



# THE CONSUMER FINANCE LAW REVIEW

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# THE CONSUMER FINANCE LAW REVIEW

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Editors

RICHARD FISCHER, OBREA POINDEXTER AND  
JEREMY MANDELL

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THE TAX DISPUTES AND LITIGATION REVIEW  
THE LIFE SCIENCES LAW REVIEW  
THE INSURANCE AND REINSURANCE LAW REVIEW  
THE GOVERNMENT PROCUREMENT REVIEW  
THE DOMINANCE AND MONOPOLIES REVIEW  
THE AVIATION LAW REVIEW  
THE FOREIGN INVESTMENT REGULATION REVIEW  
THE ASSET TRACING AND RECOVERY REVIEW  
THE INSOLVENCY REVIEW  
THE OIL AND GAS LAW REVIEW  
THE FRANCHISE LAW REVIEW  
THE PRODUCT REGULATION AND LIABILITY REVIEW  
THE SHIPPING LAW REVIEW  
THE ACQUISITION AND LEVERAGED FINANCE REVIEW  
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW  
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW  
THE TRANSPORT FINANCE LAW REVIEW  
THE SECURITIES LITIGATION REVIEW  
THE LENDING AND SECURED FINANCE REVIEW  
THE INTERNATIONAL TRADE LAW REVIEW  
THE SPORTS LAW REVIEW  
THE INVESTMENT TREATY ARBITRATION REVIEW  
THE GAMBLING LAW REVIEW  
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW  
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW  
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# CONTENTS

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<b>Editors' Preface</b>	.....v
	<i>Richard Fischer, Obrea Poindexter and Jeremy Mandell</i>
<b>Chapter 1</b>	AUSTRIA..... 1
	<i>Gerhard Dilger and Michael Fischer</i>
<b>Chapter 2</b>	BELGIUM..... 9
	<i>Pierre E Berger and Pauline Kustermans</i>
<b>Chapter 3</b>	BRAZIL..... 22
	<i>Pedro Paulo Barradas Barata and Alessandra Carolina Rossi Martins</i>
<b>Chapter 4</b>	CANADA..... 35
	<i>Alison Manzer, Suhuyini Abudulai, Belinda Chiu and Bryan Woodman</i>
<b>Chapter 5</b>	CHILE ..... 49
	<i>León Larraín A and Gustavo Delgado B</i>
<b>Chapter 6</b>	CZECH REPUBLIC ..... 58
	<i>Michaela Ericssonová and Viktor Glatz</i>
<b>Chapter 7</b>	HUNGARY..... 68
	<i>Melinda Pelikán, Zsófia Polyák and Diána Boross-Varga</i>
<b>Chapter 8</b>	MEXICO ..... 77
	<i>Federico De Noriega Olea, Maria Aldonza Sakar Almirante and Carlos Eduardo Romero Sotelo</i>
<b>Chapter 9</b>	PORTUGAL..... 92
	<i>Hélder Frias</i>

<b>Chapter 10</b>	SOUTH AFRICA ..... 101 <i>Ina Meiring</i>
<b>Chapter 11</b>	SPAIN..... 112 <i>Laura Machuca Menéndez</i>
<b>Chapter 12</b>	THAILAND ..... 122 <i>Sui Lin Teoh and Saroj Jongsaritwang</i>
<b>Chapter 13</b>	UNITED KINGDOM ..... 132 <i>Harriet Russell, Ben Regnard-Weinrabe and Nikki Johnstone</i>
<b>Chapter 14</b>	UNITED STATES ..... 154 <i>Richard Fischer, Obrea Poindexter and Jeremy Mandell</i>
<b>Appendix 1</b>	ABOUT THE AUTHORS..... 169
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS..... 177

# EDITORS' PREFACE

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Consumer choice for financial products and services is proliferating across global markets. The ability to reach consumers at any time on their mobile devices and tablets, or on their in-home computers has helped attract substantial capital investment in consumer financial services.<sup>1</sup> Consumers in many diverse markets, with varying degrees of size, sophistication and modernisation, can now access myriad financial products and services with just a swipe, tap or click. Traditionally cash-based economies now also have a wide range of options for electronic payments, alternative lending and other banking and financial services.

