
Legal Update – 4th Quarter 2021

Newsletter Banking, Finance and Capital Markets

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Amendment to Portuguese General Framework for Collective Investment Undertakings on pre-marketing, crossborder marketing and financial sustainability

Decree Law 109-F/2021 of December 9 partially transposes Directive (EU) 2019/1160 of the European Parliament and of the Council, of June 20, 2019, and Commission Delegated Directive (EU) 2021/1270, of April 21, 2021. With its publication, the General Framework for Collective Investment Undertakings (“**RGOIC**”), approved as an annex to Portuguese Law 16/2015 of February 24 was amended. The purpose of the amendment is to (i) harmonize the current rules on different matters relating to crossborder collective investment undertaking (“**CIU**”) activities, and (ii) incorporate recent legislative developments at the European Union (“**EU**”) level on disclosing sustainability information in the financial services sector.

> **Pre-marketing system**

A pre-marketing system for CIUs was introduced, establishing the situations that fall under the pre-marketing category, with the RGOIC establishing (i) the forms in which this activity can be exercised, and (ii) the information to be provided to investors. The new system also regulates supervision and cooperation procedures between competent authorities of Member States in the pre-marketing area.

> **Rules on crossborder marketing**

The amendments to the RGOIC further harmonize the infrastructure system and means that managing bodies in other Member States must have to be able to carry out CIU marketing activities in Portugal—particularly regarding carrying out certain functions in the host state—without being physically present in Portugal or having to appoint third parties for this purpose.

> **Rules on discontinuing crossborder marketing**

The RGOIC now contains specific rules on discontinuing crossborder CIU marketing in securities by establishing procedures based on whether the CIU is authorized in Portugal or the other Member State. These procedures aim to give investors greater predictability regarding disinvestments if CIU marketing is discontinued.



➤ **Incorporation and assessment of risks and sustainability factors**

In harmony with the EU's legislative developments in sustainable finance, CIU managing bodies in securities are required to incorporate and assess the risks and sustainability factors of their activity.

Decree Law 109-F/2021 entered into force on December 10, 2021, except for the rules on the incorporation of sustainability risks, which will enter into force on August 1, 2022.

“Right to be forgotten” in access to credit and insurance by persons who have overcome or mitigated situations of aggravated health risk or disability

Portuguese Law 75/2021 of November 18 (“**Law 75/2021**”) aims to strengthen access to credit and insurance by persons who have overcome or mitigated situations of aggravated health risk or disability, prohibiting discriminatory practices and upholding the so-called “right to be forgotten.” It further carries out (i) the first amendment of Law 46/2006 of August 28, 2006, which prohibits and punishes discrimination due to disability and the existence of aggravated health risk; and (ii) the second amendment to the law governing insurance policies, as approved by Decree Law 72/2008 of April 16, as successively amended (the “**RJCS**”).

By establishing the right to be forgotten for obtaining mortgages and consumer loans, and for purchasing mandatory or optional insurance associated with those loans, the lawmakers' intention concerning persons who have overcome or mitigated situations of aggravated health risk or disability is to prevent:

- (i) any increase in insurance premium or exclusion from guarantees under insurance; and
- (ii) any health information concerning the medical situation that led to the aggravated health risk or disability from being collected or subjected to processing by credit institutions or insurers in the pre-contractual context.



Under Law 75/2021, neither credit institutions nor insurers can collect this information in the pre-contractual context if the following periods have elapsed, without interruption:

- (i) Ten years since the completion of the treatment for the aggravated health risk or disability that has been overcome
- (ii) Five years since the completion of treatment if the disease overcome took place before the age of 21
- (iii) Two years of continued and effective treatment for aggravated health risk or disability that has been mitigated

The establishment of a national agreement for access to credit and insurance (the “**National Agreement**”) is also highlighted by amending article 15(a) and 15(b) RJCS, to be executed between the state and sectoral associations representing credit institutions, financial companies, mutual societies, welfare institutions, and insurance and reinsurance companies, and Portuguese organizations representing persons with aggravated health risks, persons with disabilities and users of the health system.

