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§ 19. Portugal

I. Compliance in Portugal[1]

Regulatory compliance rules require legal persons, such as companies, to comply with relevant laws and regulations. According to the Bank for International Settlement, the term "compliance risk" is defined as "the risk of legal or regulatory sanctions, material financial loss, or loss to reputation a bank may suffer as a result of its failure to comply with laws, regulations, rules, related self-regulatory organisation standards, and codes of conduct applicable to its banking activities".[2]

It is important to clarify that there is no general rule that obligates companies in Portugal to adopt compliance programmes. However, the existence of a compliance programme often serves as a defence in criminal or administrative proceedings. By having an effectively implemented compliance programme, the company makes clear that it is concerned with obeying the law, despite something clearly having gone wrong.

However, in certain cases, compliance is mandatory. For example, financial intermediaries are obliged to adopt internal policies and processes (Article 305-A of the Securities Code). The financial intermediary must establish internal protocols that allow him to assess the risks involved with the financial activity. Financial intermediaries are also obligated to (i) assess the adequacy and strength of the steps and processes used to detect the risk of non-compliance, and (ii) report to the management board and the surveillance body any compliance risks that were detected in order to allow them to properly address said risks.

Pursuant to Law no. 25/2008 of June 5, certain companies are required to have compliance programs in order to combat money laundering and the financing of terrorism.

Compliance is very important for Portuguese companies, especially those who are involved in regulated areas of activity. According to KPMG's Global Anti-Money Laundering Survey 2014, companies should: (i) "Nominate a member of the Board to be responsible for maintaining effective Anti-Money Laundering controls"; (ii) "Ensure a broad-ranging assurance program is in place which tests systems, processes and procedures; and (iii) Prepare effectively for regulator visits, and ensure that the Board can demonstrate awareness and oversight".[3]

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[1] With contributions by Rui Cardona Ferreira, Partner and Lawyer; Ana Moutinho Nascimento, Lawyer; Magda Sousa Gomes, Lawyer; João Carmona Dias, Lawyer; Raul Taborda, Lawyer; David Silva Ramalho, Lawyer and Marta Salgado Areias and José Duarte Coimbra, Trainee-Lawyers at Sérvulo & Associados – Sociedade de Advogados, RL.

[2] Bank for International Settlements, "Compliance and the compliance function in banks", April 2005, page 7 available in http://www.bis.org/publ/bcbs113.pdf.

[3] https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/global-anti-money-laundering-survey/Documents/global-anti-money-laundering-survey-v3.pdf.

II. The most relevant fields of law in Portugal that a business will have to cover with its compliance management activities

It would be impossible to describe every relevant field of law that a business must cover with its Compliance Management activities. In theory, every company, regardless of its particular area of activity, should have a compliance programme. Every company has tax obligations. And every company is at risk of committing administrative and criminal offences. However, compliance programmes are particularly important for those who intervene in regulated areas of activity. Bellow, there is a list of the most relevant fields of law.

1. Anti-corruption

Main relevant laws:

- Articles 373 and 374 of the Portuguese Criminal Code (*Código Penal*).
- Law no. 20/2008 of 21 April, last amended by Law no. 30/2015 of 22 April, which provides for the new legal regime against corruption in the international business and in the private sector, according to the Framework Decision 2003/568/JAI on combating corruption in the private sector, which also applies to bribing foreign government officials.
- Law no. 54/08 of 4 September, which provides for the creation of the Corruption Prevention Board.
- Law no. 19/2008 of 21 April, last amended by Law no. 35/2015 of 22 April, which provides for the creation of anti-corruption rules.

The Portuguese Criminal Code differentiates between active and passive corruption in the public sector, but it does not define corruption. Active corruption focuses on the briber, and involves granting something of value with the intention of receiving an illicit advantage. Passive corruption is the opposite, i. e., the act of receiving something of value in order to perform an action or an omission intended to benefit the giver. Generally, Article 374 of the Portuguese Criminal Code (concerning active corruption) provides that any person who offers or promises to provide an advantage to a public official in the exercise of his/her duties, or to any other person with the public official's knowledge or by his/her designation (excluding foreign officials[4]), may be subject to imprisonment of between 1 and 5 years. Legal persons may be fined from EUR 12,000 to EUR 6,000,000. Article 373 of the Portuguese Criminal Code (concerning passive corruption) provides that a public official (excluding foreign officials) that requests or accepts an advantage or promise of such an advantage for himself/herself or third party, in return for said public official acting against his/her duties, may be imprisoned for from 1 to 8 years.

The Portuguese Criminal Code does not include bribery of foreign officials (with the exception referred above). This was only enacted by Law 20/2008 of 21 April. In 2003, the European Council adopted the Framework Decision 2003/568/JAI on combating corruption in the private sector. Its aim is to "ensure that both active and passive corruption in the private sector are criminal offences in all Member States, that legal persons may also be held responsible for such offences, and that these offences incur effective, proportionate and dissuasive penalties."[5] A foreign government official is a person that is

[4] Unless they are foreign officials of other EU member states or members of an organization in which Portugal is a member. In these cases, bribery also includes these employees whenever the infringement is committed in Portuguese soil.

[5] Recital 10 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.

assigned by a foreign country to perform public functions in another country. According to Article 7, if the act of bribery serves the purpose of maintaining a business, contract, or other illicit advantage in international trade, and a public official, national or foreign, is aware of said bribery, then those directly involved may be imprisoned for from 1 (one) to 8 (eight) years. If the perpetrator is a company, said company may be fined from EUR 120,000,00 to EUR 9,600,000,00.

Law no. 54/2008 of 4 September created the Council for the Prevention of Corruption, an independent administrative authority presided over by the President of the Audit Court whose mission is to combat and prevent corruption.

2. Antitrust law

Main relevant laws:

- Treaty on the Functioning of the European Union, Articles 101 to 108 (there is no official codified version of the Treaty published in the EU or Portugal; the last consolidated version was published in the OJ, C 326, of 26.10.2012, although not updated as it lacks the Croatia Accession and amendments to treaties).
- Competition Act (Law 19/2012, of May 8, 2012 Competition Act).

The culture of compliance regarding competition law is not very developed in Portugal. Multinational and international companies tend to be much more aware of the need for strong compliance programmes and systems, since they act in a multi-jurisdictional arena. However, given the economic concept of "undertaking" and the high level of fines that may be levied for failure to comply with competition law, the fact that small and medium size companies do not show the same level of concern in increasingly unjustified, thus, increased awareness of competition law, and of the need to comply with it, is needed in Portugal. Portuguese competition law is growingly mirroring EU competition rules. The statutes of the *Autoridade da Concorrência* (the Portuguese Competition Authority, hereinafter AdC) were revised following the entry into force of the independent economic regulators law (Law 67/2013 of 28 August) and approved by Decree-Law no. 125/2014 of 18 August. The objectives of competition law are affirmed in the Portuguese Constitution.

Under the international intervention in Portugal due to the sovereign crisis, the competition act was reformed, a new judiciary specialised in regulation and competition was created and the AdC was given much broader powers to enforce Competition law. Also, private enforcement is becoming more visible with some extra-contractual liability cases (the violation of imperative competition rules) pending. There may also be consequences for contracts in private enforcement cases as agreements contrary to imperative legislation are null and void under Portuguese law. In 2006, a leniency policy was implemented that has recently been further aligned with the EU model (AdC's Regulation no. 1/2013 of 3 January). A reduction of fine, either total or partial, is the greatest incentive to participate in said leniency program both in Portugal and at the EU level. Also, the 2012 Competition Act allows for other forms of closing procedures (*e. g.* settlement).

3. Money laundering

Main relevant laws:

- Article 368-A of the Portuguese Criminal Code.
- Law no. 25/2008 of 5 June, last amended by Law no. 118/2015 of 31 August, which requires the establishment of preventive measures to combat money laundering and the financing of terrorism.

- Law no. 52/2003 of 22 August, last amended by Law no. 60/2015 of 24 June, which enacted the law on combating the financing of terrorism.
- Law no. 5/2002 of 11 January, last amended by Law no. 55/2015 of 23 June, which requires the establishment of measures to combat organized crime and economic/financial crime.

According to article 368-A of the Portuguese Criminal Code, introducing illegally obtained assets to the commercial or financial system is a crime punishable by from 2 to 12 years imprisonment. However, if the perpetrator is a legal person (i. e. an enterprise such as a company) it may be fined between EUR 24,000,00 and EUR 14,000,000,00.

There are also certain rules related to money laundering that apply to financial entities and certain non-financial entities, such as those who deal in cash transactions of EUR 15,000,00 or more. Non-compliance with these rules may result in the company receiving administrative fines (i. e. fines that are imposed by an administrative authority or by a regulator) of between EUR 5,000,00 and EUR 500,000,00.[6]

Pursuant to Law no. 25/2008 of 5 June, entities subject to this provision are obliged to have a compliance program, and to adopt internal policies in order to prevent money laundering and the financing of terrorism. According to Article 21 of Law no. 25/2008, "entities under the scope of this provision shall define and apply internal proceedings to fulfil the objectives stated in this law, in matters of internal audit, evaluation and risk management in order to prevent money laundering and financing of terrorism".

4. Data protection

Main relevant laws:

- Constitution of the Portuguese Republic (Constituição da República Portuguesa), the revised version last amended through Law no. 1/2005 of August 12.
- Personal Data Protection Act (Lei da Protecção de Dados Pessoais), enacted by Law no. 67/98 of October 26, last amended by Law no. 103/2015 of August 24.
- Personal Data Protection and Privacy in Telecommunications Act (Lei da Protecção de Dados Pessoais e Privacidade nas Telecomunicações), enacted by Law no. 41/2004 of August 18, last amended by Law no. 46/2012 of August 29.
- Law on the Organization and Functioning of the National Data Protection Authority, enacted by Law no. 43/2004 of August 18.
- Portuguese Criminal Code (Código Penal) enacted by Decree-Law no. 48/95 of March 13, last amended by Law no. 110/2015 of August 26.

