
Banking, Finance and Capital Markets

Newsletter Portugal

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I – Electronic Clearing System (ECOMPENSA)

Decree-Law no. 150/2019, of 10 October 2019 (“**DL 150/2019**”), in force since 1 January 2020, creates and regulates the Electronic Clearing System (“**ECOMPENSA**”), composed of accredited electronic platforms for the purpose of extinguishing, partially or in whole, through voluntary clearing, the obligations of their participant entities. Articles 837 to 840 and 847 to 856 of the Civil Code are applicable on a subsidiary basis (provided that they do not contravene DL 150/2019 and the Ordinance – as defined below).

A. SCOPE OF ECOMPENSA

➤ *Personal scope (participant entities)*

Any persons, whether individuals or legal entities, can be participant entities of ECOMPENSA, provided that they hold, in Portugal, respectively, a taxpayer number or a legal person number. Notwithstanding, if an “*insolvency proceeding or equivalent*” (as defined in article 5(3) of DL 150/2019) is pending regarding a participant entity, the same will entail the immediate refusal or revocation, by the managing entity, of the inscription in a platform of ECOMPENSA.

The inscription in a platform of ECOMPENSA is voluntary and effected by means of the execution of a voluntary clearing agreement between the participant entity and the managing entity, which shall contain the obligations of the parties under the terms of DL 150/2019 and of the ordinance to be approved by the Portuguese Government with the aim to determine, further to those obligations, the rules on the incorporation, functioning and management of the platforms (“**Ordinance**”). This agreement shall also provide for the provision of consent of the participant entity in favor of the managing entity regarding all and any assignment of credits or clearing which the latter comes to order through the platform.

As a result of the inscription, the participant entities become bound to the following obligations set forth in article 6(2) of DL 150/2019:

- communicate immediately to the managing entity any impeding circumstance regarding a clearing order;
- provide the managing entity with all information requested that is necessary for the identification of the credits and obligations which they hold;
- remove immediately from the platform any credit or obligation as soon as the same is terminated by any reason.

Any participant entity may, freely and at all time, request the cancellation of its inscription with immediate effect and without prejudice of the effectiveness and validity of the clearing orders already registered.



> *Material scope (eligible obligations)*

The pecuniary obligations emerging from legal acts or businesses, which are due and payable, may be subject to clearance through a platform of ECOMPENSA, provided that the relevant creditors and debtors are participant entities. Nonetheless, it is necessary that the same consist of obligations or credits voluntarily inscribed in the platform by the debtor or the creditor participant entity, respectively, and that they have been validated (under the terms of the Ordinance) by the relevant participant entities prior to the clearing date.

The voluntary inscription of the obligations or credits, and their respective validation, entails the waiver, by the relevant participant entity, to claim any exceptions of material law in relation to those obligations or credits. However, the right of the participants to extinguish the respective obligations or credits by alternative means, namely, through legal clearing (in whose case the participant entity is obliged to remove the obligation or credit from the platform) is not barred. By the same token, any participant entity may, at all time, withdraw effectiveness to the inscription or validation of obligations or credits (under the terms of the Ordinance to be approved).

Without prejudice to article 853 of the Civil Code, the clearing in the context of ECOMPENSA (pursuant to article 8(6) of DL 150/2019) is not permitted regarding:

- > of unseizable credits;
- > of credits which, on the date of the inscription in the electronic platform, are object of a security in favor of a third party or over which there are rights of third parties;
- > of credits which have been attached, seized or, by any other form, apprehended in the context of legal disputes;
- > of credits in relation to which the right of clearance has been waived.

B. CLEARING ORDERS

The extinction of obligations by voluntary clearing becomes effective through the registration of the issuance of a clearing order, which can be simple or complex:

- > *simple clearing order*: extinction, partially or in whole, of obligations of two participant entities which are, reciprocally, creditor and debtor;
- > *complex clearing order*: it is composed by, cumulatively and sequentially:
 - (a) the assignment of credits between participant entities in the context of one or more *pro solvendo* transfers in lieu, over credits registered in a platform and validated by the debtor participant entity (being this assignment of credits notified to the debtor participant entity by the managing entity);
 - (b) a clearance of credits which extinguishes, partially or in whole, obligations of two participant entities which, through the aforementioned *pro solvendo* transfer in lieu, reciprocally became creditor and debtor.



