THE INTERNATIONAL INVESTIGATIONS REVIEW

Tenth Edition

Editor
Nicolas Bourtin

THE LAWREVIEWS

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PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for more than a decade, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the Trump administration has announced various policy modifications incrementally to moderate the US approach to resolving corporate investigations, the trend towards more enforcement and harsher penalties has continued.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And

how does a corporation manage the delicate interactions with employees whose conduct is at issue? The International Investigations Review answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its tenth edition, this publication covers 25 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
May 2020

Chapter 19

PORTUGAL

João Matos Viana, João Lima Cluny and Tiago Coelho Magalhães[1]

I INTRODUCTION

Corporate liability for criminal and regulatory offences has a long tradition in the Portuguese jurisdiction. In the past, Portuguese companies have become more concerned with proper corporate governance and more aware of the importance of effective and fully enforced compliance programmes, a fact that has led to an increasing relevance of internal mechanisms of control and supervision, as well as whistle-blowing channels and internal investigations.

According to Portuguese law, there are basically two types of possible offences: crimes and regulatory offences.

Crimes are investigated and prosecuted by an independent public prosecutor and judged in criminal courts. During the investigation stage, the Public Prosecutor's Office will attempt to discover whether a crime was indeed committed, who were its agents, and to gather conclusive evidence of the existence (or not) of criminal liability. The Public Prosecutor's Office is aided by a police force or, exceptionally, by an administrative authority (e.g., tax authorities in tax crimes, and the Portuguese Securities Market Commission in crimes against the securities market), to collect evidence of a possible criminal offence. However, some judicial diligences and acts must be ordered or authorised by a judge; namely, those acts or diligences that may affect fundamental rights.

During an investigation, a person against whom a criminal complaint is filed or who is a suspect will be named as the defendant and will have a privilege against self-incrimination; namely, the right to remain silent and also the right to request any measures to further the investigation. However, the public prosecutor is not obliged to pursue any of the measures requested except the defendant's right to be heard.

At the conclusion of the investigation, the public prosecutor decides whether to indict the defendant or to dismiss the case.

In either an indictment or a dismissal, there is an optional stage in the criminal proceeding that is entirely conducted by a pre-trial judge. This optional stage is to decide whether the case should go to trial or not. A decision by the judge confirming the public prosecutor's indictment cannot be appealed, and the trial will proceed.

Therefore, if there is an indictment by the public prosecutor or if a decision from the pre-trial judge finds sufficient evidence that the defendant has committed a crime, the case

1 João Matos Viana is a partner, João Lima Cluny is a managing associate and Tiago Coelho Magalhães is an associate at Morais Leitão, Galvão Teles, Soares da Silva & Associados.

goes to trial. This is the most important stage in criminal procedure, with full respect for the adversarial principle. At the end of the trial, the defendant will either be convicted or acquitted. It is possible, in certain circumstances, to appeal to a higher court the lower court's decision.

Regulatory offences, on the other hand, are investigated and prosecuted by administrative entities, with varying degrees of independence. These entities or regulators can apply fines that are binding and enforceable unless the decision to apply the fine is contested in court by the defendant. Most regulatory offences, when appealed, are decided in criminal courts. However, regulatory offences can also be decided in administrative courts (e.g., tax offences and offences related to urban planning) or in a specialised court (e.g., competition, energy, and financial offences). Regulatory offences have, in general, more flexible substantive and procedural requirements and some legal frameworks index the applicable fine to a company's turnover and establish collaboration and leniency programmes. These factors incentivise and reward internal investigations and self-reporting.

II CONDUCT

i Self-reporting

Under Portuguese law, there is no general duty to self-report. However, there are certain sectors, subject to supervision, where entities are required to report wrongdoing.

Specifically, the Portuguese Securities Code (Decree Law no. 486/99, of 13 November) requires financial intermediaries to report any facts that are connected to financial crimes. The Legal Framework of Credit Institutions and Financial Companies (Decree Law No. 298/92, of 31 December) establishes a similar duty, requiring the management and supervisory bodies of credit institutions to notify the Bank of Portugal of possible fraud, both internal and external, which may produce adverse effects on the institution's results or capital. Failure to notify the authorities when required to do so is a regulatory offence.

In addition, self-reporting criminal or regulatory offences committed in a corporate context to authorities, as well as cooperating with authorities in general, allows a company to reap certain benefits, depending on the legal framework applicable to the offence in question.

Article 71, number 2, subparagraph e, of the Portuguese Criminal Code, establishes that an offender's conduct after the fact is considered when fixing the applicable penalty, especially if that same conduct consists in repairing the consequences of the crime committed. In addition, the offender's conduct after the fact may be used to assess whether the criminal procedure should be suspended under Article 281 of the Portuguese Criminal Procedure Code (one of the possible negotiated solutions under Portuguese Criminal Law).

