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# Banking, Finance and Capital Markets

Newsletter Portugal

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## Contents

- > Regulation of the Bank of Portugal regarding the governance and internal control system and organizational culture
- > Amendments to the Portuguese legal framework on the prevention of money laundering and terrorist financing
- > Legislation: Banking and finance law
- > Legislation: Insurance and pension funds law
- > Legislation: Securities and capital markets law
- > Case law



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## Regulation of the Bank of Portugal regarding the governance and internal control system and organizational culture

The Bank of Portugal Regulation 3/2020 was published on July 15, 2020 (the “**Regulation**”), which revokes the Bank of Portugal Regulation 5/2008, on the internal control system, and the Bank of Portugal Regulation 10/2011, on remuneration policies and practices.

The Regulation aims to reform the regulations that preceded it because of a significant progress of national and international banking regulations.

Although the Regulation entered into force on July 16, 2020, institutions subject to it benefit from a six-month transitional period until the Regulation’s provisions become mandatory (i.e., until January 16, 2021).

### **Organizational conduct and culture**

New duties concerning organizational culture and conduct were established for members of financial institutions’ management bodies, namely:

- requirement for regular discussion, in their meetings and in meetings with other senior management members, of matters related to organizational conduct and culture, also ensuring the recording of the respective conclusions; and
- acting with care, loyalty and neutrality in relationships maintained with third parties, and ensuring that exempt, transparent and auditable internal procedures are adopted, namely when the institution is employing services and acquiring or disposing of its assets.

A list of minimum contents that must be addressed in institutions’ codes of conduct was also introduced, which includes matters related to risk tolerance, customer relationship and the legal and disciplinary consequences of failing to comply with the code of conduct.

### **Internal governance, structure and strategic planning**

To strengthen institutions’ internal oversight, (i) collective bodies’ meeting minutes must address certain minimum aspects and be drafted and recorded onto a document management computer system; (ii) management and supervisory bodies must assess and identify their necessities at a composition and organizational level; and (iii) an effective supervision of the institution must be carried out, under which the necessary conditions are put in place so that the supervisory body and the non-executive directors may fully carry out their functions.

Institutions considered other systemically important institutions (“**O-SII**”) will be required to have risk and remuneration committees.



Also, institutions that are not qualified as O-SII, but have employees, including members of management and supervisory bodies, earning annual remunerations equal to or above €1,000,000 per fiscal year are also required to have a remuneration committee.

### **Internal control and risk management system**

The internal control and risk management system was divided into three lines of defense, separated between business generating units, support divisions and internal audit functions.

Provided it adopts the required mechanisms to prevent or mitigate the risk of conflict of interests, an institution not qualified to take deposits may concentrate in a single structure division the responsibilities concerning the risk management and compliance functions. Regarding the internal audit functions, these may be dismissed or outsourced under the terms described in the Regulation.

### **Related parties and conflict of interests**

In addition to implementing a related-party transactions' policy, institutions must also prepare a list of their related parties, which they must update every quarter. The concept of "related parties" is established in the Regulation and will include depositors, creditors and debtors whose relationship with the institution could potentially enable them to influence its management to achieve a business relationship outside normal market conditions.

Transactions with related parties must be carried out under market conditions and approved by a minimum of two thirds of the management body's members after obtaining opinions from the risk management and compliance functions, as well as from the supervisory body.

### **Whistleblowing**

A whistleblowing policy that ensures the confidentiality of whistleblowers, as well as an autonomous internal reporting procedure, must also be implemented, and a support computer system may be outsourced for this purpose.

### **Outsourcing**

Institutions are also required to adopt an outsourcing policy, under which the outsourcing is limited considering the scope (internal control's specific operational tasks) and whenever the outsourcee is not established in a jurisdiction with a legal framework that includes prohibitions or restrictions that prevent or limit compliance with the legal and regulatory rules governing the institution's activity.

### **Selection and appointment of the statutory auditor**

Institutions must approve a statutory auditor selection and appointment policy (regarding the appointment of a certified public accountant or a company of certified public accountants), also covering the contracting of non-forbidden services that do not relate to supervision, which must be



approved by the institution's general meeting after the opinion of the supervisory body has been obtained.