The staggering capital investment has, in turn, attracted non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are developing innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and other non-bank financial service providers, have responded by innovating to improve their product and service offerings to retain and strengthen their customer relationships.

At the same time, there have been significant changes in the political landscape in various global markets, and these changes may affect cross-border investments and payments, broader investments in financial technology, and the nature of regulatory and enforcement oversight.

The increasing rate of innovation in consumer financial services, the changing profile of market participants, and the evolving political landscape have given rise to new legal questions or a different spin on longstanding legal theories. This country-by-country survey of recent developments in consumer financial services considers how these new and different legal theories are being addressed in 14 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

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1 See 'Fintech and the evolving landscape: landing points for the industry,' Accenture, 13 April 2016, available at: [www.fintechinnovationlablondon.co.uk/pdf/Fintech\\_Evolving\\_Landscape\\_2016.pdf](http://www.fintechinnovationlablondon.co.uk/pdf/Fintech_Evolving_Landscape_2016.pdf).

One fundamental question confronting policymakers around the world is what entity in the financial value chain should be viewed as the provider of the financial product or service. In the alternative lending context, for example, non-bank platform operators are partnering with banks to originate loans funded on the bank's balance sheet, on the balance sheet of the platform provider, or through raising capital from investors of varying degrees of sophistication. These 'marketplace lenders' in many cases are not lenders at all, but merely technology service companies providing a platform that enables lenders to more efficiently source capital. In other cases, regulators and courts have taken the view that the marketplace lender is leveraging a bank partnership to take advantage of the special powers of a regulated bank, without itself being subject to such regulation. Courts and regulators are taking varying approaches to determine the rights and obligations of each entity participating in an increasingly disintermediated market.

In the payments context, policymakers have taken varying approaches to regulating electronic money schemes, as well as payment interfaces that rely on established payment networks, such as the payment card networks or batch processing networks. These approaches require careful consideration of the precise flow of funds to determine whether the payment provider accepts liability to one or more participating consumers.

In addition, increasing reliance on third-party service providers has led banking regulators to focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have an effective process for managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. These expectations are imposing significant costs on banks and their downstream service providers.

Other legal issues are affecting payment providers, consumers and regulators as payment system stakeholders pursue faster payments. Jurisdictions around the world are at varying stages of developing or implementing a ubiquitous, secure and efficient electronic payment system. Stakeholders are pursuing faster payments as a means to make more convenient, timely and cost-effective payments, including cross-border payments. Well-established legal principles, including settlement finality and consistent consumer protections, must be considered anew in a faster payments context.

Established payment system stakeholders, including payment card networks, are also refining fraud protections and data security measures to address an evolving risk landscape. For example, tokenisation in the payment-card space is one fraud prevention measure that is being implemented by card issuers, card networks and mobile wallet providers. As another example, EMV chip cards, firmly entrenched in many jurisdictions, are still in the process of being deployed in certain large card markets.

The evolution of consumer demands also raises new and interesting legal questions. For example, consumers and service providers are seeking to access and aggregate account or transaction data from multiple financial institutions. Now, a number of apps on browser-based tools allow consumers to aggregate account information and receive financial advice and personal wealth management services. These services give rise to significant legal issues, including matters related to privacy, data security, data ownership and consumer choice.

Cybersecurity and data security are, of course, a core concern in consumer financial services, however they are delivered. Regulators in many jurisdictions are tending toward more prescriptive requirements, including specific security controls, as well as aggressive enforcement.

The entry of new market participants also raises questions related to fair access to financial services for consumers. For example, marketplace lenders are using new and alternative sources of data to evaluate potential borrowers. The data may not be as thoroughly tested or as demonstrably statistically sound as the credit data used by traditional lenders. As a result, lenders must carefully consider whether use of alternative data sources has any unintended adverse impact on classes of potential borrowers. In addition to considering the potential adverse impact of the use of alternative data on potential borrowers, regulators and courts in some jurisdictions are revisiting the classes of consumers that are protected by fair lending or equal credit opportunity laws.