The offender's conduct after the fact is also relevant when fixing the applicable fine in various sectors of regulatory offence law, namely, under the Legal Framework of Credit Institutions and Financial Companies, the anti-money laundering legislation, the General Framework on Environmental Regulatory Offences and the General Framework on Regulatory Offences for the Media Sector.

Furthermore, certain laws establish specific regimes for self-reporting.

Under Article 405-A of the Securities Code, if the offender confesses and collaborates with the Portuguese Securities Market Commission on the collection of evidence, the applicable fine is lower, and its upper limits are halved.

Also, pursuant to Articles 75 through 82 of the Portuguese Competition Law, a company that self-reports a cartel or a concerted practice may benefit from leniency, which

may entail immunity from fines or the reduction of their amount. An amendment to the Portuguese Competition Law, which would transpose the ECN+ Directive, was proposed by the Portuguese Competition Authority to the government and is currently under discussion.

Articles 40 to 44 of the Framework on Regulatory Offences for the Energy Sector also establish a leniency programme like the one set out in Portuguese Competition Law.

ii Internal investigations

Internal investigations in a criminal context do not have a general framework in Portuguese jurisdiction.

However, internal investigations are not a common practice within the Portuguese jurisdiction to internally investigate the possible commitment of an offence, except in some specific areas, like labor law or competition law, where internal investigations are more common.

One of the reasons for the absence of more internal investigations in connection with possible criminal offences is probably the absence of plea bargaining in Portuguese criminal law and the strict limits within which a negotiated solution is allowed (there is no possible negotiated solution if the specific crime committed by the agent is punishable with imprisonment for more than five years). Because there are no plea bargains, there are significant limits to the effectiveness of internal investigations within the context of criminal liability and, therefore, companies do not feel encouraged to carry out those investigations.

However, when these investigations take place, there are different possible approaches, but they usually focus on analysing documents (on paper or digital documents) and on conducting interviews with some of the employees or members of the company.

Any internal investigation must follow the procedural guarantees set out in the Portuguese Labor Code, otherwise any sanctions applied against an employee may be invalid. Furthermore, under the General Data Protection Regulation, the Portuguese Personal Data Protection Law (Law No. 58/2019, of 8 August) and the Portuguese Safety in Cyberspace Law (Law No. 46/2018, of 13 August), all entities subject to their scope must implement adequate and appropriate measures to ensure the safety of stored data.

In the context of anti-money laundering legislation, namely Law No. 83/2017, of 18 August, obliged entities are required to examine and report activities that may be connected to possible money laundering or financing terrorism. Obliged entities must also record all filed complaints, and they must immediately proceed with the implementation of new due diligence measures whenever the complaint gives the obliged entity reasons to doubt the accuracy of the data provided by a client.

Internal investigations will most often start after someone within the structure reports facts or suspicions related to some possible wrongful activity inside the company. Usually, these investigations aim to identify the responsible party for the possible wrongful actions and therefore to protect the company from possible legal consequences, mainly criminal or regulatory. Therefore, the purpose of these investigations is to cooperate with the public authorities responsible for the investigation, providing some evidence or mitigating the company's own liability.

Most legal scholars in Portugal believe that, to use the evidence collected in the internal investigation in the following legal procedure, it is important to assure that the rights foreseen in the legal procedure are also respected in the internal investigation. This means that there is a common concern not to convert internal investigations into pre-criminal or pre-regulatory procedures, benefiting from the absence of legal regulation on the matter. In this context,

some of the evidence collected in the internal investigation may not be allowed in the criminal procedure if it has been obtained without complying with the legal requirements, particularly those evidences that in a criminal procedure can only be obtained with a judge's authorisation.

Once the company is named as a defendant, it has a privilege against self-incrimination. Therefore, the company has a right to remain silent, which means that the company's legal representative has a right to refuse to answer questions and, within a criminal procedure, not to provide any evidence that may be used against the company in a criminal case.

However, in regulated activities, entities are bound to comply with a series of rules and duties. These duties may embody collaboration duties with the supervision authorities. These duties imply, essentially, the delivery of documents that certify whether the entity is complying with the rules of the sector. Therefore, within a supervision proceeding, performed by the supervisory authority of the relevant market or economic sector, entities may be obliged to deliver certain documents to those supervisory authorities (namely those documents that the entity is legally bound to prepare and maintain), even though those proceedings may end with an accusation and condemnation for a regulatory offence.

iii Whistle-blowers

In Portugal, there is no general framework regarding whistle-blowing and the protection of whistle-blowers.

