# Banking Monitoring and Compliance in the Prevention of Money Laundering

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Money laundering has caused concern across most modern societies and a threat to the rule of law. The phenomenon develops fundamentally through the banking sector, exploiting weaknesses of a global economy strongly driven by successive technological innovations and giving rise to new forms of crime that threaten the solidity, integrity and confidence in the financial system itself, indispensable to the social and economic development. The fight against the phenomenon stands out, especially at a preventive level, with the adoption of normative instruments in the last decades that call the credit institutions to join the state administration in the accomplishment of justice, imposing demanding duties in the name of preventing money laundering.

**Keywords**: Money laundering; prevention; banking sector; internal control; compliance programs

## I. Introduction**

Concern about the adoption of appropriate mechanisms to protect the financial system emerged in the 80s with the growing increase in organised crime and the use of banks to 'conceal' proceeds from illicit activities. The international community has made the fight against money laundering one of the main priorities, encouraging the approximation and concertation of efforts between States and bodies through the implementation and strengthening of monitoring and compliance[2] procedures and mechanisms for operators in the financial system[3], which require continuous updating.

The aim of this work is to analyse developments in anti-money laundering regimes and to reflect on some of the measures in the banking sector. Thus, with a view to better framing the subject under consideration, we will start the study with a brief overview of the legislation that regulates this matter, both at international and national level, as well as of the rules within the banking sector, that have translated into the materialisation and effective application of these provisions. As a second step, we will focus on defining the system of internal control of credit institutions and, in particular, the importance of compliance mechanisms in preventing and possibly waiving credit institutions of penal liability in money laundering offences.

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** A., AA. — author, authors; AA.VV. — various authors; BCBS – Basel Committee on Banking Supervision; cf –check, compare; cit., cits. — quote, quoted, etc., quotation(s); PC – Penal Code; ed., eds. — publishing, editions; publisher; USA – United States of America; E. g. – exempli gratia (for example); FATF/GAFI – Financial Action Task Force – Groupe d'Action Financière; i.e. – id est (this is to say); nº, nºs – paragraph, paragraphs; UN – United Nations; org. — organizer, organization; p. p. — page, pages; RCBE – Central Register of Beneficial Owners; RGICSF – General Regime of Credit Institutions and Financial Companies; RPCC – Portuguese Criminal Science Magazine; EU – European Union; FIU – Financial Intelligence Unit; v. g. – *verbi gratia* (for example).

[2] Cf. Miguel da Câmara Machado referring to the existence of four generations of normative instruments which nevertheless tend to "self-destroy". In "4G in the Prevention of Money Laundering: Problems, Paradoxes and Major Duties", *Banking Law Studies* I, Almedina, 2018, pp. 78-80.

[3] The range of entities with responsibilities in the prevention of money laundering is much wider, cf. Articles 3 to 7 of Law No 83/2017 of 18 August.

We conclude the study with brief considerations on the conclusions reached.

## II. Money laundering

### *A Criminalisation and legislative developments at international level*

Anti-money laundering schemes have mainly developed since the 1990s[4] in the context of the fight against international drugs trafficking. In 1961, the United Nations[5] had already acknowledged drug addiction as a scourge for the individual and an economic and social danger to humanity, which should be urgently fought. Concerns about public health and social problems arising from the abuse of psychotropic substances were renewed a decade later in the Vienna Convention[6].

Awareness concerning the adoption of appropriate protection mechanisms in the financial system in order to prevent their use for transferring illicit funds, started during that period. This was reinforced with the recommendation[7] of the Committee of Ministers of the Council of Europe, dated 27/06/1980, supported by the report of the Committee of Experts on Violence[8] concerning the rise of organised crime and the use of banks for money laundering, which proposed the adoption of stricter procedures in the banking sector, including, particularly, the identification of customers when carrying out certain financial transactions.

In this context, it is important to highlight the initiatives of the United States of America, which, through the Money Laundering Control Act of 1986[9], provided for the establishment of measures to ensure the monitoring and compliance of procedures in the financial sector, and subsequently with the Comprehensive Thrift Act and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990[10], which laid down rules to prevent abusive financial conduct, including measures that prevent access and exercise of duties in financial institutions to individuals convicted of certain economic crimes.

It should also be noted that the Basel Committee's[11] 1988 general statement of ethical principles called on banks' administrations to implement effective due diligence procedures, to refuse transactions that did not appear legitimate and to establish cooperative links with the authorities, outlining the guidelines on which standards of conduct in banking would be structured.

The growing trend in illicit trafficking in narcotic drugs and psychotropic substances and the continuing threat posed by criminal organisations to the economic development and security

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[4] Cf. Miguel da Câmara Machado on the generations of normative instruments that have been driving the development of the anti-money laundering regime in recent decades, cit., p. 81.

[5] United Nations Single Convention on Narcotic Drugs, New York, 30 March 1961.

[6] United Nations Convention on Psychotropic Substances, Vienna, 21 February 1971

[7] Recommendation n.º R (80) 10 of the Committee of Ministers to Member States on Measures Against the Transfer and the Safekeeping of Funds of Criminal Origin, on 27 June 1980 [electronic version], accessed on 03 April 2022, at: https://rm.coe.int/16804f6231.

[8] General Observations, Recommendation on measures against the transfer and the safekeeping of funds of criminal origin – Explanatory memorandum [electronic version], accessed on 03 April 2022, at: https://wcd.coe.int/ and https://rm.coe.int/native/09000016804b7be9.

[9] The legislation is a reference in the criminalization of money laundering. Cf. United States Government Publishing Office (GPO), "The Anti-Drug Abuse Act of 1986, Public Law 99-570—OCT. 27, 1986, Subtitle H – Money Laundering Control Act of 1986", [electronic version], accessed on 03 April 2022, at: https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3207.pdf.

[10] United States Government Publishing Office (GPO), "Crime Control Act of 1990, Public Law 101- 647—NOV. 29, 1990, Financial Institutions Anti-Fraud Enforcement Act of 1990 e Comprehensive Thrift Act and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990). Accessed on 03 April 2022, at: https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg4789.pdf.

[11] Prevention of criminal use of the banking system for money laundering, The Basel Committee on Banking Supervision or BCBS [electronic version], accessed on 03 April 2022, at: https://www.bis.org/publ/bcbsc137.pdf.

and sovereignty of States[12], triggered the first internationally harmonised response against money laundering in the same year, with the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)[13] of 20 December.

This instrument has become a reference for subsequent legislative developments by providing the guidelines, which have made it possible to classify money laundering as unlawful conduct and to consider the derogation from banking secrecy[14] as a special mechanism of choice in the prevention and investigation of this criminal phenomenon.

By the late 1980s, drug trafficking and money laundering reached alarming proportions and became a global social problem. As a response, an intergovernmental body (Financial Action Task Force/FATF) was established in 1989 at the Group of 7 Summit (G-7)[15] to assess and promote cooperation and mutual assistance in the fight against drug trafficking, as well as to study and propose appropriate measures to prevent the use of the banking system and, in general, financial institutions for the purpose of money-laundering, and also to assess the possible adaptation of legal and regulatory systems to improve multilateral legal assistance[16].

FATF presented its first report the following year, proposing the implementation of a set of recommendations (the FATF's 40 Recommendations)[17] to strengthen the fight against money laundering achieved through drugs trafficking.

