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Transposition of the Cross-Border Distribution Directive | New Investment Company Regime

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TRANSPOSITION OF THE DIRECTIVE ON CROSS-BORDER DISTRIBUTION OF COLLECTIVE INVESTMENT UNDERTAKINGS

Last 9 December 2021, Decree-Law 109-F/2021 was published amending the General Regime for Collective Investment Undertakings, partially transposing Directive (EU) 2019/1160 of 20 June 2019 on the cross-border distribution of collective investment undertakings and Delegated Directive 2021/1270 of 21 April 2021 on sustainability risks and sustainability factors to be taken into account by undertakings for collective investment in transferable securities.
Decree-Law 109-F/2021 entered into force on 10 December 2021, with the exception of the rules on the integration of sustainability risks which will only enter into force on 1 August 2022.

In addition, Law 99-A/2021, of 31 December was also published, which, of its many amendments, also amends some provisions of the General Regime for Collective Investment Undertakings, approved in annex to Law 16/2015, of 24 February, resulting, to a large extent, from the amendments made to the Securities Code, being necessary to update the references in the General Regime for Collective Investment Undertakings to the CVM.
In turn, the amendments introduced by Law 99-A/2021 in the General Regime for Collective Investment Undertakings will come into force 30 days after its publication.

1. Legislative Background

The amendments made to the General Regime for Collective Investment Undertakings by Decree-Law 109-F/2021 reflect a need identified by the European institutions for the harmonization of various matters relating to the cross-border activity of Collective Investment Undertakings (CIUs), with the aim of guaranteeing equal conditions of competition and standardizing investor protection.
In turn, regarding Law 99-A/2021, this law carried out an extensive reform on several capital market diplomas, with the purpose of promoting the protection of investors and stimulating the development, competitiveness and efficiency of the markets, through the implementation of a simpler, objective, clear and proportional regulation, with repercussions in the legislation applicable to CIUs.

2. Object and Scope of Application

Decree-Law 109-F/2021, of 9 December, significantly amends the General Regime of Collective Investment Undertakings, enshrined in Law 16/2015, of 24 February, with these amendments focusing on:
(i) The new pre-marketing regime;
(ii) The marketing regime, as well as the termination of cross-border marketing of Collective Investment Undertakings based in other Member States, through the adoption of a harmonized procedure;
(iii) Implementation of sustainability factors within the scope of the activity of Undertakings for Collective Investment in transferable securities and respective management companies.
Law 99-A/2021, of 31 December, also introduced amendments to multiple articles of the General Regime of Collective Investment Undertakings, in order to bring it into line with the CVM, updating the terminology adopted by Portuguese legislation on this matter, as well as introducing reference to new rules applicable to management companies.

3. Pre-marketing regime

Decree-Law 109-F/2021, of 9 December, adds articles 229-A to 229-D, relating to the new concept of "Pre-marketing".
As the concept of pre-marketing differed between the various legal systems, and did not actually exist in some of them, as in Portuguese legislation, Directive (EU) 2019/1160 provided a harmonized definition of pre-marketing and this has been transposed to Article 229-A of Decree-Law 109-F/2021.

This establishes the regime applicable to the pre-marketing of Collective Investment Undertakings by European management entities, in relation to Alternative Investment Undertakings that are not yet authorized or have not yet been notified for commercialization in the Member State in which the potential investors have their domicile or registered office. Portuguese Law has closely followed the definition of pre-marketing in the Directive, as "the provision of information or communication, directly or indirectly, on investment strategies or investment ideas by or on behalf of a management entity to gauge the interest of potential professional investors, domiciled or having their registered office in the European Union, in an Alternative Investment Fund (AIF), or a separate asset compartment, which is not authorized or has not been notified for marketing in the Member State where the potential investors have their domicile or registered office".
On the other hand, the subsequent articles not only identify the cases in which pre-marketing may exist, but also specify the information to be provided to investors and the procedure for supervision and cooperation in pre-marketing.
It is important to highlight the following points regarding this new regime:
(i) The new article 229-D determines that the notification to CMVM on pre-marketing must be made in a durable medium;
(ii) This regime is not extended to non-EU AIFs, which means that any marketing of these entities will trigger authorization requirements. In this respect, it should be recalled that the definition of marketing in the Portuguese legal system is very broad, covering any activity directed towards investors, in the sense of advertising for the purpose of subscription or proposing the subscription of units or shares in CIUs, using any means of advertising or communication; and
(iii) It does not cover Venture Capital Funds, given that there has been no change to the Legal Framework for Venture Capital, Social Entrepreneurship and Specialized Investment enshrined in Law 18/2015, as amended.

