

# Criminal intent: when companies are held liable

It is possible to show that an individual acted with criminal intent, but how can the criminal intent of a company be proven? By Rui Patrício of Moraes Leitão, Galvão Teles, Soares da Silva & Associados

**U**nder Article 11 of the Portuguese Penal Code, in principle, only individuals may be held liable for criminal offences. As a general rule, corporate entities are not considered to be defendants for purposes of criminal liability.

This principle is in harmony with the traditional grounds of the Portuguese Criminal Law, which provides that conviction on a criminal penalty is dependent on the *criminal intent* of the defendant.

However, this rule has always raised two main difficulties.

On one hand, with certain types of crimes, such as crimes against financial interests, public health or the environment, failure to hold corporate entities criminally liable could lead to their impunity under the law. In some circumstances, it is not possible to identify, within the organization of the company, which particular worker, director or organ committed the unlawful activity. The existence of several spheres of administration and the division of tasks, especially when large companies are involved, frequently make it difficult to establish causality between the action of an individual and the violation of the law.

On the other hand, corporate entities have become the usual and standard *vehicle* to perform financial, industrial and trading activities. As a result, the failure to provide for corporate entities' criminal liability when (unlawfully) developing or commissioning such activities would constitute an unjustified and unfair privilege for corporate entities.

Taking this into consideration, current Portuguese law provides, in some restricted cases and due to the special characteristics of the relevant crimes, criminal liability for corporate entities. Those crimes include the following:

- crimes against the economy, such as fraud in the attribution of subsidy,

fraud in the attribution of bank credit to a company, forestalling the market, and unlawful manipulation of the quality and composition of foodstuff;

- crimes against public health, such as illegal slaughter of animals for public consumption;
- crimes against the security of computer data, systems or communication networks;
- tax crimes, such as smuggling, tax fraud, tax embezzlement and crimes against social security;
- labour crimes, such as illegal employment of minors and contempt of an order of the General-Labour Inspection.

Only individuals may be sentenced to imprisonment. Therefore, Portuguese criminal law establishes alternative penalties to punish legal persons in case of conviction for one of the above-mentioned crimes. The main penalties established under Portuguese law to punish legal persons are admonition, a fine, or a judicial winding-up order.

The fine is set taking into consideration the legal person's financial capacity. Failure to pay the fine within

the time limit established by the court could result in the assets of the legal person being sold off to pay the fine. In the case of implied partnership (for example, a company that is not legally incorporated), if the fine is not paid within the time limit set by the court, the personal assets of the partners may also be sold.

Winding-up will only be ordered if the corporate entity was incorporated with the exclusive or predominant intention to commit the above-mentioned crimes, or

if it is being used repeatedly to commit those crimes.

Furthermore, Portuguese law also establishes several ancillary penalties to punish corporate entities, such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, loss of equipment or goods, revocation of licences, and publication of the decision convicting the corporate entity, among others.

However, the ancillary penalties may not be ordered immediately as a direct consequence of the conviction. On the contrary, punishing the corporate entity with an ancillary penalty always depends on the assessment of special requisites and conditions (that furthered the commitment of the crime). For example, in principle, the exclusion from entitlement to public benefits may only be ordered if there is a direct link between committing the crime and the relevant benefit.

According to Portuguese law, corporate entities may only be held liable for the crimes mentioned above if those same crimes have been committed:

- for the benefit of the corporate entity;
- by a person, acting either individually or as part of an organ of the corporate entity, who has the authority to take decisions on behalf of the corporate

entity or has the authority to exercise control within the corporate entity.

However, the corporate entity will not be held liable for the relevant crime if the individual that acted unlawfully violated an order or instruction given by a competent director of the corporate entity.

Considering that Portuguese law provides (exceptionally) for the criminal liability of corporate entities, it is necessary to reconcile it with the traditional grounds upon which Portuguese criminal law is founded - that a conviction on a criminal charge requires the *criminal intent* of the defendant.

Portuguese legal authors argue that it is necessary to analyse the *criminal intent* in a different perspective when corporate entities are involved.

**Winding-up will only be ordered if the corporate entity was incorporated with the exclusive or predominant intention to commit crimes, or if it is being used repeatedly to commit those crimes**



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Having joined MLGTS in 1994 as a trainee lawyer, Rui Patrício has since then developed a successful career as a litigation lawyer. He is now one of the firm's most experienced lawyers in litigation, and has recently developed the firm's criminal and misdemeanour litigation practice. His practice also focuses on the area of civil litigation, namely cases of civil liability, and in cases regarding agency and distribution agreements, leasing, factoring and franchising.

The development of the criminal and misdemeanours practice has been accompanied by an academic and lecturing career. Since 1994 he has taught at the University of Lisbon Law School (in the area of civil and criminal law), where he completed his degree in law in 1994 and his masters in criminal law in 1999.

To round out an already distinguished professional career Rui Patrício is also the author and co-author of several criminal law books and articles in his areas of specialty, in law magazines and other legal publications. He has participated in seminars and conferences and has lectured in post-graduate courses, predominantly on criminal and misdemeanour legal themes.

Only individuals have the ethical structure and the domain to exercise the free will that allows for the judgement of *criminal intent*. However, as a human and social organization, corporate entities are also the result of free will.

Therefore, in some specific and restricted circumstances, when the characteristics of the relevant crime allow it, the unlawful free will of the corporate entity could be considered equivalent to the *criminal intent* of an individual.

