

COUNTRY UPDATE-Portugal: Insurance

Nov 15 2019 Ana Sofia Batista, Rodrigo Formigal and Jorge Morais

The Insurance and Pension Funds Supervisory Authority (Autoridade de Supervisão de Seguros e Fundos de Pensões (ASF)) regulates insurance companies in Portugal. It controls and supervises the business of insurance and reinsurance, pension funds and intermediaries including brokerage.

Decree-Law no. 72/2008, of April 16, as amended, notably by Law 147/2015 of September 9 (which transposed into domestic legislation Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 (the Solvency II Directive)), provide the main regulation for the insurance and reinsurance sector in Portugal

Albeit the transposition of Solvency II Directive only came into force on January 1, 2016, its effects are still being felt, given that it entails more demanding quantitative and qualitative requirements for the Portuguese players with impact on relevant areas such as: financial requirements, governance, information, market conduct, intra-group relations and supervision.

Solvency II Directive brought a strong harmonization at EU level and is mainly focused on three sectors (called pillars):

- 1) Pillar one, regarding capital requirements of insurance companies, with rules consisting in:
 - (a) the calculation of technical provisions (includes own funds, solvency capital requirement (SCR) and minimum capital requirement (MCR));
 - (b) eligibility of assets to cover such provisions;
 - (c) investment management principles and, in general, solvency requirements.

- 2) Pillar two consists of rules relating to the more qualitative section and includes corporate governance (with specific focus on the fit and proper requirements, risk management and internal audit functions) and rules relating to the supervisory function of the ASF.

- 3) Pillar three, consists of rules on transparency and sets out disclosure obligations towards the ASF and the market as well.

A number of regulations further detailing have been issued/are still going to be issued in respect of these pillars.

Under Law 147/2015, an "insurer/reinsurance undertaking", also referred to as an insurer or reinsurer, means any undertaking that has received official authorisation to pursue the business of insurance/reinsurance activity in Portugal or towards residents

in Portugal. Portuguese legislation determines that insurance undertakings which pursue the business of insurance in Portugal are financial institutions whose exclusive aim is the pursuit of the business of direct insurance and/or of reinsurance, except for those classes or types which are legally reserved for certain kinds of insurers.

Insurance undertakings may also pursue business that is related or complementary to insurance or reinsurance, namely that which relates to salvage acts and contracts, to the reconstruction and repair of buildings, to the repair of vehicles, to the maintenance of medical facilities and to the application of provisions, reserves and capital.

Provision of services

Establishing an undertaking in Portugal

Law no. 147/2015 provides that a person or legal entity that is established in Portugal may not, in principle, carry out any life or non-life business without first receiving the authorisation of the Portuguese regulator, the ASF. The ASF will, on application, grant authorisation if the applicant demonstrates that, inter alia, will comply with a number of provisions regarding the company's management, employees, finances and structure, such as:

- It has a company structure that is a joint stock company, i.e. limited liability company by shares.

- Its denomination must contain unequivocally reference that its business is insurance or reinsurance;

- It has capital sufficient to cover the absolute minimum capital requirement.

- Qualified shareholders must ensure being capable of prudent and sound management of the Portuguese company.

- There is a submission of a detailed programme of activities;

- Must demonstrate the adequate implementation of proper governance procedures and checks and controls,

- Owners of qualifying shareholdings must meet the integrity and professionalism requirements set out in Article 77 of the Private Insurance Code.

- Individuals who will carry out the administration, management and supervisory tasks, as well as those who will hold key roles within the company, must be fit and proper.

The carrying out of insurance and/or reinsurance activities in Portugal by companies which have their registered head office in another European Union member state can take place as follows:

- Under the freedom of establishment principle, that is, by opening a branch in Portugal.

- Under the freedom to provide services principle (also called UE passport) that is, by entering into insurance contracts in Portugal without a branch.

The carrying out of insurance and/or reinsurance activities in Portugal on the part of companies which have their registered head office in a country outside the European Union (that is, third countries) is subject to additional requirements.

Acquiring a Portuguese undertaking

Any natural or legal person, or legally-equivalent entity, who, directly or indirectly, proposes to acquire a qualifying holding in an insurance undertaking, or who proposes to increase their qualifying holding so that the proportion of the voting rights or share capital that they hold would reach or exceed 10 or 20%, one-third or 50%, or so that the undertaking would become their subsidiary, should give prior notice to the ASF of their intention.

