ICLG

The International Comparative Legal Guide to:

Anti-Money Laundering 2019

2nd Edition

A practical cross-border insight into anti-money laundering law

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PREFACE

We hope that you will find this second edition of *The International Comparative Legal Guide to: Anti-Money Laundering* useful and informative.

Money laundering is a persistent and very complex issue. Money laundering has been said to be the lifeblood of all financial crime, including public corruption and the financing of terrorism. Over the last 30 years, governments around the world have come to recognise the importance of strengthening enforcement and harmonising their approaches to ensure that money launderers do not take advantage of weaknesses in the anti-money laundering (AML) controls. Governments have criminalised money laundering and imposed regulatory requirements on financial institutions and other businesses to prevent and detect money laundering. The requirements are continually being refined and interpreted by government authorities. Because of the often international nature of the money laundering process, there are many cross-border issues. Financial institutions and other businesses that fail to comply with legal requirements and evolve their controls to address laundering risk can be subject to significant legal liability and reputational damage.

Gibson, Dunn & Crutcher LLP is pleased to join a group of distinguished colleagues to present several articles we hope you will find of interest on AML topics. This guide also has included chapters written by select law firms in 31 countries discussing the local AML legal and regulatory/administrative requirements and enforcement requirements. Gibson Dunn is pleased to present the chapter on the United States AML regime.

As with all ICLG guides, this guide is organised to help the reader understand the AML landscape globally and in specific countries. ICLG, the editors, and the contributors intend this guide to be a reliable first source when approaching AML requirements and considerations. We encourage you to reach out to the contributors if we can be of further assistance.

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1 The Crime of Money Laundering and Criminal Enforcement

1.1 What is the legal authority to prosecute money laundering at national level?

The Public Prosecutor prosecutes at national level and is assisted by police agencies.

1.2 What must be proven by the government to establish money laundering as a criminal offence? What money laundering predicate offences are included? Is tax evasion a predicate offence for money laundering?

Anyone who converts or transfers funds – or intervenes or aids within such operations – in order to conceal their unlawful origin may be held liable for money laundering. Predicates offences include, e.g., tax evasion, bribery and corruption, influence peddling, trafficking (arms, organs, drugs) and any crime punishable with a minimum sentence of six months' imprisonment or a maximum sentence of five years' imprisonment.

1.3 Is there extraterritorial jurisdiction for the crime of money laundering? Is money laundering of the proceeds of foreign crimes punishable?

Yes. The Portuguese criminal law applies provided that any stage of the money laundering process relates in any way with the Portuguese territory (e.g. funds transferred to Portuguese banks).

1.4 Which government authorities are responsible for investigating and prosecuting money laundering criminal offences?

The public prosecutor – and the police agencies – have full competency regarding money laundering criminal offences. However, the Bank of Portugal, the Portuguese Securities Exchange Commission, the Registry and Notary Office, the Real Estate and Construction Authority and the Tax Authority, among others, are also responsible for investigating regulatory infractions related with money laundering offences.

1.5 Is there corporate criminal liability or only liability for natural persons?

There is both corporate and natural person criminal liability for money laundering criminal offences and related regulatory offences.

1.6 What are the maximum penalties applicable to individuals and legal entities convicted of money laundering?

The imprisonment penalty may range up to a maximum of 12 years, although this is always limited to the maximum sentence applicable to the predicate offence, if lower. In case of legal entities, the imprisonment sentence is converted into a fine penalty. One day of prison corresponds to a 10-day fine, and each day of fine corresponds to an amount of between €100 and €10,000, which the court shall set depending on the economic and financial situation of the convicted entity and its expenses with employees.

1.7 What is the statute of limitations for money laundering crimes?

The statute of limitations is 15 years (without prejudice of potential causes of interruption or suspension, which may impact the calculation of the maximum time period).

1.8 Is enforcement only at national level? Are there parallel state or provincial criminal offences?

Yes, currently the enforcement applies only at national level.

1.9 Are there related forfeiture/confiscation authorities? What property is subject to confiscation? Under what circumstances can there be confiscation against funds or property if there has been no criminal conviction, i.e., non-criminal confiscation or civil forfeiture?

If the Public Prosecutor has solid suspicions that the defendant may lack funds to guarantee the payments and debts related to the crime under investigation, it can issue a petition to the court and the latter may order the confiscation of the defendants' assets, even without criminal conviction.

