

THE NEW REGULATORY
FRAMEWORK OF PORTUGUESE
CONSUMER CREDIT MARKET
(DECREE-LAW 133/2009)



Excerpt from
the impact assessment report



Banco de Portugal
EUROSYSTEM

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Lisbon, 2011



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CONTEXT



1. NEW EUROPEAN DIRECTIVE ON CONSUMER
CREDIT AGREEMENTS
2. OTHER RULES OF THE INITIATIVE OF THE NATIONAL LEGISLATOR
3. SUPPLEMENTARY REGULATIONS ISSUED
BY BANCO DE PORTUGAL

Consumer credit is an important source of funding of durable goods for families and, although it is granted by most credit institutions, it has a very significant weight in the balance sheet structure of credit financial institutions.

The legislative framework of the consumer credit market changed considerably as of 1 July 2009, with the entry into force of Decree-Law No 133/2009, of 2 June. This diploma transposed Directive 2008/48/EC of the European Parliament and of the Council, of 23 April 2008 ("the Directive"), relative to this type of credit contract, and introduced a series of other supplementary provisions of the initiative of the national legislator.

Banco de Portugal, the authority in charge of the conduct supervision of retail banking markets, was attributed competences of regulation, supervision and sanctioning relative to the application of the rules of Decree-Law No 133/2009.

The article 36 of Decree-Law No 133/2009 also establishes that Banco de Portugal shall prepare an assessment report of the impact of the application of the diploma one year after its enforcement and biannually in subsequent years.

The present report complies with the abovementioned legal provision, undertaking a detailed analysis of the regulated matter and changes introduced by the diploma relative to the previous legislative framework and assessing its impact on the functioning of the consumer credit market.

Regarding the preparation of this report and complementing the information that had already been collected through its supervisory action (e.g. inspections to institutions, analysis of reports to Banco de Portugal and assessment of bank customer claims), Banco de Portugal, through Circular Letter No 73/2010/DSB, requested from the credit institutions a summarised qualitative assessment report on the implementation of the diploma and quantitative information on consumer credit contracts that were concluded, withdrawal by the customer, with early repayment, in default and renegotiated, as well as on the involvement of credit intermediaries. A qualitative appraisal on the impact of the diploma was also requested from the main associations representing the industry – Portuguese Bank Association (APB), Association of Specialised Credit Institutions (ASFAC) and Portuguese Leasing, Factoring and Renting Association (ALF) – and from consumer protection associations – DECO and SEFIN.

The analysis carried out on the implementation of Decree-Law No 133/2009 covers the period between July 2009 and the end of 2010, since it was considered appropriate that the reference period should be extended so that an assessment could also be made of the first year of application of the interest rate caps regime, introduced by this diploma and enforced as of 1 January 2010.

In general, it was found that institutions complied with the new legal regime of the consumer credit market. Irregular situations that were detected were acted upon by Banco de Portugal and resolved by the institutions. The issues identified with higher level of non-compliance derived from incorrect interpretation or doubts as to the application of the rules of the diploma which, at the time, were enlightened through clarifications conveyed bilaterally or disseminated through the system, in order to firmly lay down good practices in the sector.

1. NEW EUROPEAN DIRECTIVE ON CONSUMER CREDIT AGREEMENTS

The Directive on consumer credit agreements was approved by the European Parliament and the Council of the European Union in April 2008, with a transposition deadline of 10 June 2010. Portugal was the first Member State to complete the transposition process – Decree-Law No 133/2009 was published on 2 June 2009 and entered into force one month later on 1 July. By the end of 2010, twenty-three Member States had already transposed the Directive, where the publication of the transposition diplomas was still pending in Spain, Holland, Luxembourg and Poland.

Directive No 2008/48/CE replaced the previous Consumer Credit Directive (87/102/EEC), approved in 1986 (amended in 1990 and 1998) and which had been transposed by Decree-Law No 359/91, of 21 September (amended subsequently by Decree-Law No 101/2000, of 2 June, and by Decree-Law No 88/2006, of 3 May).

The objective of the new Directive was to strengthen the integration of the internal consumer credit market and increase the degree of consumer protection through the establishment of a legislative framework that is harmonised at a Community level and stricter in terms of duties of information and rules of conduct of the credit institutions. The Community legislator sought, in this way, to overcome the existing legislative disparities between the different Member States and, simultaneously, respond to the evolution of credit institution market practices and to the emergence of new credit products and growing mobility of European consumers.

The Directive therefore established a legal regime of maximum harmonisation on matters of credit granted to consumers in the European Union. In the areas not covered by the Directive, the respective regulations remain under the criteria of each Member State. This choice of maximum harmonisation aims to create an environment of equitable competition conditions (same level playing field) for credit institutions that intend to market their products in the area of the European Union and must adapt the characteristics of their products and marketing practices to the different national legislative frameworks. This measure also boosts the confidence of the consumer, who now has the same degree of protection in this economic area, facilitating cross border transactions.

This Directive covers consumer¹ credit contracts of an amount above 200 euros and below 75 thousand euros, which are not home loans (also excluding contracts with a mortgage guarantee) or aim the commercial or professional activity of the borrower. In this way, the Directive clarifies the borderline between consumer credit and mortgage loans. Personal loans, car loans, credit cards, credit lines and overdraft facilities are thus covered. Contracts where the loan is granted free of interest and other costs are excluded from the scope of application of the Directive.

The provisions of the Directive may be grouped into the following main components relative to: (i) pre-contractual information and practices; (ii) contractual information and rights, including the conditions for early repayment; (iii) method of calculation of the Annual Percentage Rate of Charge (APR); (iv) credit intermediaries; and (v) implementation measures.

¹ Consumers are, for this effect, all natural persons who act for purposes which are outside their business or profession activity.

Compared with the previous one, this Directive has increased consumer protection. In advertising, the information minimum requirements have been strengthened, with the presentation of a representative example of the underlying APR (both already established previously) now being compulsory as well as the inclusion of a predefined series of information. The Directive has also promoted the transparency and comparability of the pre-contractual information, establishing as compulsory the provision of a European Standardised Information Sheet (SIS), which, pursuant to a harmonised model, presents the characteristics, costs and risks of the credit product to be contracted.

Before the signing of the contract, the institutions are now also obliged to assess the solvability of the customer, so as to appraise the customer's capacity to meet the new financial commitment, as well as to provide the necessary assistance to the customer in order to clarify the characteristics of the contract. In this context, the Directive has established a series of requirements relative to the conclusion of this type of credit contract, introducing the principle of responsible lending², which covers all the stages of the loan relationship. Amongst other objectives, compliance with this responsible lending principle aims to prevent situations of over-indebtedness.

The information that must be presented in the contract has also been strengthened, and is now similar to that required to be provided to the consumer prior to the conclusion of the contract. Compared with the previous directive, the contractual information and the information during the contract are now more detailed and precise, in particular with new duties of information on the right of the consumer to request an amortisation table for loans with defined maturity and repayment plan, on the periods, conditions and procedures for the change of the nominal interest rate, and also on the exercise of the partial or total early repayment of the loan.

Also noteworthy is the consumer's right of withdrawal (without indication of motive), whose implementation had already been foreseen in the previous directive, albeit in an optional form. This right is compulsory under the present Directive, which establishes a period of 14 days for its exercise by the consumer.

The Directive has also strengthened the right to early repayment, already foreseen previously, limiting the situations where a fee may be charged to the consumer. For contracts with variable interest rates, it is no longer possible to charge any fees, while for contracts with fixed interest rates, maximum fees have been established.

Regarding the APR, the Directive has not introduced any conceptual change in relation to the existing calculation formula. However, the calculation of this cost measure has been specified in a more complete manner, which contributes to its harmonisation and, therefore, to greater comparability of the credit proposals presented to the consumer.

It should also be noted that the Directive contains provisions that are not only applicable to credit institutions, but also to credit intermediaries, thus broadening its scope of subjective application. These entities, which intervene in an accessory form (in the case of points of sale) or principal manner (exercising only this activity) in the marketing of credit products, must provide information to consumers (in the advertising and pre-contractual information) as to whether they operate in connection with one (exclusivity) or more credit institutions, or whether

² In general, the principle of responsible lending or responsible granting of loans establishes that lending entities lend funds in a correct, honest, fair and balanced manner.

they operate as independent intermediaries. Credit institutions must be informed of the costs paid by consumers relative to any intermediation services before the conclusion of the contract and must include them in the calculation of the APR conveyed to consumers.

