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# Banking, Finance and Capital Markets

Newsletter Portugal

2<sup>nd</sup> Quarter 2021

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## Amendments to the legal framework on the taking-up and pursuit of the business of insurance and reinsurance

Decree-Law 56/2021, published in the Official Journal on June 30, 2021 (the “**Decree-Law**”), transposes Directive (EU) 2019/2177 of the European Parliament and of the Council of December 18, 2019, which amended (i) Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (the “**Solvency II Directive**”); (ii) Directive 2014/65/EU on markets in financial instruments; and (iii) Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing (“**Directive (EU) 2015/849**”). The Decree-Law also transposes Directive (EU) 2020/1504 on collaborative financing service providers and adapts the domestic legal framework to Regulation (EU) 2019/2175 of the European Parliament and of the Council of December 18, 2019.

We highlight the amendments to the Legal Framework on the Taking-Up and Pursuit of Insurance and Reinsurance Business (“**RJASR**”) aimed at improving the system of cooperation and exchange of information between the Insurance and Pension Funds Supervision Authority (“**ASF**”) and the supervisory authorities of other Member States and the European Insurance and Occupational Pensions Authority (“**EIOPA**”):

- Where an authorization procedure for an insurance or reinsurance undertaking is being assessed by the ASF and the latter considers that the applicant's activities are partly based on providing services or an establishment in another Member State that would make it relevant in that market, the ASF will notify the supervisory authority of that Member State and EIOPA if it wishes to grant authorization.
- Where it has serious and grounded consumer protection concerns regarding the activities of an insurance undertaking operating in another Member State through a branch, the host Member State supervisory authority can notify its counterpart authority of these circumstances and, if no bilateral solution is reached, seek the assistance of EIOPA.
- It is now possible for the ASF to participate in cooperation platforms to enhance the exchange of information and cooperation between supervisory authorities in cross border activities.
- EIOPA's coordination role in situations of deteriorating financial conditions or other emerging risks posed by an insurance or reinsurance undertaking is now strengthened.

Regarding the remaining amendments, we highlight the financial markets sector, as (i) the European Securities Markets Authority (“**ESMA**”) has supervisory powers over the activity of data reporting



services providers; and (ii) the European Banking Authority ("EBA") on the prevention of money laundering and terrorism financing.

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## Registration of entities that carry out activities with virtual assets (cryptoassets)

Bank of Portugal Regulation 3/2021 (the "**Regulation**"), published on April 23, 2021, regulates the registration procedure with the Bank of Portugal ("**BoP**") regarding entities that carry out activities with virtual assets, under the terms of article 112-A of Law 83/2017, of August 18 (as amended), which establishes measures to prevent money laundering and terrorism financing.

Under that law, carrying out activities with virtual assets is subject to the authorization, prior registration and supervision by BoP, which is now the competent authority to verify compliance with the duties related to the prevention of money laundering and financing of terrorism by entities carrying out activities with virtual assets in Portugal.

By standardizing the data to be reported and the forms to provide the information, the Regulation specifies the requirements and other formalities for initial registration application and any subsequent amendments to the information subject to registration.

Registration of the applicant entities with the BoP is subject to providing certain information; i.e., identifying the management and supervisory bodies and other individuals holding the position of senior managing officer, the shareholder structure, the beneficial owners, and the policies and procedures implemented for anti-money laundering and terrorism financing purposes. Providing this information aims to demonstrate the expertise and suitability of the applicant entities to carry out activities with virtual assets.

Amendments to the registration must be made under the same terms as the initial registration application, and it is only necessary to resubmit to the BoP the items or information amended. However, authorized entities must repeat all the procedures provided for the initial registration if the changes involve (i) extending the type of virtual assets activities; or (ii) exercising any virtual assets activity in a jurisdiction with a potentially higher risk of money laundering or terrorism financing.



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## Legislation: Banking and finance

### Domestic law

#### **Decree-Law 41/2021 – Official Journal 106/2021, Series I, of June 1, 2021**

Approves the penalties applicable for non-compliance with legal provisions established in Council Regulation (EC) 2271/96, of November 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country.

#### **Law 32/2021 – Official Journal 103/2021, Series I, of May 27, 2021**

Establishes limits the wording of contract terms and sets up a system to control and prevent unfair terms, amending Decree-Law 446/85, of October 25, establishing the legal framework for general contract terms.

