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# Banking, Finance and Capital Markets

Newsletter Portugal

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## **Transitory legal framework applicable to the provision of financial services by entities with registered office in the United Kingdom**

The Official Journal recently published Decree-Law 106/2020, of December 23, 2020, approving the transitory legal framework applicable to the provision of financial services by entities with registered office in the United Kingdom of Great Britain and Northern Ireland (the “**UK**”), following the end of the transitional period established in the Agreement on the withdrawal of the UK from the European Union (“**EU**”) and the European Atomic Energy Community.

Since January 1, 2021, credit institutions, investment firms and management companies of collective investment undertakings with registered offices in the UK ceased to benefit from the European legal framework, which grants the freedom to provide services to investors in Portugal, and are now covered by the legal framework applicable to entities established in third countries.

Under this transitional regime, financial entities with registered office in the UK that were authorized to provide investment services and engage in investment activities in Portugal, on December 31, 2020, will be able to continue to do so, on a transitional basis, until December 31, 2021.

The transitory period is granted to give these entities time to terminate ongoing contracts and associated investments or, if they intend to continue to operate in Portugal, to apply for the necessary authorization, notification or communication procedures before the competent national authorities.

In addition, insurance companies established in the UK will no longer be allowed to carry out insurance business under the freedom of establishment or freedom to provide services regimes, unless a branch is set up in Portugal for this purpose. Measures are also established specifically for insurance contracts covering risks in Portugal or for which Portugal is the Member State of the commitment, whose insurer is an insurance undertaking with registered office in the UK.



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## Crowdfunding framework

Regulation (EU) 2020/1503 of the European Parliament and of the Council, of October 7, 2020 (“**Regulation 2020/1503**”), and Directive (EU) 2020/1504 of the European Parliament and of the Council, of October 7, 2020 (“**Directive 2020/1504**”), were published in the Official Journal of the European Union (“**EU Official Journal**”) on October 20, 2020. Their approval aims to promote cross-border crowdfunding services and facilitate the exercise of the freedom to provide and receive these services in the internal market, by establishing a uniform regulatory framework at EU level.

Regulation 2020/1503 sets out uniform requirements on the provision of crowdfunding services, the organization, authorization and supervision of crowdfunding service providers, and the operation of crowdfunding platforms, as well as transparency and marketing communications relating to the provision of crowdfunding services. The scope of Regulation 2020/1503 excludes:

- (i) crowdfunding services provided to project owners who are consumers; and
- (ii) crowdfunding offers of more than € 5,000,000.00, calculated over 12 months according to the sum of the elements established in this regulation.

Under the new legal framework, crowdfunding service providers benefit from the community passport regime, under which they may engage in their activities in a Member State different from the state for which they are authorized, without requiring a physical presence in that Member State. To avoid needing multiple authorizations in the EU, crowdfunding service providers covered by Regulation 2020/1503 are excluded from the scope of Directive 2014/65/EU (MiFID II).

Regulation 2020/1503 will apply on November 10, 2021. Regarding Directive 2020/1504, Member States are required to enact the necessary implementing laws and regulations, with the aim of implementing them into national law before May 10, 2021, with these being applicable from November 10, 2021.



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## Securities Market Commission regulations on reporting duties

Regulations 6/2020, 7/2020, 8/2020 and 9/2020 of the Portuguese Securities Market Commission (“**CMVM**”), on reporting obligations to the CMVM (the “**Regulations**”), were published in the Official Journal on December 16, 2020, promoting the reform of the previous regulations on this matter, aiming to simplify and adjust reporting duties to the current supervision needs. As a result of the publication of the Regulations:

- (i) the CMVM anticipates that it will reduce its supervision costs, as well as those of the supervised entities; and
- (ii) 19 CMVM instructions and 7 CMVM regulations will be revoked, suppressing or amending a total of 53 reporting duties.

The Regulations enter into force on July 1, 2021, after which the obliged entities must comply with the reporting duties.

### **CMVM Regulation 6/2020**

Amends several regulations on reporting duties, including CMVM Regulation 2/2007, on the pursuit of financial intermediation activities; CMVM Regulation 2/2015, on managing collective investment undertakings; CMVM Regulation 3/2016, on formal compliance with reporting duties to the CMVM; CMVM Regulation 1/2017, on reporting duties applicable to real estate appraisers; CMVM Regulation 8/2018, on reporting and marketing duties concerning PRIIPs; and CMVM Regulation 1/2020, on reporting duties for prudential supervision purposes.

