
Banking, Finance and Capital Markets

Newsletter Portugal

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I – Payment Services in the Internal Market: Elements of Strong Customer Authentication

The European Banking Authority ("EBA") published on 21 June an Opinion on strong authentication elements in the context of the implementation of Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services ("PSD2").

This opinion is essentially addressed to the competent national authorities, although the information is also of utter importance for payment service providers and payment service users.

As of 14 September 2019, the date of entry into force of Commission Delegated Regulation (EU) 2018/389 of 27 November 2017, which complements PSD2, payment service providers will have to perform strong authentication customers in the following cases:

- > Online access to a payment account;
- > Starting an electronic payment operation; and
- > Use of a remote channel, which may involve the risk of payment fraud or other abuse.

Strong authentication entails that payment service providers, in all abovementioned situations, require the user to provide two or more elements corresponding to "knowledge", "possession" and "inherence" categories.

The EBA opinion¹ gives some hints about the elements that can be considered in each of the three categories provided for in the context of strong client authentication, identifying, albeit in a non-exhaustive way, possible solutions:

KNOWLEDGE

Element	Compliant with SCA? ²
Password	Yes
PIN	Yes
Knowledge-based challenge questions	Yes
Passphrase	Yes
Memorized swiping path	Yes
Email address or user name	No

¹ The EBA opinion complements the information previously submitted to the market, published in June 2018 ([EBA-Op-2018-04](#)), and the answers provided under the Q & A tool available on the Authority's website ([Q&A](#)).

² Compliance with AFC requirements depends on the specific approach used in the implementation of the elements.



Element	Compliant with SCA? ²
Card details (printed on the card)	No
OTP generated by, or received on, a device (hardware or software token generator, SMS OTP)	No (for approaches currently observed in the market)

POSSESSION

Element	Compliant with SCA? ³
Possession of a device evidenced by an OTP generated by, or received on, a device (hardware or software token generator, SMS OTP)	Yes
Possession of a device evidenced by a signature generated by a device (hardware or software token)	Yes
Possession of a card or device evidenced through a QR code (or photo TAN) scanned from an external device	Yes
App or browser with possession evidenced by device binding — such as through a security chip embedded into a device or private key linking an app to a device, or the registration of the web browser linking a browser to a device	Yes
Possession of a card evidenced by a card reader	Yes
Possession of a card with possession evidenced by a dynamic card security code	Yes
App installed on the device	No
Possession of a card with possession evidenced by card details (printed on the card)	No (for approaches currently observed in the market)
Possession of a card evidenced by a printed element (such as an OTP list)	No (for approaches currently observed in the market)

INHERENCE

Element	Compliant with SCA? ⁴
Fingerprint scanning	Yes
Voice recognition	Yes
Vein recognition	Yes
Hand and face geometry	Yes
Retina and iris scanning	Yes
Keystroke dynamics	Yes
Heart rate or other body movement pattern identifying that the PSU is the PSU (e.g. for wearable devices)	Yes
The angle at which the device is held	Yes
Information transmitted using a communication protocol, such as EMV® 3-D Secure	No (for approaches currently observed in the market)
Memorized swiping path	No

EBA further clarified that, in exceptional circumstances and with the aim of minimizing the impact on users, national competent authorities could provide an additional period of time for the adoption of solutions compatible with strong authentication mechanisms, provided

³ See footnote no. 2.

⁴ See footnote no. 3.



that the providers of payment services establish a migration plan for these new mechanisms. The payment services providers shall, therefore, (i) have a migration plan, (ii) this plan shall be agreed with the national competent authorities and (iii) the migration plan shall be easy to implement.

The complexity and difficulties in implementing strong client authentication solutions have been shared by several payment service providers operating in the market, and the subject is far from being fully clarified.

We anticipate that EBA will, therefore, continue to receive additional clarification requests on the interpretation of the applicable regulatory technical standards through its Single Rulebook Q&A, available on its website.



II – Legislation: Institutional and Material Banking Law

National law

Law No. 36/2019 – Official Journal No. 103/2019, Series I of 29-05-2019

Expressly determines the expiry of certain decrees-laws published between the years of 1975 and 1980, on different matters.