### European Union law

#### **Regulation (EU) 2021/840 of the European Parliament and of the Council, of May 20, 2021– EU Official Journal L-186, of May 27, 2021**

Establishes an exchange, assistance and training program for the protection of the euro against counterfeiting (the Pericles IV program), for the period between 2021 and 2027 and repeals Regulation (EU) 331/2014, on the creation of the Pericles 2020 program.

#### **Commission Delegated Regulation (EU) 2021/930, of March 1, 2021 – EU Official Journal L-204, of June 10, 2021**

Supplements regulatory technical standards by specifying the nature, severity and duration of an economic downturn referred to in articles 181 (1) (b) and 182 (1) (b) of Regulation (EU) 575/2013 of the European Parliament and of the Council, on prudential requirements for credit institutions and investment firms.

#### **Commission Delegated Regulation (EU) 2021/923, of March 25, 2021 – EU Official Journal L-203, of June 9, 2021**

Supplements regulatory technical standards by setting out the criteria to (i) define managerial responsibility, control functions, material business units and the significant impact on a material business unit's risk profile; and (ii) identify staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in article 92 (3), of Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

#### **Commission Implementing Regulation (EU) 2021/763, of April 23, 2021 – EU Official Journal L-168, of May 12, 2021**

Lays down implementing technical standards for the supervisory reporting and public disclosure of the minimum requirement for own funds and eligible liabilities to apply (i) Regulation (EU) 575/2013, and



(ii) Directive 2014/59/EU, of the European Parliament and of the Council, establishing a framework for the recovery and resolution of credit institutions and investment firms.

**Commission Implementing Regulation (EU) 2021/776, of May 11, 2021 – EU Official Journal L-167, of May 12, 2021**

Provides templates for certain forms and technical rules for the effective exchange of information under Regulation (EU) 2018/1672 of the European Parliament and of the Council on controls on cash entering or leaving the Union to supplement the legal framework for the prevention of money laundering and terrorism financing established in Directive (EU) 2015/849.

**Commission Implementing Regulation (EU) 2021/637, of March 15, 2021 – EU Official Journal L-136, of April 21, 2021**

Lays down implementing technical standards for public disclosure by institutions of the information referred to in Part VIII, Title II (“Technical criteria on transparency and disclosure”) and Title III (“Qualifying requirements for the use of particular instruments or methodologies”), of Regulation (EU) 575/2013. It repeals (i) Commission Implementing Regulation (EU) 1423/2013; (ii) Commission Delegated Regulation (EU) 2015/1555; (iii) Commission Implementing Regulation (EU) 2016/200; and (iv) Commission Delegated Regulation (EU) 2017/2295.

Commission Implementing Regulation (EU) 2021/1018, of June 22, 2021, amended the disclosure of indicators of global systemic importance.

**Commission Implementing Regulation (EU) 2021/622, of April 15, 2021 – EU Official Journal L-131, of April 16, 2021**

Lays down implementing technical standards for uniform reporting templates, instructions and methods for reporting the minimum requirement for own funds and eligible liabilities for applying Directive 2014/59/EU.

**Commission Delegated Regulation (EU) 2021/598, of December 14, 2020 – EU Official Journal L-127, of April 14, 2021**

Supplements Regulation (EU) 575/2013 on regulatory technical standards for assigning risk weights to specialized lending exposures.

### **Bank of Portugal (BoP) Regulations**

**Regulation 5/2021 – Official Journal 118/2021, Series II, Part E, of June 21, 2021**

Amends Regulation 2/2016 on reporting individual financial information for supervisory, statistical and macroprudential risk analysis purposes to be submitted to BoP, and it revokes Instruction 9/99.

**Regulation 4/2021 – Official Journal 109/2021, Series II, Part E, of June 7, 2021**

Regulates the registration, organization and operation of banking offices and extension of banking offices, and it revokes BoP Instruction 100/96 on the registration of banking offices.



## **Regulation 3/2021 – Official Journal 79/2021, Series II, Part E, of April 23, 2021**

Regulates the registration and the amendment of elements subject to registration by entities that aim to carry out activities with virtual assets (cryptoassets). See above.

## **Regulation 2/2021 – Official Journal 68/2021, Series II, Part E, of April 8, 2021**

Sets out the regulatory framework applicable to payment institutions and electronic money institutions and revokes Regulation 10/2009 and Regulation 4/2014.

