21, 2022**

On the common procedures and methodologies for the supervisory review and evaluation process of the business model, governance and control arrangements, risk and capital adequacy, and liquidity and suitability of investment firms, aimed at harmonizing these practices.

## **EBA Report of July 21, 2022**

On large exposure exemptions under Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013, and Regulation (EU) 876/2019 of the European Parliament and of the Council of May 20, 2019.

## **EBA Report of July 21, 2022**

On benchmark remuneration trends at the European Union level and data on staff who earn €1 million or more per financial year (high earners).

## **Joint EBA and ESMA report of July 21, 2022**

Final report on the guidelines on procedures and methodologies regarding the prudential supervision and the evaluation process under Directive (EU) 2019/2034 of the European Parliament and of the Council of November 27, 2019.



## **Joint EBA and ESMA report of July 2, 2022**

Final report on the guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013, and Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014.

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

### **EU law**

#### **Commission Delegated Regulation (EU) 2021/1288 of April 6, 2022 – OJEU L-196, of July 25, 2022**

Supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of “do no significant harm”, specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in pre-contractual documents, on websites and in periodic reports.

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

##### **Regulatory Standard 8/2022-R – DR 181/2022, Series II, Part E, of September 19, 2021**

Establishing the quarterly capital updating indexes for fire and natural risk policies beginning or falling due in the fourth quarter of 2022.

### **ASF circulars**

#### **Circular 8/2022 of September 14, 2021**

On the accumulation of appointments as responsible actuary.

#### **Circular 7/2022 of July 19, 2021**

On the statements of the FATF following the plenary meeting of this body last June.

### **ASF public consultations**

#### **ASF Public Consultation 10/2022 of September 21, 2022**

Draft regulatory standard approving the chart of accounts for insurance companies.

#### **ASF Public Consultation 9/2022 of July 27, 2022**

Draft regulatory standard establishing the quarterly capital updating indexes for fire and natural risk policies beginning or falling due in the fourth quarter of 2022.

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

#### **On Legal Entity Identifier of December 20, 2021, updated August 9, 2022**

The objective of the revised and updated guidelines is to facilitate and further promote the use of the Legal Entity Identifier (LEI) as the unique identification code for legal entities. By harmonizing the



identification of legal entities and ensuring high-quality, reliable and comparable data, the guidelines will continue to establish consistent, efficient and effective supervisory practices.

### **EIOPA Guidelines on group solvency of February 2, 2015, updated July 18, 2022**

Under Article 73 of the EIOPA regulation relating to language arrangements, EIOPA issued the updated version of its guidelines in all official EU languages (except for Irish, according to Council Regulation (EU) 1257/2010).

### **EIOPA Guidelines on the valuation of technical provisions of July 6, 2022**

According to Article 16 of Regulation (EU) 1094/2010, the EIOPA issued these revised guidelines to explain how insurance and reinsurance companies should apply the requirements of Directive 2009/138/EC3 ("Solvency II Directive") and Commission Delegated Regulation (EU) 2015/354 ("Delegated Regulation") on the best approximate valuation.

### **EIOPA Guidelines on Contractual Limits of July 6, 2022**

According to Article 16 of Regulation (EU) 1094/2010, the EIOPA issued these revised guidelines to explain how insurance and reinsurance companies should apply the requirements of the Solvency II Directive and the Delegated Regulation on insurance and reinsurance contractual limits.

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## **Legislation: Securities and capital markets law**

### **EU law**

#### **Commission Delegated Regulation (EU) 2022/1455 of April 11, 2022 - OJEU L- 229 of September 5, 2022**

Supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirement for investment firms based on fixed overheads.

#### **Corrigendum to Commission Delegated Regulation (EU) 2022/1159 of March 11, 2022 – OJEU L-220 of August 25, 2022**

Amending Commission Delegated Regulation (EU) 2022/1159 of March 11, 2022, supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards for public disclosure of investment policy by investment firms. The purpose of the rectification was to add two tables relating to the voting rights proportion model and voting behavior.

#### **Commission Delegated Regulation (EU) 2022/1299 of March 24, 2022 - OJEU L- 197 of July 27, 2022**

Supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of position management controls by trading venues.





**Commission Delegated Regulation (EU) 2022/1301 of March 31, 2022 - OJEU L - 197 of July 26, 2022**

Amending the regulatory technical standards laid down in Delegated Regulation (EU) 2020/1226 as regards the information to be provided in accordance with the simple, transparent and standardized notification requirements for on-balance-sheet synthetic securitizations.

**Commission Delegated Regulation (EU) 2022/1303 of April 20, 2022 - OJEU L - 197 of July 26, 2022**

Supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives and procedures for applying for exemption from position limits.

**Commission Implementing Regulation (EU) 2022/1300 of March 24, 2022 - OJEU L - 197 of July 26, 2022**

Amending Implementing Regulation (EU) 2017/1093 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators.

