

General good provisions: freedom of establishment and freedom to provide services

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EU member states may avail themselves of the concept of general good in order to demand compliance with national laws from an insurer wishing to pursue business in its territory under the freedom of establishment or freedom to provide services. Under Article 146(3) of the EU Solvency II Directive (2009/138/EC), before an insurer enters the market in a host member state, the host member's supervisory authority must inform the home member's supervisory authority of the conditions under which, in the interest of the general good, business must be pursued in the host member state. The home member's supervisory authority then conveys such information to the relevant insurer.

The EU Solvency II Directive was transposed into Portuguese law via Law 147/2015 of September 9, which approved the Insurance Supervision Act. In the second half of 2017, the Portuguese Insurance Supervisory Authority (ASF) published Consultation Paper 7/2017, requesting comments on the draft regulatory norm, which sets out the general good provisions applicable to insurers acting in Portugal under the freedom of establishment or freedom to provide services. The ASF has yet to publish this regulatory norm. The draft sets out a number of general good provisions which would be applicable to the distribution of all types of insurance, as well as some additional provisions which would apply to the distribution of mandatory insurance and life insurance products.

Common general good provisions

Under the draft regulatory norm, the following general good provisions would apply to the distribution of insurance products:

- Language – under the Insurance Supervision Act, the information that the insurer makes available to the public must be written in Portuguese.
- Tax – insurance premiums collected in relation to insurance policies that cover risks in Portugal or where Portugal is the state of commitment are subject to Portuguese tax requirements.
- Market conduct – insurers must provide the ASF with the necessary information in order it to be able to ensure their compliance with the applicable market conduct duties, including:
 - the appointment of a local ombudsman;
 - the approval of a claims handling policy; and
 - requirements regarding the publicity of insurance products.
- Mandatory provisions of the Insurance Contract Act – Articles 12 and 13 of the act (approved by Decree-Law 72/2008 of April 16) are deemed to be absolutely or relatively mandatory. This general good provision is surprising, given that the list of mandatory provisions contained in these articles is extensive (totalling more than 60 articles of the Insurance Contract Act).

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- Insurance registry – insurers must maintain a registry of all insurance contracts and capitalisation operations that they conclude. As regards life insurance or personal accident insurance, information on the beneficiaries in the case of death must be notified to the ASF for the purposes of being included in a central registry of beneficiaries.
- Health and genetic information – Portuguese rules on the management of health and genetic information under Law 12/2005 of January 26 are applicable in their entirety.
- Non-discrimination – the prohibition of and penalties for discrimination on the basis of gender, disability or aggravated health risks under Law 46/2006 of August 28 and Law 14/2008 of March 12 apply in their entirety.
- Complaints book – insurers must make available a complaints book in accordance with Decree-Law 156/2005 of September 15.
- Other – when the general interest is not safeguarded by the rules applicable to the insurer in the respective home member state, the following rules apply:
 - the rules on the management of personal data;
 - the mandatory provisions on consumer protection, distance marketing, unfair trade practices and standard terms; and
 - the constitutional protection of fundamental rights.

General good provisions applicable to mandatory insurance

The following general good provisions would apply to mandatory insurance:

- Supervision – insurers that wish to distribute mandatory insurance must disclose to the ASF the applicable standard terms before the beginning of the distribution thereof or within one month after that date. The ASF has three months to analyse such conditions and may suggest amendments.
- Contributions to national guaranty systems – insurers must adhere to and pay the respective contribution to the applicable national guaranty systems in force. For example, insurers exploring the accidents at work insurance cover or motor civil liability insurance cover would have to adhere to the respective guaranty system (the Work Accidents Fund and the Car Warranty Fund, respectively).
- Claims representative – insurers acting under the freedom to provide services and distributing mandatory insurance must appoint a local claims representative and notify the ASF of their name and address.
- Motor insurance – insurers acting under the freedom to provide services and exploring mandatory motor insurance must notify the ASF that they have adhered to the local green card bureau and confirm that they will comply with the specific applicable rules (Decree-Law 291/2007 of August 21 and Regulatory Norm 11/2016), ensuring that the individuals claiming compensation resulting from a motor accident will not be placed in a less favourable situation than the one they would be in if it were an insurer with an establishment in Portugal.
- Other – all other general and special rules applicable to mandatory insurance covers in Portugal will also apply.

General good provisions applicable to life insurance

Under the draft regulatory norm, insurers that distribute life insurance products for housing loans would have to comply with the applicable specific consumer protection rules, as set out in Decree-Law 222/2009 of September 11.

Specific provisions would also apply to unit-linked insurance products. However, they are under review by the Securities Market Commission together with the ASF due to EU Regulation 1286/2014's entry into force on January 1 2018.

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