

## REGULATORY INTELLIGENCE

**COUNTRY UPDATE-Portugal: AML**

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The transposition into domestic legislation of Directive (EU) [2015/849](#) of the European Parliament and of the Council dated May 20, 2015 (the fourth money laundering directive or AML IV), occurred through (i) Law No. 83/2017, of August 18, which established new prevention and control measures to combat money laundering and terrorism financing and (ii) Law No. 89/2017, of August 21, which approved the Legal Framework on the Central Register of Beneficial Owners (CRBO).

Law no. 83/2017 of 18 August, came into force on September 17, 2017 and partially enacted the fourth money laundering directive and Directive 2016/2258/EU of the Council of December 6, 2016. It also amended the Criminal Code and the Industrial Property Code, and repealed the previous Law 25/2008 of June 5, and Decree-Law 125/2008 of July 21.

Law No. 89/2017, of August 21, also transposed Chapter III of Directive (EU) 2015/849 of the fourth money laundering directive.

On August 31, 2020 law number 58/2020 was published in the official gazette (New Law), that transposes European Directive [2018/843](#) of the European Parliament and the European Council of May 30, 2018 (the fifth money laundering directive or AML V), that alters AML IV and European Directive [2018/1673](#) of the European Parliament and the European Council of October 23, 2018 relative to combating money laundering via criminal law.

The New Law came into force on September 1, 2020 and changed legislation of major relevance for financial activity in Portugal, in particular law number 83/2017 of August 18 that establishes measures for combatting money laundering and financing of terrorism and which had transposed AML IV into Portuguese legislation; The legal regime of the central registry of the beneficial owner (approved by law 89/2017 of the August 21) and the General Regime of Credit Institutions and Financial Companies (RGIC, approved by Decree Law 298/82 of the December 31).

Portugal transposed in this way AML V (which had to be transposed by all member states by January 10, 2020), which was approved in order to respond to, namely, the emerging new techniques in the context of financing of terrorism, ensuring transparency in the structure of European companies, as well as in other entities such as trust funds, and broadens the remit of existing rules to include any entity carrying out any of the virtual assets activities, thus capturing virtual currency exchanges and custodial wallet providers .

Virtual assets activities include:

- Exchange of crypto assets for fiat currency;
- Exchange of crypto assets for other crypto assets;
- Transfer of crypto assets from an address or wallet to another address or wallet; and
- Custody or custody and management of crypto assets or any instruments which enable control, custody, storage or transfer of crypto assets, including cryptographic keys.

The Bank of Portugal has become the entity responsible for the registration of these entities and the verification of the fulfilment of the legal provisions and applicable regulation in terms of prevention of money laundering and financing of terrorism by the same entities –



not being, however, responsible for the prudential supervision or supervision of conduct of these entities (as stated by the communiqué of the regulator available at: [Click here to view this document](#)).

The Bank of Portugal published on October 27, 2020 a draft regulation detailing the registration requirements that any entity carrying out any virtual assets activities in Portugal will need to follow. The draft regulation has been under public consultation until December 10, 2020. The final regulation is expected to be available during 2021.

Promotion of a more agile cross-border cooperation between the competent authorities and revision of the applicable administrative and criminal sanctions including via the introduction of the category of particularly serious misdemeanours and broadening of the type of criminal covered by the Penal Code via the express inclusion of new typical underlying illegal activities, expressly covering technological embezzlement and deception, terrorism and criminal association, environmental damage, among others, and broadening the concept of the advantages obtained via these same illicit activities.

**Member of the Financial Action Task Force?** Yes.

**Member of Egmont?** Yes.

### **The offence**

Penalties for laundering or assisting laundering: A jail sentence of a maximum of 12 years.

Law no. 83/2017 created three new types of crimes, which are punishable with prison sentences (up to three years, after the alterations implemented by Law 58/2020) and fines: (i) unlawful disclosure of information, (ii) revealing and benefiting from the discovery of identity and (iii) disobedience. Law 58/2020 extended the two first types of crimes to legal persons, punishable with a minimum 50 day-fine.