4. Regime of marketing and termination of marketing of Undertakings for Collective Investment in Transferable Securities

Taking into account the possibility of Undertakings for Collective Investment in Transferable Securities (UCITS) being marketed in Member States other than their own, Decree-Law 109-F/2021 adopted harmonization measures for the marketing and cessation of marketing of these undertakings.

In this regard, with the purpose of remove the obligation of physical presence in the national territory (or, alternatively, to appoint a third party for marketing purposes) and to strengthen the proximity of the execution of certain functions in the host state, the Decree-Law starts by harmonizing the procedure of notification of changes to the competent authorities of the management company's host state, as well as the regime of infrastructure provision in the Member States where the marketing takes place. It is therefore no longer necessary to appoint a paying agent established in Portugal, which was until now usually done by appointing a Portuguese bank or a bank with a branch in Portugal.

Also within this context of simplification, a procedure for the termination of cross-border marketing of UCITS and AIFs has been established as a way of guaranteeing predictable conditions for disinvestment in the event of termination of their marketing in the host Member State.

In this context, it should also be emphasized that the new Article 203-A lists the conditions necessary for the termination of cross-border marketing, namely:

(i) Submission to the public, during the minimum period of 30 business days, of an offer to repurchase or redeem the units, free of any charges or deductions, and transmitted individually, directly or through a financial intermediary, to all investors whose identity is known. This rule is not, however, applicable to closed-end AIFs or European long-term investment funds;

(ii) Disclosure of the intention to cease marketing of such units through a publicly accessible medium which is customary in the marketing of UCITS and AIFs and suitable for the typical investor, including by electronic means; and

(iii) Amendment or termination of the contracts entered into with a financial intermediary or its representative, with effect from the date of withdrawal of the notification, to prevent further direct or indirect offers or placements of units.

5. Sustainability

In terms of sustainability, the changes introduced essentially arise from the transposition of Delegated Directive 2021/1270, of 21 April, reflecting a central commitment of the European Union in the transition to a more sustainable and resource efficient economy, focused on environmental, social and governance (ESG) objectives.

In this context, Decree-Law 109-F/2021 provides that UCITS and their management companies must integrate and weigh risks and sustainability factors in the exercise of their activity, always taking into account the nature, scale and complexity of the activities.

These entities are thus subject to new general rules of conduct and must have the necessary resources and technical capacity for the effective integration of sustainability criteria.

6. Amendments introduced by Law 99-A/2021, of 31st December

With regard to the amendments introduced by Law 99-A/2021, of 31st December, it is important to point out, firstly, the update of the references to the provisions of the Securities Code (approved by Decree-Law 486/99, of 13th November) in order to remove any reference to "public company".

In addition, transparency requirements applicable to financial intermediaries providing portfolio management services on behalf of others have been added, including by providing information regarding:

(i) The relevant key medium to long-term risks associated with the investments;

(ii) the composition, rotation and rotation costs of the portfolio;

(iii) The use of voting advisors for engagement activities and their securities lending policy;

(iv) The manner in which that policy is implemented in order to carry out its engagement activities, if applicable, in particular on the occasion of the general meeting of the investee companies;

(v) whether and, if so, how financial intermediaries make investment decisions based on an assessment of the medium to long-term performance of the investee company, including non-financial performance; and

(vi) the possibility that conflicts of interest exist in relation to engagement activities and, if so, .

