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# Legal Update – 1<sup>st</sup> Quarter 2022

Banking, Finance and Capital Markets Newsletter

April 27, 2022



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## Index

- Regulation (EU) 2019/1238 of the European Parliament and of the Council of June 20, 2019, on a pan-European Personal Pension Product (“PEPP”)
- Legislation: Banking and finance law
- Legislation: Insurance and pension funds law
- Legislation: Securities and capital markets law
- Selected case law
-



## Regulation (EU) 2019/1238 of the European Parliament and of the Council of June 20, 2019

Regarding the disparity in the supply of individual retirement products in the European Union, Regulation (EU) 2019/1238 introduced a pan-European Personal Pension Product (“PEPP”), to promote the union of capital markets and encourage investment in long-term savings products that complement public pension schemes.

The PEPP is a voluntary, long-term individual retirement product (with no or limited possibility of early repayment). It is a simple, transparent and portable investment option, particularly appealing to young people and mobile workers.

### ➤ PEPP marketing and providers

The regulation sets out the rules for the marketing of PEPP, including mandatory registration in the central public register maintained by EIOPA and requirements regarding the distribution, supervision and governance of the products.

Only the following entities will be authorized to sell PEPP:

- (i) credit institutions
- (ii) insurance companies operating in the life insurance business
- (iii) institutions providing professional pension plans authorized to provide individual retirement products and subject to supervision in relation to this activity
- (iv) investment firms providing portfolio management services
- (v) investment or management companies in undertakings for collective investment in transferable securities and managers of alternative investment funds

### ➤ Advice

PEPP providers and distributors should provide advice before the saver signs the contract, to specify the saver's requirements and retirement needs and recommend a suitable product, so the saver can make an informed, appropriate decision.

### ➤ Investment options

PEPP providers will be able to provide savers with up to six investment options, which should include the basic PEPP, a safe standard product. The rest are offered taking into account the saver's risk appetite. Investors may also change their option free of charge, for at least five years from the subscription date.

### ➤ Key information document (“PEPP KID”)



Providers must prepare, and review annually, a PEPP key information document, describing the benefits and costs of the product and a summary chart of the risk, which is published on the respective websites, to ensure transparency.

### ➤ Portability

The portability service allows savers to continue contributing to their PEPP account even if they move to another Member State. PEPP providers must ensure, within three months after the regulation enters into force, that they provide national sub-accounts for at least two Member States.

### ➤ Provider change

There is also the possibility of changing providers, internally or crossborder, at the saver's request. In this case, PEPP providers must ensure the transfer of amounts or, where applicable, assets in kind, from one account to another. A change of provider may occur every five years, during the accumulation or payment phases.

### ➤ Payment of benefits

PEPP providers must make available, at the saver's choice, forms of payment of benefits through annuities, single installment of capital, regular capital installments, or combinations of these forms. The saver may also change, free of charge, the payment method for each open sub-account, under the terms of the regulation.

Providers must also provide, annually, during the accumulation phase, a *Statement on PEPP benefits*, which is personalized and contains the main information for each saver. This statement ensures that information regarding the PEPP is kept up-to-date, including the projection of retirement benefits.

### ➤ Implementation

This product started to be marketed throughout the European Union on March 22, 2022.



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## **Legislation: Banking and finance law**

### **Portuguese law**

#### **Rectification Declaration 8/2022 - Official Gazette of the Republic of Portugal 46/2022, Series I of March 7, 2022**

Rectifies Decree Law 12/2022, of January 12, amending the Mutual Counter-Guarantee Fund.

#### **Ordinance 53-A/2022 - Official Gazette of the Republic of Portugal 16/2022, Series I of January 24, 2022**

Amends Ordinance 193/2021, of September 15, establishing specific guidelines regarding the financial circuit applicable to the Recovery and Resilience Plan.

#### **Decree Law 12/2022 - Official Gazette of the Republic of Portugal 8/2022, Series I of January 12, 2022**

Amends the Mutual Counter-Guarantee Fund, particularly aiming to modernize a series of aspects of the fund's governance, in addition to including the mid cap and the small caps as potential recipients of individual guarantees provided by the fund.

