

INFORMATIVE NOTE

BANKING AND FINANCE

PLMJ

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BANK OF PORTUGAL REGULATION ON MARKETING OF BANKING SERVICES AND PRODUCTS

The Bank of Portugal set up a regime to govern the advertising of the banking products and services that come under its supervision in Regulation No. 10/2008, of 9 December, which came into force on 1 January 2009.

The Regulation builds on the general regime laid down in Articles 77 and 77-C of the General Credit Institutions and Financial Companies Regime (the RGIC), as most recently amended by Article 2 of Decree-Law 211-A/2008, of 3 November.

Although the Regulation is not clear on this subject, it seems reasonable to conclude that it shall only be applicable to agreements entered into with consumers, since this is the scope of application of Article 77, nr. 2 of the RGIC, which the Regulation aims to develop.

As these are rules whose underlying purpose is to protect the general interest of retail customers in the Portuguese market, the respective addressees must be taken to be any credit institutions and financial companies, whether or not based in Portugal, who offer bank services to this type of clients.

The new rules are grounded in a fundamental concern: which is to ensure that the advertising information made available to the customer prior to the pre-contractual stage and the information disclosed at that stage are equivalent. As explained in the preamble to the Regulation, experience has shown that the information provided by credit institutions and financial companies in marketing campaigns for their banking products and services prior to the contract and pre-contract stages exert a determining influence on the bank customer during the selection and decision process.

Another basic feature of this regime should be mentioned: it extends to all the advertising means that can be used, whether audiovisual, verbal or written, via e-mail or internet. The regulator has taken the view that all of these means can exert a considerable influence on the customers of the credit institutions and financial companies so specific rules have been introduced for each one. It should be noted in this respect that there is now a duty to present information in a way as to allow for an adequate reading and/or hearing.

The Regulation sets out certain general principles that advertising campaigns must follow, including identification, truthfulness, transparency and balance, in addition to the other principles laid down in the Marketing Code. The Bank of Portugal attaches special attention to the principle of transparency, listing examples of certain conducts that will be deemed non-transparent:

- Announcing financial products or services without clearly explaining their nature or purpose;
- Omitting or dissimulating the conditions which permit access to the products as advertised;
- Omitting or dissimulating the conditions that allow customers to obtain a reduction in their loan instalments;
- Omitting and dissimulating charges that must be paid in return for advantages to which the customer has access.

The Regulation also introduces two regulatory measures unknown to the Portuguese market so far:

- A minimum size for the characters used in advertising campaigns;
- The restriction of the use of certain popular expressions such as "no charge" or "0% interest", "no initial deposits", "we return your money" or "new customers" to the situations provided for in the Regulation.

In terms of the information that must be given to the customers, it should be noted that the Regulation goes into some detail in this respect, making specific provisions for advertising of mortgage loan contracts, consumer credit and subscription to complex financial products.

As a rule, advertising campaigns will be supervised by the Bank of Portugal on an *ex post facto* basis, while the first level of control of compliance with the principles and rules set out in the Regulation will be based on self-regulation by the credit institutions and financial companies.

The Regulation provides that on the start date of advertising campaigns that involve written leaflets available at the counter, through direct mailing or posters for exclusive use inside the bank

"Best Portuguese Law Firm for Client Service" - Client Choice - International Law Office, 2008

"Portuguese Law Firm of the Year" - IFLR Awards 2006 & Who's Who Legal Awards 2006, 2008

(internet, television or radio campaigns appear to be excluded), the credit institutions must submit an electronic copy to the Bank of Portugal.

Although the Regulation makes no reference in this case to the need for prior approval, the truth is that the regulatory body can require the operators to change the content of this advertising material on an *ex post facto* basis if it considers that they are in breach of the provisions of the Regulation or other legislation.

Nevertheless, an *ex ante* supervisory regime applies to the “complex financial products” defined in Decree—Law 211-A/2008, such as those which, although they have the same form as an existing banking instrument, have characteristics that are not directly comparable with these instruments, for the progression of their value varies in line with the changes in the value of other instruments to which they are associated (the most paradigmatic case in the banking sector is the so-called “structured deposits”).

Advertising campaigns for this type of product are subject to the prior approval of the Bank of Portugal. Approval for advertising campaigns for this type of product must be requested by the credit institutions through a network system provided by the Bank of Portugal pursuant to the provisions set out in the Circular Letter nr. 108/2008 of 22 December.

In the event of breach of the provisions of the Regulation, fines may be imposed on the credit institutions or they may have their advertising campaigns suspended until the contents are changed, and they may be obliged to publish corrections. It may also be possible for customers to seek to hold the credit institutions liable and claim compensation in the event that they suffer losses as a result of the breach of these duties.

Although the advertising of bank products is already subject to the Marketing Code, other legislative instruments concerning the banking sector, consumer protection rights and certain Bank of

Portugal regulations, the Regulation No. 10/2008 is truly innovative, given that until now neither the legislator nor the regulator had achieved such a level of detail.

Compliance with this Regulation will require from the credit institutions/financial companies - through their legal and compliance departments – an efficient coordination with advertising agencies that design their marketing campaigns, in order for the latter to prepare the materials taking into account the limitations in terms of form and content that will now apply.

The Regulation will also require close cooperation between the credit institutions – which, in order to comply with the applicable requirements, must submit the advertising material to the Bank of Portugal – and the Bank of Portugal – which will have to ensure a speedy and effective review of the contents so as to demand prompt correction of these materials, particularly when they are associated with complex financial products.

If all this is achieved, the Regulation may bring greater transparency, accuracy and symmetry to the advertising information provided to Portuguese consumers.

CMVM (Portuguese Securities Market Authority) – Regulation on Advertising for Complex Financial Products

Finally, we would like to draw your attention to CMVM Consultation No. 11/2008 regarding the New Regulation on Advertising for Complex Investment Products, in the wake of the powers granted under Decree-Law 211-A/2008, of 3 November. It should be noted that this Consultation includes a proposal for amendments to CMVM Regulation 8/2007 which seeks to adapt the information and advertising regime on unit-linked insurance investment funds to the new requirements.

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