As is the case with other previously approved directives³, the present Directive has also introduced, in the context of consumer credit, access to alternative means to settle disputes, reflecting the growing trend of promoting the use of these systems. In particular, it is established that Member States must ensure the creation of extrajudicial procedures that are suitable and effective for the settlement of disputes.

2. OTHER RULES OF THE INITIATIVE OF THE NATIONAL LEGISLATOR

In the transposition act, the national legislator decided to include, in the scope of application of Decree-Law No 133/2009, contracts relative to the leasing of movable assets that establish the option to purchase the leased asset; these contracts were excluded from the Directive.

Furthermore, the national legislator also decided to introduce a series of rules which had not been established in the Directive and correspond to specific legislative initiatives of the legislative framework of the Portuguese consumer credit market. These initiatives refer to:

- Introduction of a regime of consumer interest rate caps;
- Regulation of cross-selling (bundling);
- Dissolution of the contract in the event of default by the consumer; and
- Establishment of stricter duties of information in advertising.

Regarding advertising, Decree-Law No 133/2009 obliges the indication of the APR in any advertising message on which the creditor proposes to grant loans (even if the loan in question is presented as free of charge or interest) and establishes the requirements for this indication. At the same time, it continues to require the specification of standardised information in the cases where it is indicated, in the advertising message or communication, an interest rate or amounts relative to the cost of the loan. It should be noted, in fact, that most of the concerns of the Community legislator were already reflected both in Decree-Law No 359/91, of 21 September, repealed by Decree-Law No 133/2009, and in the Notice of Banco de Portugal No 10/2008, of 22 December, which establishes a series of duties of information that are stricter and more demanding than those established for advertising in the Directive on consumer credit.

Indeed, the Directive establishes that the APR and corresponding representative example should be presented only in advertising that indicates an interest rate or amounts relative to the cost of the credit for the consumer.

Decree-Law No 133/2009 also defines the conditions that should be met, in the case of the consumer's default, so that the credit institution may claim the loss of the entitlement to pay by instalments or the dissolution of the loan contract, a situation which is not regulated in the Directive.

3 Directive No 2002/65/EC, of 23 September, on the distance marketing of financial services provided to consumers and Directive No 2007/64/EC, of 13 November, on payment services.

Furthermore, national legislator also decided to include in the diploma a rule on usurious lending practices, not foreseen in the text of the Directive, and that establishes a regime of maximum APR, whose manner of calculation is actually defined by Decree-Law No 133/2009, to be observed by institutions in the conclusion of consumer credit contracts which fall within its scope of application. Banco de Portugal was entrusted with the responsibility of the quarterly calculation and publication of the interest rate cap for each type of loan.

In the area of cross-selling, the legislator decided to apply to consumer credit contracts the regime already in force for mortgage loan contracts, pursuant to which credit institutions are barred from making the conclusion of the contracts, as well as their respective renegotiation, dependent on the acquisition of other financial products or services.

The national legislator also stipulated that, in addition to the provisions of the Directive that now regulate the action of this type of agent, the professional activity of credit intermediaries would be the object of special legislation.

Decree-Law No 133/2009 thus significantly reinforces the degree of protection and the mobility of the bank customers in the context of the marketing of consumer credit products and services, both through the effect of the transposition of the Directive (composed of stricter rules concerning the duties of information and marketing practices to be observed by credit institutions, compared with those established in the previous directive of 1986), and via the effect of the specific initiatives of the national legislator included in this legal diploma.

3. SUPPLEMENTARY REGULATION ISSUED BY BANCO DE PORTUGAL

The new consumer credit regime introduced by Decree-Law No 133/2009 attributed to Banco de Portugal duties of regulation and supervision of its provisions.

In order to implement and standardise the application of some of the provisions introduced by this legal diploma and facilitate its supervision, Banco de Portugal, using the competence attributed by article 17 of its Organic Law, published the following regulation:

- Instruction No 8/2009, of 15 July – regulated the Standardised Information Sheet (SIS), presented in Annex I of the diploma, thus standardising its format and explaining its respective content;
- Instruction No 11/2009, of 13 of August – systematised the APR calculation methodology for the different types of consumer credit contracts, pursuant to the provisions in Decree-Law No 133/2009;
- Instruction No 12/2009, of 13 August – defined the categories of consumer credit for the effect of the implementation of the interest rate cap regime and instituted a system of reporting, to Banco de Portugal, of the consumer credit contracts concluded by credit institutions each month;
- Instructions No 26/2009, No 7/2010, No 15/2010 and No 19/2010 – established the the maximum APR by type of consumer credit on a quarterly basis, over the period under analysis.

BOX I.1 | CLARIFICATIONS CONVEYED BY BANCO DE PORTUGAL

In the scope of the support provided to the implementation of the new diploma (Decree-Law No 133/2009), Banco de Portugal, when faced with questions posed by credit institutions or following its supervisory action, has conveyed clarifications to the institutions on the provisions of this diploma, promoting its appropriate implementation and the harmonisation of bank practices, which, in view of their importance, are repeated below:

- Banco de Portugal considers that, notwithstanding the exemption from the **pre-contractual duties of information** applicable to **credit intermediaries** acting in an ancillary capacity, established in Decree-Law No 133/2009, the lending credit institution may use these intermediaries for the provision of the pre-contractual information to which the actual lender is obliged. In these situations, the credit institution, in the contractual relationship that it establishes with the credit intermediary, should ensure that the latter complies with the obligation to provide the Standardised Information Sheet (SIS) and that this compliance is confirmable, since it is certain that the credit institution in question is ultimately responsible for the provision of this information.
- Banco de Portugal considers that the promissory note, as a credit title, does not constitute a **guarantee of the loan contract**, therefore, even if the borrower of a contract guaranteed exclusively by a pledge (constituted by the actual borrower) underwrites a promissory note, the contract in question is not subject to the provisions in Decree-Law No 133/2009.
- Banco de Portugal clarifies that contracts for use of a **deferred debit card** are subject to the provisions in Decree-Law No 133/2009 whenever this contract is concluded with a consumer, the maximum limit of use is equal to or above 200 euros and charges are associated to the card (for example, payment of an annuity). Credit institutions marketing this credit product are obliged to comply with the duties of information established in Decree-Law No 133/2009 and in the supplementary regulations, as well as the obligations arising from the interest rate cap regime.
- Banco de Portugal clarifies that the **duty of assistance** to the consumer is complementary to the provision of pre-contractual information, hence the credit institution should provide, on its own initiative or upon the request of the consumer, all clarifications required for a full understanding of the characteristics of the loan, in particular, of the costs that the consumer is about to incur, advising the consumer to read and suitably explaining all the information provided.
- Banco de Portugal recalls that, since an **annuity** is a cost that the consumer must incur in order to contract a **credit card**, this annuity should be included in the calculation of the APR. However, admitting that, in some situations, credit institutions exempt consumers from the payment of the annuity, Banco de Portugal reiterates that, as a result of Instruction No 11/2009, this cost may not be considered in the calculation of the APR "if a single use of the maximum credit ceiling, at any given time, enables exemption from its payment".
- Banco de Portugal recalls that the inclusion of the conditions arising from adhesion to **customer loyalty programmes** in the **calculation of the APR** of credit cards may occur only if these conditions are of a permanent character and exclusively monetary nature, as defined in Instruction No 11/2009. Other benefits, such as "miles" or discounts in certain shops, are always subject to a subjective assessment of their amounts and their objective

reflection in APR calculation cash flows is not feasible, which is why they should not be considered in the calculation of this cost measurement.

- Banco de Portugal considers that, whenever there is **optional cross-selling** (bundling), the APR should be calculated without the effect of the cross-sales (that is, without reflecting the reduction of costs associated to the optional acquisition of other financial products and services) and indicated in point C.2. of the SIS and in the contract. For the effect of the application of the interest rate cap regime, Banco de Portugal emphasises that credit institutions should consider the APR calculated without the effect of the optional cross-selling, and that this APR cannot exceed the maximum rate disclosed for the credit category in question.
- Banco de Portugal reiterates that, in an **early repayment** operation, the credit institution, in addition to the debit of the early repayment fee under the legally established terms, may request the payment of the expenses that it has incurred. “Expenses” are defined as amounts paid by the institution to third parties on account of the customer, namely payments to Register Offices, Notary Offices, or that of a fiscal nature, through the presentation of the respective documental justification, as defined in sub-paragraph b) of article 2 of Notice No 8/2009.
- Banco de Portugal recalls that number 2 of article 19 of Decree-Law No 133/2009 establishes that the period of prior notice by the consumer for the partial or total **early repayment** of the loan contract cannot be less than 30 calendar days. If credit institutions accept the repayment before the end of the legally established period of prior notice, then no interest or fees can be charged other than those legally established.
- Banco de Portugal clarifies that, although overdraft facilities with a repayment period of one month are excluded from the scope of application of Decree-Law No 133/2009, institutions are obliged, under the terms of number 8 of article 8, to provide pre-contractual information, in paper or other durable format, on the conditions associated to these loan contracts (total amount of the loan, nominal interest rate, APR, amongst others).

