
Legal Update – 2nd Quarter 2022

Legal flash – Banking, Finance and Capital Markets

July 20, 2022



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Updated anti-money laundering and terrorist financing measures: Bank of Portugal Notice 1/2022 of June 6, 2022

The Bank of Portugal (“BoP”) published Notice 1/2022 of June 6, 2022 (“BoP Notice 1/2022”), which regulates:

- (i) under article 94 of Law 83/2017 of August 18 (“Law 83/2017”), the procedures, instruments, mechanisms, implementation formalities, reporting obligations, and other aspects necessary to ensure compliance with the duties to prevent money laundering and terrorist financing within the scope of the activity of financial entities subject to BoP supervision;
- (ii) under article 27 of Law 97/2017 of August 23 (“Law 97/2017”), the means and mechanisms necessary for financial entities subject to BoP supervision to comply with the duties laid down in Law 97/2017; and
- (iii) the steps payment service providers take to detect transfers of funds where information on the payer or the payee is missing or incomplete and the procedures they use for handling transfers of funds that are not accompanied by the information required under Regulation (EU) 2015/847 of the European Parliament and of the Council of May 20, 2015, on information accompanying transfers of funds.

Law 83/2017 establishes (i) the measures to prevent and punish money laundering and terrorist financing, partially transposing into Portuguese law Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015, on the prevention of the use of the financial system and of specially-designated activities and professions for the purposes of money laundering or terrorist financing; and (ii) the measures for implementing Regulation (EU) 2015/847 of the European Parliament and of the Council of May 20, 2015, on information accompanying transfers of funds, in any currency, for the purposes of the prevention, detection and investigation of money laundering and terrorist financing.

In turn, Law 97/2017 regulates the application and enforcement of restrictive measures approved by the United Nations or the European Union, and it establishes the penalties for infringing these measures.



Both Law 83/2017 and Law 97/2017, in articles 94 and 27 respectively, provide for the possibility of approving sector regulations aimed, in essence, at adapting the duties and obligations laid down in these cross-sector legal instruments to the specific operational realities to which they apply.

BoP Notice 1/2022 comes in the wake of the new legislative measures introduced by Law 58/2020 of August 31, which transposes into Portuguese law Directive (EU) 2018/843 of the European Parliament and of the Council of May 30, 2018, and which amends and republishes Law 83/2017.

Based on this framework, BoP Notice 1/2022 revokes and replaces Notice 2/2018 on the same matters, as well as Instruction 2/2021 on low- and high-risk factors for money laundering and terrorist financing and specific simplified or enhanced identification and due diligence measures.

The reasons given by the BoP to justify this revision of the regulatory framework are to:

- (i) remove the aspects of the regime that are now laid down in Law 83/2017 through the amendments made by Law 58/2020;
- (ii) bring together in one single regulatory document the substantive rules applicable to the prevention of money laundering and terrorist financing by incorporating the regime which, to date, originated in BoP Instruction 2/2021;
- (iii) bring this regime in line with the provisions of BoP Notice 3/2020 of July 15, which regulates governance and internal control systems and establishes the minimum standards on which the organizational culture of entities subject to BoP supervision must be based; and
- (iv) bring greater simplicity, clarity, and flexibility to the normative provisions, but without affecting the substance and stability of the regulatory solutions, given the expected approval of a new European legal framework on this matter in the medium term.

BoP Notice 1/2022 will come into force on August 5, 2022.



Legislation: Banking and finance law

European Union legislation

Commission Delegated Regulation (EU) 2022/954 of May 12, 2022 – OJEU L-165 of June 21, 2022

Amending the regulatory technical standards established in Commission Delegated Regulation (EU) 183/2014 on prudential requirements for credit institutions and investment firms, with regard to regulatory technical standards for specifying the calculation of specific and general credit risk adjustments.

Commission Delegated Regulation (EU) 2022/786 of February 10, 2022 – OJEU L-141 of May 20, 2022

Amending Commission Delegated Regulation (EU) 2015/61, which supplements Regulation (EU) 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for credit institutions.