## **Regulation 1/2021 – Official Journal 65/2021, Series II, Part E, of April 5, 2021**

Updates the list of entities subject to Regulation 11/2014, on the application of prudential requirements set out in Regulation (EU) 575/2013, by including Banco Português de Fomento, S. A. and eliminating IFD - Instituição Financeira de Desenvolvimento, S. A.

## **Bank of Portugal (BoP) Instructions**

### **Instruction 10/2021 – Official Bulletin 6/2021, Supplement, of June 21, 2021**

Amends Instruction 3/2015, which establishes uniform rules for the implementation of the single monetary policy by the Eurosystem.

### **Instruction 9/2021 – Official Bulletin 6/2021, Supplement, of June 21, 2021**

Amends Instruction 5/2017, which regulates the reporting of information for supervisory purposes of some of the entities subject to the BoP's supervision.

### **Instruction 8/2021 – Official Bulletin 5/2021, 2<sup>nd</sup> Supplement, of June 2, 2021**

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

### **Instruction 7/2021 – Official Bulletin 4/2021, of April 15, 2021**

Introduces the European Central Bank Information Management System Portal (IMAS Portal) into the Portuguese jurisdiction and amends the statement on compliance with the obligation to provide information on the processing of personal data.

## **Bank of Portugal (BoP) Circular Letters**

### **Circular Letter CC/2021/00000026 – Official Bulletin 5/2021, Supplement, of May 26, 2021**

Highlights the importance for less significant credit institutions and other entities to which it applies of complying with the EBA Guidelines on conditions for applying the alternative treatment of institutions' exposure under "tri-party repurchase agreements" set out in article 403(3) of Regulation (EU) 575/2013.

### **Circular Letter CC/2021/00000021 – Official Bulletin 4/2021, 3<sup>rd</sup> Supplement, of April 30, 2021**

Warns account servicing payment service providers to legalize certain irregularities by September 30, 2021, within the supervisory actions to ensure the removal of obstacles to providing services by third-party payment providers.



## **Circular Letter CC/2021/00000016 – Official Bulletin 4/2021, 2<sup>nd</sup> Supplement, of April 29, 2021**

Informs about the application of (i) Law 44/2020, of August 19, 2020; (ii) Law 53/2020 of August 26, 2020; and (iii) Law 57/2020 of August 28, 2020, following their entry into force on January 1, 2021.

## **Circular Letter CC/2021/00000015 – Official Bulletin 4/2021, Supplement, of April 21, 2021**

Informs about the use of BPnet for electronic communications and file transfer in the context of virtual assets (cryptoassets) activities, particularly for preventing money laundering and terrorism financing.

## **Circular Letter CC/2021/00000010 – Official Bulletin 4/2021, of April 15, 2021**

Sets out supervisory expectations on the identification and management of financial risks related to climate and environmental change for less significant institutions, and it highlights the importance for institutions to comply with the guidelines of the ECB Guide published on November 27, 2020 on climate and environmental risks.

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

### **Regulation (EU) 2021/943 of the ECB, of May 14, 2021– EU Official Journal L-210, of June 14, 2021**

Amends Regulation (EU) 2015/534 of the ECB, on reporting supervisory financial information, following the approval of Commission Implementing Regulation (EU) 2021/451, laying down implementing technical standards for the application of Regulation (EU) 575/2013 for supervisory reporting of institutions and repealing Implementing Regulation (EU) 680/2014.

### **Regulation (EU) 2021/728 of the ECB, of April 29, 2021 – EU Official Journal L-157, of May 5, 2021**

Amends the methodology and identification procedures set out in Regulation (EU) 795/2014 of the ECB, on oversight requirements for systemically important payment systems.

### **ECB Guideline (EU) 2021/564, of March 17, 2021 – EU Official Journal L-119, of April 7, 2021**

Regulates the Eurosystem's provision of reserve management services in euro to central banks and countries outside the eurozone and to international organizations, and it repeals Guideline (EU) 2018/797 and Guideline (EU) 2020/1284 on this matter.

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

### **Guidelines on major incident reporting under PSD2, of June 10, 2021**

Revised guidelines on major incident reporting under article 96 of Directive (EU) 2015/2366, of the European Parliament and of the Council, on payment services in the internal market (“PSD2”), which (i) simplify the reporting process and templates; (ii) focus on incidents with significant impact on payment service providers (“PSP”); and (iii) improve the meaningfulness of the information to be reported, with a view to reducing the reporting burden for PSPs.



