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# Banking, Finance and Capital Markets

Newsletter Portugal

First Quarter 2020

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## CMVM Regulation on prevention of money laundering and terrorist financing

On March 17, 2020, CMVM Regulation 2/2020, on the prevention of money laundering and terrorist financing (“**AML Regulation**”), was published. This regulation further develops the legal framework of Act 83/2017, of August 18, 2017 (the “**AML Act**”).

The AML Regulation regulates the anti-money laundering and anti-terrorist financing obligations of (i) financial entities subject to the supervision of the Portuguese Securities and Exchange Commission (*Comissão do Mercado de Valores Mobiliários*) (“**CMVM**”); and (ii) auditors. It also establishes their reporting duties toward CMVM.

### > Scope

The AML Regulation applies to:

- > financial entities subject to the sole supervision of CMVM or shared supervision with the Bank of Portugal; and
- > corporatized or sole practice auditors subject to the sole or shared supervision of CMVM.

### > Internal control system

Under the AML Act, obliged entities must have policies, procedures and controls in place to manage money laundering and terrorist financing risks effectively and to comply with the legal and regulatory provisions on this matter. Under the AML Regulation, at least every 12 months, obliged entities must ensure their policies, procedures and controls are adequate and up to date. However, if obliged entities can prove that they have a low exposure to money laundering and terrorist financing risks, they can do this every 24 months (maximum).

### > Compliance officer

Under article 4 of the AML Regulation, the compliance function regarding anti-money laundering matters may be cumulated with the compliance officer role. Moreover, the compliance officer may be a third-party if (i) it holds the same function in a financial entity (subject to CMVM’s supervision) of the same group, or (ii) the appointed person is an auditor registered with CMVM.

The appointed officer’s identity must be notified to CMVM by email, with the first deadline being May 16, 2020.



### > Effectiveness assessment

Obligated entities must also assess the effectiveness of their policies, procedures and controls at least every 12 months. Again, if obligated entities can prove that they have a low exposure to money laundering and terrorist financing risks, they may do this every 24 months (maximum).

Entities must also ensure that their effectiveness assessments are independent if:

- > they have 50 or more employees (excluding directors); or
- > their turnover was higher than €20,000,000 in the last economic year.

### > Customer due diligence

Main additions of the AML Regulation:

- > Obligated entities may use videoconference mechanisms or trust services providers, provided a copy of the identification document is previously obtained.
- > Customer identification verification, as established in article 26(3) of the AML Act, can now be carried out within 60 days from the date the information was collected.
- > In circumstances involving low money laundering and terrorist financing risks, information on beneficial owners may be proven in a statement issued by the customer or its representative.
- > The range of factors allowing entities to adopt simplified or enhanced measures has been widened.

### > Reporting duties

Annex I to the AML Regulation lists the information obligated financial entities must prepare and submit to CMVM annually; Annex II to the AML Regulation lists the information that auditors must submit to CMVM annually. Both have until February 28 of each year to submit this information, which refers to the period between January 1 and December 31 of the previous year.

However, for 2018 and 2019, obligated financial entities have until September 30, 2020, to submit the above information (as per CMVM letter dated April 2, 2020).

Obligated entities operating in Portugal under the freedom to provide services regime are exempt from presenting the above report. However, some of these entities are required to submit to CMVM an annual report on their activities in Portugal.



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## CMVM Regulation on management of collective investment undertakings

On March 23, 2020, CMVM Regulation 3/2020 was published, being the third amendment to CMVM Regulation 2/2015 (“**Regulation 2/2015**”), on the management of collective investment undertakings.

The amendment of Regulation 2/2015 reflects the recent review of the Legal Framework on Collective Investment Undertakings, approved by Act 16/2015, of February 24, 2015, and republished by Decree-Law 144/2019, of September 23, 2019. One of the main purposes of this legislative amendment was to transfer, from the Bank of Portugal to CMVM, the prudential supervision of collective investment undertakings (“**SGOIC**”). Following this transfer, CMVM is the entity responsible for the prudential and behavioral supervision of SGOICs.