1.10 Have banks or other regulated financial institutions or their directors, officers or employees been convicted of money laundering?

Yes, including directors.

1.11 How are criminal actions resolved or settled if not through the judicial process? Are records of the fact and terms of such settlements public?

In the case of money laundering, there is no other way if not by a criminal (judicial) proceeding to settle the case. The records of the proceedings become public, if not early, at the trial stage.

2 Anti-Money Laundering Regulatory/ Administrative Requirements and Enforcement

2.1 What are the legal or administrative authorities for imposing anti-money laundering requirements on financial institutions and other businesses? Please provide the details of such anti-money laundering requirements.

Under the recent Law 83/2017, from August 18th 2017, the authorities responsible for imposing anti-money laundering requirements on financial institutions, depending on the type of institution, are the Bank of Portugal, the Portuguese Securities Market Commission, the Portuguese Insurance and Pension Funds Supervisory Authority and even the General Inspectorate for Finance. On other businesses, the responsible authorities are professional associations and other government agencies and authorities with supervisory powers within the relevant business sector.

2.2 Are there any anti-money laundering requirements imposed by self-regulatory organisations or professional associations?

Yes, our legal framework allows self-regulatory organisations or professional associations to impose regulatory provisions or rules concerning anti-money laundering requirements in development of the above-mentioned Law 83/2017, which is based on the model of a risk-based approach.

2.3 Are self-regulatory organisations or professional associations responsible for anti-money laundering compliance and enforcement against their members?

Yes, some professional associations are responsible for anti-money laundering compliance and enforcement against their members, including the legal requirements.

2.4 Are there requirements only at national level?

No, there are also requirements at the European Union level. The aforementioned Law 83/2017 intends in fact to transpose Directive (EU) 2015/849 (4th AML Directive).

2.5 Which government agencies/competent authorities are responsible for examination for compliance and enforcement of anti-money laundering requirements? If so, are the criteria for examination publicly available?

Please see question 2.1 above: the agencies/authorities responsible for compliance and enforcement of anti-money laundering requirements are the same. There are currently no criteria for examination which are publicly available.

2.6 Is there a government Financial Intelligence Unit ("FIU") responsible for analysing information reported by financial institutions and businesses subject to anti-money laundering requirements?

Yes, there is a Financial Intelligence Unit ("FIU") that integrates the bodies of the Portuguese Criminal Police. FIU is responsible for preparing and updating statistical data related to suspicious transactions that have been reported and their results, and data related to transnational information requests that have been sent, received or refused by the FIU. Further information may be found at http://portalbcft.pt/.

2.7 What is the applicable statute of limitations for competent authorities to bring enforcement actions?

In what concerns regulatory offences, under the Law 83/2017, the statute of limitations is five years, with possible suspension (and interruption) of this deadline in certain cases.

2.8 What are the maximum penalties for failure to comply with the regulatory/administrative anti-money laundering requirements and what failures are subject to the penalty provisions?

Failure to comply with the regulatory/administrative anti-money laundering requirements may lead to penalties of up to €5,000,000, depending on the nature of the entity, which may be aggravated up to double of the economic benefit obtained with the infraction or up to 10% of the annual volume of business in certain cases.

Penalty provisions include: (i) the illegitimate disclosure of information, communications, analyses or other elements, to clients or third parties; (ii) the disclosure or improper favouring of identity discovery of those who provided information, documents or elements concerning suspicious transactions; and (iii) the disobedience of orders or legitimate instructions from sectorial authorities when issued in the context of their duties, or, by any means, creating obstacles to their execution.

2.9 What other types of sanction can be imposed on individuals and legal entities besides monetary fines and penalties?

It is possible to impose on both individuals and legal entities for regulatory offences, besides monetary fines, additional sanctions such as: (i) losing for the State the object of the offence and the economic benefit derived from it; (ii) closing of the establishment where the agent develops the activity or job related to the offence, for a period up to two years; (iii) prohibition of professional activity or job related to the offence, for a period up to three years; (iv) prohibition of exercising certain directorial and representative functions, among others, in obliged entities to the supervision or control by a sectorial authority, for a period up to three years; and (v) publication of the final or definitive conviction.

2.10 Are the penalties only administrative/civil? Are violations of anti-money laundering obligations also subject to criminal sanctions?

