

CORPORATE FRAUD & CORRUPTION

ANNUAL REVIEW 2019



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Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in corporate fraud and corruption.

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INTRODUCTION

Corporate fraud and corruption collectively costs businesses and economies hundreds of billions a year. It has the potential to damage reputation and brand, severely weaken business development, compromise efficiencies and ultimately leave an irremovable stain on the corporate landscape.

Seemingly ubiquitous, corporate fraud and corruption can wear many faces – be it insider trading, money laundering, embezzlement, fraudulent financial reporting or misappropriation of corporate assets, among others – permeating every sector and industry, and in virtually every country across the globe.

As globalisation continues to advance and technologies become ever more complex, if businesses are to avoid devastating damage to their finances and reputation, they need to prioritise the identification and implementation of robust anti-fraud and corruption policies and procedures. All told, corporate fraud and corruption is a business world cancer that desperately requires exorcising.



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Tiago Geraldo is a senior associate in the criminal, misdemeanour and compliance practice group. His practice focuses on criminal litigation, specifically white-collar defence and corporate crime, where he has substantial experience in representing and advising companies and individuals, both in and out of court. He is also actively engaged in regulatory disputes in sectors such as energy, banking, capital market, telecommunications and media. He teaches criminal law as assistant teacher at the University of Lisbon School of Law and often lectures in seminars and conferences on criminal law issues.

Portugal

■ **Q. To what extent have you seen a notable rise in the level of corporate fraud, bribery and corruption uncovered in Portugal in recent years?**

GERALDO: In recent years, several high-profile cases of bribery or corruption have been uncovered, prosecuted and tried in the Portuguese courts. There have been three cases which have had a significant impact. The 'Face Oculta' case involved an alleged corruption ring designed to favour a private business group linked to business waste and waste management, with relevant state firms also involved. The 'Labirinto Operation' was related to alleged unlawful concession of 'golden' visas. The 'Marquês Operation', considered by many to be the biggest corruption case in Portugal's modern history, saw a former prime minister and the former CEO of one of the largest Portuguese private banks formally charged with several counts of corruption, money laundering, document forgery and tax fraud. Despite these cases, there has not been a significant increase in instances of corporate fraud, apart from minor tax fraud cases.

■ **Q. Have there been any legal and regulatory changes implemented in Portugal designed to combat fraud and corruption?**



What penalties do companies face for failure to comply?

GERALDO: The fight against fraud, bribery and corruption is being led through criminal enforcement. Portuguese legislation recognises a number of basic offences in the areas of fraud, bribery and corruption, such as fraud, punishable under Article 217 of the Criminal Code, insurance fraud, punishable under Article 219 of the Criminal Code, food, beverage and services fraud, punishable under Article 220 of the Criminal Code, and so on. Corporate liability may coexist with individual liability for these offences. A legal person may be held liable, without excluding individual liability, if the relevant offence is committed in its name and in the collective interest by individuals who occupy a position of leadership or by an individual who acts under the authority of someone occupying a position of leadership due to a violation of monitoring and control duties pertaining to the latter.

■ **Q. In your opinion, do regulators in Portugal have sufficient resources to enforce the law in this area? Are they making inroads?**

GERALDO: The Public Prosecutor's Office is the competent body to investigate any suspected fraud, bribery or corruption offences, aided notably by the Judiciary Police, the Tax Authority, the Authority for Food and Economic Safety and the Securities and Exchange Commission (SEC), among other institutions. Public prosecutors have the powers attributed to them by law to investigate any facts which may constitute a criminal offence in Portuguese territory, without prejudice of the rules that govern extra-territorial jurisdiction of Portuguese law. Usually the investigation of most relevant cases is carried out by the Central Department of Investigation and Prosecution, which has nationwide jurisdiction to coordinate and direct the investigation and prevention of some specific criminal offences, including bribery and related offences. Besides the powers generally endowed upon the Public Prosecutor's Office in any criminal investigation, for bribery and corruption offences, there are special provisions regarding the breach of secrecy of financial institutions, allowing a more effective collection of evidence by means of requesting documentation and information, according to Law 5/2002, of 11 January. Under Law 5/2002, breach of banking and professional secrecy must be ordered by the



