MONEY LAUNDERING AND TERRORIST FUNDING: ESSENTIAL LINES OF A MUSCULED STATE INTERVENTION

The preventive and repressive measures against money laundering and terrorist funding, provided for by Law n. 83/2017, of August 18th, came into effect on September 17th, transposing various European Union Law instruments.

NEW CONCEPTS OR NEW FORMULATION

Among the most significant, the term "beneficial owner" defined as "the natural person or people who, ultimately, hold the ownership or control of the client and/or natural person or people on whose behalf an operation or activity is carried out in accordance with the criteria set out in Article 30, which points to one of the following hypotheses: "a) The natural person or people who ultimately own or control, directly or indirectly, a sufficient percentage of shares or voting rights or a participation in the capital of a legal person; [the reference to bearer shares disappears]; (b) the natural person or people exercising control by other means over that legal person; (c) the natural person or people holding the "top management" if, after all possible means have been exhausted and provided there is no reason to suspect: *(i)* No person has been identified in accordance with the preceding paragraphs; or *(ii)* there is any doubt that the identified person or people are the beneficial owners."

It should be noted that the entities covered have the duty to periodically consult the information contained in the central registry of the beneficial owner and communicate any divergence to the Registry and Notary Institute.

The concept of "politically exposed person" is broadened to include close family members and people recognized as closely associated.

Also relevant is the greater specification of what a "shell bank" is, enlightening the legislator that the "mere presence of a local agent or subordinate employees is not considered physical presence", thus also increasing the cases of control measures.

BROADENING OF THE SUBJECTIVE SCOPE OF APPLICATION

In addition to those already provided for in the previous law – now revoked – the following are now part of the range of entities bound to the obligations resulting from the new regime:

- Dealers operating bingo halls will be included in the range of bound entities (although with the possibility of total or partial exemption by the Government, with the exception of casinos, according to a specific risk assessment);
- Real estate entities that dedicate themselves to leasing;
- Economic operators engaged in auctioning, import or export of rough diamonds;
- Entities engaged in the distribution of funds and securities;
- Certified accountants;
- As for financial entities, the following are now affected: *(i)* payment institutions and electronic money institutions based in another Member State of the European Union acting in national territory through agents or distributors; *(ii)* real estate investment companies and self-managed real estate investment companies; and *(iii)* social entrepreneurship societies and self-managed specialized alternative investment companies.

STRENGTHENING THE INTERNAL CONTROL OF OBLIGED ENTITIES

It is now mandatory for the above entities to have: *(i)* formal processes to gather, process and store information related to the analysis and decision-making of potential suspicions; *(ii)* testing mechanisms for the quality, adequacy and effectiveness of these processes; *(iii)* procedures to control the specific risks of money laundering and terrorist funding inherent to the operational reality; *(iv)* a specific, independent and anonymous channel for communication of possible violations and risk situations [*whistleblowing*]; *(v)* someone responsible for monitoring compliance with the applicable regulatory framework and for complying with the obligations of communication and collaboration with the authorities; *(vi)* tools appropriate to effective risk management, such as blocking or suspending operations.

It's also worthy to note the reinforcement of the duty of training that the obliged entities must assure to their managers, employees and other employees whose functions are relevant for the purpose of the prevention of money laundering and terrorist funding, and also the obligation to maintain updated and complete records of the internal or external training actions carried out.

These procedures have to be reduced to writing, being the responsibility of the management body of the obliged entities.

It should be noted that whenever the country where the company is represented adopts less demanding mechanisms, the bound entity must ensure the application of effective combat measures.

SEGREGATION OF THE COMPLIANCE BODY (*COMPLIANCE RESPONSIBLE [WITHIN THE NEW LAW]*)

The matter is regulated under Articles 13 and 16 of the Law. It seems to be the law itself (literally) that imposes the need for segregation between the administrator in charge of *Compliance* (and even the board itself, we may say), and this new *Compliance Officer* (a kind of head of compliance adapted to the new legal regime). In fact, the need for independence and autonomy of decision concerning this specific person in charge stems from the letter of the law, and is very difficult to reconcile with the exercise of management positions. Moreover, the very enunciation of these functional principles in the autonomy of the normative compliance function is very difficult to comply with the provisions of the Law regarding potential functional conflicts, especially when there is no segregation of the functions of the person responsible for compliance.

