

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | FINANCE AND CAPITAL MARKETS

FINANCE AND CAPITAL MARKETS NEWSLETTER

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FINANCE AND CAPITAL MARKETS NEWSLETTER

I THE NEW PORTUGUESE LEGAL FRAMEWORK ON THE TAKING-UP AND PURSUIT OF THE BUSINESS OF INSURANCE AND REINSURANCE

Law no. 147/2015, aimed at entering into force on January 1, 2016, was published on September 9, 2015. This Law has approved the new Portuguese Legal Framework on the taking-up and pursuit of the business of insurance and reinsurance, enacting into Portuguese Law Directive 2009/138/EC of the European Parliament and of the Council of November 25, 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), as amended by Directives 2011/89/EU of the European Parliament and of the Council of November 16, 2011, 2012/23/EU of the European Parliament and of the Council of September 12, 2012, 2013/23/EU of the European Parliament and of the Council of May 13, 2013, 2013/58/EU of the European Parliament and of the Council of December 11, 2013 and 2014/51/EU of the European Parliament and of the Council of April 16, 2014.

Besides the enactment into Portuguese Law of the Solvency II Directive, based on the same legal approval, the above mentioned Law has also:

- a) Approved the processual regime applicable to the crimes which are specific of the businesses of insurance, reinsurance and pension plans as well as to the sanctioning regime whose proceeding is an attribution of the Portuguese Insurance and Pension Plans Supervisory Authority (ASF), unless the applicability of a different legal regime is expressly set forth;
- b) Amended Decree-Law no. 12/2006, of May 20, 2006 (as amended by Decree-Laws no. 180/2007, of May 9, 2007, no. 357-A/2007, of October 31, 2007, no. 18/2013, of February 6, 2013 and no. 124/2015, of July 7, 2015), which governs the creation and the business activity of pension funds and of the pension funds management entities;
- c) Amended the legal framework applicable to insurance contracts, approved by Decree-Law no. 72/2008, of April 16, 2008; and
- d) Amended Decree-Law no. 40/2014, of March 18, 2014 (as amended by Decree-Law no. 157/2014, of October 24, 2014), which guarantees the execution in Portugal of the Regulation (EU) no 648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC derivatives, central counterparties and trade repositories, as well as the relevant delegated or implementing acts.

Apart from establishing in a single document a set of significant changes to a relevant number of matters which are material for the insurance and reinsurance businesses, whose main purpose has been to ensure a consistent, efficient and effective application of the new legal regimes, it is also noteworthy that Law no. 147/2015 sets forth a complex transitory regime imposed by the need to coordinate different sources of legislation at an

European Union level (e.g. delegated and implementing acts adopted by the European Commission, regulatory and implementing technical standards and guidelines issued by the European Insurance and Occupational Pensions Authority (EIOPA)).

Although the legislation and regulations still in force (notably Decree-Law no. 94-B/98 of April 17, 1998 (restated by Decree-Law no. 2/2009, of January 5, 2009, and subsequently amended by Law no. 28/2009, of June 19, 2009, Decree-Law no. 52/2010, of May 26, 2010 and Law no. 46/2011, of June 24, 2011) had already anticipated and gradually introduced in Portugal some of the main principles underlying the Solvency II regime, whilst imposing a new regulatory and supervisory paradigm - aimed at strengthening the financial soundness of the insurance and reinsurance undertakings, the stability and competitiveness of the insurance sector and the smooth functioning of the internal market, with the main purpose of protecting insurance creditors -, the Portuguese legislator has considered that the enactment into Portuguese Law of the Solvency II Directive also justified and imposed a global revision of the legal framework on the taking-up and pursuit of the business of insurance and reinsurance.

The new rules impose a holistic and integrated vision of the risks necessary to identify, measure, monitor, manage and report on a continuous basis the risks to which insurance and reinsurance companies are, or may be in the future, exposed.

Towards that purposes, the regime is based in three pillars:

- a) Quantitative requirements (First Pillar) – based on an economic risk-based approach determining that the calculation of technical provisions should be consistent with the valuation of assets and other liabilities, market consistent and in line with international developments in accounting and supervision, as well as on the imposition of a solvency capital requirement along with a minimum capital requirement.
- b) Qualitative requirements and supervision (Second Pillar) – requiring that all insurance and reinsurance undertakings have in place an effective system of governance which, whilst imposing an adequate transparent organizational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information, provides for sound and prudent management of the business. In addition, every insurance undertaking and reinsurance undertaking shall conduct its own risk and solvency assessment. Such risk and solvency assessment shall be performed regularly and without any delay following any significant change in their risk profile. Finally, under this Second Pillar, all investments held by insurance and reinsurance undertakings shall be managed in accordance with the ‘prudent person’ principle.