Commission Delegated Regulation (EU) 2022/676 of December 3, 2021 – OJEU L-123 of April 26, 2022

Supplementing Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms regarding the regulatory technical standards that specify the conditions on which prudential consolidation must be made in the cases referred to in articles 18.3 to 18.6 and 18.8 of the regulation.

Commission Delegated Regulation (EU) 2022/629 of January 12, 2022 – OJEU L-117 of April 19, 2022

Amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/583 regarding the adjustment of the liquidity thresholds and trade percentile used to determine the size specific to the instrument applicable to certain non-equity instruments.

BoP Instructions

Instruction 12/2022 – BO 6/2022, 2nd Supplement, dated June 21, 2022

Amending Instruction 3/2015, which establishes uniform rules for implementing the single monetary policy by the Eurosystem.

Instruction 11/2022 – BO 6/2022, 2nd Supplement, dated June 21, 2022

Amending Instruction 7/2012, which establishes the temporary measures for the eligibility criteria for asset-backed Eurosystem credit transactions.

Instruction 10/2022 – BO 6/2022, Supplement, dated June 21, 2022

Amending Instruction 8/2018, with a view to reviewing the Interbank Clearing System to accommodate the implementation of the new continuous gross settlement mechanism by EBA Clearing.



Instruction 9/2022 – BO 5/2022, 3rd Supplement, dated June 9, 2022

Releasing the maximum rates for the 3rd quarter of 2022 to be charged in consumer credit contracts under Decree-Law 133/2009 of June 2.

Instruction 8/2022 – BO 4/2022, Supplement, dated April 20, 2022

Amending BoP Instruction 54/2012, which regulates the functioning of the real-time gross settlement automatic transfer system.

BoP Notices

Notice 1/2022 – RD 109/2022, Series II, Part E of June 6, 2022

Establishing the necessary aspects for ensuring compliance with the duties to prevent money laundering and terrorist financing within the scope of the activity of financial entities subject to BoP supervision, revoking Notice 2/2018 and Instruction 2/2021.

BoP public consultations

BoP public consultation 4/2022 of May 18, 2022

The BoP has released for public consultation until July 1, 2022, a draft instruction to amend reporting in the field of securities statistics with a view to replacing Instruction 31/2005, now applicable to the branch offices of foreign credit institutions in Portugal.

BoP public consultation 3/2022 of May 4, 2022

Draft instruction that partially amends BoP Instruction 7/2021, transposing into Portuguese law the new version of the questionnaire available on the website of the European Central Bank Information Management System. The public consultation will last until June 17, 2022.

European Central Bank documents

Guideline (EU) 2022/912 of the European Central Bank of February 24, 2022 – OJEU L-163 of June 17, 2022

Guideline on a new-generation Trans-European Automated Real-time Gross Settlement Express transfer system, repealing Guideline 2013/47/EU and regulating the replacement of TARGET2 by TARGET.

Decision (EU) 2022/911 of the European Central Bank of April 19, 2022 – OJEU L-163 of June 17, 2022

Decisions concerning the terms and conditions of TARGET-ECB and repealing Decision 2007/601/EC, in the wake of European Central Bank Guideline (EU) 2022/912 of February 24, 2022.



European Banking Authority (“EBA”) documents

EBA Guidelines of June 30, 2022

Final guidelines on the data collection exercise regarding high earners, in light of the requirements introduced by Directive (EU) 2019/2034 of the European Parliament and of the Council of November 27, 2019, on the prudential supervision of investment firms, and by Regulation (EU) 2019/2033 of the European Parliament and of the Council of November 27, 2019.

EBA Guidelines of June 30, 2022

Final guidelines on the benchmarking exercises on remuneration practices and the gender pay gap under the Capital Requirements Directive and the Investment Firm Directive.

EBA Guidelines of June 14, 2022

On the role and responsibilities of the compliance officer and the management body of credit institutions and financial institutions.

EBA technical standards of May 24, 2022

Technical standards on reporting data, aimed at improving the cost-effect ratio for banks and increasing data consistency between public disclosure and supervisory reports.

EBA regulatory technical standards of May 23, 2022

Specifying the criteria for identifying shadow banking entities for the purposes of reporting large exposures.