New concept of Investment Firm

which ones, and how they are dealt with by the asset managers.
It has also introduced the obligation to establish a policy of shareholder engagement in their investment strategy, which must be disclosed to the public.
Finally, the present law clarified that Alternative Investment Funds that raise capital exclusively from professional investors and are required to publish a prospectus under the Portuguese Securities Code, are only required to share information that is complementary to the information already disclosed in the prospectus itself.
Additionally, for Alternative Investment Funds which qualify as issuers for which Portugal is the competent Member State or an issuer whose securities are admitted exclusively to trading on a regulated market in Portugal but for which Portugal is not the competent Member State, it is now necessary to publish the annual report and accounts within four months after the end of the financial year (and keep them available to the public for ten years), in which case the Alternative Investment Funds are only required to share with investors information that is complementary to the information already disclosed in the aforementioned annual report.

CONCLUSIONS
Therefore, it is worth emphasizing the importance of the transposition of Directive (EU) 2019/1160, dated June 20, 2019, and Delegated Directive 2021/1270, dated April 21, 2021, as a means of eliminating restrictions on the free movement of shares and units of collective investment undertakings in the Union, while ensuring more uniform investor protection, as well as guaranteeing a level playing field among collective investment undertakings.

NEW INVESTMENT FIRM REGIME
Decree-Law 109-H/2021 of 10 December, which transposes three European Union Directives on the financial sector and approves the Investment Company Regime, was approved by the Council of Ministers.
This legislative reform, by seeking to gather and reorganize the legal regime applicable to investment firms, impacts several diplomas, including the amendments to the Securities Code and to the General Regime of Credit Institutions and Financial Companies.
With some specific exceptions, the amendments shall enter into force on 1 February 2022.

1. New concept of Investment Firm
Until today the investment firms, defined in the Legal Framework of the Credit Institutions and Financial Companies, were listed as several types, each one subject to specific legal regimes. The Investment Firm Regime, similarly to what occurs in other legal systems, removes this difference and defines one single legal regime applicable to investment firms, defined as legal persons which are not credit institutions and have as main activity the provision of investment services to third persons or the pursue of investment activities at professional level as foreseen in the Securities Code. It also removes the double prudential supervision existing to date of these companies, by the Bank of Portugal and CMVM, being now this latter the sole supervisory entity.

The new regime sets forth that the investment firms must adopt the form of company by shares, being possible to adopt the form of company by quotas if these pursue solely the activity of investment advice. In addition, they must adopt the expression “investment firm” in their legal name.
The minimum share capital requirements depend on the activities specifically performed and vary between EUR 750,000, EUR 150,000 and EUR 75,000. Moreover, the initial share capital of the investment firm must be fully subscribed and paid on the date of its set-up.

2. Supervisory Duties of the Securities Market Commission
As stated above, one of the main novelties of the new regime is the elimination of the overlapping of supervisory powers of investment firms, which will now be under the exclusive responsibility of the CMVM. This change will allow, according to the Government, to reduce administrative costs and improve the exercise of supervision.
In this sense, the CMVM will be responsible for granting authorization for the commencement of activity of investment firms in Portugal, even if in coordination with other entities, such as the Bank of Portugal and the Insurance and Pension Funds Supervisory Authority, taking into account the activities which those firms intend to carry out.
Within the scope of the internal organizational requirements for investment firms, it is also important to note that the regime provides for an extensive framework for their corporate governance system, also under the supervision of the CMVM.

CMVM's supervisory powers have the nature and extent provided for in the Securities Code and in the legislation on credit institutions as regards the recovery of investment companies (including the application of measures of corrective intervention, appointment of provisional directors and suspension or dismissal of directors).
The sanctioning framework follows the one provided for in the Securities Code, both for its substantive and procedural regime.

3. Qualifying Holdings
The intention to acquire a qualifying holding requires prior notification to the CMVM whenever there are plans to acquire a percentage which reaches or exceeds the thresholds of 20%, 33% or 50% of voting rights, calculated in accordance with Article 20 of the Portuguese Securities Code, or a holding in the capital of the investment company or which becomes its subsidiary.
In the light of this communication, the CMVM has 60 working days to conduct an initial assessment procedure, which may be extended, in certain situations, for a further 30 working days.
The duty to communicate is also maintained for situations of reduction or disposal of qualifying holdings, in accordance with the thresholds described above.

