THE CONSUMER FINANCE LAW REVIEW

Fifth Edition

Editors
Rick Fischer and Jeremy Mandell

THE LAWREVIEWS

THE CONSUMER FINANCE LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Rick Fischer and Jeremy Mandell

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Claire Ancell

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-766-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BAKER MCKENZIE

HOGAN LOVELLS

MORRISON & FOERSTER LLP

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

R&T ASIA (THAILAND) LIMITED

URÍA MENÉNDEZ

WOLF THEISS

CONTENTS

PREFACE

Consumer choice for financial products and services is continuing to proliferate across global markets. The ability to reach consumers at any time on their mobile phones, tablets or other devices has helped attract substantial capital investment in consumer financial services. 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, wave 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 substantial capital investments have, in turn, attracted non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar valuation technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are now developing innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and other non-bank financial services providers, have responded by innovating to improve their product and service offerings in order to retain and strengthen their customer relationships.

At the same time, the political landscape in various global markets continues to evolve, and this evolution 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 long-standing 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 11 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

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 either 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 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 using a bank partnership to take advantage of the special powers of the regulated bank, without itself being subject to similar 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.

Another defining characteristic of global consumer financial products and services is an increasing reliance on third-party service providers. This characteristic has led many banking regulators to focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have a hands-on, risk-based approach to managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. Notwithstanding the risk-based approach, these regulatory 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 and digital currencies. 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 and digital currencies as a means to make more convenient, timely and cost-effective payments, including cross-border payments. Well-settled legal issues, including settlement finality and consistent consumer protections, must be considered anew in these contexts.

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 continues to achieve greater penetration by card issuers, card networks and mobile wallet providers.

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. There is an ever-growing number of apps and other tools by which consumers can aggregate account information and receive financial advice and personal wealth management services. These services present significant legal issues for market participants and regulators, including issues related to privacy, data security, data ownership, liability, and consumer choice and control.

High-profile cyberattacks and data security incidents underscore a continuing focus on cybersecurity and data security issues, as they relate to consumer financial services, however delivered. Regulators in many jurisdictions are trending towards 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 credit models and sources of data to evaluate potential borrowers who might not otherwise meet the underwriting criteria of traditional lenders. These models and data may not be as thoroughly tested or as demonstrably statistically sound as the credit models or data used by traditional lenders. As a result, in addition to evaluating whether use of such data affects the lender's credit risk, lenders also must carefully consider whether use of alternative credit models and 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 credit models or 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.

Consumer protection authorities continue to focus on combating unfair trade practice, 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 practice have been enforced against 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 expanding choice for consumers and an exciting opportunity for consumer financial services providers. Accelerating 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. Thus, 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.

Rick Fischer and Jeremy Mandell
Morrison & Foerster LLP
Washington, DC
January 2021

Chapter 7

PORTUGAL

Hélder Frias and Sofia Santos Júnior[1]

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 June 1998. 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 the payment systems and the issuing of banknotes are now controlled by the ESCB.

Thus, 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. Furthermore, not only has the direct influence of EU law provided the Portuguese banking industry with a high level of protection regarding consumer finance, but recent national government policies have also contributed to this high level of protection. This has been achieved through the reinforcement of the information disclosure duties of credit institutions and financial companies, and the imposition of maximum interest rates in certain types of financing agreements.

Further to the Economic and Financial Assistance Programme, the Portuguese banking industry has undergone significant adjustments that have led to an asset contraction as well as to a change in its funding structure, giving preference to consumers' deposits rather than wholesale funding through securities. The banking industry in Portugal now comprises around 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, Banco Santander Totta (who acquired Banco Popular Portugal following the resolution measure applied over Banco Popular España) and Novo Banco (a bridge bank following the resolution measure applied by the BdP over Banco Espírito Santo).

As for its key financial indicators, by the end of the first semester of 2020, they showed that the banking industry had a total asset value of €413 billion, while on the other hand, the value of credit granted to customers amounted to a total of €236.24 billion and the value of deposits amounted to a total of €278.78 billion.

