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The Legal 500 Country Comparative Guides

Portugal

INSURANCE & REINSURANCE

Contributing firm

Espanha e Associados



Leonor Futscher de Deus

Senior Associate | leonor.deus@espanhaassociados.pt

Mónica Almeida

Senior Associate | monica.almeida@espanhaassociados.pt

This country-specific Q&A provides an overview of insurance & reinsurance laws and regulations applicable in Portugal.

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PORTUGAL INSURANCE & REINSURANCE



1. How is the writing of insurance contracts regulated in your jurisdiction?

The writing of insurance contracts is a regulated activity in Portugal exclusively reserved to licensed entities and subject to the supervision of the Portuguese insurance regulator, *Autoridade de Supervisão de Seguros e Fundos de Pensões* (“ASF”). The main sources of insurance law are the following:

- Insurance and Reinsurance Law (“InsuranceLaw”), approved by Law no. 147/2015 of 9/9/2015, which transposed into Portuguese legal order Directive 2009/138/EC of the Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II Directive). Insurance Law establishes the conditions for taking up and pursuing insurance and reinsurance business in Portugal;
- Insurance Contract Law, approved by Decree-Law no. 72/2008 of 16/4/2008, which establishes general rules applicable to all types of insurance contracts, namely in what concerns pre-contractual and contractual information, obligations of the parties throughout the term of the insurance contract, payment of insurance premium and claims handling; and
- Civil Code, approved by Decree-Law no. 47344/66 of 25/11/1966, which lays down general rules applying to insurance contracts.

The referred to laws are supplemented by other several diplomas with specific scope, as well as by ASF’s regulations.

2. Are types of insurers regulated differently (i.e. life companies, reinsurers?)

Apart from specific rules applying to insurers and reinsurers by virtue of their own nature (namely, in

terms of corporate purpose, share capital, market conduct and reporting to ASF), insurers and reinsurers are subject to the same legal provisions regarding the taking-up and pursuit of the business under InsuranceLaw and to ASF’s supervision.

3. Are insurance brokers and other types of market intermediary subject to regulation?

Insurance distribution activity is also a regulated activity in Portugal reserved to licensed entities and subject to prior authorisation from ASF (unless the activities in question fall under an exemption pursuant to law).

The rules for taking up and pursuing insurance distribution are laid down in Insurance Distribution Law, approved by Law no. 7/2019 of 16/1/2019, which transposed into Portuguese legal order Directive 2016/97/EU of the Parliament and of the Council of 20 January 2016 on insurance distribution (“InsDistributionLaw”).

InsDistributionLaw provides for the following types of Portuguese-based insurance intermediaries:

- Ancillary insurance intermediaries (“All”);
- Insurance agents; and
- Insurance brokers.

All and agents act for and of behalf or one or more insurers (or insurance intermediaries) pursuant to a distribution agreement executed between the parties, whereas brokers act on behalf of customers and independently from insurers, being subject to portfolio diversification.

4. Is authorisation or a licence required and if so how long does it take on average to obtain such permission? What are the key criteria for authorisation?

The taking-up of business by Portuguese-based insurers and reinsurers is subject to prior authorisation from ASF.

ASF shall grant authorisation within 6 months after receiving the application from the undertaking concerned or, where applicable, after receiving any additional information from the applicant (however, up to 12 months from the date the application was initially filed).

The key criteria for the authorisation of Portuguese-based insurers and reinsurers are as follows:

- Compliance with formal requirements in terms of legal form, corporate purpose, share capital and head office;
- Qualifying shareholders must demonstrate their ability to ensure the undertaking's sound and prudent management;
- Submission of a scheme of operations under the applicable legal terms;
- Holding the eligible basic own funds to cover the absolute floor of the minimum capital requirement;
- Evidence that the undertaking will be in a position to hold eligible own funds to cover the solvency capital requirement and eligible basic own funds to cover the minimum capital requirement;
- Evidence that the undertaking will be in a position to comply with a system of governance under the applicable legal terms;
- In the event there are close links between the undertaking and other persons, said links must not prevent ASF from carrying on or enforcing its supervision powers;
- In the event the undertaking intends to cover direct risks regarding motor vehicle liability, other than carrier's liability, a claims representative must be appointed.