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## Legislation: Insurance and pension funds

### Domestic law

#### **Decree-Law 56/2021 – Official Journal 125/2021, Series I, of June 30, 2021**

Amends (i) Law 147/2015, of September 9, which approves RJASR; (ii) Law 83/2017, of August 18, which establishes measures to combat money laundering and terrorism financing; (iii) Decree-Law 357-C/2007, of October 31, which provides the legal framework for market management companies; (iv) Decree-Law 486/99, of November 13, which approved the Portuguese Securities Code; (v) Decree-Law 27 -C/2000, of March 10, which creates the system for access to minimum banking services; (vi) Decree-Law 107/2017, of August 30, which establishes rules on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. See above.

#### **Ordinance 99/2021 – Official Journal 90/2021, Series I, of May 10, 2021**

Regulates the private insurance system for cooperation agents entered into by public entities.

### European Union law

#### **Commission Implementing Regulation (EU) 2021/897, of March 4, 2021 – EU Official Journal L-197, of June 4, 2021**

Lays down implementing technical standards for the format of supervisory reporting to the competent authorities and the cooperation and exchange of information between competent authorities and EIOPA, for the application of Regulation (EU) 2019/1238 of the European Parliament and of the Council, on a pan-European Personal Pension Product (“**Regulation (EU) 2019/1238**”).

#### **Commission Delegated Regulation (EU) 2021/896, of February 24, 2021 – EU Official Journal L-197, of June 4, 2021**

Supplements Regulation (EU) 2019/1238 regarding additional information for the purposes of the convergence of supervisory reporting.

#### **Commission Delegated Regulation (EU) 2021/895, of February 24, 2021 – EU Official Journal L-197, of June 4, 2021**

Supplements Regulation (EU) 2019/1238 regarding intervention on a pan-European Personal Pension Product.

#### **Commission Implementing Regulation (EU) 2021/744, of May 6, 2021 – EU Official Journal L-160, of May 7, 2021**

Provides technical information for calculating technical provisions and basic own funds for reporting with reference dates from March 31, 2021, to June 29, 2021, under Solvency II Directive.





## Insurance and Pension Funds Supervision Authority (ASF) Regulatory Standards

### **Declaration of Rectification 383/2021 – Official Journal 98/2021, Series II, of May 20, 2021**

Amends the inaccuracies identified in Regulatory Standard 11/2020-R, of November 3, on pension fund management companies' provision of information to the ASF for supervisory purposes.

### **Regulatory Standard 3/2021-R – Official Journal 85/2021, Series II, Part E, of May 3, 2021**

Establishes the elements and information that must be included in the prior notification of projects for the acquisition, increase or decrease of qualifying holdings in insurance and reinsurance companies and management companies of pension funds, as well as the notification of the creation of encumbrances or charges over qualifying holdings in insurance and reinsurance companies and management companies of pension funds.

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

### **Circular 3/2021, of May 11, 2021**

Informs about EIOPA's guidelines on security and governance of information and communication technology security and the outsourcing of cloud service.

### **Circular 2/2021, of May 4, 2021**

It informs about the continued adoption of countermeasures commensurate with the very high risk of money laundering and terrorism financing involving the Democratic People's Republic of Korea (North Korea) and the Islamic Republic of Iran, after the February 2021 plenary meeting of the Financial Action Task Force.

## European Insurance and Occupational Pensions Authority (EIOPA) Guidelines

### **Guidelines on PEPP Supervisory Reporting, June 4, 2021**

Ensures the common, uniform and consistent application to the Pan-European Personal Pension Product (PEPP) supervisory reporting the nature, scope and format of the information to be submitted by PEPP providers to the competent authorities at predefined intervals and on certain predefined events.

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## Legislation: Securities and capital markets

### European Union law

### **Regulation (EU) 2021/558 of the European Parliament and of the Council, of March 31, 2021 – EU Official Journal L-116, of April 6, 2021**

Amends Regulation (EU) 575/2013, on prudential requirements for credit institutions and investment firms, regarding adjustments to the securitization framework, with a view to maximizing the capacity



of institutions to lend and to absorb losses related to the COVID-19 crisis, while still ensuring their continued resilience to support economic recovery.

