
Legal Update – 3rd Quarter 2023

Portugal | Banking, Finance and Capital Markets Newsletter

3rd Quarter 2023



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Securities Market Commission’s Electronic One Stop Shop

On August 25, 2023, the Portuguese Securities Market Commission (“**CMVM**”) issued the following regulations—which were published in the Official Gazette of the Republic of Portugal—to implement the Electronic One Stop Shop (“**EOSS**”) (the “**Regulations**”):

- CMVM Regulation 6/2023, implementing the EOSS (revoking CMVM Regulation 3/2016);
- CMVM Regulation 3/2023, regarding the reporting duties of real estate appraisers, as established in CMVM Regulation 1/2017;
- CMVM Regulation 4/2023, regulating the means for complying with issuers’ information duties (revoking CMVM Regulation 1/2022); and
- CMVM Regulation 5/2023, regulating the Legal Regime on Audit Supervision (revoking CMVM Regulation 4/2015).

CMVM Regulations 3/2023, 4/2023 and 5/2023 should be read alongside CMVM Regulation 6/2023 (the “**EOSS Regulation**”).

On September 11, when the EOSS Regulation entered into force, it became mandatory to use the EOSS for processing interactions between the CMVM and the entities under its supervision. This includes requests for (i) administrative actions; (ii) monitoring, sending and receiving communications or notifications relating to administrative procedures; and (iii) paying ongoing supervision fees and charges for CMVM actions. The CMVM can also use this channel to communicate with other stakeholders who seek to benefit from this regime. However, interactions regarding administrative offense proceedings that the CMVM initiates follow a separate legal regime, meaning they are not included within the EOSS.

The EOSS implementation comes with the redesigned CMVM website, which is now <https://www.cmvm.pt/PlInstitucional/>.

Main changes made by the EOSS Regulation:

- 1) Obligation (articles 3 and 4):** Supervised entities must use the EOSS to send requested information reports in CMVM procedures, reports sent on its own initiative, and applications in ongoing CMVM procedures. Also, the CMVM will now send communications and notifications to supervised entities through the EOSS.

The EOSS Regulation applies to any supervisory acts or administrative procedures that start after it enters into force.



- 2) **Access (articles 5–7):** Supervised entities are responsible for requesting access to the EOSS. To submit the application, they have to fill out the form provided in Schedule I to the EOSS Regulation to appoint primary and secondary users through the EOSS. When the supervised entity is a legal person, at least one member of its management body must sign the application.

Supervised legal persons can have up to five registered users, while natural persons can have up to two registered users.

Supervised entities will continue to communicate with the CMVM by email if the following subparagraphs of article 357-A of the Portuguese Securities Code apply to them on the date the EOSS Regulation is published:

- Subparagraphs (a) and (b); that is, persons and entities subject to the CMVM's supervision or wish to become subject to it by request— these must use the EOSS to appoint primary users and provide the mandatory general address (using Schedule II to the EOSS Regulation) within 30 days from the date the EOSS Regulation enters into force.
- Subparagraph (c); that is, supervised entities must be notified of any acts issued due to the fact that they are supervised entities.

- 3) **Alternative means (article 12):** If providing information through the EOSS is not possible, the supervised entity must present evidence of this when sending the files or applications by email (to cmvm@cmvm.pt, the CMVM's general email address) or in digital format (USB device). The security, integrity, confidentiality, and timeliness of the information sent must be ensured. The information should be resent through the EOSS as soon as possible.

If communication obligations persist (article 14.3), the information should be sent to the CMVM's general email address until EOSS access is granted or after it has been withdrawn.

- 4) **Information provision (articles 14–18):** Information must be reported by either sending an electronic file or completing the EOSS form, while adhering to the format and content rules outlined in the applicable CMVM regulation for the specific case.

For each reported file, the EOSS platform generates either a success or failure message for the report (article 17.3). If the reported information changes, the supervised entity must resend all the information (article 18). The reported information is considered received only when the success or failure file for the report is made available on the EOSS.



Legislation: Banking and finance law

European Union (“EU”) law

Commission Implementing Regulation (EU) 2023/2083 of September 26, 2023 - OJEU L- 241 of September 29, 2023

Effective from October 19, 2023, it lays down implementing technical standards for the application of Article 16.1 of Directive (EU) 2021/2167 of the European Parliament and of the Council with regard to the templates to be used by credit institutions for the provision to buyers of information on their credit exposures in the banking book.

Commission Implementing Regulation (EU) 2023/2056 of September 26, 2023 - OJEU L- 238 of September 27, 2023

Effective from October 17, 2023, it amends the implementing technical standards laid down in Commission Implementing Regulation (EU) 945/2014 as regards an update of the list of relevant appropriately diversified indices in accordance with Regulation (EU) 575/2013 of the European Parliament and of the Council.