In what regards another EU Member State-based insurers and reinsurers, the license granted in their home Member State allows them to pursue activity in Portugal through a branch or under freedom of services ("FoS") in accordance with the EU passport, provided they notify the authorities of their home member State of such intention and comply with certain conditions considered of general good.

As for undertakings with head office outside the EEA, the taking-up and pursuit of insurance and reinsurance business in Portugal shall require the establishment of a branch and prior authorisation from ASF, provided the undertaking complies with the criteria laid down under InsuranceLaw.

5. Are there restrictions or controls over who owns or controls insurers (including restrictions on foreign ownership)?

Any person who intends either to acquire, directly or indirectly, a qualifying holding in an insurer or reinsurer or to further increase such qualifying holding as a result of which the proportion of the voting rights or of the capital held would reach or exceed the thresholds of 20%, 1/3 or 50%, or the company concerned becomes its subsidiary, must prior notify ASF of said acquisition project. Notification also applies when the qualifying holding is below the mentioned thresholds, but the acquisition is likely to enable the acquirer to exercise a significant influence over the management of the company. ASF may oppose to the acquisition project if the acquirer fails to guarantee a sound and prudent management of the company.

The reduction/disposal of a qualifying holding to a stake below the above-mentioned thresholds is likewise subject to prior notification to ASF.

In what regards foreign ownership/investment, there are no restrictions provided the provisions laid down in InsuranceLaw are complied with.

6. Is it possible to insure or reinsure risks in your jurisdiction without a licence or authorisation? (i.e. on a non-admitted basis)?

As a rule, it is not possible to insure or reinsure risks in Portugal without a license granted by ASF (in the case of Portuguese-based undertakings and third countries undertakings) or by a supervisory authority from another Member State (in the case of EU undertakings that intent to act in Portugal through a branch or under FoS).

Undertakings from third countries that carry on reinsurance business in Portugal without a branch, however, may benefit from an authorisation exemption provided that the European Commission decided that the solvency regime in that third country is equivalent to that laid down in Solvency II Directive.

7. Is a branch of an overseas insurer, insurance broker and/or other types of market intermediary in your jurisdiction subject to a similar regulatory framework as a locally incorporated entity?

EU-based insurers and intermediaries acting in Portugal under the EU passport through a branch or under FoS

are subject to a lighter regulatory framework than Portuguese-based entities. Once granted in their Member State, their license allows them to conduct business in Portugal, provided they notified their home Member State authorities for such purpose and comply with some provisions considered of general good.

As for third countries' (non-EEA) insurers and intermediaries, the taking-up and pursuit of the business requires the establishment of a branch and prior authorization from ASF. The regulatory framework applicable to non-EEA undertakings is similar to that applicable to Portuguese-based entities.

8. What penalty is available for those who operate in your jurisdiction without appropriate permission?

Pursuing insurance activities or operations without proper license is punishable with up to 5 years imprisonment or a fine up to €1.500.000.

In what regards insurance distribution business, the pursuit of activity without proper license is punishable with a fine up to €5.000.000.

9. How rigorous is the supervisory and enforcement environment? What are the key areas of its focus?

ASF is very active in ensuring the proper functioning of the insurance market, making regular on-site and off-site audits to the entities under its supervision in order to check compliance with legal and regulatory framework. The key areas of ASF's focus are the undertakings' soundness and consumers protection. Besides regulation, ASF frequently issues recommendations to the supervised entities on specific matters.

10. How is the solvency of insurers (and reinsurers where relevant) supervised?

Portuguese-based insurers and reinsurers are subject to Solvency II Directive requirements, which were transposed into InsuranceLaw.