1 Hélder Frias is a counsel and Sofia Santos Júnior is a junior associate at Uría Menéndez - Proença de Carvalho.

II LEGISLATIVE 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 contains principles regarding the national financial system as a whole, as well as other provisions governing the regulatory role of the BdP. Following it is the Basic Law of the BdP, enacted by Law No. 5/98 of 31 January, as amended. This law establishes the basic structure of the BdP and relevant aspects of banking supervision. Both the Portuguese Commercial and Civil Codes must be considered when referring to the relevant legal framework governing consumer finance.

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. 91/2018 of 12 November.

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, as amended. 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:

a Decree-Laws Nos. 381/77 of 9 September, and 454/91 of 28 December, regarding payments by means of bank cheques and other debt securities;

b Decree-Laws Nos. 220/94 of 23 August, and 74-A/2017 of 23 June, as amended, regarding lending agreements (the applicable information disclosure duties, interest rates, etc.);

c Decree-Law No. 349/98 of 11 November, regarding housing credit; and

d Decree-Law No. 446/85 of 25 October, as amended,[2] which establishes the Portuguese unfair contract terms regime applicable to contractual terms that have not been individually negotiated.

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property was partially implemented into Portuguese law by Decree-Law No. 81-C/2017 of 7 July, which establishes the requirements for the taking-up and pursuit of the credit intermediation activity.

ii Regulation

As for the body in charge of implementing and enforcing the regulation of consumer finance services, the BdP, as the Portuguese central bank, plays a central role. Notwithstanding this, there are also bodies responsible for consumer protection that must be taken into account, as

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

they not only support consumers in general but also in some circumstances offer legal advice to their members, notably the Portuguese Association of Consumer Law and the Consumer's Directorate-General, from the Ministry of Economics.

The BdP is responsible for the prudential and market conduct supervision of credit institutions, financial companies and payment institutions with a view to ensuring the stability, efficiency and soundness of the financial system, as well as the compliance with rules of conduct and transparency requirements towards bank customers, thereby ensuring the safety of deposits and depositors, and the protection of consumer interests. Likewise, whenever credit institutions or financial companies pursue financial intermediation activities, they will be 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 the customer's rights.

Among the different aspects of its actions, of the utmost importance are the BdP's powers to issue notices, instructions and circular letters, which set out rules and conduct for the banking industry to comply with regarding the services to be provided to the general public. Furthermore, the BdP has the power to enforce Portuguese banking laws and regulations through:

a fines and ancillary penalties;
b injunctions for the fulfilment of certain duties;
c seizure of documents and valuables; and
d special audits through on-site inspections.

Each consumer has the right to file complaints against banks or other institutions (e.g., credit institutions, financial companies, payment institutions) within the scope of the marketing of consumers' banking services (e.g., deposits, home credit, consumer finance, credit cards). These entities are required to present their complaints book when solicited to do so. These complaints may also be filed directly before the BdP, but the latter only has powers to verify whether the institution is complying with its duties or not, and is incapable of demanding the institution to remedy the damages or to pay a compensation to the consumer. This level of legal protection is only guaranteed by courts and similar judicial entities.

In July 2019, the BdP joined the e-platform '*Livro de Reclamações*', so that bank customers can submit complaints through this channel as well. With this new channel, complaints received increased and in 2019, the BdP received 18,104 bank customers' complaints, 18.7 per cent more than in the previous year.

Moreover, 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, as amended, 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 international best 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, which has been repealed and replaced by Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 (the Payment Services Directive), the issuance and management of debit cards was mainly governed by the BdP 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 the enactment of Decree-Law No. 317/2009 of 30 October, which has been repealed and replaced by Decree-Law No. 91/2018 of 12 November (DL 91/2018), the RGICSF has been amended in order 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 – these include 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 91/2018 provides for rules on the issuance of debit cards applicable to entities that may provide payment services – credit institutions, financial companies and payment institutions – and BdP Notice 11/01 provides for rules on the issuance of debit cards for credit institutions and financial companies.

The large majority of rules provided for BdP Notice 11/01 are also provided for in DL 91/2018, although there are some differences worth highlighting, such as:

a whereas in DL 91/2018, when the client is not a consumer or a micro-enterprise, parties may provide 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; and

b BdP Notice 11/01 requires the agreements to be written in Portuguese and 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 that the issuer is entitled to change the agreement by giving a 15-day notice period 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

Up until now, the BdP has only issued some guidelines on its official 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'.