Thus, the CMVM has promoted the update of the content of the reports provided for under these regulations, removing information considered non-essential for supervision purposes and introducing new duties adjusted to current needs.

### **CMVM Regulation 7/2020**

Establishes a semi-annual reporting duty relating to complaints made by retail investors to financial intermediaries, management companies of collective investment undertakings and crowdfunding electronic platforms management entities. Under this regulation, the information must be sent up to the last day of the month following the end of the 6-months’ term to which the information refers.

Except for management companies of collective investment undertakings authorized in Portugal, entities engaging in activities under the freedom to provide services’ regime in Portugal are not subject to these reporting duties.



## **CMVM Regulation 8/2020**

This regulation, which will apply to both financial intermediaries and management companies of collective investment undertakings, amends the reporting duties to CMVM on price lists applicable to retail investors as well as on the marketing and charges of collective investment undertakings, establishing reporting duties relating to:

- price list for retail investors, regarding the activities of receiving and transmitting orders on behalf of a third party, executing orders on behalf of a third party, and registering and safekeeping financial instruments;
- the current rate of charges (TEC) of collective investment undertakings; and
- charges associated with marketing collective investment undertakings relating to subscription, redemption and transfer fees, according to the calculation methods established in their constitutional documents.

This information must be provided (i) when the management company or the collective investment undertakings under its management starts the activity; (ii) when there are changes to the activity; and (iii) annually, up to the 10th business day after April 30 of each year, with reference to this date.

## **CMVM Regulation 9/2020**

The new self-assessment report on governance and internal control systems replaces the previous internal control report applicable to financial intermediaries, management companies of collective investment undertakings and self-managed collective investment undertakings.

Since certain entities may be obliged to submit the self-evaluation report to the Bank of Portugal (“BoP”) under BoP Regulation 3/2020, those who are also subject to the supervision of the CMVM are only required to send that report to the CMVM on an annual basis. However, entities subject to the exclusive supervision of the CMVM must submit to this authority the self-assessment report attached to CMVM Regulation 9/2020 by December 31 of each year, with reference to November 30.

Under this regulation, the first self-assessment report must be provided to the CMVM by April 1, 2021.



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## Legislation: Banking and finance law

### Domestic law

#### **Decree-Law 106/2020 – Official Journal 248/2020, Series I, of December 23, 2020**

See above.

#### **Law 73/2020 – Official Journal 224/2020, Series I, of November 17, 2020**

Amends the rules on appointing the governor and the remaining members of the BoP's board of directors, amending the Law of the BoP, approved as an annex to Law 5/98, of January 31, 1998.

#### **Declaration of Rectification 37/2020 – Official Journal 195/2020, Series I, of October 7, 2020**

Rectifies the date of entry into force of Law 53/2020, of August 26, 2020, on establishing protection rules for consumers of financial services, determining that it enters into force on January 1, 2021.

### European Union (EU) law

#### **Commission Delegated Regulation (EU) 2020/2176, of November 12, 2020 – EU Official Journal L-433, of December 22, 2020**

Amends, relating to the deduction of software assets from common equity tier 1 items, the Delegated Regulation (EU) 241/2014, supplementing Regulation (EU) 575/2013, on the regulatory technical standards for own funds requirements for institutions.

#### **Commission Delegated Regulation (EU) 2020/1989, of November 6, 2020 – EU Official Journal L-429, of December 18, 2020**

Amends, relating to the update of the taxonomy of the International Financial Reporting Standards (IFRS), the Commission Delegated Regulation (EU) 2018/815, supplementing Directive 2004/109/EC, with regard to regulatory technical standards on the specification of a single electronic reporting format, as stated in article 4(7) of this directive, to be used by issuers to prepare annual financial reports.

#### **Commission Delegated Regulation (EU) 2020/1423, of March 14, 2019 – EU Official Journal L-328, of October 9, 2020**

Supplements, with regard to regulatory technical standards on the criteria for appointing central contact points in the field of payment services and on the functions of those central contact points, Directive (EU) 2015/2366, on payment services in the internal market (“PSD II”).

### Bank of Portugal (BoP) Instructions

#### **Instruction 34/2020 – Official Bulletin 12/2020, 4th Supplement, of December 31, 2020**

Amends Instruction 3/2015, which establishes uniform rules on implementing the Eurosystem monetary policy framework, following the amendments introduced by Guidelines (EU) 2020/1690 and 2020/1692 of the European Central Bank (“ECB”).