The original Article 35 of the Constitution of the Portuguese Republic included reference to the protection of personal data and to the general prohibition of processing certain types of sensitive data with computers. However, it was not until 1991 that data protection would be addressed by the Portuguese legislature, by means of the approval of Law no. 10/91 of April 29, also known as Act on Personal Data Protection regarding the use of computers. In addition to creating a legal regime for the protection of personal data, Law no. 10/91 of April 29 also created an independent administrative authority called the National Computerized Personal Data Protection Authority (*Comissão Nacional de Protecção de Dados Informatizados*), to enforce the Law.

After Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data entered into force, and taking into consideration the fourth revision of Article 35 of the Constitution of the Portuguese Republic, dated 1997, changes to the existing national legislation regarding data protection became necessary.

[6] Law no. 25/2008 dated of 5 June.

The Portuguese legislature passed the Personal Data Protection Act (*Lei da Protecção de Dados Pessoais*) which repealed Law no. 10/91 of April 29, and Law no. 28/94, of August 29, With the repeal of said laws, the National Computerized Personal Data Protection Authority ceased to exist and the new Law brought forth the National Data Protection Authority (*Comissão Nacional de Protecção de Dados*), whose functioning and organization would later be regulated by means of the Law on the Organization and Functioning of the National Data Protection Authority, approved by Law no. 43/2004, of August 18.

The Portuguese legal regime on data protection is based on four main concepts: transparency, proportionality, purpose, and consent. Therefore, data must be processed in a transparent manner, meaning that the data holder is aware of its occurrence and limits. Secondly, the data processed must be relevant and proportional to the purpose for which it is processed. Thirdly, each processing must be for a specific purpose and only that purpose. Finally, the data subject must give his/her unequivocal consent to the processing of the data, except for in specific circumstances[7]. The processing of sensitive personal data is generally prohibited. Sensitive personal data is any data that reveals one's philosophical or political beliefs, political party or trade union membership, religion, privacy and racial or ethnic origin, and health or sex life, including genetic data. However, sensitive personal data may be processed if doing so is specifically permitted by law. Such processing is also permitted if the National Data Protection Authority authorizes it on important public interest grounds or if the data subject gives his explicit consent for such processing. In both situations, the data processor must provide a guarantee of non-discrimination and that they will abide by the security measures provided for in the law (which, in case of health-related data tends to be stricter).

All data processors must notify the National Data Protection Authority of their data processing through filling out an online form indicating the type of data to be collected, the occurrence of data communication, the destination of said communication, the length of the data conservation, and the purposes of the processing, amongst other information. However, if the data to be collected is deemed to be sensitive, the notification must follow an authorization procedure and the data processing is prohibited until the National Data Protection Authority has authorized it.

Though the Portuguese legal regime is fundamentally identical to the one created by Directive 95/46/EC, its application must be combined with a set of exemptions, orientations and interpretative decisions issued by the National Data Protection Authority. These decisions are of great importance given that they allow one to understand the Authority's position on certain subjects and to adapt one's requests in conformity therewith.

Special data protection provisions are also found in the Personal Data Protection and Privacy in Telecommunications Act[8] which transposed Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications, commonly known as the ePrivacy Directive). This law has recently been altered by Law no. 46/2012, transposing the so-called "*cookie*" Directive[9] to introduce, amongst other changes, a provision requiring that prior consent from the data holder be obtained before information is stored on its terminal equipment (the so-called "cookie" provision).

[7] Basically the ones mentioned in Article 7 of Directive 95/46/EC, as transposed into Article 6 of Law no. 67/98.

[8] Approved by Law no. 41/2004 of August 18.

[9] Law no. 46/2012 of August 29, which transposed Directive 2009/136/EC of the European Parliament and of the Council, of 25 November 2009.

Violations of data protection laws may result in imprisonment or fines.[10] The National Data Protection Authority may, in some cases, impose daily penalty payments on those who violate its decisions until said decisions are complied with.

5. Product Safety

Main relevant laws:

- Constitution of the Portuguese Republic, the revised version last amended through Law no. 1/2005 of August 12, regarding consumers' right to safe products (art. 60).
- Law no. 24/96, of 31 July (as last changed by Law no. 47/2014 of 28 July): general regime on consumer protection.
- Decree-Law no. 69/2005 of 17 March (as changed by Decree-Law no. 126-C/2011 of 29 de December): regime on general product safety. Transposed Directive no. 2001/95/CE of the Parliament and of the Council of 3 December 2001.
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- Decree-Law no. 98/2010 of 11 August: on classification, packaging and labeling of dangerous substances for human health and environment. Transposed Directives nos. 67/548/CEE of the Council of 27 June and 2006/121/CE of 18 December.
- Decree-Law no. 82/2003 of 23 April (as last changed by Decree-Law no. 155/2013, of 5 November): regulation on classification, packaging and labeling of dangerous preparations. Transposed several E.U. directives.
- Decree-Law no. 145/2009 of 17 de June (in the wording of Law no. 21/2014, of 16 April): act on medical devices, implementing the medical devices directive (except for *in vitro* diagnostic medical devices).

These laws impose mandatory requirements on how products may be marketed and placed on the Portuguese market. They also impose different duties on manufacturers, importers, distributors, and other agents within distribution channels, in order to protect the health and safety of consumers. The majority of the laws on product safety implement EU directives into Portuguese law, as indicated.

In addition to the listed laws, many other product safety laws are in force in Portugal, including EU regulations which specific kinds of products; for example toys, foodstuffs, feeds, and detergents. There are also laws that set requirements regarding product labelling. These laws also serve product safety purposes; for example, laws on labelling and advertising of foodstuffs, and on language requirements applicable to product information and instructions offered on the Portuguese market.

The majority of the above-mentioned laws, namely those laws on general product safety, electric equipment, chemicals, dangerous substances and preparations, and medical devices, prescribe penalties for violations. Such violations are considered civil infractions (offenses not considered as crimes), punishable by fines of variable amounts and accessory

[10] Though the upper limit of the applicable fines is significantly higher in Law no. 41/2004 of August 18.

penalties. Said accessory penalties include, *inter alia*, withdrawal of products from the market, recall and seizure of products, closure of premises, and publicising said penalties.

Depending on the category of product or the economy sector involved, there are different public authorities in Portugal competent for monitoring and enforcing compliance with the legal regimes involved. These authorities have the power to carry out inspections, apply preventive injunctions; initiate administrative proceedings, and apply penalties for infractions.

Manufacturers and other persons involved in the production and distribution chain may be held liable for death, personal injuries and damage to property used by the injured persons for private purpose, caused as result of defective products.

Nevertheless, in many situations involving infractions of product safety law, violators may be held criminally liable and/or liable in tort. Obviously, such liability involves different consequences for the violator.

Portugal complies with all the EU regulations and Directives in Health Products. Said health products mainly include medicines, medical devices, cosmetics, food, biocides, etc. INFARMED, I.P. is the regulator responsible for ensuring compliance with national and EEA health product legislation.

6. Environmental Law

Main relevant laws:

- Basic Law on the Environment (*Lei de Bases do Ambiente*), enacted by Law no. 19/2014, of April 14.
- Environmental Liability Act (*Lei da Responsabilidade Civil Ambiental*), enacted by Decree-Law no. 147/2008 of July 29, last amended by Decree-Law no. 29-A/2011 of March 1 (transposing Directive 2004/35/CE of European Parliament and of the Council of 21 April 2004).
- Environmental Administrative Offences Framework Act (*Lei Quadro das Contra-ordenações Ambientais*), enacted by Law no. 50/2006 of August 29, amended and republished by Law no. 114/2015 of 28 August.
- Portuguese Criminal Code (environmental offences are laid down in Articles 278, 279, 279-A and 280), enacted by Decree-Law no. 48/95 of March 13, last amended by Law no. 60/2013 of 23 August 2013 (transposing Directive 2008/99/CE of European Parliament and of the Council of 21 April 2004).
- Environmental Impact Assessment Regime Act (*Regime Jurídico da Avaliação de Impacte Ambiental*), enacted by Decree-Law no. 151-B/2013 of October 31, amended by Decree-Law no. 47/2014 of March 24 (transposing Directive 2011/92/UE of the European Parliament and of the Council of 13 December 2011).
- Integrated Pollution Prevention and Control Act – Environmental Permit and other Licenses (*Prevenção e Controlo Integrado da Poluição – Licença Ambiental e outras Licenças*), enacted by Decree-Law no. 127/2013 of August 30 [transposing, *inter alia*, Directive 2010/75/UE of European Parliament and of the Council of 24 November 2010].
- Greenhouse Gas Emission Allowance Trading Scheme Act (*Regime do Comércio Europeu de Licenças de Emissão de Gases com Efeito de Estufa*), enacted by Decree-Law no. 38/2013 of March 15 (transposing Directive no. 2003/87/CE of the European Parliament and of the Council of 13 October 2013).
- Water Law (*Lei da Água*), enacted by Law no. 58/2005 of December 29, last amended and republished by Decree-Law no. 130/2012, of June 22.
- Natura 2000 Network Act (*Regime Jurídico da Rede Natura 2000*), enacted by Decree-Law no. 140/99 of April 24, amended and republished by Law no. 49/2005

of February 24 (transposing Directive 79/409/CEE, of the Council of 2 April 1979 and Directive 92/43/CEE of the Council of 21 May 1979).
- Conservation of Nature and Biodiversity Act (*Regime Jurídico da Conservação da Natureza e da Biodiversidade*), enacted by Decree-Law no. 142/2008 of July 24, rectified by Declaration of Rectification no 53-A/2008 of September 19.