There are both administrative and criminal penalties in case of violations of anti-money laundering obligations. Besides the crime of money laundering itself, the crimes related to violations of anti-

money laundering obligations include (i) illegitimate disclosure of information, (ii) disclosure and improper favouring of identity discovery, and (iii) disobedience of lawful orders or instructions from the competent agencies/authorities.

2.11 What is the process for assessment and collection of sanctions and appeal of administrative decisions? a) Are all resolutions of penalty actions by competent authorities public? b) Have financial institutions challenged penalty assessments in judicial or administrative proceedings?

The process for assessment and collection of sanctions is carried out by several different government agencies and authorities, listed above (see question 2.1 above), depending on the type of institution or obliged entity. The process has an entire administrative procedural stage where the individuals or legal entities may defend themselves after a formal indictment is issued. If the competent authority decides to impose a sanction on an individual or legal entity, the latter may appeal to a judicial court.

Not all administrative resolutions become public, although the secrecy regime, applicable as a general rule to the proceedings in their administrative stage, elapses with the final decision.

Several financial institutions have challenged penalty assessments in judicial and regulatory proceedings.

3 Anti-Money Laundering Requirements for Financial Institutions and Other Designated Businesses

3.1 What financial institutions and other businesses are subject to anti-money laundering requirements? Describe which professional activities are subject to such requirements and the obligations of the financial institutions and other businesses.

The financial institutions subject to anti-money laundering requirements are: (i) all kind of banks, including credit, payment and electronic money institutions; (ii) investment firms and other financial companies; (iii) self-managed securities and real estate investment companies; self-managed venture capital companies, investors in venture capital, social entrepreneurship companies, venture capital investment management companies, venture capital investment companies and specialised alternative investment companies; (iv) securitisation companies; (v) companies which commercialise contracts relating to the investment in tangible assets to the public; (vi) consultants for investment in securities; (vii) pension fund management companies; and (viii) companies and insurance intermediaries with activity in life insurance. The requirements apply also to any branches located in Portuguese territory pertaining to any previous entities headquartered abroad, as well as to any offshore financial centres, to payment institutions headquartered in another EU Member State, when operating in Portuguese territory through agents, or any electronic money institutions headquartered in another EU Member State, when operating in Portuguese territory though agents or distributors. Any of the previously mentioned entities operating in Portugal under the free provision of services may have to render information to the relevant sector authority. The agents and distributors, whether natural or legal persons, are also subject to anti-money laundering requirements.

The following professional activities are also subject to anti-money laundering requirements: (i) providers of gambling, lottery or betting services, whether in an establishment or online; (ii) non-financial real estate entities; (iii) auditors, external accountants and tax advisors, whether as natural or legal persons; (iv) lawyers, solicitors, notaries and any other independent legal professionals performing certain activities; (v) trust or company service providers in certain activities; (vi) other professionals who intervene in operations of selling and buying rights over professional sport's players; (vii) economic operators exercising auction or lending activities; (viii) economic operators importing or exporting rough diamonds; (ix) entities authorised to exercise the activity of transportation, custody, handling and distribution of funds and values; and (x) other entities/persons trading in goods where payment is made in cash.

Finally, some requirements are also applicable to crowdfunding platforms, of the loan and capital type, and managing entities of crowdfunding platforms, in the categories of donation and reward and non-profit organisations.

3.2 To what extent have anti-money laundering requirements been applied to the cryptocurrency industry?

Crypto exchanges are not entities subject to anti-money laundering requirements for the purpose of Law 83/2017. However, the EU Directive 2018/843, from May 30th 2018, now stipulates that virtual currency exchanges and custodian wallet services shall be considered as obliged entities, forcing Portugal to amend said Law before January 10th 2020, extending the obligations provided therein to those service providers. Furthermore, the Bank of Portugal issued the circular letter 11/2015/DPG, endorsing credit, payment and electronic money institutions to refrain from buying, owning or selling virtual currency, to prevent a variety of risks, including money laundering. The Bank of Portugal also restated that financial institutions must assess the transfers of funds with the origin and destination on virtual currency trading platforms, in the light of the current rules of prevention of money laundering and terrorism financing. These rules include several obligations, such as identifying customers, recordkeeping of clients and operations, examining and communicating suspicious operations and adopting an internal compliance system.