Regarding the supervision, its imminent preventive nature is noteworthy, notably including the undertaking of last resource measures such as the imposition of additional solvency capital requirements by the ASF where the standardized approach does not adequately reflect the very specific risk profile of an undertaking.

- c) Report to the Supervisory Authority and Public Disclosure of Information (Third Pillar) – imposing on the insurance and reinsurance undertakings the obligation to disclose all information deemed necessary for supervision purposes on a regular basis. Disclosure shall notwithstanding be proportionate and reflect the nature, scale and complexity of the business of the undertaking concerned, and in particular the risks inherent in that business. Furthermore, it also requires insurance and reinsurance undertakings to disclose publicly, on an annual basis, a report on their solvency and financial condition, as approved by the relevant board of directors and updated whenever any event occurs which has a material impact on the information provided.

Finally, it should be noted that while they have not been replaced, the provisions contained in regulations previously issued by the ASF shall be deemed as remaining in full force and effect, provided they do not contradict the legal regime approved by the law under analysis.

The RJASR plays an important role in the Portuguese legal framework representing a significant step in the path designed at an EU level towards a new paradigm of risk approach on the insurance and reinsurance businesses, which is still depended on a series of subsequent acts. In spite of the long way to go, voices have been raised claiming that the new approach will, eventually, impose the extinction of the so-called traditional life insurance business. Let's wait and see, after 1 January 2016.

II LEGISLATION

A. Banking Law: Institutional and Material

European Economic and Social Committee

Opinion of the European Economic and Social Committee on the role of cooperative and savings banks in territorial cohesion – proposals for an adapted financial regulation framework (own-initiative opinion).

European Economic and Social Committee

Opinion of the European Economic and Social Committee on the Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS) and the Report from the Commission to the European Parliament and the Council on the mission and organization of the European Systemic Risk Board (ESRB).

Corrigendum to 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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

Decree-Law no. 140/2015 – Official Gazette no. 148, Series I of July 21, 2015

Thirty-seventh amendment to General Framework for Credit Institutions and Financial Companies approved by Law no. 298/92, of December 31.

Law no. 66/2015 – Official Gazette no. 129, Series I of July 6, 2015

Third amendment to Decree-Law no. 27-C/2000, of March 10, thirty-sixth amendment to General Framework for Credit Institutions and Financial Companies approved by Law no. 298/92, of December 31, fifth amendment to Decree-Law no. 454/91, of December 28, simplifying and standardizing the commissioning of current accounts and first amendment to Law no. 23-A/2015, of March 26.

Law no. 118/2015 – Official Gazette no. 169, Series I of August 31, 2015

Thirty-eighth amendment to General Framework for Credit Institutions and Financial Companies approved by Decree-Law no. 298/92, of December 31, eighth amendment to Law no. 25/2008, of June 5, and third amendment to Decree-Law no. 228/200, of September 23, providing for specific measures to strengthen the stability of the Portuguese financial system.

Parliament Resolution no. 72/2015 – Official Gazette no. 127, Series I of July 2, 2015

Recommends to the Government the implementation of measures to promote and ensure an effective collaboration and coordination between the various entities of financial supervision – Bank of Portugal, Portuguese Securities Market Commission (CMVM) and Portuguese Insurance and Pension Funds Supervisory Authority (ASF).

Parliament Resolution no. 129/2015 – Official Gazette no. 172, Series I of September 3, 2015

Approves the Agreement on Transfer and Mutualisation of contributions to the Single Fund Resolution, signed in Brussels on May 21, 2014.

Presidential Decree no. 100/2015 – Official Gazette no. 172, Series I of September 3, 2015

Ratify the Agreement on Transfer and Mutualisation of contributions to the Single Fund Resolution, signed in Brussels on May 21, 2014.

Decree-Law no. 190/2015 – Official Gazette no. 177/2015, Series I of September 10, 2015

Approves the legal framework of “saving banks”.

Bank of Portugal Notices

Notice no. 1/2015 of Bank of Portugal, which has entered into force on September 18, 2015, establishes a constitution of a capital reserve of 2,5%, pursuant to article 138-D of the Legal Framework of Credit Institutions and Financial Companies, with effect from January 1, 2016.