### **Remuneration policies and practices**

The independent nature of the remuneration committee must be further strengthened, as it must be made up of a majority of independent members under article 414(5) of the Portuguese Companies Code.

### **Annual self-evaluation report**

The previous internal control report was replaced by an annual self-evaluation report, which must be comprised of independent assessments from both the supervisory body and management body, as well as reports from the internal control functions. Compared to its predecessor, the annual self-evaluation report includes a broader scope, namely concerning organizational culture, corporate governance, internal control, related parties, conflict of interests, outsourcing, and remuneration matters.

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## **Amendments to the Portuguese legal framework on the prevention of money laundering and terrorist financing**

Law 58/2020, published in the Official Journal on August 31, 2020, implemented into the Portuguese legal order Directive (EU) 2018/843 of the European Parliament and of the Council, of May 30, 2018, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and Directive (EU) 2018/1673 of the European Parliament and of the Council, of October 23, 2018, on combating money laundering by criminal law.

This transposition introduced several amendments to multiple Portuguese laws, notably to Law 83/2017, of August 18, 2017 (the "**AML Act**"), regarding which we highlight the following amendments:

- **Scope**: the AML Act now includes as obliged entities venture capital companies, venture capital management companies, securitization companies and securitization fund management companies, real estate investment trusts and entities treated as payment institutions. It is also clarified that, besides insurance companies and insurance intermediaries, insurance intermediaries that carry out life insurance activities on an ancillary basis will also be obliged entities.
- **Ultimate beneficial owner**: the criteria used to determine the ultimate beneficial owner of companies have been adapted for collective investment undertakings. Certain pension funds will also be subject to the rules of ultimate beneficial owner identification.
- **Virtual assets**: following the introduction of the concept of "virtual currency," the exercise of activities related to it must comply with the duties established in the AML Act. The exercise of



those activities will also be subject to prior registration with the Bank of Portugal, which becomes the authority empowered to supervise activities involving virtual currencies.

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## Legislation: Banking and finance law

### Domestic law

#### **Decree-Law 78-A/2020 – Official Journal 190/2020, Series I, of September 29, 2020**

Amends (i) Decree-Law 10-J/2020, of March 26, 2020, amended by Law 8/2020, of April 10, 2020, by Decree-Law 26/2020, of June 16, 2020, and by Law 27-A/2020, of July 24, 2020, which establishes exceptional measures concerning the protection of credits from families, companies, private social security institutions and other social economy entities, which will apply for an additional six-month period, until September 30, 2021; (ii) Decree-Law 20-F/2020, of May 12, which establishes an exceptional and temporary framework on insurance agreements, which will apply until March 31, 2021; and (iii) Decree-Law 37/2020, of July 15, which establishes social measures within the Economic and Social Stability Program (*Programa de Estabilização Económica e Social*).

#### **Decree-Law 63/2020 – Official Journal 174/2020, Series I, of September 7, 2020**

Promotes the merger by incorporation of PME Investimentos - Sociedade de Investimento, S. A., and IFD - Instituição Financeira de Desenvolvimento, S. A. into SPGM - Sociedade de Investimento, S. A., which alters its corporate name to Banco Português de Fomento, S. A. (“BPF”). It regulates the activity and functioning of BPF and approves the respective bylaws.

#### **Law 58/2020 – Official Journal 169/2020, Series I, of August 31, 2020**

Transposes into Portuguese law (i) Directive (EU) 2018/843 of the European Parliament and of the Council, which amends Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and (ii) Directive (EU) 2018/1673 of the European Parliament and of the Council on combating money laundering by criminal law. It amends several laws.

#### **Law 57/2020 – Official Journal 168/2020, Series I, of August 28, 2020**

Establishes rules for the protection of consumers of financial services in banking commissions, housing credit and consumer credit, relating to duties of information and limits on the collection of commissions, amending (i) Decree-Law 133/2009, of June 2, 2009, on consumer credit agreements, (ii) Law 66/2015, of July 6, 2015, and (iii) Decree-Law 74-A/2017, of June 23, 2017, on consumer credit agreements for habitational housing.