Specifically, the National Agreement established in Law 75/2021 aims to:

- (i) ensure access without discrimination to mortgages and consumer loans for persons covered by Law 75/2021, further ensuring that both credit institutions and financial companies respect the rights, freedoms and guarantees of these persons;
- (ii) define specific data categories and information that may be requested and processing operations of these data and information and corresponding confidentiality guarantees;
- (iii) develop a mediation mechanism between insurers and credit institutions and persons covered by Law 75/2021; and
- (iv) define general guidelines on information required to be published on websites of credit institutions, financial companies, mutual societies, welfare institutions, and insurers.

To summarize, through Law 75/2021, which entered into force on January 1, 2022, Portugal follows the legislative trends of the EU by implementing the “right to be forgotten.”



Legislation: Banking and finance law

Portuguese law

Decree Law 109-H/2021 – Official Gazette of the Republic of Portugal 238/2021, 2nd Supplement, Series I, of December 10, 2021

Approving the system for investment firms and transposing several directives concerning their functioning.

Decree Law 109-G/2021 – Official Gazette of the Republic of Portugal 238/2021, 1st Supplement, Series I, of December 10, 2021

Partially transposing Directive (EU) 2019/2161, aiming to ensure the better application and modernization of EU rules on consumer protection, amending a set of Portuguese laws, particularly the system for general contractual clauses established in Decree Law 446/85 of October 25, as amended.

Decree Law 108/2021 – Official Gazette of the Republic of Portugal 236/2021, Series I, of December 7, 2021

Amending the competition system, the system for individual restrictive trade practices and the system for general contractual clauses.

Law 78/2021 – Official Gazette of the Republic of Portugal 228/2021, Series I, of November 24, 2021

Establishing the system for preventing and combating unauthorized financial activity and consumer protection, establishing a protective regulatory framework for products, goods or financial services offered by persons or entities not authorized to carry out that activity.

EU law

Directive (EU) 2021/2167 of the European Parliament and of the Council, of November 24, 2021 – OJEU L-438, of December 8, 2021

Establishing the common system for credit servicers and credit purchasers in matters of non-performing loans and amending Directive 2008/48/EC, on consumer loans, and Directive 2014/17/EU, on consumer loans for residential properties.

Delegated Commission Regulation (EU) 2021/2153, of August 6, 2021 – OJEU L-436, of December 7, 2021

Supplementing Directive 2019/2034 on regulatory technical standards that specify the criteria for subjecting certain investment firms to the requirements of 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 (the “CRR”).

Delegated Commission Regulation (EU) 2021/2155, of August 13, 2021 – OJEU L-436, of December 7, 2021



Completing Directive 2019/2034 on regulatory technical standards, specifying the classes of instruments that adequately reflect the credit quality of the investment firm as a going concern and possible alternative arrangements that are appropriate for the purposes of variable remuneration.

Commission Implementing Regulation 2021/1971, of September 13, 2021 – OJEU L-412, of November 19, 2021

Amending Commission Implementing Regulation 2016/2070, which implements technical standards for templates, definitions and IT solutions to be used by institutions when reporting to the European Banking Authority (the “EBA”) and to competent authorities under Article 78(2) of Directive 2013/36/EU, on access to the activities of credit institutions and the prudential supervision of credit institutions and investment firms.

Commission Implementing Regulation 2021/2005, of November 16, 2021 – OJEU L-407, of November 17, 2021

Implementing technical standards that amend Commission Implementing Regulation 2016/1799, on mapping tables, specifying the correspondence between the credit risk assessments of external credit assessment institutions and the credit quality steps set out in the CRR.

Commission Implementing Regulation 2021/2006, of November 16, 2021 – OJEU L-407, of November 17, 2021

Implementing technical standards that amend Commission Implementing Regulation 2016/1800, on the allocation of credit assessments of external credit assessment institutions to an objective scale of credit quality steps under Directive 2009/138/EC, on the taking-up and the pursuit of the business of Insurance and Reinsurance (Solvency II).

Commission Implementing Regulation (EU) 2021/1848, of October 21, 2021 – OJEU L-347, of October 22, 2021

Designating a replacement for the benchmark Euro overnight index average.

