



SOCIEDADE DE ADVOGADOS, SP,RL
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NEWSLETTER

THE REGISTRATION OF ENTITIES THAT PERFORM ACTIVITIES WITH VIRTUAL ASSETS IN PORTUGAL

SUMMARY

Banco de Portugal Notice no. 3/2021 was published on 23 April 2021, regulating the terms for the submission to Banco de Portugal of registration applications and applications for changes to registration of entities that carry on, or intend to carry on, activities with virtual assets. And, on January 24, 2023, Banco de Portugal Notice no. 1/2023 was published, which regulates the necessary aspects to ensure compliance with the duties to prevent money laundering and terrorist financing.

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INTRODUCTION

Law No 58/2020 of August 31, which transposes Directive (EU) 2018/843 into the national law, amended, for the second time, Law No 83/2017 of August 18th, associated with combating money laundering and terrorism funding.

With this amendment, some activities related to virtual assets are made part of the list of activities subject to compliance with the provisions of the law on money laundering combat and terrorism funding.

Therefore, according to the provisions of Law No. 83/2017, the exercise of activities related to virtual assets, depends on previous registration with the Bank of Portugal, with the possibility of defining, by regulation, the elements which must instruct the registration requests of entities exercising activities with virtual currencies

As such, Notice n.º 3/2021 of the Bank of Portugal, was published on 23rd of April 2021 (henceforward designated by “2021 Notice”), which regulates the terms of presentation of the registration applications by the entities who intend to develop activities related with virtual currency.

Given the operational reality of the entities that perform activities with virtual assets, the need arose to specifically regulate on preventive duties with regard to money laundering and terrorist financing, which is why the Bank of Portugal, in the use of its powers, published on January 24, 2023, Notice No. 1/2023 (hereinafter “2023 Notice”).

SCOPE

The provisions of the 2021 Notice apply to entities who intend to work, exclusively or simultaneously with other economic activities, the following activities with virtual currencies in the national territory:

- i. Exchange services between virtual assets in national territory and fiat currencies;
- ii. Exchange services between one or more virtual assets; and
- iii. Services through which a virtual asset is moved from one address or wallet to another (transfer of virtual assets).

SUBMISSION FOR REGISTRATION

The submission of the registration applications is made through the website of the Bank of Portugal. Therefore, besides

the electronic forms – also made available online on the Bank of Portugal website –the required documentation to complete the registration application will also be submitted on that website.

Alternatively, and only in cases of *force majeure*, entities may fill the applications, add necessary elements and documentation, and send by email or post services to the Bank of Portugal. However, all these elements and documentation should also be sent in digital format to the Bank of Portugal, to ensure accessibility, durability, reliability, integrity, and legibility of the information.

INITIAL APPLICATION

To make the Initial Application, the entities shall present the provided models in Annex I, I.A and II of the 2021 Notice, duly filled.

APPLICATION FOR AMMENDMENTS

In the event of an application for amending registrations, the provisions of the 2021 Notice set forth two alternative methods, depending on the type of amendments.

As such, in most part of the changes, the provision of the 2021 Notice requires a deadline of 30 days counting from the date on which the fact has occurred (deadline settled in the provisions of Article 112-A, No.6 of Law No. 84/2017), for the entities to submit the new model set out in Annex I of the Notice, filled only in the fields applicable to the amendment.

The request must be sent together with the elements and the documentation requested under terms of Annex I of the 2021 Notice, only on what concerns the promoted amendment.

If the application concerns the members of the management or supervisory bodies of the entity, the request must be sent together with the elements and requested documentation under Annex II of the 2021 Notice on what concerns the amendment.

However, in the requests which rely on the extension of the type of virtual assets activities or the change of the entity jurisdiction, having that jurisdiction a higher risk of money laundering or terrorism funding, it is necessary to make an application in similar terms to the Initial Application for Registration.

It is important to note that in these type of amendment requests, according to the Annexes of the 2021 Notice, information and documentation already provided in the Initial Application for Registration, does not require a new submission, with the possibility of referring to said information and documentation, provided they are valid.

DUTY TO MANTAIN DOCUMENTATION AND INFORMATION

All the elements and documentation sent by the entity to the Bank of Portugal, when filling an Initial Application for Registration or an Application for Modification of Registration, must be maintained for 10 years and in such terms that they can be made available to the Bank of Portugal at any time.

COMMUNICATION TO THE BANK OF PORTUGAL

After being granted the registration to the entities, these shall communicate to the Bank of Portugal the starting date of activity, by email to ativosvirtuais@bancodeportugal.pt, within 30 days following the granting of the registration.

DEFAULT

The failure to comply with the provisions of the 2021 Notice, concerning the presentation of the registration, means that Bank of Portugal may deem the request as “not presented”.

Besides that, the failure of registration by the entities carrying out the activity of virtual assets trading is a serious misdemeanor (under Article 169-A, p. ccc of Law No. 83/2017), punishable with fines ranging from €50.000 to €5.000.000 (in the case of credit or financial institutions) or between €5.000 and €1.000.000 (in the case of other entities).

DUTY TO INFORM AND COOPERATE

When the competence and suitability of the beneficial owners is at stake, members of the management or supervisory bodies, or other persons working on senior management positions in an entity who trades on virtual assets, must communicate this to the Bank of Portugal.

In addition, upon the renewal of the term in a management or supervisory body takes place, or any person working on a senior management position in an entity

trading on virtual assets, the filling of the applicable fields under Annex I, as well as the collection of the declaration that appears in Annex II of the 2021 Notice must be promoted.

All the diligences taken to fulfill this duty should be documented and be kept for a period of 10 years, as is the case of the elements of information and documentation provided in Initial Applications for Registration and Application for Modification of Registration, in terms that allow the immediate availability to the Bank of Portugal, at any time.

THE 2023 NOTICE AND THE STRENGTHENING OF PREVENTIVE DUTIES

With the publication of the 2023 Notice, provisions are introduced in the legislation applicable to the access to activities with virtual assets in Portugal regarding preventive duties in the field of money laundering and terrorism financing.

To this extent, provisions specifically dealing with control duties and duties of identification and diligence come into force, which must be observed and put into practice by entities that carry out activities with virtual assets in Portugal,

and which, although they were already provided for previously, are now densified.

Among other novelties brought by the 2023 Notice, in the context of control duties, it is now mandatory for the entities in question to have a member of the management body with executive functions in their organizational structure to monitor compliance with this duty, as well as simplified and strengthened measures to be provided and put into practice by these entities in the context of identification and due diligence duties.

CONCLUSIONS

As happened with the publication of the 2023 Notice, it is expected that the legislation and regulation of this activity will expand.

It should be noted that temporally, this phenomenon is recent and that, therefore, only with the passage of time by the applicable legislation will it be possible to note where it is necessary to legislate or not.

In any case, it should be pointed out that the legislator should not, in our opinion, be complex in what he or she brings to the public eye, insofar as, as can be seen

from the number of entities that are registered with the Bank of Portugal, this is, for the time being, an activity that is difficult to access in Portugal.

Another observation to be made focuses on the form in which registration requests are submitted. While it is true that the legislation is thorough in stating that applications must be submitted via online forms, the truth is that, to date, no such forms are available, which shows, in fact, a desire by the legislator to complexify what perhaps does not need to be complexified, which most likely extends to many other provisions.

In short, we should not lose sight of an attempt to simplify and debureaucratize this type of processes, ensuring, of course - and in this scope, the 2023 Notice offers the necessary contribution - everything that is necessary to prevent and combat money laundering and terrorist financing.

Lisbon, February 10th, 2023

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