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# BRIEFING

## CORPORATE AND COMMERCIAL

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### LAW NO. 89/2017, AUGUST 21

#### LEGAL FRAMEWORK OF THE CENTRAL REGISTER OF BENEFICIAL OWNERSHIP (CRBO)

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Following the publication of Law No. 83/2017, 18 August, which establishes measures to combat money laundering and terrorist financing, Law No. 89/2017 (hereinafter “Law”) was published on last 21 August. This Law transposes into national law Chapter III of Directive (EU) 2015/849, 20 May, approving the legal framework of the Central Register of Beneficial Ownership (CRBO) laid down in Article 34 of the above-mentioned Law No. 83/2017, 18 August, and introducing a set of legislative amendments to a number of legal diplomas which the legislator considered primary *to ensure the internal coherence and functionality of the legal system.*

#### THE CRBO AND THE COVERED ENTITIES:

In practical terms, the CRBO will be a database managed by the Registry and Notary Institute (*Instituto dos Registos e do Notariado*) which will contain the identification details of natural persons who own property or have effective control over a company or other legal entity, either directly or through a third party. The main objective of the CRBO is to organise

and keep up-to-date the identification of and information about the beneficial owners of the covered entities in order to enhance transparency in business relationships and compliance with the duties for the prevention and combat of money laundering and terrorist financing.

The following entities are subject to the CRBO<sup>1</sup>:

- i)* associations, cooperatives, foundations, civil or commercial companies, as well as any other collective entities with legal personality governed by Portuguese law or foreign law, which exercise an activity or perform a legal act or business in national territory that requires the obtainment of a tax number (*NIF*) in Portugal;
- ii)* representation offices of international legal persons or legal persons governed by foreign law which carry out an activity in Portugal;
- iii)* other entities which, pursuing their own objectives and different activities from those of their members, do not have legal personality;
- iv)* trusts registered in the Madeira Free Trade Zone (*ZFM*);
- v)* off-shore financial centres registered in the *ZFM*; and
- vi)* trust funds and other legal arrangements similar to trusts, under certain circumstances.

#### DUTIES IMPOSED BY THE CRBO:

After the entry into force of the CRBO, the covered entities will be obliged to comply with the following duties:

- **to keep an up-to-date internal record**<sup>2 3</sup> of the identification details of the shareholders (with a breakdown of their holdings) and of the natural persons who, indirectly or through a third party, own the shareholdings or have effective control over the company;
- Make a **declaration of beneficial ownership**, make a declaration of beneficial ownership, which shall be made at the time and with the periodicity set forth

<sup>1</sup> The CRBO excludes a number of entities from its scope of application, namely companies listed on a regulated market and subject to disclosure requirements which ensure sufficient transparency, consortia and complementary groupings of companies and condominiums which meet certain requirements (Article 4(1) of the CRBO).

<sup>2</sup> Under Article 5 of Law No. 89/2017, 21 August, shareholders are obliged to inform the company of any change in the identification details provided for in the register within a period of 15 days thereafter, and the company may notify the shareholder to, within a maximum period of 10 days, update his/her identification details. It is further established that an unjustified breach of the duty of information by the shareholder after the above-mentioned notice will enable the amortisation of the relevant shares on the terms laid down in the Companies Code, approved by Decree-Law No. 262/86, 2 September, specifically Articles 232 and 347 of the same.

<sup>3</sup> A breach of the duty to keep an up-to-date record of the beneficial owner's identification details constitutes a regulatory offence punishable with a fine of EUR 1,000 to EUR 50,000 being applicable the regulatory offence framework laid down in Law No. 83/2017, 18 August, and, on a subsidiary basis, the general regulatory offence framework contained in Decree-Law 433/82, 27 October, as amended by Decree-Law 356/89, 17 October, Decree-Law 244/95, 14 September and Decree-Law 323/2001, 17 December and by Law No. 109/2001, 24 December.

in the legal framework and should contain sufficient, accurate and up-to-date information about the beneficial owners, as well as all the circumstances indicative of this capacity and information about their economic interest.

#### DECLARATION OF BENEFICIAL OWNERSHIP:

The **duty to declare beneficial ownership** is fulfilled by completing and submitting an electronic form to be established by ordinance from the members of government responsible for finance and justice – **this ordinance will likewise establish the terms on which the circumstances indicative of the capacity of the beneficial owner, laid down in Law No. 83/2017, 18 August, must be considered when fulfilling the declaratory obligation** -, or alternatively, in person at a registry service with an application for commercial registration or enrolment in the National Registry of Legal Persons (*RNPC*).