Further, consumer protection authorities continue to focus on combating unfair trade practices, particularly with respect to new market entrants that may not have the same culture of compliance as traditionally regulated financial institutions. Prohibitions on unfair trade practices have been enforced on a broad range of market participants in consumer financial products and services, including payments, credit cards and other credit products, as well as deposit products.

Notwithstanding the many legal issues, this is a time of great choice for consumers and exciting opportunity for financial services providers. Advancements in technology have given consumers in developing markets, as well as unbanked or under-banked consumers in more well-developed markets, access to financial products and services previously unavailable to them. Therefore, regulators and consumer protection agencies are challenged to ensure financial stability and a level playing field, while also promoting consumer choice.

This survey of consumer finance law describes the legal and regulatory approaches taken in the jurisdictions covered. Each chapter addresses the key characteristics of, and current climate within, a particular jurisdiction. Although payments, lending and deposits are the focus of this survey, other financial products and services are discussed where relevant.

**Richard Fischer, Obrea Poindexter and Jeremy Mandell**

Morrison & Foerster LLP

Washington, DC

February 2017

## Chapter 9

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# PORTUGAL

*Hélder Frias*<sup>1</sup>

### I OVERVIEW

The Portuguese financial system is fully integrated with the international and European financial markets. The Bank of Portugal (BdP) joined the European System of Central Banks (ESCB) on 1 January 1999. As a result, the definition and implementation of the country's monetary and exchange rate policy, the management of official currency reserves, the efficiency of payment systems and the issuing of banknotes are now controlled by the ESCB.

The Portuguese regulatory system governing credit institutions and financial companies is, in broad terms, identical to the legal framework in force in other EU Member States. The direct influence of EU law has provided the Portuguese banking industry with a high level of protection regarding consumer finance, and recent national government policies have further contributed to this high level of protection. This has been achieved through reinforcing the information disclosure duties of credit institutions and financial companies and setting limits on interest rates in certain types of financing agreements.

Further to the Economic Adjustment Programme for Portugal adopted in response to the 2011 to 2014 economic crisis, the Portuguese banking industry has undergone significant adjustments that led to an asset contraction and to a change in funding structure, giving preference to consumer deposits rather than wholesale funding through securities. The banking industry in Portugal now comprises over 150 credit institutions, of which the four largest groups of banks are (by total value of assets and from the largest to the smallest): Caixa Geral de Depósitos (a state-owned bank), Banco Comercial Português, Novo Banco (a bridge bank following the resolution measure applied by the BdP over Banco Espírito Santo) and Banco Santander Totta.

By the end of the first quarter of 2016 the key financial indicators showed that the banking industry had a total asset value of €408.9 billion, while the value of credit granted to customers amounted to €255.4 billion and the value of deposits to €249.1 billion.

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1 Hélder Frias is a senior associate at Uría Menéndez – Proença de Carvalho.

## II LEGAL AND REGULATORY FRAMEWORK

### i Legislation

The Portuguese legal framework governing consumer payment, deposit and lending services is strongly influenced by EU legal instruments. As for national law, at the top of the hierarchy, the Constitution of the Portuguese Republic (CRP) contains principles regarding the national financial system as a whole as well as other provisions governing the regulatory role of the BdP. Subordinate to this is the Basic Law of the BdP, enacted by Law No. 5/98, of 31 January, as amended. This establishes the basic structure of the BdP and relevant aspects of banking supervision. The Commercial Code and Civil Code must also be considered.

The Portuguese regulatory framework governing the activity of credit institutions and financial companies (authorisation, registration, etc.) is set out in the Credit Institutions and Financial Companies General Framework, enacted by Decree-Law No. 298/92, of 31 December, as amended (RGICSF). This law also governs, among others, the supervisory activity of the banking regulator, the BdP and the Resolution Fund. In turn, payment institutions are subject to the Legal Framework of Payment Institutions and Payment Services, enacted by Decree-Law No. 317/2009, of 30 October, as amended.

In particular, Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers was implemented into Portuguese law by Decree-Law No. 133/2009, of 2 June. This regime has been in force since 1 July 2009. Notwithstanding, the previous regime enacted by Decree-Law No. 359/91, of 21 September, is still applicable to credit agreements executed before 1 July 2009.