Moreover, it is considered that, with respect to **overdraft facilities with a repayment period of one month** marketed together with a current account, the pre-contractual information in question may be provided through indication of the elements of information required in Decree-Law No 133/2009 in the field “overdraft facility” of the SIS of the current account, as established in Notice No 4/2009.

Banco de Portugal also notes that, although these products are in fact excluded from the scope of application of Decree-Law No 133/2009, they are subject to the rules laid down in Notice No 10/2008 on matters of advertising, namely, the obligation to indicate an APR, highlighted in a similar manner as the highlighted characteristics, as well as the respective representative example, as follows from the provisions established in numbers 1 and 2 of article 15 of that Notice.

- Banco de Portugal recalls that, although Decree-Law No 133/2009 does not establish pre-contractual duties of information regarding the **credit agreements in the form of overrunning**, institutions are obliged, under the terms of Notice No 4/2009, to provide

pre-contractual information. Specifically, the institution should explain that the overrunning depends on its acceptance and describe the applicable conditions should the institution decide to accept the withdrawal, namely the nominal annual rate, interest payment dates, any fees and expenses and the maximum amounts or duration, when applicable.

- Banco de Portugal considers that, for the effect of the application of the provisions in number 2 of article 23 of Decree-Law No 133/2009, the information on the nominal interest rate and the charges applicable to the **overrunning** should be provided to the consumer whenever the respective amounts are changed, observing a period of 60 days in advance of the enforcement of these changes, under the terms of the provisions in article 7 of Notice No 4/2009.
- Banco de Portugal considers that **financial leasing contracts** do not fall within the concept of linked credit agreements; hence the provisions in article 18 of Decree-Law No 133/2009 are not applicable to them.
- Banco de Portugal considers that, in the context of **linked agreements**, although article 18 of Decree-Law No 133/2009 does not explain the period of time in which the consumer may question the credit institution due to not having obtained from the supplier the precise compliance with the purchase and sale agreement, this same period of time corresponds to that which, pursuant to the provisions in the Law, the consumer is entitled to in order to react before the supplier of the product or service in question.
- Banco de Portugal recalls that, for the effect of compliance with the **reporting obligation** arising from Instruction No 12/2009 and verification of the compatibility of the APR of the contracts that are concluded with maximum limits in force, the contract conclusion date corresponds to the date when this contract is signed by the parties, independently of the time of the availability of the loan.

BOX 1.2 | GOOD PRACTICES TO BE FOLLOWED BY CREDIT INSTITUTIONS

Based on its assessment of the implementation of this diploma, Banco de Portugal considers that, in order to ensure a more efficient functioning of this market, promoting, namely, greater protection of bank customers, credit institutions should also pursue a series of good practices, in particular, with respect to the following:

Legibility of the information

Decree-Law No 133/2009 establishes that credit institutions should provide the information to which they are legally bound, in the pre-contractual phase and contractual phase, in conditions of full legibility, and Instruction No 8/2009 defines that the data presented in the Standardised Information Sheet (SIS) should be completed with a minimum letter size of 9 points.

Banco de Portugal considers that the SIS, draft contract and concluded contract should be completed, with a minimum letter size of 9 points, based on an "Arial" type of font.

Time for providing the SIS

Decree-Law No 133/2009 establishes that the SIS should be given to the consumer at the time of presentation of a loan offer or before the conclusion of the loan contract.

Banco de Portugal considers that it is a good practice to provide the SIS to the consumer as soon as the personalised information required for its respective completion is conveyed to the credit institution. Since the primary purpose of the SIS is to allow the consumer to compare different proposals and, in this way, take an enlightened and informed decision, the provision of this document should, in any case, occur in due time, that is, with sufficient time in advance to enable compliance with this purpose.

Therefore, Banco de Portugal considers that the provision of the SIS at the time of the signing of the contract does not comply with the good practice described above.

Assessment of the customer's creditworthiness

Article 10 of Decree-Law No 133/2009 establishes that each credit institution is responsible for determining the information that it considers sufficient to assess whether the consumer has the capacity to meet the new financial commitment.

Banco de Portugal considers that the collection of information from consumers and consultation of databases on credit liabilities of appropriate scope and detail of information are practices that facilitate the provision of evidence of the assessment of creditworthiness required to institutions before concluding loan contracts with consumers.

Financing of charges

Decree-Law No 133/2009 establishes that the total amount of the loan corresponds to the maximum limit or total amount made available through the loan contract, where credit institutions are obliged to inform consumers on the costs associated to the loan, and explain their essential characteristics.

Banco de Portugal considers that credit institutions may only include the amount of the charges associated to the loan operation in the amount to be financed, namely fees, taxes and other charges, if, during the negotiation process, they have questioned the customer on their interest in these items being included.

Information requirements of loan contracts in the form of overdraft facility with repayment period of one month

Number 8 of article 8 of Decree-Law No 133/2009 establishes that credit institutions are obliged, in the pre-contractual information, to calculate and inform consumers on the APR of loan contracts in the form of overdrafts with repayment period of one month.

Banco de Portugal considers that it is a good practice to mention, in the clauses of this type of loan contract, not only this cost measure, but also all the other elements presented in number 8 of article 8 of the diploma.

Provision of information on the nominal interest rate

Article 14 of Decree-Law No 133/2009 establishes that, during the period of the loan contract, the consumer should be informed of any changes to the nominal interest rate before their application to the contract. However, if the change results from a modification of the underlying reference rate and the information on this rate is published through suitable means and is accessible at the premises of the institution, this diploma allows the credit institution and the consumer to agree on the periodic provision of this information.

Banco de Portugal considers that, in these cases, the periodicity that is agreed for the provision of information, in paper or other durable format, should match the period to which the reference rate of the contract refers and, consequently, the periodicity of its review.

Information on the change of the financial conditions of the loan in the event of non-compliance with the obligations assumed by the consumer in relation to the acquisition of other financial products and services (bundling)

Article 14 of Decree-Law No 133/2009 establishes that credit institutions are obliged to inform the customer in advance of any changes to the nominal rate applicable to the contract.

Banco de Portugal considers that, in cases where the consumer no longer holds the financial products and services, whose subscription and respective impact on the financial conditions of the loan are established in the contract, the credit institutions, in addition to the obligation of communication to which they are bound under the terms of article 14, should remind the consumer of the potential consequences of this situation, namely the termination of exemption from the payment of fees.

Moreover, it is also considered that the information in question should be provided before the enforcement of the alterations arising from this non-compliance, through communication in paper or other durable format.

Amendments to contracts

Article 12 of Decree-Law No 133/2009 establishes that all contractors, including the guarantors, should be given a copy, duly signed, of the loan contract.

Banco de Portugal considers that any contractual amendment carried out validly is an integral part of the contract; hence, these amendments, after having been drawn up in a paper or other durable format, should be given to all the contractors, including guarantors.

Provision of mechanisms for the extrajudicial settlement of disputes

Article 32 of Decree-Law No 133/2009 establishes that the implementation of extrajudicial mechanisms that are appropriate and effective in the settlement of consumer conflicts related to loan contracts should be promoted.

Banco de Portugal considers that it is a good practice for credit institutions to adhere to at least two entities that are registered in the system of voluntary register of procedures for the extrajudicial settlement of consumer conflicts, instituted by Decree-Law No 146/99, of 4 May, or two entities that are authorised to carry out arbitration under Decree-Law No 425/86, of 27 December.



NEW CONSUMER CREDIT REGIME



1. SCOPE OF APPLICATION

2. PRE-CONTRACTUAL INFORMATION AND MARKETING PRACTICES

3. CONTRACTUAL INFORMATION

4. INFORMATION DURING THE PERIOD OF THE CONTRACT

5. ANNUAL PERCENTAGE RATE OF CHARGE (APR)

6. REGIME OF INTEREST RATE CAPS

7. CREDIT INTERMEDIARIES

Since 1 July 2009⁴, credit institutions are required to comply with a series of rules concerning the publicising and marketing of consumer credit products arising from the new legal and regulatory framework that is applicable to them as of this date.