#### **Decree Law 11/2022 - Official Gazette of the Republic of Portugal 8/2022, Series I of January 12, 2022**

Establishes the legal framework for equity loans, aiming to provide companies with an additional and flexible capitalization tool, in addition to the traditional instruments offered by the banking system.

### **EU law**

#### **Commission Delegated Regulation (EU) 2022/466, of December 17, 2021 – OJEU L-96, of March 24, 2022**

Supplements Regulation (EU) 600/2014 of the European Parliament and of the Council by specifying criteria for derogation of the principle that approved publication arrangements, and approved reporting mechanisms are supervised by the European Securities Markets Authority.

#### **Commission Delegated Regulation (EU) 2022/439, of October 20, 2021 – OJEU L-90, of March 18, 2022**

Supplements Regulation (EU) 575/2013 of the European Parliament and of the Council regarding regulatory technical standards for specifying the assessment methodology competent authorities are to follow when assessing the compliance of credit institutions and investment firms with the requirements to use the Internal Ratings Based Approach.

#### **Commission Implementing Regulation (EU) 2022/389, of March 8, 2022 – OJEU L-79, of March 9, 2022**



Establishes implementing technical standards for the application of Directive (EU) 2019/2034 of the European Parliament and of the Council regarding the format, structure, content lists and annual publication date of the information to be disclosed by competent authorities.

**Commission Delegated Regulation (EU) 2022/25, of September 22, 2021 – OJEU L-6, of January 11, 2022**

Supplements Regulation (EU) 2019/2033 of the European Parliament and of the Council regarding regulatory technical standards specifying the methods for measuring the K-factors referred to in article 15 of that regulation.

**Commission Delegated Regulation (EU) 2022/26, of September 24, 2021 – OJEU L-6, of January 11, 2022**

Supplements Regulation (EU) 2019/2033 of the European Parliament and of the Council regarding regulatory technical standards specifying the concept of segregated accounts to ensure the protection of the client money's if an investment firm fails.

**Commission Implementing Regulation (EU) 2022/365, of March 3, 2022 – OJEU L-69, of March 4, 2022**

Establishes implementing technical standards regarding procedures and standard forms and templates for providing information for the purposes of resolution plans for credit institutions and investment firms under Directive 2014/59/EU of the European Parliament and of the Council.

**Commission Delegated Regulation (EU) 2022/244, of September 24, 2021 – OJEU L-41, of February 22, 2022**

Supplements Regulation (EU) 2019/2033 of the European Parliament and of the Council regarding regulatory technical standards specifying the total margin amount for calculating the K-factor 'clear margin given' (K-CMG).

**Commission Implementing Regulation (EU) 2022/193, of November 17, 2021 – OJEU L-31, of February 14, 2022**

Amends the implementing technical standards in Implementing Regulation (EU) 926/2014, establishing standard forms, templates and procedures regarding the information to be notified when exercising the right of establishment and the freedom to provide services.

**Commission Delegated Regulation (EU) 2022/192, of October 20, 2021 – OJEU L-31, of February 14, 2022**

Amending the regulatory technical standards established in Commission Delegated Regulation (EU) 1151/2014 regarding the information to be notified when exercising the right of establishment and the freedom to provide services.

**Commission Delegated Regulation (EU) 2022/76, of September 22, 2021 – OJEU L-13, of January 20, 2022**



Supplements Regulation (EU) 2019/2033 of the European Parliament and of the Council regarding regulatory technical standards specifying adjustments to the K-factor 'daily trading flow' (K-DTF) coefficients.

**Commission Delegated Regulation (EU) 2022/27, of September 27, 2021 - OJEU L-6, of January 11, 2022**

Amending Regulation (EU) 236/2012 of the European Parliament and of the Council regarding the adjustment of the threshold for notifying significant net short positions in shares.

**Bank of Portugal instructions**

**Instruction 7/2022 - Official Bulletin 3/2022, Supplement, of March 24, 2022**

Establishes the duty to report to the Bank of Portugal information on exposures subject to measures applied in response to the COVID-19 crisis according to guidelines issued by the European Banking Authority.

