



19 March 2014

Decree-Law no. 40/2014

Yesterday the Decree-Law no. 40/2014 (“**DL 40/2014**”), which defines certain aspects that Regulation (EU) no. 648/ 2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (“**EMIR**”) has delegated on the Member States, was published .

In particular, the present DL 40/2014 aims to:

- > Appoint the Bank of Portugal, the Portuguese Securities Market Commission (“**CMVM**”) and the Insurance Institute of Portugal, as the national competent authorities for the **supervision of the financial counterparties** regarding the entities subject to their respective supervision;
- > Appoint the CMVM as the national competent authority for the **supervision of non-financial counterparties**, for the **authorization and supervision of the central counterparties (“CCPs”)** and for **verifying the authenticity of ESMA decisions that may apply sanctions to trade repositories**’;
- > Establish a **legal regime applicable to central counterparties**, when that does not result already directly from the Regulation; and
- > Set the **sanctions framework** applicable to financial and non-financial counterparties for the breach of the obligations foreseen in the Regulation.

In addition to what is established in the Regulation and in the Portuguese Securities Code (“**CVM**”), the DL 40/2014 extends its scope to the CCPs, pursuant to the regime attached to DL 40/2014 (“**Annex**”).

The Annex contains the applicable rules to the CCPs corporation type (*sociedade anónima*), the number of shareholders (*any shareholder, unlike any other corporation*), to the attribution of voting rights (*application of Article 20 of the CVM, mutatis mutandis*), to the special regime of invalidity of resolutions (*the disqualification of voting rights shall be communicated by the CMVM or by the CCP board of directors to the chairman of the general meeting, and the invalidity of the resolutions approved based on disqualified votes may also be requested by CMVM, in addition to the general terms of the invalidity regime*), to the assessment of the suitability, availability and professional qualification requirements of members of the boards of directors and supervisory board (*it is a CMVM competence, taking into account, with the necessary adjustments, the Legal Framework of Credit Institutions and Financial Companies*), to the exercise of the CCPs activity, to the activities of its management members and employees (*code of conduct, professional secrecy, disciplinary power*), to the notification obligations towards the CMVM.

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According to the aforementioned Annex, CMVM shall have 90 days to approve the necessary regulations regarding the CCP's requests for authorization, information requirements relating to qualifying holdings, appointment of the management bodies members and financial information.

DL 40/2014 also defines the sanctions framework applicable to financial counterparties and non-financial counterparties (as well as to natural persons who are members of those entities management bodies, or therein hold management positions) which conclude derivative contracts covered by EMIR, in the case of breach of the obligations set in articles 9 (*Reporting obligation*) and article 11 (*Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP*) of the Regulation.

The sanctions framework presently envisaged punishes offenses committed intentionally as follows:

	Committed by a financial counterparty	Committed by a non-financial counterparty
Serious offence	€ 3,000.00 to € 1,500,000.00 (legal person) € 1,000.00 to € 500,000.00 (natural person)	€ 600.00 to € 300,000.00 (legal person) € 200.00 to € 100,000.00 (natural person)
Very serious offence	€ 10,000.00 to € 5,000,000.00 (legal person) € 4,000.00 to € 2,000,000.00 (natural person)	€ 2,000.00 to € 1,000,000.00 (legal person) € 800.00 to € 400,000.00 (natural person)

The sanctions framework established in the DL 40/2014 also foresees the sanctioning of offenses negligently committed (in this case, the minimum and the maximum limits of the applicable fines are reduced by half) and also establishes the possibility of imposing ancillary sanctions, such as a ban or prohibition of exercising the activity in connection with the offense for a period up to three years.

Moreover, regarding the sanctions framework, it shall be noted that the DL 40/2014 introduces significant changes to the administrative offenses regime applicable to the central counterparties and settlement systems. In general terms, the amendments to this regime exacerbate the sanctions framework applicable to these entities.

This DL 40/2014 shall enter into effect 30 days from its publication.

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