However, for certain sectors there is an obligation to develop internal mechanisms to protect whistle-blowing. For instance, the Portuguese Securities Code establishes that any person who has any knowledge of facts, information or evidence connected to possible wrongdoing shall report them to the Portuguese Securities Market Commission (Article 368-A et seq.). This Commission must protect the whistle-blower's identity, except if a court decision rules that the Commission reveal the whistle-blower's identity. The Portuguese Securities Code also establishes that if the report is true and in good faith, it cannot be deemed as possible ground for any disciplinary, criminal, civil or regulatory proceeding against the whistle-blower (Article 368-A, number 6).

Another example is the Legal Framework of Credit Institutions and Financial Companies (Decree Law No. 298/92, of 31 December) that establishes an obligation for credit institutions to develop specific, independent and adequate internal mechanisms to receive, handle and file any report on possible irregularities concerning the management, accounting organisation and internal auditing of the company (Article 116-AA). Those mechanisms must also protect the whistle-blower's identity as well as his or her personal data and the reporting per se cannot be deemed as possible grounds for any disciplinary, criminal, civil or regulatory proceeding against the whistle-blower (Article 116-AA, number 2 and number 6).

Law no. 83/2017, of 18 August, also establishes that the obliged entities must create specific, independent and adequate internal mechanisms to receive, handle and file reporting on possible irregularities concerning anti-money laundering legislation (Article 20). Moreover, the obliged entities shall also protect the confidentiality of the whistle-blowing and the protection of the whistle-blower's personal data (Article 20, number 2). The obliged entities shall not retaliate or discriminate against a whistle-blower and whistle-blowing per se cannot be deemed as possible grounds for any disciplinary, civil or criminal proceeding (Article 20, number 6).

A new version of the Portuguese Competition Law is currently being discussed and will most likely establish the protection of a whistle-blower who reports to the Portuguese Competition Authority any practice that may restrict competition.

In recent years, some companies have adopted internal measures to allow its members or employees to report possible offences in the company's structure and to provide the possibility for whistle-blowers to assure their anonymity. The need to legally regulate this matter is a fact. It would be relevant to establish rules concerning the status of whistle-blowers and their protection against possible retaliation within the company's structure.

Whistle-blowers may participate in criminal proceedings as a witness or even as a defendant and both have different legal status. A witness must answer every question truthfully during examination, while a defendant has a right to remain silent.

Although in the Portuguese jurisdiction there are no incentive programmes for whistle-blowing or specific rewards for whistle-blowers, if the whistle-blower reports some relevant facts or information to the competent public authorities, mainly to the Public Prosecutor's Office, that conduct may help mitigate a penalty if the whistle-blower is a defendant in a criminal case and indicted by the public prosecutor. As mentioned above, Article 71 of the Portuguese Criminal Code establishes that, when determining a criminal fine, the court must consider the conduct of the defendant after the illegal fact, which may help whistle-blowers to mitigate their possible penalties by cooperating with the public authorities.

Although it is not designed to protect whistle-blowers, Law No. 93/99, of 14 July, establishes certain rules and programmes regarding the protection of witnesses. A witness may receive protection if his or her life, physical or psychological integrity, freedom, or material assets of high value are in danger because of the witness' contribution to the case. This may help protect a whistle-blower's identity and anonymity.

There is also the recent Directive (EU) 2019/1937 of the European Parliament and of the Council, of 23 October 2019, on the protection of persons who report breaches of Union Law, as an EU instrument on whistle-blowing. Portugal has yet to bring into force the legislation and necessary provisions to comply with the final version of the directive.

III ENFORCEMENT

i Corporate liability

The rule in Portuguese criminal law is that only natural persons (individuals) are subject to criminal liability. However, the law establishes some exceptions, restricted to range of crimes, that allow extending criminal liability to legal persons (companies).

Article 11 of the Portuguese Criminal Code establishes that companies, except for the state or organisations acting within public authority, may be held liable for the crimes listed in paragraph 2, which include, among others: (1) trading of favours; (2) violation of prohibitions or restrictions; (3) bribery; (4) cronyism; (5) money laundering; (6) unlawful offering of an advantage; (7) corruption; and (8) embezzlement.

However, companies can only be held liable if a crime is committed on behalf of the company and for the company's benefit or interest: (1) by an individual in a leadership position; or (2) by someone acting under the authority of an individual in a leadership position because of his or her lack of surveillance or control duties incumbent upon the latter.

An individual in a leadership position is a member of a governing body or someone who has the power to control the activity of the company.

The main exception to this regime is established for the specific case of tax crimes, where a company is held liable for actions performed on its behalf and for the company's benefit or interest, by governing bodies and any representatives (Article 7 of Law No. 15/2001, of 5 July).

A company can exclude its liability by evidencing that an individual has acted against its concrete orders and instructions. Corporate liability does not exclude individual liability and does not depend on it.

Other crimes can be committed by companies as per specific legislation (for instance, Law No. 20/2008, of 21 April, regarding corruption in international trade and in the private sector, and Law No. 52/2003, of 22 August, regarding counter-terrorism).