Any breach of the duties and obligations provided for in Law no. 83/2017 is also punishable with administrative offences. There is a considerable extensive list of offences which are punishable with significant fines, up to a maximum of 5 million euros. Law 58/2020 created a divide between administrative offences and especially serious administrative offences. The maximum values of the fines for the first ones is half of the fines for the latter, which continue to be of a maximum of 5 million euros.

Ancillary sanctions might also apply, e.g. the closure of the commercial establishment.

**Top fine:** If it is possible to determine that the benefit deriving from the infraction, multiplied by two, exceeds the maximum limit of the applicable fine, then the fine that will apply will correspond to that amount.

The maximum limits may also correspond to the limit of the benefit obtained or, in the specific case of legal entities that are notably (i) credit institutions or financial institutions, (ii) holders of concessions to operate gambling in casinos and holders of concessions to operate bingo halls, (iii) entities that pay betting and lottery prizes, and (iv) entities covered by the Legal Framework of Online Gambling and Betting, to an amount corresponding to 10 percent of the total annual turnover, if higher, according to the last available accounts.

**Failure to report:** For failure on the part of a credit institution or investment company, a regulatory fine ranging from 50,000 euros to 5,000,000 euros if the fault is from a legal person or 25,000 euros to 5,000,000 euros if the fault is from an individual person; for failure on the part of another financial entity, a regulatory fine ranging from 25,000 euros to 2,500,000 euros if the fault is of a legal person or 12,500 euros to 2,500,000 euros if the fault is of an individual person.

If the failure is from a non-financial entity, namely holders of concessions to operate gambling in casinos and bingo halls, betting and lottery prizes payers entities and entities covered by the Legal Framework of Gambling and Betting Online, the regulatory fine ranges from 50,000 euros to 1,000,000 euros if the fault is of a legal person, or 25,000 euros to 1,000,000 euros if the fault is from an individual person.

If the failure is from any other non-financial entity, except certified accountants, lawyers, solicitors and notaries, a regulatory fine ranging from 5,000 euros to 1,000,000 euros if the fault is of a legal person, or 2,500 euros to 1,000,000 euros if the fault is from an individual person.

The following additional ancillary penalties are also applicable:

- Loss, in favour of the state, of the infraction and of the economic benefit obtained through its practice;
- Closing of the commercial establishment where the infractor works for a period of up to two years;
- Prohibition of exercising the professional activity to which the offence relates to, for a period of up to three years;
- Prohibition of the functions of administration, direction, management, ownership of corporate bodies, representation, mandate and supervision in entities subject to supervision by the competent sectoral authority and entities in a group or control relationship, for a period of up to three years,;
- Publication of the decision.

Regulators, not the courts, levy such fines, and fines can be appealed against in the court of appeal - the Competition, Regulation and Supervision Court.

Entities subject to CRBO are also required to maintain an internal updated record of the identification elements of their shareholders together with their respective shareholdings and of the natural persons who own – even if indirectly or through a third party – or



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ultimately control the company. The failure to comply with this obligation is punishable by a fine ranging from 1,000 euros to 50,000 euros.

The breach of duties under the CRBO will have as consequence the removal of the reporting entities from, inter alia, the following arrangements: bidding processes for the concession of public services, the award and/or renewal of contracts for supply, public works or acquisition of goods and services with the Portuguese state, autonomous regions and local authorities, applications for European structural and investment funds and other public funds, admission of securities to regulated markets, intervention in property transfer agreements or agreements that involve the creation, acquisition or transfer of any property or security over real estate.

The New Law also broadens the concept of the beneficial owner, namely in the context of entities of collective investment and trusts and alteration of the regime applicable to the registration of the beneficial owner in the CRBO, including in the remit of the obligation to update this, as well as rights to access to this, with relation to the rules applicable to the protection of data;

*Disclosing the identity of the author of a suspicious transaction report:* Three years' maximum imprisonment or fine in case of an individual and a fine with a minimum limit of 50 days in case of a legal person.