On the basis of the information publicly available on the matter, 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 Articles 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.

Notwithstanding, in Portugal, for debit-card-based payment transactions, the interchange fee cannot be more than 0.2 per cent of the transaction value. In credit-card-based payment transactions, this fee cannot be more than 0.3 per cent of the transaction value.

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 registered a further decline, both in value and in volume.

Lastly, Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (the PSD2 Directive) was implemented in Portugal by means of Decree-Law No. 91/2018 of 12 November.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Overview

In Portugal, only credit institutions duly authorised by the BdP are allowed to 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 of time, although credit institutions may allow for early fund mobilisation subject to a penalty on the accrued interest. Conversely, 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 of these types of contracts, which are frequently set out by means of 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, leading to an unbalanced legal relationship. As mentioned above, these contracts are subject to the Portuguese unfair contract terms regime, which has a significant role in avoiding unfair and unfavourable conditions.

Credit institutions must comply with certain information disclosure duties in order for consumers to have correct knowledge of the contracts. The content of the information provided therein, 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 overrunning, which refers to the situation where there is no prior agreement; instead, the credit institution tacitly allows consumers to make use of funds even if their current balance is exceeded.

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, notably:

a opening and holding of minimum banking services accounts;
b provision of a debit card;
c access to the accounts through cash machines, home banking services and service over the counter; and
d deposit facilities, withdrawals, payment for services and goods, 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 2019 the Portuguese DGS had a capitalisation level of 1.13 per cent, still well above the 0.8 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, as amended, has brought some changes to the deposits' legal framework. First, credit institutions cannot offer overdraft facilities or overrunning under the regime of Minimum Banking Services. Second, pursuant to the amendment now introduced in the RGICSF, 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 and conditions of the contractual relationship between the cardholder and the entity that has issued it. Very often a credit agreement is executed through the use of a credit card that has the provision of a line of credit underlying it, as opposed to the lending of a certain amount. As the terms and conditions of a credit card are linked to the respective 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 are obliged to provide the customer with the respective 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 and conditions, as the card's sole purpose is to serve as a means of payment.

As for servicing burdens 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 applicable, the calculation method and the reference date used in determining the applicable interest or exchange rate.

It is also worth mentioning Decree-Law No. 227/2012 of 25 October, which establishes the set of principles and rules that credit institutions must follow on the management and monitoring of the risk of default in consumer finance. This statute provides that all credit institutions must create a Plan of Action for the Risk of Default in order to prevent situations of default by their customers. More importantly, this statute creates and defines the Out-of-Court Procedure of Default Situations' Regularisation (PERSI), which consists of a debt restructuring procedure designed 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 the debt restructuring

negotiations under the PERSI, the consumer has a set of legal guarantees, three of them being the impossibility that credit institutions may terminate the credit agreement; take legal actions in order to claim those credits; and assign those credits to a third party.

Finally, a brief reference must be made to contactless cards, which have recently been introduced to the Portuguese banking industry. Usually, the issuer entity establishes both the maximum amount allowed for single payments as well as an overall maximum amount for successive transactions without the use of the card's PIN (personal identification number) code. The BdP issued a circular letter on the subject, thus publishing the good practices regarding the information duties that the issuer entities must provide to their customers, including the obligation for those entities to provide said information by means of a paper document or other 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 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 housing credit regime applies to contracts for the purpose of the purchase, construction, maintenance or improvements of privately owned property or the purchase of land for its 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 have the right to terminate both consumer and housing credit contracts. For the purpose of consumer credit, credit institutions may terminate the contract if the following two requirements are met:

a the non-payment of two consecutive instalments that exceed 10 per cent of the total amount of credit; and

b in the case that the creditor has given additional time of a minimum of 15 days for the consumer to pay the delayed 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 housing credit contracts, credit institutions may terminate the contract in the case that the consumer fails to pay at least three overdue and unpaid instalments.