Besides criminal liability, companies can also be held liable for regulatory offences. The legal requirements are similar to the ones mentioned above regarding criminal liability. The main difference is that, although the General Framework on Regulatory Offences (Decree Law No. 433/82, of 27 October) determines that companies should be held liable for the offences committed by their governing bodies (Article 7), most courts have broadly interpreted said principle to include in its scope actions performed by workers, members of the board or any representatives. Once again, if the company is able to demonstrate that an individual's actions are a result of a violation of express orders or instructions, its liability can be excluded.

Other specific legal frameworks, namely the energy sector, the securities market sector and the banking sector, have adopted the same criteria followed by case law regarding the General Framework for Regulatory Offences.

On the other hand, for instance, the Competition Legal Framework has adopted a similar provision to the one established in the Portuguese Criminal Code.

If there are no incompatible positions between the company and its members or employees, it is not strictly forbidden that both the company and the individuals are represented by the same counsel. Besides, if the company's defence strategy also includes the defence of its employees, a joint legal representation or, at least, a closely coordinated defence is advisable. In that case, there is no issue regarding a company's paying the individual's legal fees connected to the case.

However, if the company argues that the individual's actions were committed against its orders or instructions, the defence shall be separately conducted. In such case, any counsel who represents both parties will be acting under a professional conflict of interest. In this regard, Article 99, number 3, of the Code of Practice of the Portuguese Bar Association (Law No. 145/2015, of 9 September), establishes that a lawyer shall not represent two or more clients in the same matter or a related matter, if there is a conflict of interest between those clients. If that is the case, it is not advisable for the company to pay the individual's legal fees.

Companies may also be held civilly liable for the conduct of their employees. According to Article 500 of the Portuguese Civil Code, companies are strictly liable for all damages caused to third parties by an individual acting in its name (even if the damages are intentionally caused or against the company's orders or instructions). Nevertheless, companies have a right of recourse against said individual unless it is demonstrated that the company itself has contributed to those damages.

ii Penalties

Under Portuguese Criminal Law, there are two kinds of criminal penalty that may be imposed on companies: main penalties and ancillary penalties. Pursuant to Article 90-A of the Portuguese Criminal Code, companies may be punished by penalties of a fine or with a judicial winding-up order.

The winding-up shall only be ordered if the company was incorporated with the exclusive or predominant intention to commit crimes, or if it is being used, exclusively or predominantly, to commit those crimes by those who have a leadership position.

The concrete application of a criminal fine depends on the decision of the court. Under Article 90-B of the Portuguese Criminal Code, fines are determined in two steps: (1) establishing the number of days that compose the fine, which may never be less than 10 and that is determined in accordance with the gravity of the offence; and (2) defining the monetary value of each day in accordance with its economic and financial situation as well as any obligations to workers; in each case, the monetary value of each day shall correspond to an amount between €100 and €10,000.

In cases in which the rule of criminal law does not set a day-rate system, but solely a prison sentence, the corresponding penalty for a company will still be a fine, in which a month in prison will be equivalent to 10 days of fine.

If the applicable fine is not higher than 240 days, the court is entitled to condemn companies by a simple admonition, as set forth in Article 90-C of the Portuguese Criminal Code.

Under Article 90-D of the Portuguese Criminal Code, if the applicable fine is not more than 600 days, the court is entitled to replace it for a good behaviour bail, from €1,000 up to €1 million. This bail will be retained by the court for one to five years. If the company, in that period, commits the same crime, the bail reverts to the Portuguese State.

Furthermore, the Portuguese Criminal Code sets forth the following ancillary penalties:

a adopting necessary procedures to cease the unlawful behaviour;

b prohibition of exercising a certain activity, from three months up to five years, if the crime was committed within the scope of the company's activity;

c prohibition of engaging in certain agreements;

d prohibition of the right to receive public grants or subsidies;

e closing down of the business, from three months up to five years, if the crime was committed within the scope of the company's activity; and

f advertisement of the condemning decision.

In sectorial areas of criminal law, namely the Criminal Framework for Corruption in the International Trade and in the Private Sector (Law No. 20/2008, of 21 April) and the Anti-Money Laundering Legislation (Law No. 83/2017, of 18 August), the company will be punished with a fine according to Article 90-B of the Portuguese Criminal Code.

As foreseen in Criminal Law, under the General Framework for Regulatory Offence there are two kinds of regulatory penalties that may be applied to companies: main penalties and ancillary penalties. The main penalty applicable is also a fine.

Regarding companies' concrete penalties, in some areas of Regulatory Offences, namely, inter alia, the Anti-Money Laundering Legislation and the Legal Framework of Credit Institutions and Financial Companies, the maximum limit of the fine is aggravated

up to the following amounts: (1) 10 per cent of the annual business turnover of the financial year before the condemning decision; or (2) the double of the amount obtained as a result of the offence.