Notice no. 2/2015 of Bank of Portugal, which has entered into force on October 5, 2015, establishes the duties of information to note by credit institutions in the dissemination of Minimum Banking Services and the conditions of access to and the provision of such services, revoking the Notice no. 15/2912 of Bank of Portugal.

Bank of Portugal Instructions

Instruction no. 7/2015, which has entered into force on July 1, 2015, discloses, for the third quarter of 2015, the maximum rates for the practice in consumer credit under the Decree-Law no. 133/2009, of June 2.

Instruction no. 8/2015, which has entered into force on July 1, 2015, repeal, with immediate effect, the Instruction no. 25/2012, which regulated the Interbank Unsecured Money Market.

Instruction no. 9/2015, which has entered into force on July 16, 2015, determines which institutions and guidelines that must be follow with regard to credit risk transfer in the context of securitization operations.

Instruction no. 11/2015, which has entered into force on June 29, amendment to Instruction no. 47/98, which characterized and regulated the Market Electronic Transfer System (SITEME).

Instruction no. 12/2015, which has entered into force on August 18, 2015, determines which elements to be present by the institutions with the application for authorization for the exercise of functions of the members of the management and supervisory bodies, establishing the form of presentation.

Instruction no. 13/2015, which has entered into force on October 1, 2015, discloses, for the fourth quarter of 2015, the maximum rates for the practice in consumer credit under the Decree-Law no. 133/2009, of June 2.

Instruction no. 14/2015, which has entered into force on September 16, 2015, which regulate the reporting on own funds and capital requirements for Investment Fund Management Companies of securities and real estate.

Instruction no. 15/2015, which has entered into force on October 5, 2015, determines the bianual submission of information relating to the Minimum Banking Services which is attached to this Instruction.

Bank of Portugal Circular Letters

Circular Letter no. 55/2015/DSP, of July 10, 2015, published on August 17, 2015, informs that should comply with the Recommendations/Guidelines from the European banking authority (EBA), about the safety of payments made via the internet in order to strengthen the prevention and the fight against fraud, as well as public confidence.

Circular Letter no. 68/2015/DSC, of September 9, 2015, published on September 15, 2015, transmits the information duties to be fulfilled by payment service providers to the holders of contactless card reader.

B. Insurance Law: Institutional and Material

Commission Delegated Regulation (EU) 2015/1515 of June 5, 2015

Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the extension of the transitional periods related to pension scheme arrangements, with the following contents: *«until 16 August 2017, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default»*.

Commission Delegated Decision (EU) 2015/1602 of June 5, 2015

On the equivalence of the solvency and prudential regime for insurance and reinsurance undertakings in force in Switzerland based on Articles 172(2), 227(4) and 260(3) of Directive 2009/138/EC of the European Parliament and of the Council.

Law no. 147/2015 – Official Gazette no. 176, Series I of September 9, 2015

Approves the legal framework of the access and exercise of insurance and reinsurance activity.

Ministerial order no. 307/2015 – Official Gazette no. 187, Series I of September 24, 2015

Ministries of Finance, Economy, Environment, Land Planning, Energy and Farming and Sea

Establishes the system of compulsory insurance of extra-contractual civil liability.

ASF Regulation no. 3/2015-R – Official Gazette no. 162, Series II of August 20, 2015

Repeal the ASF Regulation no. 9/2008-R, of September 25, on the calculation and reporting of technical provisions based on economic principles.

ASF Regulation no. 4/2015-R – Official Gazette no. 162, Series II of August 20, 2015

Establishes the quarterly indices of capital to upgrade the branch «fire policies and elements of nature» commencing or expiration in the fourth quarter of 2015.

ASF Circular no. 1/2015, of July 16

Applications for approval to the use of measures concerning the quantitative requirements under the Solvency II regime.

C. Securities and Capital Markets

Regulation (EU) 2015/1017 of the European Parliament and of the Council of June 25, 2015

On the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the European Fund for Strategic Investments.

Commission Implementing Decision (EU) 2015/1612 of September 23, 2015

Amending Decision 2008/961/EC on the use by third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements.

Decision (EU) 2015/1613 of the European Central Bank, of September 10, 2015

Amending Decision (EU) 2015/5 on the implementation of the asset-backed securities purchase programme (ECB/2015/31).

European Commission

Communication from the Commission amending the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2015/C 215/01).

Committee of the Regions

Opinion of the European Committee of the Regions – Green Paper – Building a Capital Markets Union (2015/C 313/05).

Law no. 102/2015 – Official Gazette no. 164, Series I of August 24, 2015

Legal framework for collaborative funding.

