
Banking, Finance and Capital Markets

Legal Flash | Portugal

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I. Decree Law no. 91/2018, of November 12

Decree Law no. 91/2018, of November 12 (“Decree Law no. 91/2018”) was published today, approving the new Legal Framework for Payment Services and Electronic Money (LFPSEM) and transposing Directive (EU) 2015/2366 of the European Parliament and of the Council, of 25 November 2015 (Payment Services Directive II – “PSD II”) into the Portuguese legal order.

Such Decree Law, approved by the Government following Law no. 57/2018, of August 21, was very much expected by the market, considering its importance and its potential impact on the financial sector in Portugal.

In fact, the amendments brought by PSD II, now transposed through Decree Law no. 91/2018, introduce several new aspects into the regulatory framework on payment services affecting the activity of payment service providers, amongst which banks and payment institutions – whether existing or entering into the market – and respective clients.

On the other hand, it must be highlighted that the new legal framework introduced by Decree Law no. 91/2018 includes a set of legal provisions that goes beyond the transposition of PSD II’s mandatory provisions, comprising a range of options exercised by the national legislator, many of which do not result directly from the Directive.

Given its relevance, we state below some of the most relevant amendments foreseen in the new LFPSEM.

II. Transposition of Payment Services Directive II (PSD II)

Considering that the deadline for transposition of PSD II has terminated on January 13, 2018, Decree Law no. 91/2018 has cured the breach by the Portuguese Republic of the obligation to proceed with its transposition, thus establishing an enhanced and harmonized regulatory framework in line with other Member States.

The amendments brought by the new LFPSEM as a result of the transposition of PSD II aim essentially at promoting innovation and competition in the market, notably through the access to data and to the technical infrastructures by new players, the safety of information systems and the efficiency of payment services.

Firstly, and accordingly, the new LFPSEM foresees an extension of its scope of application, which now encompasses two new main payment services that shall be regulated and supervised: account information services and payment initiation services. The former refers to the consolidation in an Internet site or in an application of information regarding a client’s accounts opened before several payment service providers (notably, banks). As for the latter,



it allows for the initiation of online payments at the request of the payment service user to a certain payee without interact between the client and its payment service provider.

A major paradigm shift in the financial services is thus foreseen, to the extent that third parties will now be able to access different payment accounts, as long as the client consents.

Also, in terms of scope, the new legal framework shall be generally be applicable to payment operations carried out in Portugal, irrespective of the currency, even if only one of the payment service provider is located in Portugal and the other provider is situated outside the European Union (one-leg transactions).

Secondly, the new LFPSEM foresees strict rules with regard to the security requirements applicable to electronic payments, notably strong customer authentication (SCA).

As such, where the payer intends to access its payment account online or initiate an electronic payment transaction, the payment service providers must ensure their clients' authentication through strong authentication mechanisms. The regulation of this authentication mechanism is supplemented by the Commission delegated regulation that introduces the Regulatory Technical Standards, which is still not in force.

Such mechanisms consist of the use of two or more elements categorized as knowledge (e.g., a password), possession (e.g., a token) and inherence (e.g., biometrical data) that are independent from one another. In respect of remote payment operations, strong authentication must include elements which dynamically link the transaction to a specific amount and a specific payee.

Thirdly, the new LFPSEM foresees the possibility to access (on equal terms) the technical infrastructures for payment services, even if indirectly, by all payment service providers (e.g., banks and payment institutions).

This aspect has been recently subject to a specific recommendation by the Portuguese Competition Authority, in relation to the access on equal terms to SICOI (the Portuguese Interbank Compensation System) with no bank intermediation, in order to effectively promote the entry into the market of new FinTech players.

Fourthly, the new FSPSEM sets forth a set of amendments aiming at strengthening payment service users' protection. On the one hand, the maximum amount to be borne by clients in case of unauthorized transactions is lowered (to EUR 50), the 1-day deadline for reimbursement is clarified and a principle of no liability for clients is established in case of online operations for which the service provider does not require strong authentication. On the other hand, a set of rules regarding the expenses of payers and payees is foreseen, maintaining the prohibition of charging for the use of a specific instrument.



Lastly, the new LFPSEM now expressly provides for a control requirement on qualifying stakes, i.e., for non-opposition by the supervisor (*Banco de Portugal*) in relation to the acquisition or increase, directly or indirectly, of qualifying holdings representing over 20%, 30% or 50% of the share capital or of the voting rights of payment institutions. The procedural framework foreseen in the General Legal Framework of Credit Institutions and Financial Companies (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*) is partly applicable.

III. Other amendments

Decree Law no. 91/2018 is not confined to the transposition of PSD II, further introducing a set of specificities into the LFPSEM that should be considered.

For instance, the national legislator has chosen to foresee directly in the LFPSEM requirements regarding the remuneration policy for certain employees of payment service providers, in accordance with the according Guidelines issued by the European Banking Authority in respect of the remuneration practices. Also, winding-up and liquidation of payment institutions shall now follow a joint harmonized procedure, irrespective of the payment services provided by the entity.

It should also be noted that some payment institutions may be exempted, by means of an ordinance by Minister of Finance, from the requirements and procedures applicable to the access and exercise of payment services activity.

Additionally, it should be noted that Decree Law no. 91/2018, aiming at avoiding legislative dispersion, integrates and consolidates in the LFPSEM several provisions pertaining to the execution in the Portuguese legal order of the following EU regulations:

- a) Regulation (EC) no. 924/2009 of the European Parliament and of the Council, of 16 September 2009, on cross-border payments in the Community;
- b) Regulation (EU) no. 260/2012 of the European Parliament and of the Council, of 14 March 2012, establishing technical and business requirements for credit transfers and direct debits in euro; and
- c) Regulation (EU) 2015/751 of the European Parliament and of the Council, of 29 April 2015, on interchange fees for card-based payment transactions.

Lastly, and considering the foregoing, Decree Law no. 91/2018 revokes:

- a) Decree Law no. 317/2009, of October 30, subsequently amended and republished by Decree Law no. 242/2012, of November 7;
- b) Decree Law no. 141/2013, of October 18; and
- c) Article 4 of Decree Law no. 18/2007, of January 22.



IV. Entry into force

The amendments introduced by Decree Law no. 91/2018 enter into force tomorrow, on November 13, 2018.

It should be underscored that the new requirements foreseen in the LFPSEM are applicable to the institutions already authorized for the provision of payment services, which shall submit all relevant information to the Bank of Portugal within 90 days from the entry into force of Decree Law no. 91/2018. However, the supervisor may grant an additional period not exceeding 90 days.

Additionally, the application of the security measures is only applicable 18 months after the entry into force of the Commission delegated regulation that approves the according Regulatory Technical Standards.



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