These recommendations were addressed primarily to financial institutions in the banking sector and included the adoption of anti-money laundering programmes, aimed mainly at the development of specific policies and the implementation of internal procedures and control involving the appointment of compliance officers, the selection of officials according to high standards, the establishment of training programmes and the establishment of an audit function (see Recommendation 20).

Later that year, the Council of Europe adopted the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[18], extending the measures proposed in the Vienna Convention to the tracing and confiscation of instruments, proceeds and property derived from the commission of crimes other than drug trafficking.

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[12] In this regard, Nuno Brandão stresses the importance of the adoption of conventions as a response to international concerns in relation to money laundering and organized crime, in: Money laundering: The Community's Prevention System, Coimbra Editora, 2002, p. 61.

[13] Approved for ratification by the Resolution of the Assembly of the Republic No 29/91 of 06/09 and ratified by Presidential Decree No 45/91 of 06/09. It was published in Diário da República I-A No 205 of 06/09/1991.

[14] See Article 79, entitled 'Exceptions from the duty of secrecy', of the General Rules on Credit Institutions of Financial Companies, approved by Decree-Law No 298/92 of 31 December 2006.

[15] "Summit of the Arch", University of Toronto Library and the G7 Research Group at the University of Toronto. Accessed on 03 April 2022, at: www.g8.utoronto.ca/summit/1989paris/index.html.

[16] Financial Action Task Force on Money Laundering – Annual Report 1990. Accessed on 03 April 2022, at: http://www.fatf-gafi.org/media/fatf/documents/reports/1990%20ENG.pdf. In the meantime, other intergovernmental bodies have been set up to develop and implement a global and comprehensive strategy to combat money laundering and terrorist financing, as set out in the FATF Recommendations, among which: the Financial Action Task Force of Latin America (GAFILAT), Asia/Pacific Group on Money Laundering (APG) Caribbean Financial Action Task Force (CFATF), Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) Eurasian Group (EAG) Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Inter Governmental Action Group against Money Laundering in West Africa (GIABA) Middle East and North Africa Financial Action Task Force (MENAFATF) Task Force on Money Laundering in Central Africa (GABAC).

[17] The Forty Recommendations on Money Laundering (1990) of Financial Action Task Force, [electronic version], accessed on 03 April 2022, at: https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf

[18] Strasbourg Convention, approved for ratification by Resolution of the Assembly of the Republic No 70/97 of 13/12; ratified by Presidential Decree No 73/97 of 13/12. Published in the Diário da República I-A, No 287, of 13/12/1997 (Resolution of the Assembly of the Republic No 70/97).

At the Community level, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, defined the scope of a preventive framework based essentially on the binding of financial sector entities to a set of duties. The instrument echoed the recommendations of FATF, specifically providing for the establishment of "adequate internal control and reporting processes to prevent and hinder money laundering operations", by credit institutions and other financial institutions, deriving from drugs trafficking.
In accordance with FATF Recommendation 16, the establishment of a mandatory system for reporting financial transactions to authorities when suspected[19] of having resulted from criminal activities was achieved. That obligation related exclusively to financial institutions, which, in regard of their privileged position, would be in a position to detect and prevent any abusive conduct from clients and thereby contribute to the preservation, reputation and integrity of the financial system.
The expansion of crime, in particular transnational organised crime, has led States to work together towards a more effective global response. Thus, in November 2000, the United Nations adopted the Convention against Transnational Organised Crime[20], extending the scope of the criminalisation for money laundering to other predicate serious offences and promoting enhanced international cooperation[21] and exchange of information. It also proposed to strengthen the supervision of banks and other financial institutions and the creation of a Financial Intelligence Unit[22] whose competences would be to collect, analyse and disseminate information relating to the prevention of money laundering.

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[19] By Instruction No 70/96 of 17 June 1996, the Central Bank of Portugal defined the criterion for assessing the degree of suspicion of a given financial transaction. As expressly stated in that legislation, the suspicion did not necessarily imply the existence of evidence confirming the commission of the criminal activity, but rather arose from the assessment of the specific circumstances in which the transaction was carried out, by reference to the standard criterion of the 'average man'. Cf. [Electronic version], accessed on April 03, 2022, at: https://www.bportugal.pt/instrucao/7096).
[20] Palermo Convention approved for ratification by Resolution of the Assembly of the Republic No 32/2004 of 02/04; ratified by Presidential Decree No 19/2004 of 02/04. Published in the *Diário da República* I-A, No 79, of 02/04/2004 (Resolution of the Assembly of the Republic No 32/2004).
[21] Euclides Dâmaso Simões in "The importance of international judicial cooperation in combating money laundering", Portuguese Criminal Science Magazine, Coimbra Editora, Coimbra, 2006, A. 16, No 3, July-September, pp. 423-424. In the same sense, Anabela Miranda Rodrigues regards judicial and police cooperation, along with legislative harmonization as necessary tools to combat the new crime that develops in the borderless European context, in "Emerging European Penal Law", Coimbra Editora, 2008, p. 151.
[22] Cf. Article 7(1) (b) of the Convention against Transnational Organized Crime, "Each State Party:"…"…shall consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering." [Electronic version], accessed on 03 April 2022, at: www.unodc.org and https://www.imolin.org/pdf/imolin/Overview%20Update_0107.pdf.
The Council of Europe Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism has adopted the following definition "*Financial Intelligence Unit means a central, national unit responsible for receiving (and, if permitted, requesting), analyzing and disseminating to competent authorities information of a financial nature (i) on presumed proceeds and potential means of terrorist financing; or (ii) required by national laws or regulations aimed at combating money laundering and terrorist financing*". Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 adopted the same definition by including it in No. 37 and Article 32 as a *'central national unit'*, which is '*operationally independent and autonomous' responsible for 'collecting and analyzing the information they receive with the aim of establishing links between suspicious transactions and their predicate criminal activities in order to prevent and combat money laundering and terrorist financing*'. In Portugal, the Financial Intelligence Unit was set up by Decree-Law No 304/2002 of 13 December and placed under the organizational authority of the National Directorate of the Criminal Police, in accordance with Law No 37/2008 of 6 August. In accordance with Article 27(1) and (3) of Decree-Law No 137/2019 of 13 September approving the new organizational structure of the Criminal Police, the 'FIU shall be responsible for collecting, centralizing, processing and disseminating information at national level concerning the prevention and investigation of offences involving the laundering of advantages of illegal provenance, the financing of terrorism and tax crimes, ensuring, at internal level, cooperation

Subsequently, Directive 2001/97/EC of the European Parliament and of the Council of the European Union of 4 December, amended Directive 91/308/EEC by introducing a broader notion of money laundering. This was achieved by including other predicate offences and by extending the range of obliged entities, including natural and legal persons in the performance of certain professional activities[23].
Following the terrorist attacks in USA, on 11 September 2001, FATF issued guidelines for financial institutions to develop new practices to adapt their procedures for the detection and deterrence of transactions with funds linked to terrorist financing and to strengthen their overall internal and external audit processes[24] (cf. Consideration 7). The document praised the importance of the financial institutions in detecting and reporting suspicious financial transactions which, with the United Nations International Convention for the Suppression of the Financing of Terrorism, started to be assessed on the basis of a criterion[25] combining the 'complexity' and the 'frequency' of the transaction.
The regime for the prevention of money laundering gained momentum in 2003 with the United Nations Convention against Corruption[26], which required States to establish comprehensive internal regulatory and supervisory rules for banks and non-banking financial institutions in the fight against money laundering[27].
Later that year, the FATF revised and expanded the 40 Recommendations on the prevention of money laundering and terrorist financing and stressed the importance for financial institutions, to implement "anti-money laundering programmes" with "appropriate compliance management arrangements", "employee training programme", "independent audit function", as well as the appointment of a "compliance officer at the management level" (Recommendation 15).
Two new instruments on the prevention of money laundering were adopted on 26 October 2005. Regulation (EC) No 1889/2005 of the European Parliament and of the Council of the European Union, on the control of cash entering and leaving the Community, and Directive 2005/60/CE27[28] of the European Parliament and of the Council of the European Union, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, establishing, among others, the concept of politically exposed person and the

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and coordination with the judicial authority. with the supervisory and control authorities and with the financial and non-financial entities provided for in Law No 83/2017 of 18 August, and at international level, cooperation with financial intelligence units or similar structures', which may also integrate 'officials of the Taxes and Customs Authority and other supervisory authorities or government services and structures, in a manner to be defined by ministerial order, in accordance with the rules applicable to them'.