Regulation 2/2015 now regulates the procedural elements related to the SGOIC authorization procedure, particularly the documentation and information that must complement the program of activity or organizational structure, as well as the human, technical and material means. Regarding internal policies and procedures, Regulation 2/2015 now lists the documents that must be submitted to CMVM, namely those relating to compliance, risk management, internal audit, conflicts of interest, or prevention of money laundering and terrorist financing.

The following procedures are also regulated:

- Notification to reduce or application to extend the authorization scope
- Prior notification of substantial amendments to the authorization’s conditions
- Application for authorization of mergers or demergers that involve SGOIC

Regarding the IT systems that the manager must put in place, CMVM Regulation 3/2020 introduces additional means that shall be ensured by SGOIC performing the following activities:

- portfolio management on behalf of third parties;
- reception and transmission of orders in relation to financial instruments; or
- registration and deposit of investment units.

Regarding the human means, SGOIC employees must ensure they comply with Regulation 3/2018 if they carry out certain activities, such as investment advice, portfolio management on behalf of third parties or provision of information to investors in financial products and investment services.



As anticipated by Circular Letter of January 17, 2020, Regulation 3/2020 clarifies that SGOIC must continue to prepare its financial statements on an individual and consolidated basis according to the International Accounting Standard.

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## Legislation: Banking and finance law

### National law

#### **Decree-Law 9/2020 – Official Journal 49/2020, Series I, of March 10, 2020**

Establishes the measures that goods and services suppliers must take to fulfil the obligation of maintaining an electronic complaints book, amending Decree-Law 156/2005, of September 15, 2005, which establishes the obligation of making a complaints book available for all goods and services suppliers in contact with the general public.

#### **Notice 1568/2020 – Official Journal 21/2020, Series II, Part C, of January 30, 2020**

General Directorate of Treasury and Finance: Publication of the subsidiary rates of default interest in effect in the first semester of 2020: (i) under article 102.3 of the Commercial Code, the default interest subsidiary rate for credits held by commercial companies or individual or legal persons is 7%; and (ii) under article 102.5 of the Commercial Code and Decree-Law 62/2013, of May 10, 2013, the default interest subsidiary rate for credits held by commercial companies or individual or legal persons is 8%.

### European Union law

#### **Commission Regulation (EU) 2020/34, of January 15, 2020 – EU Official Journal, L-12, of January 16, 2020**

Amends Regulation (EC) 1126/2008, adopting certain international accounting standards under Regulation (EC) 1606/2002 of the European Parliament and of the Council regarding (i) International Accounting Standard 39 (Financial Instruments: Recognition and Measurement); and (ii) International Financial Reporting Standards (“IFRS”) 7 (Financial Instruments: Disclosures) and 9 (Financial Instruments).



## Instructions of the Bank of Portugal

### **Instruction 7/2020 – Official Bulletin 3/2020, 2<sup>nd</sup> Supplement, of March 31, 2020**

Discloses the maximum rates to be applied to consumer credit agreements in the second quarter of 2020.

### **Instruction 6/2020 – Official Bulletin 2/2020, 2<sup>nd</sup> Supplement, of March 6, 2020**

Promotes the amendment of Instruction 5/2019 to include, in the Report on the Prevention of money laundering and terrorist financing, information referring to the specific procedures to comply with Regulation (EU) 2015/847, on information accompanying transfers of funds.

### **Instruction 5/2020 – Official Bulletin 2/2020, of February 17, 2020**

Regulates the reporting, to the BoP, of information on payment systems, instruments, transactions and services, as well as transfers of funds, including information regarding fraud.

