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CORPORATE & GOVERNANCE

LEGAL REGIME OF THE BENEFICIAL OWNER CENTRAL REGISTER

Law no. 89/2017, of 21 August approving the legal regime of the Beneficial Owner Central Register (“BOCR”) was published in connection with the legislative package that transposed the new European rules on prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

This law will enter into force on November 20, 2017.

The BOCR is a database with updated information on the natural person(s) who, directly or indirectly, or by means of a third party, own or control entities subject to registration. This database is managed by the Institute for Registrations and Notaries (*Instituto de Registos e Notariado, I.P.*).

i. **Obligated entities:** associations, cooperatives, foundations, civil law companies (*sociedades civis*), commercial companies and other legal persons, even if subject to foreign law, that operate in Portugal or engage in a legal act or in a business in Portugal that requires the attainment of a Portuguese taxpayer number are subject to the BOCR.

The BOCR is extensive to the representations of international legal persons, or representations of legal persons subject to foreign law that operate in Portugal, trusts or offshore financial branches registered in the Madeira Free Trade Zone, trust funds and other legal arrangements, provided that (a) the trustee, the person who is legally responsible for its management, or any person or entity holding a similar position is an obligated entity as defined in Law no. 83/2017, of 18 August, and (b) any such person or entity has obtained a taxpayer number in Portugal.

ii. **Out of scope entities:** apart from diplomatic or consular missions, international public bodies recognised under international agreements to which the Portuguese State is a party to, services and entities of the subsectors of the central, regional or local administration of the Portuguese State, independent administrative entities (including regulators) and the Bank of Portugal, the following entities are excluded from the scope of legal regime of the BOCR (a) companies which shares are listed on a regulated market that are subject to the rules of European Law or equivalent international rules that ensure enough transparency on the ownership of the shares; (b) joint ventures and complementary groups of companies (*agrupamento complementar de empresas*); (c) the condominiums relating to buildings or to groups of buildings in horizontal real property regime (*propriedade horizontal*), as long as the global property value for tax purposes, including common areas, is not higher than €2,000,000 and a per thousand (*per milagem*) higher than 50% is not held by a single owner, by co-owners or by beneficial owner(s).

iii. **Duty to report:** entities subject to the BOCR must declare, in accordance with certain periodicity rules, sufficient information about their beneficial owners. Such information must be exact and updated and include all circumstances that induce such capacity as well as information about the economic interest held in them. Compliance with this duty is achieved by filling and submitting an electronic form, to be defined by ministerial order (*portaria*).

The information in the BOCR must be updated by the entities subject thereto (or, if and when possible, by means of automatic communication from the Public Administration databases) within up to 30 days from any fact that requires the update of the BOCR and is **subject to annual confirmation until 15 July** (through the Simplified Enterprise Information – IES – for entities subject to delivery thereof).

Most information on the identification of the beneficial owner in the BOCR will be available in a public website.

Whenever the law requires proof that the company tax situation is in order, the company must also submit proof of registration and updates, if any, of the beneficial owner, to be made by electronic consultation to the BOCR.

iv. **Penalties:** entities that do not comply with their reporting duties under the legal regime of the BOCR are prevented from (a) distributing profits from that financial year or advance payments on profits; (b) entering into supply agreements, public works agreements or acquisition of services or goods agreements with the Portuguese State, autonomous regions, public institutes, local municipalities and independent charitable organisations (*instituições privadas de solidariedade social*) mostly financed by the State Budget; (c) competing for public services concessions; (d) having securities representing its share capital or convertible in share capital admitted to trading on a regulated market; (e) launching public distribution offers; (f) benefiting from European structural and investment funds and public funds, as well as from (g) taking part in businesses over real estate assets.

Noncompliance with the reporting duties also causes the inapplicability of the participation exemption regime to profits distributions made by Portuguese entities to non-resident shareholder.

Moreover, the participation exemption regime will also not apply if any beneficial owner declared under the BOCR regime has its residency or domicile in a country, territory or region subject to a clearly more favourable tax regime listed in the list approved by ministerial order (*portaria*) 150/2004, of 13 January, in its present wording, unless the taxpayer proves the company which benefits from such income does not form part of a construction or series of constructions considered by law as not genuine. This requirement accrues to all other (general) requirements for the application of the participation exemption.

False declarations for the beneficial owner registration purposes originate criminal liability, in addition to any civil liability for damages.

Besides introducing changes in several laws, Law no. 89/2017, of 21 August sets out a number of additional obligations impacting the incorporation of companies and their operations (as well as the creation and operation of other entities subject to the BOCR), as follows:

- i. Company's incorporation documents:** must now identify the natural persons who hold, even if indirectly, or by means of a third party, the ownership of the shares or effective control of the company (by any means). Noncompliance with this obligation is subject to registration.

- ii. Amendments to the company's articles of association:** any amendment to the company's articles of association must be filled for registration with an updated and complete version of its shareholders list, alongside their identification data.

- iii. Companies' obligation to keep an updated beneficial owner register, mandatorily including the registration of the identification elements of:**
 - Shareholders and the identification of their shares;
 - The natural persons who, directly or indirectly, or by means of a third party on their behalf, own the company's share capital; and,
 - The entities that anyhow have the effective control thereof.Noncompliance with this obligation is an administrative offence punishable with a fine from € 1.000 to € 50.000.

- iv. Information duties applicable to shareholders:** the company's shareholders must inform the company of any change to the elements which must be included in the beneficial owner register within 15 days from the change.
Noncompliance with this obligation, upon notification of the company for the performance thereof, authorises the company to amortise the shares held by the defaulting shareholder in accordance with the general terms provided in the Portuguese Companies Code.

These new rules will be very demanding on companies and their shareholders when adapting their structures and mechanism for gathering of information to timely comply with their new obligations. This seems not to have been properly safeguarded by the legislator, remarkably for already existing entities.

To fully understand the scope and extent of the new rules and how the BOCR will work it is relevant to wait for the publication of the regulation set out in the legal regime of the BOCR. The same shall be published up until the entry into force of this Law no. 89/2017, of 21 August.

VdA is available to further clarify and explain in detail the effects of this new law.