



**COUNTRY
COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

Portugal

INSURANCE & REINSURANCE

Contributing firm

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

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PORTUGAL INSURANCE & REINSURANCE



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

In Portugal insurance contracts are regulated under Decree-Law no. 72/2008 of April 16. Under this legal regime the insurance contracts don't need to be concluded in writing, however the insurance companies are not exempted of including in the insurance policy all the conditions agreed by the parties.

The insurance sector supervision authority (ASF – *Autoridade de Supervisão de Seguros e Fundos de Pensões*) is the entity responsible for regulating and supervising the insurance, reinsurance, insurance brokerage and pension funds and its managing entities sectors.

The ASF holds regulatory, licensing, registration or certification, on-site or off-site supervision, enforcement, revocation and institutional powers as well as the power to impose misdemeanor penalties. All these powers are foreseen and regulated under:

- ASF Statute – Decree-Law no. 1/2015, of January 6;
- Regulation Authorities' framework law – Law no. 67/2013, of August 28;
- Insurance and Reinsurance Activities Access and Exercise Legal Regime – RJASR – Law no. 147/2015, of September 9;
- Pension Funds and Pension Funds Managing Entities Legal Regime – Law no. 27/2020, of July 23;
- Insurance and Reinsurance Distribution Legal Regime – Law no. 7/2019, of January 16.

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

The insurance and reinsurance activities access and exercise rules are foreseen in Law no. 147/2015 of September 9.

The license for exercising the insurance and reinsurance

activities is granted by ASF. The companies applying for those licenses must be assuming one of the following forms:

- Public Limited Company;
- Insurance or reinsurance mutuality;
- Branch of foreign insurance or reinsurance company;
- State owned insurance or reinsurance companies incorporated under the Portuguese law provided its purpose is the performance of insurance or reinsurance operations in conditions similar to the ones of the private law companies;
- Insurance and reinsurance companies under the form of European companies under the terms of the applicable law;
- The insurance and reinsurance activities under the freedom to provide services regime can only be pursued by insurance or reinsurance companies with its seat in another Member State and provided the requirements of Directive 2009/138/CE of the European Parliament and the Council of 2009/11/25 are met.

The license particulars regard the classes of insurance because the insurance companies cannot be authorized to simultaneously perform their activities in the Life and Non-Life business. However the license can be granted for cumulative activities in Non-Life Casualties class, including labor casualties and professional illness, and Health Insurance.

The initial license of an insurance company is granted class by class. On the contrary the initial license of a reinsurance company is granted for reinsurance activities in Non-Life class, reinsurance activities of Life class or all type of reinsurance activities.

The complementary license to explore new classes or type of activities is granted according to the legal and regulatory terms in force at each moment.

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

Law no. 7/2019 of January 16 that approves the insurance and reinsurance distribution legal regime, transposes Directive (UE) 2016/97 and amends Law no. 147/2015 which approves the insurance and reinsurance activities access and exercise legal regime and the procedural regime applicable to the specific crimes in the insurance and pension funds sector and to misdemeanor to be investigated and imposed by the ASF. This law also revokes Decree-Law no. 144/2006 of July 31.

This regime determines the access and exercise terms of the insurance and reinsurance distribution activities within the European Union territory by individuals residing or by companies whose head office is in Portugal or by insurance or reinsurance distributors registered in other European Union Member States.

The rules regarding insurance or reinsurance distributors registered in other European Union Member States are also applicable to distributors registered in third countries which have entered into association agreements with the European Union that have been ratified or approved by Portugal, under the specific terms set out in those agreements.

Under the insurance and reinsurance distribution activities legal regime it is possible to separate insurance intermediaries, insurance brokers and insurance agents, with different formalities regarding the licensing, registration, supervision and penalties depending whether they are individuals or legal persons.