EBA regulatory technical standards of May 13, 2022

Final draft of regulatory technical standards that specify the information that crowdfunding service providers must provide to investors about calculating the credit terms, as well as the information to be considered in assessing the credit risk.

EBA report of April 5, 2022

Final report on the amendment of the regulatory technical standards for strong customer authentication and secure communication under the Payment Services Directive (PSD2).

Legislation: Insurance law and pension funds

European Union legislation

Commission Delegated Regulation (EU) 2022/975 of March 17, 2022 – OJEU L-167 of June 24, 2022

Amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/653 on key information documents for packaged retail and insurance-based investment products (PRIIPs) regarding the transitional arrangement laid down in article



14.2 of that regulation for specific information about each underlying investment option, and amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2021/2268 regarding the date of application of that regulation.

Commission Implementing Regulation (EU) 2022/732 of May 12, 2022 – OJEU L-136 of May 13, 2022

Laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from March 31, 2022, to June 29, 2022, 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.

Rectification of Commission Delegated Regulation (EU) 2021/2268 of September 6, 2021 – OJEU L-115 of April 13, 2022

Amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/653 as regards the underpinning methodology and presentation of performance scenarios, the presentation of costs and the methodology for calculating summary cost indicators, the presentation and content of information on past performance and the presentation of costs by 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 laid down in that article.

Regulatory standards of the Insurance and Pension Funds Supervisory Authority

Regulatory Standard 7/2022-R – DR 125/2022, Series II, Part E of June 30, 2022

On market conduct and complaint handling by the Insurance and Pension Funds Supervisory Authority (“ASF”), which establishes the general rules insurance companies must follow in their relations with policyholders, insured persons, beneficiaries and injured third parties, as well as the general rule pension fund management companies must follow in their relationship with members, participants, contributors and beneficiaries, as well as the procedure for handling complaints made to the ASF against supervised entities.

Regulatory Standard 6/2022-R – DR 125/2022, Series II, Part E of June 30, 2022

On the security and governance of information and communication technologies (ICT) and outsourcing to cloud computing service providers.

Regulatory Standard 4/2022-R – DR 105/2022, Series II, Part E of May 31, 2022

On the governance system of insurance and reinsurance companies aimed at updating the regulatory regime in view of the Portuguese and European legal framework and best supervisory practices, increasing the level of demand by establishing the basis for



implementing forward-looking, proportional, consistent, and assertive supervisory mechanisms and practices.

Regulatory Standard 3/2022-R – DR 101/2022, Series II of May 25, 2022

Amending article 10-A of Regulatory Standard 6/2019-R of September 3, which regulates suitable qualifications, training, and ongoing professional development, supplemented by Regulatory Standard 2/2020-R of April 8.

ASF circulars

Circular 6/2022 of May 24, 2022

Updating the flexibility measures and recommendations for the exceptional situation related to the COVID-19 pandemic and the recent geopolitical crisis – pension fund management companies.

Circular 5/2022 of May 24, 2022

Updating the flexibility measures and recommendations for the exceptional situation related to the COVID-19 pandemic and the recent geopolitical crisis – insurance companies.

Circular 4/2022 of April 19, 2022

Joint statement of the European Supervisory Authorities on the application of Regulation (EU) 2019/2088 of the European Parliament and of the Council of November 27, 2019, on sustainability-related disclosures in the financial services sector (Regulation (EU) 2019/2088) and articles 5 and 6 of Regulation (EU) 2020/852 of the European Parliament and of the Council of June 18, 2020, on the establishment of a framework to facilitate sustainable investment between March 10, 2021, and March 10, 2022, and the date of application of the regulatory technical standards (RTS) laid down in Regulation (EU) 2019/2088.

Circular 3/2022 of April 13, 2022

On anti-money laundering and terrorist financing, including FATF press releases.

Guidelines of the European Insurance and Occupational Pensions Authority

April 21, 2022, guidelines on the application of the requirements of Directive 2009/138/CE of the European Parliament and of the Council and of Commission Delegated Regulation (EU) 2015/35 of October 10, 2014

European Insurance and Occupational Pensions Authority (“EIOPA”) issued these revised Guidelines under article 16 of Regulation (EU) 1094/2010 to provide guidance on how insurance and reinsurance companies should apply the requirements of Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance (Solvency II) and Commission Delegated Regulation (EU) 2015/35 of October 10, 2014, on insurance and reinsurance contract limits and the valuation estimate.