ASF's mission is to ensure the proper functioning of the insurance market, by promoting the stability and financial soundness of the entities under its supervision, aiming to protect policyholders, insureds, subscribers, beneficiaries and any interested parties.

In order to ensure the aforesaid, ASF's supervision encompasses powers to verify the undertakings'

solvency status, establishment of technical provisions, assets and eligible own funds, accounting, governance system, market conduct and insurers' groups, in accordance with the legal and regulatory provisions in force at all times.

11. What are the minimum capital requirements?

The absolute floor of the minimum capital requirement is as follows:

- i. EUR2.700.000 for non-life insurance undertakings, including captive insurance undertakings, save in the case where all or some of the risks included in one or some of the Non-life classes 10 to 15 are covered, in which case it shall be no less than EUR4.000.000;
- ii. EUR4.000.000 for life insurance undertakings, including captive insurance undertakings;
- iii. EUR3.900.000 for reinsurance undertakings, except in the case of captive reinsurance undertakings, in which case shall be no less than EUR1.300.000;
- iv. The sum of the amounts set out in paragraphs (i) and (ii) for insurance undertakings authorised to pursue simultaneously both life and non-life insurance activities.

12. Is there a policyholder protection scheme in your jurisdiction?

Where a Portuguese-based insurer is wound up, the assets held by the company representing mathematical provisions are subject to a credit privilege in favour of the policyholders, insureds and beneficiaries.

Furthermore, insurers pursuing certain classes of non-life insurance (such as motor vehicle insurance and work accidents) are required to join and participate in national guarantee schemes (this obligation applies likewise to insurers acting in Portugal through a branch and under FoS).

13. How are groups supervised if at all?

Undertakings which are part of a group are subject to ASF's supervision under the applicable legal terms. Portuguese law incorporates Solvency II Directive's rules regarding group supervision.

14. Do senior managers have to meet fit and proper requirements and/or be approved?

As regards Portuguese-based insurers, the following persons are subject to fit (professional qualification / experience) and proper (good repute) requirements and prior authorization from ASF before their designation by the undertaking (they are also subject to registration at ASF):

- Members of the management body and any persons who effectively run the undertaking;
- Members of the supervisory body and statutory auditor;
- Senior managers and persons who have key-functions.

In what regards Portuguese-based intermediaries, fit and proper requirements apply to the staff selling insurances and to the member(s) of the board responsible for insurance distribution activities (the other members of the board are only subject to proper requirements).

15. To what extent might senior managers be held personally liable for regulatory breaches in your jurisdiction?

The undertaking shall be liable for any offences committed by its management or supervisory bodies, senior managers, persons who have key-functions, employees or any persons representing the undertaking and acting on behalf and for the account of the undertaking within the scope of powers granted by the latter. The undertaking's liability shall be excluded, however, in the event the perpetrator acted against express orders from the undertaking.

The undertaking's liability shall not exempt the above-mentioned persons from personal liability where applicable in accordance with the relevant legal provisions. Particularly, the members of the management or supervisory bodies of the undertaking can be held personally liable whenever they were aware of or should be aware of the offence and did not take suitable measures to put an end to the breach.

16. Are there minimum presence requirements in order to undertake insurance activities in your jurisdiction (and obtain and maintain relevant licences and authorisations)?

Portuguese-based insurers and reinsurers must comply

with minimum share capital as follows:

- EUR2.500.000 in the event the insurer conducts business in sickness, legal expenses or assistance;
- EUR7.500.000 in the event the insurer conducts business in more than one of the classes referred to in the preceding bullet or in any other class or classes of non-life insurance;
- EUR7.500.000 in the event the insurer conducts life insurance business;
- EUR15.000.000 in the event the insurer conducts business simultaneously in life insurance and one or more classes of non-life insurance;
- EUR 7.500.000 in the event the reinsurer conducts non-life reinsurance or life reinsurance business; and EUR15.000.000 in the event the reinsurer conducts both.