The retroactivity provided for in article 854 of the Civil Code is not applicable to the voluntary clearing in the context of ECOMPENSA (even if the cleared credits were susceptible of legal clearance),

After their registration, clearing orders are irrevocable, being enforceable vis-à-vis third parties, even in case of insolvency or equivalent in relation to a participant entity, provided that the orders have been registered before the commencement of the respective proceeding (being valid also on the day of commencement of the respective proceeding if the managing entity demonstrates that it did not know nor had it the obligation to know of the commencement of that proceeding).

No rule, whichever the legal source, which determines the ineffectiveness, invalidity or in any way affects the legal acts or businesses performed before the commencement of the insolvency proceeding or equivalent, may lead to the invalidity, modification or in any way harm of a clearing operation validly performed in the context of ECOMPENSA.

C. MANAGING ENTITY, SUPERVISION AND AUDITS

> *Role, duties and remuneration of the managing entity*

The managing entity is responsible for the management and functioning of a clearing electronic platform integrated in ECOMPENSA. The same has, through the platform, several duties, from issuing the clearing orders and the resulting discharge receipts evidencing the extinction of the obligations (partially or in whole), to a set of duties of technical nature, duties of computer recording, data protection, equal treatment, amongst others.

The managing entity of a platform shall also: (i) subscribe and maintain a civil liability insurance considering the nature and scope of the risks inherent to its activity – whose contractual characteristics (namely the minimum capital) will be determined by the Ordinance –, and (ii) refuse the inscription in a platform of ECOMPENSA managed by it of any company which is in a group or control relationship with itself.

Its remuneration is paid, on an equitable basis, by the participant entities involved in the clearing operation, not being able to exceed the maximum percentage defined through the Ordinance, which cannot be higher than 1% of the amount object of clearance.

> *Supervision powers and audits*

The electronic platforms of ECOMPENSA are accredited by the National Center of Cybersecurity (*Centro Nacional de Cibersegurança*) (“**CNCS**”) and supervised by the Agency for the Administrative Modernization, P.I. (*Agência para a Modernização Administrativa, I.P.*) (“**AMA**”), which shall monitor the electronic platforms’ management activity, being able to



request from the managing entities, the participant entities and any public services or authorities, the cooperation and support that may be necessary.

AMA and CNCS may, at all time and without prior notice, promote audits to the electronic platforms, being obliged to prepare the relevant reports. Upon detection of a situation of non-compliance, AMA and CNCS shall demand that the managing entity promotes its correction within a 30-day period, following which a new audit shall be performed. In case of persistence of any identified breach, these entities may be obliged to cancel the accreditation of the relevant electronic platform of ECOMPENSA.

D. SANCTIONS FRAMEWORK

Without prejudice to any potential civil or criminal liability, under the terms of article 18 of DL 150/2019 it is foreseen a catalogue of administrative offences punishable with fines:

- *in case of individuals*, and according to the perpetrated infringements, (i) ranging from EUR 350 to EUR 1,500, or (ii) ranging from EUR 750 to EUR 3,000;
- *in case of legal persons*, and according to the perpetrated infringements, (i) ranging from EUR 5,000 to EUR 25,000, or (ii) ranging from EUR 10,000 to EUR 40,000.

Both the infringement attempts and the negligent infringements are punishable, in which case the fines' thresholds shall be reduced in half. The director council of AMA is responsible for the investigation and decision of the relevant proceedings of administrative offences, as well as for the application of fines and ancillary sanctions resulting from the same.

II – Legislation: Banking & Finance Law

National law

Ordinance No 356/2019 – Official Journal No 193/2019, Series I of 08-10-2019

Regulates the electronic communications of the judicial courts to the Bank of Portugal (“BoP”) in the context of the proceedings regulated by the Insolvency and Corporate Recovery Code, approved by Decree-Law No 53/2004, of 18 March 2004, determining that it shall be henceforth communicated to the BoP, via electronic mean, the declaration of insolvency, for the purposes of inscription in the credit risks' central, as well as the decision to close proceedings.



