Chapter 18

PORTUGAL

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I INTRODUCTION

In Portugal, corporate entities may be subject to liability pursuant to private as well as public law. Civil liability is assessed in civil proceedings carried out in civil courts. Additionally, corporate conduct often falls under public law, an area in which there are two possible liability outcomes: criminal liability and administrative offences. The most serious offences are regulated by criminal law, primarily in the Portuguese Criminal Code, and conduct considered less serious is punished by public law through administrative sanctions.

Not every criminal offence established in the Criminal Code may be committed by a company, as most of the offences provided for involve individual conduct. This means that the lack of criminal offences is often compensated for by a vast number of administrative offences.

In general, criminal investigations are conducted by a special type of magistrates – distinct in nature from the judicial judges, assigned by law to investigate an alleged crime, conducting all sorts of investigation – the public prosecutors. Although in some acts, such as in matters concerning fundamental rights, the intervention of a judge is needed.

Also, some administrative authorities have powers to investigate certain crimes. For instance, the securities and exchange commission ('the CMVM'), the Tax authorities and the Food Safety and Economic Authority ('the ASAE') have been granted, either by law, or by delegation of the public prosecutors the power to investigate some crimes committed in the areas of their competence.

It is not possible, due to their number and variety, to indicate all the authorities empowered to investigate and prosecute administrative offences, which include, in their

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respective areas, the tax authorities, and the most important regulation and supervision authorities, such as the CMVM, Banco de Portugal, the ASAE, the Competition Authority and the Portuguese Insurance Institute. Normally, those authorities have special powers of investigation (such as interviewing persons, and requesting documents and other informations). Dawn raids are normally not permitted, although similar results may be reached through other inspection powers. The Competition Authority has the power to undertake dawn raids (with the authorisation of a Public Prosecutor or judge) and a new Competition Law extends that power to searches of the houses of board members and workers, law firms, medical clinics, banks and other credit institutions.

One of the fundamental and constitutional principles of Portuguese criminal law is the privilege against self-incrimination, which applies both to criminal and administrative procedures. This means that the defendant is under no obligation to assist investigations, or to provide any elements that may lead to self-incrimination (i.e., the defendant may remain silent with minimal intervention, awaiting the final decision).

Nevertheless, Portuguese law includes a number of provisions that force companies to collaborate with the authorities before any formal charges are even made. For instance, Article 361 of the Portuguese Securities Code states that credit institutions are obliged to provide the competent authority with all requested elements and documents. Refusal to collaborate may lead to criminal liability (Article 381 of the previously mentioned Code). Despite discussion on the subject, it could be said that there is a tendency to force companies to collaborate in investigations on administrative offences.

II CONDUCT

i Self-reporting

As previously mentioned, the Portuguese Constitution recognises the privilege against self-incrimination. The majority of academic authors infer that there generally is no obligation upon companies to self-report when they discover internal wrongdoing, especially private companies. But every rule has its own exception – in fact, the Criminal Procedure Code establishes that civil servants that become aware of any crime while in the exercise of their duties, and because of their duties, must present a criminal complaint. This leads to an immediate conclusion: in criminal matters, the reality for private companies is different from the reality for state-owned enterprises.

Nevertheless, the Portuguese Criminal Law does not punish public employees for failing to report offences noted in the exercise of their duties, although they can be held liable for disciplinary action.

Regardless, a private company that confesses an offence fully and without reservations will benefit from a reduction in penalties, when, after its criminal liability has been established, the court determines the penalty to be applied to the company in question.

In the area of administrative offences, only the Competition Law contains a formal leniency programme based on self-reporting and collaboration with the Competition Authority, which ranges from complete exemption (for the first enterprise to reveal valuable information on the malpractice) to a variable reduction of the applicable fines

(from 10 per cent to 50 per cent). In other cases, self-reporting and collaboration can be large factors in reducing the severity of the sanctions.

ii Internal investigations

Portuguese law does not establish a general obligation for companies to run investigations for any internal wrongdoing. Furthermore, if a company decides to run any investigations, there is no express obligation to share its results with the authorities, apart from the general duty to testify.

