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MONEY LAUNDERING AND TERRORIST FINANCING: THE NEW INFORMATION REQUIREMENTS

The Bank of Portugal recently implemented specific measures envisaging the reinforcement of the supervisory framework for the use of the financial system for money laundering and terrorist financing. The beginning of this process was signaled by Notice 9/2012 of the Bank of Portugal, which reinforced the quality of the information reported by credit institutions to the Bank of Portugal. This Notice is based on two essential foundations: (i) the segregation of information concerning the prevention of the risk of money laundering and terrorist financing ("ML"/"TF" risk) from the internal control report, prepared in accordance with Notice 5/2008, and transfer of such information to a specific Report on Money Laundering and Terrorist Financing Prevention (RMLTF), as well as (ii) the accentuated increase of informative requirements.

As to this latter item, one of the major innovations introduced by Notice 9/2012 was the increase of the involvement of institutions' management and supervisory bodies in the internal system of ML/TF risk prevention. Thus, in addition to the extensive information requirements set out in the Appendix of Notice 9/2012, the Report



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should also include specific appendixes concerning (i) the overall opinion of the management body of the institution regarding the adequacy and effectiveness of the internal control system for purposes of prevention of the ML/TF risk, (ii) information on any findings, by the institution's supervisory body, involving high risk level deficiencies in the system of prevention of ML/TF, and (iii) an opinion of the institution's supervisory body, expressing, positively and in a clear, detailed and reasoned manner, the understanding of such body in what regards the quality of the respective system of internal control for purposes of prevention of ML/TF.

Moreover, in general terms, the extent of the enlargement of the information requirements operated by Notice 9/2012 is portrayed by the contrast of the categories of information regarding the risk of ML/ FT required under notice 5/2008 and those listed in the Appendix to Notice 9/2012. In contrast to what was required by Notice 5/2008 - where the reporting duties regarding the ML/FT were limited to the communication of operations carried out and analyzed by the institution, credit institutions are now bound to include in the RMLTF, to be made available to the Bank of Portugal, information concerning the ML/FT risk management system, information on the assessment that the institution makes regarding the functioning of its own system and information on the measures taken to correct the imperfections detected in said system.

This extension of informative duties raises legal issues, specifically in what regards the linking of the provisions of the Appendix of Notice 9/2012 with the provisions of Law 25/2008, which regulates the specific



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duties of credit institutions in what regards risk prevention and communication. Many of the information duties set out in Notice 9/2012 concern the way of implementing the measures which do not result from the legal framework. These duties can, in principle, be perceived as implicitly establishing the corresponding duties of conduct or, alternatively, as duties of communication of these measures in case any of these are taken. In practical terms the difference is quite significant: should this latter understanding be considered correct, the compliance of the duty will only depend on the correspondence of the information provided with what is effectively implemented in the credit institution and the Bank of Portugal will not be entitled to question the authenticity of the information provided. Even if the setting out of these information duties is intended to informally suggest to the credit institutions to implement this set of measures, the preamble of the Notice is clear when establishing that the informative requirements laid out therein are limited to ML/TF – which confirms that it is unacceptable to make a different interpretation of the provisions of Notice 9/2012.

Although the determination of its exact content requires some additional interpretative efforts, the overall assessment of Notice 9/2012 leads us to conclude that such Notice also clarifies the extension of the information duties generally set out by Law 25/2008. Apart from that, this Notice clearly increases the bureaucratic burden on Banks as well as entailing a significant accrual of compliance costs, especially to the extent that the adequate drafting of the RMLTF may imply legal advice. The increase of the regulatory burden on credit



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institutions generated by Notice 9/2012 is however limited to this aspect and does not create new organizational requirements.

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