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

Under article 52 of Law no. 147/2015, of September 9, the license for incorporating an insurance or reinsurance company can only be granted by ASF if the following conditions are met:

- a. The company is a public limited company;
- b. The companies' sole purpose is the insurance activity;
- c. The company has a share capital of no less than € 2.500,000 and on the date the company is incorporated the share capital must be entirely subscribed and paid up;
- d. The shareholders that directly or indirectly have a qualifying holding must prove their

- capacity to guaranteeing a safe and prudent management of the company;
- e. The seat and head office of the company must be located in Portugal;
- f. A program of activities must be supplied to the licensing authority;
- g. The company proves to have the level of own funds eligible to respect the lower limit of the minimum share capital requisite of € 2.500,000;
- h. Being proved that the company will be able to have own funds eligible to cover the solvency capital requirement;
- i. Being proved that company will be able to have base own funds eligible to cover the minimum capital requirement;
- j. Being proved that the company will have a governance system that will respect the requirements applicable to insurance and reinsurance companies with its seat in Portugal;
- k. Whenever there are close relations between the company and other individuals or legal persons:
 - a. The inexistence of any obstacles to the exercise of the supervisory functions that would result from the existence of such close relations;
 - b. The inexistence of any obstacle to the exercise of the supervisory functions resulting from any legal, statutory or administrative provision of a third country that would be bounding to any such individual or legal persons having close relations with the company.

Regarding the insurance companies wishing to cover risks in the "Civil Liability of motorized ground vehicles", with exception of the transporter responsibility, those companies must appoint in each of the Member States a claims representative that shall be responsible for dealing with (and to pay) in victim's country any claim arising out of any accident occurred in a foreign Member State (a state in which a victim doesn't live).

The licensing process may also involve other supervision authorities such as the Bank of Portugal or the Securities Market Authority, because one of the powers granted to the ASF is to cooperating with the remaining regulation authorities in any matter within its powers.

A decision must be informed within 6 months from the date of the initial request (or any additional request for documents) but never after 12 months from the initial request.

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

The ASF can oppose that any member of the management board or of the supervisory body of the insurance or reinsurance companies take any office in other companies, whenever it believes that any such accumulation of positions is susceptible of causing any damage to the exercise of the positions already held (or to be held in the future) by any such person, namely when there are serious situations of conflict of interests or when the individual doesn't show to have enough time available for the exercise of the position.

Any incompatibility determined by the Companies' Code is also applicable to members of the supervisory body of insurance and reinsurance companies.

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

The insurance and reinsurance companies must be legally authorized to exercise the insurance activity in Portugal, within the class in which they act, and it isn't possible to develop any activity without such permit.

The lack of permission entails the nullity of the contract but doesn't exempt those that accepted to cover someone else's risks of fulfilling its obligations arising from the contract or from the law as if the contract was valid, except if there was misconduct of the other party.

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

Under Law no. 147/2015, of September 9, the establishment and operation of a branch of a company from another European Union country or from a third country is different.

Branches of insurance companies seated in another EU country are subject to the same rules of companies seated in Portugal.

For branches of companies seated in third countries the access conditions are adopted from the requirements to which companies seated in Portugal are subject to.

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

Those exercising the insurance activity, capitalization or reinsurance activities on their own account or on behalf of third parties without the necessary authorizations are subject to imprisonment up to five years or subject to a fine. There is also the possibility of being subject to accessory penalties.

Legal persons are also liable under the general terms.

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

The broad scope of the supervisory activity shows the rigor put in place by ASF when exercising these functions. ASF checks under the applicable legal and regulatory framework the solvency situations of the companies, the sufficiency of technical provisions, the assessment of assets and eligible own funds of insurance and reinsurance companies, as well as the regularity of its accounting records, of its governance system and of its relations with policyholders, insured, beneficiaries, injured parties, the relations between companies pertaining to the same group, etc.

The main purpose of the supervisory activity is the protection of policyholders, insured and beneficiaries.

