

NATIONAL-LEVEL CORPORATE ANTI-ABUSE MEASURES RELEVANT TO THE EU COMPANY LAW PACKAGE

Expert Questionnaire

Portugal

Philippe Lafontaine

Expert Practitioner

December 2020

1) **Anti-abuse mechanisms** - do any of these exist in this country? If so, how do they work?

a. Disqualified Directors

i. Is there an official definition of “disqualified directors”? If so, what are the grounds for disqualification? Where is this? (legal text and link)

No. There is only the requirement for “commercial aptitude” for certain businesses

ii. Is there an official list of (current) disqualified directors? If so, where is it? (name and link)

N/A

iii. Who has access to this list?

N/A

b. Beneficial Owners

i. Where is the database of beneficial owners and who maintains it (link)

The responsible organization is the RCBE. The link is: <https://rcbe.justica.gov.pt/>

There is an obligation on the company to have a complete and actual list of beneficial owners; violation constitutes an administrative offence punishable by a fine of 1 000 EUR to 50 000 EUR. A declaration to the RCBE must be made within 30 days of incorporation. If this is not done, there is a prohibition on distributing profits, on participating in public tenders and on being involved in any transaction regarding real estate, etc. The failure to provide this is registered in the Commercial Register. False declarations are not only punishable under Article 348-A of the Criminal Code but can also result in civil liability for damages

ii. Are there any checks on the authenticity of beneficial owners, or does the organization depend on a “statutory declaration” or “affidavit” from the company directors??

Law no. 83/2017 of 18th of August, which partly transposes the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing into Portuguese law foresees checks on the authenticity of beneficial owners: “Obligated entities” must have a “satisfactory knowledge of the beneficial owners” and “adopt all measures

necessary to assess the status of beneficial owner”, “obtain information on the identity of the client's beneficial owners”, and “take reasonable measures to verify the identity of the beneficial owners”. The registration authority, however, is not qualified as “obliged entity”, but only as “auxiliary entity”, and as such not obliged to the duty of identification and due diligence which includes the obligation to have a satisfactory knowledge of the beneficial owners of a client. Its duties as “auxiliary entity” are limited to the obligation to communicate suspect operations to the judicial and criminal authorities, the obligation to cooperate with said authorities, and the obligation not to disclose to the customer or third parties the fact they communicated suspect operations or cooperated in an investigation.

iii. How quickly must the company give notice when ownership has changed (updating of lists/databases)?

A declaration must be made to the RCBE within 30 days of changes

iv. Who has access to the beneficial ownership database? Does the general public have unrestricted access, restricted access or no access?

Access for the public is restricted. “Obliged entities” have full access to data regarding the declarant. Authorities have full access.

c. Electronic identity (E-ID) scheme – name and eIDAS level of assurance

Portuguese national identity card (eID card) (Cartão de Cidadão) – high.
Chave Móvel Digital (Digital Mobile Key) – high.

2) Company registry – transparency, access, cost

a. Identity and location

Commercial registry - <https://eportugal.gov.pt/en/espaco-empresa/empresa-online>

b. To what extent is the registry digitalized? Can company foundations/registrations and reporting be carried out fully online/digitally?

Registration and reporting can be done fully online

c. Are bulk downloads of the entire list of registered companies possible?

No

d. Does the registry have search features beyond the name of the company or person (e.g. by sector or employee size)

No keyword search, only certificates for identified companies

e. What is the typical cost of downloading a document from the registry?

Paper 30 EUR, “permanent” 25-70 EUR. There is full access to the data regarding the company (name, object, directors, etc.), but not to the supporting documents.

f. Is there information on employment beyond what is contained in company annual accounts?

No.

g. Information on European company forms and EU reorganizations (CBM) is a search possible for companies with the SE legal form or companies reorganized through a CBM?

No

Documents available for the SE: constitution, annual accounts, project to transfer seat, amendments

For CBM: draft terms of incorporation of a European Company by way of merger, the draft terms of incorporation of a European Company by way of transformation of a company under national law and the draft terms of incorporation of a European Holding Company

3) Firm foundations

a. What authority or organization is responsible for registering new companies?

The Institute of Registration and Notary Affairs IRN <https://irn.justica.gov.pt/en-gb/>

- oversees registration services
- control and supervision of the notarial activity

Registers relevant for companies:

- Commercial Register -> publicity
- National Register of Legal Persons RNPC -> organise and manage / assess the admissibility of firms and names
- Central Register of Beneficial Owners RCBE -> information on the natural person/s who hold ownership or effective control

b. What are the steps needed to found and register a new company? To what extent can these happen digitally?

The basic steps are 1) get a certificate of the admissibility of the company's designation (or select a designation from an official list), 2) notarize the memorandum and articles of association of the company, and 3) request the registration of the company. This can be done fully digitally.

c. What checks (if any) are done on the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners

i. By registration authority

These are always involved, since registration is necessary to acquire legal personality. But they are only an "auxiliary entity" – there is no identification check of the beneficial owners; only the document which formalizes the incorporation must identify them.

ii. By notaries

If a notary is involved, they verify identities of founders and indicate this in a notarial act. Regarding the beneficial owners; the "obliged entity" has an obligation to have a satisfactory knowledge of the beneficial owners of a client. The notary is only one type of "obliged entity". They are listed in article 3 (financial entities) and 4 (not financial entities) of Law no. 83/2017 of 18th of August, which partly transpose the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the

financial system for the purposes of money laundering or terrorist financing into Portuguese law.

iii. By “facilitator” companies (foundation agents)

Lawyers/solicitors, if involved, have the same obligations as notaries.

4) Cross-border Mergers (CBMs)

a. Which authority is responsible for the pre-merger certificate (outbound CBMs), which authority is responsible for approving the merger (inbound CBMs)? (name and link)

The authority responsible for the pre-merger certificate is the Institute of Registration and Notary Affairs (IRN). It must monitor the legality of cross-border mergers, which includes issuing the pre-merger certificate, in relation to each of the participating companies with headquarters in Portugal.

The common draft terms of the cross-border merger are to be approved by the general meeting of each of the participating companies; approval is verified by IRN, if the company will have seat in Portugal.

b. What personnel capacity/qualifications does the authority/ies listed above (organization(s) granting the pre-merger certificate + approving merger) have?

According to the “Social Report 2019” of the Human Resources Department of the Institute of Registration and Notary Affairs IRN there are 4748 employees. But the Commercial Register is only one service of IRN; there are several others. The “personnel capacity of the authority of organization vetting the CBMs” is therefore only a part of the 4748 employees.

c. What (if any) anti-abuse checks are made?

i. Purpose of reorganization

The common draft terms must indicate purpose; Commercial Register will check whether the document complies with this requirement, but no assessment of the appropriateness of the purpose.

ii. Background check on directors

None

iii. Identity of beneficial owners

The Commercial Register as an “auxiliary entity” is not obliged to identify (see above).

iv. Worker I/C/P arrangements

Common draft terms must indicate, whenever appropriate, information on the procedures to establish the rules for the involvement of employees; the general meeting of any of the participating companies may make the implementation of the cross-border merger subject to the condition that the rules for employee participation are approved at that meeting