For both types of credit contracts, consumers have the right to request a partial or total early repayment, upon providing a prior notice to the bank. If the consumer decides upon an advanced repayment, it could result in extra costs. For consumer credit contracts, credit institutions are not authorised to charge any fees when this concerns the early repayment of loan agreements with a variable interest rate. However, they are entitled to do so in the case of the early repayment of loan agreements with a fixed interest rate. Concerning housing credit contracts, 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 housing credit, is entitled to clear, complete and updated 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 housing credit contracts provided by credit institutions.

Under Portuguese law, lending (secured or otherwise) is considered a banking activity. Accordingly, any short-term consumer lending activity that is carried out, on a professional basis, by an entity that is not duly authorised or registered with the BdP, shall be deemed a very serious administrative offence, subject to a fine of up to €5 million, plus ancillary sanctions.

As mentioned above, although the banking activity may only be carried out by credit institutions or financial companies that are duly authorised, crowdfunding is emerging within the scope of the sharing economy. Crowdfunding, as a channel of financing, allows matching investors directly with the contributors and projects in need of funds, mainly in the early stages, by means of electronic platforms.

Law No. 102/2015 of 24 August, as amended, has established the rules on crowdfunding. This law addresses the:

a models of crowdfunding;
b key features and duties of the owners of digital platforms;
c key features and duties of the parties;
d conditions of entry to the activity;
e registration procedure;
f terms of open call to the public to raise funds for a specific project; and
g competence of the Portuguese Securities Market Commission, as the Portuguese authority responsible for supervising and monitoring proper decisions of managing bodies of platforms.

Law 102/2015 of 24 August is encouraged by European interest on this form of financing, though with limited cross-border activity for the moment.

There is a recent regulatory change that will have an impact on banking lending activities. Decree-Law No. 144/2019 of 23 September was recently enacted and it establishes, among other changes, the creation of loan funds as an alternative financing instrument, especially designed to accommodate the difficulties felt by small and medium-sized enterprises in obtaining financing through banking loans. The purpose of these loan funds is to lend directly to debtors, to participate in loan syndicates or to acquire loans originated by banks or other entities, through credit assignments. Therefore, loan funds represent a new way of boosting the capital markets, in an attempt to follow the trends observed in other reference European markets that admit loan funds.

Additionally, Decree-Law No. 144/2019 also transferred from the BdP to the Portuguese Securities Market Commission supervisory powers over management companies of collective investment schemes and management companies of securitisation funds. This statute will enter into force on 1 January 2020.

VII OTHER AREAS

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

The first widely discussed issue is related to the effects of a potential negative interest rate on lending agreements. This was because of European financial policies, which have led to the lowest interest rates in years, with direct effects on the Euro Interbank Offered Rate (EURIBOR), which in the first semester of 2015 reached negative values for the first time (when considering the three-month rate). 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, in which, in general terms, it stated that:

a the interest rate applicable to a contract should result from the arithmetic average between the fixed and the variable interest rate; and

b if no specific provision exists regulating the negative value event, credit institutions may hedge said event by means of financial instruments.

This means that the clients would benefit from the negative value of the EURIBOR. More than one year later and after much controversy, the Governor of the BdP stated before the Parliament, and by means of 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 equal to zero. Subsequently, Law no. 32/2018, of 18 July, was enacted, establishing that in situations where the sum of the index and the spread results in a negative interest rate, credit institutions are obliged to reflect that rate in full in the amounts payable by customers. Credit institutions may choose either one of the following:

a to decrease the negative amount determined to the outstanding principal of the outstanding instalment; or

b to create a credit in favour of the customers, which shall be deducted from the interest due as soon as it becomes positive.

If, upon termination of the loan agreement, there is still a credit in favour of the customer, credit institutions are obliged to pay it.

Second, the Portuguese banking industry has discussed crowdfunding as an alternative way of financing. See Section VI on the regulated nature of the lending activity and the recent developments in crowdfunding.

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 the following decisions:

a prohibition of clauses under which the customer expressly authorises the bank, without fulfilling any formality of any nature whatsoever, 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 prohibition of 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 Risk Users of the BdP;

c prohibition of 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 prohibition of clauses, as contrary to the requirements of good faith, that allow the predisposing bank to set-off its credit over a customer with a joint bank account balance of which the customer is the holder 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 rules governing consumer finance. 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 default of the financial consumer. 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:

a the principal amount;

b the accrued compensatory interest; and

c 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 latter entails the

termination of the former. In this context, it is important to note that the court decided that it was abusive for the creditor to fill in and execute an unfilled promissory note issued by the consumer for the purposes of securing the consumer loan.

