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SEP. 20

INFORMATIVE NOTE

DISPUTE RESOLUTION

# New measures to prevent and combat money laundering and terrorist financing

Law 58/2020 came into force on 1 September 2020 and it implements into Portuguese law:

- Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for money laundering or terrorist financing, commonly known as the 5th Anti-Money Laundering Directive; and

- Directive (EU) 2018/1673 of the European Parliament and the Council of 23 October 2018 on combating money laundering by criminal law.

This law introduces substantial changes to the rules previously in force. These changes are being made to implement in Portugal's national legal system new measures to prevent and combat money laundering and terrorist financing. They strengthen the measures implemented following the recommendations of the Financial Action Task Force (FATF) and the approval of Law 83/2017 of 18 August, the Law to Combat Money Laundering and Terrorist Financing ("LCMLTF"), and Law 89/2017 of 21 August, which approves the Legal Rules of the Central Register of the Beneficial Owner.

**"Law 58/2020 of 31 August implements into Portuguese law Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018, commonly referred to as the 5th Anti-Money Laundering Directive, and Directive (EU) 2018/1673 of the European Parliament and the Council of 23 October 2018 on combating money laundering by criminal law."**

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Specifically, the new legislation is intended to: (i) increase the transparency of the economic and financial system, and deter the concealment of criminal practices through opaque structures, (ii) ensure the transparency of corporate structures, trust funds and similar legal arrangements, (iii) combat and mitigate the risks inherent to the use of alternative financial systems, such as electronic money and other virtual assets, which allow anonymity, and (iv) ensure that Portugal has coherent and consistent criminal mechanisms and instruments to provide better cross-border cooperation with the authorities in other countries in combating money laundering and terrorist financing.

To this end, significant changes have been made to the following legal texts:

- Law 15/2001 of 5 June, the General Rules on Tax Infringements
- Law 20/2008 of 21 April 21, Criminal Liability for Crimes of Corruption in International Trade and Private Activity
- Annex I to Law 147/2015 of 9 September, Legal Rules on Access to and Engaging in Insurance and Reinsurance Activity;
- Law 83/2017 of 18 August, Measures to Combat Money Laundering and Terrorist Financing
- Law 89/2017 of 21 August, Legal Rules of the Central Register of the Beneficial Owner
- Law 97/2017 of 23 August, Application and Enforcement of Restrictive Measures Approved by the UN or EU
- The Criminal Code
- The Commercial Registry Code
- The General Rules on Credit Institutions and Financial Companies
- Decree-Law 15/93 of 22 January, Legislation to Combat Drugs
- The Notarial Code
- Fee Regulations for Registries and Notaries
- Decree-Law 14/2013 of 28 January, which organises and harmonises the legislation regarding the Tax Identification Number.

Highlights of the changes mentioned above include: i) widening the range of entities subject to measures to prevent and combat money laundering, and increasing transparency regarding the identification of the beneficial owner, ii) the introduction of stricter controls on transactions with customers located in high-risk third countries, iii) implementing restrictions on the anonymous use of virtual currencies, iv) better identification of politically exposed persons ("PEPs"), and v) broadening the framework of offences and typical conducts underlying the crime of money laundering.

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The list of obliged entities now includes:

- **In the financial sector:** i) securities investment companies to foster the economy, ii) qualified venture capital fund managers, iii) qualified social entrepreneurship fund managers, iv) self-managed European Union long-term investment funds with the designation ELTIF, and v) real estate investment and management companies in Portugal.

- **In the non-financial sector:** i) entities that engage in any activity with virtual assets; ii) any person that provides, directly or indirectly, material aid, assistance or consultancy in tax matters, as their main commercial or professional activity; iii) persons that store, trade or act as intermediaries in the trade of works of art, when the payment is made in cash, if the value is EUR 3000 or more, or through another means of payment, if the value is EUR 10,000 or more; iv) merchants dealing in goods of high unit value, namely gold and other precious metals, precious stones, antiques, aircraft, boats and motor vehicles, when the payment is made under the same terms as in the previous paragraph; v) other merchants and service providers dealing in goods or providing services, when the payment of the transaction is made in cash and the value is EUR 3000 or more, regardless of whether the payment is made through a single transaction or several transactions.