4. Regulatory powers of the CMVM
In order to implement the new regime, the CMVM will have powers to regulate a wide range of relevant matters, which include, for instance, the elements to be attached to communications, requests for authorization to incorporate, merge, spin-off and transform investment companies, the criteria used to assess the suitability of the members of corporate bodies and holders of qualifying holdings in investment companies or the submission, maintenance and revision of recovery plans.

CONCLUSIONS

The New Investment Firm Regime simplifies the legislative framework applicable to these firms and it is anticipated that the amendments will have a profound impact in the investment services and activities sector, making the Portuguese market more competitive vis-à-vis other Member-States.

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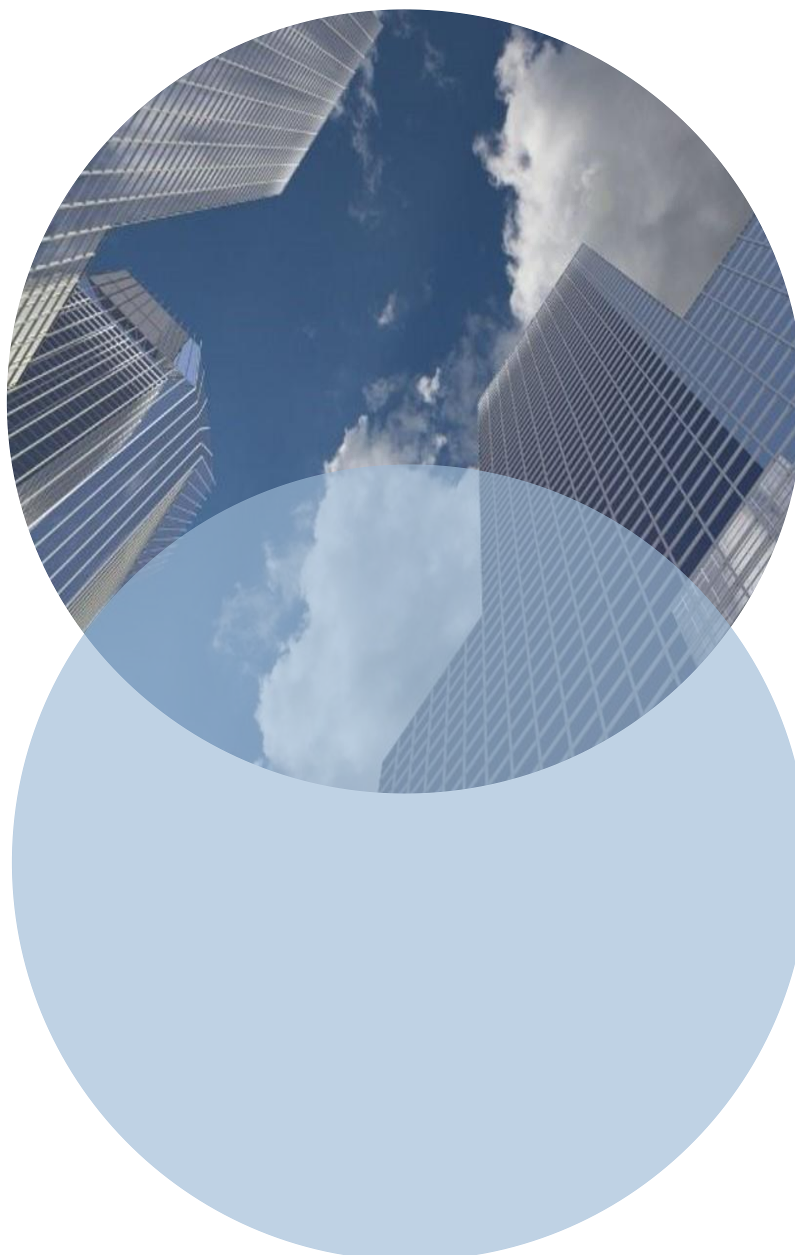

Thinking about tomorrow? Let's talk today.

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