Among several others, the following laws (as amended) must also be taken into consideration: (1) Decree-Laws No. 381/77, of 9 September, and 454/91, of 28 December, regarding payments by means of bank cheques and other debt securities; and (2) Decree-Laws No. 220/94, of 23 August, and 51/2007, of 7 March, regarding lending agreements (the applicable information, disclosure duties, interest rates, etc.) and Decree-Law No. 349/98, of 11 November, regarding mortgage loans.

Lastly, Decree-Law No. 446/85, of 25 October, as amended,<sup>2</sup> establishes the Portuguese unfair contract terms regime applicable to adhesion contracts.

### ii Regulation

The BdP, as the Portuguese central bank, is principally responsible for implementing and enforcing the regulation of consumer finance services. Notwithstanding, other bodies, notably the Portuguese Association of Consumer Law (APDC) and the Consumer's Directorate-General, from the Ministry of Economics support consumers in general and in some circumstances offer legal advice to their members.

The BdP is responsible for the prudential and market conduct supervision of credit institutions, financial companies and payment institutions to ensure the stability, efficiency and soundness of the financial system, as well as the compliance with rules of conduct and transparency requirements towards bank customers, and ensuring the safety of deposits and depositors, and the protection of consumer interests. Credit institutions or financial

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2 Decree-Law No. 446/85 has been amended, *inter alia*, by Decree-Law No. 220/95 of 31 January as a result of Directive 93/13/EEC of the Council of 5 April on unfair terms in consumer contracts.

companies pursuing financial intermediation activities are subject to the supervision of, and regulations issued by, the Portuguese Securities Market and Exchange Commission. In turn, whenever those entities also pursue insurance intermediation activities (e.g., banks), they will be subject to the supervisory powers, and the regulations issued by, the Portuguese Insurance and Pensions Supervisory Authority. Among others, a significant number of those regulations are targeted at consumer protection and safeguarding customer rights.

The BdP has powers to issue notices, instructions and circular letters, which set out rules and conduct for the banking industry regarding the services to be provided to the general public. Furthermore, the BdP may enforce Portuguese banking laws and regulations through: (1) fines and ancillary penalties; (2) mandatory injunctions; (3) seizure of documents and valuables or (4) special audits through on-site inspections.

Each consumer may file complaints against banks or other institutions (credit institutions, financial companies, payment institutions, etc.) within the scope of the marketing of consumers' banking services (deposits, home credit, consumer finance, credit cards, etc.). These entities must present their complaints book when solicited to do so. These complaints may also be filed directly before the BdP, which may only verify whether the institution is complying with its duties, and may not demand that the institution remedy the damages or compensate the consumer. This level of legal protection is only guaranteed by courts and similar judicial entities.

Finally, Portugal has implemented Directive 2013/11/EU of the European Parliament and of the Council, of 21 May, by means of Law No. 144/2015, of 8 September, regarding the alternative resolution of consumer disputes.

### III PAYMENTS

#### i Overview

Payment instruments in Portugal are highly reliable and the payments market in Portugal is in line with best international practice. According to the official numbers released by the BdP, Portugal is the euro area country with the most card payments, as a percentage of GDP.

Prior to the entry into force in Portugal of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (the Payment Services Directive), the issuance and management of debit cards was mainly governed by the Bank of Portugal Notice No. 11/2001 of 20 November on credit and debit cards and corresponding terms of use (BdP Notice 11/01) and by the RGICSF. The pursuit of this activity in the Portuguese territory had to be carried out by credit institutions or financial companies.

Upon the implementation into Portuguese law of the Payment Services Directive by Decree-Law No. 317/2009, of 30 October, as amended (DL 317/09), the RGICSF has been amended to provide for the establishment of the new 'payment institutions' (which do not fall under the definition of credit institutions or financial companies) that are entitled to provide 'payment services' including the issuance of debit cards.

However, BdP Notice 11/01 has not been amended or revoked in light of the new rules on the provision of payment services. Consequently, at present, DL 317/09 provides rules on the issuance of debit cards applicable to the entities which may provide payment services – credit institutions, financial companies and payment institutions – and BdP Notice 11/01 provides rules on the issuance of debit cards for credit institutions and financial companies.