### **Instruction 3/2020 – Official Bulletin 1/2020, 2<sup>nd</sup> Supplement, of February 14, 2020**

Amends Instruction 34/2018, which established the reporting of interest rate risk exposure of activities not included in the negotiation portfolio, as well as the results of the standard shock evaluated by the supervisor. This amendment updates the standardized reporting of interest rate risk exposure resulting from these activities, as well as the impact on the variation of the economic value and the financial margin of a rapid and unexpected change in the interest rates of 200 basis points in the yield curve.

### **Instruction 2/2020 – Official Bulletin 1/2020, Supplement, of January 17, 2020**

Revokes Instruction 4/2011, which defined the legal framework for carrying out stress tests and the potential adoption of corrective measures, following the entry into force of the European Banking Authority (“EBA”) Guidelines (EBA/GL/2018/04) on institution stress testing.

### **Instruction 1/2020 – Official Bulletin 1/2020, of January 15, 2020**

Amends Instruction 7/2019, incorporating the most recent EBA Guidelines (EBA/GL/2018/08 and EBA/GL/2018/09) on the STS criteria (simple, transparent and standardized) applicable to ABCP (asset-backed commercial paper) securitization and non-ABCP (i.e., securitization backed by assets other than commercial paper).

## Bank of Portugal Circular Letters

### **Circular Letter CC/2020/00000015 – Official Bulletin 3/2020, of March 16, 2020**

Informs on the framework and operationalization of disseminating information through the banking system regarding situations of loss, theft, falsification, counterfeiting or the unlawful use of personal identification documents, through the Electronic Platform of Registry and Transfer of Trades (PERTO), which is the electronic means provided in the



Banking Customer Portal, which was disclosed in Circular Letter CC/2020/00000010, of February 17, 2020.

Revokes Circular Letter CC/2019/00000047, of May 15, 2019.

### **Circular Letter CC/2020/00000013 – Official Bulletin N3/2020, of March 16, 2020**

Recommends that, when granting and restructuring credits of debtors or groups of debtors with increased risk, the risk increase should be subject to the approval of the institution's management body, which should hold a plenary session. It also recommends that (i) the supervisory body be immediately informed of the transactions the management body analyzes, regardless of whether it approves or denies the increased risk of the debtors or groups of debtors; and (ii) institutions send to the BoP, by June 30, 2020, the internal policies approved following the previous recommendations.

### **Circular Letter CC/2020/00000004 – Official Bulletin 2/2020, of February 17, 2020**

Discloses, according to paragraph 9 of Instruction 18/2015, the reporting templates of the financing and capital plans, the description of the macroeconomic and financial scenario, and other guidelines necessary for institutions to provide information.

## **Acts of the European Central Bank (ECB)**

### **Decision (EU) 2020/187 of the ECB, of February 3, 2020 – EU Official Journal L-39, of February 12, 2020**

Implements the third covered bond purchase program of the central banks of the Eurosystem.

### **Guideline (EU) 2020/381 of the ECB, of February 21, 2020 – EU Official Journal L-69, of March 6, 2020**

Amends Guideline (EU) 2017/2335 on the procedures for collecting granular credit and credit risk data.

## **Guidelines of the European Banking Authority (EBA)**

### **EBA Guidelines on fraud reporting, of January 22, 2020**

Updates the EBA Guidelines (EBA/GL/2018/05) on fraud reporting under Directive (EU) 2015/2366, on payment services in the internal market.



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## Legislation: Insurance and pension funds law

### European Union law

#### **Commission Delegated Regulation (EU) 2020/442, of December 17, 2019 – EU Official Journal L-92, of March 26, 2020**

Amends Delegated Regulation (EU) 2015/35, supplementing Directive 2009/138/EC on taking up and pursuing the business of insurance and reinsurance, correcting the rules on the look-through approach regarding related undertakings, and replaces, in Annex X, the schedule referring to the risk weights for flood risk.

#### **Commission Implementing Regulation (EU) 2020/193, of February 12, 2020 – EU Official Journal L-40, of February 13, 2020**

Establishes the technical information for calculating technical provisions and basic own funds for reporting with reference dates from December 31, 2019, to March 30, 2020, according to Directive 2009/138/EC, on taking up and pursuing the business of insurance and reinsurance.