European Central Bank (“ECB”) acts

Regulation (EU) 2023/1679 of the European Central Bank of August 25, 2023 - OJEU L-216 of September 1, 2023

Amending Regulation (EU) 2021/378 on the application of minimum reserve requirements (ECB/2021/1). It entered into force on September 6, 2023, and has been applicable since September 20, 2023.

Bank of Portugal notices

Notice 6/2023 of September 5, 2023 - Official Gazette of the Republic of Portugal 183/2023, Series II, Part E of September 20, 2023

Concerning the regime on the communication of legal acts by notaries, lawyers and solicitors within the reporting obligations established in article 4.5 of Law 78/2021 of November 24. It entered into force on September 21, 2023.

Bank of Portugal instructions

Instruction 21/2023 of September 7, 2023

Concerning the maximum rates to be charged on consumer credit agreements under Decree-Law 133/2009 of June 2. It entered into force on October 1, 2023.

Instruction 20/2023 of September 5, 2023

Regulating the procedure for registering the agents of payment institutions and electronic money institutions—and their distributors—with the Bank of Portugal. It entered into force on September 6, 2023.



Instruction 19/2023 of August 30, 2023

Concerning information duties regarding minimum banking services, revoking Instruction 28/2020. It entered into force on September 18, 2023.

Instruction 18/2023 of July 21, 2023

Regulating the duty, format and period for reporting to the Bank of Portugal information on remuneration practices, the gender pay gap, and higher ratios, revoking Instruction 5/2015. It entered into force on July 22, 2023.

Instruction 17/2023 of July 21, 2023

Regulating the duty, format and period for reporting information on highly compensated employees to the Bank of Portugal, revoking Instruction 4/2015. It entered into force on July 22, 2023.

Instruction 16/2023 of July 11, 2023

Concerning participation in BPnet (Bank of Portugal's network for communicating with the financial system), such as accessing the infrastructure, signing up for services, and providing services, revoking Instruction 21/2020. It entered into force on July 17, 2023.

Bank of Portugal circulars

Circular Letter CC/2023/00000033 of August 25, 2023

Concerning the adoption of proportional countermeasures in response to the very high risk of money laundering and terrorist financing relating to the Democratic People's Republic of North Korea and the Islamic Republic of Iran. It reaffirms the continued suspension of the Russian Federation's membership status.

Bank of Portugal reports

2022 Loan Markets Monitoring Report

Published in July 2023, it analyzes the evolution, in 2022, of the housing and mortgage credit markets, as well as consumer credit subject to behavioral supervision by the Bank of Portugal.

European Banking Authority ("EBA") and European Securities and Markets Authority ("ESMA") acts

EBA report of August 4, 2023

Follow-up report on the use of machine-learning for internal rating models.

EBA report of August 3, 2023

Concerning the progress made by resolution authorities in incorporating the topics identified in their 2022 European Resolution Examination Programme (EREP) (EBA/REP/2023/27).



EBA report of July 31, 2023

Concerning proposals to change the implementing technical standards related to supervisory reporting, with the aim of introducing new reporting requirements for interest rate risk in the banking book.

EBA and ESMA report of July 31, 2023

Assessing the implementation of Directive (EU) 2017/828 of the European Parliament and of the Council of May 17, 2017 (Shareholder Rights Directive 2 or SRD2). This assessment identifies areas for further progress and provides detailed suggestions for policy action, in relation to SRD2 effectiveness, difficulties in practical application and the appropriateness of its scope of application.

EBA and ESMA report of July 24, 2023

Concerning interdependent assets and liabilities in the net stable funding ratio under Article 428-F of Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013, on prudential requirements for credit institutions.

EBA guidelines of July 19, 2023

Overall recovery capacity in recovery planning.

Legislation: Insurance and pension funds law

EU law

Commission Implementing Regulation (EU) 2023/1672 of August 30, 2023 - OJEU L- 214 of August 31, 2023

Laying down the technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from June 30, 2023, until September 29, 2023, in accordance with Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance. It entered into force on September 1, 2023.

Insurance and Pension Funds Supervisory Authority (“ASF”) regulatory standards

Regulatory Standard 7/2023-R of August 23 - Official Gazette of the Republic of Portugal 187/2023, Series II, Part E of September 26, 2023

Establishing the quarterly capital update indices for policies in the “Fire and natural elements” category starting or maturing in the fourth quarter of 2023. It entered into force on October 1, 2023.

Regulatory Standard 6/2023-R of August 23 - Official Gazette of the Republic of Portugal 188/2023, Series II, Part E of September 27, 2023

Amending the Uniform Fruit and Vegetable Harvest Insurance Policy for the Autonomous Region of the Azores, approved by Regulatory Standard 2/2016-R of March 23, as amended by Regulatory Standard 3/2019-R of March 8. It entered into force on October 27, 2023.



