



The Ultimate Beneficial Owner In the Scope of Combating Money Laundering and Terrorist Financing

Summary:

The regime of Law no. 83/2017, of 18 August has strengthened the rules and obligations aimed at preventing the use of the financial system and of specially designated activities and professions for the purposes of money laundering and terrorist financing, imposing on the obliged entities several obligations, namely of reporting and identification.

Nowadays, one of the most complex legal issues arising from the above-mentioned obligations is related to the identification of the Ultimate Beneficial Owners of legal persons. In fact, in order to mitigate the difficulties inherent to this identification, it is extremely important to analyse and know the criteria established by law, essential for a correct interpretation and application of the regime.

1. Introduction – The general duty of identification and diligence

One of the most relevant measures of preventive and repressive nature to combat money laundering and terrorist financing, established in the scope and following the entry into force of **Law No. 83/2017 of August 18¹** (the Law), corresponds to the duty of obliged entities² to obtain, in certain situations, a satisfactory level of knowledge about the ultimate beneficial owners of the client.

According to the Law, the list of obliged entities is composed of:

- I. Financial entities:
 - a) Credit institutions;
 - b) Payment institutions;
 - c) Electronic money institutions;
 - d) Investment companies and other financial corporations;
 - e) Securities investment companies and self-managed real estate investment companies;

¹ Which partially transposed Directives 2015/849/EU of the Parliament and of the Council of May 20 and 2016/2258/EU of the Council of December 6 and repealed, inter alia, Law no. 25/2008 of June 5.

² Pursuant to article 11 of the Law, these are the entities that are subject, in their actions, to comply with the following preventive duties, within the scope of Prevention and Combating of Money Laundering and Terrorist Financing.

- f) Venture capital companies, venture capital investors, social entrepreneurship companies, venture capital fund management companies, venture capital investment companies and self-managed specialized alternative investment companies;
 - g) Credit securitization companies;
 - h) Companies that market, to the public, contracts relating to investment in tangible goods;
 - i) Securities investment consultants;
 - j) Pension fund management companies;
 - k) Insurance companies and intermediaries operating in the life insurance field;
- II. Entities equivalent to financial entities:
- a) Branches located in Portuguese territory of financial entities, or others of equivalent nature, having their head office abroad, as well as foreign financial branches;
 - b) Payment institutions having their head offices in another member state of the European Union, when operating in national territory through agents;
 - c) Electronic money institutions with headquarters in another member state of the European Union, when operating in national territory through agents or distributors;
 - d) Financial entities, or others of an equivalent nature, which operate in Portugal under the regime of free provision of services, but to which only the regime of free provision of services set forth in article 73 of the Law applies;
- III. Entities that provide financial services to the public:
- a) Entities providing postal services;
 - b) The Agency for Treasury and Public Debt Management, E. P. E. (IGCP, E. P. E).
- IV. Non-financial entities:
- a) Concession holders for the operation of casino games and concession holders for the operation of bingo halls;
 - b) Entities which pay betting and lottery prizes;
 - c) Entities covered by the Legal Regime on Online Gambling and Bets, under the terms of the applicable legislation;
 - d) Entities not provided for in the sub-paragraphs, which carry out any real estate activity;

- e) Auditors, certified accountants and tax consultants, incorporated as a company or in individual practice
- f) Lawyers, solicitors, notaries and other independent professionals in the legal area, established in a company or in individual practice;
- g) Providers of services to companies, to other legal persons or to collective interest centres without legal personality
- h) Other professionals intervening in operations of alienation and acquisition of rights over practitioners of professional sporting activities;
- i) Economic operators exercising the activity of auctioneer, including pawnbrokers;
- j) Economic operators exercising the activities of importation and exportation of rough diamonds;
- k) Entities authorized to carry out the activity of transport, safekeeping, handling and distribution of funds and values, under the terms of the applicable legislation
- l) Traders who transact goods or provide services for which payment is made in cash.

Also according to the Law, the following are equivalent to obliged entities:

- a) Natural and legal persons acting in Portugal as agents of payment institutions having their head office in another member state of the European Union, or as agents or distributors of electronic money institutions having their head office in another member state of the European Union, but to whom only the regime provided for in Article 72 in the Law applies;
- b) The following entities that operate in national territory, but to which only the regime provided for in articles 114 to 146 of the Law applies:
 - i) Managing entities of collaborative financing platforms, in the loan and equity modalities;
 - ii) Entities managing collaborative financing platforms, in the modalities of donation and with reward;
 - iii) Non-profit organisations.