**Instruction 6/2022 - Official Bulletin 2/2022, 3rd Supplement, of March 9, 2022**

Repeals Bank of Portugal Instruction 13/2020, of May 21, 2020, on communicating information on public and private moratoriums.

**Instruction 5/2022 - Official Bulletin 2/2022, 3rd Supplement, of March 9, 2022**

Establishes, for the second quarter of 2022, the maximum rates to be applied in consumer credit agreements within the scope of decree law

**Instruction 4/2022 - Official Bulletin 2/2022, 2nd Supplement, of February 28, 2022**

Repeals Bank of Portugal's Instructions 18/97, of February 17, 1997, and 14/2006, of October 20, 2006, to simplify and eliminate duplication of reporting and, consequently, reduce associated costs for the entities covered.

**Instruction 3/2022 - Official Bulletin 2/2022, Supplement, of February 17, 2022**

Amends Instruction 8/2018, of March 22, which regulates the Interbank Clearing System.

**Instruction 2/2022 - Official Bulletin 12/2021, 3rd Supplement, of January 10, 2022**

Amends Instruction 3/2015, of May 20, 2015, establishing uniform rules for the Eurosystem's implementation of the single monetary policy.

**Instruction 1/2022 - Official Bulletin 12/2021, 3rd Supplement, of January 10, 2022**

Amends Instruction 7/2012, of February 15, 2012, establishing temporary measures relating to the criteria for the eligibility of collateral for Eurosystem credit operations.

**Bank of Portugal circulars**

**Letter CC/2022/00000001 – Official Bulletin 2/2022, Supplement, of February 15, 2022**



Establishes, under paragraph 9 of Instruction 18/2015, of January 15, 2016, the reporting models for the Financing and Capital Plans, the description of the macroeconomic and financial scenario and other guidelines necessary for institutions to complete the exercise and provide information with a reference date of December 31, 2021.

### **EBA documents**

#### **Guideline (EU) 2022/508 of the European Central Bank of March 25, 2022 – OJEU L-102, of March 30, 2022**

Amends Guideline (EU) 2017/697 of the European Central Bank on national competent authorities exercising options and discretions available under Union law relating to less significant institutions.

#### **Regulation (EU) of the European Central Bank 2022/504, of March 25, 2022 – OJEU L-102, of March 30, 2022**

Amends Regulation (EU) 2016/445 on exercising options and discretions available under Union law.

#### **Decision (EU) 2022/368 of the European Central Bank, of February 18, 2022 – OJEU L-69, of March 4, 2022**

Amends Decision (EU) 2015/2218 on the procedure to exclude staff members from the presumption of having a material impact on a supervised credit institution's risk profile.

#### **Guideline (EU) 2022/311 of the European Central Bank of February 17, 2022 – OJEU L-46, of February 25, 2022**

Amends Guideline ECB/2012/27 on a Trans-European Automated Real-Time Gross Settlement Express Transfer System (TARGET2).

#### **Decision (EU) 2022/310 of the European Central Bank, of February 17, 2022 – OJEU L-46, of February 25, 2022**

Amends Decision (EU) 2019/1743 of the European Central Bank on the remuneration of holdings of excess reserves and of certain deposits.

#### **Decision (EU) 2022/134 of the European Central Bank, of January 19, 2022 – OJEU L-20, of January 31, 2022**

Establishes common rules on the European Central Bank's transmission of supervisory information to authorities and bodies for the purpose of carrying out the tasks given to it by Council Regulation (EU) 024/2013.

#### **Guideline (EU) 2022/67 of the European Central Bank of January 6, 2022 – OJEU L-11, of January 18, 2022**

Amends Guideline (EU) 2021/830 on balance sheet item statistics and interest rate statistics of monetary financial institutions.



## **Guidelines on common procedures and methods to use for the supervisory review and evaluation process (SREP) and supervisory stress testing under Directive 2013/36/EU**

These guidelines provide a common framework for supervisors when assessing risks to banks' business models', and their solvency and liquidity, as well as the conduct of supervisory stress testing.