#### **Law 53/2020 – Official Journal 166/2020, Series I, of August 26, 2020**

Establishes rules for the protection of consumers of financial services in banking commissions and in the use of payment applications operated by third parties, amending Decree-Law 3/2010, of January 5, 2010, which prohibits the collection of charges for the provision of payment services and for carrying out operations at ATMs.



## **Law 44/2020 – Official Journal 161/2020, Series I, of August 19, 2020**

Amends Decree-Law 27-C/2000, of March 10, 2000, which created the system for access to minimum banking services, now including transfers made through payment applications operated by third parties in the set of operations classified as minimum banking services.

## **Regulations of the Bank of Portugal (BoP)**

### **Regulation 4/2020 – Official Journal 137/2020, Series II, Part E, of July 16, 2020**

Amends, regarding the models and frequency of reporting, Regulation 2/2016, which regulates the reporting to the BoP of financial information, on an individual basis, for supervisory, statistical and macro-prudential risk analysis purposes.

### **Regulation 3/2020 – Official Journal 136/2020, Series II, Part E, of July 15, 2020**

Regulates the governance and internal control systems and determines the minimum standards on which the organizational culture of the entities subject to the BoP's supervision must stand. It revokes Regulations 5/2008 and 10/2011, as well as Instruction 20/2008.

## **BoP Instructions**

### **Instruction 25/2020 – Official Bulletin 9/2020, 2<sup>nd</sup> Supplement, of September 24, 2020**

Approves, within the prevention of money laundering and financing of terrorism framework ("ML/FT"), the reporting on activities carried out, in national territory, by financial entities from other Member States of the European Union, operating in Portugal under the freedom to provide services regime.

### **Instruction 24/2020 – Official Bulletin 8/2020, 5<sup>th</sup> Supplement, of September 9, 2020**

Discloses the maximum rates to be applied to consumer credit agreements, under Decree-Law 133/2009, of June 2, 2009, in the fourth quarter of 2020.

### **Instruction 22/2020 – Official Bulletin 7/2020, Supplement, of July 16, 2020**

Amends, regarding the subjective scope and Annexes I (*Financial Information*) and II (*Information on own funds and own funds requirements*), Instruction 5/2017, which regulates the reporting of information for the purposes of supervision, on an individual basis, of certain entities subject to the BoP's supervision.

### **Instruction 21/2020 – Official Bulletin 7/2020, of July 15, 2020**

Regulates the participation in the electronic communication system called "BPnet," including the access to the infrastructure and the subscription and availability of services within the scope of that system. It revokes Instruction 5/2016, on the "BPnet" system.

### **Instruction 20/2020 – Official Bulletin 7/2020, of July 15, 2020**

Amends Instruction 2/2017, which regulates the credit assessment internal system ("CAIS"), to provide for the use of CAIS (i) with the intervention of an analyst for credit rights portfolios, and (ii) without the intervention of an analyst, when the assessment of the credit quality of non-financial companies is made through a statistical process.



## **Instruction 18/2020 – Official Bulletin 7/2020, of July 15, 2020**

Regulates the reporting duties relating to the conduct and organizational culture and governance and internal control systems that entities subject to Regulation 3/2020 must comply to, on the conduct and organizational culture and governance and internal control systems.

## **BoP Circular Letters**

### **Circular Letter CC/2020/00000055 – Official Bulletin 9/2020, Supplement, of September 18, 2020**

Discloses the template applicable to communications made by payment services providers to the BoP, in compliance with article 70 (7) of Regulation 2/2018, on the aspects required to ensure the compliance with the ML/FT preventive duties, within the scope of activities of financial entities subject to the BoP's supervision.

### **Circular Letter CC/2020/00000042 – Official Bulletin 7/2020, 2<sup>nd</sup> Supplement, of July 16, 2020**

Publishes the reporting templates for the financing and equity plans ("FEP"), the description of the macroeconomic and financial scenario and other guidelines necessary for institutions to carry out the exercise and provide information, according to no. 9 of Instruction 18/2015, on the regulatory framework for implementing FEPs.