European Union law

Regulation (EU) 2019/2176 of the European Parliament and of the Council, of 18 December 2019 – EU Official Journal, L-334, of 27-12-2019

Amends Regulation (EU) No 1092/2010 on EU macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

Regulation (EU) 2019/2175 of the European Parliament and of the Council, of 18 December 2019 – EU Official Journal, L-334, of 27-12-2019

Amends, in respect of the supervision powers and the prevention and combat of the money laundering and terrorist financing, amongst others: (i) Regulations (EU) No 1093/2010, No 1094/2010 and No 1095/2010, which established, respectively, the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority, (ii) Regulation (EU) No 600/2014, on markets in financial instruments (“**Regulation (EU) 600/2014**”), (iii) Regulation (EU) 2016/1011, on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and (iv) Regulation (EU) 2015/847 on information accompanying transfers of funds.

Regulation (EU) 2019/2160 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal, L-328, of 18-12-2019

Amends, as regards exposures in the form of covered bonds, Regulation (EU) No 575/2013, on prudential requirements for credit institutions and investment firms (“**Regulation (EU) 575/2013**”).

Commission Regulation (EU) 2019/2104, of 29 November 2019 – EU Official Journal, L-318, of 10-12-2019

Amends Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 as regards International Accounting Standards 1 and 8.

Regulation (EU) 2019/2088 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal, L-317, of 09-12-2019

Lays down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products.

Regulation (EU) 2019/2033 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal, L-314, of 05-12-2019

Lays down uniform prudential requirements which apply to investment firms and amends (i) Regulation (EU) No 1093/2013, which established the European Banking Authority, (ii) Regulation (EU) 575/2013, (iii) Regulation (EU) 600/2014, and (iv) Regulation (EU) No 806/2014, establishing uniform rules and a uniform procedure for the resolution of



credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

Commission Implementing Regulation (EU) 2019/2028, of 29 November 2019 – Official Journal L-313, of 04-12-2019

Amends, as regards the mapping tables specifying the correspondence between the credit risk assessments of external credit assessment institutions and the credit quality steps, Implementing Regulation (EU) 2016/1799, laying down implementing technical standards with regard to the mapping of credit assessments of external credit assessment institutions for credit risk in accordance with Articles 136(1) and 136(3) of Regulation (EU) No 575/2013.

Directive (EU) 2019/2162 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal, L-328, of 18-12-2019

Lays down investor protection rules concerning covered bonds issued by credit institutions established in the EU, in respect of: (i) issuing requirements, (ii) structural features, (iii) public supervision, and (iv) publication requirements. It also amends Directive 2009/65/EC, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (“**Directive 2009/65/EC**”), and Directive 2014/59/EU, establishing a framework for the recovery and resolution of credit institutions and investment firms (“**Directive 2014/59/EU**”).

Directive (EU) 2019/2034 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal, L-314, of 05-12-2019

Lays down, on the prudential supervision of investment firms, rules concerning (i) initial capital of investment firms, (ii) supervisory powers and tools for the prudential supervision, (iii) the prudential supervision of investment firms by competent authorities in a manner that is consistent with the rules set out in Regulation (EU) 2019/2033, and (iv) publication requirements for competent authorities in the field of prudential regulation and supervision of investment firms.

Moreover, it amends: (i) Directive 2002/87/EC, on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, (ii) Directive 2009/65/EC, (iii) Directive 2011/61/EU, on alternative investment fund managers, (iv) Directive 2013/36/EU, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, (v) Directive 2014/59/EU, and (vi) Directive 2014/65/EU, on markets in financial instruments, commonly designated MiFID II (“**Directive 2014/65/EU**”).

Directive (EU) 2019/1937 of the European Parliament and of the Council, of 23 October 2019 – EU Official Journal, L-305, of 26-11-2019

Enhances the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law (*whistleblowing*).



Regulations of the Bank of Portugal (BoP)

Regulation No 3/2019 – Official Journal No 212/2019, Series II, Part E, of 05-11-2019

Amends Regulation No 11/2014 of the BoP, which regulates the application of the prudential requirements established in Regulation (EU) 575/2013, now encompassing, in its scope, the branches in Portugal of financial institutions with registered office in another Member State.

Instructions of the Bank of Portugal (BoP)

Instruction No 22/2019 – Official Bulletin No 11/2019, 3rd Supplement, of 11-12-2019

Discloses, for the 1st quarter of 2020, 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 21/2019 – Official Bulletin No 11/2019, Supplement, of 25-11-2019

Regulates the duty of reporting to the BoP the cybersecurity incidents qualified as significant or severe, by entities supervised by the BoP and by significant credits institutions with registered office in Portugal supervised by the European Central Bank (“ECB”).