This new regime results from the transposition of the new European directive on this type of contract and the decision of the national legislator to introduce, of its own initiative, other specific provisions in this market. Banco de Portugal, in the scope of the application of the provisions in the new regime, subsequently published various regulatory diplomas promoting the standardisation of practices by institutions and facilitating its implementation and supervision.

The Directive embodied new customer rights in the relationship that they establish with credit institutions operating in this market. Customer rights were strengthened with respect to the pre-contractual information, the content of contracts and the provision of information during the period of the contract.

Included in the new duties of information is the obligation to provide the customer with a Standardised Information Sheet (SIS), adapted to the requested loan, before the conclusion of the contract. The SIS makes it easier for the customer to compare different alternatives of loans proposed by the institutions during the phase prior to the contracting of the loan. The institutions must also provide, whenever requested by the customer, a copy of the draft contract with the conditions of the SIS and ensure that the contract specifies all the relevant rules and complies with the legibility requirements.

In the case of loan contracts with fixed duration, the institutions must provide, on customer request, at any time and free of costs, a copy of the amortisation table.

The institutions also had to adapt the characteristics and practices of marketing of their products, namely, as a result of the endorsement of the principle of responsible lending. Indeed, in addition to the provision of the SIS, institutions are obliged to enlighten customers on the characteristics of the loan (duty of assistance), so that they may assess as to whether the proposed contracts are suited to their needs and financial situation and, also, appraise the solvability of their customers.

The calculation of the Annual Percentage Rate of Charge (APR) was also harmonised, which now includes all the costs associated to the contracting of the loan. This harmonisation increases the comparability of the advertising, with particular impact in the case of credit cards, and of the pre-contractual information provided to the customer. It also enabled the implementation of the interest rate caps regime, introduced on the initiative of the national legislator, and which is based on this cost measure.

Complementing the provisions of the Directive, the national legislator has prohibited compulsory cross-selling (tying) and regulated the requirements of action of the institution in the event of contractual default by the consumer.

The new regime of the early repayment now allows the customer to proceed, at any time, with the partial or total early repayment of the loan, where the institutions are forbidden to charge any fee for the early repayment of loans at a variable interest rate, and must observe the maximum fees for loans at a fixed interest rate (0.50 percent if the period between the early repayment and the date established for the end of the contract is greater than one year, and 0.25 percent, in cases where the repayment takes place at a time when this period is equal to or less than one year), in this way contributing to the greater mobility of customers in the consumer credit market and stimulating competition between credit institutions.

⁴ Date of entry into force of Decree-Law No 133/2009, of 2 June.

This chapter presents a detailed characterisation of the structural changes introduced by the new regime in the functioning of the consumer credit market, namely concerning the rights which customers are now able to exercise in the area of loan contract marketing and the duties that institutions must now observe.

Due to its structural effect in the promotion of efficient functioning of the market, these types of changes were also the object of particular inspection by Banco de Portugal, in the context of the monitoring of the implementation of the new legislative framework.

1. SCOPE OF APPLICATION

The new regime (Decree-Law No 133/2009, of 2 June) applies to loan contracts with consumers, that is, with natural persons taking out loans for purposes unrelated to their commercial or professional activity and provided that the amount of the loan is between 200 euros and 75,000 euros.

In terms of time horizons, the new diploma applies to consumer credit contracts signed after 1 July 2009 and to contracts of undefined duration (e.g. credit cards, overdraft facilities, credit lines) which have been signed before this date.

The following types of contract are excluded from the new regime, namely:

- Loan contracts guaranteed by mortgage or whose purpose is the acquisition of housing;
- Loan contracts exclusively guaranteed by pledge constituted by the consumer;
- Loan contracts in the form of an overdraft facility with compulsory repayment within the period of one month⁵.

On the other hand, the new regime applies only partially to some types of contract under its scope, namely:

- Loans granted in the form of an overdraft facility, that establish the possibility of repayment upon request or compulsory repayment within up to three months, to which only some of the rules of the diploma are applicable, such as those relative to advertising, pre-contractual and contractual duties of information⁶, duty of creditworthiness assessment, linked credit agreements, cession of contractual position, calculation of APR, credit intermediaries and usurious lending;
- Loans granted in the form of overrunning, where only the rules that confer imperative character to the diploma and prevent situations of fraud against the law are applicable;
- Loans through which the creditor and the consumer agree on clauses relative to deferred payment or to the repayment methods by a consumer in a situation of default, provided that such contracts do not result in conditions for the consumer that are less favourable than those in the initial contract (in default) and provided that the clauses are capable of preventing judicial action due to default⁷.

⁵ Category which includes a significant part of the overdraft facilities granted by credit institutions, namely under the designated "salary-account" contracts.

⁶ Partial application of articles 6 and 12, and full application of articles 8 and 15.

⁷ See article 3.

BOX II.1 | SCOPE OF APPLICATION OF THE NEW VERSUS THE PREVIOUS REGIME

Comparing the scope of application of the new regime⁸ with that of the previous one⁹, particular note should be made of the following:

- The inclusion of a greater number of contracts due to the change of the amount of loan operations in the scope of this diploma: the new diploma includes loan contracts of amounts between 200 and 75,000 euros, which compares with amounts between 150 and 30,000 euros defined in the previous regime;
- The exclusion in the new regime of all loan contracts guaranteed by mortgaged, while the previous regime merely excluded loans with mortgage guarantees intended for housing; there is now a clear distinction between the mortgage loan regime and the consumer credit regime;
- The inclusion in the new regime of all leasing contracts for durable and movable consumer goods which establish both the right (option) and obligation to purchase the leased asset, while the previous regime merely included contracts that established the obligation to purchase the leased asset.

On the other hand, the new regime establishes a series of new exclusions, in particular:

- Loan contracts in the form of overdraft which establish the obligation of repayment of the loan within the period of one month;
- Loans granted by an employer to his employees, in a subsidiary manner, which are interest-free or with an APR lower than the rates practiced in the market;
- Loan contracts exclusively guaranteed by pledge constituted by the consumer;
- Contracts that refer to loans granted to a restricted public, under a legal provision of general interest, with interest rates lower than those practiced in the market or interest-free or under other conditions that are more favourable for consumers than those practiced in the market and with interest rates that are not above those practiced in the market.

Through the effect of the revocation of the previous Decree-Law No 359/91, consumer credit contracts excluded from the scope of application of the new regime are now subject only, in terms of duties of information to consumers, to the general rules of Decree-Law No 220/94, of 23 August, namely those relative to the calculation of the APR and content of the contract, and of Decree-Law No 171/2007, of 8 May, on rounding off and calculation of the interest rate.

⁸ Decree-Law No 133/2009.

⁹ Decree-Law No 359/1991.

2. PRE-CONTRACTUAL INFORMATION AND MARKETING PRACTICES

2.1 ADVERTISING

The new regime (Decree-Law No 133/2009) strengthened the information duties in advertising messages compared with that established in the previous regime (Decree-Law No 359/91), through the specification of the minimum parameters that should be presented in the representative example of the loan operation underlying the APR and due to the fact that the diploma has introduced very precise rules for the calculation of this total cost measure of the loan (see point 5. of the present Chapter).

The new rules contribute to the greater transparency of the messages and comparability of the characteristics and cost of the products advertised by the institutions.

Maintaining the compulsory requirement to indicate the APR in any advertising message where the creditor, directly or through an intermediary, proposes to grant a loan, even if the loan in question is presented free of charge or interest, the new regime specified the minimum parameters to be presented in the representative example of any loan announced in an advertising message:

- Nominal annual rate;
- Charges included in the total cost of credit for the consumer;
- Total amount of the loan;
- Annual Percentage Rate of Charge (APR);
- Contract duration, when applicable;
- Cash price of the good for whose acquisition the financing is intended;
- Total amount payable by the consumer and amount of the instalments, when applicable.

The entry into force, in the beginning of 2009, of Notice No 10/2008 of Banco de Portugal on the duties of information and transparency in advertising had already anticipated some of the rules of this new regime. The Notice already obliged the presentation of a representative example whose parameters should include, at least, the amount of the loan, repayment period, nominal annual interest rate, in the case of a fixed rate, or the reference rate and the spread, in the case of a variable rate.