3.3 Are certain financial institutions or designated businesses required to maintain compliance programmes? What are the required elements of the programmes?

Financial institutions must maintain an independent, permanent and effective "function of compliance" to monitor and enforce internal control procedures regarding anti-money laundering and other risks. The Bank of Portugal defines several requirements for this "function", beginning with full independence and adequacy.

3.4 What are the requirements for recordkeeping or reporting large currency transactions? When must reports be filed and at what thresholds?

There are no thresholds for reporting transactions suspected of money laundering. All suspicious transactions ought to be reported, regardless of the amounts involved.

The reporting of suspicious transactions is directed at the General Prosecution Office and the Financial Information Unit and must be performed as soon as the suspicion arises and whether the operation has been merely proposed or attempted, if it is under course or it has

already been concluded. The report must, at least, include: (i) the identification of the natural or legal persons involved, as well as any known information on their activity; (ii) the specific procedures of enquiry and analysis carried out; (iii) the characterising and descriptive elements of the relevant or envisaged operation; (iv) the specific suspicious factors identified by the entity; and (v) a copy of all supporting documentation obtained through due diligence.

All entities subject to anti-money laundering requirements must keep records for a period of seven years, from the moment the client 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 produced in compliance with legal requirements, such as the documents gathered and sent to the relevant authorities to comply with the reporting duty.

3.5 Are there any requirements to report routinely transactions other than large cash transactions? If so, please describe the types of transactions, where reports should be filed and at what thresholds, and any exceptions.

According to ministerial order 310/2018, from December 4th 2018, all entities subject to anti-money laundering requirements must communicate to the Central Department of Criminal Investigation and Prosecution and to the Financial Intelligence Unit cash transactions of €50 or more, but also transactions of those values by cheques or any other paper document drawn on the payment service provider. In addition, fund transfers of €50,000 or more to or from risky jurisdictions – identified in specific lists which bind the Portuguese State – early repayment of funds and insurance policies of €50,000 or more and operations or transactions of gambling services providers must be communicated as well. An exemplificative list of red flags can be found at http://portalbcft.pt/.

3.6 Are there cross-border transactions reporting requirements? Who is subject to the requirements and what must be reported under what circumstances?

The anti-money laundering requirements are applicable to all transactions, regardless of being national or cross-border operations. Within the EU there is a level playing field regarding applicable requirements and authority control and information sharing. If the transaction is carried out in the context of a correspondent relationship or with a high-risk third party, even though there are no specific requirements for reporting, there is an increased risk profile to the operation, leading to enhanced due diligence measures.

3.7 Describe the customer identification and due diligence requirements for financial institutions and other businesses subject to the anti-money laundering requirements. Are there any special or enhanced due diligence requirements for certain types of customers?

Entities subject to anti-money laundering requirements must comply with customer identification and due diligence requirements whenever they establish a business relationship or when carrying out an occasional transaction that (i) amounts to €15,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked, or (ii) constitutes a transfer of funds, as defined in point (9) of Article 3 of Regulation (EU) 2015/847 of the European Parliament and of the Council, exceeding €1,000.

For providers of gambling, lottery or betting services, the threshold corresponds to transactions amounting to €2,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked.

Finally, such requirements apply whenever there is a suspicion of money laundering practices, regardless of any derogation, exemption or threshold or when there are doubts about the veracity or adequacy of previously obtained customer identification data.

Customer identification and due diligence require obtaining elements of identification, the activity exercised, documents to verify such elements and information regarding the purpose and nature of the intended business relationship. When the specific risk profile of the client or the characteristics of the operation may justify it, information should be obtained regarding the origin and destination of the funds. There must be a constant monitoring of the business relationships to ensure that the operations carried out in its course are consistent with the knowledge the entity has of the activities and risk profile of the client and the origin and destination of the movement of funds.

Due diligence requirements are enhanced whenever there is a transaction involving high-risk third countries, non-face-to-face business relationships or transactions, politically exposed persons or other high public and political offices, life insurance policies or cross-border correspondent relationships with third country institutions, as provided in annexes I and II to the Regulation 2/2018, from September 11th 2018, of the Bank of Portugal.

3.8 Are financial institution accounts for foreign shell banks (banks with no physical presence in the countries where they are licensed and no effective supervision) prohibited? Which types of financial institutions are subject to the prohibition?