The ASF may oppose the plans, if it considers that the acquirer does not meet the necessary conditions to guarantee sound and prudent management, or set a reasonable limit within which they must be fulfilled. In certain circumstances, the evaluation of the acquisition may be subject to prior consultation with the competent authority of another member state, or with the Bank of Portugal.

In the event of insurance portfolio transfers (total or partially) and scissions and mergers of insurance or reinsurance undertakings operating in Portugal, the prior authorization from the ASF is also required.

Branch offices or general agencies and cross-border activities

The expression "providing services to Portugal" is interpreted as providing services to persons or entities that have their place of residence or business in Portugal. This means the state where the policyholder normally resides or, in the case of a legal person, the state in which the establishment of the legal person to whom the contract or operation relates is situated.

Life insurers and non-life insurers established in another member state

Entities authorised by another member state's supervisory authority

After communication by the supervisory authority of the home member state that an insurance company intends to exercise the right of establishment in Portugal by creating a branch, the ASF will inform that authority, within two months from the date of receipt of that notice, of the conditions based on reasons of general interest to be satisfied by the exercise of the insurance activity by that branch.

Entities not authorised by another member state's supervisory authority

These entities are prohibited from carrying out insurance business from a branch that is situated in Portugal without the ASF's authorisation. Such authorisation depends on compliance with a number of provisions in regard to the company's management, employees, finances and structure. The establishment in Portugal of branches of insurance undertakings whose head offices are outside European Union territory is dependent on authorisation granted by the ASF.

Those insurance undertakings which, in their home country, pursue both the business of non-life insurance and life assurance, may only be authorised to establish branches in Portugal to take up non-life insurance business or life assurance business. If such a non-authorised entity wishes to carry out an insurer's business by providing services to Portugal, it must notify the ASF.

It must also demonstrate that it will comply with certain requirements regarding the corporate personality, the power to carry out the business of a life/non-life insurer, the exercise of such power and the solvency of the company.

Insurers established in a non-member state

The requirements mentioned above for a non-authorised entity that is established in another member state are similar to those required of an entity that is established in a non-member state.

Insurance mediation

Law no. 7/2019 of 16 January (Insurance Distribution Law) approves the legal framework on insurance and reinsurance distribution, transposing Directive (EU) 2016/97, known as the Insurance Distribution Directive.

Law no. 7/2019 (Insurance Distribution Law), introduces the definition of the concept of insurance distribution (enshrining a broader concept covering a large number of activities, from pre-contractual relations to the execution of contracts and administration and performance of the same) and of the entities qualifying as insurance distributors.

Establishes a uniform legislative framework applicable to the different participants, insurance intermediaries, ancillary or otherwise, and insurance undertakings, directly involved in the distribution activity, regardless of the channel used.

Insurance intermediaries are now qualified under the following categories: insurance agent, insurance broker and ancillary insurance intermediary.

This change does not affect the vested rights of the former "tied insurance intermediaries", i.e., those who operated and were registered in accordance with the previous legal framework, since these are converted automatically and registered into the new categories, that is, as ancillary insurance intermediaries or insurance agents, according to the greater or lesser proximity or degree of dependence or ties with the insurance undertakings.

This automatic conversion process, to be carried out by ASF, does not prevent those concerned from deciding to register themselves under a different category, if it is considered more appropriate for their business model.

The lawmaker has strengthened the organisational rules and procedures, as well as the rules on the appropriate qualification and fit and proper assessment for carrying out the activity, as regards the appropriate qualification, and to assumptions of compliance

with the requirements set forth in the Insurance Distribution Law, has established new vocational training rules and the minimum requirements and content of insurance courses and sets out continuous professional development requirements, and new rules on remuneration, with the purpose of preventing conflicts of interest.

The lawmaker also broadened the obligations in respect of the policies for design and approval of insurance products, which must include identification of the profile of the relevant policyholders or insured persons which are the target market and ensure that all relevant risks to such persons are assessed and that the distribution strategy is consistent with the identified target market, and also strengthened the pre-contractual information duties, including the special duty of the insurance distributor to assess whether the insurance product is appropriate for the customer.

There are stricter rules as regards insurance-based investment products, taking into account the nature of the products and subject to compliance with the obligations under Regulation (EU) no. 1286/2014 (legal framework of packaged retail and insurance-based investment products – PRIIPs) and Law no. 35/2018 of 20 July, that amends the rules governing the marketing of financial products and the organization of financial intermediaries, and transposes MiFID II Directives 2014/65, 2016/1034 and 2017/593.