Therefore, the new regime compared with the provisions in the Notice, imply that only three new elements should be presented in the representative example, when applicable: (i) the cash price of the good; (ii) the amount of the instalments and (iii) the total amount payable by the consumer.

Although Notice No 10/2008 did not establish the obligation to indicate the instalment associated to the loan, which Decree-Law No 133/2009 does lay down, it had, however, established duties of information in the case of the institutions advertising the instalment, requiring explicit indication of the repayment period of the loan and of the credit amount.

Notice No 10/2008 had also established a series of supplementary rules that reinforced the duties of information in the advertising of consumer credit, namely the:

- Presentation of the APR, highlighted in a manner similar to the highlighted characteristics;
- Presentation of the conditions of access or restrictions, highlighted in a manner similar to the highlighted characteristics;
- Indication of the duration and amount of the loan, highlighted in a manner similar to the advertised instalments;
- Requirement of a minimum size in the characters used in the compulsory notes of the Notice;
- Clear identification of the credit institution granting the loan.

2.2 STANDARDISED INFORMATION SHEET

One of the most innovative elements introduced by the new regime was the imposition made to credit institutions on pre-contractual duties of information and their provision in a harmonised form, through the delivery of the Standardised Information Sheet (SIS). Nothing had been established on this matter in the previous legal regime on consumer credit (Decree-Law No 359/91).

This measure thus specified the information that credit institutions should provide to the consumer and the form of its presentation, improving the comparability and clarity of the different loan proposals. It also established that compliance with the duty of provision of pre-contractual information requires that the credit institution must be capable of providing evidence of the delivery of the SIS to the customer, duly completed and at a time prior to the conclusion of the contract.

The creditor (or credit intermediary, whenever its intervention exists) must now provide the consumer with the necessary information so that the customer may compare different loan proposals and take more enlightened and informed decisions. Where credit intermediaries exercise this activity merely in an accessory manner (the designated “points of sale”) the credit institution is responsible for ensuring compliance with the pre-contractual duties of information, directly or through the points of sale, under the protocol established between them. The consumer should, in all of the above cases, receive the SIS and obtain all the clarifications required for understanding its content.

Through Instruction No 8/2009, Banco de Portugal defined the model of the SIS to be followed by credit institutions, pursuant to the provisions established in the new diploma, and laid down guidelines as to its completion.

BOX II.2 | THE STANDARDISED INFORMATION SHEET FOR CONSUMER CREDIT

The pre-contractual duties of information, established by the new regime (Decree-Law No 133/2009), involve the provision to the consumer, before the conclusion of the contract, of a Standardised Information Sheet (SIS) with a defined series of components (under the terms of articles 6 and 8 of the diploma and specified in its Annex II and III). This same information should be reflected, in a clear and complete manner, in the contract that will be signed between the institution and the consumer.

Of the **informative elements to be included in the SIS**, the following are of particular importance:

- The creditor's identification data;
- The obligation to inform the consumer on the type of loan;
- The contractual duration, nominal annual rate and APR;
- The total amount payable by the consumer;
- The type, amount and number of instalments;
- The required guarantees;
- The notary costs arising from the conclusion of the contract; and
- The consumer's right to receive, upon the consumer's request, a copy of the draft contract to be signed.

Through **Instruction No 8/2009**, Banco de Portugal standardised the model of the SIS to be used by credit institutions and established guidelines regarding its completion. It also determined that, when the loan contract has a defined duration and repayment plan, but does not have a regime of constant instalments, the credit institutions, at the time of the provision of the SIS, should also provide the consumers with the Financial Plan of the loan.

The **Financial Plan of the loan** should contain data on:

- The number of instalments of the loan;
- The value of the interest rate;
- The amounts of the principal amortised and the interest on each instalment and the total amount of the instalment;
- The amount of the outstanding principal at each moment of payment of the instalment;
- The amount of stamp tax charged on each instalment;
- The amount paid for insurance required in the loan contract; and
- The amount of any fees that might be charged and the total costs charged.

The information to be provided in the SIS and respective Financial Plan should be written in a letter size of a minimum of 9 points and should be provided in a paper or other durable format, thus ensuring its legibility.

The Instruction establishes the **four models of the SIS** foreseen in the new diploma to be used by credit institutions:

- Standardised Information Sheet – General;
- Standardised Information Sheet, in the case of distance contracting – General;
- Standardised Information Sheet for loan contracts in the form of an overdraft facility repayable within the period of three months and for other special loan contracts (loan contracts referred to in article 3);
- Standardised Information Sheet for consumer credit in the form of an overdraft facility and in other special loan contracts, in the case of distance contracting.

It should be noted in particular, however, that the diploma establishes specific **pre-contractual duties of information** for loan contracts in the form of an overdraft facility with repayment period less than three months, where the credit institutions are obliged to provide a specific SIS on the date of the presentation of a proposal of this type of loan or at a time prior to the conclusion of the respective contracts.

Likewise, this is also the case of loan contracts whose clauses, agreed between the institution and the consumer as a result of a situation of default in a previous loan contract, on the one hand, refer to the deferral of the payment or change in the method of repayment, and, on the other hand, do not subject the consumer to conditions that are less favourable than those of the unfulfilled contract and enable preventing the use of judicial means in order to ensure the repayment of the loan. Indeed, Decree-Law No 133/2009 also obliges the provision of a specific SIS for loan contracts with these characteristics.

Moreover, although excluded from the scope of application of this diploma, the legislator decided to establish a series of specific requirements of pre-contractual information for loan contracts in the form of an overdraft facility with repayment period of one month. The credit institutions should provide pre-contractual information on the conditions of these contracts (total amount of the loan, nominal rate, APR, amongst others). It is considered that, in relation to overdraft facilities with repayment period of one month that are associated to a current account, the pre-contractual information in question may be provided through indication of the elements of information required in Decree-Law No 133/2009 in the field “overdraft facility” of the SIS of the current account, as established in Notice No 4/2009.

At the same time, particular pre-contractual duties of information are established for consumer credit contracts concluded through distance means of communication, when the contracts are requested by the consumer and in situations when it is not possible for the creditor to provide the information established for this type of contracts (for example, telephone requests). In these cases, the creditor may provide the consumer with the pre-contractual information through the SIS, provided immediately after the conclusion of the contract. In all other situations, the general obligations regarding the time of provision of the pre-contractual information are maintained for these contracts.

2.3 DUTY OF ASSISTANCE

The new regime introduced the duty of assistance of the credit institutions, which are responsible for suitably enlightening the consumer on the characteristics of the credit product and commitments undertaken with its contracting, so that the consumer may assess whether the proposed contract is adapted to his needs and financial situation. These clarifications should be provided before the conclusion of the contract and the information should be given in a clear, concise and legible manner and in a reproducible and durable format.

The duty of assistance is a general rule, guiding the action of credit institutions to the consumers in the context of negotiation of a loan contract. The diploma determines, as a minimum requirement for compliance with this duty, that it is the responsibility of the credit institution or credit intermediary, as applicable, to provide the correctly completed Standardised Information Sheet and explain the essential characteristics of the proposed credit products, describing the specific risks to the consumer, including the consequences of any non-compliance.

2.4 ASSESSMENT OF CREDITWORTHINESS

Another rule of this new regime, unparalleled in the previous regime (Decree-Law No 359/91), is that it is compulsory for credit institutions to assess the creditworthiness of the consumers, prior to the granting of the loan. This new regime¹⁰ establishes that the conclusion of the contract must be preceded by the assessment of the consumer's creditworthiness based on information that is considered sufficient by the creditor. This information may be obtained from the actual customer and, if necessary, through consultation of databases on credit liabilities, or consultation of the public list of enforcements or other databases considered useful for the assessment of the creditworthiness of the customers.

The assessment of the creditworthiness of the consumer, before the granting of a loan, is an important requirement for the credit institutions to check the consumer's capacity to meet the financial commitment arising from the loan contract, with this assessment thus constituting a measure to prevent situations of default and over-indebtedness.

In cases where the institution refuses to grant the loan based on the information obtained from the consultation of a database¹¹ used in the assessment of the consumer's creditworthiness, the new regime foresees that the customer should be informed immediately, free of charge and with justified grounds, that the loan was refused due to this fact and notified of the elements contained in the consulted database that support this decision (unless the provision of this information is prohibited through a provision of Community or national law, or if it goes against the objectives of public order or public security).

Also pursuant to Decree-Law No 133/2009, whenever, during the period of the contract, the parties decide to increase the total amount of the loan, the credit institution should update its financial information on the consumer and re-assess the consumer's creditworthiness.

