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New rules applicable under Portuguese law on AMLCTF prevention

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On August 31st, **Law no. 58/2020** was published, which transposed into Portuguese law Directive (EU) 2018/843 of the European Parliament and Council of May 30th, 2018. **This Directive - known as the 5th Directive on the prevention of money laundering and counter terrorist financing ("AMLCTF")** - has in turn amended Directive (EU) 2015/849 - the 4th Directive - and has reconfigured the set of rules that establish the minimum mesh of procedures that Member States must put in place to detect economic or financial practices whose ultimate purpose is AMLCTF. Among us the most significant legislative changes brought by the aforementioned law were introduced in Law No. 83/2017 of August 18th, which establishes measures to combat money laundering and counter terrorist financing ("LBCFT") and the Legal Framework of the Central Registry of the Ultimate Beneficiary, approved by Law No. 89/2017 of August 21st ("RJRCBE"). However, the national legislator, being obliged to initiate a legislative procedure aimed at transposing the aforementioned European Directive, did not limit itself to promoting the necessary changes, but also through the referred Law no. 58/2020 clarified certain aspects of the national body of regulations aimed at repressing AMLCTF.

In the set of changes introduced in LBCFT, **the new rules that are intended to prevent the recently disseminated virtual assets from being used as a means of concealing the illicit origin of certain funds or as a mechanism for financing terrorist groups stand out first.** For this purpose, in the list of non-financial obligated entities were generically included the "Entities that carry out any activity with virtual assets" (article 4, no. 1, paragraph o)), having - for interpretation of this rule - also been established a broad definition of such activities with virtual assets (article 2, no. 1, paragraph mm)). These entities are subject to the supervision of the Bank of Portugal (Article 89, no. 1 paragraph (j)), an authority with which a specific prior registration is required for the exercise of the activity (Article 112, paragraph a, 1), under which Bank of Portugal assesses the competence and suitability (Article no. 112, paragraph a (3)). In this way, **entities wishing to engage in activities relating to virtual assets are not only subject to obtaining prior registration with the Bank of Portugal, but must also** - as obligated entities - **comply with the set of duties set forth in the LBCFT**, in particular be provided with the policies and procedures and controls that prove adequate to manage the BCFT risk specifically existing in such activity (article 12 and following.).

Also of particular importance are the legislative changes introduced to **clarify the framework applicable to collective investment undertakings (the “CIUs”) in terms of determining the respective ultimate beneficial owner**. Firstly, the legislative act in question – through the introduction of a specific definition (Article 2, no. 1 paragraph (nn) – has clarified that CIUs do not fall within the concept of legal arrangements, in particular the concept of trusts, and therefore the very broad and exhaustive criteria for determining the ultimate beneficial owner applicable to the latter would not be applicable to them (Article 30 no. 3). Nevertheless, the legislator has promoted greater clarification by directly establishing that the criteria to be used to determine the ultimate beneficial owner of an ICO are parallel to those established for commercial companies (Article 30, paragraph 1). This new framework makes it possible to annul the previously existing uncertainties in relation to the framework applicable to CIUs, and also makes it fully clear that the framework to be applied to CIUs is the same regardless of whether they are incorporated or contractual.

The following new features should also be highlighted in LBCFT: i) the express inclusion of SIMFE and SIGI as obligated entities (Article 3, no. 1 paragraph (l) and (p)); ii) the express provision for the need to register the difficulties encountered during the process of verifying the identity of the beneficial owners (Article no. 29 paragraph (4)); iii) the reduction of the period of communications to IMPIC on real estate transactions from six-monthly to quarterly (Article 46 no. 1) paragraph (a) and (b)); iv) the reduction of the period of time for which the CIU is required to notify the CIU of the real estate transactions from six-monthly to quarterly (Article 46(2)(b) and (c)). iv) reinforcing the prohibition of anonymity regarding clients of financial entities with the inclusion of the prohibition of anonymous safes (Article 64 no. paragraph 1); v) specifying the duties in the scope of the provision of payable-through accounts (Article 70, no. 1 paragraph f); and vi) classifying a set of administrative offences as particularly serious (Article 169-A).

In turn, the RJRCBE was subject to a wide range of revisions aimed fundamentally at promoting the clarification of this regime. In the first place, it highlights the express exclusion of professional associations, the insolvent masses and inheritances from the scope of the law (article 4). In terms of the declaration to be made in the RCBE, the legislator specified that the criteria to be used to determine the beneficial owner are those included in the LBCFT (article 8, no. 1, paragraph d)), as well as expressly provided for the need to identify the chain of control with the identification of the entities that comprise it (article 9, no. 3). As for the deadlines for fulfilling the declarative obligations, it was provided that the first declaration must be made within 30 days (article 12, no. 1) and that the annual confirmation of the information must be made by December 31 of each year, this being waived when the entity has made an update in the same calendar year and there are no facts that determine the alteration of the information (article 15). Finally, in regard to access to information made available in the RCBE, the legislator has established authentication in the RCBE as a clearly preferential method of access for entities obliged to authenticate (article 20, no. 2).

Finally, Law no. 89/2017, of August 21st, which approved the RJRCBE also underwent an alteration that resulted in the widening of the set of persons who must inform the company of all the elements necessary for the preparation of the effective beneficiary's registration, and now not only the partners but also the natural persons who hold, even indirectly or through a third party, the ownership of the shares and who, by any means, hold the respective effective control (article 5).