THE CONSUMER FINANCE LAW REVIEW

SEVENTH EDITION

Editors
Rick Fischer, Jeremy Mandell and Calvin Funk

THE LAWREVIEWS

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This article was first published in Feburary 2023
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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ISBN 978-1-80449-148-5

ACKNOWLEDGEMENTS

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

HOGAN LOVELLS

MORRISON & FOERSTER LLP

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

URÍA MENÉNDEZ

WOLF THEISS

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PREFACE

Consumer choice for financial products and services continues 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 continue to attract 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 developing increasingly innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and non-bank financial service providers, are responding by innovating to improve their product and service offerings 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 ever-increasing rate of innovation in consumer financial services, the changing profile of market participants, and the evolving political landscape give rise to new legal questions or put 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 a number of 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 funded on the bank's balance sheet, or 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 source capital more efficiently. 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 and digital currency 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 towards 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 put more 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 use of a 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 ever-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 continues to raise 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. An ever-growing number of apps and other tools enable consumers to 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 tending 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 the creditworthiness of potential borrowers who might not meet the underwriting criteria of traditional lenders. These models and data may not be as thoroughly tested or as demonstrably statistically sound as the time-tested credit models and data used by traditional lenders. As a result, in addition to evaluating whether use of alternative data adversely 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 protected 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 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 practices 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 both expanding choice for consumers and exciting opportunity for providers of consumer financial services. Accelerating advancements in technology have given consumers in developing markets, as well as unbanked or underbanked 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, Jeremy Mandell and Calvin Funk
Morrison & Foerster LLP
Washington, DC
January 2023

Chapter 6

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, while the Portuguese banking industry benefits from a high level of protection regarding consumer finance as a result of the direct influence of EU law, recent national government policies also contribute to this 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 both an asset contraction and a change in the industry's funding structure, which now gives preference to consumer 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 and Novo Banco (a bridge bank following the resolution measure applied to Banco Espírito Santo by the BdP).

By the end of the first half of 2022, the key financial indicators for the sector showed a total asset value of €462.983 billion, with the value of credit granted to customers totalling €252.679 billion and deposits totalling €319.7 billion.

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. At the apex of the national legal system, the Constitution of the Portuguese Republic contains principles regarding the national financial system as a whole, as well as others governing the regulatory role of the BdP. In addition

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

to the Constitution, Law No. 5/98 of 31 January, as amended (the Basic Law of the BdP) established the basic structure of the BdP and governs relevant aspects of banking supervision. Both the Commercial Code and the Civil Code must also be considered in the context of the 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). Among other things, this statute governs 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, EU Directive 2008/48/EC[2] on consumer credit agreements 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.

Among several others, the following laws (as amended) must also be taken into consideration: 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; 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.); Decree-Law No. 349/98 of 11 November, regarding housing credit; and Decree-Law No. 446/85 of 25 October, as amended, establishing the Portuguese general contractual clauses legal regime (LCCG) and providing for unfair contractual terms that have not been individually negotiated.

Directive 2014/17/EU[3] 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, as amended, which established the requirements for the taking-up and pursuit of a 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 (notably the Directorate-General for the Consumer under the Ministry of the Economy, and the Portuguese Association for Consumer Protection), as these not only support consumers in general but also, 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 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,

2 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

3 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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

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 Pension Funds Supervisory Authority. Among other things, a significant number of those regulations are targeted at consumer protection and safeguarding customers' rights.

Of principal importance among its areas of responsibility are the BdP's powers to issue notices, instructions and circulars setting 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 fines and ancillary penalties; injunctions for the fulfilment of certain duties; seizure of documents and valuables; and special audits conducted in on-site inspections.

Each consumer has the right to file complaints against banks or other institutions (e.g., credit institutions, financial companies, payment institutions) in relation to the marketing of consumer banking services (e.g., deposits, home credit, consumer finance, credit cards). These institutions are required to present their records of complaints whenever requested to do so. These complaints may also be filed directly with the BdP, but it only has power to verify whether the institution is complying with its duties, and it cannot require an institution to remedy the damage or pay compensation to the consumer, as this level of legal protection can only be provided by the courts and similar judicial entities.