**Instruction 33/2020 – Official Bulletin 12/2020, of December 31, 2020**

Amends Instruction 7/2012, which establishes temporary measures relating to the eligibility of collateral for Eurosystem refinancing operations, following the amendments introduced by Guideline (EU) 2020/1691 of the ECB.

**Instruction 32/2020 – Official Bulletin 11/2020, of December 18, 2020**

Sets at 0.060% the base contribution fee to be in effect in 2021 to determine the additional periodic contributions for the Resolution Fund.

**Instruction 31/2020 – Official Bulletin 12/2020, Supplement, of December 18, 2020**

Sets, for 2021, (i) the base contribution fee to determine the contribution fee of each institution at 0.0003%; and (ii) the minimum contribution amount to the Deposit Guarantee Fund (“DGF”) at € 235.00. It also prohibits the replacement of the annual contribution to the DGF by irrevocable payment undertakings.

**Instruction 29/2020 – Official Bulletin 11/2020, 3<sup>rd</sup> Supplement, of December 7, 2020**

Discloses the maximum rates to be applied to consumer credit agreements, under Decree-Law 133/2009, of June 2, 2009, in the first quarter of 2021.

**Instruction 28/2020 – Official Bulletin 11/2020, 3<sup>rd</sup> Supplement, of December 7, 2020**

Approves the templates for the flyers on minimum banking services and for the information document to be used by credit institutions for the broad information duties on minimum banking services established in BoP Regulation 1/2018. Revokes Instruction 16/2018.

**Instruction 27/2020, of November 26 – Official Bulletin 11/2020, 2<sup>nd</sup> Supplement, of November 26, 2020**

Regulates the BoP’s organization and management of the database of accounts opened with the Portuguese financial system, under article 81-A of the Legal Framework of Credit Institutions and Financial Companies, approved by Decree-Law 298/92, of December 31. Revokes Instruction 7/2011.

**Instruction 26/2020 – Official Bulletin 10/2020, of October 15, 2020**

Regulates the obligation to report to the BoP information on the funding plans of credit institutions, following the publishing of, and in compliance with, the European Banking Authority (“EBA”) guidelines on harmonized definitions and templates for funding plans of credit institutions.

**BoP Circular Letters****Circular Letter CC/2020/00000068 – Official Bulletin 12/2020, of December 15, 2020**

Underlines the importance of credit institutions complying with the EBA guidelines on credit risk mitigation for institutions applying the internal ratings-based (IRB) approach with own estimates of loss given defaults (LGDs), from the date it came into force on January 1, 2022.



## **Circular Letter CC/2020/00000066 – Official Bulletin 11/2020, of November 16, 2020**

Informs on the reporting deadlines for disclosing the amount of minimum reserves to be held by institutions subject to minimum reserves in the maintenance periods of minimum reserves for 2021 for the monthly and quarterly reports, and on the calendar for those maintenance periods.

## **Circular Letter CC/2020/00000064 – Official Bulletin 11/2020, of November 16, 2020**

Underlines the importance of credit institutions complying with the EBA guidelines on loan origination and monitoring, from the date it came into force on June 30, 2021.

## **Circular Letter CC/2020/00000061 – Official Bulletin 10/2020, 3<sup>rd</sup> Supplement, of October 30, 2020**

Underlines the importance of less significant credit institutions and financial companies subject to the supervision of the BoP taking actions to ensure the correct transition and the mitigation of risks arising from the benchmark interest rate reforms implemented under Regulation (EU) 2016/1011, on indexes used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (EU Benchmark Regulation).

## **European Central Bank (ECB) Acts**

### **Regulation (EU) 2020/2011 of the ECB, of December 1, 2020 – EU Official Journal L-418, of December 11, 2020**

Amends Regulation (EU) 1409/2013 of the BCE on payments statistics, to ensure the consistent reporting, the definitions and the methodology it establishes, with the definitions and the methodology established in PSD II, to the extent they are applicable for the purposes of European System of Credit Banks (ESCB) tasks.

### **Regulation (EU) 2020/2004 of the ECB, of November 26, 2020 – EU Official Journal L-412, of December 8, 2020**

Amends, widening the scope of consolidated reporting with regard to branches of reporting agents located in the UK, Regulation (EU) 1333/2014 concerning statistics on the money markets.

### **Guideline (EU) 2020/1690 of the ECB, of September 25, 2020 – EU Official Journal L-379, of November 13, 2020**

Amends Guideline (EU) 2015/510 of the ECB on the implementation of the Eurosystem monetary policy framework.