Likewise, the Portuguese Securities Code sets forth, in Article 388, number 2, that the maximum limits of applicable penalty may be aggravated up to the following amounts: (1) 10 per cent of the annual business turnover according to the last consolidated accounts approved by the board of directors in the financial year before the condemning decision; or (2) the triple of the amount obtained as a result of the offence committed.

Moreover, pursuant to Article 68, numbers 3 and 4, of the Portuguese Competition Law, the amount of the fine shall not exceed 10 per cent of the annual business turnover of the financial year before the condemning decision.

The main ancillary penalties applicable to companies, under the General Framework for Regulatory Offences, are the following:

a loss of the benefit obtained as a result of the offence;

b prohibition of exercising activities that depend of any authorisation granted by administrative agencies or other administrative authorities/bodies;

c prohibition of the right to receive public grants or subsidies;

d prohibition of the right to enter into public agreements;

e closing down business whose operations depend on an administrative business licence;

f the suspension of administrative authorisations and licences; and

g advertisement of the condemning decision.

These ancillary penalties shall only be applied in a limited period of time set forth in each sectorial legal framework. In general, Article 21, number 2, of the General Framework of Regulatory Offences establishes that the ancillary penalties, except for loss of benefit, shall not be applied for longer than up to two years.

In some cases, taking into consideration, inter alia, the *ne bis in idem* principle, companies may be held both criminally and regulatorily liable. If these offences are in a relation of consumption, the main penalty for the offence should be the one applicable to the crime, together with possible ancillary sanctions established to the regulatory offence. However, it is possible for the authorities to design the indictment as both offences (criminal and regulatory) being concurrent, and therefore requesting the application of the penalties and sanctions foreseen for both offences.

iii Compliance programmes

The existence of a compliance programme may be an important defence tool when a company faces a criminal or regulatory proceeding related to a possible offence.

However, it is mandatory that a company's compliance programme is not only approved but also fully enforced within the company's structure, with express statements and specific orders or instructions. It is not enough that the compliance programme defines the internal policy of the company, with a description of the company's values and mission. A compliance programme, to be effective or legally relevant, must establish specific guidelines concerning the company's activities, services and internal proceedings and mechanisms, and clearly stating what is forbidden according to the company's policy. It is not enough to have a programme only written on paper or with general recommendations.

In order to establish and define such a programme, it is important that the company conducts a very careful risk assessment, taking into consideration its activity, business sector

and the already adopted internal proceedings. That risk assessment should also analyse the country's main features and the features of the countries where the company has commercial activities or trade relationships. This due diligence should also identify people and services that may represent a higher risk of disrespecting the rules and internal proceedings. And that due diligence and risk assessment must always be carried out regarding a counterpart in a business or contract, before initiating a formal relationship with that other company.

When it is defined and approved, the programme should be presented and explained to all members and employees and always accessible to be read and consulted. And it is advisable that the company develops and maintains an internal compliance department, working closely with management and several departments. The compliance department and the compliance officer shall be responsible for establishing rules, improving the internal proceedings and mechanisms, and for the constant updating of the internal programmes and duties. The company may also request an external and independent auditor to analyse its compliance programmes and internal proceedings, therefore granting an additional note of adequacy and sufficiency for those programmes and proceedings.

It is also important to have internal training sessions to explain the programme to all members and workers within the company's structure. Some compliance programmes may also include a disciplinary system in case of its violation, as well as a system for protection of whistle-blowers, to assure and protect their anonymity and the confidentiality of the reported information.

The specific regulation and legal relevance of the compliance programmes depend on the sector of activity. Usually, companies operating in the financial and economic sector have been more regulated than the others, facing more legal obligations in this matter.

As explained before, according to Article 11, number 6, of the Portuguese Criminal Code, a company may not be held criminally liable if it is able to prove that the individual, who adopted a certain conduct or behaviour, acted against concrete orders or instructions from one who has the authority within the company.

An adequate and fully enforced compliance programme may therefore be used as an argument of defence to exclude the company's criminal liability.

The same rule applies to certain regulatory offences, namely in the context of the energy sector (Article 37, number 3, of Law No. 9/2013, 28 January), the banking sector (Article 203, number 2, of Decree Law No. 298/92, of 31 December) and also offences regarding anti-money laundering (Article 162, number 2, of Law No. 83/2017, of 18 August). In what concerns the securities market legal framework, the company may not be held liable if the individual acted against express, specific and individual orders or instructions provided to him, before committing the offence (Article 401, number 3, of Decree Law No. 486/99, of 13 November).