In July 2019, the BdP joined the Complaints Book e-platform,[4] providing bank customers with another channel through which to submit complaints. Following the introduction of this new channel, the number of complaints received increased and, in 2022, the BdP received 10,007 complaints from bank customers – 4.25 per cent more than in the previous year.

Moreover, Portugal implemented Directive 2013/11/EU[5] through Law No. 144/2015 of 8 September, as amended, on alternative dispute resolution for consumer disputes.

III PAYMENTS

i Overview

Payment instruments in Portugal are highly reliable and the payments market in Portugal operates in line with international best practice.

Following the implementation into Portuguese law of the revised Payment Services Directive by the enactment of Decree-Law No. 317/2009 of 30 October, which was superseded by Decree-Law No. 91/2018 of 12 November, the RGICSF was amended to provide for the establishment of new 'payment institutions', which do not fall under the definition of credit institutions or financial companies but are entitled to provide payment services – including the issuance of debit cards.

However, BdP Notice No. 11/2001[6] (which governed the issuance and management of debit cards prior to the entry into force in Portugal of the original EU Payment Services

4 https://www.livroreclamacoes.pt/INICIO/.

5 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC.

6 BdP Notice No. 11/2001 of 20 November on credit and debit cards and corresponding terms of use.

Directive) has not been amended or revoked in light of the new rules on the provision of payment services. Consequently, at present Decree-Law No. 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 No. 11/2001 provides for rules on the issuance of debit cards for credit institutions and financial companies.

A large majority of the rules provided in BdP Notice No. 11/2001 are also provided by Decree-Law No. 91/2018, although the following differences are worth highlighting:

a under Decree-Law No. 91/2018, when the client is not a consumer or a microenterprise, the parties may provide that the information requirements set out in the statute are not applicable, whereas the rules set out in BdP Notice No. 11/2001 are mandatory;

b under BdP Notice No. 11/2001, agreements are required to be written in Portuguese and it expressly provides that information on charges and rates of interest cannot be inserted in the agreement by reference to a list of costs and charges available at branches or by another medium (such as a website); and

c under BdP Notice No. 11/2001, the issuer is entitled to change the agreement subject to providing the client with a 15-day notice period.

EU Regulation 2015/751[7] on interchange fees for card-based payment transactions became directly applicable in its entirety from 9 June 2016.

ii Recent developments

Following the impact of the covid-19 pandemic on payment habits in Portugal in 2020, some changes were seen in 2021. This year was marked by a resumption of the trend of growth in electronic payments. In 2021, 10.5 million fewer payments were made with cheques than in 2019, and there was an increase of 108 million transactions made with payment cards, direct debits and transfers (including immediate transactions). This increase represented a 3.7 per cent rise compared with transaction figures for 2019, the year preceding the pandemic. Electronic payments increased even more markedly – by 14.9 per cent (a value of €65.4 billion). Contactless technology has also seen increased use, with purchases of this kind accounting for 40 per cent of card payments in Portugal by December 2021. Notwithstanding this, payment cards continue to be the instrument most used by Portuguese people, as these were used for 86.5 per cent of all payments made.

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, although credit institutions may allow for early fund mobilisation subject to a penalty on the accrued interest. Conversely,

7 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.

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 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 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 whenever the account contains no more funds. The second option, known as overrunning, occurs when there is no prior agreement; instead, the credit institution tacitly allows consumers to make use of funds even if they have exceeded their account 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, notably: opening and holding of minimum banking services accounts; provision of a debit card; access to the accounts through cash machines, home banking services and service over the counter; and 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 per bank. Further, EU Directive 2014/49/EU[8] states that every DGS must ensure a capitalisation level of 0.8 per cent. Recent data shows that the Portuguese DGS capitalisation level decreased from 1.04 per cent in 2019 to 0.98 per cent in 2021, which although slightly less robust remains above the 0.8 per cent required by the EU.

ii Recent developments

Law No. 66/2015 of 6 July, as amended, brought changes to the legal framework for deposits, whereby credit institutions cannot offer overdraft facilities or overrunning under the Minimum Banking Services regime; also, credit institutions must send an annual invoice-receipt to the account holder detailing all the fees and expenses related to on-demand deposits from the previous year.