Regulatory Standard 5/2023-R of July 11 - Official Gazette of the Republic of Portugal 159/2023, Series II, Part E of August 17, 2023

Establishing the financial, statistical and behavioral reports and items that pension fund management companies must submit to the ASF for it to exercise its supervisory powers. It entered into force on August 18, 2023.

Regulatory Standard 4/2023-R of July 11 - Official Gazette of the Republic of Portugal 158/2023, Series II, Part E of August 16, 2023

Revoking Regulatory Standard 8/2016-R of August 16 and point 21 of Circular 5/2022 of May 24, introducing new reporting duties for insurance and reinsurance companies for ASF supervision purposes. It establishes the availability of templates, instructions, charts, and reporting forms in a dedicated section of the ASF website. It entered into force on August 16, 2023.

Insurance and Pension Funds Supervisory Authority circulars

Circular 7/2023 of August 8, 2023

Releasing two Financial Action Task Force publications (“High-Risk Jurisdictions subject to a Call for Action,” also known as the “blacklist,” and “Jurisdictions under Increased Monitoring,” also known as the “grey list”) regarding the identification of jurisdictions that may pose risks to the international financial system and the procedures and measures that institutions must adopt. It provides information about the adoption of more stringent identification and due diligence measures regarding the Democratic People’s Republic of Korea (North Korea), the Islamic Republic of Iran, and the Republic of the Union of Myanmar, as well as proportional countermeasures for the very high risk of money laundering and terrorist financing by the first two jurisdictions.

European Insurance and Occupational Pensions Authority (“EIOPA”) opinions

EIOPA report on the activities carried out by the College of Supervisors of July 13, 2023

Emphasizing the importance of efficient and effective coordinated supervision of crossborder insurance groups in the EU and providing an overview of the key developments and topics discussed in the colleges.

Legislation: Securities and capital markets law

EU law

Report from the Commission to the European Parliament and the Council of July 20, 2023

Analyzing the adequacy—from a prudential and economic perspective—of Regulation (EU) 2017/1131 of the European Parliament and of the Council on money market funds.



Commission Recommendation (EU) 2023/1425 of June 27, 2023 - OJEU L - 174/19 of July 7, 2023

Concerning facilitating finance for the transition to a sustainable economy, creating an environment of trust for investors through encouraging the voluntary use of sustainable finance tools and disclosing the corresponding information for credibility purposes.

Portuguese law

Decree-Law 66/2023 of August 8 - Official Gazette of the Republic of Portugal 153/2023, Series I of August 8, 2023

Concerning the full implementation into Portuguese law of EU financial services regulations, entering into force on August 9, 2023. It affects the following Portuguese decree-laws and regimes:

- Amends Decree-Law 40/2014 of March 18, which transposes Regulation (EU) 648/2012 of the European Parliament and of the Council of July 4, 2012, on OTC (over-the-counter) derivatives, central counterparties and trade repositories, reducing the Bank of Portugal's supervisory responsibilities, eliminating references to financial companies, and extending the CMVM's supervisory duties.
- Amends the Legal Regime on Payment Services and Electronic Money to align Portuguese law with Regulation (EU) 2021/1230 of the European Parliament and of the Council of July 14, 2021, on crossborder payments in the Union, introducing the duty for payment service providers (articles 146 to 149) to ensure and provide suitable mechanisms for handling complaints related to compliance with EU legislation, specifically Regulation (EU) 2021/1230.
- Amends the Legal Regime on Crowdfunding to ensure compliance with Regulation (EU) 2020/1503 of the European Parliament and of the Council of October 7, 2020, on European crowdfunding service providers for business. It adapts the concept of crowdfunding to that established in Regulation (EU) 2020/1503, the list of entities authorized by the CMVM to provide equity and loan crowdfunding services, and the languages accepted for communication and drafting of key information documents (KIDs).
- Approves the Implementing Regime for Regulation (EU) 2022/858 of the European Parliament and of the Council of May 30, 2022, on a pilot regime for market infrastructures based on distributed ledger technology.
- Specifies that, in compliance with Regulation (EU) 2020/1503, crowdfunding platform managers must submit the necessary information by November 10, 2023, in order to continue providing those services.

CMVM regulations

Regulation 6/2023 - Official Gazette of the Republic of Portugal 165/2023, Series II of August 25, 2023

Implementing the CMVM's EOSS and revoking CMVM Regulation 3/2016. It entered into force on September 11, 2023.



Regulation 5/2023 - Official Gazette of the Republic of Portugal 165/2023, Series II of August 25, 2023

Regulating the Legal Regime on Audit Supervision and revoking CMVM Regulation 4/2015. It entered into force on September 11, 2023.

