



ULTIMATE BENEFICIAL OWNER

Transposition of the 4th EU Money Laundering Directive



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Contents

- 03. Background
- 04. Who are the beneficial owners?
- 05. Who is and who is not subject to the BOCR?
- 06. Declaration and information obligations
- 07. Access to the BOCR and penalties

Background

In 2017 Portugal has transposed the Directive (EU) 2015/849 of the European Parliament and of the Council, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. Portuguese BOCR became effective on 1 October 2018.

Directive (EU) 2015/849 appeared as a new European Union (EU) effort to prevent money laundering and/or terrorist financing and to maintain the confidence in the Union's financial system.

The Directive aimed at increasing transparency in the identification of beneficial owners, requiring all Member States to hold information on beneficial owner of several legal entities in a national central register. The Directive entered into force on 26 June 2015, and all Member States were granted a two years deadline to transpose it into national law.

Law no. 83/2017, of 18 August (the "Money Laundering Law") and Law no. 89/2017, of 21 August (the "Ultimate Beneficial Owner Law") were responsible for transposing the Directive in Portugal. The later, which is already in force, establishes the legal framework for the Beneficial Owner Central Register (BOCR).

The BOCR emerged as a response to the need to identify any natural person who exercises ownership or control over a legal person in order to ensure effective transparency. The accurate information on the beneficial owner is a key factor in tracking money laundering criminals who might otherwise hide their identity behind a corporate structure.

The Money Laundering Law defines who are the beneficial owners of a legal person and the relevant criteria to presume it in case the main requirements are not possible to verify.

With the same purpose of preventing money laundering, the Portuguese Government has prohibited the issuing of bearer shares.

Decree no. 233/2018, of 21 August, which regulates the BOCR, establishing the form, term and publicity of the relevant information provided, has entered into force on 1 October 2018.

Who are the beneficial owners?

Beneficial owner is the natural person who ultimately owns or controls, directly or indirectly, a sufficient percentage of shares, voting rights or participation rights in the share capital of a legal person, and the individual exercising control by any other means over such legal person.

The following are evidences of control:

- A company has exclusive control over another company;
- A company and one or more other companies unrelated with the former are under the same direction through an agreement entered into between them or due to statutory provisions of such companies;
- The board of directors or the supervisory body of a company and the corporate bodies of one or more companies unrelated with the former are mainly composed by the same natural persons; and
- The effective control of a company is exercised by a limited number of shareholders and the decisions regarding the entity are mutually agreed between them.

On the other hand, the holding, by a natural person, of shares representing more than 25% of the share capital of the company is a evidence of direct ownership .

The holding, by a company controlled by one or more natural persons or by several companies controlled by the same natural persons, of shares representing more than 25% of the share capital of the company is evidence of indirect ownership .

If the beneficial owner cannot be identified or there are doubts regarding who he is, the following people will be considered beneficial owners of the company: any top officer or member of the staff of the company with sufficient knowledge of the exposure of the company to money laundering and terrorist financing risks and having a sufficiently high position in the company's hierarchy to take decisions affecting its risk exposure (which may not necessarily be a member of the board of directors or management of the company).

Regarding trusts, the beneficial owner is a specific natural person determined from the following: the settlor, the directors, the trustees, the beneficiaries or any other natural person who ultimately controls the trust through direct or indirect shareholding.

Who is and who is not subject to BOCR

The following persons and entities are obliged to keep an updated record and submit a statement regarding their beneficial owners:

- Associations, cooperatives and foundations;
- Companies (both civil and commercial);
- Any other legal person subject to Portuguese or foreign laws, as long as they operate or adopt any measure on Portuguese territory that requires a Portuguese tax number;
- Branches of international companies which operate in Portugal;
- Other entities which pursuing their own objectives and activities different from those of their associates, do not have legal personality;
- Trusts registered in the Madeira's free zone; and
- External branches registered in the Madeira's free zone.