The large majority of rules provided for in BdP Notice 11/01 are also provided for in DL 317/09, although there are some differences: whereas in DL 317/09, when the client is not a consumer, or a micro enterprise, parties may agree that the rules on the information requirements set out in the law are not applicable, the rules set out in BdP Notice 11/01 are mandatory. Further, BdP Notice 11/01 requires the agreements to be written in Portuguese; it expressly provides that the information on charges and rates of interest cannot be inserted in the agreement by reference to a list of costs and charges available in the branches or by another medium (such as the website); and the issuer is entitled to change the agreement by giving 15 days' notice to the client.

More recently, Regulation (EU) 2015/751 of the European Parliament and of the Council, of 29 April 2015, on interchange fees for card-based payment transactions (IFR), became directly applicable in its entirety from 9 June 2016.

## **ii Recent developments**

To date the BdP has only issued some guidelines on its website regarding interchange fees, which are mainly addressed to consumers, containing among other matters, a summary of the main provisions of the Regulation, and an explanation of the concepts of 'brands' and 'co-branding'.

Based on the information publicly available Portugal has not yet exercised (nor indicated that it will exercise) any of the three discretions mentioned below:

- a* discretion in relation to domestic consumer debit card transactions under Article 3(2) or 3(3) of the IFR;
- b* discretion to set a lower interchange fee cap in relation to domestic consumer credit transactions under Article 4 of the IFR; or
- c* discretion to waive fee caps in relation to domestic schemes, such as the three party payment card scheme, until 9 December 2018 under Article 1(5) of the IFR.

More broadly, retail payments grew in value and volume, reflecting the trend of private consumption in Portugal. Recourse to electronic payments rose further, particularly for international purchases, in line with the growth of tourism in Portugal. The use of cheques declined further, while recourse to electronic payment instruments continued to increase.

## **IV DEPOSIT ACCOUNTS AND OVERDRAFTS**

### **i Overview**

In Portugal, only credit institutions authorised by the BdP may take deposits and other repayable funds.

As provided in Decree-Law No. 430/91, of 2 November, as amended, there are several types of deposits. If we consider the movement of funds, the most common are on-demand and term deposits. The first are characterised by the freedom to withdraw the funds at any time, while the second are refundable only after a certain period, although credit institutions may allow for early fund mobilisation subject to a penalty on the accrued interest. On the other hand, if we consider the banks' remuneration, we may include simple or indexed deposits, as the first use fixed rates (or variable rates indexed to money market rates), while in indexed deposits the remuneration depends on the evolution of other variable rates.

Under the principle of contractual freedom, each credit institution is free to determine the conditions in these types of contracts, which are frequently set out in standard adhesion

contracts for the opening and managing of bank accounts. These contracts may reveal a clear asymmetry between the rights and obligations of credit institutions and consumers. As mentioned above, these contracts are subject to the Portuguese unfair contract terms regime.

Credit institutions must comply with certain information disclosure duties to ensure consumers understand the contract terms. The content of the information requirements regarding simple deposits is provided in BdP Notice No. 4/2009, of 20 August, while the details of the information for indexed deposits are set out in BdP Notice No. 5/2009, of 20 August.

In addition, credit institutions may authorise overdrafts, through an agreement with the consumer or a tacit acceptance from the institution itself. The first option is called an overdraft facility and is based on a contract between the client and the credit institution, allowing the client to continue to withdraw money up to a certain pre-agreed amount when the account has no more funds. The second option is called overrunning and refers to the situation where there is no prior agreement, instead the credit institution tacitly allows consumers to make use of funds even if it exceeds their current balance.

Under Decree-Law No. 27-C/2000, of 10 March, as amended, all credit institutions must offer access to basic banking services at a reduced cost through a minimum banking services account. This service consists of, in particular: (1) opening and holding of minimum banking services accounts; (2) provision of a debit card; (3) access to the accounts through cash machines, home banking services and over the counter; and (4) deposit facilities, withdrawals, payment for goods and services, direct debit and transfers between different national banks.