## **European Banking Authority (EBA) Acts**

### **Final draft of regulatory and implementing technical standards on impracticability of contractual recognition of bail-in powers, of December 23, 2020**

Final draft regulatory technical standards on the cases and conditions of impracticability of contractual recognition of the bail-in clause and draft implementing standards for the notification to the resolution authorities concerning the impracticability of that contractual recognition, under Directive 2014/59/EU, establishing a framework for the recovery and resolution of credit institutions and investment firms (the “BRRD”).





## **Final draft of regulatory technical standards on setting the minimum requirement for own funds and eligible liabilities requirement, of December 23, 2020**

Final draft regulatory technical standards on the methodology to be used by resolution authorities to estimate the Pillar 2 and combined buffer requirements for resolution entities at the resolution group consolidated level for the purpose of setting minimum requirements for own funds and eligible liabilities under the BRRD.

## **Final draft of regulatory technical standards on the prudential treatment of investment firms, of December 16, 2020**

Seven draft regulatory technical standards related to the prudential regime for investment firms aiming to ensure a balanced introduction of the new prudential regime for investment firms, established by Directive (EU) 2019/2034, on the prudential supervision of investment firms, and by Regulation (EU) 2019/2033, on the prudential requirements of investment firms.

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

### **Domestic law**

#### **Decree-Law 109/2020 – Official Journal 253/2020, Series I, of December 31, 2020**

Establishes, until December 31, 2022, a stamp duty exemption on (i) export credit insurance policies; and (ii) suretyship insurance policies and bank guarantees in the external order, provided, in both cases, the stamp duty is paid by the exporter and it is acting within the scope of its export activity.

#### **Decree-Law 84/2020 – Official Journal 198/2020, Series I, of October 12, 2020**

Amends the Legal Framework for Access and Exercise of Insurance and Reinsurance Activities, approved as an annex to Law 147/2015, of September 9, 2015, modifying the rule on the adjustment of the volatility of risk-free interest rates, reducing the risk adjusted country spread threshold from 100 to 85 basis points.

### **European Union (EU) law**

#### **Commission Implementing Regulation (EU) 2020/1647, of November 9, 2020 – EU Official Journal, L-375, of November 10, 2020**

Establishes technical information for calculating technical provisions and basic own funds for reporting with reference dates from September 30, 2020, until December 30, 2020, under Directive 2009/138/EC on taking-up and pursuing the insurance and reinsurance business.



## Insurance and Pension Funds Supervision Authority (ASF) Acts

### **Regulatory Standard 10/2020-R – Official Journey 233/2020, Series II, Part E, of November 30, 2020**

Adjusts the provision of information by the supervised entities to the ASF, and the reporting, to the current requirements of the supervisory process, by amending Regulatory Standard 8/2016-R, of August 16, 2020, which regulates the provision of information by entities supervised by the ASF for the purpose of exercising the supervisory powers that are legally committed to it. The ASF rectified this act with the Declaration of Rectification dated December 10, 2020.

### **Regulatory Standard 11/2020-R – Official Journey 231/2020, Series II, Part E, of November 26, 2020**

Regulates pension fund management companies' reporting duties to ASF for supervisory purposes, defining the set of reports and financial, statistical and behavioral elements that these management companies must submit to ASF when exercising supervisory powers. The ASF rectified this act with the Declaration of Rectification dated December 10, 2020.

## Insurance and Pension Funds Supervision Authority (ASF) Circulars

### **Circular 3/2020, of December 10, 2020**

Provides clarifications on the framework associated with the reporting obligation regarding the application of the look-through approach to collective investment undertakings other than undertakings for collective investment in transferable securities, relating to the first two quarters of 2020.

### **Circular 2/2020, of November 3, 2020**

Provides information on the end of the transitional period for the UK's withdrawal from the EU, clarifying that insurance undertakings and insurance intermediaries based in the UK can no longer benefit from the "EU passport" framework and can no longer operate in the EU under the freedom of establishment or the freedom to provide services.

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## Legislation: Securities and capital markets law

### European Union (EU) law

#### **European Parliament and Commission Regulation (EU) 2020/1503, of October 7, 2020 – EU Official Journal L-347, of October 20, 2020**

See above.