[23] Article 2 A now provides for credit institutions, financial institutions, as well as a range of natural and legal persons who carry out their professional activities (Auditors, external accountants and tax advisors; Real estate agents; Notaries and other independent legal professionals, high-value traders and casinos).

[24] Guidance for Financial Institutions in Detecting Terrorist Financing, Financial Action Task Force on Money Laundering. [Electronic version], accessed on 03 April 2022, at: https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance%20for%20financial%20institutions%20in%20detecting%20terrorist%20financing.pdf.

[25] Article 18 (1) (b) of the United Nations International Convention for the Elimination of the Financing of Terrorism provides for the "*adoption of regulations requiring financial institutions to report promptly to the competent authorities all complex transactions of an unusual size and all unusual types of transactions which do not have an obvious economic purpose or a clear legal purpose, without fear of criminal or civil liability arising from the breach of confidentiality obligations, if the statements are made in good faith*;"

[26] Adopted by Resolution of the Assembly of the Republic No 47/2007 of 31/09; ratified by Presidential Decree No 97/2007. It was published in the Official Gazette No 183 of 31/09/2007 (Resolution of the Assembly of the Republic No 47/2007).

[27] Cf. Article 14 of the United Nations Convention.

[28] Directive 2006/70/EC of the Commission of the European Communities of 1 August lays down implementing measures for Directive 2005/60/EC as regards the definition of politically exposed persons and the technical criteria for simplified customer due diligence procedures, and for exemption on the basis of a financial activity carried out on an occasional or very limited basis.

provision of appropriate policies and procedures for internal control, risk management, compliance and reporting of suspicious transactions by obliged entities.
Regulation 1781/2006 of the European Parliament and of the Council, of 15 November, laid down rules on the information concerning transfers of funds, whereas Directive 2009/110/EC of the European Parliament and of the Council, on the taking up, pursuit and prudential supervision of the business of electronic money institutions, bound electronic money institutions to the anti-money laundering regime. Subsequently, Regulation 2015/847 of 20 May established new rules with a view to achieving greater uniformity in the implementation of international standards to combat money laundering and the financing of terrorism and proliferation, which had been defined by FATF in 2012.
On the same occasion, the European Parliament and the Council adopted Directive 2015/849[29] on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, introducing changes to the subjective scope (with the inclusion of new entities), the establishment of a three-dimensional competence-based risk assessment process and the strengthening of beneficial ownership identification measures and the institutional cooperation framework.
With the firm aim of strengthening the protection of the financial system, two new instruments emerged in 2018. Directive (EU) 2018/843 of 9 July, of the European Parliament and of the Council of 20 May, also known as the '5th AML Directive', provided for a tightening of the criminal law framework for money laundering, the possible accountability of legal entities and the strengthening of cross-border judicial and police cooperation. Directive (EU) 2018/1673 of the European Parliament and of the Council, of 23 October, required the adoption of measures to harmonise the criminalisation of money laundering and the establishment of a system of penalties consistent with the cross-border dimension, taking into account the (new) risks to money laundering and the financing of illicit activities arising from the use of virtual currencies.

### *B Money laundering in the domestic legal system*

Under the heading 'Money Laundering', Article 368-A of the Penal Code gives concrete expression into national law to the principle of depriving[30] criminals of the proceeds of their activities, stated in the 1988 United Nations Convention. In succinct terms, money laundering can be described as 'the activity by which the criminal origin of property or proceeds is concealed, seeking to give them a legal appearance'[31]. The object of money laundering is, therefore, the proceeds or assets derived from the commission, in any form of assistance, of a predicate offence, defined by the use of a mixed criterion, combining a catalogue of offences, a general clause relating to the seriousness of the predicate offence, valued according to the applicable penalty, and, in addition, a reference to a list of criminal offences set out in separate law[32].
Money laundering constitutes a derived or secondary crime, in the sense that it is conditional on the existence of predicate offence, even if not culpable and punishable, from which the

[29] Amended Regulation (EU) No 648/2012 of the European Parliament and of the Council and revoked Directive 2005/60/EC of the European Parliament and of the Council, as well as Commission Directive 2006/70/EC.
[30] Money laundering is the process whereby perpetrators of criminal activities conceal the origin of assets and income (proceeds) obtained unlawfully, turning the liquidity arising from those activities into legally reusable capital by concealing the origin or the real owner of the funds. Money Laundering and Terrorist Financing Portal. Accessed on 03 April 2022, at: http://www.portalbcft.pt/pt-pt/content/branqueamento-de-capitais.
[31] Nuno Brandão, cit, p.15.
[32] Paulo Pinto de Albuquerque – Commentary on the Penal Code in the light of the Constitution of the Republic and the European Convention on Human Rights, 3rd updated edition, Universidade Católica Editora, 2015, pp. 1152-1157.

advantages derive (objective condition for punishment)[33]. This is to say, that it starts from the principle of a unlawful act, but it 'does not depend on conviction for the previous offence, or even on its prosecution in the country of origin of the advantages, assets or rights, since that is implied in the principle of the autonomy of the money laundering offence laid down in Article 368- A of the Penal Code'[34], even though it results in an autonomous offence to the predicate and common crime, which may be committed by any person, since it does not require the offender to have any special quality.
It is risk posed offense as far as the actual impairment of the legal interest protected may not occur, as referred to by Vitalino Canas, for whom the legal interest protected by the incriminating rule is not limited to the protection of the administration or realisation of justice, but to a number of interests pursued[35]. By contrast, Paulo Pinto de Albuquerque takes the view that criminalisation is aimed at the realisation of justice, as manifested in the pursuit and confiscation of the proceeds of criminal activity[36].
The criminalisation of money laundering in the domestic legal system took place through Decree-Law No 15/93 of 22 January, which transposed the objectives and rules laid down in the 1988 United Nations Convention, creating a specific regime for forfeiture of the proceeds from drug-related offences[37], making the derogation from banking secrecy a special investigative technique, as expressly stated in the Convention on Laundering, Screening, Seizure and Confiscation of the Proceeds from Crime[38].
Later that year, Decree-Law No 313/93 of 15 September[39] laid down a set of special preventive duties to be observed by certain operators in the financial sector[40], non-compliance with which gave rise to liability for administrative offences.
Decree-Law No 325/95 of 2 December[41] extended the criminalisation of money laundering to other forms of previous serious crime and gave the scope of preventive measures to entities in the non-financial sector[42]. This was followed by legislative amendments which increased the catalogue of primary offences relating to money laundering, in particular by Law No 65/98 of 2 September on incitement to prostitution, trafficking in human beings, including minors, and by Law No 10/2002 of 11 February on trafficking in nuclear products, trafficking in human organs or tissues, pornography involving minors, trafficking in species, tax fraud and crimes

[33] Vitalino Canas – The Money Laundering Offence: Prevention and repression regime. Coimbra: Almedina, 2004, p. 149,

[34] Judgment of the Court of Appeal of Lisbon on 06/06/2017, proceeding No. 208/13.9TELSB.G.L1-5

[35] Vitalino Canas – cit, p. 20.