The Portuguese Deposit Guarantee Scheme (DGS) covers every deposit up to a maximum of €100,000 per client and per bank. Further, Directive 2014/49/EU of the European Parliament and of the Council, of 16 April, states that every DGS must ensure a capitalisation level of 0.8 per cent. Recent data shows that in 2015 the Portuguese DGS had a capitalisation level of 1.24 per cent, placing the Portuguese guarantee fund among the most highly capitalised DGSs within the EU.

## ii Recent developments

Law No. 66/2015, of 6 July, has brought some changes to the legal framework for deposits. Firstly, credit institutions cannot offer overdraft facilities or overrunning under the regime of minimum banking services. Secondly, pursuant to the amendment now introduced in the RGICSE, credit institutions must send an annual invoice-receipt detailing all the fees and expenses related to on-demand deposits from the previous year to the account holder.

## V REVOLVING CREDIT

A bank card is issued in accordance with an umbrella agreement that must establish the terms of the contractual relationship between the cardholder and the issuer. Very often a credit agreement is executed through the use of a credit card with a line of credit underlying it, as opposed to the lending of a certain amount. As the terms of a credit card are linked to the credit agreement, only where a limit has been set out in the scope of a line of credit is there the possibility of revolving credit. Lending entities must provide the customer with written contracts, which are commonly drafted as standard contracts (and therefore subject to the unfair contract terms regime) and usually presented as the card's general terms, as the cards' sole purpose is to serve as a means of payment.

As for servicing amounts charged by the credit card issuer, they vary among the different credit institutions. However, it is mandatory for all such costs to be clearly indicated in the credit agreement, which must contain information on all the applicable interest and exchange rates, or, if relevant, the calculation method and the reference date used in determining the applicable interest and exchange rate.

Decree-Law No. 227/2012, of 25 October, establishes the principles and rules on the management and monitoring of the risk of consumer default that credit institutions must follow. This statute provides that all credit institutions must create a plan of action for the risk of default (PARI). More importantly, this statute creates and defines the out-of-court procedure for regularisation of default situations (PERSI), which consists of a debt restructuring procedure for financial consumers. The PERSI is applicable to the majority of credit agreements executed with consumers and does not depend on any access conditions (not even a request from the consumer). During debt restructuring negotiations under the PERSI, the consumer has a set of legal guarantees, including prohibitions on credit institutions terminating the credit agreement; taking legal actions to claim those credits; and assigning those credits to a third party.

Finally, reference must be made to the current panorama of contactless cards that have recently been introduced in the Portuguese banking industry. Usually the issuer entity establishes both the maximum amount allowed for single payments and an overall maximum for successive transactions without the use of the card's PIN code. The BdP has recently issued a circular letter on the subject, publishing best practice regarding the information that issuers must provide to their customers, including the obligation to provide the information in writing or another durable medium.

## **VI INSTALMENT CREDIT**

The consumer credit regime applies to contracts for amounts between €200 and €75,000. There are different forms of consumer credit, depending on their purpose, namely personal credit, which may include student and health loans; and car loans, through leasing, with reservation of title, or others. Even though they are all considered consumer credit, these contracts entail different costs, fees and charges.

The mortgage loan regime applies to contracts for the purpose of the purchase, construction, maintenance or improvements of privately owned property or the purchase of land for development. These contracts may be secured by a mortgage on the property, which may be reinforced by other means, such as the life insurance of the debtor and his or her spouse or any other kind of guarantee that may fit the intended purpose.

Credit institutions may terminate both consumer and mortgage loan contracts. Credit institutions may terminate consumer credit contracts if: there is a failure to pay two consecutive instalments exceeding 10 per cent of the total amount of credit; and the creditor has given an additional minimum of 15 days for the consumer to pay the late instalments, together with possible compensation due, with a warning regarding the consequences of losing the right to pay by instalments or the consequences concerning the termination of the contract. For the purpose of mortgage loans, credit institutions may terminate the contract if the consumer fails to pay at least three overdue and unpaid instalments.

For both types of credit contracts, consumers may request a partial or total early repayment, upon providing a prior notice to the bank. If the consumer decides on advanced repayment, it could result in extra costs. For consumer credit contracts, credit institutions

may not charge any fees when this concerns the early repayment of loan agreements with a variable interest rate. On the other hand, they may do so in the case of the early repayment of loan agreements with a fixed interest rate. Concerning mortgage loans, banks may charge extra fees for early repayments for loan agreements with either fixed or variable interest rates.