**Tipoff:** Same as paragraph above.

**Predicate offences:** The laundering of proceeds of all serious offences (e.g. as terrorism, including terrorist financing, trafficking in human beings and migrant smuggling, illicit arms trafficking, environmental crime, fraud, corruption or tax crimes) are foreseen in the Portuguese Criminal Code and also include a range of predicate offences that are punishable with minimum imprisonment greater than six months and a maximum imprisonment greater than five years.

**Is foreign tax evasion a predicate offence?** Fiscal fraud is specifically included as a predicate offence.

### **Know your customer requirements**

The duty to perform identification and due diligence, shall apply to any transfer of funds or to any transaction executed in the sphere of activity with virtual assets exceeding 1,000 euros and on any other suspicious transaction irrespective of the amounts involved, in addition to new business relationships and occasional transactions equal to or greater than 15,000 euros. Exception made for providers of gambling services where the obligations apply to transactions equal to or greater than 2,000 euros.

The New Law creates a new concept of virtual assets, defined as any digital representation of value (Bitcoin and other digital currencies) that isn't necessarily linked to a legally established currency and which doesn't have the legal stature of a fiat currency, but which is accepted as a means of exchange or investment that can be traded via electronic means.

The law sets out a long list of specific duties and obligations regarding internal control policies and procedures and risk management practices, out of which we would highlight the following:

designation of a compliance officer (may be required by law or by the dimension and nature of the activities of the entity at stake);  
implementation of systems and processes in place for the collection, processing and filing of information relating to analysis and decision making and the discharge of reporting and collaboration duties;

putting in writing policies, procedures and controls, as well as any updates thereof, and to keep a written record of actions and training to employees relating with applicable anti money laundering legislation;

implementation of mechanisms that allow for regular monitoring, testing and periodical review of the quality, suitability and effectiveness of existing policies;

in respect employees whose functions are considered relevant, the obligation to: (i) have in place screening procedures to guarantee high standards in the hiring practice; (ii) make available accessible and updated information on internal rules to those employees; and (iii) implement mechanisms to control their performance;

a specific independent and anonymous channel to communicate any breaches and risk situations;

obligation to develop a personal data protection policy and procedure;

the duty to consult periodically the information published in the CRBO to identify "beneficial owners" and, where appropriate, to report to the competent authorities any irregularities identified during the identification procedure.

The above adopted measures must be (i) proportional and suitable to the nature, dimension and complexity of the specific entity and (ii) suitable to the risks associated to the business relationship or occasional transaction at stake.

As regards entities that are a part of a group, group-wide policies, procedures and controls require implementation. In case the country where the entity is represented adopts looser control mechanisms, the entity is required to ensure that additional measures are applied to comply with domestic requirements and to adopt procedures and to share information between branches, subsidiaries or entities under their control, namely with respect to the protection of personal data, in so far as the law of the host country so permits.

The following entities are subject to registration with the CRBO: (i) associations, cooperatives, foundations, commercial or civil law companies, as well as any other legal entities, subject to Portuguese or foreign laws, engaged in an activity or performing legal acts or transactions in Portuguese territory that require a Portuguese Taxpayer Number; (ii) representation offices of international or foreign legal entities operating in Portugal; (iii) other entities pursuing its own objectives and activities different from those of their members and without legal personality; (iv) trusts registered in the Madeira Free Trade Zone; and (v) external financial branches registered in the Madeira Free Trade Zone. In specific circumstances, trust funds and other arrangements without legal personality with a similar structure are also subject to registration with the CRBO.



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## Reporting requirements

A compliance officer may be required by law or by the dimension and complexity of the activities of the obliged entity.