The ASF reviews and checks the strategies and procedures adopted by the insurance and reinsurance companies by means of:

- The evaluation of the requirements regarding the governance system, including the self-assessment of risk and of solvency and of the risks that insurance and reinsurance companies are exposed to (or may be exposed to) and of its capacity of evaluating those risks, bearing in mind the context in which its activities are conducted;
- The assessment of the technical provisions, of the capital requirements, of the evaluation of assets and liabilities, of investment rules, of own funds and of the total or partial internal model, whenever used, and if all those are compliant with the applicable rules and regulations.

10. How is the solvency of insurers (and

reinsurers where relevant) supervised?

Apart from the ASF requirements for granting the licenses, namely in what regards the minimum share capital and the fulfillment of reserve requirements, within its supervision activity the ASF may also determine, in exceptional circumstances, an increase in the solvency capital requirement.

The insurance and reinsurance companies must publicly disclose an annual report on its solvency and financial situation and must inform the ASF on the self-assessment analysis of risk and solvency.

From the analysis conducted, the reported information and from any other supervision element available, specific measures can be adopted depending on the seriousness of the conclusions achieved, namely;

- An ongoing surveillance of the insurance company and/or group activities, a regular monitoring of the business model adopted, of the fulfillment of the capital solvency requirement, of the sufficiency of the technical provisions and of the investment options bearing in mind the “prudent person” principle;
- Definition of specific reporting measures specifically designed to monitor the identified issue;
- Issuance of recommendations applicable to the market as a whole;
- Request of information on the insurance company and/or group regarding financing and recovery plans and monitoring the fulfillment of those plans;
- Imposing the increase of technical and/or own funds provisions.

11. What are the minimum capital requirements?

The insurance and reinsurance companies must have eligible own funds sufficient to cover the solvency capital requirement.

The minimum share capital requirement is calculated as linear function of a set or subset of the following variables, quantified by the net value of reinsurance:

- a. Technical provisions;
- b. Issued premiums;
- c. Capital at risk;
- d. Deferred taxes;
- e. Administration costs;

The solvency capital requirement must cover, at least, the following risks:

- a. The specific risk of non-life insurances;
- b. The specific risk of life insurances;
- c. The specific risk of accident and health insurances;
- d. The market risk;
- e. The credit risk;
- f. The operating risk.

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

The Automobile Guarantee Fund (*Fundo de Garantia Automóvel* – FGA) was created by Decree-Law no. 408/79, under the terms of Regulatory Decree no. 58/79. Currently, Decree-Law no. 291/2007, of August 21, defines the scope of activity and functions of the FGA. The FGA is liable towards injured third parties in car accidents occurred in Portugal, when there is no mandatory car liability insurance in force for the vehicle that caused the damage and, in certain conditions, it covers the damages caused by this vehicle even if was impossible to identify it.

On the other hand, the Labor Accidents Fund (FAT) assures the protection and the compensation for damages of labor accidents victims or of legal beneficiaries when there is no labor accidents insurance or whenever the payment of compensations cannot be guaranteed by the insurance company.

13. How are groups supervised if at all?

After the approval of Directive 2009/138/CE of the European Parliament and the Council that was transposed by Law no. 147/2015, of September 9, this subject is addressed specifically in Title VI of this legal instrument.

The groups are subject to supervision under the same rules foreseen for groups resulting from shareholding participations.

The supervision of the group is to operate at the level of the last parent-company seated in the European Union.

The insurance and reinsurance companies that are part of a group seated in a third country are to be subject to supervision rules at the group level equivalent and adequate.

14. Do senior managers have to meet fit

and proper requirements and/or be approved?

The members of the management board, top management and those responsible for key-functions are subject to approval before taking office and during the term of their term of office.