In 2020, Law No. 66/2015 was amended by Law No. 57/2020 of 28 August, introducing a new rule regarding the commissions and expenses charged by credit institutions and other now service providers. According to the newly introduced Article 7, these commissions

8 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast).

and expenses must correspond to a service actually provided and must be reasonable and proportionate to the costs incurred. Pursuant to this Article, any commissions, fees or other kinds of charges shall be prohibited where no service is actually provided.

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 an underlying provision of a line of credit, as opposed to the lending of a certain amount. As the terms and conditions of a credit card are linked to a specific credit agreement, the possibility of revolving credit only exists where a limit on a line of credit has been specified. Lending entities are obliged to provide the customer with the applicable written contracts, which are commonly drafted as standard contracts (and, therefore, subject to the LCCG) and usually presented as the card's general terms and conditions, because the card's sole purpose is to serve as a means of payment.

Servicing charges imposed by credit card issuers vary between the different credit institutions. However, it is mandatory for all costs of this kind to be clearly indicated in the credit agreement, which must contain information on all applicable interest and exchange rates, or the calculation method and the reference date used in determining applicable interest or exchange rates.

Decree-Law No. 227/2012 of 25 October is notable here in that it established the 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 to prevent situations of default by their customers. More importantly, this statute created and defined the Extrajudicial Procedure for the Regularisation of Situations of Default (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). The consumer benefits from a set of legal guarantees during debt restructuring negotiations under the PERSI and these include prohibitions on the credit institution terminating the credit agreement, taking legal action to claim those credits, or assigning those credits to a third party.

In 2021, Decree-Law No. 227/2012 was amended by Decree-Law No. 70-B/2021 of 6 August, to provide protective measures for bank customers with credit agreements covered by a moratorium, and amending the general default regime. Under this new regime, credit institutions are obliged to prepare and implement an action plan for default risk, describing in detail the procedures and measures adopted for monitoring the execution of credit agreements and the management of default risk situations. Decree-Law No. 70-B/2021 also requires credit institutions to create, in a durable medium, individual files for bank customers covered by the PERSI procedures, which must contain all relevant elements described in Article 19 of the Decree-Law.

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 and an overall maximum amount for successive transactions made without the use of the personal identification number associated with the card (currently bank customers may only make a contactless payment if the value

of the transaction is below €50 and the overall amount or number of successive contactless transactions is a maximum of €150 or five transactions (the entity that issues the card can set lower limits)). The BdP issued a circular on the subject, detailing best practice for issuer entities regarding their information duties to customers, including their obligation to provide information in the form 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 other means. Although they are all considered consumer credit agreements, 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: the non-payment of two consecutive instalments that exceed 10 per cent of the total amount of credit; and 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 established 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. 5/2017 of 22 September established the information requirements for housing credit contracts provided by credit institutions.

Under Portuguese law, lending (secured or otherwise) is considered a banking activity. Accordingly, the carrying out of any short-term consumer lending activity 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 banking activity may only be carried out by duly authorised credit institutions or financial companies, crowdfunding is an emerging and developing area, operating in the context of the 'sharing economy'. Crowdfunding as a financing channel allows investors to be matched 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, established the legal framework for crowdfunding. The Law addresses the different aspects of crowdfunding models: key features and duties of the owners of digital platforms; key features and duties of the parties; conditions of entry to the activity; registration procedures; terms of open call to the public to raise funds for specific projects; and the competence of the Portuguese Securities Market Commission (CMVM) as the Portuguese authority responsible for supervising and monitoring proper decisions of crowdfunding platform management bodies.