### Other European Union acts

#### **Resolution of the European Parliament on international financial reporting standards, of October 3, 2018 – EU Official Journal C-11, of January 13, 2020**

Resolution on IFRS 17 (Insurance Contracts), describing the current legal framework on this subject and calling the European Systemic Risk Board to establish a taskforce on IFRS 17 and the European Commission to ensure that, if IFRS 17 is adopted, the same will be conducive to the European public good, including its sustainability and long-term investment objectives in line with the Paris Agreement.

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## Legislation: Securities and capital markets law

### European Union law

#### **Commission Delegated Regulation (EU) 2020/448, of December 17, 2019 – EU Official Journal L-94, of March 27, 2020**

Amends Delegated Regulation (EU) 2016/2251 regarding the specification of the treatment of over-the-counter derivatives relating to certain simple, transparent and standardized securitizations for hedging purposes.

#### **Commission Delegated Regulation (EU) 2020/447, of December 16, 2019 – EU Official Journal L-94, of March 27, 2020**

Supplements Regulation (EU) 648/2012 regarding the regulatory technical standards on the specification of criteria for establishing the arrangements to adequately mitigate



counterparty credit risk associated with covered bonds and securitizations. It also amends Delegated Regulations (EU) 2015/2205 and (EU) 2016/1178 regarding the regulatory technical standards on the clearing obligation.

## Regulations of the Securities and Exchange Commission (CMVM)

### **CMVM Regulation 4/2020 – Official Journal 56/2020, Series II, Part E, of March 19, 2020**

Regulates Decree-Law 453/99, of November 5, 1999, regarding the functioning of securitization funds and managing companies of securitization funds. It also amends (i) CMVM Regulation 2/2002, of February 1, 2002, on securitization funds, and (ii) CMVM Regulation 12/2002, of August 24, 2002, on managing companies of securitization funds.

### **CMVM Regulation 1/2020 – Official Journal 39/2020, Series II, Part E, of February 25, 2020**

Establishes the reporting obligations toward CMVM for prudential supervision purposes.

## Circulars of the Securities and Exchange Commission (CMVM)

### **CMVM Circular of February 11, 2020**

Establishes the accounting regime applicable to managing companies of collective investments undertakings (SGOIC) and to managing companies of securitization funds (SGFTC) as of January 1, 2020.

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## Case law

### **Judgment of the Court of Appeal of Coimbra, of February 11, 2020 (proceedings 8592/17.9T8CBR.C1)**

To avoid computer fraud, the legal framework applicable to home banking contracts establishes duties that apply to both service providers and users. Breaching these duties gives rise to civil liability. If users suffer losses, the compensation amount depends on the extent to which they are implicated in the breach.

If users are found guilty of gross negligence, they must bear all the losses resulting from the fraud; if users are not involved in the breach, they will not bear any losses, unless they committed fraud.

However, providing security credentials in response to a fraudulent practice (e.g., phishing) cannot be considered gross negligence, as these practices affect a considerable number of people.



### **Judgment of the Court of Appeal of Lisbon, of February 6, 2020 (proceedings 4161/16.9T8ALM-A.L1-2)**

Establishes that, under article 695 of the Civil Code, a mortgage can be enforced if the mortgaged property is transferred, encumbered, leased (partially or wholly), subject to attachment, enforcement or any other type of precautionary proceedings or lawsuit. Therefore, if the property is seized, the mortgage creditor can still lawfully enforce the mortgage.

Furthermore, such legal provision shall also apply to, and it will not constitute a *venire contra factum proprium*, the situation where the mortgage creditor enforces the mortgage upon declaration of seizure over the mortgaged property, and later becomes the owner of part of that property, through the exercise of its right to claim its mortgage credit within the tax enforcement proceedings which led to the property's seizure, provided that no action of such creditor had occurred to motivate the relevant seizure.



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