

## **DECREE-LAW NR. 352-A/88 of October 3**

The legislation that created the Madeira Free Trade Zone, authorized, within its institutional scope, the development of industrial, commercial and financial activities by the entities to be licensed to operate therein pursuant to the regulated terms.

Some of those entities will be from countries with a legal system different from the Portuguese system, namely those of common law countries.

Accordingly, and in order to provide the said Zone with the indispensable attributes so as to attract foreign investment and to develop competition in the international markets, it is advisable to place at the disposal of those entities, the legal instruments and means on which they usually rely for the development of their activities and which are provided in other offshore centres.

Trusts are one of these cases being a characteristic institution with its origin in common law countries.

Several steps have been taken by the different common law and Roman-German law countries, in view of converging common principles relating to the law applicable to trusts and their recognition by each State.

However, the purpose of this decree merely aims at the institution of trusts destined to offshore activities, i.e., based on a criteria of extraterritoriality, without having any interference in the Portuguese internal legal system, such criteria being exclusively applied to legal entities - trust companies - subject to the same statute.

After the relevant bodies of the Madeira Autonomous Region Government having been heard:

Therefore:

In accordance with article 201 number 1 paragraph a) of the Constitution, the Government decrees the following:

### **CHAPTER I Definitions and principles**

#### **Article 1 (Definitions)**

For the purposes of the present decree, the following words and expressions shall have the following meaning:

- a) Trust or trust management - term applied to the legal relations resulting from an *inter vivos* or *mortis causa* act, through which a person, the settlor, transfers and places any assets - with the exception of immovable assets located in the Portuguese territory - under the control and management of a trustee for the benefit of a beneficiary, that may be the settlor himself or the trustee, or envisaging a specific purpose;

- b) Settlor - natural or legal person establishing the trust;
- c) Trustee or trust manager - entity to whom the assets are transferred, in accordance with the wishes of the settlor;
- d) Beneficiary - natural or legal person in whose favour the trust was incorporated;
- e) Offshore trust - a trust established in accordance with the law (admitting such institute) designated by the settlor. The settlor and the beneficiary may not be residents in the Portuguese territory and the trustee being a legal person authorised to operate as such within the institutional scope of the Madeira Free Trade Zone;
- f) Offshore trust company or branch - entity previously authorised and licensed to develop an offshore trust activity.

## **CHAPTER II**

### **Offshore Trust**

#### **Article 2** **(Characteristics of the trust)**

1- A trust has the following characteristics:

- a) The assets of a trust are totally segregated from the assets of the trustee;
- b) Title of ownership in respect of the assets of the trust shall remain in the name of the trustee or its representative;
- c) The trustee is vested with the powers and bound to the obligations to administer, manage and dispose of the assets of the trust, under the terms of the trust deed and in accordance with the law governing the trust, being also bound to render the relevant accounts thereof.

2- The maintenance of certain prerogatives by the settlor or the performance of certain rights by the trustee while and in the capacity of beneficiary is not incompatible with the existence of a trust.

#### **Article 3** **(Offshore Trust)**

1- A trust established in accordance with a legislation admitting such establishment, shall be included in the activities developed within the institutional scope of the Madeira Free Trade Zone and, as such, shall for all purposes be integrated in the referred Zone, pursuant to the terms of the following articles.

2- Trusts established in accordance with a foreign law shall be recognised in the Madeira Free Trade Zone for all purposes.

#### **Article 4** **(Specific legal requirements)**

For the purposes of the previous article, a trust shall be considered as an offshore activity provided that:

- a) The settlor stipulates the law governing the trust;

- b) The settlor and the beneficiary are non residents in Portugal, although they may be offshore entities duly licensed to operate within the institutional scope of the Madeira Free Trade Zone;
- c) The trustee is a company or branch authorised in accordance with this decree-law;
- d) The revenues of the trust do not arise from local funds, with the exception of those resulting from deposits placed with the offshore financial entities of the Zone;
- e) The trust and the beneficiaries are not paid based on local income, with the exception of the income originated in the entities referred to in the preceding paragraph;
- f) The trust does not include real property located in Portugal;
- g) The objective of the trust is not physically or legally impossible, contrary to the law or indeterminable and contrary to public order, or offensive to moral customs.

## **Article 5**

### **(Applicable law)**

- 1- The settlor or the relevant representative thereof shall expressly designate the law applicable to the trust, namely regarding matters of validity, interpretation, effects and administration.
- 2- The trust deed may foresee that the settlor may reserve the right to replace the governing law of the trust or of any of its elements susceptible of being separated, for another law of a different jurisdiction, without prejudice to the provisions of article 7.

## **Article 6**

### **(Form)**

- 1- The settlement instrument of a trust must be drawn up in writing and signed by the settlor, or by the trustee in representation thereof.
- 2- The signature must be legalised by a public notary.