All insurance intermediaries have to be registered with the ASF as insurance agent, insurance broker and ancillary insurance intermediary to exercise mediation activities. Banks are also allowed to pursue insurance mediation activities. The registration of intermediaries can only occur after the ASF has verified the fulfilment of the professional requirements set forth in the law to access each category which will "authorise" or validate the registration.

Any insurance or reinsurance intermediary that is registered in another EU member state may provide services within Portuguese territory, under the freedom to provide services or the freedom of establishment, one month after the date on which the competent authorities of the home member state informs it of the notification to the ASF of its intention to carry on mediation activity in Portugal.

Business requirements for Portuguese insurance companies

The business of direct life insurance and reinsurance may be pursued in conjunction with accident and sickness classes only; however, distinct management systems should be adopted for each of these activities. The ASF imposes certain requirements on the solvency, liquidity, transparency and administration of Portuguese insurance companies.

Financial status and investment restrictions

Financial status

Both Portuguese and foreign companies that provide services in Portugal through a Portuguese branch office must establish technical reserves, comply with the solvency capital and the minimum capital requirements and respect the prudential regime applicable to the evaluation of the assets and liabilities, own funds and investments. There are some additional requirements for the assistance class of insurance and for life insurance contracts.

As far as technical reserve is concerned, the amount should be sufficient to enable the insurance undertaking to meet the

commitments which result from the insurance contracts (to the extent that they are reasonably foreseeable). The solvency capital requirement is calculated based on the principle of continuity of the activities of the insurance or reinsurance undertaking. The insurance and reinsurance undertakings should have eligible basic own funds to cover the minimum capital requirements.

The own funds shall comprise the sum of own funds and additional own funds. The evaluation of the asset and liability items is made on the basis of methods and assumptions established in a delegated act of the European Commission, namely the Delegated Regulation no. 2015/35 of the European Commission, as amended by Delegated Regulation no. 2016/467, of the European Commission.

The ASF defines the types of financial instruments or assets in which a Portuguese company may fund its technical provisions. The value of technical provisions shall correspond to the amount an insurance or reinsurance undertaking would have to pay if it transferred its contractual rights and obligations immediately to another undertaking. Technical provisions shall be calculated in a prudent, reliable and objective manner.

Distributions

According to Portuguese legislation, if an insurance undertaking is in an inadequate financial position, the ASF may decide to ban or restrict the dividend payments as part of the wide range of recuperation measures allowed to the ASF in such circumstances.

Supervision

EU insurers

Insurance companies domiciled in another member state that carry out the business of an insurer from a branch which is situated in Portugal, or provide services to Portugal from a branch in another member state, are subject to home supervision. They must, however, observe certain requirements stipulated by the ASF.

Non-EU insurers and Portuguese insurers

The ASF supervises insurers that are domiciled in Portugal, including the activities that their respective branches carry out within the territory of member states or under the freedom to provide services, as well as the activities which branches of insurance undertakings whose head offices are outside the EU carry out within Portuguese territory.

As regards insurance-based investment products (or unit-linked investment products), under Law 35/2018 of 20 July, that amends the rules governing the marketing of financial products and the organization of financial intermediaries, and transposes Directives 2014/65, 2016/1034 and 2017/593, the ASF is the local supervisory and regulatory authority.

Accordingly, all Key Information Documents (KID) concerning PRIIPs to be marketed in Portugal, shall be notified to ASF, at least two days prior to the date on which the product in question is to be marketed.

In addition to this initial notification, and prior to marketing, whenever changes are made to the KID, namely as a result of the

review provided for in Article 10 of Regulation (EU) No. 1286/2014, the new version of the KID must be notified to the ASF at least two working days in advance of its availability.

Marketing practice

Supervision of the ASF

Marketing of insurance products that insurance undertakings and their associations make in Portugal is subject to the provisions of general law, but also to the ASF's regulations and supervision and, in the case of insurance products associated to investment funds, the regulations of the Securities Market Commission, after hearing the ASF.

Without prejudice to the attributions of other institutions specifically designed to ensure consumer protection, the ASF is responsible for supervising the fulfilment of the applicable regulations which concern marketing and publicity matters by insurance companies and their associations.

Before signing an agreement, insurance companies must provide the client with all information that is relevant for an adequate assessment of the product. Insurance companies must also have in place adequate procedures for the settlement of complaints and, since March 1, 2009, insurance companies must also set up a "client mediator" who has the powers to handle clients' complaints and to seek to achieve out-of-court agreements.