Reporting entities have been broadened, including notably: (i) bingo licence holders; (ii) entities engaged in real estate rental activities; (iii) professionals engaging in the sale or purchase of professional sportsmen's rights; (iv) economic operators engaging in auction activities; (v) 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 3000 euros or more, or through another means of payment, if the value is 10,000 euros or more, (vi) entities engaged in transport, storage, treatment and distribution of funds and valuables, (vii) traders who trade in goods of high unit value, notably gold and other precious metals, precious stones, antiques, aircraft, boats and motor vehicles when the payment is made in cash, if the value is 3,000 euros or more, or through another means of payment, if the value is 10,000 euros or more, and (viii) entities carrying out any activity with virtual assets,

The list of financial institutions now also includes notably (i) payment and electronic money institutions based in another member state of the European Union that operate in Portugal through agents or distributors; (ii) self-managed securities investment companies and real estate investment companies; (iii) self-managed social entrepreneurship companies and specialist alternative investment companies; (iv) qualified venture capital fund managers; and (v) self-managed European Long-Term Investment Fund, or "ELTIF". Furthermore, Law No. 58/2020, of August 31, which amends Money Laundering Law includes the following entities in the definition of financial institutions: (i) movable investment companies for the promotion of the economy, (ii) qualified venture capital fund managers, (iii) qualified social entrepreneurship fund managers, (iv) self-managed European Union long term investment funds (ELTIF), and (v) Investment and Real Estate Management Companies in Portugal.

When a reporting entity has reported its suspicions about a transaction, it may go ahead with that transaction (i) when it is not notified, within seven working days of the communication, of the decision on the temporary suspension of the operations in respect of which the duty to abstain was or should have been exercised or (ii) when it is notified, within seven working days of the communication, of the decision of Departamento Central de Investigação e Ação Penal da Procuradoria-Geral da República (DCIAP) to not temporarily suspend the operations in respect of which the duty to abstain was or should have been exercised.

If a judge does order the institution to freeze the money for longer, the Portuguese law [art 49, no 5 of Law no. 83/2017] does not impose the order to be lifted in a certain timeframe. The Portuguese Criminal Procedure Code, however, does say that every criminal investigation against any person must end (either with a decision to prosecute or not) within 14 months.

Money laundering law says that the institution can go ahead with a transaction that a judge has banned if it cannot avoid doing so, or if the Unidade de Informação Financeira (UIF) or DCIAP believes that the suspension of the transaction will hamper the investigation. If it does go ahead in these circumstances, it must forward all relevant information to the UIF or DCIAP.

The Bank of Portugal Notice N° 2/2018 that was published on September 26, 2018, sets out the rules applicable to the entities subject to the supervision of Bank of Portugal, and, additionally, aims at simplifying the regulating frame applicable by comprising within its content the regulations scattered in different former regulations.

Thus, on the one side, Notice N° 2/2018 unifies two different mandatory reports: The Report on anti-money laundering (RPB) measures, and the self-evaluation questionnaire (QAA). On the other side, it regulates the admissibility requisites for the recourse to videoconference and to identification by confidence service qualified providers as alternative means or procedures for proof of identifying elements that guarantee high security levels.

According to the notice, the annual report on anti-money laundering measures must be submitted to Bank of Portugal before February 28 each year.

The report must include institutional information and relevant contacts of the financial entities, information on the politics and procedures for anti-money laundering, risk management, control of legal compliance, internal and external audits, deficiencies detected in the internal compliance procedures, types of operations carried on by the entities, specific procedures to comply with Regulation (EU) 2015/847 and deficiencies detected in its execution, corrective measures adopted to correct identified deficiencies, relevant quantitative information, self-evaluation questionnaire and also other relevant information.

Together with the above mentioned information, the report must also include a global opinion of the board on the adequacy and effectiveness of the internal control procedures for anti-money laundering, information on the possible detection by the supervisory bodies of the financial entities of deficiencies of high risk level in the internal control procedures regarding anti-money laundering for the reference period, and opinion of the supervisory bodies on the quality of the internal control procedures for anti-money laundering.

Following the approval of Law no. 83/2017, the Portuguese Securities Regulator (CMVM) published Regulation no. 2/2020, regarding the measures to combat money laundering and terrorist financing. It applies to entities of a financial nature subject to exclusive supervision by the CMVM, as well as entities of a financial nature whose supervision is shared with the Banco de Portugal and the auditors, incorporated or in individual practice.