Decree-Law No. 47/2019 – Official Journal No. 72/2019, Series I of 11-04-2019

Creates the early alert mechanism regarding the economic and financial situation of companies.

Ordinance No. 200/2019 – Official Journal No. 122/2019, Series I of 28-06-2019

Establishes the terms for the RCBE (Central Registry of Beneficial Owners) initial declaration and revokes articles 13 and 17 of Ordinance No. 233/2018, of 21 August 2019, which regulated Law No. 89/2017, of 21 August 2019, which approved the RCBE legal regime. Under the terms of this ordinance, the entities subject to the RCBE shall submit the relevant initial declaration until: (a) 31 October 2019, in the case of entities subject to commercial registry, and (b) 30 November 2019, in the case of the remainder entities subject to the RCBE. In turn, the obliged entities under the terms of Law No. 83/2017, of 18 August 2017, shall perform consultations to the RCBE after 31 January 2020, except if the respective access code is provided to them before that date.

Parliamentary Activity

Parliament Resolution No. 57/2019 – Official Journal No. 81/2019, Series I of 26-04-2019

Recommends to the Government the automatic identification by financial institutions of the potential beneficiaries of the minimum banking services.

Draft Law No. 843/XIII, of 23-04-2018

It has been approved, on 26 April 2019, the full replacement text to the draft law regarding the new Housing Framework Act. This initiative aims at permitting the transfer in lieu of payment regarding the debt under the housing loan agreement regardless of the value attributed to the property for the purposes, provided that this is contractually established.

European Union law

Regulation (EU) 2019/877 of the European Parliament and of the Council, of 20 May 2019 – EU Official Journal L-150, of 07-06-2019

Amends Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalization capacity of credit institutions and investment firms.



Regulation (EU) 2019/876 of the European Parliament and of the Council, of 20 May 2019 – EU Official Journal L-150, of 07-06-2019

Amends Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012, on OTC derivatives, central counterparties and trade repositories.

Commission Delegated Regulation (EU) 2019/758, of 31 January 2019 – EU Official Journal L-125, of 14-05-2019

Supplements Directive (EU) 2015/849 of the European Parliament and of the Council with regard to regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries.

Directive (EU) 2019/879 of the European Parliament and of the Council, of 20 May 2019 – EU Official Journal L-150, of 07-06-2019

Amends Directive 2014/59/EU as regards the loss-absorbing and recapitalization capacity of credit institutions and investment firms and Directive 98/26/EC, on settlement finality in payment and securities settlement systems.

Directive (EU) 2019/878 of the European Parliament and of the Council, of 20 May 2019 – EU Official Journal L-150, of 07-06-2019

Amends Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures.

Directive (EU) 2019/713 of the European Parliament and of the Council, of 17 April 2019 – EU Official Journal L-123, of 10-05-2019

Provides for rules on combating fraud and counterfeiting of non-cash means of payment and replaces Council Framework Decision 2001/413/JHA.

Bank of Portugal Regulations

Regulation of the Bank of Portugal No. 2/2019 – Official Journal No. 100/2019, Series II, Part E, of 24-05-2019

Sets, for the purposes of Regulation (EU) No 575/2013 of the European Parliament and of the Council, of 26 June 2013, on prudential requirements for credit institutions and investment firms, and its supplementing regulation, the thresholds as to the significant nature of the risk exposures over retail portfolios and of the risk exposures that are not exposures over retail portfolios.



Bank of Portugal Instructions

Instruction No. 12/2019 – Official Bulletin No. 6/2019, 2nd Supplement, of 28-06-2019

Details the types of risk exposures which shall be associated with high risks under the terms of article 128 of Regulation (EU) No 575/2013 of the European Parliament and of the Council, of 26 June 2013.

Instruction No. 11/2019 – Official Bulletin No. 6/2019, Supplement, of 26-06-2019

Amends Instruction No. 2/2009, of 16 February 2009, in order to establish the RIPA – Registry of Payment Instructions as a way of transmission of payment instructions by the holders of deposit account with the Bank of Portugal.

Instruction No. 10/2019 – Official Bulletin No. 6/2019 of 17-06-2019

Amends Instruction No. 8/2018, of 22 March 2018, which regulates the Interbank Clearing System (SICOI).