The person and entities below are not subject to BOCR obligations:

- Diplomatic and consular missions;
- Services and entities of the subsector of the central, regional or local State's administration;
- Independent administrative authority;
- The Bank of Portugal and the Regulatory Authority for the Media;
- Companies listed in the stock exchange/regulated market, subject to information duties according to the EU laws, or equivalent international laws;
- Consortia and ACE (complementary group of companies); and
- Condominiums, as long as its value does not exceed €2,000,000 and none of the proprietaries own more than 50% of the total value of the building.

Declaration and information obligations

Companies subject to the BOCR are obliged to keep an updated record and submit a statement regarding their beneficial owners (Statement) through an online form and until the deadline of 30 June 2019, when such companies are already incorporated, or immediately after their incorporation.

The information on the BOCR must be updated as soon as possible and within 30 days as from the date of the event that determined a change to the data included in such register.

Until 15 July of each year, the relevant companies must confirm if the information provided to the BOCR is updated.

On the other hand, shareholders are obliged to inform the company of any change to their meaningful information within 15 days as of the date of such change or the company may redeem the shares of the defaulting shareholder.

The omission, inaccuracy, nonconformity or outdatedness of the information submitted to the BOCR must be communicated to the relevant service of the BOCR by the company or its beneficial owners.

The following information must be reported to the BOCR:

- Regarding the company and its shareholders, whenever they are companies as well: (i) shares owned (ii) tax number; (iii) corporate name; (iv) legal nature; (v) head office; (vi) SIC code; (vii) Legal Entity Identifier (when applicable); and (viii) corporate's email;
- Regarding the beneficial owners and other natural persons such as managers/directors: (i) shares owned; (ii) full name; (iii) date of birth; (iv) place of birth; (v) nationality(ies); (vi) full address of permanent residence; (vii) identification document's data; (viii) tax number issued by the relevant authorities of the State of nationality; (ix) email (when applicable); and (x) tax representative's name, address and tax number (when applicable); and
- Regarding the person which files the information on the beneficial owners: (i) name; (ii) full address of the permanent residence or professional domicile; (iii) identification document or professional licenses' data; (iv) tax number (when applicable); (v) capacity in which the information is filed; and (vi) email.

Access to the BOCR and penalties

Who has access to the register?

The company whose beneficial owner is registered, any judiciary authorities, police authorities, the Portuguese Tax Authority and certain supervisory authorities such as the Bank of Portugal, the Supervisory Authority for Insurance and Pension Funds and the Portuguese Securities and Exchange Commission have access to the information provided in the BOCR.

The information available in the BOCR regarding the company subject to the BOCR, such as tax number, corporate name, legal nature, head office, SIC code, Legal Identity Identifier, when applicable, and email, is public and available to anyone. The same goes for information in the BOCR regarding the beneficial owner, such as name, month and year of birth, nationality, country of residence and the economic interest held.

In any case, the access to information on the beneficial owner may be totally or partially restricted when disclosure is likely to expose him to the risk of fraud, abduction, extortion, violence or intimidation, or if the beneficial owner is a minor or incapable.

Penalties in case of default

If a company does not keep an updated record of the identification elements of its beneficial owners, fines ranging from €1,000.00 to €50,000.00 may apply.

Until reporting and correction obligations are complied, the relevant companies cannot: (i) distribute annual profits or advances on such profits; (ii) enter into supply agreements, construction agreements or services agreements with the State and any other public entities or renew contracts in force; (iii) bid for the concession of public services; (iv) issue financial instruments representing its share capital or that may be converted into share capital and trade such instruments in the stock exchange/regulated market; (v) launch public offers of distribution of any financial instruments; (vi) benefit from European structural and investment aids as well as from State aids; and (vii) be a party to any transaction aiming at transferring property rights over real estate assets, either for a consideration or free of charge, or to any transaction aiming at creating, acquiring or selling any other rights *in rem* and guarantees over any real estate asset.



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