Legislation: Securities and capital markets

Portuguese legislation

Decree-Law 31/2022 – DR 88/2022, Series I of May 6, 2022

Approving the Legal Regime for Covered Bonds and transposing Directive (EU) 2019/2162 on the issue of covered bonds and covered bond public supervision and Directive (EU) 2021/2261 on the use of key information documents by management companies of undertakings for collective investment in transferable securities.

European Union legislation

Commission Delegated Regulation (EU) 2022/1011 of March 10, 2022 – OJEU L-170 of June 28, 2022

Supplementing Regulation (EU) 575/2013 of the European Parliament and of the Council regarding regulatory technical standards, specifying how to determine the indirect exposures to a client arising from derivatives and credit derivatives contracts where the contract was not directly entered with the client, but the underlying debt or equity instrument was issued by the client.

Commission Delegated Regulation (EU) 2022/930 of March 10, 2022 – OJEU L-162 of June 17, 2022

Supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council by specifying fees relating to the supervision by the European Securities and Markets Authority (“ESMA”) of data reporting service providers.

Commission Delegated Regulation (EU) 2022/803 of February 16, 2022 – OJEU L-145 of May 24, 2022

Supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council by specifying rules of procedure for exercising the power to impose fines or periodic penalty payments by the ESMA regarding data reporting service providers.

Commission Delegated Regulation (EU) 2022/804 of February 16, 2022 – OJEU L-145 of May 24, 2022

Supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying rules of procedure for measures applicable to the supervision by the ESMA of certain benchmark administrators.

Commission Delegated Regulation (EU) 2022/805 of February 16, 2022 – OJEU L-145 of May 24, 2022

Supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council



by specifying fees applicable to the supervision by the ESMA of certain benchmark administrators.

Commission Delegated Regulation (EU) 2022/749 of February 8, 2022 – OJEU L-138 of May 17, 2022

Amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2017/2417 regarding the transition to new benchmarks referenced in certain over-the-counter (“OTC”) derivative contracts.

Commission Delegated Regulation (EU) 2022/750 of February 8, 2022 – OJEU L-138 of May 17, 2022

Amending the regulatory technical standards laid down in Commission Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts.

Commission Implementing Regulation (EU) 2022/631 of April 13, 2022 – OJEU L – 117 of May 19, 2022

Amending the implementing technical standards laid down in Implementing Regulation (EU) 2021/637 as regards the disclosure of exposures to interest rate risk on positions not held in the trading book.

Securities Market Commission documents

Regulation 5/2022 –DR 112/2022, Series II of June 9, 2022

Amending Securities Market Commission (“CMVM”) Regulation 2/2020 concerning the prevention of money laundering and terrorist financing. The main amendments come from the approval of the legal regime for Real Estate Investment and Management Companies (“SIGIs”, in the Portuguese acronym) by Decree-Law 19/2019 of January 28 and the amendments made by Law 83/2017, which grant the CMVM the supervisory authority to prevent these companies, which are classified as obliged financial entities under Law 83/2017, from committing money laundering and terrorist financing.

Regulation 4/2022 –DR 92/2022, Series II of May 12, 2022

Regulating the specifics for management companies to send information about money market funds to the CMVM under article 37 of Regulation (EU) 2017/1131 of the European Parliament and of the Council of June 14, 2017, on money market funds.

CMVM public consultation 4/2022 of April 1, 2022

Submitting the draft of Regulation 4/2022 for public consultation until May 17, 2022, which aims to amend Regulation 2/2020 on the prevention of money laundering and terrorist financing.



Regulation 3/2022 –DR 82/2022, Series II of April 28, 2022

Amending CMVM Regulation 2/2022 of January 31, which establishes the form and content of the duties of central securities depositories to report information about missed settlements to the CMVM.

ESMA

ESMA Guidelines of May 31

ESMA guidelines on sustainability risks and disclosures in the assets management area.

ESMA Guidelines of May 31

ESMA guidelines on supervision of costs and taxes in investment funds.