Internal investigations are often undertaken, especially in medium or large companies, as a preliminary step before disciplinary proceedings against the persons responsible. They typically include documents, analysis and witness interviews.

Regardless of what may have been said, companies – as well as non-legal entities – have limited powers to conduct investigations; this role is best played by public prosecutors. For instance, witness interviews conducted by a company are not valid in a criminal or an administrative investigation. Only the police authorities, under the direction of the public prosecutor, can conduct this type of investigation.

Where the company, after conducting internal an investigation, finds itself injured by an internal wrongdoing, the Criminal Procedure Code establishes that the injured party can play a active role in the criminal proceeding, offering evidence and requesting the necessary inquiries.[2] In this case, it must be represented by a lawyer and pay the corresponding judicial fee (which is currently €102).[3]

iii Whistle-blowers

According with P Janet Near and P Márcia Miceli,[4] whistle-blowing can be defined as the act of revelation of illicit activities by members of an organisation, within the employer's sphere of control. In Portugal, the company's supervisory body is obliged to file a complaint with the Public Prosecutor's Office in relation to any crimes of which it becomes aware, as long as they do not depend on a criminal complaint by the injured party[5] (in Portugal known as 'public crimes').

Besides this, the company's supervisory body must inform the board of directors of any investigations that took place, and also inform the shareholders of all known irregularities in the first available general meeting.

As for a company's employees, there is no explicit legal obligation on them to disclose suspected or actual criminal offences or other detected irregularities. Nevertheless,

2 Articles 68 and 69(a) of the Criminal Procedure Code.

3 Article 70 of the Criminal Procedure Code and Article 8(1) of the Law No. 7/2012 of 13 February.

4 Quotation by Mathias Schmidt, '"Whistle-Blowing' Regulation and Accounting Standards Enforcement in Germany and Europe – an Economic Perspective', available at Social Science Research Network's site, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=438480.

5 Articles 420(1(b)) and 422(3) of the Portuguese Companies Code.

on a facultative basis, employees can always file a criminal complaint, as long as the crime in question is a public crime.[6]

It is safe to say that whistle-blowing is not yet part of the corporate culture in Portugal. So, besides the forgoing, companies do not generally have specific provisions regarding acting towards employees who report suspicious of illegal activity.

III ENFORCEMENT

i Corporate liability

As previously mentioned, corporate conduct may lead to civil, administrative or criminal liability.

Civil corporate liability

There are two forms of civil corporate liability: contractual liability, which arises out of contractual obligations; and aquilian liability, where the company can be held liable for damages caused by the company itself or by its employees when the requirements provided in the Articles 483 and 500 of the Civil Code are met. In cases of aquilian liability, or non-contractual liability, the company may be held liable for damages caused by its employees, based on a strict or non-fault liability. The purpose of the law is to guarantee that an injured individual has an effective possibility of recovering from the damages suffered; the company also has the right of recourse against its employees. The Supreme Court has stated that a company cannot be held liable for theft committed by one of its employees, as that crime has no relation to the activities developed by the company.

Damages arising out of criminal offences have their own special legal regime under the Criminal Procedure Code. As a general rule, if the damages arise from criminal offences the plea shall be presented before the criminal courts in the criminal procedure.

Administrative corporate liability

Although the provisions are not always exactly the same, as a general rule, companies can be held liable if an administrative offence is committed by its representative bodies or employees acting under its orders.

Criminal corporate liability

The Portuguese Criminal Code of 1982 did not provide for criminal corporate liability. Criminal corporate liability was first provided for offences against food safety and public health, tax offences and computer-related crimes.