The consumer, whether requesting details on consumer or mortgage loans, is entitled to clear, complete and up-to-date information regarding the characteristics, conditions and costs of the loan. Credit institutions, apart from these pre-contractual obligations, must continue to inform their clients, among others, on the status of the loan, of changes to the interest rate and of any breaches of contractual obligations. BdP Notice No. 10/2014, of 3 December, establishes the information requirements that must be fulfilled by credit institutions during the term of the consumer credit contract. By the same token, BdP Notice No. 2/2010, of 16 April, as amended, establishes the information requirements for mortgage loans provided by credit institutions.

## **VII OTHER AREAS**

In recent years, two other issues have been widely discussed in Portugal, as much for their relevance within the banking industry as for the rising public controversy they have caused.

The first issue relates to the effects of a potential negative interest rate on lending agreements. This was due to the lowest interest rates in years, with direct effects on the EURIBOR (Euro Interbank Offered Rate), whose three-month rate in the first half of 2015 reached negative values for the first time. In Portugal EURIBOR is commonly used as the variable interest rate in consumer finance agreements such as home credit. The BdP was thus questioned as to whether such negative values should serve as a 'discount' on the consumers' credit instalments or whether the variable interest rate should be deemed as equal to zero, whenever the relevant credit agreement did not specifically govern the matter.

The BdP started by issuing Circular Letter No. 26/2015/DSC, of 30 March, where, in general terms, it stated that the interest rate applicable to a contract should result from the arithmetic average between the fixed and the variable interest rate; and, if no specific provision exists regulating the negative value event, credit institutions may hedge against the event with financial instruments. This means that the clients would benefit from the negative value of EURIBOR. More than one year later and after much controversy, the Governor of the BdP stated before Portugal's parliament and in a letter to the Minister of Finance that credit institutions should not bear the risk of negative interest rates alone and that, if the average between the variable interest rate and the spread (usually a fixed rate) is negative, then it should be deemed as equal to zero. This is now a matter in the hands of political parties, as a new legislative proposal is being drafted.

Secondly, the Portuguese banking industry has recently discussed the lifting of bank secrecy by tax authorities, as a new legislative proposal was presented to, and voted on by, the Parliament. Bank secrecy is considered to be an instrument defending the fundamental right to privacy of every citizen provided for in Article 26 of the CRP. Additionally, pursuant to Article 78 of the RGICSE, among others, all members and employees of credit institutions must respect consumers' bank secrecy. Its violation is sanctioned with up to one year in prison, pursuant to Article 195 of the Portuguese Penal Code.

In light of the proposed amendment to the banking secrecy regime, the government and other left-wing parties supporting it proposed the lifting of bank secrecy in bank accounts holding over €50,000. This legislative proposal never became an effective law, as the President

vetoed it on the grounds of its inappropriate timing and owing to the lack of justification presented for the lifting of secrecy and for the determined threshold. This rejection followed the negative opinion on the law issued by the Portuguese Data Protection Authority. In particular, the law was criticised for proposing to lift bank secrecy without the tax authorities needing to present evidence of tax crimes or an unjustified growth in assets.

## VIII UNFAIR PRACTICES

Recent case law of Portuguese superior courts has questioned the effectiveness and validity of specific standard unfair contract terms used in banking contracts.

The assessment of the legal compliance of unfair contract terms adopted by each credit institution and financial company is not usually made beforehand at the time of their drafting. This means that the failure to satisfy the requirements imposed by the Portuguese unfair contract terms regime is indeed more frequent than is desirable.

The law allows for procedures to challenge unfair contract terms used in consumer finance contracts, not only by the customers, but also by the Public Prosecutor's Office and consumer associations, among others, who may initiate a general procedure for an injunction, the effects of which all parties concerned may benefit from.