### **Circular Letter CC/2020/00000040 – Official Bulletin 7/2020, of July 15, 2020**

Discloses BoP's understanding on the prudential treatment of exposures originated through credit intermediation platforms, in terms of own funds requirements, large risks and ML/FT's preventive duties.

### **Circular Letter CC/2020/00000044 – Official Bulletin 6/2020, 3<sup>rd</sup> Supplement, of July 8, 2020**

Recommends a set of good practices applicable to the marketing of retail banking products and services (namely, bank deposits, credit products, payment services and e-money) through digital channels (online or mobile), based on the set of recommendations issued by the European Banking Authority to increase the transparency of information in those digital channels.

## **European Banking Authority (EBA) Acts**

### **Guidelines on the treatment of structural foreign-exchange positions, of July 1, 2020**

Provide guidelines on the treatment of structural foreign-exchange positions, under article 352-(2) of the Regulation (EU) no. 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms, which establish objective criteria to assist competent authorities with their assessment of the structural nature of a foreign-exchange position and to understand whether that position has been deliberately taken for hedging the capital ratio (EBA/GL/2020/09).

### **Final report on disclosure and reporting on MREL and TLAC, of August 3, 2020**

Reports on the implementing technical standards related to disclosing and reporting on minimum requirement for own funds and eligible liabilities (MREL) and total loss absorbency requirement (TLAC), to harmonize the respective requirements and maximize efficiency when complying with disclosure and reporting obligations (EBA/ITS/2020/06).



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## Legislation: Insurance and pension funds law

### Domestic law

#### **Law 27/2020 – Official Journal 142/2020, Series I, of July 23, 2020**

Implements into national law Directive (EU) 2016/2341 of the European Parliament and of the Council, on the activities and supervision of institutions for occupational retirement provision and approves the legal framework for the incorporation and functioning of pension funds and pension fund management companies. It amends the legal framework for the taking-up and pursuit of the insurance and reinsurance activity, approved as an annex to Law 147/2015, of September 9, 2015, and revokes Decree-Law 12/2006, of January 20, 2006.

### European Union law

#### **Commission Implementing Regulation (EU) 2020/1145, of July 31, 2020 – EU Official Journal, L-250, of August 3, 2020**

Provides technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from June 30, 2020, until September 29, 2020, according to 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.

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## Legislation: Securities and capital markets law

### Domestic law

#### **Law 50/2020 – Official Journal 165/2020, Series I, of August 25, 2020**

Transposes Directive (EU) 2017/828 of the European Parliament and of the Council, on the rights of shareholders of publicly traded companies regarding the encouragement of long-term shareholder engagement (“**Shareholders Directive II**”). It amends (i) Decree-Law 486/99, of November 13, 1999, approving the Portuguese Securities Code (“**PSC**”); (ii) Law 16/2015, of February 24, 2015, approving the Legal Framework for Collective Investment Undertakings (“**LFCIU**”); and (iii) Decree-Law 298/92, of December 31, 1992, approving the Legal Framework of Credit Institutions and Financial Companies. It revokes Law 28/2009, of June 19, 2009, which reviews the sanctioning framework in the financial sector in criminal and misdemeanor matters.

#### **Law 25/2020 – Official Journal 130/2020, Series I, of July 7, 2020**

Amends, with respect to sanctioning frameworks, (i) the LFCIU; (ii) Law 18/2015, of March 4, 2015, approving the Legal Framework of Venture Capital, Social Entrepreneurship and Specialized



Investment; (iii) Decree-Law 453/99, of November 5, 1999, which approves the Legal Framework of Credit Securitization; and (iv) the PSC.

## European Union law

### **Commission Delegated Regulation (EU) 2020/1304, of July 14, 2020 – EU Official Journal L-305, of September 21, 2020**

Supplements Regulation (EU) no. 648/2012 of the European Parliament and of the Council on over-the-counter derivatives, central counterparties (“**CCP**”) and trade repositories (“**Regulation 648/2012**”) regarding the minimum elements to be assessed by the European Securities and Markets Authority (“**ESMA**”) when assessing third-country CCP’s requests for comparable compliance and the modalities and conditions of that assessment.