With regard to companies to be set up after the CRBO comes into force, the beneficial ownership declaration will be made in the incorporation document submitted to the commercial register.

The following persons can submit the beneficial ownership declaration: *(i)* members of the board of directors or those who hold equivalent positions in other types of legal persons; *(ii)* the natural or legal person that acts as trustee, or where there is no trustee, the legal or de facto manager; *(iii)* the founding members of legal persons incorporated through special immediate or online procedures; *(iv)* lawyers, notaries and legal executives; and *(v)* certified accountants, together with the declaration of commencement of activity or the Simplified Business Information (*Informação Empresarial Simplificada - IES*) return.

The Law establishes a duty to update the CRBO register whenever there is a change in the information declared and contained in that register, which should be communicated within a maximum period of 30 days thereafter. In addition, the entities subject to the CRBO are obliged to confirm, on an annual basis, the accuracy, sufficiency and current status of the information about the beneficial owner. This confirmation must be made by 15 July of each year and may be effected together with the IES return for entities who are obliged to file it.

The beneficial ownership declaration<sup>4</sup> must contain relevant information about:

- i)* the entity subject to the CRBO<sup>5</sup>;

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<sup>4</sup> In the case of trust instruments registered in the said ZFM, other trust funds subject to the CRBO and other collective interest centres with no legal personality, special information is required (see Article 8(2) and 10 of the CRBO).

<sup>5</sup> The information gathered includes the identification number of the legal person (*NIPC*) attributed in Portugal by the relevant authority and, in the case of a non-resident entity, the tax number (*NIF*) or equivalent number issued by the relevant authority in the jurisdiction of residence, if any; the name, legal type, registered office, including the jurisdiction of registration, in the case of foreign entities; the economic activity code (*CAE*); the legal entity identifier, where applicable; and the institutional electronic address.

- ii)* In case of companies, the identification details of the share capital holders with a breakdown of the respective shareholdings<sup>6</sup>;
- iii)* The identification of the directors or of whomever manages the entity subject to the CRBO<sup>7</sup>;
- iv)* The beneficial owners<sup>8</sup>;
- v)* The person making the declaration<sup>9</sup>.

Any entities subject to the CRBO which do not comply with the duty to declare the beneficial ownership will be unable to carry out any of the following acts: *(i)* distribution of or advances on profits; *(ii)* execution/renewal of supply contracts, public works contracts or contracts for the acquisition of services and goods with the State and other public bodies; *(iii)* enter bids for public service concessions; *(iv)* have financial instruments representing their share capital or convertible into their share capital admitted to trading on a regulated market; *(v)* launch public distribution offers for any financial instruments they issue; *(vi)* benefit from European structural funds and public investment funds; and *(vii)* be a party to any transfer of property, whether for valuable consideration or no consideration, or to the creation, acquisition or divestment of other real property rights or guarantees over real property.

#### ACCESSING AND VIEWING THE INFORMATION CONTAINED IN THE CRBO:

The information about beneficial owners will be made available to the public on a webpage. Proof of the registration and updates of the beneficial owner by the entities envisaged in the CRBO must be demanded in all the circumstances where the law requires proof that tax status is in good order.

The Law establishes different levels for access to the information about the entities and their beneficial owners, making provision for narrower and broader access levels depending on the entity that is seeking access to that information. Accordingly:

- i)* A **free public access level via internet** to all the information about the entities and to the beneficial owner's name, date and month of birth, nationality, country of residence and economic interest in terms to be regulated by ordinance, thereby permitting any interested party access to a fundamental set of data, without needing densification of the concept of "legitimate interest"<sup>10</sup>;

<sup>6</sup> The information gathered includes the data referred to in the preceding footnote regarding share capital holders which are legal persons and the following data regarding natural persons: full name, date of birth, place of birth, nationality, full address of permanent residents; identification document details; tax number, where applicable, and, in the case of a foreign national, the tax number issued by the relevant authorities of the State/States of nationality, or equivalent number; and e-mail address, if any.

<sup>7</sup> The information gathered includes the data mentioned in the preceding footnote for natural persons.

<sup>8</sup> The information gathered includes the data referred to in footnote 6 for natural persons and, in the case of beneficial owners that are not resident in Portugal, the name, full address and tax number of their tax representative.