ESMA Report, May 19, 2022

Final report on the possibility to extend the transitional period under the crowdfunding regulation as provided for under article 48 of Regulation (EU) 2020/1503 of the European Parliament and of the Council of October 7, 2020, on European crowdfunding service providers for business.

ESMA Report, May 19, 2022

Final report on highly liquid financial instruments with regards to the investment policies of central counterparties under Regulation (EU) 648/2012 of the European Parliament and of the Council of July 4, 2012, on OTC derivatives, central counterparties and trade repositories.

ESMA Report, May 16, 2022

Final reports on the framework for the recovery and resolution of central counterparties under Regulation (EU) 2021/23 of the European Parliament and of the Council of December 16, 2020.

ESMA Guidelines of April 29, 2022

Addressed to the European Commission and concerning aspects related to the protection of small investors, presenting proposals to make it easier for them to obtain the necessary information to make an investment decision.

ESMA Report, April 4, 2022

On the review of the Short Selling Regulation, proposing specific changes to improve its functioning, focusing on clarifying procedures for prohibiting net short selling and the calculation of net short positions.



ESMA regulatory technical standards of March 29, 2022

Draft regulatory technical standards establishing criteria for the sound and prudent management of data reporting service providers and their operational effectiveness under Regulation (EU) 600/2014 of the European Parliament and of the Council of May 15, 2014.

Selected case law

Portuguese court decisions

Ruling of the Lisbon Court of Appeal, Case 19222/20.1T8LSB.L1-6 of April 8, 2022

In a decision published on April 8, 2022, the Lisbon Court of Appeal held that although the legal regime on “first demand” bank guarantees gives autonomy and literality to these guarantees, injunction proceedings may be brought in exceptional cases to prevent the issuing bank from paying if it has clear and unequivocal proof of fraud or bad faith.

The court’s decision was made in proceedings brought by a private limited company (the “**Claimant**”) that was the tenant of a store located in Lisbon against a bank (the “**First Respondent**”) and a closed-end real estate investment fund (the “**Second Respondent**”). The Claimant had provided a first demand guarantee in favor of the Second Respondent as security for all the obligations arising from the performance or non-performance of its lease agreement. Due to the COVID-19 pandemic and the ensuing economic crisis, the Claimant decided to terminate the lease agreement, claiming an abnormal change in circumstances under article 437 of the Civil Code.

To avoid the execution of the bank guarantee, which, according to the Claimant, would drive it into insolvency, it filed an injunction application in which it requested that:

- (i) the First Respondent be “*ordered to refrain from paying any amount to the Second Respondent under the first-demand bank guarantee issued at the request of the Claimant under the terminated lease agreement until the decision in the main proceedings becomes final*”; and
- (ii) the Second Respondent be “*ordered to refrain from executing the first-demand bank guarantee provided by the Claimant under the terminated lease agreement until the decision in the main proceedings becomes final.*”

The Second Respondent filed a defense claiming that “*the guarantee provided by the First Respondent is a first-demand bank guarantee, which precludes any discussion, by the guarantor, of the relationships underlying the issuing of the guarantee and any proof of default,*” and that “*the line taken by academics and in court case law is extremely demanding with regard to granting injunction applications that seek to prevent the execution of such guarantees, requiring that there is outright and flagrant abuse or fraud and that this is unequivocal.*”



The Second Respondent's view prevailed at first instance, with the court holding that the injunction application was baseless, dismissing the claims against the First Respondent and the Second Respondent.

However, the Claimant lodged an appeal to the Lisbon Court of Appeal, which ruled in its favor to the effect that:

- (i) there was an abnormal change of circumstances in accordance with article 437 of the Civil Code;
- (ii) the termination of the contract on these terms was lawful; and
- (iii) in view of the specific circumstances of the case, the filing of an injunction application to prevent the execution of the first-demand guarantee was legitimate, as there was a well-founded fear of serious and difficult-to-repair harm to a right of the Claimant; i.e., the justified fear that the natural delay in the definitive resolution of the dispute would cause irreparable or difficult-to-repair harm (*periculum in mora*) to the Claimant; in other words, the Claimant would become insolvent.

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