**Regulation (EU) 2021/557 of the European Parliament and of the Council, of March 31, 2021– EU Official Journal L-116, of April 6, 2021**

Amends Regulation (EU) 2017/2402, establishing a general framework for securitization and creating a specific framework for simple, transparent and standardized (“STS”) securitization, with a view to extending the STS securitization framework to synthetic securitization and removing regulatory obstacles to securitization of non-performing exposures (“NPE”), to further increase lending capacities without lowering the prudential standards for bank lending and to support economic recovery from the COVID-19 crisis.

**Commission Implementing Regulation (EU) 2021/1043, of June 24, 2021 – EU Official Journal L-225, of June 25, 2021**

Extends until June 28, 2021, the transitional period referred to in article 497 (1) (b) (iii) of Regulation (EU) 575/2013 on own funds requirements for exposures to central counterparties.

**Commission Delegated Regulation (EU) 2021/962, of May 6, 2021 – EU Official Journal L-213, of June 16, 2021**

Extends until June 18, 2022, the transitional period referred to in article 89 (1), first subparagraph, regarding the non-application of the clearing obligation to over-the-counter 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) of Regulation (EU) 648/2012 on over-the-counter derivatives, central counterparties and trade repositories.

**Commission Implementing Regulation (EU) 2021/955, of May 27, 2021 – EU Official Journal L-211, of June 15, 2021**

Establishes implementing technical standards for the forms, templates, procedures and technical arrangements for publications and notifications of marketing rules, fees and charges, and it specifies the information to be communicated for creating and maintaining the central database on crossborder marketing of alternative investment funds and undertakings for collective investment in transferable securities (UCITS), as well as the forms, templates and procedures for communicating this information for application of Regulation (EU) 2019/1156 of the European Parliament and of the Council, on facilitating cross-border distribution of collective investment undertakings.

**Commission Delegated Regulation (EU) 2021/931, of March 1, 2021 – EU Official Journal L-204, of June 10, 2021**

Supplements the regulatory technical standards by specifying (i) the method for identifying derivative transactions with one or more than one material risk driver for the purposes of article 277(5); (ii) the formula for calculating the supervisory delta of call and put options mapped to the interest rate risk category; and (iii) the method for determining whether a transaction is a long or short position in the primary risk driver or in the most material risk driver in the given risk category for the purposes of



article 279-A(3)(a) and (b) in the standardized approach for counterparty credit risk of Regulation (EU) 575/2013.

**Commission Delegated Regulation (EU) 2021/732, of January 26, 2021 – EU Official Journal L-158, of May 6, 2021**

Amends, regarding the content of the file to be submitted by the investigation officer to the ESMA, the right to be heard with regard to interim decisions and paying fines and periodic penalties, Commission Delegated Regulation (EU) 667/2014, supplementing Regulation (EU) 648/2012 with regard to rules of procedure for penalties imposed on trade repositories by the ESMA, including rules on the right of defense and temporal provisions.

**Commission Delegated Regulation (EU) 2021/731, of January 26, 2021– EU Official Journal L-158, of May 6, 2021**

Supplements Regulation (EU) 648/2012, regarding the rules of procedure for penalties imposed on third-country central counterparties or related third parties by the ESMA.

**Corrigendum to Commission Implementing Regulation (EU) 2021/451, of December 17, 2020 – EU Official Journal L-136, of April 21, 2021**

Rectifies the above Implementing Regulation by replacing Annex XII (“Reporting on net stable funding ratio”) and establishing implementing technical standards for supervisory reporting of institutions for the application of Regulation (EU) 575/2013.

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

**Circular of May 21, 2021**

Circular on the implementation of the new reporting duties on ongoing information to CMVM under the terms of CMVM Regulations 6/2020, 7/2020, 8/2020 and 9/2020 (“**New Reporting Duties**”), which extends the testing period referred to in the Circular from April 16, 2021, to June 15, 2021.

**Circular of May 14, 2021**

Circular on questions and answers on implementing the New Reporting Duties.

**Circular of April 16, 2021**

Circular on the testing phase for implementing the New Reporting Duties.