### **Commission Delegated Regulation (EU) 2020/1303, of July 14, 2020 – EU Official Journal L-305, of September 21, 2020**

Supplements Regulation 648/2012 regarding the criteria that ESMA should consider to determine whether a CCP established in a third country is systemically important or likely to become systemically important for the financial stability of the European Union or of one or more of its Member States.

### **Commission Delegated Regulation (EU) 2020/1302, of July 14, 2020 – EU Official Journal L-305, of September 21, 2020**

Supplements Regulation 648/2012 regarding fees the ESMA charges to CCP established in third countries.

### **Commission Delegated Regulation (EU) 2020/1273, of June 4, 2020 – EU Official Journal L-300, of September 14, 2020**

Amends and corrects several provisions and annexes of Commission Delegated Regulation (EU) 2019/980, supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (“**Regulation 2017/1129**”), regarding 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.

### **Commission Delegated Regulation (EU) 2020/1272, of June 4, 2020 – EU Official Journal L-300, of September 14, 2020**

Amends and corrects several provisions and annexes of the Commission Delegated Regulation (EU) 2019/979 supplementing Regulation 2017/1129, regarding amendments 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.

### **Commission Delegated Regulation (EU) 2020/1230, of November 29, 2019 – EU Official Journal L-289, of September 3, 2020**

Supplements Regulation (EU) 2017/2402 of the European Parliament and of the Council, which establishes a general framework for securitization and creating a specific framework for simple,



transparent and standardized securitization (“**Regulation 2017/2402**”), regarding regulatory technical standards specifying the details of the application for registration of a securitization repository and the details of the simplified application for an extension of the registration of a trade repository.

**Commission Delegated Regulation (EU) 2020/1229, of November 29, 2019 – EU Official Journal L-289, of September 3, 2020**

Supplements Regulation 2017/2402 regarding regulatory technical standards on securitization repository operational standards for data collection, aggregation, comparison, access and verification of completeness and consistency.

**Commission Implementing Regulation (EU) 2020/1228, of November 29, 2019 – EU Official Journal L-289, of September 3, 2020**

Establishes implementing technical standards regarding the format of applications for registration as a securitization repository or for the extension of a registration of a trade repository under Regulation 2017/2402.

**Commission Implementing Regulation (EU) 2020/1227, of November 12, 2019 – EU Official Journal L-289, of September 3, 2020**

Establishes implementing technical standards regarding templates for the provision of information according to the simple, transparent and standardized criteria (“**STS**”) notification requirements under the Commission Delegated Regulation (EU) 2020/1226 and Regulation 2017/2402.

**Commission Delegated Regulation (EU) 2020/1226, of November 12, 2019 – EU Official Journal L-289, of September 3, 2020**

Supplements Regulation 2017/2402 regarding the regulatory technical standards, specifying the information to be provided under the STS notification requirements.

**Commission Implementing Regulation (EU) 2020/1225, of October 29, 2019 – EU Official Journal L-289, of September 3, 2020**

Establishes implementing technical standards regarding the format and standardized templates for making available the information and details of a securitization by the originator, sponsor and securitization special purpose entity (“**SSPE**”), under the Commission Delegated Regulation (EU) 2020/1224 and Regulation 2017/2402.

**Commission Delegated Regulation (EU) 2020/1224, of October 16, 2019 – EU Official Journal L-289, of September 3, 2020**

Supplements Regulation 2017/2402 regarding the regulatory technical standards, specifying the information and the details of a securitization to be made available by the originator, sponsor and SSPE.

**Commission Delegated Regulation (EU) 2020/1212, of May 8, 2020 – EU Official Journal L-275, of August 24, 2020**

Amends article 42, regarding the entry into force of the Commission Delegated Regulation (EU) 2018/1229 supplementing Regulation (EU) no. 909/2014 of the European Parliament and of the Council regarding the regulatory technical standards on settlement discipline.