**Commission Delegated Regulation (EU) 2020/1818, of July 17, 2020 – EU Official Journal L-406, of December 3, 2020**

Supplements, in what concerns the minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks, Regulation (EU) 2016/1011 on indexes used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (“Regulation 2016/1011”).

**Commission Delegated Regulation (EU) 2020/1817, of July 17, 2020 – EU Official Journal L-406, of December 3, 2020**

Supplements Regulation 2016/1011 regarding the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology.

**Commission Delegated Regulation (EU) 2020/1816, of July 17, 2020 – EU Official Journal L-406, of December 3, 2020**

Supplements Regulation 2016/1011 regarding the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published.

**Directive (EU) 2020/1504 of the European Parliament and of the Council, of October 7, 2020 – EU Official Journal L-347, of October 20, 2020**

See above.

**Commission Implementing Decision (EU) 2020/1766, of November 25, 2020 – EU Official Journal L-397, of November 26, 2020**

Determines, for the period between January 1, 2021, and June 30, 2020, that the regulatory framework applicable to central securities depositories of the UK is equivalent, according to Regulation (EU) 909/2014 on improving securities settlement in the EU and on central securities depositories.

### **Securities and Exchange Commission (CMVM) Regulations**

**Regulation 9/2020 – Official Journal 243/2020, Series II, Part E, of December 16, 2020**

**Regulation 8/2020 – Official Journal 243/2020, Series II, Part E, of December 16, 2020**

**Regulation 7/2020 – Official Journal 243/2020, Series II, Part E, of December 16, 2020**

**Regulation 6/2020 – Official Journal 243/2020, Series II, Part E, of December 16, 2020**

See above.

### **European Securities and Markets Authority (ESMA) Acts**

**Guidelines on leverage-related risks, of December 17, 2020**

Guidelines on article 25 of Directive 2011/61/EU, on alternative investment fund managers (AIFMD), aiming to (i) promote convergence among the competent authorities in the way they assess the extent to which the use of leverage in the alternative investment funds sector contributes to the build-up of systemic risk in the financial system; and (ii) regulate and implement leverage limits.



## **Guidelines on portability of information, of October 5, 2020**

Guidelines on portability of information between securitization repositories, providing clarifications to ensure compliance with certain obligations established in Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (“**EMIR**”), as applied by Regulation (EU) 2017/2402 establishing a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization.

## **Decision on the central securities depository established in the UK, of December 11, 2020**

Recognizes the central securities depository established in the UK, Euroclear UK & Ireland Limited (EUI), as third-country CSDs after the UK’s withdrawal from the EU.



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## Case law

### National case law

#### **Judgment of the Supreme Court of Justice, of November 12, 2020 (proceedings 7617/15.7T8PRT.S2)**

The Supreme Court of Justice (“**STJ**”) was asked to decide whether, in a household credit agreement, the lending bank may impose on the borrowers the payment of the corresponding instalments through a current account opened or held with that bank, for the purposes of applying article 11(2)(a) of Decree-Law 74-A/2017, of June 23, 2017, according to article 12(2)(a) of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (“**Directive 2014/17/EU**”).

Following the case law of the European Court of Justice (“**ECJ**”) (cf. Judgment of the ECJ, of October 15, 2020, proceedings C-778/18), the STJ considered that a contractual clause that requires the borrower to keep the account provisioned for the purpose of repaying the credit instalments meets the requirements established in article 12(2)(a) of Directive 2014/17/EU, as long as the minimum account balance requirements are limited to the purposes of securing and repaying the credit.

### European case law

#### **Judgment of the European Court of Justice, of December 10, 2020 (proceedings C-735/19)**

Article 5(4), first paragraph, of Directive 2004/25/CE on takeover bids (“**Directive 2004/25/CE**”), establishes a method for determining the equitable price for the purposes of a mandatory takeover bid.

Questioned on whether this provision is contrary to national legislation establishing three methods for determining the equitable price at which the offeror will acquire the shares of the offeree company, including the method established in article 5(4), first paragraph, of Directive 2004/25/CE, the ECJ highlighted that the second paragraph of the provision enables Member States to authorize their supervisory authorities to adjust the equitable price, upwards or downwards, in certain circumstances and under clearly determined criteria.

The ECJ concluded that, when, under certain national legislation, the equitable price may be determined according to several methods, one of which replicates the method established in article 5(4), first paragraph, of Directive 2004/25/CE, it may be considered that the other methods established correspond to the power to adjust the equitable price provided for in article 5(4), second paragraph, of Directive 2004/25/CE.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our Task Force by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com) or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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