[36] Paulo Pinto de Albuquerque – cit, p. 1152.

[37] Article 23, entitled '*Conversion, transfer and concealment of property or proceeds*', the seizure and confiscation of proceeds from drugs trafficking.

[38] Council of Europe Convention No. 141 on Money Laundering, Search, Seizure and Confiscation of the Proceeds of Crime was adopted by the Committee of Ministers of the Council of Europe in September 1990.

[39] Transposed Council Directive 91/308/EEC of 10 June on the prevention of the use of the financial system for purposes of money laundering.

[40] The measures were addressed to credit institutions, financial companies, insurance companies, in so far as they carry out activities under the 'Life' branch, and companies managing pension funds, which had their registered office in Portuguese territory. Branches and general agencies located in Portuguese territory of those entities having their head office abroad and external financial branches, were also covered. The law also applied to entities operating the public postal service to the extent that they provided financial services.

[41] Established preventive and repressive measures against money laundering and other property derived from crime.

[42] The law included in the range of obliged entities, casinos, entities active in the real estate mediation sector, the purchase and resale of real estate, the marketing of tickets or bearer securities and high value goods, cf. Articles 4 to 8 of Decree-Law No 325/95.

punishable by imprisonment with a maximum limit of more than 5 years. This legislation has (further) extended the subjective scope of obliged entities[43].
A mirror of the extension of preventive duties in the banking sector is Circular No 17/99/DSB of 16 July from the Central Bank of Portugal, which imposed compliance with the obligations related to the prevention of money laundering as far as suspicious transactions are concerned, even those predicate to tax offences.
Law No 11/2004 of 27 March[44] added money laundering to the Criminal Code by including it in Article 368-A, under the title 'Laundering', laying down new preventive duties which were further developed in Law No 25/2008 of 5 June[45], and unifying the regimes for the prevention and suppression of money laundering and terrorist financing. It should be noted that with regard to the duty of control, Article 21 has imposed on obliged entities the definition and implementation of adequate and effective internal policies and procedures to comply with internal duties, risk assessment and management and internal audit, within the framework of prevention against money laundering and terrorist financing. Subsequently, by means of Notice No 5/2013 of 18 December, the Central Bank of Portugal regulated the conditions, mechanisms and procedures necessary for the effective fulfilment of the preventive duties of money laundering and terrorism financing laid down in Chapter II of Law No 25/2008, of 5 June, in the context of the provision of financial services subject to the supervision of the Central Bank of Portugal.
A new *Anti-Money Laundering* legislative package, consisting of four pieces of legislation, emerged in August 2017. Law No 83/2017 of 18 August[46], laying down measures to combat money laundering and the financing of terrorism, which, in the meantime, has been regulated by the Central Bank of Portugal by means of Notice No 2/2018 of 26 September 2007; Law No 89/2017 of 21 August approving the legal regime governing the Central Register of the Beneficial Owner (RCBE)[47]; Article 27(1) of Law No 92/2017 of 22 August, which required

[43] Articles 8 A, 'accountants, external auditors and fund carriers', and Article 8 B, entitled 'Other entities', have been added, which now includes notaries, registrars, or any other entities involved in the purchase and sale of immovable property or commercial entities, transactions in funds, securities or other assets belonging to clients, opening or managing savings or securities bank accounts, the creation, operation or management of companies, trusts or similar structures and the execution of any financial transactions.
[44] It transposed into Portuguese national law Directive 2001/97/EC of 4 December, which introduced an essentially preventive and punitive regime against the laundering of proceeds of illegal origin.
[45] Transposed into Portuguese law Directives 2005/60/EC of the European Parliament and of the Council of 26 October and Commission Directive 2006/70/EC of 1 August on the prevention of the use of the financial system and of activities and professions specially designated for the purpose of money laundering and terrorist financing.
[46] It partially transposed Directives (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 and (EU) 2016/2258 of 6 December 2016 amending the Penal Code and the Industrial Property Code and revoking Law No 25/2008 of 5 June and Decree-Law No 125/2008 of 21 July.
[47] The transposition into Portuguese law of Chapter III of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 entailed, in accordance with Article 1 (2) of Law No 89/2017 of 21 August, amendments to:
(a) Real Estate Register Code, approved by Decree-Law No 224/84 of 6 July;
(b) Commercial Register Code, approved by Decree-Law No 403/86 of 3 December;
(c) Decree-Law No 352-A/88 of 3 October governing the establishment and operation of companies or branches of off-shore trusts in Madeira Free Trade Zone;
(d) Decree-Law No 149/94 of 25 May regulating the register of trust instruments;
(e) Notaries Code, approved by Decree-Law No 207/95 of 14 August;
(f) the National Register of Legal Persons, approved as an annex to Decree-Law No 129/98 of 13 May;
(g) Regulation on the Fees of Registries and Notaries, approved by Decree-Law No 322-A/2001 of 14 December;
(h) Decree-Law No 8/2007 of 17 January creating simplified business information;
(i) Decree-Law No 117/2011 of 15 December approving the Organizational Law of the Ministry of Finance;
(j) Decree-Law No 118/2011 of 15 December approving the organization of the Taxes and Customs Authority;
(k) Decree-Law No 123/2011 of 29 December approving the Organizational Law of the Ministry of Justice;

the use of specific means of payment in transactions involving amounts of EUR 3,000 or more[48]; and Law No 97/2017 of 23 August[49], on the implementation and enforcement of restrictive measures approved by the UN and the EU, provided that 'entities with legal powers of supervision or control in relation to the prevention of money laundering and terrorist financing' are to verify 'whether the entities subject to their supervision or control put in place the appropriate means and mechanisms to comply with the restrictive measures adopted by the United Nations or the European Union, including the specificities and duties provided for in this Law.

As mentioned above, Notice No 2/2018 of 26 September of the Central Bank of Portugal regulated the conditions of exercise, procedures, instruments, mechanisms, implementation formalities, reporting obligations and the other aspects necessary to ensure compliance with the preventive obligations of money laundering and terrorism financing, laid down in Law No 83/2017 of 18 August, as well as the means and mechanisms necessary to comply with those obligations, adopted by Law No 97/2017, and the measures that payment service providers were required to take in order to detect transfers of funds in which information on the payer or payee was missing or incomplete.

As we will see below, with regard to the monitoring obligation, Article 16 of Law No 83/2017, of 18 August, provided for the designation of an administrative body responsible for policies, procedures and controls, in matters relating to the prevention of money laundering, and of a person responsible for compliance with the rules, who is responsible for ensuring the effective implementation of policies and procedures and controls appropriate to the effective management of money laundering risks, and the monitoring of compliance with the relevant legislative framework, the failure of which is now sanctioned by Law No 58/2020, of 31 August[50], as a particularly serious administrative offence, in accordance with Article 169- A, sub-paragraph (g) of that law.