judiciary authority conducting the proceedings, which includes the Public Prosecutor's Office during the investigation stage. The order must identify the envisaged individuals and specify the information and documents to be presented, even if generically. The request may also be made by reference to the accounts or transactions in relation to which the information needs to be obtained. For bribery and corruption offences, the enforcement body also has complete access to the tax administration database. The financial institutions are required to provide the information requested in a period of five days, when the information is available as computer data, or 30 days when the information is not available as computer data. This timeframe is reduced to 15 days if there are suspects detained in custody. All documents not voluntarily rendered can be apprehended by court order.

■ **Q. If a company finds itself subject to a government investigation or dawn raid, how should it respond?**

GERALDO: In the event of a raid, companies should first confirm if there is a legal and valid warrant for the raid and if it was authorised or commanded by either the public prosecutor or the judge, and if the criminal procedure is in the investigation stage or another, respectively. Companies can have a trusted person supervising the raid. If a company wants to consent to the raid, consent should be given by the company's legal representative. Obviously, the presence and assistance of a lawyer who specialises in criminal law is highly recommended.

■ **Q. What role are whistleblowers playing in the fight against corporate fraud and corruption? How important**

is it to train staff to identify and report potentially fraudulent activity?

GERALDO: Although there is not a specific regime affording special protection to whistleblowers, several provisions grant a waiver or mitigate the penalty of a perpetrator who, under certain conditions, reports the crime or who has decisively contributed to the gathering of evidence which allows the identification and capture of others criminally liable. In general terms, in bribery and corruption offences, Law 93/99 establishes special measures for the protection of witnesses under criminal proceedings. In addition, Article 4 of Law 19/2008 establishes that government workers and workers of state-owned companies, as well as private sector workers, who report on offences that they become aware of in the course of their work or because of the exercise of their duties, cannot be jeopardised. These workers also have the right to remain anonymous, until a charge is brought. After the charge, they also have the right to request a transfer to a different position, which cannot be refused. Whistleblowers are an important resource in the fight against corporate fraud and corruption. Hence, corporations have been implementing compliance programmes with confidential reporting channels. It is paramount that employees are trained to identify and report potentially fraudulent activity.

■ **Q. What advice can you offer to companies on conducting an internal investigation to follow up on suspicions of fraud or corruption?**

GERALDO: Although there are also no specific provisions establishing what comprises adequate compliance procedures, considering



“ Whistleblowers are an important resource in the fight against corporate fraud and corruption. Hence, corporations have been implementing compliance programmes with confidential reporting channels. ”

that companies may have their criminal liability excluded when the perpetrator of the offence has acted against orders or instructions from the proper authority, the existence of such programmes and procedures may be used as an argument for defence in order to demonstrate that the perpetrator acted against said orders or instructions. Internal investigations demonstrate the will to cooperate with the enforcement bodies, but they should not be conducted in contravention of the criminal procedural rules. Respect for the workers' privacy must be promoted and threats of dismissal and other employment sanctions should be avoided.

■ **Q. What general steps can companies take to proactively prevent corruption and fraud within their organisation?**

GERALDO: Companies can implement genuine compliance programmes in order to prevent corruption and fraud within their organisation. To promote the internal discovery of potential criminal offences, companies should have confidential, though not anonymous, reporting channels. They should create a compliance department to handle all matters related to fraud and corruption prevention, with the support of in-house lawyers or the assistance of outsourcing legal practitioners. Companies should also promote regular corporate crime prevention training for workers and managers alike. ■

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with decades of experience. Morais Leitão is well renowned across many sections of the law on both a national and international level. The firm's reputation among both its peers and clients stems from the excellence of the legal services it provides. The firm's work is characterised by its unique technical expertise, its distinctive approach and the cutting-edge solutions it provides, which often challenge some of the industry's most conventional practices.

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