¹⁰ Decree-Law No 72-A/2010, of 18 June amended Decree-Law No 133/2009, henceforth requiring that the assessment of the consumer's solvency should be "based on information considered sufficient for such", which may be obtained from the customer or through the consultation of databases on credit liabilities, under the terms of the legislation in force and with appropriate coverage and detail to provide the grounds for the assessment of solvency.

¹¹ Article 11 of the diploma establishes that the management entities of the databases should ensure, in conditions of reciprocity, the non-discriminatory access of creditors operating in other Member States. In the case of Banco de Portugal, it was determined that access to the Central Credit Register database should be ensured to credit institutions operating in other Member States, under the terms established in Decree-Law No 204/2008, of 14 October, the diploma approving the legal regime of this Central Credit Register.

2.5 CROSS-SELLING

The new regime prohibits that the conclusion of consumer credit contracts, as well as their renegotiation, depend on the acquisition of other financial products and services, and consequently prohibits the compulsory cross-selling (tying) of these products or services by credit institutions. This has therefore harmonised the rules applicable to the main types of loans granted to individuals (mortgage loans and consumer credit), through the adoption of the same provisions as those already adopted for mortgage loan contracts (Decree-Law No 51/2007, of 7 March).

Optional cross-selling (bundling) is permitted, and there are no legal restrictions on the type of products that can be marketed jointly. However, as conveyed by Banco de Portugal, through Circular Letter No 31/2011/DSC, of 28 April, credit institutions should abstain from marketing, in association with consumer credit contracts, financial products without guaranteed capital at any time, as a form of improving the respective financial conditions.

Also pursuant to this Circular Letter, the nature of the optional joint sale of financial products and services with consumer credit contracts should be reflected in the Standardised Information Sheet (SIS) of the latter. Hence, it should be noted in the SIS that this loan is part of a basket of products marketed jointly and an explanation should be given of the benefits arising from this joint contracting, as well as impact of any changes to the composition of the basket, with effects on the net worth of the consumer, in the fields that are considered relevant, namely those relative to interest rates, spreads, fees, charges and other costs, as well as those establishing the conditions of application, maintenance and review of the product.

3. CONTRACTUAL INFORMATION

3.1 ELEMENTS OF INFORMATION

The new regime clarifies and strengthens the information to be provided in the loan contract, identifying the components that should be presented therein. The information contained in the Standardised Information Sheet should be reflected, in a clear and complete manner, in the loan contract. A copy of the contract must now be provided not only to the borrower, but also to the(s) guarantor(s). The borrower is now entitled to receive a copy, free of charge, of the amortisation table of any loan with a fixed maturity period, whenever requested by the borrower, and this right should be noted in the contract.

In addition to the identification of the creditor and respective postal address, the contract should contain all the essential elements of the credit product, such as its maturity period, nominal annual rate and applicable conditions, total amount of the loan and respective conditions of use.

It is now compulsory for the contract to refer to a series of rights to which the borrower is entitled, namely: (i) the right of withdrawal from the contracted loan, to be exercised within the period of 14 days after its conclusion (a right that, in this new regime, cannot be waived); (ii) the right to early repayment under terms that are more flexible than in the previous regime and with the application of maximum fees of a legally predefined amount.

BOX II.3 | CONTENT OF THE LOAN CONTRACT

The new regime (article 12 of Decree-Law No 133/2009) defines the elements that are of compulsory presentation in a loan contract covered by this diploma.

The loan contract must include the information contained in the Standardised Information Sheet (SIS), specifically:

- Type of loan;
- Identification and postal address of the credit institution;
- Total amount of the loan and conditions of use;
- Maturity period of the contract;
- Indication of the product or service to be acquired, as well as its cash price (in the cases of loan contracts in the form of the deferred payment of a product or service or linked credit agreements);
- Nominal annual rate and conditions applicable to it;
- APR and total amount payable by the consumer; and
- Type, amount, number and periodicity of payments to be made by the consumer.

The loan contract, apart from the elements that are of compulsory presentation in the SIS, **must list a series of rights to which the borrower is entitled:**

- Right of withdrawal, noting its mode of exercise and the period of 14 days provided for this effect;
- Right of the consumer to receive, upon his request and free of charge, a copy of the amortisation table, provided that this refers to loan contracts with a fixed maturity period;
- Right of the consumer to receive bank statements of the periods and conditions for the payment of interests and any associated recurrent and non-recurrent costs, provided that this involves contracts where there is payment of interests or costs without amortisation of the principal;
- Rights of the consumer arising from any linked credit agreements and the conditions for their exercise;
- Right to early repayment, procedures to adopt for its exercise, mode and form of calculation of the amount repayable, as well as the conditions where a fee may be charged for this early repayment.

The loan contract **must also specify:**

- Charges relative to the maintenance of bank accounts, when their opening is compulsory for the granting of the loan, to the use of means that simultaneously enable the undertaking of payment and loan operations, as well as other costs arising from the loan contract; furthermore, the conditions under which the costs may be changed should also be indicated;

- Applicable penalty interest rate on the contract conclusion date and any conditions of adjustment of this rate, also including indication of other costs owed in the case of default;
- Consequences of failure to ensure payment;
- Notary costs arising from the conclusion of the contract payable by the consumer;
- Guarantees and insurance required for the conclusion of the contract;
- Procedures to be adopted by the consumer for the extinction of a loan contract of undefined duration;
- Existence of extrajudicial procedures for the settlement of any disputes between the consumer and the credit institution;
- Name and address of the competent supervisory entity.

Banco de Portugal clarifies that the costs referred to in sub-paragraph c) of number 3 of article 12 of Decree-Law No 133/2009 must, whenever required, be identified and quantified in the contractual clauses. The conditions under which these costs may be changed should also be explained in the contract, where credit institutions should, for this effect, observe the provisions in the law and guidelines issued by Banco de Portugal through Circular Letter No 32/2011/DSC, of 15 May.

Moreover, the new diploma (Decree-Law No 133/2009) also establishes specific rules for the **content of loan contracts granted in the form of an overdraft facility with repayment up to three months**, determining the provision of a less demanding series of information:

- Type of loan;
- Identification and postal address of the creditor;
- Total amount of the loan and conditions of use;
- Maturity of the contract;
- Nominal annual rate and conditions applicable to it;
- APR, mentioning all the assumptions used in its calculation;
- Possibility of the credit institution requiring from the consumer, at any time, the full repayment of the amount of the loan, where this is applicable;
- Procedure for the exercise of the right of withdrawal;
- Charges applicable during the validity of the contract, as well as the conditions under which they may be changed.

3.2 RIGHT OF WITHDRAWAL

The new regime establishes the right of withdrawal, a concept equivalent to the “period of reflection” foreseen in the previous regime. However, the period of time for the exercise of the right of withdrawal has been expanded from the 7 business days defined previously to 14 calendar days. Furthermore, the consumer is no longer entitled to waive this right, contrary to the previous legal regime which permitted this possibility in cases of immediate handover of the financed product or service.

3.3 EARLY REPAYMENT

The new regime increases the flexibility and simplifies the exercise of the right of early repayment and defines the maximum fees that may be charged by institutions in these cases.

Hence, the borrower is now able to undertake various early repayments during the period of the contract, and the previously existing limitation for partial repayments has been eliminated (that this could only take place once, unless stipulated otherwise by the parties). However, the borrower is now required to provide a longer period of prior notice, defined as 30 calendar days.

On the other hand, the maximum fees that institutions may charge in the case of the early repayment of the loan have been established. Hence, if the early repayment takes place during a period where the nominal interest rate of the contract is fixed, the credit institution cannot charge the consumer a fee that is above¹² :

- 0.5 percent of the amount of the principal that is repaid, if the remaining period between the date of the early repayment and the date stipulated for the end of the loan contract is greater than one year; or
- 0.25 percent of the amount of the principal that is repaid, if the remaining period between the date of the early repayment and the date stipulated for the end of the loan contract is less than or equal to one year.

There will be no early repayment fee when:

- The repayment takes place at a period when the nominal interest rate of the contract is variable;
- The loan contract refers to an overdraft facility;
- The repayment is made as a result of the execution of the insurance contract securing the loan.

These new rules are applicable not only to contracts concluded after 1 July 2009, but also to contracts of undefined duration concluded before this date (i.e., contracts without pre-defined termination, as is typically the case of credit cards or overdraft facilities).

All other contracts that were concluded before this date remain subject to the provisions on the exercise of early repayment established in the previous regime (Decree-Law No 359/91).