It is assumed that a person holds the necessary professional qualification when she/he demonstrates to having the skills and qualifications necessary for the performance of her/his functions, acquired by means of adequate academic degree or specific training. Professional experience, its nature, the duration, degree of responsibility and competence are considered in the assessment to be conducted and it is analyzed if those are suitable according to the nature, dimension and complexity of the insurance or reinsurance company activity.

When evaluating the reputation of the person at stake, it must be paid attention to the manner said person usually runs her/his professional or personal affairs, how she/he performs her/his job, especially in the aspects revealing the capacity to decide in a considerate and judicious manner, or her/his tendency to timely fulfil her/his obligations or to conduct in a manner that will preserve the market confidence. All circumstances that will allow to evaluating the professional behavior of that person shall be taken into consideration.

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

The members of the management board or of the supervisory board benefit from independence and exemption in order to prevent the risk of undue influence and must promote the conditions that will allow the exempt exercise of their functions.

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

Branches of third countries insurance and reinsurance companies cannot cease or significantly reduce the activity for a period longer than six months.

17. Are there restrictions on outsourcing

services relating to the business?

Insurance and reinsurance companies that will outsource some functions or insurance or reinsurance activities must put in place the measures allowing it to guaranteeing that the following conditions are met:

- a. The service provider will cooperate with ASF within the scope of the supervision of the outsourced function or activity;
- b. The insurance or reinsurance company, its statutory auditors and ASF will be granted effective access to the data regarding the outsourced functions or activities;
- c. ASF will be granted effective access to the facilities of the service provider.

18. Are there restrictions on the types of assets which insurers or reinsurers can invest in or capital requirements which may influence the type of investments held?

The insurance and reinsurance companies may invest all its assets according to the principal of the "prudent person" principle. This is generally materialized in the following rules

1. Investments must be exclusively made in assets and instruments whose risks can be properly identified, measured, monitored, managed, controlled and communicated and that can be properly accounted for the calculation of the global solvency requirements.
2. All the assets, namely the ones covering the minimum capital requirement and the solvency capital requirement, must be invested in a manner allowing to guaranteeing the safety, quality, liquidity and profitability of the portfolio as a whole.
3. The location of the assets must assure its availability.
4. The assets representing technical provisions must be adequately invested according to its nature and the duration of the reinsurance and reinsurance responsibilities, as well as in the best interest of the policyholders, insured persons and beneficiaries, bearing in mind the disclosed purposes. In this line those assets cannot be pledged or seized, unless for payment of those responsibilities, and cannot be, in any case, be offered to third parties as a collateral under any type or form.

19. How are sales of insurance supervised or controlled?

Insurance companies acting in Portugal must be compliant with the legal regime of the insurance contract (Decree-Law no. 72/2008, of April 16) that addresses in special the protection of the policy holder and of the insured person – considered as the weak party in the contract – without overseeing the necessary balancing of the insurance companies' interests.

In this legal regime information duties of the companies to the policy holders prevail and are subsequently developed and detailed in special regimes such as the life insurance legal regime.

Apart from the rights and duties of insurance companies foreseen in this diploma, there are also other rules to be followed under the Civil Code, the Commercial Code, the General Contract Terms Law and the Consumers' Protection Law.

On the other hand the insurance companies must also comply with regular information duties to the ASF (both at an individual level and for the insurance groups). Those duties include amongst others the duties to supply:

- Files with quantitative information – regarding the solvency capital requirement, the balance sheet evaluation according to economic principles, especially in what concerns technical provisions and investments, and the eligible own funds required to cover the capital requirements;
- Qualitative information reports regarding the governance system and the self-assessment of risk and solvency;
- External auditing reports, of the statutory auditor and of responsible actuary;
- Reports and accounts and other statistic information used with the purpose of monitoring the insurance companies' business model.

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

EU countries or third countries insurance companies can exercise the activity by means of a branch established in Portugal. Insurance companies of other EU countries can

exercise the activity in Portugal under the freedom to provide services regime.