Bank of Portugal instructions

Instruction 20/2021 – Official Bulletin 12/2021, of December 15, 2021

Amending Bank of Portugal Instruction 1/2019, which regulates the duty to report serious incidents relating to payment services, under Directive (EU) 2015/2366 of the European Parliament and of the Council, of November 25 (commonly called the revised Payment Services Directive, or PSD2).

Instruction 16/2021 – Official Bulletin 11/2021, 5th Supplement, of December 10, 2021

Establishing the information that must be reported by institutions on the implementation of the procedures covered in Portugal’s Action Plan for Risk of Breach (*Plano de Ação para o Risco de Incumprimento - PARI*) and the Out-of-Court Procedure for Regularizing Situations of Breach (*Procedimento Extrajudicial de Regularização de Situações de Incumprimento - PERSI*), as



well as the reporting template to be followed for this purpose, revoking Bank of Portugal Instruction 44/2012.

Instruction 15/2021 – Official Bulletin 11/2021, 4th Supplement, of December 9, 2021

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

Instruction 14/2021 – Official Bulletin 11/2021, Supplement, of November 18, 2021

Regulating the reporting of statistical information to the Bank of Portugal and, effective January 31, 2022, revoking Bank of Portugal Instruction 25/2014.

Instruction 13/2021 – Official Bulletin 10/2021, of October 15, 2021

Amending Bank of Portugal Instruction 54/2012, which regulates the functioning of the trans-European automated real-time gross settlement express transfer (TARGET2-PT) system.

Bank of Portugal notices

Notice 7/2021 – Official Gazette of the Republic of Portugal 244/2021, Series II, Part E, of December 20, 2021

Regulating the duties that, under Decree Law 227/2012, of October 25, institutions are required to observe as part of the out-of-court prevention and regularization of breaches of consumer loans, revoking Bank of Portugal Notice 17/2012.

Notice 6/2021 – Official Gazette of the Republic of Portugal 212/2021, Series II, Part E, of November 2, 2021

Regulating the items to be communicated to the Bank of Portugal as part of procedures for acquiring, increasing or reducing qualified shareholdings regulated in the General Framework for Credit Institutions and Financial Firms (RGICSF), approved by Decree Law 298/92 of December 31, as amended, and further revoking Bank of Portugal Notice 5/2010.

Bank of Portugal circulars

Circular CC/2021/0000060 – Official Bulletin 12/2021, Supplement, of December 17, 2021

Publishing the guidelines (EBA/GL/2021/09) that specify the criteria for assessing the exceptional cases in which institutions may exceed the high-risk limits covered in article 395(1) CRR and the term and measures for reestablishing compliance with the limits under article 396(3) CRR.

Circular CC/2021/0000058 – Official Bulletin 11/2021, 5th Supplement, of December 10, 2021

Notifying that the joint guidelines (EBA/GL/2021/06) of the EBA and the European Securities and Markets Authority on matters of assessing the sufficiency of the members of corporate bodies and those exercising essential functions have been revised. Measures for compliance with them must be adopted by December 31, 2021.



Circular CC/2021/00000057 – Official Bulletin 11/2021, 3rd Supplement, of November 30, 2021

Notifying that the guidelines (EBA/GL/2021/05) of the EBA on internal governance have been revised. Measures for compliance with them must be adopted by December 31, 2021.

Circular CC/2021/00000056 – Official Bulletin 11/2021, 3rd Supplement, of November 30, 2021

Notifying that the guidelines (EBA/GL/2021/04) of the EBA on good remuneration policies have been revised. Measures for compliance with them must be adopted by December 31, 2021.

Circular CC/2021/00000052 – Official Bulletin 11/2021, Supplement, of November 11, 2021

Concerning the recommendation of the European Systemic Risk Board on identifying legal entities (CERS/2020/12), and recommending that institutions also provide the Legal Entity Identifier (“LEI”) in the corresponding identification when reporting the information to the Bank of Portugal, indicating the LEI of any legal entity about which information is being reported.