<sup>9</sup> The information gathered includes the name, full address of permanent residence or business address, the identity card or professional licence identification details, the tax number, where applicable; the capacity in which he or she is acting and the e-mail address, if any.

<sup>10</sup> It should be noted that the Directive stipulates that access to the information contained in the CRBO should be given to anyone who can prove a legitimate interest. This public access will certainly raise questions of breach of fundamental rights, as was indeed mentioned in the National Data Protection Committee's opinion on the legislative bill (available on the Portuguese Parliament website).

- ii) An **intermediate level** of access reserved to the obliged entities<sup>11</sup> with access to the general content of the declaration and the data gathered<sup>12</sup>, which *configures an ancillary tool for compliance with the duties for the prevention and combat of money laundering and terrorist financing*; and
- iii) A **maximum access level** reserved to judicial, police and sectoral authorities<sup>13</sup> bem como à Administração Tributária, entidades que podem aceder a toda a informação constante no RCBE.

#### LEGISLATIVE AMENDMENTS:

The Law introduces a series of legislative amendments from among which, due to its significance, we have highlighted the amendment made to the **IRC Code** (Corporate Income Tax Code)<sup>14</sup>. According to this amendment, when an entity resident in Portuguese territory fails to comply with the declaration obligations laid down in the CRBO, it will no longer be able to benefit from the corporate income tax exemption within the “participation exemption” framework on the relevant profits and reserves distributed to resident entities or to those situated in other European Union Member States, the European Economic Area, Switzerland or any other State with which a Double Taxation Treaty providing for exchange of information has been executed. In such cases, the distribution of profits and reserves will be subject to withholding tax in Portugal.

The corporate income tax exemption will also cease to apply to the profits and reserves distributed in situations where the declared beneficial owner has his/her residence or domicile in any country, territory or region that has a clearly more favourable tax system (tax havens) included in the list approved by an ordinance of the Minister of Finance, except when the distributing entity proves that the beneficiary company of such income is not part of a construct or series of constructs that are classified as not genuine, i.e., made without valid economic reasons and having no economic substance.

Apart from the amendment referred to above, the following legislative amendments introduced by this Law are noteworthy:

- i) it is mandatory for any notarial, procedural or other acts which contain facts that are subject to registration and entail the payment of any sum, to state the moment when this occurs and the means of payment used, establishing the

11 Financial entities with their registered office in the national territory and non-financial entities that carry on an activity in the national territory which are identified in Articles 3 and 4 of Law No. 83/2017, 18 August.

12 With the exception of the data about the person making the declaration, access to which is permitted only to the name or the capacity in which he or she is acting. In the case of trusts registered in the ZFM, other trust funds subject to the CRBO and other collective interest centres with no legal personality (see Article 20(1) of the legal framework for the CRBO).

13 Regulatory and supervisory authorities provided for in Article 2(1)(f) of Law No. 83/2017, 18 August.

14 Article 14 of the CIRC is given an additional section 19, which reads as follows: «19 - The provisions of clauses 3, 6 and 8 are not applicable when an entity resident in Portuguese territory which pays out profits and reserves has not complied with the declaratory obligations provided for in the legal framework for the Central Register of Beneficial Ownership or in situations where the declared beneficial owner, or any of the declared beneficial owners, under the terms of that framework, reside or are domiciled in a country, territory or region with a clearly more favourable tax system included on the list approved by ordinance from the member of government responsible for finance, except when, without prejudice to the other requirements set forth in this article, the taxable person proves that the company benefiting from such income is not part of a construct or series of constructs as envisaged in sections 17 and 18.»

information to be provided if payment occurs prior to or at the time the act is executed;

- ii) Any breach of the obligation to declare the beneficial owner as well as the creation, modification or extinction of a trust is subject to registration;
- iii) In the event of an amendment to company by-laws, it is mandatory to register the updated version of the amended text of the company by-laws and the list of shareholders, with their identification details;
- iv) The notary has a duty to refuse to carry out any notarial acts if any of the parties have not complied with the obligations for the purposes of the CRBO;
- v) The revocation of secrecy regarding the names of the settlor and the beneficiaries of trusts registered in the ZFM.

## COMMENCEMENT

The Law will come into force 90 days after its publication, i.e., on 19 November 2017, and it is expected that an ordinance with the necessary regulations for the functioning of the CRBO, including the time limit within which the initial declaration regarding the beneficial ownership must be made, will be published by then.



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