Law No. 102/2015 has encouraged European interest in this form of financing, although with limited cross-border effect for the moment.

The enactment of Decree-Law No. 144/2019 of 23 September marked a regulatory change that will have an impact on banking lending activities as, among other changes, it established the creation of loan funds as an alternative financing instrument, one especially designed to address the difficulties faced 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 entered into force on 1 January 2020 and transferred supervisory powers over management companies of collective investment schemes and management companies of securitisation funds from the BdP to the CMVM.

VII OTHER AREAS

Important legislative changes took place in 2021 and 2022 and these are detailed below.

Law No. 32/2021 of 27 May amended the LCCG by imposing new formal requirements regarding, basically, aspects of the information and communication duties imposed on these types of contract. According to Law No. 32/2021, general contractual terms are absolutely prohibited from being written in a font size smaller than 11 or 2.5 millimetres and with a line spacing of less than 1.15 millimetres.

Decree-Law No. 59/2021 of 14 July introduced the regime applicable to the availability and dissemination of telephone lines for consumer contact. This new regime applies to 'suppliers of goods or service providers' and 'entities providing essential public services'. According to this Decree-Law, these entities must have a free telephone line or, alternatively, a telephone line with a geographic or mobile numbering range (i.e., starting with two or nine, according to Portuguese telephone numbers). However, calls relating to the pre-contractual phase and those that in themselves constitute performance of the contract are not included. Another important innovation is that it requires companies to provide a telephone line.

Decree-Law No. 9/2021 of 29 January approved the Legal Regime of Economic Offences and punishes as a minor administrative offence failure to comply with the duty

of information regarding alternative resolution of consumer disputes, and as a serious administrative offence unfair commercial practices and failure to comply with the duty to provide pre-contractual information in distance or off-premises contracts.

Law No. 78/2021 of 24 November established the legal regime on the prevention and combating of unauthorised financial activity, and protection of consumers, by imposing certain additional information disclosure requirements on financial institutions operating within the Portuguese territory.

In addition, Decree-Law No. 11/2022 of 12 January was published at the beginning of 2022, establishing the legal framework for equity loans and regulating this innovative legal instrument, which promotes the diversification of corporate financing sources. The legal framework establishes the essential characteristics of equity loans, namely the concept that underpins them, identification of the financial sector entities qualified to market them, the conditions for the remuneration or repayment of the credit or debt securities involved, the rules on the conversion of such loans into share capital, and the corporate provisions governing the relationship between the company concerned, its shareholders and the relevant financial sector entities or their investors, without prejudice to the principle of exclusivity and the autonomy of the parties to stipulate otherwise.

Lastly, Decree-Law No. 80-A/2022 of 25 November has implemented measures to mitigate the effects of the increase in interest rates in credit agreements for the acquisition or construction of housing for permanent home ownership. To fulfil the conditions defined in Decree-Law No. 227/2012, credit institutions must submit proposals that are appropriate to the borrower's situation. These may include, for example, an extension of the term with an option to resume the term previously contracted. To meet the statutory requirements of Decree-Law No. 80-A/2022, no commissions may be charged for the renegotiation of contracts, nor may the interest rate be increased. Furthermore, to ensure better conditions for borrowers while simultaneously promoting competition in the banking sector, this statute has also suspended temporarily the fee charged for early repayment of variable rate mortgage loans, thereby reducing the cost of the decision to transfer the loan to another institution or to make partial repayments using the savings accumulated.

VIII UNFAIR PRACTICES

Consumer credit agreements, governed by Decree-Law No. 133/2009 of 2 June, often contain general contractual clauses and must, therefore, comply with specific requirements.

Pursuant to Decree-Law No. 446/85, qualification as a general contractual term requires the lack of ability of one of the parties to negotiate the contractual term stipulated by the other party or the inability of the addressee of the contractual term to influence its content.