Circular CC/2021/00000051 – Official Bulletin 10/2021, Supplement, of October 29, 2021

Regarding the guidelines (EBA/GL/2021/07) of the EBA on criteria for using date inputs in the risk assessment template mentioned in article 325-BC CRR.

Circular CC/2021/00000047 – Official Bulletin 9/2021, Supplement, of October 7, 2021

Publishing the Recommendations on Managing Business Continuity, approved by the National Council of Financial Supervisors (*Conselho Nacional de Supervisores Financeiros - CNSF*) on September 20, 2021, which were prepared jointly by the Bank of Portugal, the Supervisory Authority of Insurance and Pension Funds (ASF) and the Portuguese Securities Market Commission (CMVM), as part of the Better Regulation initiative, and which comprise a set of generic good practices that the CNSF considers must be implemented and expanded on by financial sector institutions.

EBA documents

EBA Guidelines of December 17, 2021

Final guidelines on reporting financial resources available for deposit guarantee systems (EBA/GL/2021/17).

EBA Report of December 13, 2021

Final report on the draft regulatory technical standards on credit risk adjustments (EBA/RTS/2021/15).

EBA Guidelines of November 22, 2021



Guidelines on remuneration policies for investment firms under Directive (EU) 2019/2034 of the European Parliament and of the Council, of November 27, 2019, on the prudential supervision of investment firms.

Legislation: Insurance and pension fund law

Portuguese law

Law 75/2021 – Official Gazette of the Republic of Portugal 224/2021, Series I, of November 18, 2021

Strengthening access to credit and insurance by persons who have overcome or mitigated situations of aggravated health risk or disability, prohibiting discriminatory practices and upholding the “right to be forgotten,” amending Law 46/2006 of August 28, on insurance policies (RJCS), as approved by Decree Law 72/2008 of April 16.

EU law

Commission Implementing Regulation (EU) 2021/1964, of November 11, 2021 – OJEU L-347, of November 12, 2021

Establishing technical information for calculating technical provisions and basic own funds for reporting with reference dates from September 30, 2021, to December 30, 2021, in accordance with Directive 2009/138/EC, on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II).

Regulatory Standards of the Insurance and Pension Fund Supervisory Authority (Autoridade de Supervisão de Seguros e Fundos de Pensões - ASF)

Standard 8/2021-R, of November 16 – Official Gazette of the Republic of Portugal 233/2021, Series II, of December 2, 2021

Establishing the system for calculating the minimum value of the liabilities resulting from defined-benefit pension plans and health benefit plans financed by pension funds.

Circulars of the Insurance and Pension Fund Supervisory Authority (ASF)

Circular 13/2021 of December 14, 2021

On regulatory technical standards under 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.

Circular 10/2021 of November 30, 2021

On the importance, for preventing and attenuating systemic risks to the EU's financial stability, of the general adoption of the LEI code as a single global identifier for unequivocally identifying entities involved in financial transactions.

Circular 9/2021 of November 23, 2021



Publishing the revision of applicable thresholds for determining serious risks and the absolute lower limit amounts for calculating the minimum capital requirement for insurance and reinsurance companies.

Circular 8/2021 of November 16, 2021

Listing the main duties that insurance distributors must comply with in distributing protection insurance for payments associated with other uninsured services, to disclose the regulatory framework in force, establishing the good practices they should adopt to provide greater protection to the specific creditors of the insurance sector.

Circular 5/2021 of October 7, 2021

Publishing a set of (revised) recommendations on managing business continuity, approved by the Portuguese Council of Financial Supervisors (CNSF).

Reports of the European Insurance and Occupational Pensions Authority (EIOPA)

Final Report of the European Insurance and Occupational Pensions Authority, of October 22, 2021

Reporting on draft regulatory technical standards of the European Supervisory Authorities as regards the content and presentation of disclosures under Articles 8(4), 9(6) and 11(5) of Regulation (EU) 2019/2088, on disclosure of information relating to sustainability in the financial services sector (commonly called Sustainable Finance Disclosure Regulation).