17. Are there restrictions on outsourcing services and/or operational resilience requirements relating to the business?

Outsourcing of critical or important operational functions is not allowed in the event it leads to any of the following:

- Materially impairing the quality of the governance system of the insurer concerned;
- Unduly increasing of operational risk;
- Impairing the ability of ASF to monitor compliance of the insurer with its obligations;
- Undermining continuous and satisfactory service to policyholders, insureds and beneficiaries.

Insurers and reinsurers must notify ASF prior to outsourcing critical or important functions, including any subsequent significant changes affecting said functions.

Nevertheless, insurers and reinsurers should always ensure the following when outsourcing:

- The provider collaborates with ASF;
- The undertaking and ASF have access to information/data related to the outsourced tasks; and
- ASF has access to the premises of such providers, namely for audit purposes.

18. Are there restrictions on the types of assets which insurers or reinsurers can

invest in or capital requirements which may influence the type of investments held?

Except for retirement savings schemes (PPR – *Planos Poupança-Reforma*), Portuguese law does not impose restrictions regarding the type and location of the assets, provided Solvency II Directive's «prudent person principle» is complied with and insurers invest in the best interest of policyholders and beneficiaries.

19. How are sales of insurance supervised or controlled?

ASF makes frequent on-site and off-site audits to the insurance distributors under its supervision. Also, insurance intermediaries, even those acting through a branch or under FoS, are subject to periodic reporting obligations regarding their activities, including information concerning sub-distributors and their remuneration.

20. To what extent is it possible to actively market the sale of insurance into your jurisdiction on a cross border basis and are there specific or additional rules pertaining to distance selling or online sales of insurance?

The sale of insurances into Portuguese jurisdiction on a cross-border basis regarding EU-based insurance or reinsurance undertakings depends on notification to ASF under the EU passport framework and compliance with the general good provisions determined by ASF.

As for third countries' (non-EEA) undertakings, the sale of insurances requires the establishment of a branch and prior authorization from ASF.

Distance selling and online selling are subject to specific diplomas: Decree-Law no. 95/2006 of 29/5/2006 on distance contracts concerning financial services and Decree-Law no. 7/2004 of 7/1/2004 on e-commerce.

21. Are consumer policies subject to restrictions, including any pricing restrictions? If so briefly describe the range of protections offered to consumer policyholders

Portuguese Law does not provide for a definition of «consumer policies» or «consumer insurance». Instead,

it bases the protection of consumers on the imposition of stricter rules in what regards mass risks insurances (all insurances that do not fall under the definition of large risks insurances). For such purpose, Insurance Contract Law determines that certain rules are mandatory in what concerns mass risks insurances. Said mandatory rules are divided into:

- Absolutely mandatory rules, which cannot be waived by the parties (e.g., format of the policy, insurable interest, rules regarding risk, means to pay the premium, consequences in the event premium is not paid);
- Relatively mandatory rules, which allow different solutions other than those established by law, provided said solutions benefit the policyholder, the insured or the beneficiary, where applicable (e.g., provision of pre-contractual information, risk disclosure obligation and consequences, policy contents).

Furthermore, insurance contracts where the policyholder has no negotiation powers regarding the terms of the policy are subject to Standard Contractual Clauses Law, approved by Decree-Law no. 446/85 of 25/10/1985, which forbids certain categories of contractual clauses.

22. Are the courts adept at handling complex commercial claims?

Portuguese Courts of Justice are extremely adept at handling both simple and complex commercial claims. In some areas of the Country, there are specialized Commercial Courts.

23. Is alternative dispute resolution well established in your jurisdictions?

Alternative dispute resolution is well established in Portugal and can be very effective in the resolution of insurance disputes from a consumer point of view since they allow the consumer to obtain a sooner and cheaper solution than in a court of law.