X OUTLOOK

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

In 2019, at national level, priority was given to, among others, the monitoring of the macro prudential measure[3] adopted in the form of a recommendation by the BdP in 2018, aimed at mitigating the risks associated with new credit agreements with consumers.

Asset quality also improved significantly, the non-performing loans (NPL) ratio continued to follow the downward trend that began in mid-2016, reflecting the reduction in the stocks of NPLs on balance sheets. Moreover, NPLs have fallen from a record high of € 50.5 billion in June 2016 to € 17.1 billion in December 2019, accounting for a decrease of more than € 33 billion in only three and a half years.

Compared with 2019,[4] the number of new consumer loan agreements decreased 25.6 per cent and the amount of new consumer credit agreements decreased 26.8 per cent.

The rapid escalation of the public health crisis caused by covid-19 has created an unprecedented situation that poses innumerable legal challenges, both on a national and international scale. Since 30 January 2020 when the World Health Organisation declared this situation to be a public health emergency on an international scale, the seriousness of the crisis has gradually worsened and there are now numerous countries, including Portugal, that have approved various types of measures such as mitigating the economic impact of the virus.

Portugal reacted to this situation by passing laws such as Decree-Law no. 10-J/2020, of 26 March, as amended, which approved the public moratorium pursuant to which the enforcement of payments related to loans benefiting from these measures is suspended, including the enforcement of instalments in arrears at the time the application of the moratorium was requested, and therefore default interest and other contractual penalties cannot be charged. In the case of consumer finance, the public moratorium covers, among others, credit for financing education services (including academic and vocational training). In line with the European Banking Authority guidelines,[5] credit institutions may also voluntarily provide private moratoriums to their clients and these moratoriums cover loan agreements that do not benefit from the public moratorium (e.g., car loans). The public moratorium ends on 31 March 2021 and the private moratorium ends no later than 30 June 2021 (depending on the specific private moratorium).

The impact that the end of the moratoriums will have on the Portuguese economy and, in particular, on consumer loans, can only be ascertained at a later stage, although a worsening of defaults is anticipated.

3 This measure introduced limits to some of the criteria used by credit institutions in the consumers' creditworthiness assessment within the scope of credit relating to residential immovable property, credit secured by a mortgage or equivalent guarantee, and consumer credit.

4 Reference dates October 2020/October 2019.

5 EBA/GL/2020/02, of 2 April 2020, as amended.

Furthermore, due to the uncertainty surrounding the potential impact of the ongoing pandemic in the financial sector, the Bank of Portugal has recommended that less significant institutions and investment firms shall refrain from making or limiting dividend distributions or repurchases of ordinary shares until 31 September 2021. This recommendation is in line with the approach set by the European Central Bank for significant institutions in the context of the Single Supervisory Mechanism. By the same token, the Bank of Portugal's recommendation that the Portuguese credit institutions shall apply a more restrictive set of measures in respect of the attribution and payment of variable remuneration has now been extended for the same period of time.

Appendix 1

ABOUT THE AUTHORS

HÉLDER FRIAS

Uría Menéndez – Proença de Carvalho

Hélder Frias joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2006 and became a counsel in 2019. 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).

SOFIA SANTOS JÚNIOR

Uría Menéndez – Proença de Carvalho

Sofia Santos Júnior joined Uría Menéndez – Proença de Carvalho in September 2017 and is also part of Hélder Frias' banking, finance and insurance team. Sofia's professional practice is focused on banking, finance and insurance, and corporate.

As of September 2019, Sofia became a lawyer and a junior associate of Uría Menéndez – Proença de Carvalho.

URÍA MENÉNDEZ

Uría Menéndez – Proença de Carvalho
Praça Marquês de Pombal, 12
1250-162 Lisbon
Portugal
Tel: +351 21 030 86 00
Fax: +351 21 030 86 01
helder.frias@uria.com
sofia.santosjunior@uria.com
www.uria.com

an LBR business

ISBN 978-1-83862-766-9