## **Guidelines on restricted network exclusion under Payment Services Directive II of February 24, 2022**

These guidelines aim to clarify specific aspects of their application, including (i) how a network of service providers or a range of goods and services should be assessed to qualify as 'limited'; (ii) how payment instruments should be used within limited networks; (iii) regulated financial institutions' provision of excluded services; and (iv) submission of notification to competent authorities (CAs).

## **Guidelines for institutions and resolution authorities on improving banks' resolvability under articles 15 and 16 of the Bank Recovery and Resolution Directive of January 13, 2022**

These guidelines aim to implement existing international standards on resolvability and take stock of the best practices developed so far by EU resolution authorities on resolvability topics.

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

### **Portuguese law**

#### **Law 8/2022 - Official Gazette of the Republic of Portugal 6/2022, Series I, of January 10, 2022**

Revises the horizontal property regime, amending the Civil Code, Decree Law 268/94, of October 25, and the Notary Code.

#### **Ordinance 6/2022 - Official Gazette of the Republic of Portugal 2/2022, Series I, of January 4, 2022**

Annual update of occupational accident pensions for 2022.

### **EU law**

#### **Corrigendum to Commission Delegated Regulation (EU) 2021/2268, of September 6, 2021 - OJEU L-29, of February 10, 2022**

Amends the regulatory technical standards established in Commission Delegated Regulation (EU) 2017/653 regarding the underpinning (i) methods used and presentation of performance scenarios; (ii) presentation of costs and methods for calculating summary cost indicators; (iii) presentation and content of information on past performance; and (iv) presentation of costs by packaged retail and insurance-based investment products (PRIIPs) offering a range of



options for investment and alignment of the transitional arrangement for PRIIP manufacturers offering units of funds referred to in article 32 of Regulation (EU) 1286/2014 of the European Parliament and of the Council as underlying investment options with the prolonged transitional arrangement established in that article (OJ L 455 I of December 20, 2021).

### **Corrigendum to Commission Delegated Regulation (EU) 2015/35, of October 10, 2014 – OJEU L-2, of January 6, 2022**

Supplements Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the insurance and reinsurance business (Solvency II).

### **Regulatory Standards of the Insurance and Pension Funds Supervisory Authority (ASF) Regulatory Standard 1/2022-R - Official Gazette of the Republic of Portugal 48/2022, Series II, Part E, of March 9, 2022**

Amends the Uniform Insurance Policy for Fruit and Vegetable Harvests for the Autonomous Region of Madeira. These standards approve the uniform general conditions of insurance for fruit and vegetable crops for the Autonomous Region of Madeira.

### **Circulars of the Insurance and Pension Funds Supervisory Authority (ASF) Circular 2/2022, of March 15, 2022**

Gives five-yearly update on the minimum capital amounts for compulsory motor vehicle liability insurance, from June 1, 2022.

### **Circular 1/2022, of January 25, 2022**

Analyzes scenarios on climate change risks within the scope of the ORSA exercise, through disseminating recommendations on the integration of climate change risk management in the governance system.

### **Reports of the European Insurance and Occupational Pensions Authority (EIOPA) Report on the application of the Insurance Distribution Directive, of January 6, 2022**

The report focuses on (i) changes in the insurance intermediaries' market structure; (ii) changes in the patterns of crossborder activity; (iii) improvements in quality of advice and selling methods and the IDD's impact on insurance intermediaries that are small and medium-sized enterprises; and (iv) whether competent authorities are sufficiently empowered and have appropriate resources to carry out their tasks.

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## **Legislation: Securities and capital markets law**

### **Portuguese law**

**Ordinance 60/2022 - Official Gazette of the Republic of Portugal 21/2022, Series I of January 31, 2022**



Amends Ordinance 913-I/2003, of August 30, adapting the continuous supervision fees due to the Securities Market Commission (CMVM) to the new Investment Companies Regime.

### **EU law**

#### **Commission Delegated Regulation (EU) 2022/466, of December 17, 2022 – OJEU L -96, of March 24, 2022**

Supplements Regulation (EU) 600/2014 of the European Parliament and of the Council by specifying criteria for derogation of the principle that approved publication arrangements and approved reporting mechanisms are supervised by the European Securities Markets Authority.