Instruction No. 9/2019 – Official Bulletin No. 5/2019, 3rd Supplement, of 05-06-2019

Discloses, for the 3rd quarter of 2019, the maximum rates that can be used in consumer financing agreements in the context of Decree-Law No. 133/2009, of 2 June 2009.

Instruction No. 8/2019 – Official Bulletin No. 5/2019, 2nd Supplement, of 03-06-2019

Amends Instruction No. 5/2017 on the reporting of information for supervising purposes.

Instruction No. 7/2019 – Official Bulletin No. 5/2019, Supplement, of 30-05-2019

Incorporates the EBA Guidelines on the STS (simple, transparent and standardized) criteria applicable to both non asset-backed commercial paper (ABCP) and ABCP securitization (EBA/GL/2018/08 and EBA/GL/2018/09).

Bank of Portugal Circular Letters

Circular Letter No. CC/2019/0000047 – Official Bulletin No. 5/2019 of 15-05-2019

Informs about the framework and operationalization of the disclosure service by the banking system of information on personal identification documents, through an electronic function made available for the purpose in the Bank Customer Portal, revoking Circular Letter No. 03/2015/DET, of 8 April 2015.



III – Legislation: Institutional and Material Insurance Law

National law

Decree-Law No. 69/2019 – Official Journal No. 98/2019, Series I of 22-05-2019

Establishes the special regime of the insurance contracts of the accessible lease in the context of the Accessible Lease Program.

Ordinance No. 179/2019 – Official Journal No. 110/2019, Series I of 07-06-2019

Establishes the mandatory requirements of the multiple guarantees applicable to the accessible lease insurance guarantees.

Press releases of the Council of Ministers

Press release of 27 June 2019

It has been approved the draft law that amends the legal regime on the incorporation and functioning of pension funds and managing entities of pension funds, aiming at ensuring the implementation into national law of Directive (EU) 2016/2341 of European Parliament and of the Council, of 14 December 2016, on the activities and supervision of institutions for occupational retirement provision (IORPs).

The draft provides for the reinforcement of the system of governance of the managing entities of pension funds, the strengthening of the supervising powers of the Insurance and Pension Funds Supervisory Authority, as well as the densification of the requirements of the information to be provided in order to ensure the adequate protection of the potential participants, of the participants and of the beneficiaries.

European Union law

Commission Delegate Regulation (EU) 2019/981, of 8 March 2019 – EU Official Journal L-161, of 18-06-2019

Amends Delegated Regulation (EU) 2015/35 supplementing 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 (Solvency II).

Regulatory standards of the Insurance and Pension Funds Supervisory Authority (ASF)

ASF Regulatory Standard No. 4/2019-R – Official Journal No. 110/2019, Series II of 07-06-2019

Establishes the quarterly indices of capital updates for the policies of the «Fire and forces of nature» class of insurance with beginning or maturity date in the third quarter of 2019.



IV – Legislation: Institutional and Material Capital Markets Law

European Union law

Regulation (EU) 2019/834 of the European Parliament and of the Council, of 20 May 2019 – EU Official Journal L-141, of 28-05-2019

Amends Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

Commission Delegated Regulation (EU) 2019/980, of 14 March 2019 – EU Official Journal L-166, of 21-06-2019

Supplements Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, repealing Commission Regulation (EC) No 809/2004.

Commission Delegated Regulation (EU) 2019/979, of 14 March 2019 – EU Official Journal L-166, of 21-06-2019

Supplements Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301.

Commission Delegated Regulation (EU) 2019/815, of 17 December 2018 – EU Official Journal L-143, of 29-05-2019

Supplements Directive 2004/109/EC of the European Parliament and of the Council with regard to regulatory technical standards on the specification of a single electronic reporting format, as mentioned in article 4(7) of Directive 2004/109/EC, to be used for the preparation of annual financial reports by the issuers.

Commission Delegated Regulation (EU) 2019/886, of 12 February 2019 – EU Official Journal L-142, of 29-05-2019

Amends and corrects Delegated Regulation (EU) No 480/2014 as regards the provisions on financial instruments, simplified cost options, audit trail, scope and content of audits of operations and methodology for the selection of the sample of operations and Annex II.