Unlike other European countries (*e. g.* France), Portugal doesn't have an "Environmental Code". This leads to a certain dispersion of the legislation in this area. In fact, Law no. 19/2014 of April 14[11] simply establishes the basic principles and guidelines for environmental policy. The specifics of the legal regime, including procedural, substantive, and punitive measures, can be found in specific legislation. The list of laws provided is merely illustrative. In spite of the Environmental Administrative Offences Framework Act, many administrative offences are also found in specific regulations.

The competent authority for environmental matters is the Minister for the Environment, Territorial Planning and Energy[12], but two other *key players* in environmental issues are (i) The Portuguese Environment Agency (APA)[13], and (ii) the General Office of Agriculture, Sea, Environment and Territorial Planning (IGAMAOT).[14]

In practice, very few criminal proceedings are brought based on violations of environmental laws in Portugal. However, the Portuguese Criminal Code provides penalties ranging from simple fines to imprisonment (max. 10 years for pollution offences).

On the other hand, fines applied in case of environmental administrative offences may vary between EUR 2,000,00 and EUR 5,000,000,00 (for legal persons, such as companies). In addition to these monetary fines, Portuguese environmental legislation provides many additional penalties that involve *e. g.* requiring factories or undertakings to cease operating, prohibiting undertakings from exercising certain professional activities, or revoking tax benefits.

The Environmental Impact Assessment Regime and the Environmental Permit are the more commonly employed administrative procedures. In compliance with EU rules, the first applies to any public or private project likely to have significant effects on the environment, while the latter only applies to hard industrial and industrial animal agriculture activities (i. e., the activities listed in Annex I of Directive 2010/75/UE).

7. Labour law and occupational safety

Main relevant laws:
- Portuguese Labour Code, enacted by Law no. 7/2009 of 12 February, last amended by Law 102/2015 of 1 September.
- Safety and Health at Work Act, enacted by Law no. 102/2009 of 10 September, last amended by Law no. 146/2015 of 9 September.
- Work related accidents and occupational diseases Act, approved by Law no. 98/2009 of 4 September.
- Portuguese Social Security Code, enacted by Law no. 110/2009 of 16 September, last amended by Law no. 83-C/2013 of 31 December.
- Work Compensation Fund Act, enacted by Law no. 70/2013 of 30 August.

[11] Law no. 19/2014 of April 14 is the second Basic Law on Environment and it revoked the first one, enacted previous Law no. 11/87 of April 7.

[12] See Decree-Law no. 17/2014, dated of 4 February, which establishes the organizational scheme of the Ministry.

[13] See Decree-Law no. 56/2012, dated of 12 March, which establishes the Portuguese Environment Agency's Bylaws, accessible at http://www.apambiente.pt/index.php?ref=x178.

[14] See Decree-Law no. 23/2012, dated of 1 February, which establishes the APA's Bylaws, accessible at http://www.igamaot.gov.pt/.

- Collective Bargaining Agreements, which are entered into between employers and employee unions. These agreements contain provisions that are, in principle, more favourable to employees than statutory provisions in areas such as minimum wage, and working hours, amongst others.

Labour and occupational safety regulations are traditional compliance issues for Portuguese companies. Management must ensure adherence to legally and collectively agreed maximum working time, minimum wage, holiday, and maternity and minor protection regulations. Management must also make certain that minimum working condition standards are met, occupational safety measures are taken – particularly accident prevention regulations – and that employees are treated equally. Violations of such regulations are generally sanctioned with fines, but may also lead to imprisonment.

8. Foreign Trade Law

Main relevant laws: In Portugal, there is no administrative control of economic activities such as exportation of goods. Therefore, from a compliance perspective, economic activities involving the export of goods or services are subject to the relevant antitrust and tax law requirements.

9. Tax Law

Main relevant laws:
- General Tax Law (*Lei Geral Tributária*, Decreto-Lei 398/98, published on December 17, 1998).
- General Taxation Infringements Law (*Regime Geral das Infrações Tributárias*, Law 15/2001, of June 5, 2001).
- Tax Procedure Code (*Código de Procedimento e de Processo Tributário*, Decreto-Lei 433/99, published October 26, 1999), all amended by the Law 83/C/2013 of December 31, 2013.
- Substantive tax laws: Personal Income Tax Code (*Código do Imposto sobre Rendimento das Pessoas Singulares*), Corporate Income Tax Code (*Código do Imposto sobre o Rendimento das Pessoas Coletivas*); VAT Code (*Código do Imposto sobre o Valor Acrescentado*); Excise Duties Code (*Código dos Impostos Especiais sobre o Consumo*); Property Tax Code (*Código do Imposto Municipal sobre Imóveis*); Municipal Transfer Tax Code (Código *do Imposto Municipal sobre as Transmissões Onerosas de Imóveis*); Stamp Duty Code (*Código do Imposto do Selo*); Tax Benefits Code (*Estatuto dos Benefícios Fiscais*); Investment Tax Code (*Código Fiscal do Investimento*).

Tax law plays a major role for all organisations operating in Portugal. The frequent changes of tax law and the increase in reporting obligations has become a serious issue for companies as it requires that companies' internal procedures be constantly updated in order to comply with their tax obligations.

Violations of tax law may lead to fines being imposed on companies and their directors. If such a violation is considered criminal, it may even result in the imprisonment of the company's managers and/or other persons involved.

In recent years there has been a significant increase in the amount of instruments used by the Tax Authorities to improve the efficiency of tax supervision. Furthermore, tax audits have become more sophisticated. Tax and criminal authorities have also become more involved in fighting tax fraud and tax evasion.

All of these improvements have led to more efficient use of the tax legal regime.

Lawyers, auditors, and consultants who may offer tax planning advice or implement tax planning transactions are obligated to report fraudulent transactions and any tax products that may be considered as abuses of tax planning[15].

III. Liability of legal persons (i. e. a company), executives, and shareholders for non-compliance occurring during the course of business

1. General

In Portugal, legal entities such as companies face civil, administrative, and/or criminal liability. Civil liability is assessed in civil proceedings that are carried out in civil courts. Moreover, corporate conduct often falls under public law, an area that may lead to criminal or administrative liability. The most serious offences are regulated by the Portuguese Criminal Code, while less serious conduct is regulated by public law and sanctioned with administrative sanctions.

2. Liability of the company

The majority of the criminal offences established by the Portuguese Criminal Code cannot be committed by a legal person, such as a company. This is because most of these criminal offences require the conduct of a natural person. To make up for any deficiencies that may exist with company criminal liability as a result, a wide number of administrative offences applicable to companies exist. This will be explained in greater detail further on.

a) Criminal liability. As previously stated, not every criminal offence in the Portuguese Criminal Code and other criminal legislation can be committed by a legal person[16]. As a general rule, Article 11(1) provides that usually only individuals (natural persons) may be held liable for criminal offences. However, in certain situations, which are described in Article 11(2) of the Portuguese Criminal Code and include corruption, money laundering, sexual discrimination, receiving bribes, etc., legal persons may be held criminally liable. These crimes are usually punished with fines (which are different from administrative fines, as they do not involve criminal liability). In addition to the offences provided in Article 11(2), legal persons will also be held liable for offences found in other specific legislation (*legislação penal extravagante*).

Beyond that, a legal person may only be held liable if the criminal offence is (1) committed in its name and by those who possesses a leadership position within the organization (for instance, the managing board), or (2) by those who act under the authority of the persons mentioned in (1), when these persons have violated their duties of due diligence and control.

Also, Article 11(7) of the Portuguese Criminal Code stipulates that the "company's criminal liability does not exclude the liability of the individuals that acted on its behalf, nor it depends on their liability".

In regard to criminal liability for tax offences, the General Taxation Infringements Law provides that legal persons will be held liable for infringements committed by their representative bodies[17]. For instance, a legal person that commits tax evasion can be

[15] See Decree-Law no. 29/2008, dated February 25, which establishes the duties of communication, information and clarification to the tax administration to prevent and combat abusive tax planning.

[16] It is important to clarify that Article 11(2) provides that the State, other legal entities exercising powers of national sovereignty, and public international organisations shall not be held criminally liable.

[17] Article 7 (1) of the General Taxation Infringements Law.

fined between EUR 200,00 and EUR 3,600,000,00. Ancillary penalties are also provided in the law, such as: (i) temporary prohibition of professional activity; (ii) deprivation of the right to benefit from certain subsidies granted by any entity or public service; and (iii) loss of previously granted tax advantages. Again, the company's criminal liability does not exclude the liability of individuals that acted on its behalf, nor does it depend on their liability.

b) Administrative Liability. Corporate conduct may also give rise to administrative liability (infringements that although are similar to criminal liability do not have ethical repercussion). Certain administrative authorities can impose administrative fines and other ancillary penalties. Both legal and natural persons are administrative liable.

aa) Regulatory fine. Article 1 of the Legal Framework for breaches of administrative offences ("*Regime Geral das Contra-ordenações*") defines an administrative offence ("*contra-ordenação*") as any unlawful or reprehensive act punishable with an administrative fine.

Pursuant to Article 7 of the mentioned Legal Framework, both natural and legal persons are subject to administrative liability. As a general rule, companies can be held administratively liable if an administrative offence is committed by its representative bodies or an employee acting under its orders.