## III. Internal control and compliance in banking activity

### *A Internal control system*

The importance of adequate internal control procedures in credit institutions was emphasised by Directive 89/646/EEC (Second Council Directive) of 15 December 1989 on the taking up and pursuit of the business of credit institutions. It was necessary to ascertain, as it is also expressly apparent from the considerations in that instrument, whether the activity of an institution in its jurisdiction complied with the laws and the principles of sound administrative and accounting organisation, as well as with proper internal control, particularly since, as

(l) Decree-Law No 148/2012 of 12 July approving the organization of the Instituto dos Registos e do Notariado, I.P.;

(m) Decree-Law No 14/2013 of 28 January, which establishes the systematization and harmonization of legislation relating to the Taxes Identification Number;

(n) Corporate Income Tax Code, approved by Decree-Law No 442-B/88 of 30 November.

[48] Amending the General Tax Law and the General Tax Offences regime by adding Article 63 E (prohibition of cash payment), making the offence subject to the imposition of a fine between EUR 180 and EUR 4,500, in accordance with Article 129 RGIT.

[49] It now regulates the implementation and enforcement of restrictive measures adopted by the United Nations or the European Union and lays down the system of penalties applicable to violations of these measures.

[50] It transposed into national law Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, which amended Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering through penal law, by amending several laws.

Viudez Carmona[51] pointed out in a publication dating back to the 80s in relation to the Spanish banking services, the internal control mechanisms essentially consisted of the keeping of detailed records on the transactions carried out.
With regard to the prevention of the use of the financial system for the purpose of carrying out money laundering operations linked to drugs trafficking, Decree-Law No 313/93 of 15 September, which transposed Directive 91/308/EEC into the Portuguese law, required credit institutions to set up internal control procedures and a mandatory system for reporting suspicious transactions.
With Instruction No 72/96 of 17 June, the Central Bank of Portugal defined 'prevention of the institution's involvement in money laundering operations' as one of the fundamental objectives to be pursued by the internal control system to be implemented by credit institutions and financial corporations, depending on the size of the institution itself and the nature and risk associated with the activities carried out.
In 1998, the Basel Committee outlined the principles of the internal control system in credit institutions through the publication of the *Framework for Internal Control Systems in Banking Organisations*[52] as a critical process in the banking organisation, whose main objectives were:

- Effective and efficient use of assets and resources (performance objectives);
- Confidence, completeness and relevance of financial information in decision-making within the banking organisation (information objectives);
- Compliance with law and regulations, supervisory requirements and policies and other procedures (compliance objectives);

The adoption of an internal control system in banking institutions became mandatory with Decree-Law No 104/2007 of April 03[53], which laid down requirements for the quality of financial institutions' own funds with a view to increasing their robustness, making the internal control system a key element for the stability of financial institutions and thus contributing not only to compliance with legal obligations, but also to compliance with the risk management policies inherent in the activities carried out by institutions.
However, it was by Notice No 5/2008 of 25 June that the Central Bank of Portugal formulated the definition and objectives of the internal control system, which it characterised as a 'set of strategies, systems, processes, policies and procedures defined by the management body, as well as the actions undertaken by this body and by the other staff of the institution, with a view to ensuring:

- Efficient and cost-effective performance of the business, over the medium to long term (performance objectives), which ensures the effective use of assets and resources, business continuity and the survival of the institution itself, including through adequate management and control of the business risks, prudent and appropriate evaluation of assets and liabilities, and the implementation of protection mechanisms against unauthorised, intentional or negligent uses;

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[51] Manuel Viúdez Carmona, "Los Controles Internos en Banca", in Revista Española de Financiación y Contabilidad, Vol. XIX, n. 58, 1989, p. 365. [versão eletrónica] acedida em 6 de novembro de 2018, em: https://dialnet.unirioja.es/

[52] Basle Committee on Banking Supervision. [Electronic version], accessed on 6 November 2018, at: https://www.bis.org/publ/bcbs40.pdf.

[53] It amended the General Rules for Credit Institutions and Financial Companies (RGICSF), transposing into national law Directive 2006/48/EC of the European Parliament and of the Council of 14 June relating to the access and pursuit of the business of credit institutions. Article 22 of Directive 2006/48/EC stated that "*The competent authorities of the home Member State shall require credit institutions to have robust corporate governance arrangements, including a clear organizational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures*".

- The existence of comprehensive, relevant, reliable and timely financial and management information (information objectives) supporting decision-making and control processes, both internally and externally;
- Compliance with applicable laws and regulations (compliance objectives), including those relating to the prevention of money laundering and terrorism financing, as well as professional and ethical standards and usages, internal and statutory rules, rules of conduct and relationships with customers, guidelines of social bodies and recommendations of the Basel Committee on Banking Supervision and the Committee of European Banking Supervisors (CEBS), in order to protect the reputation of the institution and to prevent it from being sanctioned."

We therefore conclude that the internal control system, the implementation and maintenance of which was the responsibility of the management body[54], now consists of at least three functions – risk management, compliance and internal audit[55] – without prejudice to the fact that it can be complemented by appropriate specific, independent and autonomous means of receiving, processing and archiving reports of serious irregularities[56].

However, the internal control system is not a finished product, instead it must be subject to monitoring, evaluation and review of the adequacy and effectiveness of the policies and procedures that make it up, as set out in Law No 83/2017 and Notice No 2/2018 of the Central Bank of Portugal, which require it to be reviewed by means of periodic and independent evaluations, to be carried out at intervals not exceeding 12 months, or up to a maximum of 24 months, where justified by the nature, size and complexity of the activity pursued by the financial entity and the specific operating reality or business area concerned, and in addition the review of the effective risk management model, and of the practices suitable for identifying, assessing and mitigating the risks of money laundering.

Recognising the special importance that the regulation of conduct and organisational and governance culture and internal control carried over financial entities, the Central Bank of Portugal published Notice No 3/2020 carrying out an in-depth review of the internal control systems regulations contained in the above-mentioned Notice No 5, including the latest developments in European and Portuguese legislation on these matters, the guidelines of the European Banking Authority, international best practices and practical supervisory experience accumulated by the Central Bank of Portugal, promoting an integrated and holistic view of the various matters as a means of ensuring legal certainty.

The various amendments include the role of administrative and supervisory bodies in promoting an organisational culture based[57] on high standards of ethical requirements, which cumulatively:

- Promote an integrated risk culture that covers all areas of activity of the institution and that ensures the identification, evaluation, monitoring and control of the risks to which the institution is or might be exposed;
- Promote responsible and prudent professional conduct, to be observed by all employees and members of the administrative and supervisory bodies in the performance of their duties, guided by high ethical standards provided for in an institution's own code of conduct;

[54] In that regard, Ana Perestrelo de Oliveira states that compliance and internal control fall within the scope of the duties of organization, supervision and control of directors, in *Corporate Governance Manual*, Almedina, 2018, p. 302.

[55] On the objectives of the various functions, see Diogo Pereira Duarte/Francisco Passaradas, 'Risk management, compliance and internal audit', in *Banking Law Studies I*, Almedina, 2018, pp. 200-201.

[56] Cf. João Pedro Castro Mendes in "Financial Stability, Principle of Proportionality and Microprudential Supervision", in *Banking Law Studies I*, Almedina, 2018, pp. 61-62.

[57] Cf. artigo 2.º, entitled "Organizational Culture", of Notice n.º 3/2020.

- Contribute to strengthening the institution's levels of confidence and reputation, whether internally or in established relationships with clients, investors, supervisors and other third parties.