Instruction No 20/2019 – Official Bulletin No 11/2019, of 15-11-2019

Establishes uniform templates for the disclosure of information on non-performing exposures, restructured exposures and enforced assets which the institutions shall use for the purposes of complying with the disclosure requirements established in Regulation (EU) 575/2013. It also amends Instruction No 5/2018, which implemented the European Banking Authority guidelines on (i) disclosure requirements under Part Eight of Regulation (EU) No 575/2013 and (ii) LCR disclosure to complement the disclosure of liquidity risk management under Article 435 of Regulation (EU) No 575/2013.

Instruction No 19/2019 – Official Bulletin No 10/2019, 3rd Supplement, of 06-11-2019

Amends Instruction No 54/2012, which regulates the functioning, in Portugal, of the trans-European automated real-time gross settlement express transfer system (TARGET2), following the publication of Guideline ECB/2019/30, which amended Guideline ECB/2012/27 on a trans-European automated real-time gross settlement express transfer system.

Instruction No 18/2019 – Official Bulletin No 10/2019, 2nd Supplement, of 05-11-2019

Amends Instruction 5/2017, which regulates the reporting of information for supervision purposes, on an individual basis, for some entities, starting to include branches in Portugal of financial institutions with registered office in another Member State.



Bank of Portugal Circular Letters

Circular Letter No CC/2019/ 00000083 – Official Bulletin No 12/2019, Supplement, of 23-12-2019

Disseminates the good practices to be followed by credit institutions and other payment services' providers in the offer to their clients of the commissions' statement through digital channels and electronic mail.

Circular Letter No CC/2019/ 00000070 – Official Bulletin No 11/2019, of 15-11-2019

Informs on the deadlines for the notification of the amount of minimum reserves (monthly and quarterly reports) and on the calendar of the periods of maintenance of minimum reserves for the year of 2020, according to Regulation (EC) No 1745/2003 of the ECB on the application of minimum reserves (“**Regulation (EC) 1745/2003**”).

Circular Letter No CC/2019/ 00000066 – Official Bulletin No 10/2019, of 15-10-2019

Regulates Instruction No 1/2011, on the rules of utilization of Intelligent Banknote Neutralization Systems (“**IBNS**”) and exchange of euro banknotes damaged by action of these systems, establishing specific utilization rules for each class of IBNS. It revokes Circular Letter No 1/2011/DET, of 18 January 2011.

Circular Letter No CC/2019/ 00000065 – Official Bulletin No 10/2019, of 15-10-2019

Communicates to credits institutions, investments firms, payment institutions and electronic money institutions subject to the supervision of the BoP, that they shall, as of 31 May 2020, comply with the requirements provided for in the “*Guidelines on outsourcing arrangements*” (EBA/GL/2019/02), related with the implementation of mechanisms and procedures on the management of outsourced functions, aiming at strengthen and harmonize the outsourcing practices of the addressee entities.

Acts of the European Central Bank (ECB)

Decision (EU) 2019/1848 of the ECB, of 29 October 2019 – EU Official Journal L-283, of 05-11-2019

Amends Decision ECB/2007/7 concerning the terms and conditions of TARGET2-ECB (ECB/2019/32).

Guidelines of the European Banking Authority (EBA)

EBA Guidelines on ICT and security risk management, of 28 November 2019

Establish requirements for credit institutions, investment firms and payment service providers on the mitigation and management of their information and communication technology (ICT) and security risks and aim to ensure a consistent and robust approach across the single market.



III – Legislation: Insurance and Pension Funds Law

European Union law

Commission Delegated Regulation (EU) 2019/1935, of 13 May 2019 – EU Official Journal L-301, of 22-11-2019

Amends Directive (EU) 2016/97, on insurance distribution, with regard to regulatory technical standards adapting the base euro amounts for professional indemnity insurance and for financial capacity of insurance and reinsurance intermediaries, which correspond to EUR 1,300,380 per accident and, in aggregate, EUR 1,924,560 per year.