## Securities and Exchange Commission (CMVM) Circulars

### **Circular of July 29, 2020**

Clarifies the requirements regarding the application of the valuation criteria of financial instruments not traded on a trading venue or similar and which are part of collective investment undertakings portfolios.

## Securities and Exchange Commission (CMVM) Guidelines

### **Guidelines on suitability assessment procedures, of September 9, 2020**

Provides guidelines on the assessment of the suitability for the performance of regulated functions and of the holders of qualifying shareholdings, to develop, harmonize and clarify the criteria, techniques and procedures for assessing suitability in line with national and international practices, being applicable as from September 9, 2020.

## ESMA Guidelines

### **Guidelines on securitization repository data, of July 10, 2020**

Provides guidelines on securitization repository data completeness and consistency thresholds, which provide clarity for market participants and securitization repositories on the accepted levels of no-data options contained in the securitization data submitted to securitization repositories.

## Acts of the Corporate Governance Portuguese Institute (IPCG)

### **Corporate Governance Code, of September 18, 2020**

Amends the 2018 Corporate Governance Code, introducing recommendations on remuneration and related-party transaction matters, according to the Shareholder Rights Directive II.



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## Case law

### European case law

#### **Judgment of the European Court of Justice, of June 16, 2020 (proceedings C-339/19)**

Article 63(1) of the Treaty on the Functioning of the European Union (“TFEU”) prohibits the restrictions on the movement of capital between Member States and between Member States and third countries.

The European Court of Justice (“ECJ”) was called on to decide whether this provision must be interpreted as precluding a national measure that provides for a 5% limit on the shareholding in financial investment companies (“FIC”) (“**National Measure**”). To do this, it first assessed whether the acquisition of a shareholding in a financial investment company constitutes a movement of capital under that provision. Invoking previous rulings, under which it was held that movements of capital include investments in the form of participation undertaking through the holding of shares that confer the possibility of participating in its management and control, the ECJ considered that the acquisition of a shareholding, notably insofar as it is accompanied by voting rights corresponding to the percentage of that shareholding acquisition, is covered by the concept of “movement of capital.”

The ECJ then assessed whether the National Measure constitutes a restriction on the free movement of capitals, and decided affirmatively, as it was considered to have the effect of deterring investments in the form of a participation in an undertaking by the holding of shares. Therefore, the ECJ considered that the measure would only be permitted if justified on one of the grounds established in article 65 of the TFEU or by overriding reasons in the public interest, and decided negatively in both cases, although reasons of public interest would be for the referring court to ascertain.

#### **Judgment of the European Court of Justice, of July 16, 2020 (proceedings C-686/19)**

Article 3(g) of Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers (“**Directive 2008/48/EC**”) defines “*total cost of the credit to the consumer*” as all costs, including interest, commissions, taxes and any other kind of fees that the consumer is required to pay relating to the credit agreement and that are known to the creditor, except for notarial costs, as well as costs for any ancillary services relating to the credit agreement, provided certain circumstances are met.

The ECJ was called on to decide on (i) whether the above concept would be an autonomous concept of European Union law; and (ii) whether it should be interpreted as including all charges relating to the extension of credit, if the corresponding terms are included in the contractual provisions and conditions of the credit agreement agreed between the lender and the borrower.



Regarding the first issue, the ECJ decided affirmatively, highlighting that the definition of the concept does not include a reference back to national law. Regarding the second issue, the ECJ underlined the broad definition of the concept *sub judice*, as well as the fact that it refers both to the granting and use of credit, and the purpose of the Directive 2008/48/EC, further invoking the need to protect its practical effect whenever a credit agreement is extended and its remuneration is amended by the payment of the applicable charges.

Therefore, the ECJ decided that the concept of “*total cost of the credit to the consumer*” must be construed as including the charges arising from the extension of the credit, provided (i) the specific conditions of the potential extension, including its term, are accurately comprised in the contractual provisions and conditions agreed between the lender and the borrower, and (ii) those costs are known to the lender.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyzes the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com). On our [website](#), you can read publications or attend webinars on legal issues arising from the pandemic and the measures adopted to mitigate it. You may also find our publications in [Portuguese](#) and [Spanish](#).

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