## **Article 7**

### **(Mandatory clauses)**

The trust deed must contain the following:

- a) The name and identification of the trust;
- b) The full identification of the settlor, trustee and beneficiary; the identification of the beneficiaries or of a category thereof may be indicated by way of a list of particulars enabling the identification thereof;
- c) The summarized identification of the alternate trustees or beneficiaries, if any;
- d) The identification and description of the trust assets;
- e) The classification and distribution of the trust assets;
- f) The express declaration of intention to incorporate the trust;
- g) The express designation of the law governing the trust;
- h) The purpose and model or the type of trust;
- i) The process of appointment, dismissal and removal of the trustee, as well as the necessary requirements for the trustee to perform its post and for the assignment thereof;
- j) The rights and obligations between trustees, in the event of there being more than one;

- l) The powers of the trustee to manage and dispose of the trust assets, to encumber such assets and to acquire additional assets;
- m) The powers of the trustee to perform investments and to establish reserves by using the income of the trust;
- n) The relations between the trustee and the beneficiaries, including the personal liability of the trustee *vis a vis* the beneficiaries;
- o) The obligation of the trustee to render accounts of its management;
- p) The rules and restrictions, if any, relating to accumulation of income in the trust;
- q) The place of incorporation, date of settlement and duration of the trust.

## **Article 8 (Regime of the acts)**

The acts of settlement, modification or extinction of the trust, as well as the acts of transfer, disposal and charging of the assets subject thereto, shall benefit from the regime foreseen in article 11, number 2 of Decree-Law nr 165/86 of June 26.

## **Article 9 (Registration)**

- 1- The acts of settlement, modification or extinction of the trust are subject to registration, which will be mandatory in the cases where the duration of the trust exceeds one (1) year.
- 2- The registration referred to in the preceding number must be filed within a period of six months as from the settlement of the trust, in accordance with the regulation to be created for these purposes.

## **Article 10 (Registration particulars)**

The registration of as trust is based on the following:

- a) The name and identification of the trust, with the indication of its object;
- b) The date of its settlement;
- c) The duration of the trust;
- d) The name and registered office of the trustee;
- e) The date and nature of the facts susceptible of modifying and extinguishing the trust.

## **Article 11 (Secrecy and confidentiality)**

- 1- The names of the settlor and the beneficiaries are subject to secrecy and may only be disclosed by way of a court decision.
- 2- The breach of the provisions of the previous number shall cause the application of the sanctions applicable to the breach of bank secrecy.

## **Article 12**

## **(Fee)**

- 1- Each and every trust is subject to the payment of an annual fee payable prior to its incorporation and thereafter in January of each subsequent year, the payment of which shall be guaranteed by the trustee.
- 2- The amount of the fee referred to in the preceding number shall be determined by way of an order of the Regional Government of Madeira.

## **CHAPTER III Offshore trust companies and branches**

### **SECTION I Incorporation**

#### **Article 13 \* (Incorporation and operation)**

- 1 - Without prejudice to the provisions of the following number and in accordance with the terms of the present Decree-Law, the incorporation and operation of companies as well as the opening of branches by already existing institutions having as their exclusive object the trust or offshore management of trusts is hereby permitted.
- 2 - The trust or trust management activities regulated under the present Decree-Law may not include activities of a financial nature.

*\*( Wording given by Decree-Law nr 264/90, August 31)*

#### **Article 14 (Legal framework)**

Companies and branches established in accordance with the present Decree-Law shall form an integral part of the activity developed within the institutional scope of the Madeira Free Trade Zone and therefore shall for all purposes integrate such Zone.

#### **Article 15 \* (Authorisation)**

The incorporation and operation of offshore trust companies and branches is subject to authorisation by the Madeira Regional Government.

*\*( Wording given by Decree-Law nr 264/90, August 31)*

#### **Article 16 (Authorisation requirements)**

- 1 - The authorisation will take into account the interest that the implementation of the project of the applicants may have to the development of the Madeira Autonomous Region and shall be granted in accordance with convenience and opportunity criteria.

- 2 - The Madeira Regional Government may request to the applicants, other public authorities or the concessionaire of the Madeira Free Trade Zone, any additional information that the latter may consider useful or necessary for taking the decision, namely information in respect of the technical and professional capacity of the applicants.

### **Article 17 (Expiration of the authorisation)**

The authorisation expires if the applicants expressly renounce thereto and also if the company or branch is not established within a period of six months or if the relevant activity is not commenced within twelve months as from the date of the notification of the decision granting such authorisation.

### **Article 18 \* (Revocation of the authorisation)**

The authorisation may be revoked by the Madeira Regional Government. The revocation decision is subject of appeal to the Supreme Administrative Court in accordance with the general terms.

*\*( Wording given by Decree-Law nr 264/90, August 31)*

### **Article 19 (Regime)**

Without prejudice to the provisions of this decree-law, the entities referred to in article 13, shall comply with the operation and registration regime of the companies and other entities licensed within the institutional scope of the Madeira Free Trade Zone.

### **Article 20 (Name)**

The name adopted by the entities referred to in number 1 of article 13, may include the expressions trust, trust company or trust branch.