24. Is there a statutory transfer mechanism available for sales or transfers of books of (re)insurance? If so briefly describe the process.

The transfer of books of insurance held by Portuguese-based insurers and reinsurers to an assignee based in Portugal or in another Member State depends on ASF's

authorisation, provided the assignee complies with the solvency capital requirement and (where applicable) the Member State of the commitment or where the risks are located agrees with said transfer. The authorisation is published at ASF's website and in two wide circulation newspapers; policyholders shall have one month as from the referred to publication to cancel their policies should they oppose to the transfer.

25. What are the primary challenges to new market entrants? Are regulators supportive (or not) of new market entrants?

Portuguese insurance market is a mature market where traditional insurers coexist with insurtech, and specialised insurers coexist with all-lines of business insurers, regardless of their State of origin. ASF is supportive of new market entrants, adopting a collaborative approach.

26. To what extent is the market being challenged by digital innovation?

The Portuguese market welcomes digital innovation. Although the business was already progressing in the last years towards a digital transformation, COVID-19 pandemic provided strong acceleration for the market modernisation. Insurance players are increasingly resorting to digital innovation aiming to accelerate their processes and business models and to improve customer experience, as the demand from online consumers is expanding and there is a need to bring new products to market faster. Several insurers use artificial intelligence to automate operations and administrative tasks, namely in underwriting and claims functions with the view to speed-up operations, modernise legacy systems and reduce costs.

27. How is the digitization of insurance sales and/or claims handling treated in your jurisdiction, for example is the regulator in support (are there concessions to rules being made) or are there additional requirements that need to be met?

Digitisation is nowadays essential and unavoidable for insurers, distributors and the supply chain. The use of technology is a cross-cutting issue in every aspect of the insurance chain, from client onboarding (providing better customer experience, secure file-sharing, online

document and data storage) to claims resolution (simplification and speed-up of the process).

ASF is aware of new market trends and supports new technologies. The distance selling of insurances (whether online, whether by phone) is an established and well accepted practice in the Portuguese market.

28. To what extent is insurers' use of customer data subject to rules or regulation?

The insurers' use of customer data in Portugal is subject to General Data Protection Regulation ("GDPR") and to Law no. 58/2019 of 8/8/2019 on data protection, which ensures the application of GDPR into Portuguese legal order. However, there are no legal provisions specifically ruling the processing of personal data in the insurance business, which brings some challenges to the market. The main issues identified by the sector relate to the lack of a specific legal ground to process health insurance data, handling automatic decisions in the event of the use of telematics/machine learning and dealing with storage limitation vs. historical/statistical analysis.

29. To what extent are there additional restrictions or requirements on sharing customer data overseas/on a cross-border basis?

No additional restrictions or requirements apply regarding sharing of customer data other than those arising from GDPR.

30. To what extent are insurers subject to ESG regulation or oversight? Are there regulations/requirements specific to insurers? If so, briefly describe the range measures imposed.

Portuguese-based insurers and insurance intermediaries are subject to EU ESG Regulation, which is directly applicable into Portuguese legal order. There are no specific requirements imposed by ASF, however, the latter is very active in collaborating with the relevant entities within EIOPA's sustainable finance action plan.

31. Over the next five years what type of business do you see taking a market lead?

Insurtech will play a very important role in the business.

Many insurers have already been establishing partnerships with technology companies aiming to improve their processes and become more competitive.

As for emerging risks, the following will take a lead:

- Cybersecurity (because of the increase of cyber-risks arising from the high connectivity of companies and populations combined with

remote work);

- Climate change / sustainability (the industry is working to increase the offer of this type of product);
- Demographic ageing and social care (the sector is working to offer products that are an alternative to the public social protection system).

Contributors

Leonor Futscher de Deus
Senior Associate

leonor.deus@espanhaassociados.pt



Mónica Almeida
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monica.almeida@espanhaassociados.pt