We note that the role of the institution's management body is greatly strengthened by establishing and maintaining an internal control system covering the institution as a whole[58], translated "into a set of strategies, policies, processes, systems and procedures with the aim of ensuring the medium and long-term sustainability of the institution and the prudent conduct of its business"[59], but also to ensure the promotion of "a control environment that values internal control as an essential element for the long-term resilience and performance of the institution"[60] and to approve "after the prior opinion of the supervisory body; the code of conduct and the internal policies and regulations that develop and implement it, setting out, amongst other aspects, the responsibilities of the internal control functions, the procedures for the regular verification of their compliance, the measures to prevent, identify, manage and mitigate conflicts of interest and the associated reporting duties"[61].

Moreover, the internal control system is now 'defined taking into account the principle of proportionality and the degree of centralisation of authority and delegation established within the institution'[62] and consists of 'permanent and effective internal control functions with status, authority and independence in the organisational structure'[63], allocated to 'management units which are organisationally segregated from the activities they monitor and control' autonomously and independently from each other[64], except where the institution 'is not entitled to receive deposits, and in so far as it adopts the necessary mechanisms to prevent or mitigate the risk of conflicts of interest' pursuant to Article 16 (a) and (b) of Notice No 3/2020.

The Central Bank of Portugal recently published a draft notice[65] on the prevention of money laundering and terrorism financing for public consultation, with which it intends to revoke Notice No 2/2018 of 26 September and Instruction No 2/2021 of 26 February, and to gather in a single piece of legislation the substantive rules applicable in this area, aiming at greater simplicity, clarity and flexibility in the regulatory provisions, even though, in the medium term, the adoption of a new European legal framework on this subject is likely to occur[66].

Among the proposals is the provision contained in Article 3, entitled 'Enforcement function', by providing that financial entities are to ensure the existence of a monitoring and enforcement function with regard to the prevention of money laundering and terrorism financing, in particular:

[58] Cf. article 12.º, n.º 2, of Notice No. 3/2020

[59] Cf. article 12.º, n.º 1, of Notice No. 3/2020 – nomeadamente, através: a) Do cumprimento dos objetivos estabelecidos no planeamento estratégico, com base na realização eficiente das operações, na utilização eficiente dos recursos da instituição e na salvaguarda dos seus ativos; b) Da adequada identificação, avaliação, acompanhamento e controlo dos riscos a que a instituição está ou pode vir a estar exposta; c) Da existência de informação financeira e não financeira completa, pertinente, fiável e tempestiva; d) Da adoção de procedimentos contabilísticos sólidos; e) Do cumprimento da legislação, da regulamentação e das orientações aplicáveis à atividade da instituição, emitidas pelas autoridades competentes, do cumprimento dos normativos internos da própria instituição, bem como das normas e usos profissionais e deontológicos e das regras de conduta e de relacionamento com clientes.

[60] Cf. article 3.º, n.º 1, subparagraph d), of Notice No. 3/2020.

[61] Cf. article 4.º, n.º 3, of Notice No. 3/2020.

[62] Cf. article 13.º, n.º 1, of Notice No. 3/2020.

[63] Cf. article 13.º, n.º 2, subparagraph a), of Notice No. 3/2020.

[64] Cf. article 15.º, n.º 1 and 2, of Notice No. 3/2020.

[65] The draft notice was under public consultation until 10 March 2022.

[66] Among other things, the notice regulates the recording, reporting and frequency of information to be provided by notaries, solicitors and lawyers, for the purposes of Law No 78/2021 of 24 November, establishing the framework for preventing and combating unauthorized financial activity and consumer protection.

- The definition and effective implementation of the policies, as well as the procedures and controls appropriate to the effective management of the risks of money laundering and terrorism financing to which the financial entity is or might be exposed;
- The financial entity's compliance with the laws and regulations relating to the prevention of money laundering and terrorism financing.

A second aspect to be highlighted is the combination of Article 73, paragraph 1, subparagraphs (b) and (c), and Article 3, paragraph 2 of Law No 83/2017 of 18 August, which makes payment institutions and electronic money institutions established in another Member State of the European Union, when operating through agents or distributors, subject to the provisions of that law, and obliged to designate "a member of the administrative body responsible for compliance with the legal framework in force in Portugal for the prevention of money laundering and terrorism financing" and "a person responsible for compliance with the rules"[67].

Finally, the increasing importance of the Financial Intelligence Unit as a reliable and credible source of information for the identification, assessment and mitigation of the concrete risks of money laundering and terrorism financing, in accordance with Article 6 of Notice No 2/2018, but also in defining and implementing the policies and procedures of the internal control system of obliged entities, in conjunction with Article 8 of Notice/Public Consultation No 1/2022, with Article 12 of Law No 83/2017 of 18 August, contributing to an adequate risk management of the activities carried out by the institutions and the promotion of an organisational culture of good compliance based on strong ethical values.

### *B Compliance and prevention of money laundering*

The economic downturn that hit the western world in the 70s, in the last century, put in crisis state intervention, opening the door to the implementation of economic policies based on neo-liberal ideology, which resulted in the search for more flexible, simplified and modern regulation. It is true that globalisation and constant technological advances have contributed to improving the development of economic activity, but they have created new risks[68] and exposed weaknesses and flaws in corporate organisation and governance systems[69], which have led to the adoption of procedures and mechanisms based on moral and ethical principles, which are based on best practices as a means of facilitating the implementation of a business culture of good compliance and respect for legality.

As Anabela Miranda Rodrigues[70] points out, a new model of (regulated) self-regulation took the form of corporate governance and compliance guidelines, a new form of public intervention in which the State assumed a more sophisticated control position. A new form of business regulation that had lost its strictly private nature, turning into a reality externally conditioned by the public authorities, whereby the State had defined structures and established the processes necessary for its development and for the pursuit of certain public purposes or interests[71].

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[67] Cf. article 73.º, n.º 2, subparagraphs a) and b), of the Notice of the Central Bank of Portugal submitted to public consultation.

[68] In this context, Anabela Miranda Rodrigues in The Emerging European Penal Law, Coimbra Editora, 2008, p.171.

[69] With regard to the liability of legal persons, João Castro and Sousa points out that the very establishment and operation of legal persons facilitates the emergence of certain illegal activities and operations *in*: Legal persons, in the light of criminal law and the so-called 'law of mere social order, Biblioteca Jurídica Coimbra Editora, 1985, p.86.

[70] Anabela Miranda Rodrigues in "A regulated self-regulation. Corporate Governance and Compliance", in: *Economic Penal Law, A Criminal Policy in the Compliance Era* Almedina, 2019, p. 45.

[71] Cf. Ogus, A., "Self-regulation", in B. Bouckaert y G. De Geest, Encyclopedia of Law and Economics, 1999, p. 588, cit. Arroyo Jiménez, Luis, "Introducción a la Autorregulación", Autorregulación y Sanciones, editorial Lex Nova, 2008, p. 24., available at https://dialnet.unirioja.es/servlet/articulo?codigo=4632380.

Compliance[72] is thus an instrument of corporate supervision, which aims to ensure that companies and their bodies comply with existing law and, ultimately, to ensure the integrity of the institution and the preservation of its assets.

On the basis of the principles affirmed by the Basel Committee in *Compliance and the Compliance Function in Banks*, the Central Bank of Portugal published Notice No 5/2008 of 25 June, which characterised the compliance function[73] as independent, permanent and effective, the institution of which was entrusted to the management body[74] through a formal process and the responsibility to provide it with adequate material and human resources to perform effectively 'the prevention, follow-up and mitigation of the corresponding risk, in the form of the possibility of allocating the financial situation of business entities, as a result of actions or omissions in breach of applicable and materialised rules'[75].