**"The amendments focus on the use of alternative financial systems, such as electronic money, for criminal purposes. Their aim is to implement new measures in the Portuguese legal system to prevent and combat money laundering and terrorist financing."**

In the non-financial sector, it is made clear that merchants who deal in goods of high unit value are considered to be obliged entities when the payment is made in cash, if the value is EUR 3000 or more, or through another means of payment, if the value is EUR 10,000 or more.

Other merchants and service providers are subject to the obligations provided for the prevention of money laundering and terrorist financing when the payment is made in cash and the value is EUR 3000 or more.

To ensure increased transparency regarding the identification of the beneficial owner, changes have been made to the Legal Rules of the Central Register of the Beneficial Owner and related legislation. The information on beneficial owners will now be made available in the corresponding registries of the other Member States, through the European Central Platform.

Importantly, the criterion for assessing the status of beneficial owner is now the ownership or control, directly or indirectly, of a sufficient percentage of units or securities in circulation in the collective investment undertakings.

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**"The following noteworthy new measures are introduced: (i) broadening the range of sectors and companies subject to the prevention obligations; (ii) increasing transparency regarding the identification of the beneficial owner; (iii) stricter control of transactions with customers located in high-risk third countries; (iv) implementation of restrictions on the anonymous use of virtual currencies; (v) better identification of politically exposed persons; and (vi) broadening the framework of typical conduct and of the illegal activities underlying the crime of money laundering."**

Furthermore, the Legal Rules of the Central Register of the Beneficial Owner now provide that the entity subject to registration with the CRBO may only be voluntarily extinguished or dissolved after the information contained in the CRBO has been updated or it has been confirmed that the existing information is up to date.

The recent law also seeks to introduce a harmonised and reinforced system of "due diligence" in transactions with high-risk third countries. For this purpose, obliged entities must now adopt reinforced due diligence measures whenever they establish business relationships, carry out occasional transactions, carry out operations or, in some other way, are involved with customers from high-risk third countries. These include the obligations to: (i) obtain additional information on customers, their representatives or beneficial owners, and on the transactions planned or carried out; ii) carry out additional due diligence to prove the information obtained, and iii) have higher levels of management authorise these transactions.

To combat the money laundering risks inherent to the use of alternative financial systems, such as electronic and other virtual assets, which allow the anonymity of the user, the new law introduces the concepts of "virtual asset" and "activities with virtual assets". The law also requires all service providers and entities carrying out activities relating to this type of asset to take measures to combat money laundering and terrorist financing. Furthermore, the ability to engage in these types of activities depends on prior registration of the entities with Banco de Portugal.

In the same vein, the "acceptance of payments in anonymous electronic money, including using prepaid anonymous instruments, except to the extent that the regulations for the sector contain a provision to the contrary" is prohibited. The violation of this prohibition constitutes a very serious administrative offence.

Another significant change is the additions made to the list of positions that make someone a "politically exposed person". The list now includes General Officers of the Republican National Guard in active service and the Chief Superintendents of the Public Security Police. In addition to members of parliament, who were already included in this category, the list now also includes other members of parliamentary chambers.

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The Portuguese Criminal Code has broadened the range of crimes underlying the crime of money laundering (preceding crimes) and the typical conducts specific to that crime. It has also increased the criminal penalties by one third in cases where the offender is an obliged entity under the Law to Combat Money Laundering and Terrorist Financing and the violation is committed in the course of their professional activity.

The range of preceding crimes provided for in article 368-A of the Criminal Code now includes crimes of pornography with minors, computer fraud and fraud in communications, abuse of a guarantee or credit card, counterfeiting of currency or similar, computer forgery, human trafficking, criminal association and fraud against the social security.

The conduct of the person who is not the perpetrator of the typical unlawful act from which the advantages come, but acquires them, holds them or uses them, with knowledge, at the time of acquisition or at the initial time of possession or use, is now typified as a preceding crime.

In addition, the crime of money laundering is punishable even in cases where the place of commission of the typical illegal acts from which the advantages originate or the identity of the perpetrators are unknown. The crime is also punishable even if the acts are committed outside Portugal, unless they are lawful under the law of the place where they were committed and Portuguese law does not apply to them.

In this context, the minimum limit of the criminal punishment applicable to the crime of money laundering has also been revised to avoid this crime being punished more severely than many of the typical crimes that precede it, with possible unfair and incomprehensible results for those being punished. In fact, the previously established limit of 2 years has now been reduced to the legal minimum (one month), with the maximum limit of the criminal punishment corresponding to 12 years in prison. ■