Law 83/2017 prohibits financial entities from establishing or maintaining correspondent relationships with shell banks or to establish or maintain correspondent relationships with other financial institutions which allow their accounts to be used by shell banks.

3.9 What is the criteria for reporting suspicious activity?

If an entity knows, suspects or has enough grounds to believe that certain funds or other assets, regardless of the amount involved, were originated by criminal activity or are related to terrorism financing, such entity must report the suspicious activity.

3.10 Does the government maintain current and adequate information about legal entities and their management and ownership, i.e., corporate registries to assist financial institutions with their anti-money laundering customer due diligence responsibilities, including obtaining current beneficial ownership information about legal entity customers?

There is a public corporate registry that can be accessed through a code for each individual company. The legislation regarding a central register for beneficial owners entered into force on November 19th 2017. The purpose of this register is to provide, through different levels of access, information about the beneficial ownership of legal entities, amongst others, to financial institutions and other entities which are subject to anti-money laundering requirements, and to customer due diligence responsibilities.

3.11 Is it a requirement that accurate information about originators and beneficiaries be included in payment orders for a funds transfer? Should such information also be included in payment instructions to other financial institutions?

Accurate information on originators and beneficiaries will depend on the client's risk profile and the features of the operation.

In the specific case of funds transfer not associated with an account, the financial institution of the originator or the beneficiary must collect a certain amount of information, depending on the type of the entity, regarding the originator or beneficiary's identification, if the transfer amounts to €15,000 or more (according to Regulation 5/2013 from the Bank of Portugal).

3.12 Is ownership of legal entities in the form of bearer shares permitted?

No, not since 2017.

3.13 Are there specific anti-money laundering requirements applied to non-financial institution businesses, e.g., currency reporting?

Yes, there are certain requirements that are specific to providers of gambling, lottery or betting services, regarding, for example, the form of prize payment. Specific requirements also apply to legal professionals, although there is a derogation of the reporting duty whenever the services provided for the client are in the context of a judicial process.

3.14 Are there anti-money laundering requirements applicable to certain business sectors, such as persons engaged in international trade or persons in certain geographic areas such as free trade zones?

Under Portuguese jurisdiction, trusts can only be registered in the free trade zone of Madeira, being applicable anti-money laundering requirements such as the gathering of information on their beneficial ownership, to be declared to the Central Register of Beneficial Owners.

4 General

4.1 If not outlined above, what additional anti-money laundering measures are proposed or under consideration?

Besides from Regulation 2/2018, from September 11th 2018, of the Bank of Portugal, there are other sectorial authorities which already proposed and published additional measures, such as the Economic and Food Safety Authority. Other sectorial authorities are preparing additional regulatory instruments, such as the Portuguese Securities Exchange Commission.

4.2 Are there any significant ways in which the anti-money laundering regime of your country fails to meet the recommendations of the Financial Action Task Force ("FATF")? What are the impediments to compliance?

In the last FATF evaluation (December 2017), Portugal was considered to have a sound legal framework in place to combat money laundering. According to that evaluation, Portugal was deemed Compliant for 12 and Largely Compliant for 22 of the FATF 40 Recommendations. The areas of non-profit organisations, correspondent banking, wire transfer, customer due diligence of designated non-financial businesses and professions, transparency and beneficial ownership of legal persons were deemed partially compliant.

4.3 Has your country's anti-money laundering regime been subject to evaluation by an outside organisation, such as the FATF, regional FATFs, Council of Europe (Moneyval) or IMF? If so, when was the last review?

FATF conducted an onsite visit (March 28th–April 13th 2017) and produced a Mutual Evaluation Report in December 2017, mentioned above.

4.4 Please provide information for how to obtain relevant anti-money laundering laws, regulations, administrative decrees and guidance from the Internet. Are the materials publicly available in English?

The AML/CFT Coordination Commission, established in 2015, is responsible for the overall policy coordination and implementation of AML, CFT and counter-proliferation financing measures. Relevant legislation and guidance can be accessed in their homepage, at the following link: http://portalbcft.pt/ (not available in English). Some sectorial authorities have internet pages in English, such as the Bank of Portugal (https://www.bportugal.pt/), but usually the legislation is not translated into English.

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MORAIS LEITÃO
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With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers) and Mozambique (HRA Advogados).

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