Even if the compliance programme does not exclude the company's liability, it may help mitigate the penalty. According to Article 71 of the Portuguese Criminal Code, which establishes the general rules regarding the relevant factors that help determine the penalty, it is mandatory to consider all circumstances that may be against or in favour of the defendant. A compliance programme may help mitigate the severity of the offence or it may be deemed as previous conduct that mitigates the severity of the offence.

The same applies to regulatory offences, as a fully approved and enforced compliance programme may help mitigate the severity of the offence and the company's fault, according to Article 18, number 1, of Decree Law No. 433/82, of 27 October.

iv Prosecution of individuals

As mentioned before, according to Article 11, number 7, of the Portuguese Criminal Code, a company's liability does not exclude an individual's liability and does not depend on it.

In most legal cases investigated and ruled in Portugal, companies and some of their individual employees were simultaneously considered liable or, at least, simultaneously investigated. The Portuguese model of corporate liability is not strictly an example of personal liability, meaning that it is grounded on the wrongdoing of specific individuals that represent the company. Therefore, it is important to identify the individuals or group of individuals who committed the offence (or omitted a required conduct) on behalf of the company and for the company's benefit or interest.

This is also the rule in regulatory offences, namely in offences set forth in the energy sector (Article 37, number 5, of Law No. 9/2013, of 28 January), in the banking sector (Article 204, number 1, of Decree Law No. 298/92, of 31 December) and in the securities market sector (Article 401, number 5, of Decree Law No. 486/99, of 13 November).

As mentioned above, if there is no conflict of interest between a company and its members or employees, they can be represented by the same counsel.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Article 4 of the Portuguese Criminal Code establishes that Portuguese criminal law shall be applied to the offences committed: (1) in the Portuguese territory, regardless of the offender's nationality; and (2) in Portuguese ships or aircrafts, unless international treaties and conventions to which Portugal is a party provide otherwise.

However, Article 5 mentions several cases in which Portuguese criminal law is also applicable, even though the offence is committed abroad. They are mostly related with:

a certain types of crimes, such as crimes concerning counterfeiting of currency, debt security and sealed values; crimes against national independence and integrity; crimes against the Constitutional State; sexual crimes; kidnaping; slavery; female genital mutilation; forced marriage; human trafficking and crimes against nature; as long as the offender is found in Portugal and cannot be extradited; or with

b the nationality principle, considering that the offence is committed by or against a Portuguese person, if: (1) the offender is found in Portugal; (2) the offence is also punishable under the law of the state where it was practiced; and (3) it is possible to extradite for such crime, but extradition is not granted in that case.

As for companies, according to Article 5, number 1, subparagraph g of the Portuguese Criminal Code, Portuguese criminal law is applied when an offence is committed abroad by or against a company that has its registered office in Portugal.

In relation to crimes concerning corruption in the international trade and in private sector, the above-mentioned general rule provided by Article 4 is also applicable. Nevertheless, under the terms of Law No. 20/2008, of 21 April, Portuguese law shall also be applicable in case: (1) of active corruption affecting international trade, in connection to offences carried out by Portuguese or foreigners who are found in Portugal, regardless where the offences were committed; or (2) of active or passive corruption in the private sector, regardless of where

the offences were committed, when whoever promises, requests or accepts an advantage or promise is a national official or holder of a national political load or, being Portuguese, is an employee of an international organisation.

Specifically concerning terrorism, Law No. 52/2003, of 22 August, provides that, besides the general rule, Portuguese law is also applied to offences committed abroad in case: (1) they constitute a crime of terrorist organisations or terrorism; or (2) when they constitute crime of other terrorist organisations, international terrorism or terrorism financing, provided that the offender is found in Portugal and cannot be extradited or handed over in execution of a European arrest warrant.

Concerning drug trafficking (Decree Law No. 15/93, of 22 January), Portuguese criminal law is still applicable to offences committed outside the national territory when they are carried out: (1) by foreigners, provided that the offender is in Portugal and is not extradited; or (2) on board a ship against which Portugal has been authorised to take the measures provided for in Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

In what concerns regulatory offences, the general rule is the same as provided for criminal offences.

However, there are some exceptions to this general rule provided by specific regulatory regimes. For instance, in what concerns the Legal Framework of Credit Institutions and Financial Companies, besides the general rule, Portuguese law is also applicable to offences committed abroad by credit institutions or financial companies having their registered office in Portugal and operating there through branches or by providing services, as well as by individuals who represent those entities or are their shareholders. On the other hand, Article 2 of Competition Law establishes that Portuguese law is applied to the prohibited practices and concentration of undertakings which take place in Portuguese territory or whenever these practices have or may have an effect there, provided that international obligations assumed by the Portuguese state are met.

ii International cooperation

Portugal has ratified numerous international instruments – bilateral and multilateral – that simplify the cooperation between states.

Being part of the Community of Portuguese-Speaking Countries, Portugal also participates in several conventions that ease the cooperation between those countries. These conventions cover specific terms for extradition, mutual assistance in criminal matters, and transfer of sentenced persons.