As these clauses are not negotiated in advance, compliance with the information and communication duties imposed by the LCCG is fundamental. These information and communication duties are particularly relevant in this context given that it is common for information to be provided in a smaller font size in this type of contract. Furthermore, according to the unfair commercial practices regime,[9] a contract is considered to be an unfair commercial practice if it contains false information or, although factually correct, it

9 Decree-Law No. 57/2008 of 26 March.

deceives or is likely to deceive the consumer or leads or is likely to lead the consumer to make a decision that he or she would not have taken otherwise, for whatever reason (including, in this context, the general presentation of the information).

To clarify these duties, the Portuguese courts ruled that it is important not to consider the matter on a subjective level but, instead, to consider an objective parameter that corresponds to a standard of reasonableness proportionate to the consequences that the parties may suffer as a result of any disparity of power.

The courts also clarified that, in light of the principle of reasonableness, the information must be transmitted by efficient means and with adequate content, and they reaffirmed the importance of a 'broad concept of informing', encompassing not only the duty to inform *strictu sensu* (merely informing the counterparty of the essence of the clause) but also the duty to advise (providing guidance on the best conduct to adopt) and the duty to warn. As mentioned above, Law No. 32/2021 amended the LCCG, imposing new requirements regarding information and communication formats. However, according to one reputed Portuguese legal scholar, the new format requirements are not applicable to pre-contractual information, given that its purpose is to inform the customer rather than govern the relationship between the parties.

Notwithstanding, if an entity fails to comply with these new requirements and, accordingly, a clause is considered to be absolutely prohibited, this non-compliance may be considered an unfair commercial practice and qualify as a serious offence under the Legal Regime of Economic Offences.

IX RECENT CASES

i Enforcement actions

In exercising 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. Following 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

The Oporto Court of Appeal recently rendered an extremely significant judgment insofar as it protected a credit institution from claims for damages based, erroneously, on alleged cyberattacks. In this ruling, the credit institution was acquitted in view of the account holder's negligent conduct in sharing her home-banking account credentials with a third party, who made them available online through an undisclosed website. Thus, it was proven that the credit institution's information technology (IT) system had not been the target of a cyberattack and the damaging consequences suffered by the plaintiff (unauthorised electronic payments) were the result not of a risk inherent in the financial institution's business operations but, rather, of manifestly thoughtless and careless conduct on the part of the account holder. It was then proven that the transfers were carried out fraudulently by third parties, using phishing techniques via the website that the third party had provided with the credentials, with no malfunction or deficiency of the credit institution's IT system having occurred.

Notwithstanding the fact that credit institutions have a duty to take care of the security of the online services they provide and of their customers' deposits, the Court concluded that bank customers also have a duty of confidentiality and a duty to safeguard their credentials

and other service access keys. Consequently, account holders' serious failings in taking necessary precautions when using online services provided by credit institutions are the exclusive responsibility of those account holders and, in these situations, credit institutions are not obliged to compensate the customer.

X OUTLOOK

After the considerable decline that took place in the period 2011–2012, consumer finance activity in Portugal has risen steadily since 2013.

Asset quality has continued to improve significantly, with the ratio of non-performing loans (NPLs) following the downward trend that began in mid-2016. NPL ratios, both gross and net of impairments, continued to decline, albeit at a slower rate, reflecting greater difficulties in the sale and recovery of already existing NPLs. In 2021, compared with the previous year, the total volume of loans granted by banks to corporations from September 2020 onwards grew by 5.1 per cent to €76.3 billion and, also from September 2020, the volume of loans to households for house purchases grew by 4.3 per cent to €96 billion.

Looking ahead, there is an expectation that more consumer protection legislation will be passed in Portugal, mainly to address inflation and the rise in interest rates; however, the Portuguese financial sector is bound to reflect the fragility of the global economy going into 2023. The Russia–Ukraine armed conflict, the rise in inflation and the tightening monetary policy across the world are only a few of the uncertainties that will affect the Portuguese economy in the 12 months ahead.

On a brighter note, developments in the area of digital payments and financial tools should continue to accelerate and transform the payments experience across different levels.

Appendix 1

ABOUT THE AUTHORS

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

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ISBN 978-1-80449-148-5