Also, the General Taxation Infringements Law provides that legal persons will be held liable for infringements committed by their representative bodies (Article 7(1)). However, unlike criminal liability, the company's administrative liability i for violations of tax law does not make individuals that acted on behalf of the company liable (Article 7(4)).

One of the most common administrative tax offences is failure to file, or the late filing of tax declarations, which is punishable by administrative fines of between EUR 150,00 and EUR 3,750,00.

bb) Forfeiture. As a general rule, if a violator of the law obtained a material gain from said infringement which cannot be compensated by the imposition of the administrative fine, the administrative fine can be increased to the amount of the material gain in order to effectively eliminate it. However, the adapted fine cannot, in any circumstances, exceed a third of the original fine's maximum amount.

Portuguese law also establishes different types of ancillary penalties according to the specific sector being regulated. The following penalties are usually administered for administrative offences:[18]

1. forfeiture of property belonging to the perpetrator;
2. forced suspension of the business (for up to a maximum of two years);
3. deprivation of the right to benefit from certain subsidies granted by any public service or entity, such;
4. deprivation of the right to participate in any trade fairs or markets;
5. deprivation of the right to participate in certain tender offers for building contracts or other public works, provide services and goods, provide public services, and grant licences or authorisations;
6. closure of an establishment whose functioning is subject to an administrative licence or authorisation; or
7. suspension of authorisations and licences.

Furthermore, administrative tax allows for the revocation of previously granted tax advantages for companies that violate tax law.

[18] According to the legality principle, applicable in both administrative and criminal proceedings, one cannot be punished with a penalty that was not previously provided for by law.

For violations of competition law, the Competition Authority can impose fines of up to 10 % of the undertaking's (in the meaning of Article 3 of the Competition Act, similar to that of the corresponde concept under the ECJ case law) turnover in the year immediately preceding the final decision issued by the Competition Authority. Other sanctions may be imposed, behavioural or structural.

cc) Blacklisting and exclusion of companies from public tender. Obtaining a *no debts certificate* (a certificate of tax compliance) from the Tax Authorities and from the Social Security system is mandatory for companies seeking to bid for public contracts. Doing so is also necessary for said companies to be allowed to negotiate with any public entities, since these cannot pay any amount to tax debtors or Social Security debtors[19]. This could have great negative effects on companies whose business is dependent on the public sector, and is a huge restriction on businesses in general.

A company's ability to receive tax benefits provided under the various tax incentive rules is also dependent on it obtaining a *no debts certificate*.

Since 2006, the Tax and Social Security Authorities have been allowed to publish a list of their debtors (see Article 64 of the General Tax law). These lists quantitatively rank the debts of debtors. The publication of the identity of debtor companies can damage the reputation of said companies, and can also seriously harm their operations. The latter is due to the fact that many private entities (including financial entities) refuse to do business with companies that owe money to the Tax and/or Social Security Authorities.

For instance in cartel or abuse of a dominant position cases, the AdC can apply as an accessory sanction a ban on the right to take part in the procedures for contracts (for further developments see below "III. 4. a) Administrative liability").

c) Civil liability. The two main types of civil liability that legal entities are subject to are contractual liability which arises out of contractual obligations, and non-contractual liability, through which a legal person can be held liable for damages caused by the company itself or by its employees when the requirements provided in Articles 483 and 500 of the Portuguese Civil Code are met. A legal person may be held liable for damages caused by its directors if said directors were acting on its behalf. For instance, if a news company publishes a defamatory article, not only will its authors be held liable, but also the news company (if certain requirements are satisfied).

Also, legal persons may be held liable for damages caused by its employees in situations involving strict liability. The policy goal of holding legal persons liable is to give an injured individual a better possibility of recovering damages. This is because employees often lack the means to compensate the injured individual.

3. Liability of management

Under Portuguese law, a company's management must ensure that the company and its employees comply with the law. If not, management may be personally liable for acts committed by the company's employees. Thus, managers are exposed to a great deal of liability.

a) Criminal liability. aa) Management's criminal liability for their own unlawful acts. The members of the management board will be held criminally liable for committing criminal offences. Article 11(7) of the Portuguese Criminal Code states that "the criminal liability of legal persons does not exclude the liability of any natural

[19] See Article 177-B of the Tax Procedure Code and Article 213 of the Code on the Contributory Regimes of the Protection Systems of Social Security.

person, nor does it depend on their liability". This means that both the individual perpetrator of the crime, and the company for which the perpetrator works may be held liable for the same criminal offence. In terms of criminal liability for violations of tax law, managers will be held liable for their unlawful acts in the same way.

bb) Management's criminal liability for unlawful acts committed by company employees. Members of the management board may be held liable due to their executive position within the company. Members of the management board must be vigilant in order to prevent employees under their control from committing unlawful acts (guarantor position). The liability is founded on the guarantor position held by members of the management board as a result of the company's activities: the members of the management board have to contain the compliance risks emerging from the company's activities.[20] Management's guarantor obligations are confined to business-related criminal offences. Or to competition law infringements, which are not of criminal nature.

b) Administrative liability for violations of supervisory duties. As a general rule, companies are liable for administrative offences committed by members of their management boards. In Portugal, the implications of this are widely discussed and debated, particularly in situations where individual members of the management board are not held liable. Nevertheless, certain regulatory regimes contain provisions stipulating that the liability of the legal person does not exclude the liability of individual members of the management board.

As aforementioned, Law no. 25/2008 of 5 June establishes measures on combating money laundering and the financing of terrorism. Supervisory duties become extremely important in this context, as the law requires a very intricate network of measures destined to prevent and assess compliance risks. Entities subject to this provision have an obligation to develop and apply efficient internal measures (for instance, internal audits, risk assessment management etc.) in order to properly prevent money laundering and the financing of terrorism. If these entities fail to comply with their supervisory duties, both the legal person and the members of the management board will be held administratively liable and fined. In addition to the fine, the administrative authority can impose ancillary penalties.

According to Article 7(4) of the General Taxation Infringements Law, individuals that acted on behalf of the company will not be held liable for violations of said law.

The members of the board of directors of the legal person or equivalent entity, as well as those responsible for the management or supervision of the areas of activity where there has been an administrative offence, are liable to a sanction under the Competition Act (for further developments see below "III. 4. a) Administrative liability").

c) The Liability of management under companies law. In addition to criminal and administrative liability, management members also face civil liability which could arise due to their relationship with the company (internal liability) or with third parties (external liability).

aa) Internal liability. Members of management must act in accordance with the duties of care and loyalty, that is, must act diligently and in the interest of the company.

Members of management are liable to the company for damages caused by acts or omissions that violate their legal or contractual duties. However, a manager will not be held liable if he can prove that he was not culpable.

[20] *Jorge de Figueiredo Dias*, Criminal Law, General Part, Vol. I, Coimbra Editora, 2007, p. 950.

The directors are always jointly and severally liable, without prejudice to the right of action according to the respective guilty if the damages were caused by more than one director in the exercise of its functions. That is, each director is liable for the full extent of the damages caused, and the company may recover all the damages from any director, despite of their individual share of liability. Then, the director that bore the damages can demand contribution to their share of liability from the others. Besides, under Portugese law, there is a presumption that those found liable are all equally liable. Paragraph 2 of Article 72 of the Portuguese Commercial Companies Code provides the "Business Judgment Rule". According to this rule, a member of management will not be held liable if he can prove that his decision was an informed one, free of any personal interest, and was objectively rational.

Within a corporate group structure members of the management of the parent company are required to exercise the same diligence to the group companies as they are required to apply to the company they are a member of (the parent company). They are liable towards the subsidiary company as they are in relation to the parent company.

bb) External liability. Members of management may also be liable to company's creditors when due to non-compliance with rules or regulations that are meant to protect creditors' interests, the assets of the company are insufficient to repay the creditors.

Management members are also liable for damages they cause to third parties in the exercise of their functions as directors. In such situations, members of management are directly liable to said third parties.

d) Management's liability under tax law. In addition to facing criminal liability and fines, the members of the board, directors and managers and other persons which exercise legal or de facto management powers in corporate bodies can also be personally liable for the companies' tax debts if the company does not have enough assets to pay them. This *subsidiary liability* of thepersons mentioned can be excluded if it is proven that the director had taken all appropriate measures to enable the payment of taxes, and was diligent in his management[21].

4. Shareholder's liability

Shareholders are not liable for criminal or administrative offences committed by employees or agents of the company, as long as the shareholders themselves do not participate in the offence. However, if the shareholders themselves take part in the management of the company they may be held liable in said capacity. Article 253 (1) of the Portuguese Commercial Companies Code provides that "in the absence of all active managers, all shareholders undertake the company's management until further managers are nominated".

a) Administrative liability. European antitrust law is applicable in Portugal through Regulation 1/2003 and other EU provisions (e. g. articles 101 or 102 TFEU). Regarding Portuguese antitrust law, Article 67 of the Competition Act states that "*without prejudice to criminal responsibility and any administrative measures that may be taken, infringements to the provisions set out in this law and in European Union law, where the enforcement of compliance with such provisions is the responsibility of the Competition Authority, shall be deemed an administrative offence, punishable pursuant to the provisions of this chapter*". Antitrust infringements are not criminal offenses under the

[21] The company's auditors, the members of the supervisory bodies. and accountants will also be liable for the company's tax debts if it can be proven that the violation of tax rules was the result of an auditing failureor the accountancy rules being violated by the accountants.