**Commission Implementing Regulation (EU) 2022/1220 of July 14, 2022 - OJEU L - 188 of July 15, 2022**

Laying down implementing technical standards for the application of Directive 2014/65/EU of the European Parliament and of the Council with regard to the format in which branches of third-country firms and competent authorities have to report the information referred to in Articles 41.3 and 41.4 of that Directive.

**Commission Implementing Regulation (EU) 2022/1210 of July 13, 2022 - OJEU L - 187 of July 14, 2022**

Laying down implementing technical standards for the application of Regulation (EU) 596/2014 of the European Parliament and of the Council with regard to the format of insider lists and their updates, in light of the need to ensure that competent authorities are provided with the information necessary to fulfill the task of protecting the integrity of the financial markets and investigate possible market abuse.

**Commission Delegated Regulation (EU) 2022/1159 of March 11, 2022 - OJEU L - 179 of July 6, 2022**

Supplementing Regulation (EU) 2019/2033 of the European Parliament and of the Council with regard to regulatory technical standards for public disclosure of investment policy by investment firms.

**Portuguese Securities Market Commission (“CMVM”) regulations**

**Regulation 7/2022 –DR 165/2022, Series II of August 26, 2022**

Relating to the prudential supervision of investment firms and their recovery plans and amending CMVM Regulations 2/2007, 1/2020 and 9/2020, revoking CMVM Regulation 6/2018 and partially revoking CMVM Regulation 1/2011.

**Regulation 6/2022 –DR 155/2022, Series II of August 11, 2022**

Amending CMVM Regulation 3/2018 of August 28, which aims to define the minimum knowledge of employees of financial intermediaries that provide investment advisory services or portfolio management services on behalf of others, or that provide information to investors on financial



products and investment services (whether main or auxiliary), as well as of independent advisors, regulating the required professional qualifications and skills.

## **CMVM circulars**

### **Circular of July 1, 2022**

On the legal regime of covered bonds.

### **Circular of July 1, 2022**

Updating the June 17 Circular on the deadline for the obligation to issue electronic invoices for micro, small and medium-sized companies when they are public procurement co-contractors, extending it to January 1, 2023.

## **ESMA guidelines**

### **ESMA Guidelines of September 23, 2022**

On sustainability requirements under Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014.

## **ESMA reports**

### **Joint Report of the ESAs of September 30, 2022**

On the information to be included in pre-contractual documents, on websites, and in periodic reports on investments in fossil gas and nuclear energy under Regulation (EU) 2019/2088 of the European Parliament and of the Council of November 27, 2019.

### **ESMA Report of September 1, 2022**

On trends, risks and vulnerabilities in the EU financial markets.

### **Joint report of the ESAs of July 28, 2022**

On the extent of voluntary disclosure of sustainability-related information in the financial sector under Regulation (EU) 2019/2088 of the European Parliament and of the Council of November 27, 2019.

### **ESMA Report of July 21, 2022**

Final report on the peer review of the scrutiny and approval procedures of prospectuses by competent authorities under Regulation (EU) 2017/1129 of the European Parliament and of the Council of June 14, 2017.

### **Joint EBA and ESMA report of July 20, 2022**

Final report on the guidelines on procedures and methodologies regarding prudential supervision and the assessment process under Directive (EU) 2019/2034 of the European Parliament and of the Council of November 27, 2019, on the prudential supervision of investment firms.

### **ESMA Report of July 15, 2022**

Final report on the revision to guidelines on the scope of application of Regulation (EC) 1060/2009 of the European Parliament and of the Council of September 16, 2009, on credit rating agencies.

**ESMA Report of July 8, 2022**

On the imposition of administrative measures and penalties for infringements of national provisions adopted under Directive 2011/61/EU of the European Parliament and of the Council of June 8, 2011.

**ESMA Report of July 8, 2022**

On the imposition of measures and penalties for infringements of national legal provisions approved under Directive 2009/65/EC of the European Parliament and of the Council of July 13, 2009.

**ESMA Report of July 8, 2022**

On the imposition of measures and penalties for infringements of national provisions approved under Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014, on markets in financial instruments.

**Joint EBA and ESMA report of July 2, 2022**

Final report on the guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013, and Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014.



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## Selected caselaw

### Portuguese caselaw

#### **Ruling of the Supreme Court of Justice of September 22, 2022 (Case 1736/19.8T8AGD-B.P1.S1)**

The Supreme Court of Justice standardized the caselaw on loan agreements, particularly in relation to the debt prescription period.

Under article 310.e) of the Portuguese Civil Code, capital repayment installments payable with interest have a five-year prescription period. Therefore, the issue was whether, in the case of the early maturity of repayments, the prescription period would apply to each of the capital repayments or to the entire outstanding obligation.

The Supreme Court of Justice ruled that, in cases of early maturity of repayments, specifically under article 781 of the Portuguese Civil Code, the prescription period remains the same and starts running on the early maturity date for all the repayments that have fallen due in this way.

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