Decree-Law no. 124/2015 – Official Gazette no. 130, Series I of July 7, 2015

Establishes national measures for the transposition of Directive (EU) no. 2011/61/UE, of June 8, Directive (EU) no. 2013/14/UE, of May 21, Directive no. 2014/51/UE, of April 16, and Directive no. 2003/71/CE, of November 4, all of the European Parliament and of the Council, amending respectively the legal framework of pensions fund, approved by Decree-Law no. 12/2006, of January 20, the Securities Code, and the legal framework of collective investment undertaking.

Regulation no. 2/2015 (Securities Market Commission) – Official Gazette no. 138, Series II of July 17, 2015

Collective Investment Undertaking (securities and real estate) and trading the Open Pension Funds of Individual Accession (Repeal the Regulations no. 8/2002 and 5/2013).

Cabinet Resolution no. 86/2015 – Official Gazette no. 193, Series I of October 2, 2015

Establishes the conditions under which permitted the issuance of new Treasury bonds with variable interest rate, called as «Treasury Bonds with variable-yield», in accordance with the Cabinet Resolution no. 3/2015, of January 12.

III RELEVANT COURT DECISIONS

Supreme Court of Justice, Decision of May 28, 2015, Procedure no. 198/14.0

The overdraft facility, as an expression of the confidence of the credit institution in its customers, can result from an explicit or tacit agreement. However, the Court decided that the framework of banking loan agreement are applicable to overdraft facility. Thus, the stipulation of compensatory interest should be made via a written document. In this way, the overdraft facility that has not been executed in writing does not imply the payment of compensatory interest during the period in which it was consented. If the credit institution prove the overdraft facility, may only require the outstanding claim.

Supreme Court of Justice, Decision of June 4, 2015, Procedure no. 319/06.7

If the company issued a payable crossed cheque to the Bank, the cheques could not be credited directly in the account of the accountant of the company because it does not appear on the cheque as beneficiary. Pursuant to article 38 of the Uniform Law on Cheques «*a cheque with general crossing can only be paid by the drawee to a banker or a drawee client*». In the face of repeated transfers that the Bank did to the account of the accounting officer, the duties of information imposed that the Bank should have informed the company of this practice, making sure that these transfers correspond to his wish.

Supreme Court of Justice, Decision of October 9, 2015, Procedure no. 1857/09.5

The customer and the credit institution signed an long-term rental agreement with a call option. By the fact of the breach of agreement, the renter (client) exercised the right of termination of the agreement. Through the application, by analogy, of article 13 of the legal framework of financial lease (which allows the lessee to exercise against the seller all rights relating to the leased good or resulting from the purchase and sale agreement), the Court decided that the lessee has the right to terminate the agreement. Finally, has been decided that is not possible to the lessee split the purchase and sale agreement from the long-term rental agreement. In that case, it does not seem possible that after the termination of the of purchase and sale agreement, the lessee can exercise the call option under the long-term rental agreement.

Supreme Court of Justice, Decision of July 9, 2015, Procedure no. 1770/13.1

Under a Swap Contract, the parties stipulate an arbitration clause for disputes arising from the said Contract. Once the action was proposed in common courts, was verified a violation of the mentioned clause, which generates absolute incompetence of the Court.

Lisboa Court of Appeal, Decision of May 21, 2015, Procedure no. 337/14.1

If the Bank has not been able to prove that safety procedures adopted in home banking services were suitable to prevent a case of fraudulent transfer, he must indemnify the client for amounts lost with the fraud.

Lisboa Court of Appeal, Decision of September 8, 2015, Procedure no. 542/14.0

Containing the Swap Contract a clause that attribute jurisdiction to the English Courts to resolve issues that can arise in the execution of the Contract, the court considered valid the clause established between the parties and, as such, the Portuguese Court in which the action was proposed is internationally incompetent to resolve the dispute.

Guimarães Court of Appeal, Decision of July 2, 2015, Procedure no. 8013/10.8

To the extent that banking activity is governed by a trusting relationship, with special emphasis on the duties of information and confidence, the financial intermediary is obliged to observe those duties. In his duties are included all necessary clarifications so that the client can take informed decisions, including, in particular, the special risks involved for the operations to be carried out under a repurchase agreement. As such, acts with guilt the Bank that led the customer to think that no risks with the repurchase agreement subscription.

Évora Court of Appeal, Decision of July 9, 2015, Procedure no. 4099/14.4

The issuer of the bank guarantee is not authorize to operate in Portugal. In this case, the issuer may not validly provide bank guarantee to produce effects in a location where cannot operate, before the Portuguese judicial authority.

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