The fees defined for partial or total early repayment correspond to the applicable maximum amounts, where the institution cannot charge any other cost, with the exception of payments enforceable by third parties and payable by customers, namely of fiscal nature or related to register offices and notary offices, requiring the presentation of documental justification.

¹² In any case, the fee payable for early repayment cannot exceed the amount corresponding to the amount of interest that would be charged to the customer for the period between the date of the early repayment and the date stipulated for the end of the fixed rate period.

BOX II.4 | EARLY REPAYMENT REGIME OF DECREE-LAW NO 359/91

For contracts where the **previous regime** (Decree-Law No 359/91) remains applicable, the total or partial early repayment is carried out under the following conditions:

- The amount chargeable for early repayment cannot exceed the amount corresponding to the sum of the net present value of the instalments of principal and interest owed, based on a discount rate of a minimum value equal to 90 percent of the interest rate in force in the loan contract, at the time of its early repayment, with reference to the principal paid in advance;
- The creditor may, however, charge interest and other costs corresponding to an agreed period, which cannot exceed a quarter of the period initially established in the contract, when the consumer proceeds with early repayment before the end of the agreed period.

Decree-Law No 359/91 thus defines a formula for the calculation of the maximum amount of the early repayment which, through the difference from the amount in debt, enables calculation of the implicit amount of the early repayment fee. This formula of calculation of the maximum early repayment fee differs significantly from the solution adopted in the new regime (Decree-Law No 133/2009).

For the exercise of early repayment, Decree-Law No 359/91 stipulates that the credit institution may demand a maximum period of prior notice of 15 days from the borrower. Furthermore, it establishes that partial early repayment may be exercised only once during the period of the contract, unless stipulated otherwise by the parties.

3.4 EXTINCTION OF CONTRACTS OF UNDEFINED DURATION

The previous consumer credit regime was silent on the rules for the extinction of contracts of undefined duration, since it had no legal rule regulating their termination. The new regime establishes procedures and legal periods of prior notice to be observed by both parties, and also requires their specification in the respective contract.

It is now legally established that the consumer may terminate a loan contract of undefined duration (e.g. contract without a pre-established end, as is typically the case of contracts for credit cards or overdraft facilities) at any time, free of charge and without claiming a motive. However, the institution may define that the parties must agree to a period of prior notice on the part of the customer, but never greater than one month, and this restriction must be presented, when applicable, in the terms of the actual contract.

The termination of the contract by the credit institution must be based on objective reasons and may take place only if this possibility is contractually established. In these cases, the institution must also comply with a period of prior notice of at least two months.

3.5 CONTRACT DISSOLUTION IN THE CASE OF DEFAULT

The new regime introduces specific rules for the dissolution of consumer credit contracts in situations of default (article 20 of Decree-Law No 133/2009), that had not been defined in the previous legislative framework. This rule had not been foreseen in the Directive that the new diploma transposed, therefore, this is an initiative of the national legislator.

Hence, it is now established that, if the consumer fails to comply with the loan contract, the institution may only claim the loss of the entitlement to pay by instalments or the dissolution of the contract and, consequently, demand the total amount in debt, if the following cumulative requirements are met:

- Failure to ensure the payment of two consecutive instalments by the consumer;
- The amount of the two unpaid instalments exceeds 10 percent of the total amount of the loan;
- The credit institution has, unsuccessfully, granted the consumer a minimum supplementary period of 15 days for payment of the overdue instalments, advising the consumer of the effects of the loss of the entitlement to pay by instalments or of the contract dissolution.

4. INFORMATION DURING THE PERIOD OF THE CONTRACT

4.1 GENERAL RULES

The new regime has expanded the requirements on the provision of information by the institution during the period of the contract, by establishing, for loan contracts of fixed duration, the consumer's right to receive, upon his request, a copy of the amortisation table, at any time and free of charge.

The new regime has also established the borrower's right to be informed previously on any changes to the nominal annual rate applicable to the contract, in paper or other durable format,

as well as the respective impact on the debt service. This information should include the amount of the instalments payable as a result of the change in the rate, as well as any changes to the number or frequency of these payments.

The diploma is, even so, silent in terms of regular information (bank statements) to be provided by credit institutions during the period of most consumer credit contracts, with the exception of contracts granted in the form of an overdraft facility with repayment greater than one month. For these contracts, the new diploma determines that the consumer should be informed, monthly, in paper or other durable format, through a bank statement specifying the following elements:

- Exact period to which the bank statement refers;
- Amounts used and respective dates of use;
- Balance of the previous bank statement and respective date;
- New balance;
- Date and amount of the payments carried out by the consumer;
- Applied nominal annual rate;
- Any costs that have been debited;
- Minimum amount payable; and
- Reference to any changes to the nominal annual rate or other costs that will occur at a later date.

The previous legal regime on consumer credit already established the provision of regular information for these loan contracts, but it was greatly less detailed, not defining the respective periodicity and with the information requirements involving only the applicable nominal annual rate and charges and the conditions for their change.

4.2 INFORMATION ON OVERRUNNING

The new regime defines “overrunning” as an overdraft tacitly accepted by the creditor, allowing the consumer to use funds in excess of the balance of his current account or contracted credit ceiling of the overdraft facility and establishes the specific duties of information of credit institutions for this type of situation.

Hence, in the case of overrunning in a contract for a current account or overdraft facility that establishes this possibility, the institutions should indicate, in that contract, the nominal interest rate and other applicable costs, as well as the conditions under which they may be changed. The credit institutions should provide this information periodically, in paper or other durable format, in a clear, concise and legible manner.

In the cases where the overrunning extends for over one month, the credit institutions are also obliged to inform the consumer of the existence of this situation of default, the amount in question and any applicable sanctions, costs or penalty interest.

While Decree-Law No 133/2009 does not establish pre-contractual duties of information regarding the overrunning, the institutions are obliged, under the terms of Notice No 4/2009,

to provide pre-contractual information on this overrunning, when this is associated to a deposit contract. Specifically, it should be explained that the overrunning depends on the acceptance of the institution and a description should be made of the applicable conditions if the institution decides to accept the withdrawal, namely, the nominal annual rate, dates of payment of interest, any fees and charges and the maximum amounts or maturities, when applicable.

5. ANNUAL PERCENTAGE RATE OF CHARGE (APR)

Although the previous legislative framework had already established a set of rules for the calculation of the APR, the new regime (Decree-Law No 133/2009 and Instruction No 11/2009 of Banco de Portugal), specifies them in a much more clear and complete manner, contributing to a greater harmonisation in its calculation and, therefore, to the greater comparability of the proposals presented to the consumer, in the advertising and in the pre-contractual phase.

The clear definition of the assumptions and method of calculation of the APR is fundamental, not only for the harmonisation of the rules of calculation of the APR, but also for the sound application of other provisions of this new diploma, in particular, for the implementation of the interest rate caps regime that is now enforced in consumer credit.

The new regime defines the APR as a measurement of the cost of the loan, expressed as an annual percentage of the respective amount. This measurement includes, in addition to the interest, fees, charges, taxes and costs of any nature related to the loan contract, and that are known by the creditor, with the exception of notary costs. The magnitude of the APR depends on the proportion between the amount of its components and the amount of the loan, as well as the way that they are distributed over time. By including all the costs of the loan, the APR necessarily reflects amounts that are higher than that of the nominal annual rate of the loan.

The requirements for the calculation of the APR are specified, namely regarding the costs that should be considered in the calculation of this rate, methodology of calculation and assumptions to be used in different situations and types of consumer credit. The conventions on the calculation of interest and rounding-off rules are also established.

BOX II.5 | METHODOLOGY OF CALCULATION OF THE APR

The new regime establishes that, in addition to the nominal annual rate, the following costs should be **included in the calculation of the APR**:

- The costs relative to payment operations, namely:
 - Current account maintenance costs, if the opening of this account is compulsory for the conclusion of the loan contract;
 - Costs of using means of payment which permit both payment operations and the drawdown of the loan;
 - Other costs associated to the processing of the loan operation; and
- The rate payable by the consumer as remuneration for any credit brokerage services.

The new diploma also established **conventions for the calculation of interest**, an area where the previous diploma (Decree-Law No 359/91) was silent. The adopted conventions, the same as those that are enforced for mortgage loans, are as follows:

- Regarding time intervals, it is assumed that a year has 12 equal months and that each standard month has 30 days. Furthermore, the daily interest should be calculated based on the Actual/360 convention;
- The APR is expressed with an accuracy of one decimal place where, when the successive decimal number is greater or equal to 5, the first decimal number should be increased by 1.