#### **Commission Implementing Regulation (EU) 2022/388, of March 8, 2022 - OJEU L -77, of March 7, 2022**

Amends Implementing Regulation (EU) 2018/2066 on the monitoring and reporting of greenhouse gas emissions under Directive 2003/87/EC of the European Parliament and of the Council (text with EEA relevance).

#### **Commission Delegated Regulation (EU) 2022/352, of November 29, 2021 - OJEU L -77, of March 7, 2022**

Amends Delegated Regulation (EU) 2019/815 regarding the 2021 update of the taxonomy established in the regulatory technical standards on the single electronic reporting format.

#### **Commission Regulation (EU) 2022/357, of March 2, 2022 - OJEU L -68, of March 3, 2022**

Adopts certain international accounting standards according to Regulation (EC) 1606/2002 of the European Parliament and of the Council regarding International Accounting Standards 1 and 8.

#### **Commission Implementing Regulation (EU) 2022/186, of February 10, 2022 – OJEU L -30, of February 11, 2022**

Establishes technical information for calculating technical provisions and basic own funds for reporting with reference dates from December 31, 2021, to March 30, 2022, under Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the insurance and reinsurance business.

#### **Commission Implementing Regulation (EU) 2022/185, of February 10, 2022 – OJEU L -30, of February 11, 2022**

Corrects certain language versions of Implementing Regulation (EU) 2021/451, establishing implementing technical standards for the application of Regulation (EU) 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) 680/2014.

#### **Commission Implementing Decision (EU) 2022/174, of February 8, 2022 – OJEU L-28, of February 9, 2022**



Determines, for a limited time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, under Regulation (EU) 648/2012 of the European Parliament and of the Council.

## **Regulations of the Portuguese Securities Market Commission (CMVM)**

### **Regulation 2/2022 - Official Gazette of the Republic of Portugal 21/2022, Series II, Part E, of January 31, 2022**

Defines the form and content of the duties of securities centers to communicate to the CMVM information on settlement failures, under article 7, no. 1 of Regulation (EU) 909/2014 of the European Parliament and of the Council of July 23, 2014, and article 14(1) and (2) of Commission Delegated Regulation (EU) 2018/1229 of May 25, 2018.

### **Regulation 1/2022 - Official Gazette of the Republic of Portugal 13/2022, Series II, Part E, of January 19, 2022**

Establishes the format for reporting duties to the CMVM by issuers of securities admitted to trading on a regulated market.

## **Circulars of the Portuguese Securities Market Commission (CMVM)**

### **Circular of February 25, 2022**

This annual circular addressed to issuers presents the CMVM's strategic plan for the three-year period 2022-2024 and identifies the main regulatory changes and the CMVM's approach to supervision.

### **Circular of February 25, 2022**

This annual circular addressed to financial intermediaries presents the CMVM's strategic plan for the three-year period 2022-2024 and identifies the main regulatory changes and the CMVM's approach to supervision.

### **Circular of February 25, 2022**

This annual circular addressed to asset management entities presents the CMVM's strategic plan for the three-year period 2022-2024 and identifies the main regulatory changes and the CMVM's approach to supervision.

### **Circular on costs and charges applicable to undertakings for collective investment in transferable securities, of February 15, 2022**

This circular reinforces the need to ensure full compliance with the current regulatory framework, particularly Directive 2009/65/EC of the European Parliament and of the Council, of July 13, 2009, coordinating laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("UCITS Directive"), the transposition of which is included in the current General Regime for Collective Investment Undertakings ("RGOIC"). It further aims at coordinating related regulations and respective guidelines on costs and charges applicable to undertakings for collective investment in transferable securities ("UCITS"), particularly regarding disclosing costs and charges to investors, complying with the duty not to allocate undue costs to investors and promoting



behavior with a high degree of care, diligence, loyalty, competence and in the best interest of the participants.