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## **Selected case law**

### **Domestic case law**

**Judgment of the Constitutional Court, of April 29, 2021 (proceedings 1010/2019)**

A constitutionality appeal was submitted to the Constitutional Court, challenging the Legal Framework of the Contribution on the Banking Sector (“**RJCSB**”), approved by Law 55-A/2010, of



December 31, specifically on the interpretation and application of the provisions of articles 2(1)(a), 3, 4 and 8, which allegedly breach the principles of (i) tax lawfulness, given that the legal provisions do not rigorously determine the objective taxable subject or the applicable rates but refer its definition to a regulation; and (ii) tax equality, in its generality or universality aspect, to the extent that the contribution of the banking sector (“CSB”) is levied on a specific category of taxpayers–credit institutions–as well as in its uniformity aspect, as the taxable event – liability and notional value of financial instruments – does not translate into the actual ability to pay.

The Constitutional Court considered the principle of tax legality respected, since the CSB is not a tax but another category of tribute–financial contributions, having sustained that the Constitution establishes different levels of requirements for the legislator, depending on whether they pertain to taxes, fees or financial contributions, and that the Constitution suffices, as far as the financial contributions regime is concerned, with the provision, by law of the Parliament or by authorized decree-law, of "a set of guidelines for the discipline of these taxes that may correspond to a common regime." As the objective incidence and the applicable rate are specifically defined in an ordinance, based on a legislative act with limiting guidelines, the Parliament is not required to approve the constituent elements of each individual tribute.

Regarding the equality principle, the Constitutional Court held that what it intends to safeguard is the arbitrariness prohibition through the use of manifestly irrational distinctive criteria or "without sufficient material basis." As the case concerned commutative and para-commutative tributes (fees and financial contributions), the typical bilateral nature of which requires that the distribution be made according to the cost caused by the taxpayer or for its benefit, the Constitutional Court decided that the criterion for distribution of commutative taxes to which the equality principle provided in the Constitution points to is the principle of equivalence, which, in the case under judicial analysis, is considered fulfilled, and thus compliant with the equality principle.

### **Judgment of the Lisbon Court of Appeal, of April 8, 2021 (proceedings 19222/20.1T8LSB.L1-6)**

The Lisbon Court of Appeals (“LCA”) was called to decide on a protective measure concerning the lawfulness of a beneficiary triggering a bank guarantee "on first demand" granted in the context of a commercial lease agreement terminated by the tenant on the grounds of an abnormal change of circumstances resulting from the pandemic situation.

Although bank guarantees are considered autonomous and literal, scholarship and case law admit, under exceptional circumstances, protective measures to prevent the issuing bank from paying the amount due. The LCA did not accept the argument that it would not be its responsibility to assess the lawfulness of the termination of the lease agreement, and it held that it was fundamental to determine the existence of abuse by the beneficiary of the guarantee.

The LCA decided that the COVID-19 crisis represented a situation that could be grounds for terminating or modifying contracts due to a change in circumstances, under the legal concept of abnormal change in circumstances.



Having considered that the termination of the lease agreement was lawful, the LCA ordered the guarantor bank to refrain from paying any amount under the bank guarantee, and the beneficiary to refrain from triggering it, until the main lawsuit is *res judicata* (definitive).

## European case law

### **Judgment of the Court of Justice of the European Union, of June 3, 2021 (case C-910/19)**

Faced with an interpretation question on article 3(2) and article 6 of Directive 2003/71/EC of the European Parliament and of the Council, on the prospectus to be published when securities are offered to the public or admitted to trading, the European Court of Justice (“**ECJ**”) considered that these provisions must be interpreted as meaning that, in the event of an offer of shares for subscription to the public addressed to retail investors and qualified investors, they can bring an action for damages on the grounds of the information given in the prospectus.

It also upheld that an investor that has participated in a securities offer in the context of which a prospectus has been published may legitimately rely on the information given in that prospectus and is entitled to bring an action for damages on the grounds of that information, regardless of whether the prospectus was issued for that investor.

Additionally, the ECJ determined that article 6(2) of Directive 2003/71 must be interpreted as not precluding provisions of domestic law that, in the context of an action for damages brought by a qualified investor on the grounds of the information given in the prospectus, allow, or even require, the court to take into account that that investor was, or ought to have been, aware of the issuer’s economic situation when offering shares to the public, based on its relationship with that issuer and otherwise through the prospectus. This interpretation is conditional on those provisions being no less favorable than those governing similar actions under domestic law that do not, in practice, make it impossible or excessively difficult to bring that action.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyzes 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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