Based on the general principles and methodological assumptions of the APR of the new diploma (Decree-Law No 133/2009), Banco de Portugal, through Instruction No 11/2009, systematised the APR calculation rules, ensuring its uniform application by credit institutions.

Instruction No 11/2009 defines specific rules for the **calculation of the APR for four types of loan contract** that are identified, for this purpose, as follows:

- “Classic loan”: includes contracts where the amount of the loan, repayment time schedule and duration are established at the beginning of the contract;
- “Leasing contract”: includes leasing contracts for durable and movable consumer goods, with a fixed payment time schedule and establishment of the right or obligation to purchase the leased item;
- “Revolving loan”: includes contracts where a maximum credit ceiling is established, which the consumer may (re)use over the time up to this limiting amount, with the exception of overdraft facilities. These are loan contracts without a fixed repayment time schedule; and
- “Overdraft facility”: contracts that establish a facility for the use of credit associated to an account, enabling the account’s movement beyond its balance, up to the previously established credit ceiling.

6. REGIME OF INTEREST RATE CAPS

The new diploma institutes a regime of interest rate caps for consumer credit contracts. This was the choice of the national legislator and did not result from the transposition of the Consumer Credit Directive.

For each type of consumer credit contract, the interest rate caps are defined quarterly based on the average value of the APR practised by the credit institutions during the previous quarter increased by one third. Consumer credit contracts whose APR, at the time of the contract conclusion, exceed the interest rate caps in force in that period are considered usurious. In addition to constituting a breach of regulation punishable under the terms of the law, the diploma also determines that the APR of the respective contract should be reduced automatically to the cap value in force for that type of loan.

Banco de Portugal was attributed the competence to classify the relevant types of loan contract for the determination of the interest rate caps, as well as their dissemination to the public, on a quarterly basis. The application of the interest rate caps regime began on 1 January 2010.

BOX II.6 | IMPLEMENTATION OF THE INTEREST RATE CAPS REGIME

Before implementing the interest rate caps regime, Banco de Portugal developed market research so as to learn about, in an exhaustive manner, the characteristics of the products marketed by credit institutions. This research, which fundamentally aimed at the suitable determination of the relevant segments in the consumer credit market, was based on information collected from the credit institutions, both through the request of the completion of questionnaires on the marketed products and bilateral meetings with credit institutions and their representative associations, as well as with consumer protection associations. This research also included an extensive survey of the international practices in this area, in particular pertinent experiences in the euro zone.

The instituted model of interest rate caps is similar to the existing regime in France and Italy, where the maximum limits are calculated based on market rates, which enables the adjustment of these limits in accordance with the evolution of the actual market conditions.

The interest rate caps are based on the APR, a measure that incorporates all the consumer credit costs: interest and costs associated to the contract. While use of the APR shows some limitations, even so, this is the measure that best reflects the total cost of the loan.

Following the research referred to above, Banco de Portugal issued **Instruction No 12/2009**, establishing a compulsory monthly reporting system for consumer credit contracts concluded by credit institutions. This Instruction defines the requirements of information and the methodology of communication to Banco de Portugal, whereby credit institutions should report the contracts that are concluded in each month, within the period of 10 business days counting from the end of the respective month. Using this data, Banco de Portugal calculates the average APR practised in the market and, based on these rates, defines the interest rate cap for each category of consumer credit.

Instruction No 12/2009 establishes that credit institutions are obliged to report to Banco de Portugal, for each concluded contract, the category of the loan, amount, maturity, type of interest rate (fixed or variable), nominal annual rate, existence or not of any subsidy or protocol, marketing channel, type of guarantees and APR.

Instruction No 12/2009 defines, for this effect, the following loan categories and subcategories:

- Personal loans – where the purpose of the loan may be none in particular, for home goods, for education, health and renewable energy, other purposes, financial leasing of equipment and consolidated credit;
- Car loans – financial leasing or long term rental of new vehicles, financial leasing or long term rental of used vehicles, loan subject to the retention of the ownership of new vehicles, loan subject to the retention of the ownership of used vehicles, other for new vehicles and other for used vehicles;
- Credit cards;
- Bank credit accounts; and
- Overdraft facilities – with domiciliation of salary and without domiciliation of salary.

In view of the diversity of the characteristics of the consumer credit products marketed by credit institutions – their purpose, the existence or not of a repayment plan or defined contract period and the type of guarantee underlying the contract – Banco de Portugal has grouped the different types of loans into three major categories: “Personal Loans”, “Car Loans”, and “Credit Cards, Credit Lines, Bank Credit Accounts and Overdraft Facilities”.

Table C.II.6.1

| TYPES OF LOANS USED IN THE PUBLICATION OF INTEREST RATE CAPS | |
|---|---|
| Personal loans | For education, health and renewable energy and financial leasing of equipments |
| | Other personal loans (for home goods, consolidated credit and for other purposes) |
| Car loans | Financial leasing or long term rental of new vehicles |
| | Financial leasing or long term rental of used vehicles |
| | Subject to the retention of the ownership and others: new vehicles |
| | Subject to the retention of the ownership and others: used vehicles |
| Credit Cards, Credit Lines, Bank Credit Accounts and Overdraft Facilities | |

With the entry into force of this regime, Banco de Portugal now discloses on a quarterly basis, through Instruction, the amounts of the interest rate caps applicable to each type of consumer credit (for the four quarters of 2010, Instructions numbers 26/2009, 7/2010, 15/2010 and 19/2010 were published, respectively). These Instructions are published in the Official Bulletin of Banco de Portugal and disclosed in the Bank Customer Portal.

The interest rate caps are disclosed approximately 20 days prior to their enforcement, so that the credit institutions may, when necessary, adjust the marketing conditions of the their consumer credit products. This period of time also enables bank customers to foresee the possible changes in the conditions in which they access to this type of loan.

7. CREDIT INTERMEDIARIES

The Directive underlying the new regime recognises the existence and growing importance of the role played by the credit intermediary in the consumer credit market. The establishment of this role in the new legal diploma was accompanied by the definition of a series of duties of information to be fulfilled by these entities in the context of the marketing of consumer credit contracts, namely in terms of advertising, pre-contractual information and duty of assistance.

The diploma defines the credit intermediary as a natural or legal person, who/which does not operate in the capacity of a creditor and who/which, in performing the respective professional or commercial activity, against monetary remuneration or other economic consideration:

- Presents or proposes consumer credit contracts;
- Offers assistance to consumers relative to the preparatory acts of loan contracts; or
- Concludes loan contracts with consumers on behalf of the respective creditors.

The new regime foresees that the activity of credit intermediaries is subject to special legislation, which, however, has not yet been published. Hence, more encompassing regulations of this activity have yet to be established, defining, amongst other relevant aspects, the types of credit intermediaries pursuant to the activity exercised, the conditions of access to and exercise of this activity, as well as any additional duties to be observed with respect to credit institutions and consumers.

Notwithstanding the above, through effect of the transposition of the Directive, the new regime establishes that, regarding pre-contractual information, credit intermediaries are responsible for the same duties to the consumer as those of the actual creditor, namely the duty to provide the Standardised Information Sheet. It also establishes that, on matters of advertising, in the campaigns carried out through intermediaries, the credit institutions must comply with the provisions of the new regime. Thus, the actual institutions are accountable for the content of the advertising messages and their legal and regulatory conformity, even when conveyed through intermediaries.

Furthermore, in advertising and other types of information aimed at consumers, the intermediaries must indicate the extent of their brokerage powers, clarifying whether they operate exclusively or on behalf of more than one credit institution, or whether they operate as independent intermediaries. They must also inform the consumer on any rate payable by the consumer for the brokerage service, and are also obliged to inform the credit institution of this amount, so that the credit institution can include it in the calculation of the APR which it will have to present to the consumer.

In the case of suppliers or service providers intervening as credit intermediaries in an ancillary capacity¹³ ("points of sale"), the credit institution is responsible for ensuring that the consumer receives and is aware of the pre-contractual information, directly or through these credit intermediaries.

13 Decree-Lei No 133/2009 does not define the concept of the credit intermediary in an ancillary capacity, in contrast to Directive 48/2008/EC which refers, in the respective Recital 24, that it may be considered, for example, that suppliers of products and service providers operate as credit intermediaries in an ancillary capacity, if their activity in that capacity is not the main objective of their commercial or professional activity.