Among the various general duties that, under the terms of the Law, the different obliged entities must comply with, namely: the duty of control (articles 12 to 22), the duty of conservation (article 51), the duty of examination (article 52) and the duty of training (article 55), one that stands out is the duty of identification and diligence (articles 23 to 28). In this context, certain elements and

information must be obtained regarding the identification of the client and, when the client is a legal person or a legal arrangement, a satisfactory knowledge of its ultimate beneficial owners.

Therefore, whenever any of the situations below is verified, the obliged entities must ensure the knowledge of the identity of the client and/or its representatives:

- i) Establishment, in general, of business relationships³;
- ii) Execution of occasional transactions with a value equal to or higher than € 15,000, or that imply a transfer of funds with a value higher than € 1,000;
- iii) The suspicion that the transactions, regardless of their value and of any exception or threshold, are related to money laundering or terrorist financing; or
- iv) Lingering doubts about the veracity or adequacy of previously collected identification data.

Consequently, obliged entities must collect and register certain identifying elements and documents, depending on whether they are, on the one hand, natural persons or, on the other, legal entities or legal arrangements. They must also, within the scope of this duty of diligence:

- a) Obtain information on the purpose and intended nature of the business relationship;
- b) Obtain information on the origin and destination of funds moved within the scope of a business relationship or in an occasional transaction, when the client's risk profile or the characteristics of the operation justifies it;
- c) Maintain a continuous monitoring of the business relationship, in order to ensure that the operations performed in the course of that relationship are consistent with the entity's knowledge of the activities and risk profile of the customer and, where necessary, of the origin and destination of the funds moved.

³ A business relationship is considered to be any relationship of a business nature, professional or commercial, between the obliged entities and their clients, which, at the moment it is established, is or is expected to be lasting, tendentially stable and continued over time, regardless of the number of individual operations that integrate or will integrate the established relational framework - article 2, no. 1, paragraph ff) of the Law.

In case the client is a legal person or a legal arrangement, obliged entities must obtain and file, in accordance with the Law (and, in the case of lawyers, the Regulation⁴), at least the following elements⁵:

- i) Corporate name;
- ii) Corporate purpose;
- iii) Full address of the registered office and, when applicable, of the branch or permanent establishment, as well as, when different, any other address of the main places the activity is performed;
- iv) Legal entity identification number or, if it does not exist, an equivalent number issued by a competent foreign authority;
- v) Identity of the holders of ownership and voting rights equal to or greater than five percent;
- vi) Identity of the holders of the board of directors or equivalent body, as well as other relevant senior management with management powers;
- vii) Country of incorporation;
- viii) CAE (Classification of Economic Activities) code, institutional sector code or other code of similar nature, if applicable;
- ix) **Satisfactory knowledge of their ultimate beneficial owners⁶.**

2. The concept of Ultimate Beneficial Owner and the legal criteria for its identification

⁴ In the case of lawyers, the information collected should be included in a specific form, the copies of which, filled in and signed by the lawyer/law firm and by the client, as well as the identification elements collected, should be kept in a safe and confidential file for a period of seven years, or transferred to a digital support, provided that their conformity with the original is certified (article 12 of the Regulation).

⁵ To be proved through a valid commercial registry certificate or equivalent document, or through interoperability platforms between information systems issued by public services. As for natural persons who are representatives, members of the management body, holders of shareholdings in the capital and voting rights of a value equal to or greater than five per cent, or ultimate beneficial owners of the client, their identity must be proven through a certified copy of the identification document or interoperability platforms between information systems issued by public services, and a document proving the aforementioned status must also be collected (valid commercial registry certificate or equivalent document, certificate of the social resolution of appointment to the position or of the Power of Attorney, and document proving the ownership and control structure of the entity).

⁶ Thus ensuring the "sufficient transparency of ownership information", provided for in Article 30(1) of the Law ("enhancing transparency" and "ensure adequate transparency of ownership information", in the words of Directive 2015/849/EU).

According to the Law, an ultimate beneficial owner is defined as *"the natural person(s) who ultimately own(s) or control(s) the customer and or the natural person(s) on whose behalf a transaction or activity is performed, according to the criteria set forth in article 30"*⁷.

The first point to retain is, therefore, that for the purposes of the Law, **the ultimate beneficial owners will always be 'natural persons'** (according to the European Union legislator), even though their identification may result from a complex exercise, involving successive chains of ownership or control, namely, by legal persons.

The forms, criteria and the manner in which, on a case-by-case basis, the ultimate beneficial owners of the entities are determined and identified is a complex matter. As such, the legal regime presents a series of tools that the interpreter must resort to, namely in articles 29 to 34 of the Law, but also in the subsidiary Legal Regime of the Central Register of the Ultimate Beneficial Owner (RCBE), approved by Law no. 89/2017, of August 21⁸, which was created and implemented so that obliged entities could have, in Portugal, a database, in electronic form, for the identification of the ultimate beneficial owners.

