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To order extra copies or reprints please contact:
Tatiana Hlivka
Expert Guides
Legal Media Group
8 Bouverie Street
London EC4Y 8AX
United Kingdom
Tel: (44) 20 7779 8418
Fax: (44) 20 7779 8678
Email: thlivka@legalmediagroup.com
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The Queen's Award for Enterprise 2008

WHITE COLLAR CRIME

METHODOLOGY 2

ASIA PACIFIC 3

EUROPE 11

LATIN AMERICA AND THE CARIBBEAN 40

MIDDLE EAST AND AFRICA 42

NORTH AMERICA 44

INDEX 64

PORTUGAL

Money laundering: the Portuguese way – from good intentions to reality check

Filipa Marques Júnior and Rui Patrício
Morais Leitão Galvão Teles Soares da Silva & Associados
Lisbon

Last September saw the coming into force in Portugal of Law No. 83/2017, which establishes anti-money laundering and terrorism financing measures, partially transposing Directive 2015/849/EU, of the European Parliament and of the Council, and Council Directive 2016/2258/EU (the so called 4th Directive).

This legislation arose in the context of an FATF assessment of Portugal and at a time when there is already talk about a 5th Directive, which means that it must be read within that framework. Going beyond the 4th Directive in many respects (perhaps already influenced by the discussions for a 5th Directive and/or marked by the "good student" syndrome), this lengthy legislation expands the array of affected entities, fleshes out duties and lays down extensive and weighty liability provisions for criminal and regulatory offences. It is a true code (though packed with "regulatory" or "circular" matters) and very often leaves a great deal of doubt as to the line between prevention and punishment.

It is still too early to know its true reach and impact for the many organisations and entities concerned. We believe that only time will allow us to grasp its applicability, its effects and the true role the competent and enforcement authorities will play in its application and enforcement. But on a first impression, one question should be asked: is there even room for a risk-based approach? The fact is that despite the term "risk" being mentioned over two hundred times throughout the legislation, the minimum contents, the default fleshing-out and the provisions regarding what, "at least", the entities concerned are subject to and which cannot be forgotten in the implementation of the various duties, can only raise doubt as to how the competent authorities will exercise their inspection and oversight powers.

It will perhaps be easy to "choose", within the scope of the competent authority's powers, one of the 90-plus regulatory offences laid down in the law. Yet one wonders whether it would not be more efficient, for the purposes of the legislation, to help the entities concerned to *navigate* this new *sea* of duties and obligations, promoting awareness of its terms and clarifying the various doubts to which it gives rise.

While there are duties and obligations which may be more easily perceivable for financial entities – given the regulations these were already familiar with and the nature and activity of such entities –, many of the other (and some new) entities concerned will be facing, for the first time, the need for an almost complete reformulation of their internal control systems to be able to comply with the imposed requirements. With no assistance, with no specialised knowledge, with no structure and with no resources (financial, human, technical, etc.), it will be hard to put everything that is required of them into practice, engendering the risk that not only will they be unable to meet the desired objectives but that possible interest may arise in "alternative" ways of framing the activities or use of the (para)financial system to avoid the application of the legislation and being subject to its duties.

> BUT ON A FIRST IMPRESSION, ONE QUESTION SHOULD BE ASKED: IS THERE EVEN ROOM FOR A RISK-BASED APPROACH?

In other jurisdictions, we have seen the transposition of a 69-article directive by means of legislation that is subsequently regulated or subjected to interpretational guidelines. In Portugal, such transposition was made by means of a 191 – article law, that will still be regulated. One can but wonder: was such extensive legislation actually necessary? Are we not inserting in primary legislation content that is best left to the regulations of the various regulatory bodies for each sector? And, by so doing, are we not *blindly* extending the "normal" terms governing financial entities and credit institutions in particular to all other financial and non-financial entities, despite the references to the necessary changes depending on the nature of the activity in question?

Besides being innovative in many aspects, the framework in force now in Portugal will require an effort on the part of the entities concerned to adapt, as well as a considerable investment. However, the competent authorities too are facing a new paradigm, focused

PORTUGAL

on cooperation, which will pose several challenges for the pursuit of their powers. In a (brave?) new world, the cooperation that would bear fruit for the paradigm it is sought to impose and the goals it is desired to reach would clearly be a cooperation model between the entities concerned and the competent authorities; one where instead of a *reign* of distrust and the propensity towards punishment which is often seen and which is perhaps fostered by this legislation, information sharing, mutual assistance and discovering true ways of preventing and combating money laundering and terrorism financing together would be better. This new legal framework even supplies some means to this end, but it remains to be seen whether and how they will be used.

PORTUGAL

Rui Patrício

Morais Leitão, Galvão Teles, Soares da Silva
Rua Castilho, 165
Lisbon 1070-050
Portugal
Tel: (351) 21 381 7482
Email: rpatricio@mlgts.pt
Website: www.mlgts.pt

Rui Patrício joined the firm in 1994 and became a partner in 2005. He heads one of the litigation and criminal, misdemeanors and compliance teams. He is member of the Board of Directors of the firm since October 2008.

Rui Patrício is one of the firm's most experienced lawyers in the area of litigation, having developed in recent years the area of criminal and misdemeanours litigation, as well as having extensive activity in the area of civil litigation.

His work in the criminal and misdemeanours area has been accompanied by an academic and lecturing career. Since 1994 and until 2006 he taught subjects in the areas of civil and criminal law at the Law Faculty of the University of Lisbon. Between 2007 and 2013 he was an Invited Professor at the Law Faculty of Nova University.

Member of the Judiciary Superior Council between May 2009 and November 2011. Rui Patrício is currently, among others, member of the Corruption Prevention Council.

Rui participates in seminars and conferences and lectures predominantly on criminal and misdemeanor legal themes in masters and postgraduate courses.

He collaborates with the media on matters related with justice. Author and co-author of law books and articles.