Regulation 4/2023 - Official Gazette of the Republic of Portugal 165/2023, Series II of August 25, 2023

Regulating the means of complying with the information duties of issuers and revoking CMVM Regulation 1/2022. It entered into force on September 11, 2023.

Regulation 3/2023 - Official Gazette of the Republic of Portugal 165/2023, Series II of August 25, 2023

Amending the reporting duties of real estate appraisers and modifying CMVM Regulation 1/2017. It entered into force on September 11, 2023.

Regulation 2/2023 - Official Gazette of the Republic of Portugal 146/2023, Series II of July 28, 2023

Implementing the requirements of the Legal Regime on Mortgage Bonds approved by Decree-Law 31/2022 of May 6, as well as of Decree-Law 59/2006 of March 20, which establishes the regime applicable to mortgage bonds and mortgage credit institutions. It entered into force on July 29, 2023.

CMVM circulars

Circular 13/2023 of July 14, 2023

Concerning the sale of units in collective investment undertakings and the conditions under which asset management companies can use intermediaries without conflicting with the general selling and prospecting regime. It supplements Circular 12/2023 of May 25, 2023, on asset management.

CMVM recommendations

CMVM recommendation of September 5, 2023, for financial intermediaries on the prevention, detection and reporting of suspected market abuse and market defense

Recommending financial intermediaries, which are obliged to defend the market, to establish and maintain systems and procedures aimed at ensuring effective and ongoing monitoring capable of detecting and identifying market abuse, and to report any well-founded suspicions of market abuse.

Selected caselaw

EU caselaw

Judgment of July 13, 2023, Case C-265/22, Banco Santander - OJEU C 321, November 11, 2023

The Court of Justice of the European Union was asked to assess the validity of the periodic interest rate review clause for a mortgage loan granted to two individuals by Banco Santander's legal



predecessor. After interpreting articles 3.1, 3.4 and 3.5 of Council Directive 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts, it ruled that:

- the above articles must be interpreted to mean that, for the purposes of assessing the transparency and potential unfairness of a clause in a variable-rate mortgage loan contract that has as a reference index, for the periodic review of the interest rate applicable to that mortgage, an index set in Circular 8/1990 (a circular published in the Official Gazette of the Republic of Portugal) to which an increase is applied, the information contained in the preamble to Circular 5/1994 should be considered;
- although the preamble to Circular 5/1994 has no normative value, the information contained in it must be applied to the index set in Circular 8/1990, considering its calculation of a negative differential aimed at aligning the interest rate with the market rate; and
- determining whether the average consumer can comprehend this information adequately is important.

Portuguese caselaw

Judgment of the Supreme Court of Justice of September 14, 2023 (Case 949/16.9T8LSB.L1.S1)

In this case, it was proven that a bank employee informed the client that the financial product in question guaranteed the invested capital and had identical conditions to those of a term deposit. The Supreme Court ruled that the bank had failed to comply with its duty, under article 7.1 of the Portuguese Securities Code, to provide information that is complete, true, up to date, clear, objective, and lawful.

As the plaintiff had alleged and proved the causal link between the bank's breach of its duty of information and the harm caused to the client, the Supreme Court held that it is admissible, in light of the general principles of the damages obligation enshrined in articles 562 and 563 of the Portuguese Civil Code, for the client to seek to be restored to the situation he would have been in if he had not invested in those financial products and had instead subscribed to a term deposit. To this end, the compensation should be calculated by deducting from the invested capital (i) the current value of the acquired notes; and (ii) the interest paid by the issuer, to the extent that it exceeds the interest that would have been paid on a term deposit.

Judgment of the Évora Court of Appeals of July 12, 2023 (Case 283/23T8ELV-B.E1)

This judgment discusses the admissibility of lifting the duty of banking secrecy whenever certain circumstances justify it.

The court considers that the established understanding is that the right to bank secrecy is not an absolute right. Therefore, in certain circumstances, it can give way to the need to safeguard the right to access justice and receive effective legal protection. Whenever the disputed interests so require, the courts must assess, on a case-by-case basis, whether the duty of bank secrecy can be lifted when it conflicts with the superior abstract value of the rules established in paragraphs 1 and 5 of article 20 (*Access to law and effective judicial protection*) of the Constitution of the Portuguese Republic.



In this case, which concerned the dissolution of a marital union, the applicant sought to ascertain the extent of the marital assets. Therefore, she initiated injunction proceedings for the listing of all bank accounts and amounts deposited in any banking institution operating in Portugal held by the couple or the respondent. The court concluded that, given the need to verify the bank transactions in question, the banking secrecy to which the financial institution was bound should be lifted, as failure to disclose the information sought would seriously undermine the purposes of the requested injunction.

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