Thus, the following are deemed to be ultimate beneficial owners of corporate entities (article 30, no. 1 of the Law):

- a) The person or persons who ultimately own(s) or control(s), directly or indirectly, a sufficient percentage of shares or voting rights or interest in the capital of a legal entity;**
- b) The natural person(s) who exercise(s) control over such a legal person by other means;**
- c) The natural person(s) who has/have the senior management⁹ if, after having exhausted all possible means and provided there are no grounds for suspicion:

 - i) No person has been identified in accordance with the previous subparagraphs; or**
 - ii) There are remaining doubts that the person or persons identified are the ultimate beneficial owner(s).****

⁷ The figure and the concept of ultimate beneficial owner are not, however, new to the national legal system, dating back to Law no. 11/2004, of March 27 (also known as the "money laundering law"), which introduced, in particular, the legal type of crime of laundering currently set out in Article 368-A of the Penal Code.

⁸ And regulated through Ordinance no. 233/2018, of August 21 and Ordinance no. 200/2019, of June 28.

⁹ That is, the manager or employee with sufficient knowledge of the obliged entity's exposure to the risk of money laundering and financing of terrorism and with a sufficiently high hierarchical level to make decisions affecting the exposure to risk, not necessarily having to be a member of the entity's management body.

Being aware, however, that the direct or indirect ownership or control of corporate entities lacked materialization, the legal regime (both of the European Union and national), established the criteria and evidence that should guide the exercise of ascertainment and identification of ultimate beneficial ownership (Article 30(2) of the Law):

- a) It constitutes evidence of direct ownership the holding by a natural person of participations representing more than 25% of the share capital;**
- b) It is an indication of indirect ownership when a natural person holds more than 25% of the share capital by:**
 - i) A corporate entity that is under the control of one or more natural persons; or**
 - ii) Several corporate entities that are under the control of the same natural person or persons; and residually,**
- c) Through the existence of any other control indicators and other circumstances that may indicate control by other means.**

With respect to other legal persons of a non-corporate nature, the criteria for determining their ultimate beneficial ownership are set out in paragraphs a) to e) of Article 30(3) of the Law - for the case of trust funds ("trusts") - and in paragraph 4 of the same Article for foundations, legal arrangements of a similar nature to trusts.

3. The Central Register of Ultimate Beneficial Owners

Once the ultimate beneficial owners of the legal person or legal arrangement in question have been ascertained and identified through the application of the above criteria, the corresponding statement must be submitted in the RCBE (Central Register of Ultimate Beneficial Owners).

The national legislator has thus chosen to create a central register, managed by the Institute of Registration and Notary Affairs, I. P. (IRN), containing a database "with sufficient, accurate and current information" of ultimate beneficial owners, **to which the following are subject:**

- a) Associations, cooperatives, foundations, civil and commercial companies¹⁰, as well as any other personalized collective entities, subject to Portuguese or foreign law, which carry out activity or practice legal act or legal business in national territory that determines the obtaining of a tax identification number (NIF) in Portugal;
- b) Representations of international or foreign legal persons, which carry on business in Portugal;
- c) Other entities which, pursuing their own objectives and activities differentiated from those of their members, do not have legal personality;
- d) Fiduciary management instruments registered in the Free Zone of Madeira
- e) External financial branches registered in the Free Zone of Madeira;
- f) Trust funds and other collective interest centres without legal personality with a similar structure or functions, whenever:
 - i. The respective "trustee", the person legally responsible for the respective management or the person or entity occupying a similar position is an obliged entity within the meaning of the Law;
 - ii. They are attributed a NIF by the Tax and Customs Authority (Autoridade Tributária e Aduaneira – "AT");
 - iii. They establish business relationships or engage in occasional transactions with obliged entities within the meaning of the Law; or
 - iv. The respective trustee, the person legally responsible for the respective management or the person or entity occupying a similar position, acting in any of those capacities, establishes business relations or carries out occasional transactions with obliged entities within the meaning of the Law.

In its turn, **the following are excluded from the scope of application of the RCBE** (other than listed companies, as mentioned in footnote ¹⁰):

- a) Diplomatic and consular missions, as well as international bodies of a public nature recognised under an international agreement of which the Portuguese State is a party, established or with an agreement host in Portugal;
- b) The services and entities of the sub-sectors of the central, regional or local administration of the State;

¹⁰ Except for companies with shares admitted to trading on a regulated market ("listed companies") provided they are subject to disclosure of information requirements consistent with European Union law or equivalent international standards, which are excluded from the scope of application of the RCBE.