Legislation: Securities and capital markets law

Portuguese law

Portuguese Law 99-A/2021 – Official Gazette of the Republic of Portugal 253/2021, 1st Supplement, Series I, of December 31, 2021

Amending the Portuguese Securities Market Code to (i) the General Framework for Collective Investment Undertakings, the bylaws of the Institute of Auditors, the law governing Audit Supervision, the bylaws of the Portuguese Securities Market Commission (CMVM), the Portuguese Insolvency and Company Recovery Code, and associated legislation, which was covered in our recent [Financial Legal Flash: Reform of the Portuguese Securities Market Code](#).

Decree Law 109-F/2021 – Official Gazette of the Republic of Portugal 237/2021, 1st Supplement, Series I, of December 9, 2021

Amending the General Framework for Collective Investment Undertakings, transposing Directive (EU) 2019/1160, on the crossborder distribution of collective investment undertakings, and Delegated Directive (EU) 2021/1270, on sustainability risks and factors to be considered for collective investment undertakings in transferable securities.



EU law

Commission Implementing Regulation 2021/2284, of December 10, 2021 – OJEU L-458, of December 22, 2021

Implementing technical standards for applying Regulation (EU) 2019/2033, of the European Parliament and of the Council, on communicating information for supervision and information disclosure of investment firms.

Regulation (EU) 2021/2259 of the European Parliament and of the Council, of December 15, 2021 – OJEU L-455, of December 20, 2021

Amending Regulation (EU) 1286/2014, on the extension of the transitory system applicable to management companies, investment firms and persons providing consultancy on shareholdings in collective investment undertakings in transferable securities (“UCITS”) and non-UCITS, or those that sell them.

Directive (EU) 2021/2261 of the European Parliament and of the Council, of December 15, 2021 – OJEU L-455, of December 20, 2021

Amending Directive 2009/65/EC, which coordinates laws, regulations and administrative provisions relating to some UCITS, on the use of critical information documents by UCITS management companies.

Commission Delegated Regulation (EU) 2021/2268, of September 6, 2021 – OJEU L-455, of December 20, 2021

Amending the regulatory technical standards established in Commission Delegated Regulation (EU) 2017/653, on the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for calculating summary cost indicators, the presentation and content of information on past performance, and the presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of Regulation (EU) 1286/2014 of the European Parliament and of the Council as underlying investment options with the prolonged transitional arrangement established in that article.

Circulars of the Portuguese Securities Market Commission (CMVM)

Circular of December 21, 2021



Relating to the capital market and sustainability, specifically on the information requirements and supervisory organization and approach of the CMVM.

Circular of October 7, 2021

Regarding recommendations for managing business continuity (revised), approved on September 20, 2021, by the Portuguese Council of Financial Supervisors (CNSF).

Selected case law

Portuguese case law

Decision by the Lisbon Court of Appeals, Case 8625/19.4T8LRS.L1-7, of November 23, 2021

Following recent decisions of the Supreme Court (see the decisions in case 1736/19, of April 28, 2021, and in case 5329/19, of April 8, 2021), the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*) maintained that the obligations resulting from a bank loan agreement, stipulating repayment in installments, in successive monthly payments, with a predetermined amount and including the interest due based on the capital agreed, are subject to a five-year statute of limitation under article 310(e) of the Portuguese Civil Code (*Código Civil*). These conclusions on the application of the statute of limitation are not affected by the circumstance of the credit right being fully due.

Based on the above understanding, the application of that legal provision on the principal results in a mechanism of redress for the debtor against the accumulation of the debt, avoiding that party's insolvency to the maximum extent. However, the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*) also concluded that the application of this law effectively encourages the creditor/lender to collect the loan punctually. Therefore, due to these justifications, the system in question cannot be considered arbitrary, having sufficient reason to be applied.

This understanding follows the change observed in Portugal's legal framework in terms of consumer protection (as the weaker contractual party), specifically as seen in various legal



documents that aim to safeguard banking consumers (e.g., under Decree Law 74-A/2017 of June 23, which approves the legal framework applicable to real estate loans).

Consequently, the court considered that the creditor must act diligently in collecting its credit, to avoid having its intention neutralized by legal provisions dealing with the statute of limitation.

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