Directive (EU) 2019/2177 of the European Parliament and of the Council, of 18 December 2019 – EU Official Journal L-334, of 27-12-2019

Amends (i) Directive 2009/138/EC, on the taking-up and pursuit of the business of Insurance and Reinsurance (“**Solvency Directive II**”), (ii) Directive 2014/65/EU and (iii) Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing.

Standards of the Insurance and Pension Funds Supervisory Authority (ASF)

ASF Regulatory Standard No 7/2019-R – Official Journal No 246/2019, Series II, Part E, of 23-12-2019

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 first quarter of 2020.

Other European Union acts

Notices from Member States to the European Commission, of 18 October 2019 – EU Official Journal C-355, of 18-10-2019

Notice from Member States to the Commission of the risks against which insurance is compulsory under its legislation, pursuant to article 179(4) of Solvency Directive II.

IV – Legislation: Securities and Capital Markets Law

European Union law

Regulation (EU) 2019/2099 of the European Parliament and of the Council, of 23 October 2019 – EU Official Journal L-322, of 12-12-2019

Amends Regulation (EU) No 648/2012, on OTC derivatives, central counterparties (“**CCP**”) and trade repositories, as regards the procedures and authorities involved for the authorization of CCPs and requirements for the recognition of third-country CCPs (“**Regulation (EU) 648/2012**”).



Regulation (EU) 2019/2115 of the European Parliament and of the Council, of 27 November 2019 – EU Official Journal L-320, of 11-12-2019

Amends, as regards the promotion of the use of small medium enterprises (SME) growth market, (i) Directive 2014/65/EU, (ii) Regulation (EU) No 596/2014, on market abuse, and (iii) Regulation (EU) 2017/1129, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

Commission Regulation (EU) 2019/2075, of 29 November 2019 – EU Official Journal L-316, of 06-12-2019

Amends Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002, as regards International Accounting Standards 1, 8, 34, 37 and 38, International Financial Reporting Standards 2, 3 and 6, Interpretations 12, 19, 20 and 22 of the International Financial Reporting Interpretations Committee and Interpretation 32 of the Standing Interpretations Committee.

Commission Delegated Regulation (EU) 2019/1851, of 28 May 2019 – EU Official Journal L-285, of 06-11-2019

Supplements Regulation (EU) 2017/2402, laying down a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization, with regard to regulatory technical standards on the homogeneity of the underlying exposures in securitization.

Guidelines of the European Securities and Markets Authority (ESMA)

ESMA Guidelines on risk factors under the Prospectus Regulation, of 9 December 2019

Guidelines on the risk factors under Regulation (EU) 2017/2019, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.



V – Relevant Case Law

Judgement of the Supreme Court of Justice, of 27 November 2019 (proceedings No 12693/16.2T8PRT.P1.S1)

Upon a transfer order, the bank becomes obliged to execute the order in accordance with the stipulated conditions and within the limit of the accessible funds, using due diligence and acting in accordance with the instructions received. Otherwise, the bank will be liable towards its client, originator of the bank transfer.

If the instructions for a bank transfer are written in an email of the client, but have not been transmitted by the same, the client is responsible for providing the proceedings' file with objective evidence of said instructions having been the result of a cyber-attack, thus being responsible for producing evidence of the typical liability conditions. Effectively, only if it had been evidenced that the transfer orders were issued by a person, other than the client, and without the client's approval, could be questioned whether the bank had complied with the duties of care contractually imposed on the bank when executed those transfer orders in the context of the existing contractual banking relationship.

Judgement of the Court of Appeal of Oporto, of 22 October 2019 (proceedings No 16315/18.9T8PRT-A.P1)

The autonomous bank guarantee on first demand assumes that the guarantor bank shall proceed with the payment of the secured amount upon being requested to do so by the guarantee's beneficiary, without arguing the underlying conditions to the right to receive the secured amount by the beneficiary. Only in very limited cases that discussion is admissible as are, amongst others, the situations of (i) unlawfulness by violation of public order principles, (ii) manifest fraud or evident abuse, (iii) termination of the guarantee by fulfilment, as well as (iv) termination or expiration thereof.

If the text of the bank guarantee does not stipulate any term of validity, the same is only terminated upon termination of the main obligation; coincidence in time between the validity of the bank guarantee and the term of the guarantee period of the works carried out shall only exist if expressly agreed.



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