It was only with Law No. 59/2007 of 4 September that the Criminal Code included criminal corporate liability in its Article 11. As a general rule, Article 11(1) provides that usually only individuals may be held liable for criminal offences; however, companies may be held liable in certain cases – those stipulated in Article 11(2) of the

6 Article No. 244 of the Criminal Procedure Code, and Article 54 of the Administrative Offence Legal Regime.

above mentioned Code – that include sexual abuse of children, racial, religious or sexual discrimination, corruption, etc. This means that not all criminal offences may give rise to corporate liability. For instance, a company cannot be held liable if an employee, under direct orders of a company's director, intentionally injures someone, as the crime against physical integrity is not established within the cases stipulated in the aforementioned Article 11(2). Furthermore, a company 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 organisation; or (2) by those who act under the authority of the persons mentioned in (1), in the context of a violation of these person's duties of due diligence and control.

Article 11(7) of the Portuguese Criminal Code also provides that the company's criminal liability does not exclude the liability of the individuals that acted on its behalf.

Article 65 of the Criminal Procedure Code establishes that in a case of multiple defendants, they can all be represented by only one attorney, as long as it does not contradict their defence as a whole.

Tax liability

Companies can also be held liable if they do not comply with certain tax obligations. The tax authorities grant the liable company one final opportunity to make the payment before seizing its assets.

If the tax authorities demonstrate that the company has insufficient assets to perform the tax payment, the tax authorities will hold the company's directors liable, unless it is demonstrated they did not act negligently (Articles 23(2) and 24 of the General Tax Law).

ii Penalties

The legality principle, applicable both in administrative and criminal proceedings, establishes that one cannot be punished with a penalty that was not previously provided for by law. Portuguese law establishes different types of penalty according to the specific sector of regulation, both in criminal and administrative liability.

The following penalties are foreseen for administrative offences:

a administrative fine;
b loss of property;
c prohibition on continuing its business (up to a maximum of two years);
d deprivation of the right to benefit from certain subsidies granted by any entity or public service;
e deprivation of the right to participate in any fairs or markets;
f deprivation of the right to participate in certain tender offers, which concern the adjudication of building contracts or of public works, of provision of services and goods, the concession of public services and the granting of licences or authorisations;
g closure of a establishment whose functioning is subject to administrative licence or authorisation; or
h suspension of authorisations and licences.

As for the criminal law, the catalogue of criminal penalties against companies includes the following:

a daily fines (up to 360 days and €10,000 per day);
b liquidation of the company;
c court order to force the company to act in a certain manner, so as to ensure cessation of the misconduct;
d prohibition against its continuing business;
e prohibition against concluding certain contracts or contracts with certain entities;
f deprivation of the right to obtain public subsidies;
g closure of the establishment; and
h publishing of the court decision.

Many authors argue that fines should be proportionate to the turnover generated by a company as, otherwise, it could effectively liquidate the company by making it impossible for it to continue its business.

iii Compliance programmes

Regulatory compliance rules describe in general the goal of companies to perfect their practice, in order to comply with relevant laws and regulations.

As a general rule, there is no express obligation for companies in Portugal to adopt compliance programmes, but the existence of a compliance programme may well serve as a defence against criminal charges or mitigate the penalties, especially if it helps to demonstrate that the company did everything in its power to comply with the obligations provided by the law. The main idea is to show that the company had previously manifested concern with its compliance with the law, but for some reason – regardless of all its efforts – something escaped from its control.

In some cases, however, compliance is not only recommended, but also mandatory. For instance, financial intermediaries are obliged to adopt internal policies and proceedings that allow them to comply with the law, and to prevent any flaws that may be encountered (Article 305-A of the Securities Code). For example, this is the case with financial intermediaries, who must:

a accompany and evaluate the adequacy and efficiency of the measures and the proceedings selected to detect any risk of transgression; and
b report both to the administrative board and the surveillance body any detected defaults, alerting for the necessary measures that need to be undertaken.

More importantly, the financial intermediary must establish numerous internal protocols in order to control and evaluate the risks involved in the financial activity (Article 305-C of the Securities Code).

iv Prosecution of individuals

One of the most basic principles, both in the Constitution and in the Criminal Code, is the defendant's presumption of innocence. This means that the defendant is considered innocent until proven otherwise in the court's final decision. Therefore, companies cannot dismiss their employees just because they are suspects in an investigation,

unless internal investigations or the data obtained in criminal procedures can lead to disciplinary measures; here, the company has 60 days to initiate corresponding disciplinary proceedings. It is open to debate whether, in general, companies can suspend a disciplinary procedure while a criminal procedure regarding the same facts is being pursued.