We believe that this change in the organizational and structural nature of the internal organization of the entities required by the new money laundering and terrorist funding prevention and repression regime will even impose a need to change existing internal control procedures and / or structures. Even is the case of financial entities, traditionally structured within these matters. For obliged non-financial entities, the new regime and the notably bureaucratic procedures of internal control within a risk-assessment approach are a brand new world.

NEW CONFIGURATION OF THE LEGAL TYPE OF LAUNDERING AND NEOCRIMINALIZATIONS

Article 368.º-A, of the Penal Code sees its scope extended because it now constitutes a "predicate offense", in regards to *(i)* the conduct contemplated and punished by that legal precept; *(ii)* the acquisition, possession or use of property, knowing at the time of its receipt that it is derived from a criminal activity or from participation in such an activity; and *(iii)* participation and association in any of these acts, the attempt and complicity in its practice, the facilitation of its execution or the advising of its practice.

In addition to this, new offenses were also created: illegitimate disclosure of information, revealing and favoring the discovery of identity, and also disobedience. The breach of the duties and obligations provided for in the new Law constitute a wide range of offenses which, in the limit, may amount to € 5,000,000.00 (in the case of a legal entity or similar entity) and € 1,000,000.00 (in the case of natural people), maximum limits that may even be raised to double if there is a financial benefit of more than € 500,000.00.

In the case of legal entities which are credit or financial institutions, gambling operators in casinos and dealers operating bingo halls, betting and lottery winners and entities covered by the Legal Framework for Online Gambling and Betting, the offenses may correspond to 10% of the total annual turnover, if it's a higher value than the regular and aforementioned limits.

Regarding additional penalties, the loss of the economic benefit obtained and the closure of a commercial establishment can also be applied, while still highlighting the prohibition of business dealings with the State and the impossibility of applying for European Funds.

Finally, companies must turn to their own partners to map them. If they do not cooperate, they also face a penalty: that of losing their holdings in favor of the company, at the balance sheet price.

ACCESS TO INFORMATION BY PUBLIC ENTITIES

The AT – *Tax and Customs Authority* - may request information on the prevention and battle on money laundering and terrorist funding, access mechanisms, procedures, documents and information regarding the duties of identification, effective diligence and conservation of beneficial owner information, while ensuring the proper functioning of the automatic exchange of information required in the field of taxation.

The DCIAP - *Central Department of Criminal Investigation and Prosecution* - will be able to directly access, through dispatch, all the necessary information for the preventive investigation procedures underlying the offenses in question, reinforcing existing measures in international cooperation between judicial and criminal police agencies.

OTHER PROCEDURAL ASPECTS

In order to give greater visibility to the sanctioning, the new Law requires that the conviction be published on the Internet site of the supervisory and control authorities. Also, in order to reinforce the greater severity of the present system – as is already happening in several areas of the merely social breaches – if the administrative decision is challenged in court, or in the case of an appeal to the court of second instance, the recurrent may be confronted with an even more severe condemnation (being an exception to the general principle of prohibition of *reformatio in pejus*). This, of course, will require a greater weight when appealing or challenging a decision.

Moreover, despite the possibility of substitution measures close to or even equal to the suspension of the execution of the sentence (or fine), it is certain that the catalog of pre-cautionary measures increases, with particular emphasis on the suspension of the exercise of functions or activity.

BRIEF SUMMARY

The new legislation that has entered into force establishes a broader regulatory frame-work – an actual package of measures – in which the State declares a genuine fight against money laundering and terrorist funding, which also involves, among other mechanisms, the prohibition of cash payments in excess of € 3,000.00 and the abolition of bearer securities (mainly shares).

It is intended, in fact, that the factual situations that may be closer to what leads to the above-mentioned crime figures are eliminated, or contained within control margins.

www.abreuadvogados.com For more information contact apc@abreuadvogados.com

Lisboa (New address)
Av. Infante D. Henrique, 26
1149-096 Lisbon
☏ (+351) 217 231 800
(+351) 217 231 899
✉ lisboa@abreuadvogados.com

Porto
Rua S. João de Brito, 605 E - 4°
4100-455 Porto
☏ (+351) 226 056 400
(+351) 226 001 816
✉ porto@abreuadvogados.com

Madeira
Rua Dr. Brito da Câmara, 20
9000-039 Funchal
☏ (+351) 291 209 900
(+351) 291 209 920
✉ madeira@abreuadvogados.com

Follow us
www.linkedin.com/company/abreu-advogados
www.twitter.com/abreuadvogados