For the insurance contracts entered into by phone or by internet it will be necessary that the insured person is informed about the details of the insurer and of the contract conditions before the contract's conclusion.

This information must be provided in a clear manner, in Portuguese and before the insured person concludes the contract. This information must be available at the insurance company's website and disclosed to the insured person while she/he progresses in the process of concluding the contract. This information must also be provided in a manner that will allow it to be filed by the insured person.

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

The insurance company must inform and explain to the insured person about the contract's terms, namely about:

- a. The company's name and legal statute;
- b. The risk that will be covered, the premium total value, any possible premium increases or bonuses resulting from the existence, or the non-existence, of claims, the payment terms and the consequences of failing the payments;
- c. What is not covered by the insurance;
- d. In mandatory insurances the minimum insured capital values;
- e. The initial term of the contracts and the rules for renewing it or for terminating it;
- f. The options available to presenting claims, the existing legal protection means and the identification of the supervisory authority.

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

The Portuguese Courts are fully capable of dealing with complex insurance litigation both in the lower courts and in the appeal courts.

For litigation regarding the specific cases of maritime insurance there is a Maritime Court specialized in this type of litigation that usually involves different jurisdictions.

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

Alternative dispute resolution in insurance related matters exists since 2015, with the creation of the CIMPAS (Insurance Mediation, Arbitration and Information Center) whose purposes are to inform and make available alternative dispute resolution means in litigation arising out of insurance contracts, with resource to Mediation and Arbitration. Our opinion is that CIMPAS is a suitable alternative for the resolution of some disputes although there is still a long way ahead in order to fully develop its capacities and purposes.

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

It is possible to transfer the whole insurances portfolio, or just part of it, provided some conditions are met. The most important one is that the transfer is approved by the ASF. Apart from it the transferee must have enough eligible own funds in order to meet the solvency capital requirement. In the case of insurance companies the supervision authorities of the EU member state in which the risks are located, or in which the commitment is located, and when they are not the same, also in which the transferor is located, must also approve the transfer.

25. What are the primary challenges to new market entrants?

Among others the pandemic has created additional challenges of which we highlight the following ones:

- Quick expansion of the distribution channels, especially of the digital;
- Balance sheet management/Solvency, with an increased perception of risks;
- Frequent adjustments and updates to the business models;
- Creation of virtual assistance services.

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

Insurance companies that have been able to successfully put in place digital transformation models have an undeniable advantage. The benefits may include enriching experiences, bigger focus in the client and achieving a strongest competitive position. Digitalization increases the exposure to cyber risks and consequently

insurance companies must reinforce their cybersecurity frameworks.

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

The trend of increasing digitalization in the insurance market has been followed by many updates to the existing legal framework, namely in what regards consumers' protection, privacy and data protection (following the GDPR there is a new legal regime in place - Law no. 58/2019, of August 8). These updates are always oriented towards providing a high level of protection to consumers without putting up unnecessary barriers to innovation.

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

Since the GDPR is in force (Regulation (EU) 2016/679) across Europe and following the approval of the new data protection law (Law no. 58/2019, of August 8), the rights of data subjects have been better defined and determined and also in some cases increased. At this level it is important to highlight the guarantees provided to data subjects in what regards the processing of health data by insurance companies.

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

Within the EU and EEE countries there are no restrictions to data transfers provided the applicable rules are met. The data transfer to third countries can only be achieved under the terms and conditions set forth in the GDPR.

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

The post-pandemic period will most certainly imply new challenges and changes that will impact each and every insurance area of activity.

Automobile insurance must be adapted to the new

models of mobility that are appearing and growing. Labor work accidents insurances will most certainly have to respond to issues raised by distance working, multiple employment, nomad employees or expatriate work. Liability insurance, the so called property insurance or

even in the credit insurance for companies it will be necessary to have new risk coverages such as, for example, an extended coverage of cyber risks, the risks arising from suspension of operation and consequent exploitation losses or the risks arising out of exportation.

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