Portuguese Competition Act. Liability is first directed at the undertaking, or undertakings, breaching the Act, but both "*natural persons and legal persons, regardless of how they are constituted, as well as undertakings and associations with no legal status*" may be held liable. The 2012 Competition Act provides that the act of finding legal persons or equivalent entities liable does not preclude the liability of any natural persons for the same offence. Indeed, liability for administrative offences is now broader. In addition to the members of a company's board of directors, those responsible for the management or supervision of the activity in which an administrative offence occurred are also liable to sanctions if they knew, or should have known, of the infringement and did not adopt appropriate measures to stop it. Natural persons cannot be fined more than 10 % of the income from the undertaking in the year prior to the restrictive practice occurring. Income, for this purpose, includes any salaries, earnings, gratifications, percentages, commissions, holdings, subsidies or bonuses, attendance vouchers, and any other payments and earned as a result of working for the company.[22]

There have already been several decisions imposing fines on directors. In the *Mass Catering* case[23] (the first following a leniency application), a fine of EUR 20,000 was imposed on the undertakings involved as well as five of their administrators and managers. In *Copidata*, the AdC fined the undertakings in more than EUR 1,000,000 and three administrators for a total of EUR 6,000. Finally, in the *Flexible Polyurethane Foam case* the AdC fined five administrators of the participating undertakings EUR 7,000. The AdC may also impose periodic penalty payments, in the maximum amount of 5 % of the average daily turnover for the year immediately preceding the decision per day that the payment is late in the following situations: (i) non-compliance with a Competition Authority decision that has imposed a sanction or required the company to adopt specific measures, and (ii) non-notification of a merger subject to prior notification.[24] In the *OTOC* case (see below), in addition to a fine, a periodic penalty payment of EUR 500 a day was imposed to ensure compliance with the decision.[25]

Furthermore, "*when the seriousness of the infringement and the fault of the party concerned so justifies*", the AdC has the authority to impose the accessory sanctions (i. e., in tandem with the fine) such as: (i) ordering the publication of its decision in the Official Journal of the Portuguese Republic (*Diário da República*) and in a national, regional, or local newspaper with a large circulation at the expense of the party concerned, and (ii) revoking the company's right to make tender offers for public work contracts, enter into public service concession contracts, lease or acquire movable assets, or the acquisition of services or procedures involving the award of licenses or authorizations, for a maximum period of two years if the administrative offense involved occurred during or because of such procedures.[26]

The 2012 Competition Act gives the AdC the power to impose structural remedies. However, as under Article 7 of Regulation 1/2003, the application of these structural remedies is subject to a strict test of proportionality, and they "*can only be imposed when there is no behavioural measure that would be equally effective or, should it exist, it would be more onerous for the party concerned in the case than the structural remedies themselves*".[27]

[22] Articles 73 and 69(4) and (5) of the Competition Act.

[23] PRC 2010/08, decision of 13.2.2012. The press release is available at www.concorrencia.pt/download/pressrelease2009_24.pdf.

[24] Article 72 of the Competition Act.

[25] See press release available at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-fines-OTOC-for-the-adoption-of-an-anti-competitive-decision.aspx?lst=1&Cat=2010.

[26] Article 71 of the Competition Act.

[27] Article 29 of the Competition Act.

The general statute of limitations for antitrust infringement procedures is five years, except for those that lead to fines of up to 1 % of the undertaking's turnover in the year immediately preceding the final decision issued by the AdC. The statute of limitations for issuing sanctions begins the "day in which the decision to apply it has becomes definitive or has reached the stage where there are no more appeals [*res judicata*]". The limitations period may be interrupted by the notification to the party concerned in the case or by the notification to this person of any act by the AdC which affects him personally. It may also be suspended (i) while the "*Competition Authority decision is the subject of judicial review*", and also (ii) from "*the date that the case is sent to Office of the Public Prosecutor until its return to the Competition Authority*".[28] This means that the statute of limitations for material infringements of the Competition Act may reach ten and a half years. The courts have repeatedly confirmed that sanctions imposed by the AdC are analogous to criminal sanctions. Indeed, the 2012 Competition Act explicitly refers to the General Regime for Administrative Offences as subsidiary law, and the General Regime for Administrative Offences, in its turn, refers to the Criminal Code for any matters not specifically regulated therein.

The 2012 Competition Act provides the AdC with substantial powers to investigate undertakings and sanction violators in order to combat anticompetitive practices.

The AdC may impose fines of up to 10 % of the company's turnover in the year immediately preceding the final decision issued by the Competition Authority for each of the undertakings involved in the violation (or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings). Said fines may be imposed for (i) restrictive practices (prohibited agreements, concerted practices, decisions of associations of undertakings, abuses of dominant position, and abuses of economic dependence), (ii) non-compliance with the conditions, obligations or measures imposed on the undertakings by the Competition Authority, and (iii) implementation of a concentration before there has been a decision of non-opposition.[29]

Like the European Commission, the AdC may impose fines of up to 1 % of the company's turnover in the year immediately preceding the final decision issued by the Competition Authority for the following administrative offences: (i) failure to provide information or providing false, inaccurate, or incomplete information in response to a request of the AdC; (ii) failing to assist the AdC, or obstructing it from exercising its powers of investigation and inspection; and (iii) unjustified failure to appear as a complainant, witness, or expert for a case in which notification was duly served.[30] Under the 2003 Competition Act, the AdC did not made public the methodology used in determining the level of the fine applied and a significant lack of transparency existed since the decisions were not made public and the elements on which the ECJ case law supported the respect of the legality principle by Regulation 1/2003 up to 10 % turnover sanctions, like the *Degussa* case, were clearly not complied with by the AdC. The 2012 Competition Act tried to remedy this in two ways. First, by imposing an obligation on the AdC to be more transparent, making mandatory the obligation to publish the infringement decisions. Second, by requiring the AdC to adopt public and transparent criteria for implementing Article 69 criteria on the determination of the concrete measure of the fine ("8 – *The Competition Authority, under its regulatory powers, shall provide guidelines containing the methodology for setting the amount of the fines, in accordance with the criteria defined in this law*"), that were finally adopted on

[28] Article 74 of the Competition Act.
[29] Articles 68(1) and 69(2) of the Competition Act.
[30] Articles 68(1) and 69(2) and (3) of the Competition Act.

26 December 2012.[31] These criteria closely follow the methodology set out in the 2006 European Commission's Guidelines on the calculation of fines. This may raise relevant legal issues, particularly but not exclusively given the drastic difference from the previous administrative and judicial practice, the economic and social implications in a country affected by a serious economic crisis and other features of the legal regimen. In particular, the expected significant increase on the amount of the fines raises serious concerns as the appeals from AdC decisions will no longer have a suspensory effect and the specialised court (the *Tribunal da Concorrência, Regulação e Supervisão*, hereinafter TCRS) may review the level of the fine and even increase it.

In at least one case, the Competition Authority considered the potential negative effects on trade between Member States as an aggravating factor.[32] Under this approach, whenever EU Competition Law is applicable to restrictive practices identified by the AdC, there could be an increase in the amount of the fine. The AdC considers that, under the 2012 Competition Act, it may apply cumulative fines to the breach of EU and Portuguese competition rules (following the ECJ, as long as *Völk vs. Vervaecke*). It would probably also, in a different regard, follow the *Expedia* ECJ case law.

The highest fine ever imposed by the AdC was EUR 53 million in *Portugal Telecom (broadband internet)*, a case of alleged abuse of dominant position.[33] Previously, the highest fine had been EUR 38 million also to a Portugal Telecom company (*PT Comunicações*, the so-called *Ducts* case), which also concerned an abuse of a dominant position. The latter fine was annulled by the Lisbon Commercial Court and, consequently, the decision was revoked. Eventually, the Lisbon Court of Appeal confirmed the Lisbon Commercial Court's judgment (see below).

Fines for cartels and other unlawful agreements have ranged from EUR 9,865 to EUR 14.7 million. Fines for decisions of associations of undertakings have ranged from EUR 76,000 to EUR 1.9 million.

b) Civil liability. According to Portuguese law, in principle, the civil liability of shareholders is limited to their investment in the company.

In any case, the shareholders that are given the authority to appoint the directors of the company, either through the shareholder's agreement or the company's bylaws, are jointly and severally liable with the appointed directors if (i) the latter are deemed liable towards the company or the shareholders, and (ii) the shareholders did not fulfil their dutiesin selecting the directors.

The sole shareholder is also liable in the event that the company is declared bankrupt. In this event, the sole shareholder is liable for the debts that incurred after the concentration of the share capital in the person of the sole shareholder implied that it is proved that during that period the legal provisions that establish that the company's assets must be allocated to the company's responsibilities were not complied with.

Also, according to the Portuguese Commercial Companies Code the sole shareholder of a company is liable for the obligations of this company.

5. Territorial application of Portuguese criminal, administrative and company law

As a general rule, the territoriality principle governs jurisdiction – as a general rule, the Portuguese courts have jurisdiction whenever a crime is committed on Portuguese

[31] See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201218.aspx.
[32] See http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200916.aspx?lst=1&Cat=2009.
[33] Press release available at www.concorrencia.pt/download/comunicado2009_16.pdf.

soil, regardless of the suspect's nationality[34]. However, this rule has exceptions. According to Article 5 of the Portuguese Criminal Code, in certain cases Portuguese courts have jurisdiction regardless of the territory in which a criminal or administrative offence[35] is committed.

According to Article 5(1)(g) of the Portuguese Criminal Code, Portuguese courts have jurisdiction whenever a crime is committed outside the Portuguese soil against a company that has its registered office in Portugal.

It is also worth mentioning that Law no. 20/2008 of 21 April (corruption in International Trade and in the Private Sector) extends the jurisdiction of the Portuguese Courts to certain crimes normally beyond the territoriality principle.