On the other hand, it is necessary to clarify the connection between the criminal liability of the corporate entity and the criminal liability of the individual that has committed the crime. Portuguese law establishes that the criminal liability of a corporate entity does not exclude the criminal liability of the individuals who are the perpetrators, instigators or accessories of the relevant crime. Therefore, cumulative liability is admissible.

Stemming from the traditional grounds upon which Portuguese criminal law is based, to punish two persons for the same crime it is necessary to establish some kind of connection between them. It could be a connection of conspiracy, instigation, complicity or compelling another to commit a crime.

However, the cumulative punishment of the corporate entity and the individual

that has committed the relevant crime does not seem to correspond to any of those categories. On the contrary, it might seem that the law is punishing the same behaviour twice. Thus, this cumulative liability raises questions regarding the possible violation of the *non bis in idem* or double jeopardy principle (prohibition of double punishment of the same fact).

In recent years, the EU Council has approved several framework decisions regarding judicial cooperation in criminal matters.

As an example, it is possible to state Council framework Decision 2000/383/JHA of May 29 2000 on increasing the public safety through criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro; Council framework Decision

2001/413/JHA of May 28 2001 combating fraud and counterfeiting of non-cash means of payment; Council framework Decision 2002/629/JHA of July 19 2002 on combating trafficking of human beings; Council framework Decision 2003/80/JHA of January 27 2003 on the protection of the environment through criminal law; and Council framework Decision 2004/68/JAI of December 22 2003 on combating the sexual exploitation of children and child pornography.

These frameworks establish that each

member state must take the necessary measures to ensure that corporate entities can be held liable, whenever a relevant crime is committed to its benefit, by a person that has the power of representation of the corporate entity, an authority to take decisions on behalf of the corporate entity or an authority to exercise control within the corporate entity.

Furthermore, the frameworks establish that each member state must take the necessary measures to ensure that a corporate entity held liable for a relevant crime is punishable by effective, proportionate and dissuasive sanctions, including criminal or non-criminal fines.

The EU framework decisions do not oblige member states to provide for criminal penalties to punish corporate entities for unlawful conduct. Instead, each member state has the power to decide, according to a judgment of proportionality and effectiveness, if corporate entities will be punished with criminal penalties or with non-criminal penalties, such as administrative fines.

Pursuant to the EU framework decisions, and according to the available information, the Portuguese state has recently proposed extending the list of criminal offences that can result in criminal liability for corporate entities.

The former Portuguese Counsel of Ministers approved a bill, not yet passed by the parliament, that established criminal liability for corporate entities for the following offences:

- non-natural and non-authorized conception and reproduction;
- trafficking in human beings for the purposes of labour exploitation;
- trading in human beings;
- crimes against sexual self-determination;
- child pornography;
- counterfeiting of money and securities;
- counterfeiting of weights and seals;
- crimes against the environment;
- criminal conspiracy;
- trafficking of influences (illegal lobbying);
- active corruption;
- contempt of an order from an authority;
- money laundering; and
- violation of an *in camera* proceeding.

(Since this bill was introduced, the Portuguese government has been dismissed, making this bill forfeit.)

According to the bill, if a corporate entity was held liable for any of those

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offences, it should be punished with a criminal penalty, such as a criminal fine or a winding-up order.

Previously in Portugal, in cases of unlawful conduct, corporate entities were ordered to pay an administrative penalty (non-criminal fine). As a general rule, those fines have a maximum value of €44,891.81 and may be determined by a non-judicial authority.

Administrative penalties, that is, non-criminal fines, will continue to be the standard and most frequent punishment suffered by a transgressor corporate entity. However, considering that the list of criminal offences that can result in criminal liability for corporate entities could be extended in the future, some of the most serious unlawful acts committed by

corporate entities will be punishable under criminal law.

Regarding the categories of crimes for which companies could be liable, the position of the individual responsible for the actions is relevant, as, in principle, only actions committed by a representative of the company (more often than not a director) in the name and interest of the company are relevant for criminal purposes. Cumulative liability against both the company and the individual could result.

In any case, for the analysis of criminal liability, it is generally necessary to identify the individual that committed the unlawful action. This means that, when a certain crime is committed within the context of the functioning of the company, it is necessary to identify the

particular worker, director or individual that has committed the unlawful activity.

The position of the individual in the company structure is relevant.

On one hand, the Portuguese Penal Code establishes the criminal liability of individuals that commit unlawful actions in their capacity as members of a corporate body or as representatives of the company, on behalf of that company.

On the other hand, several spheres of administration and the division of tasks, especially when large companies are involved, frequently impede the establishment of causality between the action of an individual and the violation of the law. Situations occur in which, as a result of this difficulty, the public prosecutor holds the members of the board responsible for the alleged criminal actions, identifying them as the company's decision makers and therefore responsible for the actions on behalf of the company. An analysis of the company's internal organization is necessary to assess the risk of this situation occurring, and to identify the possible measures to reduce the risk of criminal accusation of a director, in situations in which that director is totally unaware of the criminal actions that have allegedly taken place, or of which the director stands accused. In certain situations, formal mechanisms of internal distribution of responsibilities can help to identify more clearly the individuals responsible for several areas of business and, consequently, responsibility for actions considered to be criminal offences.

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