Moreover, as a European Union Member State, Portugal has a closer cooperation with other Member States. For instance, Law No. 65/2003, of 23 August, which implemented the European Arrest Warrant, is of utmost importance in EU cooperation, by eliminating the use of extradition, so the proceedings are swifter and with shorter time limits, albeit the rights of defence are respected. Moreover, Law No. 88/2017, of 21 August, establishes a regime for the enforcement of a decision rendered by a judicial authority of an EU Member State in another Member State concerning specific investigatory measures, to obtain evidence. The exchange of data and information between EU Member States in the context of an investigation is also eased by Law No. 74/2009, of 12 August. On the other hand, Law No. 36/2015, of 4 May, provides a regime for the recognition and supervision of the enforcement of decisions on constriction measures as an alternative to pre-trial detention, as well as the surrender of a person between EU Member States in the event of non-compliance with the measures

imposed. Law No. 158/2015, of 17 September, is also of maximum importance once it is concerned with the recognition of judgments rendered in the EU context, establishing a legal regime for the transmission and enforcement of decisions in criminal matters imposing prison or other custodial measures for the purposes of enforcing those decisions in the European Union. Finally, worth noting is Law No. 88/2009, of 31 August, which provides the legal framework for the issuance and transmission by a competent court in criminal matters, of decisions on the confiscation of property, or other products of crime, in the context of criminal proceedings, concerning their recognition and enforcement in another EU Member State.

Alongside international and European instruments, multiple national instruments have been approved to ensure international cooperation. The International Judicial Cooperation Law in Criminal Matters (Law No. 144/99, of 31 August) is the most relevant instrument, because it establishes a comprehensive regime concerning extradition, transfer of criminal procedures, enforcement of criminal judgments, transfer of sentenced persons, supervision of conditionally sentenced or conditionally released offenders and mutual assistance in criminal matters.

In relation to extradition, Portugal has signed a large number of bilateral treaties. According to those treaties, the principle of reciprocity is the basic principle that provides the possibility of extradition, subject to certain exceptions. Also, as a matter of principle, Portugal does not extradite its own nationals. Besides, for Portugal to grant extradition it is necessary that the offence at stake is considered a crime both in Portugal and in the requesting state and that such offence is punishable with a minimum of one year of imprisonment.

Finally, the extradition request shall be refused if: (1) there are grounds to admit that such request is based on any form of discrimination or for political reasons; (2) the offender's procedural guarantees are diminished because of any discriminatory factor; or (3) the offence at stake is punishable by death, irreversible injury or with life sentence in the requesting state, unless it ensures that such penalties will not be applied.

The Cybercrime Law (Law No. 109/2009, of 15 September) establishes some rules regarding international cooperation. Under the terms of that law, among other rules and measures, the criminal police assures that a contact point is permanently available to provide expert advice to other contact points and to preserve data, to collect evidence and to locate suspects in case of urgency.

iii Local law considerations

Regarding bank secrecy, Portuguese authorities may refuse to provide information in the context of an international investigation grounded on Article 78 of Decree Law No. 298/92, of 31 December. However, Article 81 of the same Decree Law provides a comprehensive regime not only concerning cooperation with other EU Member States, but also in relation to non-EU Member States, on a reciprocity basis, within the scope of cooperation agreements, regarding the information required for supervision on an individual or consolidated basis of credit institutions having their registered office in Portugal and of similar institutions having their registered office in those countries.

As regards data privacy, recently approved Law No. 58/2019, of 8 August, which alongside Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, limits the possibility of exchanging information regarding personal data. In relation to third countries, pursuant to Article 22 of Law No. 58/2019, of 8 August, the transfer of data to non-EU Member States or international organisations, carried out in

compliance with legal obligations, by public entities in the exercise of authority powers, are deemed to be in the public interest for the purposes of Article 49, number 4, of Regulation (EU) 2016/679.

Finally, regarding letters rogatory, Article 232 of the Portuguese Procedural Criminal Code establishes that Portuguese authorities can refuse to comply with those letters if: (1) the requested judicial authority is not competent to perform the act; (2) the request concerns an act prohibited by law or if it violates the Portuguese public order; (3) the execution of the rogatory effects the sovereignty or security of the State; and (4) the act entails the execution of a foreign court decision subject to review and confirmation and the decision is not revised and confirmed.

V YEAR IN REVIEW

In recent years, there have been some high-profile cases where a company's liability has been analysed.

For instance, in the *E-toupeira* case, the criminal liability of Benfica SAD (a Portuguese football club) was dropped, because the court ruled that the individual offender did not occupy a leadership position within the company and that the offence had not been committed on behalf of the company nor was it committed for its benefit or interest. The court also ruled that the company did not violate any surveillance or control duties, through someone occupying a position of leadership, pursuant to Article 11 of the Portuguese Criminal Code.