The client mediator (who must reside or be established in Portugal) also has consultation powers. The ASF is competent to analyse and give its opinion on information requests and claims submitted by consumers and respective associations against intermediaries and insurers.

Under Law no. 156/2005, of September 15, 2005, all service providers that have direct contact with customers are obliged to have a claim book. This will be applicable to the intermediaries but not to the insurer company if they do not have direct contact with customers.

Distance marketing of financial services

Law no. 95/2006 of May 29, 2007, which fully implemented the Distance Marketing Directive (2002/65/EC), provides a "cooling-off" period of 14 days, or 30 days for life insurance and insurance, that relates to personal adhesion to open pension funds, during which consumers may withdraw distance contracts without penalty and without giving any reason.

Applicable legislation

The choice of law applicable to insurance contracts that cover risks situated within Portuguese territory, or in which Portugal is the member state of the commitment, must be expressed in the contract. If Portuguese law is not chosen, Portuguese consumer protection rules, will still, however, apply.

In cases where the parties in the contract have not chosen the law applicable to the contract, the law of the country that is most closely connected governs the contract. A contract of insurance shall be assumed to be most closely connected to the law of the

member state in which the risk is located, or in case of life insurance, the residence of the holder of the insurance agreement.

In addition, art 10 of Law no. 72/2008 establishes that Portuguese law governs contracts of insurance that are compulsory in Portugal. Contracts of compulsory insurance that cover risks classified in the motor vehicle liability class, which three insurance undertakings have refused to conclude, shall be subject to the national legislation which concerns compulsory car liability insurance.

If the chosen law is the law of a non-EU member state and it offers the policyholder less consumer protection than Portuguese law, the courts may override the chosen law applicable to the policy in favour of Portuguese law.

Overview

The insurance business in Portugal has seen some concentration resulting from M&A and portfolio sales operations. Nevertheless the sustained levels of foreign investment interest shows a positive attitude for the Portuguese insurance market, having dealt reasonably well with the implementation of Solvency II Directive (insurance companies have been passing the applicable solvency capital requirements tests) but also with the General Data Protection Regulation (GDPR) which produced its effects on May 25, 2018.

Compulsory insurance and banking operations-relation insurance products are still the main driving wheels of the insurance industry. New products are also being made available by insurance companies reflecting the new risks and trends that we now all face in day-to-day life, e.g. cyberisks and the fintech industry and recent technology developments are shaping not only the insurance business but also represent new challenges that the supervisory authorities will have to address.

Taxation

Corporate income tax

Insurance companies are subject to Corporate Income Tax (IRC) as laid down in the Portuguese Corporate Income Tax Code. Portuguese resident corporations are subject to Corporate Income Tax on their worldwide net income at a tax rate of 21% (small or medium size companies are subject to a tax rate of 17% on the taxable basis not exceeding 15,000 euros, and to the general tax rate of 21% on the taxable basis exceeding such amount).

Currently, there is also an additional state surtax applicable to companies with high taxable income. Following the Corporate Income Tax Reform, Portuguese resident entities that have as their main activity a commercial, industrial, or farming activity, as well as non-resident entities with permanent establishment in Portugal with a taxable income exceeding 1.5 million euros will be subject to progressive surtax of 3% over their taxable profit that exceeds 1.5 million euros up to 7.5 million euros; of 5% over the amount exceeding the 7.5 million euros up to 35 million euros; and of 9% over the amount exceeding the 35 million euros threshold. (However, the companies established in the Autonomous Region of Azores are subject to a lower tax rate of 16.8% (in case of small or medium size companies, a tax rate of 13.6% applies to the part of the income not exceeding 15,000 euros).

In the Autonomous Region of Madeira also applicable a lower tax but of 20% (in case of small or medium size companies, a tax rate of 13% applies to the part of the income not exceeding 15,000 euros). The state surtax of both Regions are also lower when

compared to the Mainland.)

There is also a local surcharge tax (derrama) that may be (it is determined on a municipal level) levied on taxable profit before the deduction of any carried-forward tax losses at a tax rate that can go up to 1.5%. Insurance companies are required to create specific provisions, that are mandatory under the Portuguese rulings, which are tax-deductible under the IRC Code.

Stamp duty

Insurance policies are subject to stamp duty, with tax rates ranging from 3% up to 9%, depending on the type of insurance policy in question, which apply to the total amount of the cost of the insurance policies. In case there is no special provision, the residual tax rate is of 9%. However, Portuguese law establishes reduced rates and exemptions as follows:

- Life insurance-related products (seguros ramos vida), including capitalisation products, and unit-linked products are exempt.