## **SECTION II Companies**

### **Article 21 (Form)**

- 1- The companies referred to in number 1 of article 13, shall be incorporated in the form of sock corporations ("*sociedades anónimas*").
- 2- No less than 51% of the shares representing the respective share capital must be nominative shares.

## **Article 22**

### **(Shareholders composition)**

- 1- The companies may be incorporated and exist thereafter with any number of shareholders, namely in accordance with article 488 number 1 of the Companies Code.
- 2- The transfer of nominative shares representing 5% or more of the share capital of the companies referred to in number 1, article 13, shall be subject to the authorisation of the Madeira Regional Government. In any event the limits contained in number 2, article 21 shall apply.

## **Article 23 \***

### **(Share capital)**

The share capital of the companies shall be determined by the Regional Government, with a minimum limit of € 99 759,58.

*\*(Wording given by Decree-Law nr 264/90, August 31 and amended by Decree-law n.º 323/2001 of the 17<sup>th</sup> of December)*

## **Article 24**

### **(Auditors)**

- 1- The companies incorporated in accordance with the present Decree-Law may, irrespectively of the amount of their share capital, choose in the relevant memorandum and articles of association the sole auditor regime.
- 2- The sole auditor shall be domiciled or have its registered office or establishment within the Portuguese territory.

## **SECTION III**

### **Branches**

## **Article 25**

### **(Guarantee of the operations performed)**

- 1- The institutions authorised to open branches of offshore trusts in the terms of this Decree-Law shall be fully liable for the operations performed by their respective branches.
- 2- The branch must be vested with all the necessary powers to assure full representation before the Regional Government of Madeira or other public authorities and third parties. The relevant address for such purpose must be chosen.
- 3- The powers referred to in the previous number shall obligatorily include the powers to receive service of process.

## **SECTION IV**

### **Performance of activity**

## **Article 26 (Management)**

The entities referred to in article 13 shall perform their duties with the care and diligence of a prudent and cautious manager.

## **Article 27 \* (Licenses)**

The entities referred to in article 13 shall pay an installation fee and an annual operation fee, in the conditions and amount to be determined in the act of authorisation.

*\*( Wording given by Decree-Law 264/90, August 31)*

## **Article 28 (Guarantee bond)**

- 1- The aforementioned entities shall, on the moment of issue of the authorisation, provide a guarantee bond in order to secure full and timely compliance with the obligations undertaken.
- 2- The Madeira Regional Government shall establish the amount of the guarantee bond upon a proposal of the concessionaire of the Madeira Free Trade Zone.
- 3- The entity in favour of whom the guarantee bond is provided may enforce such bond, regardless of any formalities, whenever the relevant licensed entity fail to comply with their obligations.
- 4- The guarantee bond shall be provided by way of a cash deposit, through a bank guarantee or through an insurance bond, whichever the licensed entities may choose.
- 5- The guarantee bond shall be available to the entity in favour of which it was provided and may only be cancelled by way of a written statement of the latter to the guarantor.
- 6- In the cases referred to in article 25, the guarantee bond shall be provided in the name of the parent company.

## **Article 29 (Authorised activities)**

- 1- Unless otherwise stipulated in the trust deed or by the law designated by the settlor to govern the trust, the entities referred to in article 13 may perform investment operations with residents in the national territory, under any form or model, in the same legal terms and conditions in which they may perform such operations with institutions established in another cambial territory.



2- Pursuant to the preceding number, the performance of any activities with the entities duly licensed to operate within the institutional scope of the Madeira Free Trade Zone is also authorised.

**Article 30 \***  
**(Audit of accounts)**

The audit reports together with the year end accounts and management report shall be sent to the Madeira Regional Government.

*\*( Wording given by Decree-Law nr 264/90, August 31)*

**CHAPTER IV**  
**Final provisions**

**Article 31**  
**(Taxation)**

The tax regime applicable to the entities referred to in number 1 article 13, is regulated by the legislation relating to the Madeira Free Trade Zone.

**Article 32**  
**(Arbitration)**

Unless otherwise is stipulated by the law designated by the settlor to govern the trust, the trust deed may foresee that arbitration be sought to settle any disputes arising between the settlor, the trustee and the beneficiaries or between the trustee and third parties.

**Article 33**  
**(Alternative courts)**

In the absence of an arbitration clause, the courts of Funchal will settle the disputes.

**Article 34**  
**(Social Security)**

The employees at the service of the entities referred to in article 13 as well as their employers are subject to the social security general regime, in accordance with the Portuguese legislation regarding such matter.

Seen and approved by the Council of Ministers on July 28, 1988 - *Aníbal António Cavaco Silva - Lino Dias Miguel - Rui Carlos Alvarez Carp - Joaquim Fernando Nogueira - Licínio Alberto de Almeida Cunha.*

Promulgated on September 29, 1988.

To be published.

The President of the Republic, MÁRIO SOARES.

Approved on September 29, 1988.

The Prime Minister, *Aníbal António Cavaco Silva*.