IV. Defence by demonstrating adequate compliance management activities

1. The effects of compliance measures on liability

Unlike under other legal regimes, Portuguese law provides no specific guidelines regarding the reduction of fines as a result of having an effective compliance programme[36]. However, as previously mentioned, demonstrating awareness and oversight of compliance risks is an important part of proving to the relevant authorities that the company did everything in its power to comply with its legal obligations. Violations may go unsanctioned if the managing board is able to convince the relevant authorities that it acted with due diligence but regardless of its efforts the violation still occurred. Basically, the company must prove that there was no organisational fault. Also, an effective compliance programme may impact the type and amount of the penalty imposed.

a) Exemption from liability in absence of organisational fault. Criminal and administrative liability is fault-based. This means that the regulator and/or the public prosecutor's office must prove that the accused was at fault (i. e. demonstrate that the perpetrator was capable of acting in accordance with the law, but chose not to). An effective compliance programme – i. e. one that shows awareness and oversight of compliance risks – is important to attempt avoiding prosecution or mitigate consequences. The aforementioned principles generally apply to civil liability as well. There are however cases of strict liability, such as liability for risk, which are forms of non-fault liability, i. e. the claimant does not have to prove that the defendant was at fault.

b) Reduction of liability during sentencing. If a violator does not succeed in escaping liability by providing evidence of an effective compliance programme, the behaviour of the violator can still be a factor when determining the amount of the penalty. According to Article 71(2) (e) of the Portuguese Criminal Code "when determining the penalty the court shall take into consideration every circumstance that may act in favour or against the violator, namely: … e) his/her conduct prior or subsequent to the fact"… Fines may be reduced if a violator can show that he desired to comply with the law, and made efforts to do so.

[34] Article 4 of the Portuguese Criminal Code establishes that the Portuguese courts have jurisdiction whenever a crime is committed on Portuguese soil, regardless of the suspect's nationality. The same goes for the rule provided in the Legal Framework for Breaches on Regulations (administrative offences).

[35] The Portuguese Criminal Code is also applicable, although subsidiary, to the administrative offences.

[36] Naturally, we are not including the cases where the sole fact of not having a compliance program is an administrative offence, as previously mentioned about Law no. 25/2008, dated of 5 June.

c) Particularities in foreign trade law, antitrust law and tax law. The Portuguese legal system has several specialized legislations for different branches of business. However, in certain branches the legislation is beyond of what would have been desirable.

aa) Foreign trade law. As aforementioned, in Portugal, there is no administrative control of exports. Therefore, from a compliance perspective, the exportation of goods or services is generally governed by the relevant antitrust and tax law requirements.

bb) Antitrust Law. Both the AdC and the European Commission refuse to consider compliance programmes as a mitigating factor in itself while determining an organisation's liability or setting its fine. The European Commission has recently approved a *compliance programme* brochure[37] but still refuses to recognise a compliance programme as a mitigating factor, despite pressure from stakeholders to do so. As the report of the German Federal Cartel Authority states, "at best compliance measures will pay off to the extent that irregularities are detected through an efficient compliance programme".[38]

Of course, compliance programmes can have a great impact on a company's operations, as they often prevent infringements. Also, given the severity of Competition law fines and the appeals regimen now in force in Portugal, compliance programmes are more necessary than ever.

2. Minimum requirements of an adequate compliance organisation

The requirements of an effective compliance programme vary, and depend on the nature of the specific organisation. Factors such as the company's size, activity, etc, must be taken into account. In general, Portuguese law does not establish minimum requirements for compliance programmes. There are, however, certain areas where the Portuguese legislator does provide guidelines for companies participating in regulated activities. For instance, Law no. 25/2008 of 5 June on money laundering and the financing of terrorism states that "the entities under the scope of this provision shall define and apply internal proceedings to fulfil the objectives stated in this law, in matters of internal audit, evaluation and risk management in order to prevent money laundering and financing of terrorism". This provision is complemented by the Securities Commission's internal provision no. 3/2008, regarding internal audits. According to Amadeu Ferreira, the objectives of internal audits of financial intermediaries are to: (i) identify and manage the risks inherent to the activities, proceedings and systems and to define the tolerated risk, (ii) adopt political and effective mechanics in order to properly manage the risks, (iii) evaluate the adequacy and effectiveness of the risk management activity, (iv) evaluate the implementation of the compliance programs by the financial intermediary and its employees, and (v) adopt an audit plan.[39]

While compliance programmes are not exclusive to financial intermediaries, they tend to receive the most attention in such settings.

[37] In 2011 – see http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

[38] Cf. Announcement by German Federal Cartel Authority Nr. 9/2006 on immunity from fines and reduction of fines in cartel cases dated 7 March 2006 and EU Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, OJ. EU C 298/17 dated 8 December 2006; BT-Dr. 17/13675, p. VII marginal ref. 46.

[39] *Amadeu Ferreira*, Risk management and audit function within the financial intermediaries, XVII Annual Conference of the Portuguese Institute of Internal Audit, dated of 19 November of 2010, available at http://www.cmvm.pt/CMVM/A%20CMVM/Conferencias/Intervencoes/Documents/Gest%C3%A3o%20do%20Risco%20e%20Auditoria%20Interna%20nos%20Intermedi%C3 %A1rios%20Financeiros%20-%2019112010.pdf.

a) Caveat for necessity and reasonability. A compliance programme should be able to adapt to any situation (necessity). Necessity is part of an effective compliance programme, i. e. the supervisory board should be able to adopt suitable measures according to the situation at hand.

Also, a compliance programme should be reasonable. A complex supervision system should be avoided at all cost. A compliance programme can only be efficient if it do not implement a company-wide supervisory programme.

Effective implementation of a compliance programme requires an efficient network covering all the hierarchical levels within the company. This involves delegating powers and responsibilities. The modern company is complex and requires those that work within it to have knowledge of many different areas. Therefore, it is important to have leaders that assume responsibility and monitor the activity of his/her subordinates.

Practice
(1) Designate a manager for each area of activity/department, granting him/her adequate powers and access to relevant information; (2) establish a network where every piece of information is properly scrutinized in order to support decisions made by the managing board (The idea is to allow the managing board to claim, in its defense, that the decisions were not taken alone or without the proper consideration. They were inspected by an autonomous body.); (3) establish channels of communication between managers and the Head of Compliance.

b) Managerial commitment. In order to create an effective compliance programme a company must have a culture of compliance. For this, management commitment is essential. Those in the highest positions at the organisation must set an example for others.

Non-compliance consumes the organization from the inside. To avoid this type of behaviour managers should expand their oversight function. It is important to incentivize compliant behaviour. Managers must provide employees with the information and tools necessary to comply with the law. They should also pay their employees a fair salary in order to avoid misconducts such as bribery and corruption

Companies should also create an internal regulation that sets out the company's key obligations and values. This should bring attention to the importance of a culture of compliance. Such a regulation should also establish rewards for good behaviour and productivity.

A key element of any compliance programme is independence. The compliance function should be given the necessary authority and truly independent from other parts of the company.

Moreover, the compliance function should have a Head of Compliance. A Head of Compliance is a senior staff member who is responsible for coordinating and implementing the company's compliance programme.

Practice
(1) Create and implement an internal code of conduct that describes the duties of those with important compliance functions; (2) hold frequent meetings with employees in which their grievances and suggestions are heard; (3) incentivize compliant behavior; and (4) create a culture of compliance throughout the organization.

c) Organisational duty. The organisational duty requires managers to organise and allocate tasks within the organisation. According to the Bank for International Settlements, compliance responsibilities may be exercised by staff members of different departments."[T]he legal department may be responsible for advising management on compliance laws, rules and standards and for preparing guidance to staff, while the compliance department may be responsible for monitoring compliance with the policies and procedures and reporting to management (…)"[40]. It is of the utmost importance that the various departments cooperate with each other.

Also, according to the Bank for International Settlements:

"*compliance function staff should have the necessary qualifications, experience and professional and personal qualities to enable them to carry out their specific duties. Compliance function staff should have a sound understanding of compliance laws, rules and standards. The professional skills of compliance function staff, especially with respect to keeping up-to-date with development in compliance laws, rules and standards, should be maintained through regular and systematic education and training*"[41].

This means that the supervisory staff should be carefully selected. The managing board must ensure that the staff has the knowledge necessary to carry out their compliance functions.

Practice
(1) Establish internal protocols that facilitate the exchange of information between various departments; (2) create a recruitment program that can identify potential employees that have a background which would allow them to effectively carry out the company's compliance function.

d) Duty to identify and manage compliance risks. The managing board is obligated to identify and manage compliance risks. There are several sources of risk that may affect the organization: (i) internal fraud, (ii) external fraud, (iii) disregard of company policies, (iv) damage to physical assets, for example, damage caused by vandalism, (iv) corruption, etc. Determining the most relevant risks to an organization and how to prevent them is one of the most important aspects of a compliance program. The emphasis placed on a risk is based on its probability of occurrence.

According to the Bank for International Settlements, "compliance should be regarded as a core risk management activity…. Specific tasks of the compliance function may be outsourced, but they must remain subject to appropriate oversight by the Head of Compliance"[42].

Practice
Companies should have (1) effective monitoring and internal reporting; (2) high standards of moral integrity; (3) contingency continuity plans; (4) effective internal operational risk culture; (5) an independent compliance function – members of the compliance function should work solely for the compliance function in order to

[40] Bank for International Settlements, "Compliance and the compliance function in banks", April 2005, page 13 available at http://www.bis.org/publ/bcbs113.pdf.