- Accident, health, agriculture and livestock, vessel, aircraft and transportation of goods insurance: 5%.

- Guarantee insurance: 3%.

Tax liability

Insurance premiums are subject to indirect tax and duties regardless of the law that is applicable to the insurance contract or the location of the goods, assuming that the risk is located in Portuguese territory. In Portugal, the taxable person liable to the stamp duty is the insurer, although the tax is at the insured's expense. There is no reverse charge rule applicable.

Parafiscal tax

There is a parafiscal charge due on specific types of insurance premiums. The insurance company is liable to pay a charge of 0.048%, which is applicable to the net income that arises from premiums related to life insurance, and of 0.242% which is applicable to the net income that arises from premiums of other types of insurance. This charge is due twice a year (January and July), with reference to the preceding semester and is established by the ASF. It is also mandatory that insurance companies levy a parafiscal charge for the National Institute for Medical Emergencies (INEM) of 2.5%, which is applicable over the gross value of the premiums and other contributions related to life insurance, provided that the policy only secures the risk of death and the policyholder is resident in Portugal.

There are other parafiscal charges due on the certain types of insurance policies, such as:

- A charge of 13%, applicable over the value of the premiums related to fire insurances and insurances for the transportation of dangerous goods, that is due to the National Civil Protection Authority (Autoridade Nacional de Protecção Civil (ANPC)).

- A charge of 6%, applicable over the value of the premiums related to agricultural and livestock insurances, that is also due to the National Civil Protection Authority (ANPC).
- A charge of 2.5%, that is due to the Vehicle Insurance Fund (Fundo de Garantia Automóvel (FGA)) and levied on the total value of the premiums related to motor vehicles liability insurances.
- A charge of 0.21%, that is due to the Vehicle Insurance Fund (FGA) and levied on the total value of the premiums related to motor vehicle insurances.

Value added tax

According to Portuguese tax law, insurance and reinsurance operations are exempt from VAT, as long as they are carried by brokers and/or insurance intermediaries.

Foreign companies

Foreign companies are generally subject to tax on income deemed attributable to a permanent establishment in Portuguese territory, in accordance with the applicable tax treaties in force. Also, foreign companies, without a permanent establishment in Portugal, acting under the European passport, may be liable to pay parafiscal charges. In fact, the parafiscal charges mentioned above are due: (i) on insurance premiums that cover risks located in Portugal, (ii) in case Portugal is the member state where the policyholder has his/her habitual residence, (iii) if the policy holder is a legal person and Portugal is the member state where the latter's establishment, to which the contract relates, is situated, regardless of the law applicable to it.



*Ana Sofia Batista is a partner with Abreu Advogados since 2007 and Partner of the Corporate, M&A and Commercial Law Departments. Ana Sofia also co-heads and coordinates the Banking and Finance Law Department. Ana Sofia has a significant experience in dealing with corporate and M&A transactions in Portugal and in Portuguese speaking jurisdictions. Ana Sofia is a graduate from the Catholic University Law School in Lisbon and has a LL.M. in International Business Law from King's College London; Studies in Securities from the University of Lisbon Law School and a Course on Banking Law from the same University. Ana Sofia is frequently invited speaker at several Conferences, Seminars about Capital Markets and Financial Instruments. **Rodrigo Formigal** is a professional partner with Abreu Advogados since 2018 and a member of the Banking and Finance team. Rodrigo worked as external legal counsel at Citibank and was on secondment at Barclays Bank in Portugal and was previously a managing associate in the banking and finance team of another law firm. Rodrigo has over 13 years' experience and has been involved in several banking and finance transactions including General Lending, Asset Finance, Acquisition Finance, and Refinancing / Restructurings and Regulatory. **Jorge Morais** is an Of Counsel and has been at Abreu Advogados since 2015, working primarily on matters related to finance and banking. As legal director of important international banking groups, and then as a lawyer he led highly complex proceedings, specifically, the reorganization of banking groups that issue securities admitted to trading, organizing and monitoring public offerings in regulated markets, as well as the organization and structuring of issuing financial instruments, particularly shares, bonds, commercial paper and structured products by private or public subscription. Jorge Morais has a Law degree from University of Lisbon, Faculty of Law and a Diploma in European Advanced Studies, College of Europe, Belgium. The views expressed are their own.*