As previously mentioned, a company is allowed to coordinate its defence with the defence of the individuals also subject to the same investigations. They can even share the same lawyer unless a conflict of interests arises. Despite that, it is also common for a company to appoint or provide a lawyer for its employees and pay their legal fees.

Cooperation with an investigation therefore does not usually imply an adversarial stance between companies and individuals. If the facts underlying a criminal investigation do not have any connection with the existing relationship between the company and the individuals it is perfectly natural that no conflict should not arise that would (or should) oppose either party.

IV INTERNATIONAL

i Extraterritorial jurisdiction

As a general rule, the territoriality principle governs ordinary jurisdiction (i.e., Article 4 of the Portuguese Criminal Code, establishing that the Portuguese courts have jurisdiction whenever a crime is committed on Portuguese soil, regardless of the suspect's nationality).

There are, however, some exceptions. According to Article 5 of the aforementioned Code, in some cases Portuguese courts have jurisdiction regardless of the territory in which the crime is committed. This merges the following principles: national interest, universal enforcement of penal law, and nationality. Of particular interest to this subject, Article 5(1(g)) of the Portuguese Criminal Code states that the Portuguese courts have jurisdiction whenever the crime is committed by or against a company that has its registered office in Portuguese territory.

Also, Law No. 20/2008 of 21 April, which provides certain rules in the context of fighting corruption in International Trade and in the Private Sector, also extends the jurisdiction of the Portuguese courts to certain crimes beyond the territoriality principle.

ii International cooperation

International judicial assistance

In criminal matters, police and judicial cooperation is usually realised in the form of bilateral agreements between Member States. Within the EU, international judicial assistance was introduced with the Maastricht Treaty in 1993. From that moment, Member States undertook several legal instruments in order to assure union in criminal matters. This cooperation gained expression with the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters.

Law No. 144/99 of 31 August is particularly relevant in this subject, which establishes the object, scope and general principles of international judicial assistance in criminal matters. This cooperation deals with matters that include extradition, exchange of criminal cases, enforcement of criminal sentences, surveillance of individuals convicted or on probation and exchange of information.

Extradition

Extradition is commonly understood as the official process whereby a state surrenders an individual – suspected or a convicted criminal – to another state.

The use of this process comes not without certain limitations. According to Law No. 144/99 of 31 August, the basic principle is that the extradition cannot occur in the case of Portuguese nationals. Nevertheless, there are cases in which the law allows for extradition of a Portuguese national: if the extradition is provided in a treaty; if it is a case of terrorism or international organised crime; or if the other state guarantees a fair trial.

There are various examples of treaties in matters of extradition: the treaty signed between the EU and the United States; the treaty signed between EU Member States; and the treaty signed between the Portuguese-speaking countries.

iii Local law considerations

Foreign authorities can request the cooperation of Portuguese authorities. The Portuguese Supreme Court has stated that in the absence of a treaty between the countries, when a formal request is issued, authorities should apply the legal regime established in Law No. 144/99 of 31 August (on international judicial assistance in criminal matters).

One particular aspect of international judicial assistance is the respect for data privacy. In the EU, Article 6(3) and (4) of the Multilateral Memorandum of Understanding of the Committee of European Securities Regulators states that:

> *3 – To the extent permitted by law, each Authority will keep confidential any request for assistance made under this Multilateral Memorandum of Understanding, the contents of such requests and the information received under this Multilateral Memorandum of Understanding as well as the matter arising in the course of its operation, in particular consultations between Authorities; 4 – If an Authority intends to use or disclose information furnished under this Memorandum for any purpose other than those stated in this Article, it must obtain the prior consent of the Authority which provided the information. If the Requested Authority consents to the use of the information for purposes other than those stated, it may subject it to certain conditions.*

Also, Article 6.6 of the Objectives and Principles of Securities Regulation of the International Organization of Securities Commission states that 'Staff of the regulator should observe the highest professional standards and be given clear guidance on conduct matters: […] the proper observance of confidentiality and secrecy provisions and the protection of personal data'.