[41] Ibid.

[42] Bank for International Settlements, "Compliance and the compliance function in banks", April 2005, page 15 available in http://www.bis.org/publ/bcbs113.pdf.

avoid conflicts of interest; (6) effective mechanisms to monitor the implementation of its compliance program; (7) establish mechanics to effectively assess internal compliance risks; (8) channels of communication with regulators; (9) a system analysis of orders and operations (validity check); and (10) an emphasis on continual training of employees.

e) Control and monitoring obligation. The effectiveness of a compliance programme depends upon it having an adequate control and monitoring mechanism. Regardless of how well though-out and crafted a compliance programme may be, the managing board cannot simply expect every employee to comply with it. A lack of proper monitoring can have huge negative consequences on the company as it subverts the company's culture of compliance. Therefore, it is highly recommended that the compliance function perform random, unannounced checks in order to ensure that compliance rules are being followed.

Also, it is imperative that the Head of Compliance report any compliance incidents to the managing board.

Practice
(1) Perform random unannounced checks to ensure that relevant laws and regulations are being complied with; and (2) establish a system where the Head of Compliance regularly reports compliance incidents to the managing board.

3. Evidence of an effective CMS

The existence and implementation of an effective CMS should be documented and kept by the organization. It is recommended, and in some cases mandatory[43], that an internal audit report be created. This report should contain (i) the opinion of the managing board on the adequacy and efficiency of the internal audit system; (ii) a description of the business; (iii) a description of the functional areas of the company and any deficiencies of the CMS that were detected but have not been yet effectively addressed; (iv) a description of the internal audit plan, etc.

Also, in certain situations it is mandatory to preserve certain documents. For example, Article 14(1) of Law no. 25/2008 of 5 June on money laundering and the financing of terrorism financing those companies that fall under the regulation to preserve any documents related to the identification of clients for 7 years.

By preserving documents companies also preserve evidence of their compliance systems' existence. If the implementation of a CMS is not documented, not only may the compliance programme prove to be ineffective, but regulators may not actually believe that it was correctly implemented.

Practice
Create regular internal audit reports that contain (1) the opinion of the managing board on the adequacy and efficiency of the internal audit system; (2) a description of the business and future projections; (3) a description of the compliance management system and any detected deficiencies that have not yet been addressed; and (4) a description of the internal audit plan, etc.

[43] Financial intermediaries.

V. Treatment of non-compliance by the authorities

In Portugal, non-compliance is treated by the authorities in various ways.

1. Corruption

One of the most notorious cases in Portugal was *Face Oculta* ("Hiden Face"). The case involved several major Portuguese companies that allegedly partook in corruption, money laundering, and trading in influence.

The conviction rate in corruption cases increased from 2007 to 2010, showing a decrease from 2010 to 2013.[44]

The Portuguese Criminal Investigation Police created a risk assessment plan for combating corruption and other similar criminal offences.[45] The objectives were to inform Portuguese citizens about the effects of corruption and to teach them how to prevent numerous risky scenarios.

It is important to have strict rules when it comes to offer something of value to a public official or to an employee within the private sector. Bribes can be any form of payment including cash, gifts, favours, travel costs (if they are not justified). Nowadays authorities are especially alerted in terms of detecting bribery situations where a gift is granted with the purpose of obtaining improper influence. Therefore, it is important that every gift has its own justification. Also, every gift should be documented or registered.[46]

2. Antitrust law

Anticompetitive practices, be it agreements, concerted practices or decisions of associations of undertakings, are prohibited unless allowed under Article 10 or an EU regulation. The Portuguese Competition Act also prohibits abuses of a dominant position (Article 11 of the 2012 Competition Act) and abuses of economic dependence (Article 12 of the 2012 Competition Act). Public enforcement of Competition Law in this regard is inconsistent. There have been high profile abuse of dominant position cases but none related to abuse of relative dominant position (economic dependence). The current AdC Board, the internal reorganisation process and the public statements thus far adopted suggest that a new approach exists regarding cartels and other collusive behaviour. However, the results of such changes have yet to be seen. Private enforcement is also being pursued by private partners, based on stand alone or follow on actions.

Early on, the AdC usually lost restrictive practices cases at the appeals phase. However, in recent years Portuguese courts (be it the former Tribunal de Comércio de Lisboa or the current TCRS) have upheld more AdC decisions. There were only 22 convictions from 2003–2013 under Articles 9 and 10 of the 2012 Competition Act (or the former 2003 Competition Act) and/or Article 101 of the TFEU. However, 5 of these cases were dismissed on appeal.[47]

[44] See p. 3 of the Statistics on Corruption, available on http://www.dgpj.mj.pt/sections/informacao-e-eventos/prevenir-e-combater-a/arquivo-de-noticias/estatisticas-sobre/downloadFile/file/Boletim_tematico_Corrupcao_20141212.pdf?nocache=1418984507.14.

[45] Risk assessment plan, available at www.policiajudiciaria.pt.

[46] In certain sectors – such as the Health Care Professionals – the registry is actually mandatory.

[47] A table with further details on these cases can be found at http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_da_AdC/Praticas_Colusivas/Paginas/lista.aspx. It should, however, be noted that this table is not exhaustive (compare, e.g., cases mentioned in the 2012 AdC's Annual Report, available at:

a) *SIC/PT/TV Cabo* case (Case No. 14/01): a fine of EUR 3 million for a partnership agreement relating to cable television services containing certain anti-competitive clauses (e. g., exclusive distribution).
b) *Centro Hospitalar de Coimbra* (Case No. 06/03) and *Complementary diagnostic means* (Case No. 04/05): these cases related to collusive tendering and bid rigging in public procurement contracts for hospitals. Fines of EUR 3.3 million and EUR 15.8 million were levied.
c) *Moageiras* (Case No. 06/04): Ten flour-milling companies were fined a total of EUR 9 million for fixing prices in the bread making industry (a concerted practice).
d) *Agepor* (Case No. 07/04): a fine of EUR 195,000 was imposed on an association of navigation agents for unlawfully setting maximum prices.
e) *ATRAM* (Case No. 23/04): the Portuguese National Association of Public Transport and Road Transport of Goods (ATRAM) was admonished for refusing to provide certain services.
f) *Veterinarians Bar Association* (Case No. 28/04), *Dentists Bar Association* (Case No. 29/04) and *Medical Bar Association* (Case No. 07/05) were fined, respectively, EUR 76,000, EUR 160,000 and EUR 250,000, for price fixing.
g) *Nestlé Portugal* (Case No. 31/04): a fine of EUR 1 million was levied for agreements in the Horeca channel. After an appeal, the AdC accepted commitments from Nestlé and dismissed the case.
h) *Aeronorte* et al. (Case No. 20/05): two undertakings were fined a total of EUR 308,000 for bid rigging related to the purchase of airborne fire fighting means.
i) *Vatel* et al. (Case No. 25/05): four undertakings were fined a total of EUR 911,000, in a case relating to an eight year long market sharing and price-fixing cartel.
j) *Rebonave* (Case No. 06/06): three undertakings were fined a total of EUR 185,000 for participating in a cartel (price fixing), market-sharing, and establishing and monitoring a compensation mechanism relating to towage services at the port of Setúbal.
k) *Mass catering* (Case No. 02/07):[48] five undertakings were fined a total of EUR 14.7 million for bid rigging and market-sharing agreements related to the provision of meals and management services for cafeterias and restaurants; as aforementioned, five administrators and managers of the participating undertakings were fined a total of EUR 20,000[49].
l) *Madeira Driving Schools case* (Case No. 06/08): seven companies were fined a total of EUR 9,865 for a concerted practice related to unlawfully setting the prices charged by driving schools in a regional market.
m) *OTOC* (Order of Official Technical Accountants): On 14 May 2010, the AdC fined the Association of Chartered Accountants EUR 300,000 imposed the publiciation of the decision nationwide (accessory sanction) and declared its internal rules concerning professional training void. Additionally, a periodic penalty payment of EUR 500 per day was also imposed to ensure compliance with the decision. The AdC argued that the Association had unjustifiably restricted the market and abused its dominant position in the market for mandatory training services to certified accountants by reserving exclusively for itself the provision of one third of the

http://www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Relatorio-de-Actividades/Documents/Adc_Relatorio_actividades2012.pdf, at 16) and it is not kept up to date.

[48] See press release at: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2009_CA-imposes-fines-on-five-mass-catering-undertakings.aspx?lst=1&Cat=2009.