As previously mentioned, in the context of the European Union, a directive on the protection of persons who report breaches of Union law was enacted (the Directive). This Directive applies to persons who work for a public or private organisation or who are in contact with such organisation in the context of their work-related activities that report any breach of the Union law possibly harmful to the public interest. This Directive aims to protect whistle-blowers against any possible retaliation by setting up safe internal reporting channels. Portugal shall bring into force the necessary laws, regulations, and administrative provisions to comply with this Directive by 17 December 2021.

Furthermore, Portugal has been working on new anti-bribery legislation for several years, including the regulation of lobbying activity and alternatives to the criminalisation of unlawful enrichment. There was a draft law on that matter that was dismissed as unconstitutional by the Portuguese Constitutional Court.

Regarding the regulation of lobbying activity, the statute approved by the Portuguese parliament on this subject in July 2019 was vetoed by the Portuguese President for having some insufficiencies that have yet to be rectified. The discussion on the regulation of lobbying activity, namely in what concerns the rules of transparency applicable to private entities that carry out legitimate representation of interests before public entities, is expected to proceed during the following months.

Moreover, in the past year, Law No. 52/2019, of 31 July, introduced the exclusivity obligation in the exercise of public office and the obligation to present, in a single document to be accessible online, all the income and asset declarations issued by holders of political positions and high public offices. This declaration shall also include every act and activity that may lead to incompatibilities and impediments of the holder of political position or high public office. In addition, under the Organic Law No. 4/2019, of 13 September, the Entity

for Transparency of Holders of Political Positions and High Public Offices was officially created as the body responsible for monitoring and assessing the truthfulness of the income and asset declarations issued by public officers.

VI CONCLUSIONS AND OUTLOOK

In the near future, some major criminal and regulatory cases in Portugal will have relevant developments. In particular, there will be a pre-trial decision on the possible submission to trial of the case known as *Operação Marquês*, where a former Portuguese Prime Minister is accused, among others, of the crime of corruption by a political office holder. Furthermore, some relevant decisions are also expected regarding criminal and regulatory investigations in the resolution of BES, one of the biggest banks in the Portuguese financial system. This occurred in 2014, but the investigations are still ongoing.

From a different perspective, it is expected that the Public Prosecutor's General Office and the regulatory authorities of the financial system will continue to tighten their supervision on operations that may reveal evidence of money laundering – a trend that started in 2017, with the new law on the prevention and prohibition of money laundering and a possible increase of money laundering cases.

Finally, since the Portuguese indicators on public perception of transparency and illicit practices within the state administration are still not favourable, the discussion about new measures to fight against corruption is likely to continue, and new forms of leniency practices and agreements will be implemented.

Appendix 1

ABOUT THE AUTHORS

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João Matos Viana joined the firm in 2001 and became a non-equity partner in 2019. He is head of a criminal and compliance team. He currently practices in the area of litigation, focusing specifically on criminal and administrative offences involving banking, securities, insurance competition and pharmaceutical law. João collaborates regularly in administrative, tax and corporate areas regarding the criminal and administrative matters. João Matos Viana is the author of several articles regarding criminal law and criminal procedure law.

JOÃO LIMA CLUNY

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João Lima Cluny joined Morais Leitão in 2007. He is a member of the firm's criminal and compliance team. His practice focuses on the assistance of clients in the context of criminal and regulatory offences and particularly in economic and financial domain. João has been involved in high-profile litigation cases in Portugal and has extensive trial experience, especially regarding corporate liability.

In recent years, João has been intensely working on matters related to compliance (regarding the prevention of corruption and money laundering), internal investigations and regulatory enforcement in different sectors such as sports, energy, competition, environment, banking, capital markets, labour, tax and media.

He is also a member of the arbitration, sport and entertainment, and infrastructure teams.

He is a member of the first instance club licensing body for UEFA competition of the Portuguese Football Federation and a member of the certification jury for the recognition, validation and certification process of professional competences of football coaches, nominated by the Portuguese Football Federation. He is also president of the Justice Council of the Portuguese Bridge Federation.

João Lima Cluny is an arbitrator and mediator of the Portuguese Court of Arbitration for Sports.

On the academic circuit, he holds a master's degree in Forensic Sciences at the Nova Law School, where, since 2014, he teaches as Guest Professor (Interdisciplinary Legal Practice). He regularly participates in seminars and conferences predominantly on Criminal Law and Criminal Procedure, Arbitration and Sport's Law. He is an author and co-author of articles on the same matters.

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Tiago Coelho Magalhães joined Morais Leitão in 2016. He is a member of the firm's litigation team. His practice is mainly focused on criminal litigation and regulatory offences, as well as on matters concerning compliance. He previously worked with the firm's European and competition law team.

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