- c) Independent administrative entities, namely those regulating the economic activity of the private, public and cooperative sectors, covered by Law no. 67/2013, of August 28, as well as those that operate at the 'Assembleia da República';
- d) The Bank of Portugal and the Regulatory Authority for the Media (ERC);
- e) Companies with shares admitted to trading on a regulated market, subject to disclosure of information requirements consistent with European Union law or subject to equivalent international standards, which ensure sufficient transparency of information regarding the ownership of shares;
- f) Consortiums and complementary groupings of companies;
- g) Condominiums, in relation to buildings or groups of buildings that are constituted as horizontal property, provided that the following requirements are cumulatively met:
 - i) The global patrimonial value, including the common parts, determined in accordance with the applicable tax rules, does not exceed the amount of two million euros;
 - ii) No more than 50% of the shares are held by a single proprietor, by joint proprietors or by the individual or individuals who, in accordance with the indexes and control criteria set forth in the law, are to be considered its ultimate beneficial owners.

The statement of RCBE can be submitted by the members of the management bodies or the persons who perform equivalent functions in the legal person, by natural persons acting as a trustee or, when there is no trustee, by the de jure or de facto manager, and also by lawyers, notaries and solicitors, without the need to show or attach a power of attorney (although it is recommended that a power of attorney is obtained) or by certified accountants, but only as a result of the statement of commencement of activity or in the scope of the obligation to submit the annual Simplified Company Information (IES).

The statement should identify the entity subject to the RCBE and the declarant and, particularly, in the case of commercial companies:

- a) The holders of the share capital, with a description of the respective shares;
- b) The managers, administrators or whoever exercises the management or administration of the entity subject to the RCBE; and
- c) The ultimate beneficial owners.

In the case of trust management instruments registered in the Free Zone of Madeira, other trusts subject to the RCBE and other legal arrangements with a structure or functions similar to those trusts, information on:

- a) The settlor or founder;
- b) The trustee or trustees and, where applicable, their substitutes where they are natural persons;
- c) The legal representatives of the trustee or trustees where these are legal persons;
- d) The curator, where applicable;
- e) The beneficiaries and, where applicable, their respective substitutes;
- f) Any other natural person exercising effective control.

The submission of the statement of RCBE is made electronically, through the platform available on the portal <https://rcbe.justica.gov.pt/>, through authentication with a citizen card, Mobile Digital Key or Digital Certificate or, through electronic completion assisted by a registration service, provided that jointly with the request for commercial registration or registration of any fact in the Central Registry of Legal Persons (FCPC).

Once the legally stipulated dates for the already existing entities subject to the RCBE¹¹ have elapsed, the moment for filing the initial statement should correspond, depending on the case:

- i. To the date of the company's incorporation registration or with the first inscription in the FCPC, but no longer than 30 days after the referred dates;
- ii. Within 30 days after the attribution of the NIF, in the case of an entity that is not required to be registered with the FCPC.

The information contained in the RCBE must be updated or rectified within 30 days from the date of the fact that determines the alteration or correction, except for entities that perform occasional acts in national territory, in which case the update must be made at the moment of the performance of each act.

Annually, **until 15 July**, the accuracy, sufficiency and currentness of the information on the ultimate beneficial owner must be confirmed through a statement, to be submitted together with the Simplified Company Information (IES), for the entities that must submit it.

¹¹ Which, after successive extensions, were: 31 October 2019 for commercial companies, permanent representations and cooperatives and 30 November 2019 for other entities, including associations, foundations and funds.

After submission of the initial or updated statement, a supporting document is issued¹², which may be replaced by a RCBE code that allows any person to access and consult the information submitted through the portal <https://rcbe.justica.gov.pt/>.

The failure to comply with the obligations of reporting, updating and rectifying the RCBE is publicized by IRN and prevents the entity from:

- a) Distributing or making advances on profits during the financial year;
- b) Entering into supply contracts, public works contracts or the acquisition of services and goods with the State, the autonomous regions, public institutes, local authorities and private social solidarity institutions that are mainly financed by the State Budget, as well as renewing those already in existence;
- c) To tender for the concession of public services;
- d) To admit to trading on a regulated market financial instruments representing its share capital or convertible into it;
- e) To launch public offers for distribution of financial instruments issued by itself;
- f) To benefit from the support of European structural and investment funds and public funds;
- g) Intervening in any business transaction for the purpose of transferring ownership, whether for consideration or free of charge, or the creation, acquisition or disposal of any other real rights of enjoyment or guarantee over any immovable property.

The furnishing of false information for the purpose of registration of the ultimate beneficial owner makes the offender incur in the practice of the crime of false declarations, foreseen and punished by article 348-A of the Penal Code, besides possible civil liability for the damages caused.

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¹² Subject to confirmation of the conclusion of the procedure, through electronic communication issued by the IRN services.