### **Circular on product governance duties, of February 3, 2022**

This circular reinforces the need to ensure full compliance with the current regulatory framework, resulting from the transposition of MiFID II and the implementation of the respective delegated acts and guidelines, relating to product governance and particularly to identifying the target market and distribution strategy, cost and charge structure analysis and product review.

### **Reports of the European Securities Markets Authority (ESMA)**

#### **Report on amending the Market Abuse Regulation (MAR) guidelines on late disclosure under Regulation (EU) 596/2014 (MAR), of January 5, 2022**

Reviews MAR guidelines on delay in disclosing internal information under prudential supervision. The guidelines add certain cases to the issuers' list of legitimate interests for situations of delay in public disclosure of inside information.

#### **Report on Guidance Concerning Certain Aspects of MiFID II Suitability and One-Time Run-On Requirements, January 3, 2022**

Guidelines on suitability and run-once requirements under MiFID II.

### **Instructions of the European Securities Markets Authority (ESMA)**

#### **Supervisory Briefing on Tied Agents under MiFID II, February 2, 2022**

This supervisory briefing aims to ensure convergence across the European Union (EU) in the supervision of companies using tied agents, particularly those based outside the EU.

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## **Selected case law**

### **Portuguese case law**

#### **Decision by the Lisbon Court of Appeals, of January 11, 2022 (case 21927/16.2T8LSB-A-7)**

The Lisbon Court of Appeals was called on to rule on an appeal on an issue related to an autonomous bank guarantee on first demand. The issue to be settled was whether a bank, having provided an autonomous bank guarantee on first demand, can refuse to make the payment when there is a situation of fraud or abuse of rights and, also, in the event the originator of the guarantee has been declared insolvent.

The court started by stating that this type of guarantee obliges, by its nature, and in the event of default or defective performance by the debtor/payer, the guarantor to pay the guaranteed amount as soon as the beneficiary requests it. Thus, given the complex legal relationship established around the guarantee, it must be recognized that the guarantor is liable to the beneficiary creditor for the payment of its own obligation and not for the fulfillment of another's debt, without subordination to the guaranteed obligation.



Thus, despite the originator of the guarantee has been declared insolvent, the guarantee remains 'intact'. In other words, the declaration of insolvency of the originator of the bank guarantee does not imply, for the reasons set out above, the forfeiture of the guarantee. Therefore, following this logical thinking, the guarantor bank is not authorized to invoke the exception of set off between the credit guaranteed and the credit it has over the payer, to extinguish its obligations towards the beneficiary of the guarantee.

The only exception, according to the court, would be in case of bad faith or abuse of rights by the beneficiary. This assessment, however, can only be satisfied with "liquid," "unequivocal" or "irrefutable" proof of that violation and disrespect of the basic principles of the Portuguese legal system.

Based on the above, the Court of Appeals dismissed the appeal, declaring that the bank will have to pay the guaranteed amount.

### **Decision by the Court of Appeals of Coimbra, of January 25, 2022 (case 1717/20.9T8ACB-A.C1)**

In this case, a promissory note was issued for a credit arising from a contract in which the payment of the financed amount was established in monthly installments that included remuneratory interest and capital amortization.

Obligations relating to interest are subject to a statute of limitation of five years. In addition, in immediate relationships (relationships between a subscriber and the immediate exchange subject), everything happens as if the exchange obligation ceased to be literal and abstract, being subject to the exceptions that are based on these personal relationships.

Thus, the court ruled that, in immediate relationships, the prescription of the causal obligation determined the necessary extinction of the credit obligation.

### **Decision by the Supreme Court of Justice, of February 15, 2022 (case 19013/17.7T8LSB.L 2.S1)**

According to the Supreme Court of Justice, the commission relationship referred to in article 500 of the Civil Code should be understood broadly. It should not be limited to that resulting from entering into a commission contract, but it should also cover any task performed on behalf of and in the interest of others.

In this case, the insurance intermediary's activity was clearly integrated into the insurer's organic and economic structure, with the functional dependence and the pursuit of the insurer's interests being evident. Under these terms, the court ordered the insurer to pay compensation for the unlawful practices carried out by the intermediary, based on this law.



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