Similarly to Bank of Portugal's Notice N° 2/2018, this Regulation also concentrated in one single instrument relevant information that was dispersed. Therefore, this document comprises all the applicable rules to the entities subject to supervision by the CMVM



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regarding the duties arising from the Anti-Money Laundering Legislation, namely the duty to report, the duty to assure an internal control system or the duty of identification and due diligence .

On April 2, 2020 CMVM issued a Circular related to the report on the system of internal control for prevention of money laundering and terrorist financing. The entities were expected to submit the information relating to the years 2018 and 2019 until the June 30. Notwithstanding, given the fact that the COVID-19 pandemic created severe delays on most proceedings, CMVM decided to extend the deadline by three months, until the September 30.

Everyone who enters or leaves the country from or to a country outside the EU with more than 10,000 euros in cash or its equivalent must report it (Decree-law 61/2007, dated March 14). Failure to report is punishable with a fine ranging from 250 euros to 165,000 euros (art 108 of Law 15/2001, as amended).

As regards Law No. 89/2017, in addition to the internal record referred to above, the reporting entities have to declare accurate and up-to-date information on their beneficial owners to the authorities which will have to include information on: (i) the entity subject to the CRBO; (ii) the identification of the holders of the share capital, detailing the respective shareholdings; (iii) the identification of the persons performing management or directorship functions; (iv) the beneficial owners; and (v) the identification of the person making the declaration to the CRBO. Law 58/2020 eliminated the need to declare point (ii) and point (iii).

Law No. 92/2017 of August 22 requires the use of a specific means of payment in transactions involving amounts equal to or greater than 3,000 euros (or its legal equivalent in foreign currency), prohibiting their payment in cash. Although, this amount may be increased to 10,000 euros (or its legal equivalent in foreign currency) provided that payment is made by natural persons, non-residents, and if they do not act as entrepreneurs or retailers.

Recordkeeping period: The entities must keep records for a period of seven years, from the moment the customer was identified, or in case of a business relationship, from the moment it terminated, of all documents and data obtained from clients, as well as all documents pertaining to the client's files and accounts, and all documentation in compliance with a legal requirement, such as the reporting duty (article 51 Law 63/2017).

#### **Statutes/cases**

Law no. 83/2017 of August 18 and Law No. 89/2017, of August 21 (AML/CTF laws) also enhances the Tax and Customs Authority to request information and to access procedures, documents and information relating to the duties of identification, effective due diligence and conservation in respect of beneficial owners, to ensure the proper functioning of the automatic exchange of information in the area of taxation.

DCIAP and UIF also have their powers strengthened to access the information considered necessary for the procedures for preventive investigation. Special importance is also given to the exchange of information and cooperation between national and international authorities. The definition of "politically exposed person" is broadened to include "close family members" and "persons recognized as strictly associated".

Article 368(A) of the Portuguese Criminal Code sets the custodial sentences. Articles 109 and 111 set the loss of benefits. There is no concept of confiscating "unexplained wealth" due to "criminal lifestyles", however. In other words, the courts cannot deprive someone of his property without proving the existence of an underlying crime.

#### **Regulation**

Regulations for the various sectors are now being issued by: the Bank of Portugal ([link](#)); the Securities Market Commission (CMVM); the Supervisory Authority of Insurance and Pension Funds (ASF); the Portuguese Bar Association (Ordem dos Advogados); and the Accountants' Bar Association (Ordem dos Contabilistas) among several other authorities responsible for the supervision of the particular activities of the entities covered by the new AML/CTF laws.

The communication, required to be made to both the DCIAP and the UIF, can be effected through the following contacts:

UNIDADE DE INFORMAÇÃO FINANCEIRA

[uif.comunicacoes@pj.pt](mailto:uif.comunicacoes@pj.pt)

PROCURADOR-GERAL DA REPÚBLICA (Departamento Central de Investigação e Ação Penal)

[uai.dciap@pgr.pt](mailto:uai.dciap@pgr.pt)

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