Commission Delegated Regulation (EU) 2019/820, of 4 February 2019 – EU Official Journal L-134, of 22-05-2019

Supplements Regulation (EU) No 345/2013 of the European Parliament and of the Council with regard to conflicts of interest in the area of European venture capital funds.

Regulations of the Securities Market Commission (CMVM)

CMVM Regulation No. 5/2019 – Official Journal No. 122/2019, Series II of 28-06-2019

Restrains the marketing, distribution and sale of contracts for differences and prohibits the marketing, distribution and sale of binary options in Portugal to non-professional investors, implementing into national law the ESMA Decisions (EU) 2018/1636 and 2018/2064 which, respectively, restrain the marketing of contracts for differences (CFDs) and prohibit, temporarily, the marketing of binary options in all of European Union's territory.

CMVM Regulation No. 4/2019 – Official Journal No. 65/2019, Series II of 02-04-2019

Amends CMVM Regulation No. 3/2007, on Regulated Markets and Multilateral and Organized Trading Systems.

Decisions of the European Securities and Markets Authority (ESMA)

ESMA Decision (EU) 2019/679 of 17 April 2019 – EU Official Journal L-114, of 30-04-2019

Renews the temporary restriction on the marketing, distribution or sale of contracts for differences to retail clients.

V – Relevant case-law

Judgement of the Supreme Court of Justice, of 30 April 2019

(proceedings No. 17566/16.6T8LSB.L1.S2)

The bank “deposit” contract is an *in rem* contract (*quoad constitutionem*), requiring its constitution the delivery of money, with the inseparable transfer of its property from the depositor to the depository, which will be obliged to return the same amount of the same type and quality. Accordingly the depositor has a credit right over the deposited amount and the remuneratory interest thereon that have been agreed. Hence, in trusting to the depository the saving of the money, the depositor accepts to transfer to the controlling sphere of the latter the managing risk over the transferred amount, distancing itself, as of said date, from its use and fruition, but also from any responsibility for the risk of its loss, which shifts to the depository until the moment said return is due. Hence, within that interregnum, the fraudulent operation by a third party of a bank deposit is not enforceable against the depositor, who is unrelated with it, regardless of the guilt of the depository in said operation.

In this regard, the (contractual) liability of the credit institution before its clients and now



plaintiffs for the reimbursement of the monies (and respective interest) that these have deposited could not, on the date on which the depository has been subject to a resolution measure, be deemed arguable, dubious or challengeable and, therefore, contingent or unknown, for the purposes addressed in the aforementioned resolutions of the Bank of Portugal, and therefore said liability must be deemed as transferred to the bridge institution, as successor of the rights and obligations of the original institution.

**Judgement of the Appealing Court of Oporto, of 11 April 2019
(proceedings No. 33/14.0T8PVZ.P1)**

The acquisition of own shares without complying with paragraphs 1 and 3 of article 319 of the Commercial Companies Code (“CCC”) entails the possibility of annulment (and not the nullity) of the contract and, in case the directors do not divest those shares within an one year term, as provided for in article 323(2) of the CCC, the directors will incur in liability for the losses suffered by the company.

The acquisition of own shares, when surpasses the threshold established in article 317(2) of the CCC, should not be declared null. Said acquisition(s) will be valid notwithstanding unlawful, being the company obliged to promote the divestiture of the corresponding shares within one year after the acquisition (article 323(2) of the CCC), under penalty of, due to not doing so, having to be annulled the shares that should have been divested, as foreseen in article 323(3) of the CCC.

**Judgement of the Appealing Court of Lisbon, of 10 April 2019
(proceedings No. 293/18.7YUSTRL.L1-3)**

Perpetrates the administrative offence provided for in article 211(1)(q) of the General Framework of Credit Institutions and Financial Companies, corresponding to the occultation of relevant information about itself, the defendant who, when delivering the questionnaire prepared under the terms of Instruction No.30/2010 of the Bank of Portugal, omits its position as defendant in criminal proceedings for actions or omissions susceptible of integrating the perpetration of the criminal offence of breach of secrecy or misuse of secrecy, provided for, respectively, in articles 195 and 196 of the Criminal Code, and also by the perpetration of the criminal offence of abuse of information, provided for in article 378 of the Securities Code.



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