With regard to the prevention of money laundering, Law No 83/2017 of 18 August places particular emphasis on the implementation of control policies and procedures in view of the potential risk of harm to legal-penal assets posed by such activities. Those measures amount, according to Anabela Miranda Rodrigues, to the creation of compliance programmes[76] addressed to the institution itself and to the persons forming part of its organisation, making them subject to compliance with the rules and to constant monitoring and supervision. The compliance programme is designed and structured on the knowledge of the institution and its activities in such a way as to promote the integrity of the institution and a culture of compliance, which is the first condition for its effectiveness[77].

### *C Compliance Function and Compliance Officer*

Law No 83/2017 of 18 August extended the application of the anti-money laundering regime to a number of new entities (financial, non-financial and equivalent) and required the creation of the role of the person responsible for compliance[78] with the rules, who is now responsible for ensuring the effective implementation of the policies and procedures and control appropriate to the effective management of the risks of money laundering and terrorism financing to which

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[72] *International Compliance Association* defines compliance as "*the ability to act according to an order, set of rules or upon request*", cf. https://www.int-comp.org/careers/your-career-in-compliance/what-is-compliance/. João Labareda believes that the term is broad and that the appropriate alternative is to use the word "compliance", in: *Contribution to the Study of the Monitoring System and Compliance Function*, Studies of the Securities Institute, p. 7. [Electronic version] accessed on 10 October 2019 at: https://www.institutovaloresmobiliarios.pt/estudos/pdfs/1394634232compliance-jl-2013.pdf.

[73] Introduced into Portuguese national law by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004. Cf. Diogo Pereira Duarte/Francisco Passaradas, cit., pp. 207-208.

[74] Germano Marques da Silva states that it is the responsibility of the administration to organize and direct the business of the company, setting up preventive mechanisms on how to take action to prevent the commission of unlawful acts, criminal liability of companies and their directors and representatives, Editorial Verbo, 2009, p. 267.

[75] João Labareda describes the "compliance monitoring system" as corresponding to the universe of the modes of organization, resources, processes and instruments used, defined policies and action programmes, the 'compliance function', corresponding work and the structure set up to achieve the objectives set by it. *Contribution to the Study of the Control System and Compliance Function*, cit., p. 8

[76] Anabela Miranda Rodrigues states that there is a wide spectrum of entities obliged to set up compliance or compliance programmes. *Economic Penal Law – A Criminal Policy in the Compliance Era*, Almedina, 2019, p. 129.

[77] Teresa Quintela de Brito distinguishes between legal compliance aimed at preventing crimes from other types of acts whose primary purpose is not specifically criminal, in the 'Relevance of compliance mechanisms in the criminal liability of legal persons and the respective managers, in: Anatomy of Crime – Magazine of Legal and Criminal Sciences, No. 0, 2014, Almedina, p. 75.

[78] In this regard, Tiago Ponces de Carvalho on institutionalisation of a "true compliance function" for the non-financial sector, "Due Diligence and compliance in the new Anti-Money Laundering and Terrorist Financing Law", in Vida Judiciária, January/February | 2018, p. 36.

the financial entity is or might be exposed, in accordance with Article 2, paragraph 1, subparagraph j) of Notice No 2/2018 of the Central Bank of Portugal.
Although close to the figure of the person responsible for the compliance function, which had been established by Notice No 5/2008 of the Central Bank of Portugal, it appears that the person responsible for the fulfilment of the duties is appointed from among the members of the senior management or equivalent and has more comprehensive and exclusive powers, cf. Article 16 (2) of Law No 83/2017 of 18 August.
He/she shall in particular:

- Participate in the definition and give prior opinion on policies and procedures and controls aimed at preventing money laundering and terrorism financing;
- Continuously monitor the adequacy, sufficiency and timeliness of policies and procedures and controls in relation to the prevention of money laundering and terrorism financing by proposing the necessary updates;
- Participate in the definition, monitoring and evaluation of the obliged entity's internal training policy;
- Ensure the centralisation of all relevant information from the different business areas of the obliged entity;
- To play the role of intermediary for judicial, law enforcement and supervisory and control authorities, in particular by complying with the reporting obligation laid down in Article 43, and ensuring the fulfilment of other reporting and cooperation obligations.

The person responsible for compliance with the legal framework is also responsible for giving a favourable opinion on training, whether internal or external, concerning the prevention of money laundering (see Article 55) and complying with the duty to keep the documents and the analysis collected or drawn up in the context of compliance with this Notice (cf. Articles 4 and 51 of the mentioned Law).
Although separate, the Central Bank of Portugal's Notice No 2/2018 allows compliance tasks to be cumulated with those of monitoring the regulatory framework where the requirements laid down in Article 7 (5) are cumulatively met, provided that the person responsible for complying with the rules is not subject to potential conflicts arising from the assignment of responsibilities which conflict with the function of monitoring compliance with the regulatory framework or with the compliance function.
The approximation between the two figures is even more explicit if we consider that they both hold essential functions and, as such, are subject to the rules governing the suitability of members of the administrative and supervisory bodies of credit institutions, under Article 30 A of the RGICSF[79] [*Legal Framework of Credit Institutions and Financial Companies]*, whose assessment and verification of the requirements of good repute, professional qualification and availability is a matter for credit institutions and must be documented in its own report, without prejudice to any preventive monitoring by the Central Bank of Portugal under Article 30 B of the RGICSF.
Accordingly, Articles 17 (1) and (2) and 18 of Notice No 3/2020 of the Central Bank of Portugal state that 'the persons responsible for the functions of the internal control shall belong to the senior management of the institution, shall not perform any other functions within the institution and shall carry out their functions independently' and that 'they shall not, in the performance of their duties, be subordinate to the executive member of the management body who is responsible for managing the activities which each internal control function monitors and controls'[80], further acknowledging in Article 18(´1) of the same Notice No 3/2020 that "the

[79] Decree-Law No 157/2014 of 24 October, transposing Directive 2013/36/EU, recognized the existence of some positions in credit institutions whose holders, although they were not members of the administrative or supervisory bodies, exercised functions giving them a significant influence on the management of the credit institution.
[80] Cf. article 17, of Notice No. 3/2020.

suitability of those who manage risk, compliance and internal audit function is subject to authorisation for the exercise of functions by the competent supervisory authority", i.e. that we are in the presence of key function holders and, as such, they are subject to the suitability regime of members of the management and supervisory bodies of credit institutions, as indicated above.

### *D Compliance programmes and criminal liability*

Recently, the European Commission published a report on the alleged involvement of several European Union credit institutions in cases of money laundering between the years 2010 and 2018. The *post-mortem*[81] report, as it became known, points to a number of shortcomings in the processes of implementing systems for the prevention of money laundering and terrorism financing, including those resulting from poor internal organisation, the pursuit and prioritisation of high-risk business models, the absence and/or ineffectiveness of systems and compliance mechanisms for money laundering and, in some cases, failure to comply with the obligation to report suspicious transactions to Financial Intelligence Units.

These shortcomings lead us to question the importance of the monitoring and compliance mechanisms in excluding credit institutions from criminal liability in relation to money laundering, since there is no doubt that they[82] preclude strong anti-money laundering obligations which require the adoption of sophisticated internal control policies and procedures proportionate to the nature, scale and complexity of the activity carried out, the breach of which renders the institution liable for administrative offences, as is also apparent from Articles 161 and 169 A (c), in conjunction with Article 12, of Law No 83/2017 of 18 August.