Recent examples of unfair contract terms deemed invalid by Portuguese courts include:

- a* clauses under which the customer expressly authorises the bank, without requiring any formalities, to be compensated for any liabilities arising from the contract by debiting any other deposit accounts that the customer is the holder of, or will become the holder or joint holder of, within the bank, as well as the automatic set-off of any debts arising from the contract with any other customer's credits over the bank;
- b* clauses that allow the bank to cancel or suspend customers' cards without prior notice, for example in the case that the customer is featured in the List of High Risk Users of the Bank of Portugal;
- c* clauses that allow the bank to assign its contractual position, in whole or in part, to other entities within the group, based in Portugal or abroad; and
- d* clauses, as contrary to the requirements of good faith, that allow the bank to set off its credit against a customer with a joint bank account balance, of which the customer is or will become the holder.

## IX RECENT CASES

### **i Enforcement actions**

In the context of its supervisory powers, the BdP has conducted a number of inspections that specifically targeted compliance with the consumer finance rules. Particular attention was paid to annual percentage rates, information duties and the conduct of business. Pursuant to these inspections, the BdP issued both recommendations and mandatory orders to credit institutions. In a small number of cases, it also applied sanctions.

### **ii Litigation**

In 2016, the Portuguese appeal courts rendered two judgments that significantly influenced credit institutions rights' in the case of consumer default. These rulings found it unlawful

for a provision in a consumer finance contract to depart from the legal regime and allow the creditor to claim the outstanding compensatory interest if the debt is accelerated following an event of default. This entails that, if the consumer fails to pay the instalments in due course, creditors will only be entitled to: the principal amount; the accrued compensatory interest; and the default interest. Although these decisions do not bind other courts, they nevertheless provide solid grounds for other courts to rule in the same way.

Another subject addressed by the appeal courts was the relationship between consumer finance and other consumer contracts. The Lisbon Court of Appeal ruled that, where a consumer loan was granted specifically in connection with an underlying consumer contract (e.g., the sale and purchase of a good or a service), the termination of the underlying contract entails the termination of the loan. The court decided that it was abusive for the creditor to fill in and execute a blank promissory note issued by the consumer to secure the consumer loan.

## **X OUTLOOK**

After the considerable downturn that took place in 2011–2012, consumer finance activity in Portugal has been steadily on the rise since 2013.

Credit institutions and financial companies have increased advertising on consumer finance products that, in some cases, offer considerably higher yields than other financing products. This trend is expected to continue in 2017.

Car loans played an important role in the growth in 2016, probably owing to the anticipation of car vehicle acquisitions in response to the scheduled increase in the vehicle tax for 2017.

In 2016, Law 13/2016, of 23 May, introduced new rules for tax debt enforcement procedures. Since mid 2016, family houses with a tax valuation up to €574,323 may not be seized or judicially sold to pay tax debts. Prior to its approval, there were some indications that the prohibition might have been more inclusive and also extend to other debts – such as mortgage loans – which ultimately were not part of the version adopted. Nevertheless, there might be some developments in 2017 regarding this subject.

As mentioned above, negative interest rates are also a key point to look for in 2017. There is a proposal for a law that provides for the mandatory application of negative interest rates by credit institutions. This will cover both existing and new credits. With the notable exception of mortgages, consumer finance does not often raise this problem in Portugal, given the generally high applicable interest rates. Nevertheless, it is something that might impact the Portuguese financial market as a whole.

## Appendix 1

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# ABOUT THE AUTHORS

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Hélder Frias joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2006 and became a senior associate in 2015. Hélder worked in the London office of the firm from September 2010 to August 2011.

His practice is focused on banking, finance and insurance. Notably, he advises on M&A transactions involving financial institutions, bancassurance joint ventures, the transfer of insurance portfolios and on other regulatory matters related to these markets, including insurance and reinsurance intermediation.

Hélder frequently advises on regulatory and supervisory aspects of financial and insurance activities (including banking and financial intermediation services and payment services), such as lending, creation of security, factoring, sale and purchase of receivables, money laundering, venture capital and financial products, and investment and retail banking and insurance instruments (capital redemption transactions and unit-linked life insurance agreements).

### **LAURA MACHUCA MENÉNDEZ**

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Laura Machuca Menéndez joined Uría Menéndez in Madrid in 2012. Her practice focuses on M&A, banking and finance and corporate law. Laura has been involved in some of the most significant transactions in Spain in recent years.

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