



Update

Momentum

Corporate Crime and Regulatory Compliance

June 30, 2017

REVISION OF THE LEGAL FRAMEWORK FOR SANCTIONS CONCERNING CRIMINAL AND ADMINISTRATIVE INFRACTIONS IN THE FINANCIAL SECTOR

Law No. 28/2017, of May 30, which amends the Portuguese Securities Code («PSC») and Decree-Law No. 357-C/2007, of October 31, entered into force on June 30, bringing about a very significant reform of the legal framework for sanctions in the financial sector.

In an effort to improve the material and adjectival solutions enshrined in Portuguese law, this revision adapts the national regime to the new European framework for market abuse, fully transposing the new Market Abuse Directive (Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse – «**MAD**») and also adapting Portuguese law to the Market Abuse Regulation (Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse – «**MAR**»).

1. Market manipulation and inside information

The **crimes against the markets** classically provided for in the PSC (*market manipulation and insider dealing*) are, with this revision, subject to specific changes, in order to cover **new types of phenomena** (e.g., benchmarks, emission allowances or spot commodity contracts) and to **extend the list of criminal acts** under Portuguese law (e.g., the cancellation or the amendment of an order, or the attempt to cancel or amend an order, may constitute insider dealing).



Furthermore, in cases where the agent's conduct provokes or contributes in an effective way to an artificial alteration of the regular functioning of the markets, the maximum penalty applicable to the crime of **market manipulation** is now of **8 years of imprisonment** (instead of the previous 5 years).

Among the main changes introduced by the reform, it is also worth mentioning the introduction of the new crime of **using false or misleading information in the capture of investment**. In this crime, punishable by imprisonment from 1 to 8 years, the conduct subject to criminalisation consists in the act of deciding or deliberating a capture of investment, for the entity itself or for a third party, with the use of false or misleading economic, financial or legal information. This new legal provision corresponds, however, to the introduction of a new market crime into Portuguese law without the existence of a proper European command or directive that necessarily imposes it, and also without having other Member States accompanying Portugal in this measure, as it is a crime existing in only three other European jurisdictions (namely, Germany, Italy and Spain). In this vein, even though MAD contains guidelines for strengthening criminal sanctions, the addition to the national regime of this new crime constitutes a clear case of **gold-plating** that could have perverse effects on the Portuguese capital markets, such as discouraging potential offers aimed at the Portuguese markets.

2. Strengthening of the applicable sanctions

The catalogue of penalties for administrative offences is also subject to change as regards its typology and extension, with a notable strengthening in terms of amounts and duration of fines and ancillary sanctions.

Concerning the **main sanctions**, the framework of the fines applicable to **less serious misconduct** has doubled from € 2,500.00 to € 5,000.00 (minimum limit of the penalty) and from € 500,000.00 to € 1,000,000.00 (maximum sentence). On the other hand, with regard to the **major offences**, they are now punishable with a maximum limit of 10% of turnover, with the exception of the offences resulting from market manipulation and the use or transmission of inside information, which are punishable by a fine up to 15 % of the turnover of the infringing entity.



In turn, the catalogue of **ancillary penalties** has also been widened to include (i) the prohibition of trading on one's own account, and (ii) the cancellation of registrations or the revocation of authorisations for the exercise of management, directorship or supervisory functions in entities subject to the supervision of the Portuguese Securities Market Commission (CMVM - Comissão do Mercado de Valores Mobiliários).

Moreover, the provisions regarding the **exclusion of the legal person's administrative liability** has also been subject to changes, it now being necessary, in order to exclude said liability in cases in which the agent acts against orders or instructions of the legal person, for said orders or instructions to be precise and specific and to have been transmitted to the agent, in writing, before the fact.

3. Procedural amendments

Guided by the aim to clarify and to simplify the procedure, some changes were also introduced into the procedural domain. Within this context, particular mention should be made of the establishment of a **new regime of extraordinary attenuation of the sanction based on a system of confession and collaboration** by the defendant. The application of this new regime could lead to:

- i. the reduction of the maximum and minimum limits of fines by one-third when the defendant confesses to the facts of which he or she is accused, provides relevant information in order to reveal the truth of facts or effectively assists in the production of evidence that is decisive for establishing the facts or for identifying other perpetrators;
- ii. the reduction by half of said limits when the defendant simultaneously confesses and contributes to the confirmation of the facts or to identifying other perpetrators.

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