In addition to this liability (administrative offence), however, we may wonder whether failure to comply or defective performance of compliance obligations may render the banking institution criminally liable[83] for the offence of money laundering, under Article 11 of the Penal Code (PC), as amended by Law No 59/2007 of 4 September (the provision of which lays down the model of the liability of the legal person for a specific act and fault). Having satisfied the first criterion (since the offence of money laundering forms part of the catalogue of offences provided for in that type), we conclude that the attribution of the offence to the institution will necessarily involve determining, at a later stage, whether the act was committed in the name or on behalf of the person in question and in the pursuit of his direct or indirect social interest, by the person occupying a leading position within it, or by a person acting in his name or on his behalf and in his direct or indirect interest, under the authority of a person in a leading position by reason of a breach of his duties of supervision or control, under the new wording of Article 11 (2) (a) and (b), of the PC, by Law No 94/2021 of 21 December, which extended the criminal liability of legal persons or equivalent entities, with the inclusion of other types of offences.

According to Neves da Costa[84], the national legal system does not allow exemption from liability of a legal person for the mere existence of a compliance programme, even if it has not been effective in preventing the commission of the unlawful act, because no compliance programme is capable of eliminating the risk of criminal offences being committed. On the

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[81] COM(2019) 373 Final – Report from the Commission to the European Parliament and the Council on the assessment of recent alleged money laundering cases involving EU credit institutions, de 24/07/2019. https://ec.europa.eu/info/files/report-assessing-recent-alleged-money-laundering-cases-involving-eu-credit-institutions_en.

[82] Tiago Ponces de Carvalho on extending the adoption of regulatory compliance programs to the non-financial sector. "The Compliance officer and the regime of criminal liability of legal persons in the new Anti-Money Laundering and Terrorist Financing Law", *Vida Judiciária*, September – October, 2017, p. 26.

[83] On the liability of legal persons, João Castro e Sousa, cit., p.86.

[84] Cf. José Neves da Costa in "Criminal liability of credit institutions and of the Chief Compliance Officer in money laundering offences, in: Studies on Law Enforcement, Compliance and Penal Law (org.: Maria Fernanda Palma, Augusto Silva Dias, Paulo Sousa Mendes), Almedina, 2018, p. 329.

other hand, he wonders whether the compliance programme can be regarded as 'express orders or instructions' under the clause excluding liability under Article 11 (6) of the Criminal Code. In answering that question, we follow closely the view taken by Teresa Quintela de Brito[85], who, with regard to the analysis of the judgment of the Oporto Court of Appeal of 27 June 2012, states that the exclusion of liability does not depend on the express nature of the order or instruction contrary to the practice of the punishable act, but on the clarity, effectiveness and efficiency of that order or instruction, having regard to the actual method of organisation, operation and legal and economic action of the legal person, in order to draw the conclusion that the mere formal existence of a compliance programme cannot be regarded as a ground for exculpatory action on the part of the legal person, nor does the absence thereof necessarily give rise to fault on the part of the person. Thus, the reputed professor states that the culture of loyalty to the law implemented and embraced in the legal and economic organisation, operation and action of the legal person will always be the most revealing and that that culture is independent of the formal existence of a compliance programme.

As Susana Aires de Sousa rightly points out, it is not apparent from the aforementioned that such programmes are necessarily irrelevant, since the compliance programme is used as a means of excusing the institution's willingness to comply with the law. Their existence may be weighed up in determining the extent of the penalty by weighing and assessing the criteria and factors legally laid down in Article 71 of the Penal Code[86].

In that sense, it seems to follow Law No 94/2021, of 21 December, approving measures provided for in the National Anti-Corruption Strategy[87], introducing a number of significant amendments to the PC and CPP, in particular as regards the substantive relevance of compliance, helping to clarify whether the act was committed on behalf of and in the functional and organisational interest of the collective body, but also to characterise the model of ethical culture and compliance with the rules actually in place, especially since the adoption and implementation of a programme of compliance appropriate to prevent the commission of crime or crimes of the same kind[88] becomes relevant for the purposes of suspending coercion measures[89] and determining and specifically mitigating the penalties to be imposed on the legal person or equivalent person, it may even be imposed by the court[90] and, in certain cases, be monitored and supervised by a court representative[91].

It therefore seems possible to conclude that, even if there were an appropriate compliance programme in credit institutions, it would not be possible to conclude that the clause excluding criminal liability laid down in Article 11 (6) of the penal Code had been established, but it would be important to take account of the corporate culture of the institution, which reflects the way in which it is organised, operated and acted, in order to determine the institution's possible criminal liability.

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[85] Teresa Quintela de Brito, cit., p. 75-91.

[86] Cf. Susana Aires de Sousa*, Fundamental Issues in Corporate Criminal Law*, Almedina, 2019, p 134

[87] Introduced relevant amendments to a number of laws (Law No 34/87 of 16 July, which determines the crimes of responsibility of political office holders; Law No 36/94 of 29 September establishing measures to combat corruption and economic and financial crime; Law No 50/2007 of 31 August establishing a new system of criminal liability for conducts that might affect the truth, loyalty and correction of competition and its outcome in sporting activities; Law No 20/2008 of 21 April establishing the new criminal regime for corruption in international trade and in the private sector, complying with Council Framework Decision No 2003/568/JHA of 22 July, the Criminal Code, approved by Decree-Law No 400/82 of 23 September, the Commercial Companies Code, approved by Decree-Law No 262/86 of 2 September, and the Code of Criminal Procedure, approved by Decree-Law No 78/87 of 17 February.

[88] Cf. article 90.º-A, n.º 4, 5 and 6 of Law No. 94/2021, of 21 December.

[89] Cf. article 204, n.º 3 of Law No. 94/2021, of 21 December.

[90] Cf. article 90.º-G, n.º 1, subparagraph b) of Law No. 94/2021, of 21 December.

[91] Cf. article 90.º-E, n.º 1 and 2 of Law No. 94/2021, of 21 December.

## IV. Conclusions

On the basis of the foregoing, it seems possible to conclude that, although built around the combat against drugs trafficking and organised crime, the phenomenon of money laundering has evolved, and does so primarily through the financial system, promoting the emergence of new risks for society which undermine the soundness and integrity of institutions and confidence in the financial system itself.

In response to such threats, the international community has been pushing forward the development of a regulatory framework that is essentially preventive in nature, based on recognised international standards which impose high compliance obligations on banks and an effort to maintain and update procedures and mechanisms, but whose existence does not, in itself, prevent the occurrence of criminal offences, nor does it exempt financial institutions from criminal liability.

It is true that recent legislative developments have brought important innovations in the substantive relevance of compliance programmes as part of a function of the internal control system that seeks to ensure resilience and good performance in order to ensure the sustainability of the (whole) institution, and whose adoption and (adequate) implementation is a decisive criterion in determining and alleviating the penalties to be imposed on legal entities, and may even be subject to enforcement and monitoring by the court.

However, despite repeated efforts to prevent money laundering, recent cases have exposed weaknesses in credit institutions which cast doubt on the effectiveness of the solutions adopted and reinforce the importance of promoting and developing an organisational culture based on strong ethical values of loyalty to Law and good compliance across the institution as a means of (effectively) preventing illicit behaviour, but also of ensuring the sustainability of institutions and the preservation of financial stability, which is essential for economic development.

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