[49] Press release available at:http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201316.aspx?lst=1&Cat=2013.

market. It also argued that the Association had developed arbitrary criteria for the approval of external entities capable of providing that training. This case was heard by the ECJ, that ruled that a regulation such as the Training Credits Regulation adopted by a professional association such as the OTOC must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU[50].
n) *ANEPE – National Association of Parking Lot Enterprise* (Case PRC 2006/12, decided on 31.12.2010) The AdC levied a EUR 1.9 million fine against the National Parking Association due to it recommending to its members that they increase prices by a certain percentage in response to changes to their fee system introduced by the government.[51]
o) *Copidata* (Case No. 08/10): In December 2012, the AdC levied EUR 1.8 million in fines on undertakings in the printing sector. As a result of a leniency application by *Copidata*, its competitors *Contiforme, Formato* and *Litho Formas* were convicted of participating in a price-fixing and market sharing cartel. In addition to the fines imposed on the undertakings, three administrators were fined a total of EUR 6,000.[52]
p) *Conforlimpa/Number One case:* The AdC levied a EUR 315,000 fines on *Conforlimpa* and *Number One*, companies operating in the professional cleaning services sector. These companies were found guilty of bid rigging in various public invitations to tender. The Lisbon Commercial Court upheld the AdC's decision[53] but an appeal is still pending.
q) *Baxter v. Glint case*: The AdC levied EUR 400,000 in fines for an alleged anti-competitive price-fixing agreement.
r) *Lactogal* (Case No. 04/10): In July 2012, the AdC levied EUR 340,000 in fines on the largest Portuguese dairy company for engaging in resale price maintenance in the Horeca channel.
s) *Flexible Polyurethane Foam case*: On 18 July 2013, the AdC levied EUR 990,000 in fines against companies that participated in a cartel in the market for the manufacture of flexible polyurethane foam for the comfort industry. The cartel lasted ten years and five administrators were also fined a total of EUR 7,000.[54]

Although several other alleged infringements of Article 11 of the Competition Act and Article 102 of the TFEU have been investigated by the AdC, only a few have led to findings of infringements. Portugal Telecom (the former incumbent) was subject to several abuse of dominant position procedures. In the first (the ducts case), a fine of EUR 38 million was levied against it but the decision was not upheld on appeal. The second case involved allegations of abuse in the wholesale market for rented telecommunication circuits for which a fine of EUR 2.1 million was imposed.[55] However, the decision was appealed and the fine was revoked. The third procedure was related to

[50] See ECJ Judgment of 28 Feb. 2013, *OTOC* (C-1/12).

[51] Press release available at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201312.aspx?lst=1&Cat=2013 and http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201202.aspx?lst=1&Cat=2012. The decision was upheld in Court (2013).

[52] Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201216.aspx?lst=1&Cat=2012.

[53] Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201211.aspx?lst=1&Cat=2012.

[54] Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201319.aspx?lst=1&Cat=2013.

[55] Press release available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200815.aspx?lst=1&Cat=2008.

margin squeeze and discriminatory practices, etc. A EUR 53 million was levied, however, the fine was once again revoked on appeal.

3. Data protection

Compliance with data protection law is generally not seen as a priority by Portuguese companies. Though there have been a few criminal cases brought before Portuguese courts, the fact that the National Data Protection Authority is understaffed keeps it from being able to effectively enforce the law. For example, in 2012, only 9 of the National Data Protection Authority's 25 employees had received legal training. In the same year, following of more than 17,000 requests (including notifications/authorizations, complaints and information requests) the National Data Protection Authority opened a total of 13,504 new administrative proceedings. 10,325 of these were requests for authorization to process data. Furthermore, roughly 70 % of these pertained to requests for the installation of video surveillance systems (which made them relatively easy to decide). However, all of these requests require individualized attention from the National Data Protection Authority's staff, which is extremely difficult considering the aforementioned shortcomings of its staffing.

In the same year, the National Data Protection Authority also received complaints from various citizens, as well as from private and public entities. In response, it opened a total of 1,005 sanctioning procedures in 2012. During the course of that year, the National Data Protection Authority levied 169 fines for a total of EUR 283,000.

Though no further data exists, in January 2014 a well-known telecommunication services provider was fined EUR 4.5 million for Personal Data Protection and Privacy in Telecommunications Act offences. This is the highest fine ever levied by the National Data Protection Authority. The fine would ultimately be reduced by the court of appeal to EUR 100,000.

In some cases, the National Data Protection Authority may forgo sanctions if the alleged violations are deemed to have been corrected.

4. Occupational Safety

Occupational safety is a very important area of law for compliance in Portugal.

Violations of occupational safety rules may lead to severe administrative fines and in certain circumstances may result in criminal charges.

In fact, whenever a work related accident occurs due to a violation of occupational safety rules, employers may be subject to criminal charges, (namely, the respective Directors or legal representatives).

Furthermore, in such a situation, the insurance in which employees are mandatorily enrolled will not cover any of the damages arising from said accident. The employers will have to directly cover such costs themselves.

5. Tax Law

The importance of compliance with tax law should not be underestimated. The Tax Authorities are increasing their supervisory function in this regard and are continuing to work to prevent and to punish tax law violations. This has resulted in an increase in the personal accountability of the members of the board, directors and managers and other persons which exercise legal or de facto management powers, and the company's auditors, the members of the supervisory bodies and accountants.

Those that manage and advise companies are particularly susceptible to liability for tax crimes.

VI. Five typical country-specific mistakes made by foreign investors

Compliance programmes are essential for every company doing business in Portugal. No matter the size, revenue, number of employees, etc., every company is at risk of being found liable for non-compliance. Along with penalties and fines comes public exposure and damage to the company reputation. This damage to reputation is in many cases worse than any pecuniary penalties imposed.

Below is a list of typical mistakes made by investors that should be avoided at all cost.

1. Risk Assessment – Compliance in Portugal is more than corruption prevention and antitrust laws

One of the most common mistakes made by investors is believing that compliance programmes only purpose is to prevent corruption and violations of antitrust laws. Of course, compliance programmes do attempt to prevent these two things. However, they also do much more.

A company's management should pro-actively assess the risks involved with its business activity. Its compliance programme should be tailored to its specific area of activity thus covering all laws relevant to the company's business activities.

2. Legal delegation of compliance tasks

As aforementioned, companies should have a Head of Compliance – i. e. an executive or senior staff member in charge of the compliance function. The responsibilities of the Head of Compliance include the management of the organization's compliance risk and supervising activities. However, it is not mandatory, nor recommended, that all compliance responsibilities are given to the Head of Compliance. These functions can be delegated to several employees, preferably from different departments, as long as channels of communication are properly established.

In order to avoid conflicts of interest, the delegates (compliance units) should be separated and maintain their independence from the department under their direct supervision. Therefore, the existence of compliance units within the several companies' departments is highly recommended.

One of the biggest mistakes made by foreign investors is viewing the delegation of compliance tasks as a means to avoid criminal, civil, or administrative liability. This idea frequently results in the development of a complex system of delegation and signatures that do not benefit the compliance function. Also, it ignores the real problems within the organization. Thus, it is important to (i) define the role and responsibilities of the compliance units, (ii) establish measures to ensure their independence; (iii) require formal reports be made to the Head of Compliance or any senior management who assumes the compliance function.

3. Compliance investigations and penalties for violations

In Portugal, company's supervisory body (*Conselho Fiscal*) is obliged to file a criminal complaint with the Public Prosecutor's Office in relation to any crimes of which it becomes aware. However, this assumes that said awareness is not the result of a criminal complaint being filed by the injured party (in Portugal known as "public crimes"). Also, the company's supervisory body must notify the managing board of any investigations that take place, and also must inform shareholders of all known irregularities at the following general meeting.

Although it is not mandatory for employees to disclose suspected or actual criminal offences or other irregularities, they have the option of filing a complaint.

Also, according to Law no. 25/2008 of 5 June on Money Laundering and the Financing of Terrorism, entities governed by this law are obliged to report any activities suspected to involve money laundering and the financing of terrorism to the Public Prosecutor's Office. If a company that is not a financial entity fails to comply with this obligation it may be fined between EUR 5,500,00 and EUR 500,000,00. If a financial entity (credit institution or an investment firm) violates this law it can be given an administrative fine of between EUR 50,000,00 and EUR 5,000,000,00.

Self-reporting, however, is a different matter. The Portuguese Constitution acknowledges the privilege against self-incrimination. As a general rule, there is no obligation upon legal or natural persons to self-report when they discover internal wrongdoing[56]. Regardless, the perpetrator may have interest in timely reporting an administrative offence committed by the organization itself. For example, Article 29 of the General Taxation Infringements law provides for an administrative fine reduction if the perpetrator notifies the tax authorities in advance that he is willing to pay the administrative fine. This requires that such notification be made before the regulator took notice of the infringement.

In order to prevent compliance violations it is important to establish early-stage dialogue between the compliance department and the regulator. This dialogue can only benefit the company, as it allows it to better understand the regulator's perspective on a certain area of the law.

4. Data Protection Compliance

While recently there has been an increase in companies' attempts to comply with the legal framework pertaining to data protection, there is still a general lack of awareness regarding its necessity. This lack of awareness becomes clearer when contrasted with the concern usually expressed by multinational companies (mostly of European origin) that decide to do business in Portugal.

Furthermore, smaller companies tend to demonstrate less concern regarding data protection, often failing to even notify the National Data Protection Authority prior to processing personal data. Though this is partially due to a certain feeling of impunity, it is mainly due to a general lack of knowledge regarding these subjects.

Moreover, even those companies that comply with Data Protection laws have room for improvement. These companies must create and implement internal regulations on data processing (namely regarding the private use of telecommunication media in the workplace), or, when a data processor is involved, in the writing of contracts regulating the communication of personal data to these entities (with due attention being paid to such factors as the general prohibition of transfer of personal data to non-EU countries, as well as to the contractual stipulation of the implementation of physical and logical security intended to ensure the safety of the data being processed).

Overall, companies must ensure that they comply with Data Protection laws. They must also ensure that they are authorized to process personal data, and that the data and the rights of the data holder are secure.

[56] The Criminal procedure Code establishes that civil servants who become aware of any crime while in the exercise of their duties, and because of their duties, must present a criminal complaint.

5. Tax Compliance

For many organisations operating in Portugal, the complexity of the tax laws and the continuous changes in regulations pose a major difficulty. In order to create an effective tax compliance system, companies must develop strategies designed to continuously control the fulfilment of tax obligations and avoid unnecessary risks. These strategies may be implemented through internal instructions and guidelines (e. g. tax framework guidelines), by clearly defining responsibilities within the organisation, and by creating several levels of control. Due to the fact that the legal framework is constantly changing, tax compliance measures need to be updated and adjusted regularly.