In the context of Portuguese law and as previously mentioned, the General Law of Credit Institutions establishes in Article 81 the secrecy of the information exchanges among regulatory entities. In fact, this is absolutely necessary in order to maintain a reliable system of international judicial assistance in criminal matters. Also, this type of banking secrecy law preserves the Constitutional protection of clients as a fundamental right.

Another matter for debate relates to the confidentiality of information exchanged between the authorities of different Member States. For instance, the aforementioned Article 81(4) of the General Law of the Credit Institutions establishes that every individual, institution or authority that participates in the exchange of information is subject to a duty of confidentiality.

Another matter of extreme importance is the attorney–client privilege. This particular concept protects certain communications between the client and its attorney, keeping those communications confidential. Article 179(2) of the Criminal Procedure Code states that the seizure of correspondence exchanged between the defendant and its attorney is forbidden unless the judge has reasons to believe that it, on its own, constitutes a crime. Also, Article 108(2) of the Statutes of the Portuguese Bar Association establishes that confidential communications cannot be, in any case, the object of disclosure.

V YEAR IN REVIEW

Crimes such as corruption, money laundering, tax evasion, swindling and trading in influence have been recent topics in the media. At a time of worldwide financial crisis, individuals tend to be more alert to these irregularities, which ultimately leads to an increase in the feeling of injustice that is already commonly felt.

A major recent case is the *Face Oculta* case, which means 'hidden face', an allegorical figure alluding to a web of contacts, which allegedly carried out crimes such as corruption, money laundering and trading in influence. The case involves several major companies in Portugal, whose directors and employees are being tried. *Face Oculta* seems, however, to be the 'tip of the iceberg'. In fact, as forensic investigation tends to be significantly more effective, it is believed that other very similar cases will be subject to disclosure.

Also, criminal law tends to evolve according to these notorious cases, an almost scientific response to preclude a phenomenon that ultimately can consume the system from within; this is why anti-corruption laws are subject to constant modification. In this context, it is worth mentioning the approval in the Parliament of the criminalisation of 'illicit enrichment', which basically resulted in the suspect having to prove the legal origin of certain of its assets (i.e., an inversion of the burden of proof). So far, this has not come into effect, as it was found to be unconstitutional by the Constitutional Court, after it was requested by the President of the Republic to analyse such law.

As to administrative offences, among other minor developments, the most significant event was the revision of the Competition Law (by Law No. 19/2012 of 8 May) increasing a clear tendency to more flexible solutions but, simultaneously, enlarging the investigative powers of the Competition Authority and reducing the effectiveness of the judicial review guarantee.

VI CONCLUSIONS AND OUTLOOK

Reviews have recently been undertaken to consider altering both the Criminal Code and the Criminal Procedure Code, which have so far not been made public.

In regard to the Criminal Procedure Code, one of the innovative measures being discussed is the alteration of the legal regime established for the statements made by the defendant during the investigation. The current Criminal Procedure Code establishes that statements made by the defendant during investigations in the absence of a judge

cannot be taken in account, unless he or she gives consent;[7] the government now intends to establish that all the defendant's statements can be taken in account regardless of the presence of a judge. The government justifies this action by the fact that defendants often confess everything during investigations, but then remains silent in court. The Portuguese Bar Association has harshly criticised this government perspective. It argues that the government's proposal represents a serious attack on the privilege that the defendant has against self-incrimination and to remain silent.[8]

It is generally believed that any amendments to this privilege should be taken cautiously, so as to avoid the possibility of an illicit confession being taken in a defendant's trial. The presence of the judge is deemed a special guarantee for the defendant's constitutional rights.

7 Article 357 of the Criminal Procedure Code.

8 Article 31(1) of the Constitution.

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